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1861

SIR BARTLE FRERE moved that the Bill be read a third time and passed.

The Motion was carried, and the Bill read a third time.

POSTPONED ORDERS OF THE DAY.

The following Orders of the Day were postponed :—

Adjourned Committee of the whole Council on the Bill "for simplifying the Procedure of the Courts of Criminal Judicature not established by Royal Charter."

Committee of the whole Council on the Bill "to amend Act VIII of 1859 (for simplifying the Procedure of the Courts of Civil Judicature not established by Royal Charter)."

Committee of the whole Council on the Bill "to make certain amendments in the Articles of War for the Government of the Native Officers and Soldiers in Her Majesty's Indian Army."

Committee of the whole Council on the Bill "to amend Act III of 1857 (relating to Trespasses by Cattle)."

EMIGRATION (SEYCHELLES).

MR. FORBES moved that the Bill "relating to emigration to the British Colonial Dependency of Seychelles" be referred to a Select Committee consisting of Mr. Harington, Mr. Seton-Karr, and the Mover.

Agreed to.

BRANCH RAILWAYS, &c.

MR. SETON-KARR moved that the Bill "to provide for the construction, by Companies and by private persons, of Branch Railways, Iron Tram Roads, common Roads, or Canals, as feeders to Public Railways" be referred to a Select Committee consisting of Mr. Harington, Mr. Forbes, Sir Charles Jackson, and the Mover.

Agreed to.

RECOVERY OF RENT (BENGAL.)

MR. HARINGTON moved that a communication received by him from the Government of the North-Western Provinces be laid upon the table and referred to the select Committee on the Bill "to amend Act X of 1859 (to amend the law relating to the recovery of rent in the Presidency of Fort William in Bengal)."

Agreed to.

INCOME TAX.

SIR BARTLE FRERE gave notice that he would on Saturday next move the second reading of the Bill to amend Act XXXII of 1860 (for imposing Duties on Profits arising from Property, Professions, Trades, and Offices.)

LICENSING OF ARTS, TRADES, AND DEALINGS.

SIR BARTLE FRERE moved that Sir Robert Napier be requested to take the Bill "for imposing a Duty on Arts, Trades, and Dealings" to the Governor-General for his assent.

Agreed to.

PAPER CURRENCY.

SIR BARTLE FRERE moved that Sir Robert Napier be requested to take the Bill "to provide for a Government Paper Currency" to the Governor-General for his assent.

Agreed to.

The Council adjourned.

Saturday, July 20, 1861.

PRESENT :

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

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

LICENSING OF ARTS, TRADES, AND DEALINGS; AND PAPER CURRENCY.

THE VICE-PRESIDENT read Messages from the Right Honorable the Governor-General, communicating his assent to the Bill "for imposing a Duty on Arts, Trades, and Dealings,"

and the Bill "to provide for a Government Paper Currency."

SALTPETRE.

THE CLERK presented a Petition from certain Saltpetre Merchants of Delhi against the levy of a tax on Indian Saltpetre.

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

Agreed to.

COURTS OF CIVIL JUDICATURE.

THE CLERK reported to the Council that he had received a communication from the Home Department forwarding for consideration, in connection with the Bill for constituting Courts of Civil Judicature, copies of two Despatches from the Secretary of State relative to the institution of Civil suits under Section 6 Act VIII of 1859, the expediency of abolishing the grade of Sudder Ameen in the Bombay Presidency, and the necessity of adopting some general and comprehensive measure in regard to the Courts in the three Presidencies presided over by Uncovenanted Judges.

MR. HARINGTON moved that the communication be printed and referred to the Select Committee on the Bill.

Agreed to.

PENAL CODE AND CRIMINAL PROCEDURE.

THE CLERK also reported a communication from the Home Department, forwarding a Despatch from the Secretary of State, communicating remarks regarding the postponement of the introduction of the Penal Code, and expressing a hope that every exertion will be made with the view of expediting the progress of the Code of Criminal Procedure now under the consideration of the Council.

SIR BARTLE FRERE moved that the communication be read when the Council went into Committee on the Criminal Procedure Bill.

Agreed to.

SALTPETRE.

THE CLERK also reported a communication from the Government of the North-Western Provinces, relative to the Bill "to regulate the manufacture of Saltpetre and of Salt educed therefrom."

MR. HARINGTON moved, that the communication be printed and referred to the Select Committee on the Bill.

Agreed to.

HOUSE OF CORRECTION (CALCUTTA).

MR. SETON-KARR moved the first reading of a Bill "for the better enforcement of discipline in the House of Correction at Calcutta."

He said:—

Sir, it will be in the recollection of Honorable Members that, in the spring of this year, a very serious outbreak took place in the House of Correction, in which several prisoners, after violent and mutinous conduct inside the Jail, effected their escape, and caused the death of a native policeman in the exercise of his duty.

The papers relating to the enquiries which took place after the outbreak, will be found in the annexure to this Bill.

As may be conceived, the Advocate General was called on for his opinion, and it appears that not only is the law deficient, but that there is no proper controlling authority to provide for the due discipline and regularity of the Jail. The nominal authority resides in the Sheriff, but, practically, the superintendence is left to the Commissioner of Police, who, however, has not the legal power to inflict all the necessary punishments. All that he can do, is to put men in irons when an outbreak is actually imminent, but he has not the power sufficient to deal with ordinary breaches of discipline. This is a state of things which it is necessary should be at once remedied.

