

Tuesday, 18th September, 1860

PROCEEDINGS

OF THE

**LEGISLATIVE COUNCIL OF
INDIA**

Vol. VI

(1860)

Sections 34 and 35 were passed as they stood.

Chapter XIII (of offences relating to Weights and Measures) was passed as it stood.

Chapter XIV (of offences affecting the Public Health, Safety, Convenience, Decency, and Morals) was passed after amendments in Sections 14 and 27.

Chapter XV (of offences relating to Religion) was passed after the omission of Section 4 (providing for cumulative punishment).

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

EMIGRATION TO SAINT KITTS.

SIR BARTLE FRERE moved that the Council resolve itself into a Committee on the Bill "relating to the Emigration of Native laborers to the British Colony of St. Kitts."

Agreed to.

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

NOTICE OF MOTION.

MR. HARRINGTON gave notice that he would, on Saturday next, move the first reading of a Bill for licensing and regulating Stage Carriages.

The Council adjourned at 5 o'clock on the Motion of Sir Bartle Frere, till Tuesday, the 18th instant, at 7 o'clock in the morning.

Tuesday Morning, Sept. 18, 1860.

PRESENT :

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

Hon'ble Sir H. B. E. Frere,	A. Sconce, Esq.,
Hon'ble C. Beadon,	C. J. Erskine, Esq.,
H. B. Harrington, Esq.,	and
H. Forbes, Esq.,	Hon'ble Sir C. R. M. Jackson.

PENAL CODE.

The Order of the Day being read for the adjourned Committee of the

whole Council on "The Indian Penal Code," the Council resolved itself into a Committee for the further consideration of the Bill.

Section 1, Chapter XVI (of offences affecting the Human Body) was passed with the addition of the following Illustration :—

"A, by shooting at a fowl with intent to kill and steal it, kills B, who is behind a bush; A not knowing that he was there. Here although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B or cause death by doing an act that he knew was likely to cause death."

Section 2 related to murder.

Amendments were made in Illustration (b), in Exception 1 and its Explanation, and in Exception 3.

Exception 5 provided as follows :—

"Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

Illustrations.

(a) A, by instigation, voluntarily causes Z, a person under eighteen years of age, to commit suicide. Here on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder.

(b) Z, a Hindoo widow, consents to be burnt with the corpse of her husband. A kindles the pile. Here if Z be above the age of eighteen years, A has committed culpable homicide. If Z be under that age, A has committed murder."

SIR CHARLES JACKSON said, he objected to this Exception on principle. He thought that a man who killed another *prima facie* committed the murder, even if he had obtained the consent of the murdered man, because no man had a right to give his consent to the commission of any unlawful act. The Exception seemed to be founded upon the false principle that the consent of a person to his own death absolved another from causing his death. The act was *prima facie* a malicious one, and the consent of the party could not in any sense be regarded as a legal consent. He (Sir Charles Jackson) thought it a violation of principle not to call that mur-

der. He should therefore move for the omission of the Exception.

THE CHAIRMAN said, he hardly thought that a man who killed another with his consent should be punished with death. He thought there should be some distinction between such an offence and a murder committed with a malicious intent. But if the Council were in favor of the omission of the Exception, he would not object to it, for he did not see that there would be any very great harm, whether in omitting or retaining it. He would read to the Council what the framers of the Code said on this subject:—

"The second mitigated form of voluntary culpable homicide is that to which we have given the name of voluntary culpable homicide by consent. It appears to us that this description of homicide ought to be punished, but that it ought not to be punished so severely as murder. We have elsewhere given our reasons for thinking that this description of homicide ought to be punished.

Our reasons for not punishing it so severely as murder are these.—In the first place the motives which prompt men to the commission of this offence are generally far more respectable than those which prompt men to the commission of murder. Sometimes it is the effect of a strong sense of religious duty, sometimes of a strong sense of honor, not unfrequently of humanity. The soldier who, at the entreaty of a wounded comrade, puts that comrade out of pain, the friend who supplies laudanum to a person suffering the torment of a lingering disease, the freedman who in ancient times held out the sword that his master might fall on it, the high-born native of India who stabs the females of his family at their own entreaty in order to save them from the licentiousness of a band of marauders, would, except in Christian Societies, scarcely be thought culpable, and even in Christian Societies would not be regarded by the public and ought not to be treated by the law as murder.

