Monday,
22nd March, 1909

ABSTRACT OF THE PROCEEDINGS

OF THE

Council of the Governor General of India,

LAWS AND REGULATIONS

Vol. XLVII

April 1908 - March 1909

ABSTRACT OF PROCEEDING

OF

THE COUNCIL OF THE GOVERNOR GENERAL OF INDIA

ASSEMBLED FOR THE PURPOSE OF MAKING

LAWS AND REGULATIONS,

April 1908 - March 1909

VOLUME XLVII

Published by Authority of the Governor General.

CALCUTTA:
OFFICE OF THE SUPERINTENDENT OF GOVERNMENT PRINTING, INDIA.
1909

Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Indian Councils Acts, 1861 and 1892 (24 & 25 Vict., c. 67, and 55 & 56 Vict., c. 14).

The Council met at Government House, Calcutta, on Monday, the 22nd March, 1909.

PRESENT:

His Excellency the Earl of Minto, P.C., G.C.M.G., G.M.S.I., G.M.I.E., Viceroy and Governor General of India, *presiding*.

His Honour Sir Edward Norman Baker, K.C.S.I., Lieutenant-Governor of Bengal.

His Excellency General Viscount Kitchener of Khartoum, G.C.B., O.M., G.C.M.G., G.C.I.E., Commander-in-Chief in India.

The Hon'ble Sir H. Erle Richards, K.C.S.I., K.C.

The Hon'ble Major-General C. H. Scott, C.B., R.A.

The Hon'ble Sir Harvey Adamson, Kt., C.S.I.

The Hon'ble Mr. J. O. Miller, C.S.I.

The Hon'ble Mr. W. L. Harvey, C.I.E.

The Hon'ble Sir G. D. F. Wilson, K.C.B., K.C.M.G.

The Hon'ble Mr. Gopal Krishna Gokhale, C.I.E.

The Hon'ble Mr. A. A. Apcar, C.S.I.

The Hon'ble Nawab Bahadur Sir Khwaja Salimulla of Dacca, K.C.S.I.

The Hon'ble Maung Bah Too, C.I.E., K.S.M.

The Hon'ble Mr. W. W. Drew.

The Hon'ble Nawab Saiyid Muhammad Sahib Bahadur.

The Hon'ble Raja Sir Muhammad Ali Muhammad Khan, K.C.I.E., Khan Bahadur, of Mahmudabad.

The Hon'ble Mr. N. C. Macleod.

The Hon'ble Mr. J. Andrew.

The Hon'ble Mr. Maneckjee Byramjee Dadabhoy.

The Hon'ble Mr. F. A. Slacke, C.S.I.

The Hon'ble Mr. J. M. Holms, C.S.I.

QUESTIONS AND ANSWERS.

The Hon'ble SIR KHWAJA SALIMULLA asked:—

"Will the Government be pleased to have a statement prepared showing the number of permanent Muhammadan assistants (as distinct from copyists and

typists) out of the total number of assistants in each of the Secretariat offices of the Government of India, with their pay and date of appointment, detailing separately those appointed after passing the competitive clerical examination and those appointed by pure nomination."

The Hon'ble SIR HARVEY ADAMSON replied :—

"The statement asked for by the Hon'ble Member is laid upon the Table*."

The Hon'ble SIR KHWAJA SALIMULA asked :—

"Will Government also be pleased to say whether, under the rules framed in 1888 and modified from time to time for the recruitment of men for the Secretariat offices, some of the departments are entitled to recruit entirely by nomination and others are required to fill in one-half or two-thirds of the vacancies in that manner, and the remainder from among the passed candidates? If so, how many Muhammadans (as distinct from copyists and typists) have been appointed by pure nomination in comparison with the total number of appointments made in this manner during the same period?"