It appears further that there are two laws applicable to Jail discipline,

namely, Act XVI of 1840 and Act XXIII of 1854. The first empowers the Governor-General in Council to frame Rules regarding transported convicts, and the second empowers the same high authority to detain persons sentenced to penal servitude in any place that may appear advisable. But neither singly nor together is it possible to work these laws so as to obtain the desired end. They will not apply to persons sentenced to penal servitude, but detained in the House of Correction as an immediate place of confinement; nor to persons sentenced to penal servitude by a Court Martial; nor to persons sentenced to imprisonment with or without hard labour; nor to persons awaiting their trial.

Sir, it is now proposed to vest the control of the House of Correction in the hands of one person who shall be either the Commissioner of Police or some person whom Government may appoint.

In this view the powers of the Chief Commissioners are strictly defined, and we propose by law to empower him to punish persons guilty of mutinous or violent conduct, or of insolent language, or prisoners who contumaciously refuse to perform the work allotted to them, by solitary confinement for a period of three days, or by separate confinement for not more than seven days, or by placing them in irons for not more than four days, in each particular instance.

Still further to ensure order, it is proposed to empower the Government, from time to time, to frame rules for the ordinary discipline of the jail, embracing the food, the prison dress, the classification of prisoners, their hours of recreation, and their hours of work.

In order to preserve intact the jurisdiction of the Sheriff, provision has been made in the case of any prisoner condemned to death confined in the House of Correction, to allow the Sheriff to demand his body and to have the sentence executed. I need hardly say that it is in no wise intended to detract from the dignity or to impair the honor of the Sheriff's office: but it is obvious that a Chief Commissioner or Magistrate always available, experienced in his work, and not liable to be changed yearly, is more qualified for the superintendence of the House of Correction, than the Sheriff who is changed every year.

In this respect the English precedents have been closely followed.

In England the Houses of Correction are under the visiting Justices and the Jail is under the Sheriff. One further proviso has been added by which, if this Act shall pass and work satisfactorily, the Governor-General, by an order in Council, may extend its provisions to any House of Correction now existing, or that may hereafter be established, in any part of the British Territories in India.

These, Sir, are the main provisions of this enactment, and they are believed to be sufficient to meet any emergency that may arise; and, in this view, while inviting your particular scrutiny and that of the Honorable Judge on my right, to the same, I beg leave to move the first reading of the Bill.

The Bill was read a first time.

INCOME TAX.

SIR BARTLE FRERE moved the second reading of the Bill "for limiting in certain cases for the year commencing from the 31st day of July 1861, the amount of Assessment to the Duties chargeable under Act XXXII of 1860 (for imposing Duties on Profits arising from Property, Professions, Trades, and Offices) and Act XXXIX of 1860 (to amend Act XXXII of 1860)."

The Motion was carried, and the Bill read a second time.

CONSOLIDATED CUSTOMS BILL.

MR. ERSKINE moved the second reading of the Bill "for the consolidation and amendment of the laws relating to the Collection of Customs Duties."

The Motion was carried, and the Bill read a second time.

MUNICIPAL ASSESSMENT (BOMBAY).

The Order of the Day being read for the third reading of the Bill "to amend Act XXV of 1858 (for appointing Municipal Commissioners and for raising a fund for Municipal purposes in the Town of Bombay)"—

MR. ERSKINE moved that the Bill be re-committed to a Committee of the whole Council for the purpose of introducing a merely formal amendment, namely, the substitution of "the 1st of September 1861" for "the 15th of April 1861" as the date of commencement of the Act.

Agreed to.

The Bill passed through Committee with the proposed amendment, and, the Council having resumed its sitting, was reported.

MR. ERSKINE then moved that the Bill be read a third time and passed.

The Motion was carried, and the Bill read a third time.

CRIMINAL PROCEDURE.

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

The Despatch from the Secretary of State was then read as follows :—

"*India Office, London, 7th June* 1861.

Legislative No. 7.

MY LORD.—Your letter, dated 9th April (No. 10) 1861, stating that an Act had been passed by the Legislative Council, and assented to by the Governor-General deferring the introduction of the Penal Code till the 1st January 1862, in consequence of the translations of the Code into the several vernacular languages not having been completed, and of the small progress which has been made in passing the Code of Criminal Procedure through the Committee of the Legislative Council, has been laid before me in Council.

2. Under the circumstances stated, I approve of the course which has been taken, and of the Act suspending the introduction of the Penal Code, to which your Lordship's assent has been given. At the same time I regret that this important measure is not to come into operation until the commencement of the next year; and I trust that every exertion will be made by the Members of your Lordship's Government to prevent any unnecessary delay in the progress of the Code of Criminal Procedure through the Legislative Council.

3. To this end, I would suggest for the consideration of your Lordship in Council, that matters of merely local interest, and of comparatively inferior importance, might be deferred, so as to enable the Legislative Council to proceed as rapidly as is consistent with due deliberation, with a measure which is urgently used, and which is to affect the whole of the British possessions in India.

I have the honor to be, &c.,

(Sd.) C. WOOD."

The Committee proceeded to consider the Chapter of Lunatics, as proposed to be altered by the Chairman. Peacock.

Sections 1 to 7 were severally passed as follows :—

1. "When any person who is charged with any offence shall appear to the Magistrate having jurisdiction, to be of unsound mind, and incapable, in consequence, of making a defence, the Magistrate shall institute an inquiry to ascertain the fact of such unsoundness of mind, and shall cause the accused person to be examined by the Civil Surgeon of the District or some other Medical Officer, and thereupon shall examine such Civil Surgeon or other Medical Officer, and shall reduce the examination into writing, and if the Magistrate shall be of opinion that the accused person is of unsound mind, he shall stay further proceedings in the case.

