Thursday,
2nd March, 1882

ABSTRACT OF THE PROCEEDINGS

OF THE

Council of the Governor General of India,

LAWS AND REGULATIONS

Vol. XXI

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1883.

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 Government House on Thursday, the 2nd March, 1882.

PRESENT:

His Excellency the Viceroy and Governor General of India, K.G., G.M.S.I., G.M.I.E., *presiding*.

The Hon'ble Whitley Stokes, C.S.I., C.I.E.

The Hon'ble Rivers Thompson, C.S.I., C.I.E.

The Hon'ble J. Gibbs, C.S.I., C.I.E.

Major the Hon'ble E. Baring, R.A., C.S.I., C.I.E.

Major General the Hon'ble T. F. Wilson, C.B., C.I.E.

The Hon'ble Mahárájá Jotíndra Mohan Tagore, C.S.I.

The Hon'ble L. Forbes.

The Hon'ble C. H. T. Crosthwaite.

The Hon'ble A. B. Inglis.

The Hon'ble Rájá Siva Prasád, C.S.I.

The Hon'ble W. C Plowden.

The Hon'ble W. W. Hunter, C.I.E., LL.D.

The Hon'ble Seyyad Ahmad Khán Bahádur, C.S.I.

The Hon'ble Durgá Charan Láhá.

The Hon'ble H. J. Reynolds.

INDIAN PAPER CURRENCY ACT AMENDMENT BILL.

The Hon'ble MR. STOKES moved that the Report of the Select Committee on the Bill to amend the Indian Paper Currency Act, 1871, be taken into consideration. He said that, at the suggestion of the Financial Department, the Committee had repealed the provisions of the Act which related to the issue of currency-notes in exchange for bullion or foreign coin. The effect of the present law was, that importers of bullion, instead of having to wait until their bullion could be converted under the Indian Coinage Act into coin, could at once obtain the equivalent in coin, at the expense of the Currency Reserve; that was to say, they could transfer from themselves to the Currency Department the inconvenience of having to hold their importation, pending coinage, in a form which was not legal tender. The rush of silver bullion which occurred in 1877 showed that this might be carried to

such an extent as to sensibly diminish, for a time, the value of the Currency Reserve as a security for the due encashment of currency-notes. It had, therefore, been considered advisable to abolish those provisions of the law which might divert the Currency Reserve from its primary use as a reserve for the encashment of notes. In order to give the public notice of this change in the law, the Committee had provided that this repeal should not take effect till the first of July next.

The Hon'ble MR. INGLIS said, he had to apologise to the Hon'ble Member in charge of this Bill for having at the last moment raised some objections to the proposals of the Select Committee. When the Committee's report was presented to the Council four weeks ago, he was not aware that it proposed to repeal the existing Currency Act and re-enact it with certain amendments. He was under the impression then that the Bill was one simply for extending the paper currency to Burma, which was the form it took when first introduced into the Council. It was not until the notice-paper relating to the business to come before the Council to-day came round, that he discovered that certain important changes were proposed. He was told it was not the rule of the Council to accompany the presentation of the Report of a Select Committee with any remarks. He thought, however, in cases where the Select Committee proposed to make important changes, it was very desirable that attention should be prominently drawn to them when reports were presented. Had this been done in the present instance, the parties affected by the proposed changes in the Currency Act would have had ample time to consult together, and represent their views to Government before this. As matters stood, he found on enquiry that the changes proposed by the Select Committee had escaped the notice of importers of bullion, who were the parties chiefly affected by them, and that they entertained great objection to the proposed alteration in the law.

The Select Committee proposed to repeal the provisions of the existing Act which related to the issue of currency-notes in exchange for bullion or foreign coin, on the ground that importers of bullion, instead of having to wait until their bullion could be converted, under the Indian Coinage Act, into coin, could at once obtain the equivalent in coin at the expense of the Currency Reserve. The Committee said that the effect of the present law was that importers of bullion "can transfer from themselves to the Currency Department the inconvenience of having to hold their importation, pending coinage, in a form which is not legal tender. The rush of silver bullion which occurred in 1877 showed that this might be carried to such an extent as to sensibly diminish for a time the value of the Currency Reserve as a security for the due encashment of cur-

rency-notes. It had, therefore, been considered advisable to abolish those provisions of the law which might divert the Currency Reserve from its primary use as a reserve for the encashment of notes."

He had some diffidence in putting forward the arguments made use of by importers of bullion against the proposed change, as the subject was one he was not practically acquainted with himself, and, therefore, in what he was about to say, the Council would understand that he did not profess to state all the arguments that could be adduced in favour of leaving things as they were. He hoped, however, if the Council agreed to postpone the Motion, which was next on the notice-paper, for the passing of the Bill, that those who were interested in this question would submit their views to Government.

Those who were opposed to the change recommended by the Select Committee point out that the year 1877 was altogether an exceptional one. The Indian Government had during that year to deal with the Madras famine, and the Secretary of State's bills were reduced from 11½ to 8½ millions sterling. The reduction in Council bills coincided with very large imports of silver, and undoubtedly this caused a very great pressure at the time in the way referred to by the Select Committee. It seemed, however, to him to be inexpedient to legislate for a state of things which was altogether exceptional, especially as, under the existing law, Government had the power to protect themselves Under section 14, clause (*c*), of Act III of 1871, it was provided that the certificate to be issued to a person tendering bullion should state the interval on the expiration of which the holder should be entitled to receive the amount of notes he had to get for his bullion. It would be quite within the power of Government, under this clause, to name a period in abnormal times, such as occurred in 1877, which would allow of the bullion being coined.

In reply to the argument that the loss of interest while bullion was being coined was by the present method thrown upon the Currency Department rather than upon the importer, who ought to bear it, he would point out that the cost of coining bullion into rupees in Birmingham, if that were practicable, would not exceed, he was told, one per cent. The actual cost of coinage to the importers of bullion in the Indian mints was, he believed, 2·15 per cent., and they said that this heavy charge in excess of the actual cost of the process elsewhere might fairly be reckoned as a set-off against any small loss of interest to the Currency Department.

If the change proposed by the Select Committee was carried out, it would, in the opinion of many persons, operate to check imports of bullion, and

this was a point which should be well considered by the Council before agreeing to the Bill. The work of introducing into the country a sufficient supply of bullion to maintain its currency-requirements was at present carried out by banks and other traders. If, from any cause, such parties were deterred from importing, the burden of doing so would fall upon the Government, and they might soon lose in the process a good deal more than they would gain by the proposed change. It should also be considered that any failure in the supply of bullion would result in the enforced idleness of the mints and the loss of any profits to be derived from that source.

As regarded any danger to the Currency Reserve from the present method, many persons thought these reserves were too high, and that, instead of withdrawing a facility from the public for converting bullion into coin, which it was the duty of every competent State paper currency to afford, the remedy for the state of things referred to by the Select Committee should rather be the reduction of the investments of the reserves in Government-securities.

He understood the Hon'ble Member in charge of the Bill was willing to postpone the Motion for the passing of the Bill for a fortnight, to give time to the parties interested in this question to express their views to Government.

The Hon'ble MAJOR BARING said that the observations which he had now to make to the Council were those he had intended to have made on the occasion of the presentation of the Report of the Select Committee if the rules of the Council had not prevented him from doing so. Under these circumstances, he could very well understand that the banks mainly interested in the proposed change in the law only had their attention directed to this question a few days ago. The original scope of the measure was merely to establish a circle of issue in Burma, and, as regards that, he need not say anything; the measure had been long under consideration, and had been accepted by the mercantile community of Burma, who were principally interested in the matter; it merely created a Burmese circle of issue in the same sense as other circles of issue. The Government had, however, following the general principles of codification which His Excellency the Viceroy mentioned the other day, thought it desirable to repeal the existing currency law, so that the whole law on the subject might be embodied in one complete enactment. He need hardly say that, in doing so, they had made no really substantial change in the law, for the change to which the Hon'ble Mr. Inglis had alluded, although one of considerable importance, was not one of first rate importance. The currency law would remain substantially the same as it was when one of his most distinguished predecessors,

Mr. Wilson, introduced it. There were, however, a few points to which he would allude. It was the present practice for the Head Commissioner to send currency-notes to the various Currency Agents, who, if they thought fit, might issue them against the receipt of cash, and, *vice versâ*, he might cash currency-notes presented to him. But, though at the present time that was the practice, it was a practice which was not recognized by law. The law only recognized the Deputy Commissioners of Issue. It was irregular that this action of the Currency Agents should be outside the law, and it was, therefore, proposed to legalise the practice. He did not understand that, so far as that amendment was concerned, any objection was raised, and he would, therefore, not dwell upon that point any longer.