The Hon'ble SIR HARVEY ADAMSON replied :—

"Under the rules at present in force for the recruitment of clerks in the majority of the Government of India Secretariat offices two-thirds of the appointments in the lower division are filled by open competition and one-third by nomination. In the Army Department and Military Supply Department one-third are filled by open competition and two-thirds by nomination, and in the Foreign Department all vacancies are filled by nomination. Appointments in the upper division are filled by promotion of clerks from the lower division or by nomination. A statement† is laid upon the table showing the number of Muhammadans who have been appointed by pure nomination since 1888, as compared with the total number of appointments made in this way."

FINANCIAL STATEMENT FOR 1909-1910.

The Hon'ble SIR GUY FLEETWOOD WILSON introduced the Financial Statement for 1909-1910. He said :—"In accordance with the practice of recent years, I propose to lay on the table the Financial Statement for 1909-1910, and to explain in a few sentences its salient features.

"The year which is now coming to a close has been an unfortunate one. It began with famine in the United Provinces, and the adjoining areas of the

* *Vide* Appendix I.
† *Vide* Appendix II.

Punjab, Central India and the Central Provinces, as well as in scattered parts of Bombay, Bengal and Madras. Although the autumn rainfall was on the whole sufficient, distress lingered in places, and has recently become acute again in Behar. The harvests fell short of expectation, and the people in Northern India suffered severely during the latter half of 1908 from an exceptionally violent epidemic of malarial fever. Trade did as badly as agriculture. Exports fell off very seriously in sympathy with the shortage in the harvests. Prices remained high; and imports continued to pour into markets which were already glutted. The balance of trade set sharply against India, and exchange dropped to gold point, at which it was maintained only by Government selling sterling bills on London for five months continuously, and to the extent of £8 millions.

"The combined effects of famine, high prices and bad trade affected our finances very adversely. Our net Railway revenue fell short of the Budget by 551 lakhs. Land Revenue brought in 40 lakhs less, and direct famine relief cost 20 lakhs more, than had been provided. Compensation to low-paid Government servants for the dearness of food cost us nearly 90 lakhs, and high prices also enhanced the expenditure for food and forage in the Military estimates.

"Other unforeseen charges which had to be met were 19 lakhs for the Mohmand Expedition, 41 lakhs in extra payment to the War Office as the outcome of Lord Romer's Committee, and 11 lakhs for the improved scale of pay for the Indian Army which were introduced on the 1st January last. The whole of these additional Military burdens however were met by economies in the Military grants. We found unexpected assistance also in heavy receipts from Opium, which took the form chiefly of advance payments on the Malwa product in order to ensure priority of shipment against the restriction of exports which we are now enforcing.

"The not result of the year's finance is a deficit of no less than £3,720,500. It is the first deficit which our Indian budgets have shown since 1897-1898. It has imposed a great strain upon our cash balances, and it has turned the scale against the more ambitious programme of capital expenditure which we had hoped to be able to undertake next year.

"For the coming year, 1909-1910, the estimates have been framed with the closest regard to economy, and disclose a very small surplus of £230,900. This result has been reached without adding in any way to the taxation of the country.

"It assumes a return, though probably a slow return, to moderate prosperity, both in agriculture and trade; and it has necessitated the rejection of all expen-

diture which can reasonably be postponed or disallowed. I will not weary the Council with the detailed figures, which are given at length in the Statement.

" We propose to finance a capital programme of 15 crores for Railways and 1½ crores for Productive Irrigation works. It is our intention, subject to the usual reservations, to borrow 2½ crores in India; and the £6 millions of India bills which mature during the year in England will be renewed. The Secretary of State's drawings are taken at £16,200,000; but additional bills will be sold, so far as may be, should trade require them.

"It is to me a matter of genuine personal regret that, after the long series of prosperity budgets which my predecessors have unfolded, it should fall to my lot to record a year of marked financial depression, and to prepare a budget which involves a sharp curtailment of expenditure. I can only express a hope that the characteristic vitality of the Indian revenues will again assert itself, and prove our estimate to err if anything on the side of caution."

WHIPPING BILL.