2. If any person who shall be committed for trial before a Court of Session, shall at his trial appear to the Court to be of unsound mind and incapable of making his defence, the Court shall in the first instance try the fact of such unsoundness of mind, and if satisfied of the fact, shall give a special judgment that the accused person is of unsound mind and incapable of making his defence, and thereupon the trial shall be postponed.

3. Whenever any investigation or trial of a case shall be postponed under Section 1 or 2 of this Chapter, the Magistrate or Court of Session, as the case may be, may at any time resume the investigation or trial, and require the accused, if detained in custody, to be brought before him, or if the accused has been released on security, may require his appearance.

4. If when the accused appears, or is again brought before the Magistrate or the Court of Session, as the case may be, it shall appear to such Magistrate or Court that the accused is in a fit state of mind to make his defence, the investigation shall proceed, or the accused shall be put on his trial, as the case may

require. If it shall appear that the accused is still of unsound mind and incapable of making his defence, the Magistrate or Court of Session shall again act according to the provisions of Section I or II.

5. In any case in which an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or Court of Session, as the case may be, if the offence be bailable, may release such person on sufficient security being given that he shall be properly taken care of, and shall be prevented doing injury to himself or any other person and for his appearance when required. If the offence be not bailable, or if the required bail be not given, the accused person shall be kept in safe custody in such place as the local Government to which the case shall be reported shall direct.

6. Whenever any person is acquitted upon the ground that at the time at which he is charged to have committed the offence, he was by reason of unsoundness of mind incapable of knowing the nature of the act charged, or that he was doing what was wrong or contrary to law, the finding shall state specially whether he committed the act or not.

7. Whenever such finding shall state that the accused person committed the act charged, the Magistrate or Court of Session before whom the trial was held, shall, if the act charged would but for the incapacity found have amounted to an offence, order such person to be kept in safe custody, in such place and manner as to the Magistrate or Court of Session shall seem fit, and shall report the case for the order of the local Government. The local Government may order such person to be kept in safe custody in a Lunatic Asylum or other suitable place of safe custody."

The postponed Section 8 provided as follows :—

"No person, against whom any such special finding shall have been given, shall be entitled to be discharged out of custody on being restored to soundness of mind, unless by order of the local Government."

The Section was proposed by the Chairman to be altered as follows :—

"When any person is confined under the provisions of Section 5 or 7, it shall be lawful for the Inspector of Jails or the Visitors of Lunatic Asylums to visit such person in order to ascertain his state of mind, and such person shall be visited once at least in every six months by one of such officers, who shall make a special report as to the state of mind of such person. If such officer in the case of a person confined under Section 5, shall report that in his opinion such person is capable of making his defence, such person shall be taken before the Magistrate or Court of Session as the case may be at such time and place as the Magistrate or Court shall appoint, and such Magistrate or Court shall deal with such person under the provisions of Section 4, and may receive the certificate of the inspecting officer as evidence. If such person shall be confined under the provisions of Section 7, and the inspecting officer as aforesaid shall certify that in his judgment such person may be discharged without danger of his doing injury to himself or any other person, such person shall be taken before the Sessions Judge or the Magistrate of the District, and if such Judge or Magistrate shall be satisfied that he may be discharged with safety as aforesaid, such Judge or Magistrate shall order him to be discharged."

MR. HARINGTON said, he could not consent to the material alteration of the present practice which was proposed in the concluding part of this Section, first, because no reason had been assigned for so great a change, and, secondly, because he could not bring himself to think that the Magistrate or Sessions Judge was the proper authority to determine, whether a person who had committed an act which, but for his state of mind at the time he committed it, would have been a serious offence or crime rendering the perpetrator liable to a heavy penalty, extending even to a sentence of death, was in a fit condition to be again let loose upon society. He believed that no such power as that now proposed to be given to the Magistrates and Sessions Judges in this country was vested in the Magistrates or in any Criminal Court at home. There it could be exercised, he understood, only by the Secretary of State for the Home Department, and the same reasons which led to the power being given to that Officer, no doubt, induced the Legislature of this country to confer the power, not upon the local authorities by whom it had never been exercised, but upon the local Government by which, acting with the advice of the Sudder Court, it had always been exercised ; and he could not agree to the alteration now proposed, which would take the power from the Executive Government and give it to Officers holding the comparatively subordinate position of Magistrate or Session Judge. Looking at the question in a legal point of view,