The other, and indeed the only important, change was that to which his hon'ble friend Mr. Inglis drew attention; but the proposal was not a new one. It had been under the consideration of Government for three years before he came to India, and it formed the subject of correspondence between the Government of India and the Secretary of State in 1878.

In consequence of a despatch from Lord Cranbrook the question was considered by the Government of India; it stood over for a long while, and now on the present occasion it was proposed to give effect to the measure proposed by Lord Cranbrook. It was perfectly true, as had been pointed out by his hon'ble friend, that what was proposed might have been done by a Mint rule, which the Government had power to issue under the Act of 1866; but, for all practical purposes, MAJOR BARING did not see much difference between a Mint rule and the law which was now proposed. The only difference was, that those who were interested wished a Mint rule to be brought forward only in a time of emergency; but, if that course were followed, the Government might find themselves in considerable difficulty before they could introduce a rule. The point was, however, worthy of consideration, and he had, therefore, no objection to urge against the proposal that the passing of the Bill should be postponed for two weeks.

There was another objection raised, although it had not been referred to at the present time, to which he would allude. It had been pointed out to him that the position of the Government of India was the same, for the purposes of this argument, as the position of the Bank of England in England. The analogy, in his opinion, held good, not as between the Government of India and the Bank of England, but as between the Government of India and the Mint. What happened in England was this. An importer of bullion could take his

bullion to the Mint and receive from the Mint the value of it in coin. The amount he would receive there was £3-17-10½ per ounce. But, in fact, he did not generally take it to the Mint, because, if he did so, he would have to wait for a fortnight or a month before he got his money. The Bank of England gave him £3-17-9, which was 1½*d.* less than the Mint, and which covered the cost to the Bank for having the money coined. He must say that, *primâ facie*, he did not see why the Government, or in other words, the taxpayers, should bear the cost of money lying idle in the Bank. It seemed to him fair that persons who wanted their bullion to be made into coin should bear that loss He would not, however, now enter into the whole merits of the question, it was exceedingly desirable that gentlemen who were interested should have an opportunity of expressing their opinion on it, and he, therefore, hoped the Council would postpone the passing of the Bill for a fortnight.

The Motion was put and agreed to.

The Hon'ble MR. STOKES asked leave to postpone for a fortnight the Motion that the Bill, as amended, be passed.

Leave was granted.

CRIMINAL PROCEDURE BILL.

The Hon'ble MR. STOKES also moved that the Report of the Select Committee on the Bill to consolidate and amend the law relating to Criminal Procedure be taken into consideration. He had, when presenting the Report, stated the principal amendments which the Committee had made.

The Motion was put and agreed to.

The Hon'ble MR. STOKES also moved that, in section one, clause (*a*), of the same Bill, for the words "Commissioner of Police," the words "Commissioners of Police in the Towns of Calcutta, Madras and Bombay" be substituted, and that, in the first schedule, column 3, the words "and so much of section four as refers to the Criminal Procedure Code" be omitted. He said that the amendment had been made at the desire of the Madras Government, and it was intended simply to put the Commissioner of Police in the town of Madras on the same footing as the Commissioners of Police in Calcutta and Bombay, whose powers were saved by the Bill.

The Motion was put and agreed to.

The Hon'ble MR. STOKES also moved that, to section forty-six of the same Bill, the following words be added, namely :—

"or with transportation for life."

He said that the last clause of section 46 was introduced to lay down a rule as to when the Police might cause the death of a person who forcibly resisted the attempt to arrest him, or attempted to evade the arrest. In England, according to Archbold, if the offence with which the man was charged were a treason or a felony (which included manslaughter, robbery, rape and even larceny) or a dangerous wound given, the homicide was justifiable. In Scotland, however, the killing was justifiable only when the runaway was charged with a capital offence. The Committee had followed the lenient Scotch law. But it had lately been very strongly urged by the Government of the North-Western Provinces that, if this were the rule, "it will be hopeless to expect the Police to cope with the well-armed and desperate bands of dakáits who from time to time infest some of the districts of these Provinces. These outlaws will not surrender unless the only alternative be that of death; and if the Police are not allowed to meet them on at least equal terms, the attempt to arrest them may be abandoned." Similar representations had come from the Central Provinces. The effect of adopting the amendment which MR. STOKES proposed would be to enable the Police to deal, not only with persons accused of dakáití, or dakáití with murder, or belonging to a gang of dakáits (Penal Code, sections 395, 396, 400), but also with persons accused of the grave offences mentioned in the Penal Code, sections 122, 125, 128, 130, 131, 194, 222 and 225 (where the person in confinement, or who ought to have been apprehended, or who has been rescued, is under sentence of death), 226, 238, 255, 304, 307 (where hurt is caused by the attempt to murder), 311, 313, 314 (where the act is done without the woman's consent), 326, 329, 364, 371, 376, 377, 388 and 389 (where the offence of which accusation is threatened is unnatural), 394, 409, 412, 413, 436, 438, 449, 459, 460, 467, 472, 474 (where the document is one of the description mentioned in section 467), 475 and 477, and the subsequent offences referred to in section 75.

The Motion was put and agreed to.

The Hon'ble MAHÁRÁJÁ JOTÍNDRA MOHAN TAGORE moved that sections 417 and 427 be omitted, and the consequent alterations made in sections 422, 423 and 431. He said that the object of the amendment, it would be perceived, was to expunge from the Bill that objectionable section which gave power to the Government to appeal against an acquittal. Such a provision, as far as he was aware, did not find a place in the

criminal code of any civilized nation, and it did not exist in the Indian code when it was originally passed. It was inserted at the same time that the clause for the enhancement of punishment on appeal was first introduced, and as, under the benign influence of the liberal views of His Lordship's Government, that provision would no longer disfigure the Indian code, it was fitting that its companion clause should also go out at the same time. It could not be denied that Courts of the first instance had the best opportunity of examining witnesses, of making necessary local enquiries, and of judging of the character and antecedents of persons charged with any offence, and the presumption naturally was, that these tribunals had the best means of coming to a right decision as to whether an accused person was guilty or not; and when, after a fair trial, a person was pronounced innocent, surely it could not be just to allow an appeal against such acquittal. He believed these were some of the reasons why appeals against acquittals were not permitted in any other civilized country, and he did not see any good or valid ground for allowing the Government here to retain such an exceptional privilege in this respect, especially when the Indian code did not sanction an appeal of this kind by a private party. It was idle to say, he submitted, that, without such a power in the hands of Government, the ends of justice were likely to be defeated, when, in the absence of a similar provision in their codes, no complaint of failure of justice was heard of among other civilized nations of the world. To give this exceptional privilege to the Government would imply a want of sufficient confidence in our Magistracy, which could not be conducive to the administration of justice in the Criminal Courts of this country. Moreover, it should be borne in mind that, when the Criminal Procedure Code was first passed, men with wide experience of the country, like Sir Barnes Peacock and Sir John Peter Grant, were Members of the Legislative Council, and they did not consider that there was any peculiarity in the circumstances of the country which called for a departure from the recognized principles of criminal jurisprudence. It was also worthy of remark that Sir FitzJames Stephen, in the exhaustive speech which he made in this Council with reference to the Criminal Procedure Code of 1872, did not even attempt to justify the introduction of this objectionable provision; but, touching upon this point, he contented himself with simply saying that "this alteration was one of those which he would leave it to his hon'ble friends to explain and justify."