The Hon'ble SIR HARVEY ADAMSON moved that the Report of the Select Committee on the Bill further to amend the Whipping Act, 1864, and the Code of Criminal Procedure, 1898, be taken into consideration.

The motion was put and agreed to.

The Hon'ble SIR HARVEY ADAMSON moved that the Bill to consolidate and amend the law relating to the punishment of whipping be passed.

The Hon'ble MR. DADABHOY said:—" My Lord, my excuse in interposing in this debate is the extreme importance of the subject. I feel I am in a position to speak with some authority on account of my fairly long experience at the Bar. I have had opportunities of closely watching the working of the Whipping Act during a long series of years, and my observations are mostly grounded upon personal knowledge.

" The Statement of Objects and Reasons does not enlighten this Council on the circumstances under which the amendment of the Whipping Act has been undertaken by Government. It only expresses the desire of Government to amend the law relating to whipping so as to restrict the group of offences for which that punishment might be inflicted and to limit the number of officials empowered to award it. The distinguished and respected Home Member in charge of the Bill, in asking leave to introduce it, only stated that in the progress

of ideas the infliction of whipping as a form of judicial punishment had come to be regarded by the general public with ever-increasing disfavour, and that the object of the Bill was to mitigate the severity of flogging as a punishment and to bring the Whipping Act into line with the public opinion of the present day. It is not alleged that the Act as it stands is not humane or that there is anything specially revolting in the punishment of whipping.

" My Lord, I am not enamoured of the Bill in its present form. If the only excuse for undertaking this legislation is that whipping is extremely degrading and not suited to civilized times, that it is revolting to personal feelings and is absolutely in disfavour with the general public, there ought to be a policy of greater resolution and firmness than the one which has now been adopted. If whipping as a form of punishment is in disfavour as revolting to humanity, why not altogether abolish it from the Statute-book of our country ? If, on the other hand, the working of the Act for nearly half-a-century has proved its justification and the desirability of its application to the conditions of Indian life, why do away with that salutary form of punishment merely because it does not meet with the approval of a section of public opinion which is swayed too much by abstract considerations of humanity in disregard of administrative necessity ?

" As the Hon'ble Home Member has pointed out that whipping as a judicial punishment has come to be regarded with ever-increasing disfavour, and that is apparently the only justification for undertaking this legislation, I crave Your Excellency's indulgence to review briefly the history of whipping legislation in this country with the object of proving that that form of punishment has always been regarded with disfavour by the general public ; what is more, it has not had on all occasions unqualified official support. The majority of those who had anything to do with the legislation of 1864 had not much to say in its favour, while that distinguished body, the Law Commissioners, expressed themselves strongly against the measure. I need not refer to the dictums from time to time pronounced by Indian Judges of the Calcutta High Court, that according to native Indian sentiment whipping is a worse form of degrading and hardening punishment than imprisonment, and that the sentence of whipping once it is passed is calculated to do irreparable mischief ; once administered it cannot be undone ; the conviction may be reversed, but the injury cannot be repaired.

" It is well known that corporal punishment was one of the authorized modes of punishment in the Criminal Law of this country in the past. From its early