he apprehended that the Criminal Courts could not legitimately interfere after the acquittal by them of the accused person. With that acquittal their power to act judicially ceased. The case was then, as it were, taken out of the hands of the Courts, and fell within the cognizance of the Executive Government in its capacity of guardian of all its subjects. It was not alleged that the power which had been hitherto exercised by the Executive Government had been abused, or that any inconvenience had resulted from the power being in the Executive Government, and not in the local Authorities. The present practice had been in force for more than half a century. As he had already shown, it was conformable to the practice at home; and he submitted that it ought not to be altered unless found inconvenient or objectionable, which had not been shown to be the case. This was the objection which he entertained in principle to the proposed Section. Then he observed that the Section made no provision for the cases of persons who were unable to be put upon their trial for offences charged against them by reason of unsoundness of mind, but who were at large on bail. Some provision seemed to be required to keep their cases in view. This was pointed out on a former occasion by the Honorable Member for Bombay, and he (Mr. Harington) had prepared a Section to meet that Honorable Member's objection. The Section proposed by the Honorable and learned Vice-President did not indicate what Session Judge was to have the power of ordering the discharge of an accused person acquitted on account of insanity, on his being restored to a sound mind. The trial might have taken place at Meerut, and the accused person might be confined in the Lunatic Asylum at Benares. It surely could not be intended to send this man from Benares to Meerut, in order that he might be again brought before the Court which tried him, notwithstanding that the Judge who held the trial might have been removed in the interim. He thought that such a proceeding would be exceedingly hard and improper in so far as the accused person was concerned, and that it should not be allowed. These were some of the objections which he entertained to the Section as regarded its details, and he must say he greatly preferred the Section which had been prepared by him.

THE CHAIRMAN said, it appeared to him that, when a man tried for an offence, even murder for instance, was acquitted on the ground of lunacy, he was not guilty of any crime, and ought not therefore to be punished for any crime, but ought to be restrained so that he might not do any injury to himself or to the public at large. It was therefore necessary to confine him. The question then arose whether the Government ought to have the power to confine that man as long as they pleased, so as to prevent him from doing injury to himself or others. To meet such a case, the Section now under discussion provided that it should be lawful for the Inspector of Jails or the Visitors of Lunatic Asylums to visit the lunatic in order to ascertain his state of mind, and that the lunatic should be visited once at least in every six months by one of such Officers who should make a special report as to the state of mind of the lunatic. The Section went on to provide that, if the lunatic should have been acquitted on the ground of lunacy, and the Inspecting Officer should certify that in his judgment the lunatic might be discharged without danger of his doing injury to himself or others, the lunatic should be taken before the Sessions Judge or the Magistrate of the District, and if such Judge or Magistrate should be satisfied that he might be discharged with safety, the Judge or Magistrate should order him to be discharged. That appeared to him (Sir Barnes Peacock) to be a sufficient security to prevent any man from doing injury to himself and others, and there was the further security that a man would not be confined in Jail or in a Lunatic Asylum longer than might be absolutely necessary. Then with regard to the detention of persons for want

of bail pending investigation or trial, if the offence were bailable, the accused might be released on sufficient security being given for his safe custody and for his appearance when required. But if the offence were not bailable, the accused would be kept in safe custody in such place as the local Government to whom the case would be reported would direct. Now the Government would direct the accused to be kept either in a Lunatic Asylum or in the Jail, and therefore this Section required his being visited and reported on by the Inspector of Jails or the Visitors of Lunatic Asylums. The Section went on to provide that, if the Inspecting Officer should report that in his opinion the accused was capable of making his defence, the accused should be taken before the Judge or Magistrate, and the Judge or Magistrate should deal with him under the provisions of Section 4, and might receive the certificate of the Inspecting Officer as evidence. It appeared to him that the Section as now proposed provided sufficient protection, both as regarded the public by preventing dangerous lunatics from being let loose on society, and as regarded lunatics confined in Lunatic Asylums or in Jail. Whether the lunatic had committed murder was not material, for he could not be punished for an offence committed without a criminal intention, and then the only question for consideration was, whether he should be detained in confinement so long as the Government chose to do so or did not choose to release him. The Honorable Member for the North-Western Provinces had referred to the Act passed in England. But then it ought to be remembered that that Act only applied to cases of felony.

MR. FORBES said that, as a general rule, it was not good that power to undo an act should be given to any authority lower than that which had originally done the act, and he did not think it right that a Magistrate should have the power to undo an Order of the Government. There was one matter, however, which, it appeared to him, had escaped the attention of the Honorable and learned Chairman, and that was the almost physical impossibility of an Inspector of Jails visiting all the Jails every six months. There were twenty-two Districts under the Madras Presidency, in each of which there was a Jail, and there was but one Inspector of Jails for the whole Presidency.

THE CHAIRMAN said, he was quite willing to substitute "twelve months" for "six months."

MR. SETON-KARR said that, after the arguments used by the Honorable Member for the North-Western Provinces and the full exposition of the Honorable and learned Vice-President, he felt himself enabled to draw a distinction between the two Sections referred to. Section 5 referred to cases still within the possible cognizance of the Judge or the Magistrate, and, as such, within the domain of the Judicial Courts. Section 7 contemplated cases which had passed out of the hands of the Court, on which the Court had pronounced a regular finding, and which therefore belonged to the province of the Executive Government. The Court in these latter cases, had exercised all its powers within the limits prescribed to it by law, and had discharged its office. Then came what would be an exercise of discretion, and in this light the Government possessed functions analogous to those which belonged to it as the fountain of mercy. It would, in fact, be called on to grant a practical remission of a penalty. This was a matter which had better be left to the local Government than to the Courts, and there might be really practical inconvenience or obstacles to the course proposed, of deputing an Inspector, once in six or twelve months, to any Jail wherein a lunatic might be confined. Moreover the law now in force, placing this power in the hands of the Government, had worked well hitherto and should not be altered without good reason. Government had never been harsh or unreasonable in these cases, and had never kept men in confinement as lunatics without very good cause. In this view, he could not support the amendment in its present shape.