The Hon'ble MR. REYNOLDS said that he desired to say a very few words in reference to this amendment, which he for one found himself unable to accept. It appeared to him that the provisions of the law as regarded appeals from acquittals were practically confined to a small class of cases; they did not

practically apply to trials by jury at all, because, if the jury acquitted a prisoner and the Judge did not concur with the verdict, he could refer the case to the High Court, and the amendment did not propose to do away with that reference. On the other hand, if the jury acquitted the prisoner, and the Judge agreed with the jury, he could hardly imagine any circumstances under which the Government would desire to appeal from such an acquittal. Practically, therefore, such appeals were confined to sessions trials held with the aid of assessors; and it appeared to him that, in cases of this kind, the power of appealing against an acquittal, although he was quite prepared to allow that it should be cautiously and sparingly applied, might be at times a valuable and useful safeguard to prevent a failure of justice. The hon'ble mover of the amendment had told the Council that this provision of law was not known to the codes of European and other civilized nations. MR. REYNOLDS was not prepared to meet his hon'ble friend as to that fact, but he must say that that argument was not one to which he was disposed to attach any weight. If a provision of law was defensible in principle, and if it could be shown by the experience of some years to have worked satisfactorily, he did not think that it made the least difference whether it existed in other codes or not. It appeared to him that this provision was perfectly defensible in principle. The power of appeal was given in order that mistakes committed by a lower Court might be set right by a higher Court, and there was as much failure of justice where a person was acquitted who ought to have been convicted, as in the case where a person was convicted who ought to have been acquitted. As to the practical working of the law in past years, he was not aware that any single case of hardship had been adduced, and he was quite prepared to rest the vote he was about to give on the figures and the opinions which were embodied in the papers before the Council.

The Hon'ble DURGÁ CHARAN LÁHÁ said that, from what had fallen from the mover of the amendment, he thought the reasons which had been adduced for doing away with the provision to which he objected seemed to be just. If the right of appeal was given in cases of acquittal, there would be a great deal of harassment to the prisoner in being obliged to be brought to another Court, and he had, therefore, much pleasure in supporting the amendment.

The Hon'ble MR. HUNTER said he ventured to make one remark. He understood the Hon'ble Legal Member would show the Council that this right of appeal did exist in the English law, and that cases had occurred in which it had been exercised. He ventured to suggest that, when the Hon'ble Member brought forward those instances, he might say whether, as a matter of fact, it was the Government or the prosecutor on behalf of the Treasury who

exercised that right of appeal, or whether it was a private prosecutor who exercised it.

The Hon'ble Mr. PLOWDEN said that he should not support the amendment. He had no doubt that in theory there were some very excellent reasons for doing away with this power, which seemed to be exceptional. But the Council had to consider actual facts. Now, though it was quite true that, generally speaking, the Court which tried the case would hear the evidence of witnesses and would judge from their demeanour what credit the witnesses' statements were entitled to, though it was true that Courts of first instance were often able to come to a very good judgment, yet it was known that there were cases in which they came to a wrong judgment. He recollected a case illustrative of this, in which he was consulted as to whether an appeal should be lodged. In that case, under the law, the zamíndár was bound to give information of any crime which might be committed in his village. It was distinctly proved that a very bad crime had been committed in a certain village; it had been committed by a son of the zamíndár himself, and the zamíndár not only refused to give information himself, but did his best to prevent the people of the village from giving it. When the Judge who tried the case came to dispose of it, he was met by a difficulty which occurred to him, but which did not occur to others. He found that this village, under the partition-law, had been divided into two portions; but that the village-site had not been partitioned. The Judge contended that information in regard to this particular crime could not be said to be information which the zamíndár was bound to give, because the village had been divided. There was a distinct miscarriage of justice there. He acquitted the prisoner on this ground, and the Government was asked by the officer concerned in the prosecution to permit him to appeal. They directed an appeal, and the zámíndár was punished.

The Hon'ble SAYYAD AHMAD KHÁN said that he was in favour of the amendment proposed by his hon'ble friend Mahárájá Jotíndra Mohan Tagore.

The Hon'ble RÁJÁ SIVA PRASÁD said that, as the mover of the amendment said that these two objectionable sections did not exist in the law of civilized nations, he did not think any case had been made out for retaining these sections in the Indian Statute-book. His colleague to the right (Mr. Plowden) had given an example of a case in which this right of appeal had been properly exercised; but, although he (the speaker) was not prepared to dispute this, he believed he would be able to cite half a dozen instances in which appeals from acquittals had been preferred to the High Court, and the acquittal had been upheld. Acting on the principle that it was better to allow 99 criminals out of 100 to escape than to hang one innocent man, he supported the amendment.

The Hon'ble MR. CROSTHWAITE said he was opposed to the adoption of the amendment proposed by his hon'ble friend Maháráját Jotíndra Mohan Tagore for several reasons. In the first place, the amendment involved a question of very considerable importance, which it would be impossible to decide without consulting the Local Governments and the officers concerned in the working of the law. The hon'ble the mover of the amendment had had ample opportunity of pressing the matter before, either by bringing it forward in Select Committee, or by presenting a memorial to the Council or the Government. To bring forward an amendment of this nature at the last moment, when the Bill was about to be passed, was tantamount to a Motion for the postponement of the Bill for an indefinite and considerable period, and MR. CROSTHWAITE did not think that the Council should listen to such a proposal.

In the second place, the power to which the hon'ble the mover of the amendment objected—the power of directing an appeal to be made from a sentence of acquittal—had been exercised by the Local Governments for the last ten years. So far as he was aware, no cases had occurred of the abuse of this power. When it was proposed to ask for a radical change in an important principle of law, the proper course he conceived to be this: Those who advocated the change should bring forward facts to show that the law had worked badly. It would have been easy to have procured and examined the records of all the cases in which this power had been exercised by the Governments of the different provinces of India. Such cases had been rare, and the task of examining them, even for the whole of India, would not have been great. But nothing of this sort had been done. No instances of the law having been misused had been given. The Council was asked to alter the law purely on *á priori* grounds, and—with all deference to his hon'ble friend Maháráját Jotíndra Mohan Tagore—on grounds of a weak character. His hon'ble friend said that the Judges and Magistrates who tried the cases in the first instance, and who had the witnesses and the prisoner face to face, were the best judges of the facts, that their decision should be final, and that no power should be given to any one to interfere with their verdicts. This he said with reference to sentences of acquittal. But he seemed to MR. CROSTHWAITE to have overlooked the fact that his arguments told equally against all appeals. If the decision of the first Court was of such a character, if that Court was necessarily the best judge of the facts, then there was no justification for permitting an appeal at all. He apprehended, however, that his hon'ble friend was not prepared to follow his argument to this conclusion.

As a matter of experience, he was prepared to maintain that the power conferred by law on the Government had not been abused, and that it was neces-

sary for the proper administration of justice. In out-of-the-way places, where many cases were tried, it was impossible to procure good counsel for the prosecution. The Judges were sometimes inexperienced men, unaccustomed to deal with evidence. Mistakes must, and did, occur, and, unless the Council were prepared to see some of the worst criminals escape justice, they must maintain this provision of the law.

The hon'ble the mover had coupled the provision which allowed an appeal against a conviction with that permitting an enhancement of punishment on appeal, and he had represented Sir FitzJames Stephen as doubting the expediency of both provisions. MR. CROSTHWAITE thought that his hon'ble friend had mistaken the meaning of what Sir FitzJames Stephen said. In his speech, his final speech when Act X, 1872, was passed, Sir F. Stephen said—

"As to the chapter on appeals, the only alterations we have made are that in certain carefully selected cases we permit an appeal against an acquittal, and that we allow the appellate Court to enhance sentences passed if it considers them sufficient. *This* alteration is one of those which I will leave it to my hon'ble friends to explain."

MR. CROSTHWAITE understood *this* to refer to the enhancement of punishment, not to the appeal from acquittals. And this view was confirmed by the fact that Sir George Campbell, who, so far as he could discover, was the only Member of Council who referred to this matter in his speech, spoke of "the scintilla of doubt" expressed by the hon'ble the Law Member regarding the enhancement of punishment.