Again, this crime is by no means productive of so much evil to the community as murder. One evil ingredient of the utmost importance is altogether wanting to the offence of voluntary culpable homicide by consent. It does not produce general insecurity. It does not spread terror through society. When we punish murder with such signal severity, we have two ends in view. One end is that people may not be murdered. Another end is that people may not live in constant dread of being murdered. This second end is perhaps the more important of the two. For if assassination were left unpunished, the number of persons assassinated would probably bear a very small

proportion to the whole population. But the life of every human being would be passed in constant anxiety and alarm. This property of the offence of murder is not found in the offence of voluntary culpable homicide by consent. Every man who has not given his consent to be put to death is perfectly certain that this latter offence cannot at present be committed on him, and that it never will be committed, unless he shall first be convinced that it is his interest to consent to it. We know that two or three midnight assassinations are sufficient to keep a city of a million of inhabitants in a state of consternation during several weeks, and to cause every private family to lay in arms and watchmen's rattles. No number of suicides, or of homicides committed with the unextorted consent of the persons killed, could possibly produce such alarm among the survivors.

The distinction between murder and voluntary culpable homicide by consent has never, as far as we are aware, been recognized by any Code in the distinct manner in which we propose to recognize it. But it may be traced in the laws of many countries, and often, when neglected by those who have framed the laws, it has had a great effect on the decisions of the tribunals, and particularly on the decisions of tribunals popularly composed. It may be proper to observe that the burning of a Hindoo widow by her own consent, though it is now, as it ought to be, an offence by the Regulations of every Presidency, is in no Presidency punished as murder."

The following was an extract from a subsequent Report of the Law Commissioners reviewing the opinions which had been received on the Original Penal Code:—

"In the Digest of the English Criminal law it is declared that homicide is neither justified nor extenuated by reason of any consent given by the party killed.

Of the Clause in the Indian Code which recognizes 'voluntary culpable homicide by consent' as a distinct offence less than murder, Sir R. Comyn observes, 'the Clause it is true is guarded by several provisions, one of which relates to the state of mind of the party consenting to be killed, but putting aside for argument's sake all religious considerations of a future state, and merely advert- ing to man's strong natural love of life even in the most desperate circumstances, the mere fact of a person consenting to be killed would indicate a morbid state of mind sufficient to raise a doubt of his sanity. I cannot think that in any country or under any religion voluntary homicide should be leniently dealt with, or that any special circumstances like those supposed in the note would justify a law introducing the novel offence of homicide by consent.'

Sir J. Awdry referring to the Chapter of General Exceptions says, 'I agree to the exception grounded on the sanctity of human life, and I wish that they (the Commissioners) had elsewhere followed up the principle instead of providing that homicide by consent should not be murder. The prerogative of mercy would much better be allowed to apply when necessary to such cases, than a rule be laid down that a man has to some extent a right to authorize its destruction.'

Mr. Hudleston says, 'it appears to me no alleviation of homicide that I have another's consent to kill him.' Mr. A. D. Campbell on the other hand considers that the reasoning in page 61 of Note M. fully justifies the general principle.

Mr. Norton says, 'I had imagined that the Clause 298 was devised with a view mainly of punishing duels with a mitigated sentence, and for distinguishing deaths by such a deliberate act from murders. I was disposed under that impression to intimate my concurrence. But neither in the Illustrations or the Notes is any such object alluded to, and the only application of the Clause seems to me to be to cases of extraordinary local superstitions (better legislated upon specifically) or to those which are almost, or purely imaginary. The Clause in this view appears to me unnecessary and liable to ridicule.'

Mr. Greenhill, a Judge of the Sudder Court at Bombay, understands this Clause to include fatal duels.

The Judges of the Sudder Court, North-Western Provinces observe that duelling is not specifically alluded to in the Code, but they conclude that it is provided for in Clause 294 and Clause 320 according as death or wounding may have ensued.

We observe that in the Draft of the Code first printed, a duel was given as an Illustration of 'voluntary culpable homicide by consent.' The wording of the definition was slightly altered on revision, but we think Clause 298, as it stands, takes in the case of a person killed in a duel, as one 'who suffers death or takes the risk of death by his own choice.' And if the Clause be retained, if voluntary culpable homicide by consent be recognized as a distinct offence, we know not but it may be the best way of dealing with a species of crime which it has hitherto been found impossible to deter men from by the dread of capital punishment. It is in vain to denounce a penalty which is so contrary to the general sentiment, that except in cases marked by extreme malignity or some special aggravation rousing indignation against the offender, it could not be executed without shocking the public sense. Yet this is just what must be said of the penalty of death threatened by the existing law to the person who kills another, in what is called a fair duel—threatened but so rarely enforced, that it carries no terror with it, no terror at least of that which it threatens. It might be well worth a trial whether the certain expectation of punishment for culpable homicide by consent, the enforcement of which would surely be ap-

proved by the public mind, would not be more efficacious in preventing duels in which life is risked, than the present empty denunciation of the law. The penalty proposed is imprisonment of either description for a term which may extend to fourteen years, and must not be less than two years, which may be combined with fine at discretion.