MR. ERSKINE said that, with regard to the question of principle involved in cases falling under Section 7, he thought they must all concur in the opinion which had been expressed by the Honorable and learned Chairman, that in such cases the final decisions must be regarded not as acts of mercy, but as acts of justice. There were, however, two considerations which weighed with him and must influence his vote on this question. The one was the apparent unsuitableness of the person—that is, the local Judge—to whom it was proposed by the amendment to entrust the duty of final decision ; and the other was the special fitness of the Government to get that duty discharged. It seemed to him that the judicial part of the proceedings was completed when judgment was given by the Court after trial, and what remained to be done was a matter as to which the Judge would be dependent on the opinions of others. The Judge would no longer have to consider any point of law or of fact, but would simply have to consider whether or not the person in confinement would be likely, if discharged, to do injury to himself or to any other person. This was purely a matter of opinion and inference, and a medical opinion *only*, or that of a person who had scientifically studied the subject, would be of real value. In other cases where the question was whether a person actually exhibited symptoms of insanity at some particular time, the evidence of any by-stander might be of importance, and the duty of eliciting the truth could best be performed by a Judge trained to deal with conflicting testimonies. But in the cases now referred to the behaviour of the man a month before, or a week before, would be comparatively immaterial. The question would relate solely to the future, and would have to be decided almost exclusively by medical opinions. Now the Inspector of Jails was not necessarily a Medical Officer ; he was not so, he (Mr. Erskine) believed, in the Madras Presidency, and had not until recently been so in Bombay. In the greater number of cases, therefore, if a person was confined in a Civil Hospital, the Inspector would have to be satisfied with the opinion of the Civil Surgeon whose opinion might not be particularly valuable in cases of lunacy. Yet this would generally be all that the Judge would have to guide him. The Government, on the other hand, would always be in a position to obtain the best information and opinions on the subject. In Bombay the practice generally was to bring a lunatic down to the Presidency Asylum which was superintended by an Officer who had devoted much time to this particular kind of malady and had the best means of making a careful examination into such cases. If an Officer so situated came to the opinion that a person ought to be released from confinement, he would report his opinion to the Government, who would then decide on the best evidence and opinions available. He thought that that was the safer and more cautious way of proceeding in such cases, and he must therefore vote against the amendment proposed by the Honorable and learned Chairman.

SIR CHARLES JACKSON must say he did not see the force of the objections taken to the proposed Clause. The Clause, as it stood, gave power to the local Government only to order the discharge of a person out of custody on being restored to soundness of mind. Now the Honorable Member for the North-Western Provinces had said that that was the present law and that that law had never been abused. He believed it was not the intention of the Honorable and learned Chairman to say that it had been abused. But what his Honorable and learned friend meant was that it was a power round which every possible safeguard ought to be fenced. It was said by the Honorable Member for the North-Western Provinces that the Government would always take the best opinion. Now what did the Honorable and learned Chairman propose, but simply to point out the way in which the opinion might be taken. The Section provided that the Inspector of Jails or the Visitors of Lunatic Asylums should

visit and make a special report as to the state of mind of each lunatic confined under Sections 5 and 7 ; and it then went on to say that, in cases under Section 5 where clearly the matter was *sub judice*, the opinion of the Judge or Magistrate should also be taken. Then again, although it was quite clear that a matter under Section 7 was no longer *sub judice*, still for greater caution the opinion of the Judge or Magistrate should also be taken in addition to that of the Visitors of Lunatic Asylums. Therefore he thought that the object of the Honorable and learned Chairman's amendment was a perfectly legitimate one. He did not think that the decision of the Government should be final against the alleged lunatic and his friends when the Visitors had in fact given an opinion in favor of his sanity. He thought that the alleged lunatic was entitled to have his case regularly tried, and that there should be every enquiry, not only by the Inspector of Jails or the Visitors of Lunatic Asylums, but also by a Judge or Magistrate, in order to ascertain whether the lunatic was in a fit state to be enlarged. In this view, he thought the proposed Clause was a very useful and proper one, and he should vote in support of it.

After some further discussion, it was resolved, on the suggestion of Mr. Harington, to divide the Section into three Clauses, and to consider each Clause separately.

Clauses 1 and 2 were then severally put and carried as follows :—

"1. When any person is confined under the provisions of Section 5 or Section 7, it shall be lawful for the Inspector of Jails or the Visitors of Lunatic Asylums to visit such person in order to ascertain his state of mind, and such person shall be visited once at least in every twelve months by one of such Officers who shall make a special report as to the state of mind of such person.

2. If such person is confined under Section 5, and such Officer shall report that in his opinion such person is capable of making his defence, such person shall be taken before the Magistrate or Court of Session as the case may be, at such time as the Magistrate or Court of Session shall appoint, and such Magistrate or Court shall deal with such person under the provisions of Section 4, and may receive the certificate of the Inspecting Officer as evidence."

Clause 3 was then proposed as follows:—

"If such person shall be confined under the provisions of Section 7, and the Inspecting Officers as aforesaid shall certify that in his judgment such person may be discharged without danger of his doing injury to himself or any other person, the local Government may order the discharge of such person. If the Government do not order his discharge, the person confined shall be taken before any Sessions Judge who shall investigate the case, and if he be satisfied that such person may be discharged without any such danger as aforesaid, he shall order his discharge."