And in his first speech, in introducing the Bill to amend the Criminal Procedure Code—a speech made about a year and a half before the passing of Act X, 1872—Sir F. Stephen advocated the giving to the superior criminal Courts power to do full and complete justice to the parties if the question was re-opened at all. He did not think, then, that he could have been opposed to the establishment of an appeal from a sentence of acquittal.

The argument deduced by the Hon'ble Mahárájá from the alleged non-existence of a similar power in the Codes of other nations, it was difficult to answer without more knowledge of those codes than MR. CROSTHWAITE possessed. But, as regarded England, he believed the question of establishing a system of criminal appeal had been raised during past years, and that it had always been argued that, if there was an appeal at all, there ought to be an appeal on both sides. He stated this on the authority of Sir F. Stephen.

He denied, however, the validity of any argument based on the provisions of foreign codes. Such arguments had no force unless the Council were pre-

pared to maintain that no measure should be introduced into India in support of which no example could be cited from the codes of other nations.

He voted against the amendment.

The Hon'ble MR. GIBBS said that he was unable to support the amendment, and, in saying so, he had merely to draw attention to one point. The Hon'ble Member put forward, as a reason for his amendment, that similar powers did not exist in the criminal code of any civilized country. That argument had been answered by the Hon'ble Mr. Crosthwaite, but it seemed to MR. GIBBS that there was another very important reason why the Government should not be bound in the way in which the hon'ble mover of the amendment wished them to be bound, and that was, that the Courts in this country were not perfect, that they did not approach that degree of perfection which Courts in other civilized countries had attained; and, speaking from his own experience as a Judge for eight years in the Bombay High Court, he thought that this power was absolutely necessary for the ends of justice. He had seen cases in which, if it had not been for this power, criminals would have got off, not because the High Court took a different view of the evidence recorded in the case, but because the Judges had got confused notions of law, and so allowed a criminal to escape when there was no possible doubt about the man's guilt. Considering, therefore, the want of training on the part of Judges in many parts of the country, this power, he thought, was absolutely necessary. The hon'ble mover of the amendment had also alluded to the objection that this power was given to the Government, but not to private individuals. That was perfectly intelligible. It would never do to give every private prosecutor the right to appeal because he did not obtain a conviction against a prisoner. But the Bill did not cut off this right, because a private prosecutor might move the Government or the Public Prosecutor; and, if he showed sufficiently good grounds why an appeal against an acquittal should take place, the Government or the Public Prosecutor might move in the matter in the same way as they could do on the information of the Commissioner of the Division or other head of a District. Therefore, the necessity of keeping this very valuable and necessary power was apparent. MR. GIBBS could not help thinking that there was a feeling abroad amongst Native gentlemen, and especially among Native gentlemen on this side of India, of what he might perhaps call too great tenderness on behalf of the culprit. That feeling might be natural, but it seemed to lead them to think that the great thing to attain was not the ends of justice, but to see if there was not a possibility of obtaining an acquittal, and so enable a guilty prisoner to get off Considering the state of society in this country, he did not consider that that was a sound principle to follow. He would vote against the amendment.

The Hon'ble MR. STOKES said that he, too, opposed this Motion. It had been made, he feared, under two misconceptions. First, the British Indian Association, with whom his hon'ble friend the Mahárájá was acting, asserted, in their memorial of 27th February, 1882, that no period of limitation was provided for appeals from judgments of acquittal. That was not so. The Limitation Act, XV of 1877, schedule II, No. 157, which was the proper place for this provision, distinctly laid down that such appeals must be presented within six months from the date of the judgment appealed against. The notion that the Government could hold for ever an appeal "*in terrorem* over an acquitted person" was therefore altogether groundless. Secondly, the hon'ble Mahárájá and the same Association supposed that no such appeal lay in any civilized country. "Such a provision," said the Association, "does not obtain in the Criminal Code of any civilized country on the face of the globe," and "is opposed to all recognized rules of civilized jurisprudence." MR. STOKES did not possess the wide and accurate legal knowledge of the Association: he could not speak confidently of the criminal law of every civilized country in the world, or even of the countries of continental Europe; but he could assure the hon'ble Mahárájá and the Association that in England, under 20 & 21 Vic., c. 43, and 42 & 43 Vic., c. 49, section 33, what was called "an appeal from a Court of summary jurisdiction by special case" might be brought by the complainant, on the ground that the order, determination or other proceeding of the Court was erroneous in point of law, or was in excess of jurisdiction. And, in the last volume of the Law Journal Reports, the Officiating Secretary, Mr. Crosthwaite, had found four cases in which such appeals had been brought. But, in truth, it did not seem to MR. STOKES that the sections to which the Mahárájá objected required any English or other precedents to support them. The question was, or ought to be, solely whether, in the present condition of the Indian magistracy, the power to appeal from an acquittal was needed. So far as he (MR. STOKES) could form an opinion on the matter, such a power was now needed, and would continue to be needed so long as any Native Magistrates supposed that the commission of a crime could not be proved without the evidence of an eye-witness, so long as any Hindú Magistrates acquitted a Bráhman because he was a Bráhman, though the evidence of his guilt was clear, and so long as Local Governments were sometimes compelled to appoint European Magistrates who had had little or no local experience or legal training. The question now raised was no new one. It was raised in 1876, in connexion with the Bill which was now the Presidency Magistrates Act (IV of 1877). The Home Department then consulted all the Local Governments as to the working of section 272 of the present Code, which allowed an appeal on the part of the Crown against the acquittal or discharge of an accused. The Local Governments were

unanimously of an opinion favourable to the provision in question, which, though it had been cautiously and sparingly used, had proved of great value in cases where it was clear that the public had been injured by a wrong acquittal or discharge. Moreover, in 1876, no cases of complaint, hardship or abuse of the authority which section 272 conferred on the Local Governments had been brought to notice during the four years which had elapsed since Act X of 1872 was passed. And neither the Maháráját nor the British Indian Association had been able to show that any such cases had occurred during the past six years. No such appeal could be presented by a private prosecutor, who might, of course, be actuated by feelings of spite or revenge. "No such appeal," said the Government of the North-Western Provinces, (and the remark held good for the other Local Governments) "can be made without the special sanction of the Government after a careful consideration of the case; and, in these circumstances, it is believed that the working of the section cannot well be otherwise than for the furtherance of justice, and that the risk of individual hardship is either completely obviated or reduced to a minimum."

The Hon'ble MAHÁRÁJÁ JOTÍNDRA MOHAN TAGORE said that he wished, with His Ecellency's permission, to say a few words by way of explanation with reference to what had fallen from hon'ble members who had just spoken. His object in saying that such a provision, as far as he was aware, did not exist in the codes of other civilized nations was to show that, if it were right in principle, it would have been adopted by them in their codes, and it must be shown there was something peculiar in the circumstances of this country which would justify the introduction of such an exceptional clause in the Indian code; but this, he submitted, had not been done. Then, as to the experience of the past, he admitted that certain cases had occurred in which, if there was no appeal against acquittal, there would have been a failure of justice; but then there had been cases also, if he mistook not, and as had been rightly said by his hon'ble friend Rájá Siva Prasád, in which the order for acquittal had been upheld by the High Court. In such cases, the needless trouble, anxiety and hardship to the person once pronounced innocent could well be imagined. Moreover, if such a power of appeal were given to private persons, he dared say a few cases could have been found to support the extension of this power to all persons without exception; for human nature was fallible, and Magistrates were likely to make mistakes as any other men. He might mention here that cases had been cited to show the necessity of retaining the provision sanctioning enhancement of sentence on appeal, but it had nevertheless been expunged, because the Government had justly thought that it was founded on a wrong principle.

Then, as to the incompetency of the Magistrates in this country, he begged to say that, in many most important matters, the Government placed implicit confidence in their ability and judgment; and it was hard, he submitted, to bring forward the argument of their incompetency only in a question of this nature, which involved the vesting of the Executive Government with larger power. It had been said by his hon'ble friend Mr. Crosthwaite that this question ought to have been discussed at an earlier stage of the Bill. He hoped his hon'ble and learned friend opposite (Mr. Stokes) would bear him out when he said that he did raise this point in the Select Committee, but he was then told that almost all the Local Governments were strongly opposed to his view. [The Hon'ble MR. STOKES said that this was so.] Next, as to what fell from Mr. Crosthwait, that his (the MAHÁRÁJÁ's argument would cut the ground from under questions of all appeals in general, he begged to observe that a great distinction ought to be drawn between cases relating to right and property and those which affected the life and liberty of the people. It had been hinted by his hon'ble friend opposite (Mr. Gibbs) that the Natives evince an undue solicitude for the protection of the criminal class of the population. He begged simply to say that "let ten guilty men escape rather than one innocent man should suffer" was an English maxim, and that their sympathy for the protection of the liberty of the people was based upon that principle, and nothing more.