It is probable that the authors of the Code were led to distinguish this form of voluntary culpable homicide by the consideration (a), of the case stated in the first Illustration (a), of a Hindoo widow who with her own consent has been burned with the corpse of her husband. They were obliged to provide for this case which was already the subject of the penal enactments in the Regulations for the Company's Courts. They found that the burning of a Hindoo widow by her own consent, though it is now, as it ought to be, an offence by the Regulations of every Presidency, is in no Presidency punished as murder. By Regulation XVII of 1829 of the Bengal Code copied exactly in Regulation I of 1830 of Madras, and followed substantially in Regulation XVI of 1830 of Bombay, the offence is declared to be 'culpable homicide punishable in the Presidencies of Bengal and Madras by fine, or by imprisonment, or by both fine and imprisonment at the discretion of the Court, and in the same manner, except with a limitation of imprisonment to ten years, in the Presidency of Bombay. This is not a case of 'extraordinary local superstition' as Mr. Norton suggests, but a matter of national concern, affecting a whole people for which the Penal Code for India must legislate. The Commissioners had to consider whether they would rank this offence as murder, as falling within the definition thereof, or reduce it by a special exception to a lower grade of culpable homicide, following the existing law which had been enacted upon the most careful and solemn deliberation. They concluded that it ought not to be treated as murder. They had then to frame an alternative definition, and the question would naturally arise whether the terms of the definition should be limited specifically to cases of Suttee, or be made general enough to comprehend other cases depending upon the same principle. This, we presume, was the process, the result we find in Clause 298, the terms of which are general, including all cases in which 'the person whose death is caused was above twelve years of age and suffers death or takes the risk of death, by his own choice.'

After some conversation, Sir Charles Jackson's Motion was put and negatived.

SIR CHARLES JACKSON then moved for the omission of Illustration (b).

THE CHAIRMAN supported the amendment, and said he thought that the retention of the Illustration

tion might lead to the inference that the Legislature had in some measure justified the rite of Suttee.

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

Sections 3 and 4 were passed as they stood.

Section 5 was passed after an amendment.

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

The Council adjourned at 10 o'clock on the Motion of Sir Bartle Frere, till Thursday Morning, at 7 o'clock.

Thursday Morning, Sept. 20, 1860.

PRESENT :

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

Hon'ble Sir H. B. E. Frere,	H. Forbes, Esq., A. Scounce, Esq., and C. J. Erskine, Esq.
Hon'ble C. Bendon, H. B. Harrington, Esq.,	

PENAL CODE.

The Order of the Day being read for the adjourned Committee of the whole Council on "The India Penal Code," the Council resolved itself into a Committee for the further consideration of the Code.

Sections 6 to 18 of Chapter XVI were passed as they stood.

Section 19 related to the exposure and abandonment of a child under twelve years by its parent or a person having the care of it.

Mr. SCOUNCE enquired whether twelve years was not too high a limit. The limit in the Section, as it originally stood, was five years.

THE CHAIRMAN explained that the alteration in question and the introduction of the new illustrations in Sections 9 and 10 were made by the Select Committee in consequence of some papers received from the Government of Bengal, whilst the Code was under consideration. These papers referred to a superstitious custom which appeared to be rather prevalent of

abandoning children in the Soonderbuns. The following is one of the cases as mentioned by the Magistrate of the 24-Pergunnahs :—

"I find that, in April 1853, a case somewhat similar to that at Jessore was brought before this Court. One Kooran, a native of a village in the South West part of Kishennuggur, had two sons. The elder died. The other being grievously sick, Kooran made a vow that should his child recover and he spared to the age of ten, he would then dedicate him to the Almighty, by turning him loose in the Soonderbuns in order to his becoming a 'bunbask.' Kooran had come all the way to Balleaghatta with his boy Panchoo aged ten, and had there hired a boat to convey them to the Soonderbuns, when they were arrested by the Police and sent before the Magistrate. My predecessor apparently doubted the boy being Kooran's son. Investigation by the Nuddia Police however proved the truth of Kooran's statements. But the boy's mother declared that there had never been any intention of abandoning the lad. He was merely to have been let loose for a few minutes, in fulfilment of the strict letter of the vow, and then taken into the boat and brought safely home again. Kooran was discharged, having been previously warned that, if he abandoned the lad in the Soonderbuns, and thus (as was probable) caused death, he would incur the penalty for wilful murder. The Magistrate of Nuddia was requested to direct the Police to look after the boy occasionally, and to report if he was absent at any time."

The Section was passed after the insertion of the word "wholly" before the word "abandoning" on the Motion of the Chairman.

Section 20 was passed as it stood,

Section 21 was passed after a verbal amendment.

Sections 22 to 29 were passed as they stood.

Section 30 (relating to the administering of poison or drugs) was a new Section proposed by the Select Committee who left a blank for the punishment.

Several amendments were carried on the Motion of the Chairman which made the Section stand as follows :—

"Whoever administers to, or causes to be taken by any person any poison or any stupefying, intoxicating, or unwholesome drug or other thing, with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence, or knowing it to be likely that he will thereby cause