THE CHAIRMAN said that, in proposing this Clause, he wished to say only a few words in explanation. In such cases evidence must be adduced by both parties, and the evidence would doubtless be of a conflicting character. But if the Judge were competent to try the accused in the first instance, and to determine whether the accused might be hanged or confined in a Lunatic Asylum, surely the same Officer was competent to deal with the evidence as to the subsequent state of mind of the prisoner. He (Sir Barnes Peacock) was intending at one time to propose that the decision of the Session Judge should be final, but he had not done so. Suppose a woman had murdered her child in a fit of frenzy produced by a fever at the time of her confinement, and the Inspecting Officer was subsequently to report that the woman had been restored to her right senses and was a fit person to be discharged ; he (Sir Barnes Peacock) did not mean to say that the Government would refuse to act on that report improperly. But they might refuse to do so on what they might consider good grounds. Was the Government of their own opinion to refuse to discharge the woman ? What he wanted was that a person might, by a process in the nature of a *habeas corpus*, be brought up before a Session Judge, and that the Session Judge should try between the Government and the lunatic whether he was in a

fit state to be discharged. He (Sir Barnes Peacock) would not make the Clause applicable to the case of a person who had published a seditious libel, or been guilty of other misdemeanors of that nature, but would confine it to the most serious offences of the nature of felonies. If it was also considered desirable, he would provide for the report being made by the Inspector of Jails or some other competent person. But he certainly thought that, if the Government refused to discharge a lunatic, though the report of the Inspector of Jails or of the Visitors of Lunatic Asylums had declared that he was in a fit state to be set at liberty, there ought to be some legal tribunal before which the matter should be publicly determined, whether the prisoner was now a lunatic or not, and whether, if he was not, he should continue to be confined in the Jail or Lunatic Asylum in which he had been originally placed, not because he had committed a crime, but because he had been acquitted only on the ground of lunacy; and therefore he proposed the insertion of the foregoing Clause in addition to those already inserted.

SIR BARTLE FRERE said, he should have entirely agreed in all the remarks of the Honorable and learned Chairman, if insanity were an invariable condition in such cases. But in the very case put by the Honorable and learned gentleman, that of puerperal mania, this was not so. He would set aside entirely the case of a man who was considered dangerous by reason of his having published a seditious libel. He hoped we should never have in this country occasion to legislate for such cases; he would confine himself entirely to the cases of persons who could not be discharged without danger of doing personal injury to themselves or to others. He would take the case put by the Honorable and learned Chairman, and ask whether there was not something to be said on behalf of the poor lunatic herself, and whether it was not the duty of the Government to see that the woman should not be thrown loose on the world. The Court of Justice had but one duty to perform—to decide whether the person was or was not confined for the cause alleged. But Government had a higher duty to perform as guardian of the supposed lunatic, and had to see that people who could not take care of themselves and had no one to take care of them were not cast adrift on the world uncared for. The Clause, as it was proposed, put the opinion of the Session Judge who might be an utterly inexperienced Officer in these matters, higher than that of the Government who had much better means of judging and who had no possible bias in the matter. There was a great difference between judging whether a man, when he committed a specific act, was or was not mentally responsible for his acts, and deciding whether the same man was likely again to commit such acts, while in a state not to be really responsible for them. The one required no legal training to decide, while the other could only be decided by persons who had undergone a long course of professional medical education in that particular branch of the science. For these reasons, he should propose the following, by way of amendment, on what had been proposed by the Honorable and learned Chairman:—

"If such person shall be confined under the provisions of Section 7, and the Inspecting Officer as aforesaid shall certify that in his judgment such person may be discharged without danger to himself or any other person, such person shall be taken before the Sessions Court nearest to the place where he is confined, and if such Court shall be satisfied that he may be discharged with safety as aforesaid, he shall certify this opinion to the local Government, who shall thereupon order such person to be transferred to a public Lunatic Asylum if he has not been already sent thither, or shall within six months order him to be discharged, unless a Commission of three Medical Officers, of whom the Officer in charge of the Asylum shall be one, shall certify that he is of unsound mind and cannot be set at liberty without danger to himself or others."

MR. FORBES said that in his opinion one great objection to the proposal which had been made by the Honorable and learned Chairman, to let the Judge be the person to decide on the propriety or otherwise of letting loose

on society a person who had once killed another in a fit of insanity, was that in many cases all the evidence that could be adduced before the Judge would be such as would have no bearing upon the question to be decided. The evidence produced would be as to the individual's conduct, habits, and disposition during the time he had been under treatment in an Asylum, and all of these might have been exemplary and so lead to his release, while at the same time his release might be most dangerous. It must be remembered that in an Asylum a man was not subject to all the excitements, temptations, and incentives which beset him in the world, that every thing that could irritate was removed, and every thing that could soothe was done, and that therefore a patient's conduct in an Asylum which would be placed in evidence before a Judge, and on which evidence the Judge would have to decide, would be a very fallacious guide to what the patient's actions might be when exposed to all the excitements which had led to his committing the act for which he was originally placed under treatment. Government would take a broader view of the question than a Judge bound by the rules of evidence could take, and in his opinion it was in the hands of Government that the decision on the case should rest.

MR. HARINGTON proposed, by way of amendment on the Clause proposed by Sir Bartle Frere, that the Clause stop at the words "order him to be discharged."

After some further discussion, the Council divided as follows on Mr. Harington's amendment :—

Ayes 3.	*Noes* 4.
Mr. Seton-Karr.	Sir Charles Jackson.
Mr. Forbes.	Mr. Erskine.
Mr. Harington.	Sir Bartle Frere.
	The Chairman.