His Excellency THE PRESIDENT said:—"I have listened very carefully to the discussion, in which opinions have been expressed on both sides of the proposal submitted to us by the Mahárájá, and I am bound to say that my own opinion is that it would not be desirable to adopt the amendment moved by my hon'ble friend the Mahárájá, at all events on the present occasion. My hon'ble friend was good enough to inform me a few days ago that he desired to bring this question before the Council, and I then told him that I would give my attention to the subject and would not fail carefully to consider it. I need not say that I have not had time to do that up to the present moment. The question is obviously not a new one. The statements brought forward today show that it has been considered on various occasions by the Government of India and by the Local Governments, and it is certainly not a question on which I should feel myself justified in taking action without further inquiry than we have yet been able to institute. It is evidently a matter upon which the opinion of the Local Governments ought to be called for before any step is adopted which would be contrary to the opinions which they have expressed on previous occasions. I do not think that anybody is likely to suppose that I have an inherent objection to reform; but, at the same time, I am quite of

opinion that it is the duty of the Government of India, while it is always ready to consider any proposals for the amendment of the law, or for the improvement of the administration of the country, to proceed cautiously and without undue haste. I have endeavoured, since I have been in this country, to adopt that principle, and, even in cases about which I might individually have had no doubt, I have felt it right carefully to inform myself as fully as possible as to the facts and circumstances of the case, as it relates to this country, before I attempted to act upon any preconceived notions which I might have derived from my English experience.

"I believe that a steady progress of reform is the only wise course which in these matters the Government of India can adopt; and I frankly say that I have not had an opportunity of giving to this question that full consideration, and consulting all those persons whose opinion it appears to me I am bound to take into consideration, before I adopt a change involving the abandonment of a principle which has evidently been adopted most deliberately by the Legislature of this country, acting in accordance with the sanction of the Secretary of State.

"Under these circumstances, my counsel to the members of this Council is not to adopt this amendment. I have the fullest intention of fulfilling the promise made to my hon'ble friend the Mahárájá that I will give the subject my consideration as soon as opportunity offers; but if I am asked to say 'aye' or 'no' upon this Motion at the present moment, I have no alternative but to oppose it."

The Motion was put and negatived.

The Hon'ble DURGÁ CHARAN LÁHÁ moved the following amendments in section 456 of the same Bill:—

(1) that in line one, for the words "European British subject," the word "person" be substituted,

(2) that in line four, for the words "European British subject," the word "person" be substituted, and

(3) that the words "which would have jurisdiction over such European British subject in respect of any offence committed by him at the place where he is detained, or to which he would be entitled to appeal from any conviction for any such offence," be omitted.

He said that, in moving this amendment, the object he had in view was to ask the legislature to provide for his Native fellow-countrymen the

same safeguards for the protection of personal liberty which had been prescribed for the benefit of European British subjects under section 456. That there should be one law for one class of Her Majesty's subjects and another law for another class could not, he respectfully submitted, be consistent with the principles and spirit of British rule in India. As to the necessity of the provision, and in justification of what he contended for, he would, with His Excellency's permission, read some extracts from a letter on the subject which appeared in the *Englishman* last week. The writer, referring to the corresponding section in Act X of 1872, said—

"Under the section just quoted, any European British subject, who is detained in custody by any person, and who considers such detention unlawful, may apply to the High Court having jurisdiction 'for an order directing the person detaining him to bring him before such High Court to abide by such further order as may be made by it.' This privilege is denied to the Native, and though apparently the necessity for protecting the Native was brought to the notice of the then Legal Member, the Hon'ble FitzJames Stephen, that high authority considered that the liberty of the Native in the Mufassal was already sufficiently protected. With reference to this subject, Sir FitzJames Stephen said, when presenting the Report of the Select Committee on the present Criminal Procedure Act: 'It must not be supposed that personal liberty is at all unprotected in the Mufassal. Wrongful restraint (which is very widely defined) is an offence against the Indian Penal Code. And a person subjected to wrongful restraint can always procure his release by presenting a petition to any Magistrate for a summons or warrant against the person who wrongfully restrains him, and by procuring himself to be summoned as a witness.' This is all very well in theory, but experience has shown the solution suggested to be next to impracticable, especially in the Non-regulation Provinces, when the wrongfully restraining person is an official such as the Magistrate of the District or Deputy Commissioner. During 1880, no less than three separate cases of 'wrongful restraint' of this nature were brought to the notice of the Chief Court of the Panjáb; and that Court was asked to interfere in the exercise of its powers of revision, but was unable to do so, as in each case the official complained against *professed not to be acting judicially*. The petitioners were in each of the cases told that their only remedy was by civil or criminal action against the Deputy Commissioner in fault. One of these cases was the illegal arrest and confinement of certain individuals who, the Magistrate suspected, might possibly have been implicated in the matter of the Commissariat frauds now under investigation by a special commission of enquiry. It was admitted by the Chief Court Judges that it seemed quite clear that the officer, if acting judicially, was acting beyond his jurisdiction; but, as he professed not to be so acting, they could not interfere. Another case took place at Simla, right under the very noses of the Viceregal Council and the Lieutenant-Governor of the Panjáb, and yet the sufferers could obtain no redress of an immediate nature. The victims were residents and subjects of a foreign State, whom the Superintendent of Hill States deemed guilty of having committed an offence in the jurisdiction of another Hill State. Happening to be in Simla, a warrant was issued for their arrest, and they were taken into custody and released on heavy bail to appear before the Superintendent of Hill States on a certain date. Before that date an application was made by one of the leading counsel of the

Lahore Bar before the Judges of the Chief Court, but, in so much as the Superintendent of Hill States professed to be acting politically, and therefore not judicially, the Bench expressed their inability to interfere. They, however, were forced to admit that the Superintendent of Hill States had no power, political or otherwise, to act as he had done, and that the remedy in the hands of the arrested was either a civil or criminal action. The Rájá, whose subjects the men were, protested against the action of the Political and demanded the extradition of the men, and they thus escaped an illegal trial and, probably, a sentence which would undoutedly be *ultra vires*.

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"The instances above quoted are not solitary or exceptional instances of the abuse of power by executive officers; and what has occurred in the Panjáb may happen—in fact, has in other forms taken place—in Bombay and elsewhere in India.

"The natural tendency of the Executive in India is to overlook the strict provisions of the law, when specially interested in the carrying out of any policy and in the direction of arbitrary action. The difficulty is to keep this tendency in check, without entirely tying the hands of the executive officers. That some such check is necessary few will deny; and it is perfectly clear, from the cases we have cited, that cases of oppression through illegal action have occurred for which there is no simple preventative. The remedy is simple, namely, to enact a general provision similar to that which protects the European British subject. The principle that all sorts and conditions of men should be treated alike in the eye of the law is well acknowledged. The Queen's proclamation professed to give justice to every inhabitant of India without respect to class, creed or nationality, and, consequently, the extension of this required protection to the Native of India cannot justly or logically be denied to him.

"Of course, it will still be necessary to leave in the hands of the Viceroy those exceptional powers which are exercised by the issue of a Secretary's warrant; but, possibly, in some of the less civilised and wilder of our Frontier Districts, it may be necessary to give the District-officer special powers, to be exercised only in cases of special political emergency; but this can be done by special regulation. But, notwithstanding the above possible necessity, it seems extremely necessary that the Native in India should be similarly protected to his European fellow-subject or fellow-sojourner."

He was afraid that there were many cases of this kind which had not reached the public.