SIR BARTLE FRERE'S amendment was then put, and the Council divided as follows:—

Ayes 2.	*Noes* 5.
Mr. Seton-Karr.	Sir Charles Jackson.
Sir Bartle Frere.	Mr. Erskine.
	Mr. Forbes.
	Mr. Harington.
	The Chairman.

THE CHAIRMAN'S amendment was next put, and the Council divided as follows :—

Ayes 2.	*Noes* 5.
Sir Charles Jackson.	Mr. Seton-Karr.
The Chairman.	Mr. Erskine.
	Mr. Forbes.
	Mr. Harington.
	Sir Bartle Frere.

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

Ayes 3.	*Noes* 4.
Mr. Seton-Karr.	Sir Charles Jackson.
Mr. Forbes.	Mr. Erskine.
Mr. Harington.	Sir Bartle Frere.
	The Chairman.

The following Clause was ultimately proposed by Sir Bartle Frere, and carried :—

"If such person shall be confined under the provisions of Section 7, and the Inspector of Jails or the Visitors of Lunatic Asylums, as the case may be, shall certify that in his or their judgment such person may be discharged without danger of his doing injury to himself or to any other person, the local Government shall thereupon either order his discharge or order such person to be transferred to a public Lunatic Asylum if he has not been already sent to such an Asylum, and shall within six months appoint a Commission consisting of a Judicial Officer not below the grade of a Sessions Judge, and two Medical Officers whereof the Chief Medical Officer attached to the Lunatic Asylum shall be one. The said Commission shall make formal enquiry into the state of mind of such person, taking such evidence as shall be necessary; and if they consider that he can be set at liberty without danger to himself or to any other person, he shall be discharged."

Section 9, as proposed to be altered by the Chairman, provided as follows :—

"Whenever it shall appear to the local Government that any person, imprisoned by the sentence of any Magistrate or Court is of unsound mind, the local Government, by an order which shall set forth the grounds of belief that such prisoner is of unsound mind, may order the removal of such prisoner to a Lunatic Asylum, or other fit place of safe custody, there to be kept and treated as the local Government shall direct; and when it shall appear to the local Government that such person has become of sound mind, the local Government by an order directed to the person having charge of him, shall remand

such person to the custody from which he was removed, if then still liable to be kept in custody, or if not, shall order him to be discharged out of custody."

THE CHAIRMAN proposed the omission of the words "or other fit place of custody," and the insertion of the following words after the words "as the local Government shall direct" :—

"during the remainder of the term of imprisonment ordered by the sentence, or if it shall be certified by a Medical Officer that it is necessary for the safety of the prisoner or others that he should be detained under care and treatment, then until he shall be discharged according to law."

Agreed to.

THE CHAIRMAN then moved the addition of the following words to the above Section :—

"The provisions of Section 9 of Act XXXVI of 1858, shall apply to persons confined in a Lunatic Asylum, under this Section, after the expiration of the imprisonment ordered by the sentence. The period during which a person shall be confined in a Lunatic Asylum shall be reckoned as part of the period of imprisonment ordered by the sentence."

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

Section 10, as proposed to be altered by the Chairman, provided as follows :—

"Whenever any relative or friend of any person detained under the provisions of Section 7, is desirous that such person shall be delivered over to his care and custody, the local Government, upon the application of such relative or friend, and on his giving security to the satisfaction of such Government, that the person detained shall be properly taken care of, and shall be prevented from doing injury to himself or to any other person, may make an order that the person so detained may be delivered to such relative or friend. Whenever such person shall be so delivered over, it shall be upon condition that he shall be subject to the inspection of such Officer as the local Government shall think necessary to appoint, and at such times as such Government shall direct."

THE CHAIRMAN moved the addition of the following words to the above Section :—

"The provisions of Clause 3 Section 8 shall apply to persons detained under the provisions of this Section, and the certificate of the Inspecting Officer appointed under this Section shall have the same effect as a Certificate of an Inspector of Jails or the Visitors of Lunatic Asylums under the said Clause of that Section."

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

MR. HARINGTON moved the addition of the following words to Section 3 :—

"Until such investigation or trial is completed, the case shall be considered as pending before the Magistrate or Court of Session, and shall be included in any register of pending cases kept by such Magistrate or Court. The surety of such person shall be bound at any time to produce him to any Officer whom the Magistrate or Court may appoint to inspect him, and the certificate of such Officer shall have the same effect as the certificate of an Inspector of Jails or the Visitors of Lunatic Asylums granted under Clause 2 Section 8 of this Chapter."

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

MR. HARINGTON then went back to Section 8, Clause 1, and moved the omission of the words "the Inspector of Jails or the Visitors of Lunatic Asylums," and the substitution of the words "the Inspector of Jails if such person is confined in a Jail, or for the Visitors of Lunatic Asylums, or any two of them, if such person is confined in a Lunatic Asylum."

Agreed to.

Corresponding alterations were ordered to be made in the other Clauses, and the Chapter was then finally passed.

MR. ERSKINE went back to Section 307, which provided that—

"The examination of a witness taken and attested by the Magistrate, may be given in evidence if the witness be dead or the Court be satisfied that for any sufficient cause his attendance cannot be procured ;"

and moved the insertion of the words "in the presence of the accused person" after the word "Magistrate."

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

Section 309 provided as follows :—

"The declaration of a deceased person, whose death is the subject of enquiry, may be given in evidence if the deceased person at the time

of making such declaration believed himself to be in danger of approaching death, although he entertained at the time of making it hopes of recovery."

THE CHAIRMAN said, it was not necessary that the declaration of a deceased person should have been made in the presence of the accused to admit of its being given in evidence. He should therefore move the insertion of the words "whether it be made in the presence of the accused person or not" after the word "enquiry" and before the words "may be given in evidence."

Agreed to.

THE CHAIRMAN said, he did not see why the dying declaration of a person regarding the death of another man should not be taken in evidence. The rule in England was thus stated at page 28 of Roscoe's Criminal Evidence :—

"It is a general rule that dying declarations, though made with a full consciousness of approaching death, are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death is the subject of the dying declarations."

No reason was assigned why, the principle of taking dying declarations in evidence being once admitted, the subject of the declarations should be confined to the death of the person whose death was the subject of enquiry.

After some conversation, the words "whose death is the subject of enquiry" were omitted, on the Motion of Mr. Erskine; and the Section, as amended, then passed.

SIR CHARLES JACKSON proposed the introduction of the two following new Sections after Section 310 :—

"The Court, at the close of the evidence on behalf of the accused person if any evidence is adduced on his behalf, or otherwise at the close of the case for the prosecution, may put any question to the accused person which it may think proper. It shall be in the option of the accused person to answer such questions.

The accused person or his Counsel or Agent may address the Court at the close of the case for the prosecution, or at his option at the close of any evidence that may be adduced in his behalf."

After some conversation, the further consideration of the proposed Sections, as well as of the Bill, was postponed, and the Council resumed its sitting.

INCOME TAX.

MR. HARINGTON said, he had been asked by the Honorable Member of Government (Sir Bartle Frere) to move that the Bill "for limiting in certain cases, for the year commencing from the 31st day of July 1861, the amount of assessment to the duties chargeable under Act XXXII of 1860 (for imposing Duties on Profits arising from Property, Professions, Trades, and Offices) and Act XXXIX of 1860 (to amend Act XXXII of 1860)" be referred to a Select Committee consisting of Sir Bartle Frere, Mr. Harington, Mr. Forbes, Mr. Erskine, and Mr. Seton-Karr.

Agreed to.

MR. HARINGTON said, he had also been asked by the Honorable Member of Government to move that the Standing Orders be suspended to enable the Select Committee to make their report within one week. It was obviously desirable that the Bill should be passed rapidly through its remaining stages.

MR. FORBES seconded the Motion, which was put and carried.

MR. HARINGTON then moved that the Select Committee be instructed to present their report within one week.

Agreed to.

BRANCH RAILWAYS, &c.

MR. SETON-KARR moved that Mr. Erskine be added to the Select Committee on the Bill "to provide for the construction, by Companies and by private persons, of Branch Railways, Iron Tramroads, common roads, or canals, as feeders to Public Railways."

Agreed to.

CONSOLIDATION CUSTOMS BILL.

MR. ERSKINE moved that the Bill "for the consolidation and amendment of the laws relating to the collection of Customs Duties" be referred to a Select Committee consisting of Mr. Harington, Mr. Forbes, Mr. Seton-Karr, and the Mover.

Agreed to.

MUNICIPAL ASSESSMENT (BOMBAY).

MR. ERSKINE moved that Sir Robert Napier be requested to take the Bill "to amend Act XXV of 1858 (for appointing Municipal Commissioners and for raising a fund for Municipal purposes in the Town of Bombay)" to the Governor-General for his assent.

Agreed to.

CATTLE TRESPASS.

MR. ERSKINE moved that a communication received by him from the Government of Bombay, regarding the Bill "to amend Act III of 1857 (relating to trespasses by Cattle)", be laid upon the table and printed.

Agreed to.

The Council adjourned.

Saturday, July 27, 1861.

PRESENT:

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

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

MUNICIPAL ASSESSMENT (BOMBAY).

THE VICE-PRESIDENT read a Message from the Governor-General, communicating his assent to the Bill "to amend Act XXV of 1858 (for appointing Municipal Commissioners, and for raising a fund for Municipal purposes in the Town of Bombay)."

INCOME TAX.

SIR BARTLE FRERE presented the Report of the Select Committee on the Bill "for limiting in certain cases for the year commencing from the 31st day of July 1861, the amount of assessment to the Duties chargeable under Act XXXII of 1860 (for imposing Duties on profits arising from Property, Professions, Trades, and Offices), and Act XXXIX of 1860 (to amend Act XXXII of 1860);" and moved that the Council resolve itself into a Committee upon the Bill.

Agreed to.

Sections I to VI were passed as they stood.

Section VII was passed after amendments.

Sections VIII to X were passed as they stood.

Section XI provided as follows:—

"The Governor-General of India in Council may extend the provisions of this Act to all or any of the years subsequent to the year ending on the 31st July 1862, during which the said Act XXXII of 1860 shall remain in force."

THE CHAIRMAN said he understood, when this Bill was brought in, that it was only intended to apply to the assessments for the ensuing year. As the Bill now stood, however, it proposed to authorise the Governor-General in Council to extend its provisions to all or any of the subsequent years during which the Income Tax Act should remain in force. It appeared to him that it was quite altering the principle of the Income Tax Act, to extend the same assessment from one year to five years. A merchant, whose business was small this year and might be very much increased the next year, would not apply for a fresh assessment, and, if he were within a District to which this Act might be applied, would not be liable to a fresh assessment during any portion of the duration of the Income Tax Act. On the other hand, a merchant, whose business was large this year and might decrease next year, would be entitled to demand a fresh assessment. He should therefore vote against this