The Hon'ble RÁJÁ SIVA PRASÁD said that, as section 457 of the Bill gave ample power to the High Court of granting or refusing applications for writs of *habeas corpus*, and as the Magistracy of this country it was acknowledged, was not so experienced as the Magistracy in England, in his humble opinion it would be a mere act of justice to support the amendment.

The Hon'ble MR. CROSTHWAITE said that he opposed the amendment because it was not necessary. Ample security to the liberty of every class of Her Majesty's subjects had been given in this Bill. Section 439 gave the very

widest powers of revision to the High Court. The word "judicial" had been omitted before the word "proceeding" in section 439, which corresponded with section 297 of the present Act, and the effect of this omission was to widen the owers of the Court to a large extent.

Then they had, in section 100, which was a new provision, given powers to the Presidency Magistrates, Magistrates of the first class and Sub-divisional Magistrates to issue search-warrants for the discovery of persons wrongfully confined. He did not see, therefore, what would be gained by the adoption of the amendment proposed by his hon'ble friend.

There were three cases in which a person might be wrongfully detained in custody. He might be detained by a private person; he might be detained by a Magistrate under an order given illegally, or on insufficient evidence, or without proper reasons and due consideration; or he might be detained by a Magistrate in a purely arbitrary manner without any show of law at all.

Now, the first case was amply provided for by the provisions regarding wrongful restraint, coupled with section 100 of the present Bill. The person injured, or his relatives, or some one on his behalf, could petition the Magistrate, who might institute a search for the person detained, might have him brought before him, and pass suitable orders regarding him.

In the second case, where the person was detained under an illegal or erroneous order made by a Magistrate, all that had to be done was to present a petition to the High Court, who had the most ample powers to deal with the case by releasing the detained person, with or without bail or security.

The third case, the detention of a person by a Magistrate without any written order or show of law at all, was one that he could hardly think was within the range of possibility.

His Excellency THE PRESIDENT asked whether section 100 did not apply to such cases also?

The Hon'ble MR. CROSTHWAITE replied that it did. Section 100 would certainly apply to such cases also, and he could not understand what else the Council could do but leave such cases to the operation of the general law. A person who was detained in such a way by a Magistrate would have his remedy under the Penal Code, and could bring his case to the notice of the Executive Government, which would, he thought, deal very sharply with such Magistrate. His hon'ble friend the mover would probably ask, If the Magistrate was the wrong-doer, to whom was the injured person to apply for a search-warrant, or

before whom was he to bring his case. But MR. CROSTHWAITE could not conceive that an aggrieved person would have any difficulty in getting redress in such cases; and, as he had said before, they must be very rare, and must be confined, in fact, to occasions in which the Magistrate had become a lunatic.

As to cases where a person was detained from political reasons under an order of the Executive Government, such an order could only be passed in the exercise of a power conferred by law, and the High Court would have no authority in such a case, whether the person detained was or was not a British subject.

The Hon'ble MAHÁRÁJÁ JOTÍNDRA MOHAN TAGORE said that he fully agreed with the view expressed by his hon'ble friend opposite (Durgá Charan Láhá). The remedy for wrongful restraint as regards Natives, which was alluded to by Sir FitzJames Stephen in his speech, had by experience been found insufficient, and the cases mentioned in the memorial of the British Indian Association, and also cited by his hon'ble friend, showed it had failed in those instances.

If the two sections alluded to by his hon'ble friend to his right were considered sufficient, might he ask what was the necessity of having a special provision for the protection of the British subject, and might not section 456 as well go out of the Bill altogether? For to draw a distinction between Europeans and Natives in the question of protection of personal liberty could not but have an injurious effect on the impartial administration of justice, and was opposed to the principle of equality in the eye of the law. He, therefore, begged to support the amendment moved by his hon'ble friend.

Major the Hon'ble E. BARING said that he rarely made a speech in this Council, except on what concerned his own work; but he would on this occasion like to offer a few remarks on his hon'ble friend's amendment to section 456, which related to the rights of a European British subject to apply for an order directing the person unlawfully detaining him to bring him before the High Court. The effect of the amendment of his hon'ble colleague was to apply the provisions of that section, without distinction, to all persons. His hon'ble friends, the mover of the amendment and the Hon'ble Mahárájá Jotíndra Mohan Tagore, had ably and temperately placed their view of the case before the Council; and the Council had also had the advantage of perusing a very able document from a public body,—the British Indian Association,—whose representations always met with the attention of the Government and of this

Council. He (MAJOR BARING) wished to say, as regards the spirit in which his hon'ble friend the Mahárájá, and the spirit also in which the British Indian Association, had approached the question, that there was a great deal in it with which he (the speaker) entirely sympathised. He was not prepared to vote for the amendment as it stood, for reasons which he was about to give. But as regards the spirit and effect of their proposals, namely, that there should be perfect equality and protection in respect of all races, that was a sentiment which was entirely in harmony with the general course of British legislation, and one with which he thoroughly sympathised. This was, nevertheless, a difficult question, which required very great and careful consideration. MAJOR BARING thought that his hon'ble friend Mr. Crosthwaite had shown, and he (the speaker) believed that his hon'ble colleague the Law Member would further show, that there was some misapprehension as to the facts. And if the Council were to proceed any further in the direction which was now proposed, the subject would require more thorough consideration than it had yet received; but he did not think it was possible to pass an amendment like that put forward at this meeting of Council. The real issue was, in fact, somewhat different from what appeared from the mere reading of the amendment, and he (MAJOR BARING) would like to show what, in his opinion, the real issue was. His Excellency the President addressed to the Council the other day a very instructive and eloquent speech on the subject of codification in general. In the views set forth in that speech, MAJOR BARING entirely concurred, and he was glad to notice that his hon'ble friend Sayyad Ahmad Khán and other hon'ble members also concurred, that codification was a good thing in itself. Upon this point the speaker thought there could hardly be two opinions. We all knew, or, at all events, some of us knew, to our cost, what the effect of going to law was in England. We go to a solicitor; then we take the opinion of some distinguished Counsel, and, when we have that opinion in our favour, we resort to a Court of law, there to find, occasionally, that another distinguished Counsel has given an opinion diametrically opposed to that given to us; and we find that the Court agrees with the opinion of the latter, and not with that given by our Counsel. That, of course, was a state of things which may occur in every country. At the same time MAJOR BARING submitted that, with codification, the risk of futile litigation would be minimised, for every ordinary layman could now, except in cases of exceptional difficulty, find out for himself what the law of the country really was. Hardly a day passed in which he (MAJOR BARING) did not want to know what the law on some particular point was, and, unless the subject was a very difficult one, he at once turned to the Code and found out what he wanted. That was the great advantage of codification; but, on the other hand, it had this disadvantage. It

was a disadvantage more of procedure than of substance. The disadvantage was that, if the Code was really to be a manual, which should be useful to those who administer justice and those for whose interest justice is administered, then, whenever an amendment was required to be made, the whole Code must be re-enacted, and the amendment incorporated with it; otherwise, in process of time, the object of codification would be defeated, and, instead of one complete manual, we would have a more or less obsolete Code with a number of minor Acts grafted on to it. His hon'ble colleague Mr. Stokes had produced this bulky Code now, which was a re-enactment of the existing law, with a re-arrangement of its provisions, which, MAJOR BARING was told on good authority, was an improvement upon the arrangement which existed hitherto; and he also proposed three important amendments in addition to some minor ones. The first of these was, that the latitude heretofore given to the Courts in regard to the examination of accused persons should be limited; secondly, that the law as regarded whipping should be altered in the sense of diminishing the power which is now allowed; and thirdly, that the power of enhancing sentences upon appeal by the Appellate Courts was withdrawn. These amendments were, he understood, generally accepted by this Council and public opinion. They were all amendments conceived in a liberal spirit, and in harmony with the general tone of Native opinion, and although, as his hon'ble friend on his left (Mr. Gibbs) had remarked, from our English point of view, Native opinion seemed to sympathise to an extreme degree with the culprit, at the same time the Council ought to remember that charity and sympathy with suffering was inculcated by the Hindú religion, and was indeed one of the most amiable traits of the Native character. The real issue, however, was this—Were the Council to pass and accept this Code, which was a good one, with the amendments which were generally accepted, or were they to let the whole thing be postponed until they could consider the further and important amendment which had been moved by his hon'ble friend Durgá Charan Láhá? That was the issue which presented itself to MAJOR BARING'S mind and, in that sense, he deprecated the amendment, while he at the same time thought that the point raised was well worthy of attention. But if, on every occasion of codification, the whole merits of the Code had to be discussed; and if difficulties which are presented in regard to each of its sections had to be discussed again, the process of codification would become impossible, and the law would practically be thrown into the comparatively chaotic state which preceded codification. On these grounds, MAJOR BARING opposed the amendment, but at the same time he wished to repeat that he sympathised with the spirit of the remarks which had been made by his hon'ble friend Mahárájá Jotíndra Mohan Tagore and the British Indian Association.

The Hon'ble MR. GIBBS said that he had only one word to say. He did not think that this amendment should be agreed to. It seemed to him to form a portion of a very large amendment of principle which the Council would have to go into if they took it up at all, and at this stage of the proceedings he did not think it was possible to do that. The section which his hon'ble friend objected to formed part of a chapter in the Code referring to British-born subjects. That chapter would become imperfect if the amendment of his hon'ble friend Durgá Charan Láhá was made. At the same time, it had been shown by his hon'ble friend Mr. Crosthwaite—and he understood would be also shown by his hon'ble friend Mr. Stokes—that the rest of Her Majesty's subjects were, by amendments made by the Select Committee, exactly in a similar position to that in which these particular clauses placed European British subjects. Under these circumstances, as the Council could not now open up the much wider question, he objected to the amendment.

The Hon'ble MR. STOKES said that he opposed this amendment for three reasons: First, for the reason referred to by his hon'ble friend Mr. Crosthwaite, that the amendment, if carried, would turn the section into nonsense. Any hon'ble member could ascertain that for himself by making the substitutions and omissions which the hon'ble mover proposed. The section would then run as follows:—

"456. When any person is unlawfully detained in custody by any person, such person, or any person on his behalf, may apply to the High Court for an order directing the person detaining him to bring him before the High Court to abide such further order as it may pass."

Secondly, because the amendment would convert three sections which now related only to European British subjects, and which found a place in the Part of the Code which was headed "Special Proceedings" and in the chapter entitled "Criminal Proceedings against Europeans and Americans," into general provisions applicable to persons of every nationality, and thus render those sections incongruous with the provisions of the Code in connection with which they appeared.

Thirdly, because it seemed to him that the amendment was not necessary. He had reason to believe that the hon'ble mover, when he brought his amendment to the Secretary, was unaware of the existence of that important section (100), which was inserted for the first time in the present Bill, and which gave power to certain Magistrates, when they had reason to believe that any person was unlawfully confined, to issue a search-warrant for the production of such person. That section declared that—

"100. If any Presidency Magistrate, Magistrate of the first class or Sub-divisional Magistrate has reason to believe that any person is confined under such circumstances that the confine-

ment amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person if found shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper."

The British Indian Association also ignored that section, and it was clear that they must have been unaware of its existence. Furthermore, the hon'ble member and the Association had overlooked the fact that the section dealing with the High Court's power of revision had been greatly extended in its operation, and some of the cases which had been cited by the hon'ble mover of the amendment could not possibly have occurred if this Code had been law. The extension resulted from the omission of the word "judicial" in the first line of section 439. That section clearly now applied to *all* proceedings under the Code, the record of which had been called for by the High Court, or which had been reported for orders, or which otherwise came to its knowledge. The High Court could do under that section practically all that the hon'ble member wished it to do. The Hon'ble Mahárájá Jotíndra Mohan Tagore had remarked that experience had proved that the present power of revision had been insufficient. MR. STOKES did not deny that, but the object of the amendment to which he had just referred, namely, the omission of the word "judicial", was for the very purpose of meeting that defect. Then his hon'ble friend also said "What was the use of those sections (456, 457, 458) relating to European British subjects?" MR. STOKES dared say that, with sections 100 and 491 in the Code, and with the extended power of revision to which he had referred, it might be plausibly contended that sections 456, 457 and 458 were superfluous; but they were part of the personal law of European British subjects: if the Council attempted to withdraw them, there would be an agitation throughout the country amongst Europeans; and the Government of India would never undertake such an alteration of the law without previously communicating with the Secretary of State and the Local Governments. As the sittings of the Council at Calcutta were now nearly at an end, and a Bill like this could not be passed at Simla, such a communication would involve a delay of nearly a year; and he did not think the hon'ble member would be willing to deprive his countrymen for so long a time of the benefits of the changes which would be made by the new Code.

His Excellency THE PRESIDENT said:—"It has often been my fate in discussions in Parliament and elsewhere to find that, when I spoke late in a debate, I was placed in a most unfortunate position; because most of what I was going to say—all my best arguments—were taken away from me by those who had preceded me on the same side. I have very great cause of quarrel in this respect

with my hon'ble friend Major Baring, because he has stated so fully and ably the views which I hold on this subject, that there is very little for me to say beyond what the gentleman at Bristol said, when he and Mr. Burke were canvassing for that city—'I say ditto to Mr. Burke.' Nevertheless, at the risk of repeating some of the arguments he has used, I will, for a few moments, go over the ground traversed by him and others, who feel that it is not advisable to adopt this amendment on the present occasion. In the first place, I think it is quite clear that the particular case to which my hon'ble friend Durgá Charan Láhá alluded, and in respect to which he read an extract from a letter in the *Englishman* newspaper, is, if I understand the extract that he read, met by the amendments made in the existing law by the Bill now before us; because the difficulty which arose in the cases in the Panjáb to which my hon'ble friend referred appeared to have arisen because the Court could not inquire into any proceedings on the part of a Magistrate which were not in the nature of judicial proceedings. The word 'judicial' does appear in the existing code, but has been removed from the clause as it stands in this Bill. At the present moment, the words are 'in any judicial proceeding.' The word 'judicial' has been taken out, and that will, I hope, meet the particular case quoted by my hon'ble friend from the *Englishman*.

"Besides this, however, section 100 of the Bill provides greater security than at present exists against anything in the nature of arbitrary or illegal imprisonment. Now, I certainly cannot think it necessary that I should say that no one can be more opposed to anything of that kind than I should be; and I desire to give every person in this country, of whatever race he may be, the fullest security against suffering so grievous a wrong as that which would undoubtedly result from anything in the nature of illegal or improper imprisonment. I venture to hope, however, that sufficient provision has been made in this Bill, by the changes to which I have alluded, to give reasonable and adequate security against danger of that kind. I must, however, admit that I sympathise a good deal with what I think is the feeling at the bottom of the amendment moved by my hon'ble friend Durgá Charan Láhá. I think the real meaning of the amendment is that he feels a certain amount of disinclination to there being such a chapter as the 33rd chapter of this Bill—a chapter providing a special mode of procedure for Europeans and Americans. I should be very glad if it was possible to place the law in regard to every person in this country, not only on the same footing,—for that the Bill will, I hope, practically do,—but to embody it in the very same language, whether it relates to Europeans or Natives. But no one who recollects the history of questions of this kind in this country can doubt that to deal with that special chapter, which regulates the procedure with

regard to Europeans and Americans, in the manner that has been suggested, would be to deal with very difficult and very delicate questions. Cases have arisen, not under this particular clause, but of a kindred nature, in which the Government of the day has been beaten in this Legislative Council. We all know the agitation that has taken place and the strong excitement which has arisen in past times upon questions of this sort. They are certainly matters not to be entered upon without very full consideration, or, as my hon'ble friend Mr. Stokes remarked, without consultation, not only on the part of the Government here, but also with the Government at home. Under these circumstances, I would strongly recommend that that particular section, and that particular portion of the Bill, be left alone now. Whether any alterations can be made in them from time to time will always be a matter of interest to the Government,—certainly to me,—and I will not fail to consider this particular subject of *habeas corpus* when opportunity offers; but I think that it is impossible to open a question of that magnitude, complication and difficulty without a great deal more thought and examination than would be possible for the Council and the Government to give to it at the present time.

"Then there is the point upon which my hon'ble friend Major Baring touched, namely, whether, as this amendment is proposed, and as other amendments might easily be proposed, in this Code of Criminal Procedure, we should not wait until all the possible amendments have been got together and considered, instead of adopting the more limited amendments which the Bill proposes at the present time. I must say that I earnestly hope the Council will not take that course, for I confess to a great personal interest in some of the amendments which it is proposed to make in the law by this Bill. The three amendments to which special attention has been drawn by my hon'ble friend Major Baring, and the amendments in the direction of greater security for personal liberty, are all amendments to which I myself attach great importance; and I think that it would be a great misfortune—at all events, if that is too strong a term, I should greatly regret—if those amendments were not introduced now, and if the country were to be deprived for another period of twelve months of the advantage of those amendments. Take one of them,—the question of enhancing, a sentence upon appeal. That is a thing which is going on from time to time and, in fact, instances of such enhancement have only very recently been brought under my notice; and I think it is a very undesirable power to entrust to the Courts if it were only for the reason that it is evidently a distinct discouragement to a man who thinks he has been aggrieved to resort to appeal; and I should be very sorry to deprive the people of India of the advantage of that and other amendments for twelve months longer, simply because there are some

further amendments which might, in the opinion of some of my hon'ble friends, be introduced.

"I am always glad when discussions like this take place. I think that they do a great deal of good. They bring points under the attention of the Executive Government, which it is very desirable we should consider; but, as I said before on the previous Motion, it is not reasonable to expect that the Government should deal hastily with questions of this magnitude. What they ought to do is to proceed steadily and with caution in the improvement of the law and the administration of this country in those respects in which they are capable of amendment. Of course, there is always difficulty, as my hon'ble friend Major Baring has pointed out, when we are dealing with one of our great codes. Nobody can doubt,—indeed, I do not believe that there is anybody in the country who does not admit,—that it is a great advantage that we have this Code of Criminal Procedure and the Penal Code and the other great codes of India, which have been elaborated now for a series of years with so much care by the most eminent men, in the form of a regular code; that is to say, of a book which may be put into a man's pocket, and which contains all the information required upon questions of criminal procedure, the penal laws and other matters. But if you are to pass small amendments of these codes without re-enacting the whole code, then in a short time your whole code as a body would become obsolete, and would be surrounded by a quantity of confusing satellites which would entirely obscure the vision of those who had to look at the great central planet itself. Now, we know very well that there is a certain amount of inconvenience in throwing a large Bill of this kind on the table of this Council, and saying, "We are going to pass this Bill of four or five hundred clauses for the sake of a comparatively small number of amendments;" but, unless you wish to give up the advantage of having these great codes, that appears at present to be the only mode in which we can proceed, though I think it quite worthy of consideration whether some other mode ought not to be devised which might obviate that difficulty. I saw a criticism the other day in a public journal as to the great expense said to be incurred in the printing of all this matter for the purpose of making a few amendments. That is a subject which has attracted my attention, and I think it is desirable that we should see whether any other system could not be safely adopted.

"I wish only to make one other remark, and that is, that the necessary mode of procedure being, for the present at all events, to re-enact the whole code, it must not be taken that, because the Government in the year 1882 re-enacts the whole of this code, it therefore expresses the same deliberate opinion upon every

single clause contained in it which it would be expressing if it were enacting it for the first time. Technically, it is a re-enactment; in reality it is a reprint with certain amendments. The only points on which the definite opinion of the Government is expressed are the points to which these amendments relate. The Government is perfectly open to reconsider any other portion of this code at any time, and must not be taken to imply any opinion upon any of its general provisions. As I have said, it is practically a reprint and a re-arrangement of the code with certain amendments, and those are the only portions of it upon which the opinion of the Government is now deliberately pronounced. Those amendments, though few in number, appear to me calculated to confer considerable advantage on the people of this country, and to improve our methods of criminal procedure in a liberal and generous spirit; and therefore it is that I trust that, without adopting the amendment of my hon'ble friend Durgá Charan Láhá, because it raises large and difficult questions which we are not in a position to deal with at the present moment, the Council will pass this Bill, in order that the people of India may have without delay the advantage of those other improvements of the law which will result from the amendments which the Government has submitted."

The Motion was put and negatived.

The Hon'ble Mr. Stokes moved that the Bill, as amended, be passed.

The Motion was put and agreed to.

INDIAN PENAL CODE AMENDMENT BILL.

The Hon'ble Mr. Stokes also moved that the Report of the Select Committee on the Bill to amend the Indian Penal Code be taken into consideration. He said that, in order to provide for cases falling under paragraph III, section 236, of the Bill to amend the Code of Criminal Procedure, the Committee thought that section 71 of the Indian Penal Code should declare that "where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences," and they had amended section 4 of the Bill accordingly.

Section 73 of the Indian Penal Code prescribed the time for which an offender might be sentenced to solitary confinement in the case where he was sentenced to imprisonment for a term of less than a year and in the case where he was so sentenced for more than a year. But it omitted the case where the

sentence was for a year, neither more nor less. The Committee had inserted a section in the Bill which would supply this defect.

They had also added a section (section 7 of the Bill as amended) adding fine without imprisonment to the punishments prescribed by section 309 of the Indian Penal Code for the offence of attempting to commit suicide.

They had also, in order to provide for the case where the offence by which property became "stolen property" was committed without British India, inserted in the Bill a section (section 9) amending section 410 of the Indian Penal Code so as to render property "stolen property" within the meaning of that section, whether the transfer of the property by theft, robbery, extortion or criminal misappropriation, or the criminal breach of trust committed in respect of the property, had been effected or committed within or without British India (see *Empress* v. *Moorga Chetty*, I. L. R. 5 Bom. 338).

The Motion was put and agreed to.

The Hon'ble MR. STOKES also moved that the Bill, as amended, be passed.

The Motion was put and agreed to.

PRISONERS' ACT AMENDMENT BILL.

The Hon'ble MR. STOKES also moved that the Report of the Select Committee on the Bill to amend the Prisoners' Act, 1871, be taken into consideration. The Committee had made no change in the Bill, and recommended that it should be passed.

The Motion was put and agreed to.

The Hon'ble MR. STOKES also moved that the Bill be passed.

The Motion was put and agreed to.

PRESIDENCY SMALL CAUSE COURTS BILL.

The Hon'ble MR. STOKES also presented the final Report of the Select Committee on the Bill to consolidate and amend the law relating to the Courts of Small Causes established in the Presidency-towns.

CIVIL PROCEDURE CODE AMENDMENT BILL.

The Hon'ble MR. STOKES then presented the Report of the Select Committee on the Bill to amend the Code of Civil Procedure.

His Excellency THE PRESIDENT said:—"Before the Council separates, I wish to state that I propose to hold a special meeting of the Legislative Council

on Wednesday next, the 8th instant, in order that my hon'ble friend Major Baring may make his Financial Statement. Members of Council are of course aware that in regard to these financial proposals it is of the utmost importance, both for the Government, as regards its revenue, and for the convenience of those engaged in trade, that when final alterations are once announced, they should be carried into effect as speedily as possible. That is the course which has always been followed in the British Parliament, in order to prevent the loss to Government and the inconvenience to trade which otherwise would result. At the same time, it appears to me that to propose that the Bills, which will be submitted by my hon'ble friend Major Baring in connection with his proposals, should be passed on the same day, by suspending the standing orders of this Council, would be to go further than the requirements of the case demanded. What I would suggest is that the Council should assemble on Wednesday to hear the Financial Statement, and that it should again meet on Friday, instead of Thursday, which will give Members of the Council a whole day to consider the financial proposals of the Government. The consideration of the Bills which my hon'ble friend will present on Wednesday will then be taken up on Friday, and the Bills passed if they meet with the approval of the Council, and afterwards the ordinary business, which would in the usual course of things have come on Thursday, will be proceeded with. There will be no sitting on Thursday."

The Council adjourned to Wednesday, the 8th March, 1882.

R. J. CROSTHWAITE,
Offg. Secy. to the Govt. of India,
Legislative Department.

CALCUTTA ;
The 2nd March, 1882.

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