history this form of punishment was in vogue throughout the whole of India; the Bombay and Madras Presidencies had it even during the East India Company's time and almost till the end of 1861. Lord William Bentinck, that just and sympathetic Viceroy, took upon himself the noble task of abolishing that form of punishment in Bengal in the year 1834 by Regulation II of that year; and that memorable Regulation did away with corporal punishment and urged in its stead the introduction of a better and more effective system of prison discipline as a deterrent against crimes. The Committee of Prison Discipline that was appointed two years later to make a full and careful investigation into the matter, after over two years' labour, in finally submitting its report, suggested many essential reforms and improvements. Some of them were ultimately carried out, but the object contemplated by Lord William Bentinck was not achieved. This was clear from the preamble of Act III of 1844, which re-introduced corporal punishment in the Bengal Presidency, and subsequently extended it from time to time into all the dominions acquired by Government. This re-introduction of corporal punishment was justified, as appears from the preamble of that Act, because in the matter of prison discipline improvements had not been effected. It was deemed expedient to provide flogging for certain offences. This state of things continued till May 1861 when the Indian Penal Code came into operation. It is noteworthy that though corporal punishment was abolished in Bengal in 1834, the Penal Code which embodied so completely the Criminal Law of the country did not provide whipping as a form of punishment. The draft Code was laid before the Governor General in Council as far back as 1837, but was not passed into law until nearly 25 years later. The distinguished Law Commission which was entrusted with the task of preparing the Code expressed its opinion on the subject of flogging in the Chapter on punishments in the following terms:—'We have not thought it desirable to place flogging in the list of punishments. Being satisfied that the punishment of flogging can be proper only in a few cases, and not being satisfied that it is necessary in any, we are unwilling to advise the Government to retrace its steps and to re-establish throughout the British territories a practice which by a policy unquestionably humane and by no means proved to have been injudicious, has recently been abolished through a large part of those territories.' It was in this spirit and in language so emphatic that corporal punishment was entirely eliminated from the Indian Penal Code. For upwards of two decades the Code remained incomplete and unpassed. It was not until 1855 that it was referred to a Select Committee for a thorough overhaul and careful revision. The Select Committee, however, adopted a view contrary to the Law Commission and recommended, besides other modifications, that whipping should be included

in the list of punishments authorized by the Code. Subsequently, when the Code came up for consideration before the Supreme Council, it was decided to invite the opinions of local officers and public bodies on the subject, particularly as the draft Code did not contain or include the punishment of flogging. It was deemed inexpedient to delay any further the passing of the Code, but simultaneously a Select Committee was appointed to fully consider the question, and to report on the desirability of providing flogging as a form of punishment in a separate Bill, supplementary to the Penal Code. As the result of their recommendation a Bill was drafted, introduced and discussed in Council, and passed on the 7th September 1861, but it failed to obtain the assent of Lord Canning, the Viceroy and Governor General of India. Lord Canning did not withhold his assent because he doubted the soundness, or disapproved, of the principle of flogging, but because the Act teemed with many and serious defects in important details. The Act was not only vague, but failed to furnish a guide to Courts of Law; particularly, as there was no guarantee for the exercise of safe and judicious medical supervision.

"Lord Canning on the 5th February 1862 took the opportunity of giving his reasons for withholding his assent to the Bill of 1861. A new Bill was then introduced by Sir Cecil Beadon, the then Lieutenant-Governor of Bengal, on lines more acceptable to Lord Canning, on the 26th February 1862, but that Council suspended its sittings for legislative purposes sometime in April of that year, before the preliminary stages could be got through. In November of the same year, when the Council re-met, the Government of India thought it expedient to call for reports from Local Governments on the effect of the absence of corporal punishment from the Penal Code. I do not intend going into the details of the reports that were received from the various Local Governments. Suffice it to say, all Local Governments expressed a very strong opinion on the subject, and advised on grounds of necessity the retention of that form of punishment. It was pointed out that during the year 1862 nearly 20,000 persons had been committed to jail for various terms of imprisonment for offences for which they might have been flogged and discharged. The Select Committee in charge of the Bill of 1862, in view of the strong opinions expressed by the various Local Administrations about the necessity of the retention of whipping as a form of punishment, the attitude taken by Lord Canning, the then condition of the country, and the defective system of Jail administration, came to the conclusion that a Bill embodying suitable provisions was necessary, nay, indispensable. It accordingly prepared a Bill providing corporal punishment in a form which subsequently became the Act of 1864, the general whipping law of India.

" My Lord, from what I have stated above it is perfectly clear that there has been neither uniformity nor consistency in the policy of this Government with reference to whipping legislation. At one period corporal punishment was condemned as ineffective for the prevention of crime, degrading to culprits, branding them as it did with marks of infamy and doing them irreparable injury on account of the permanent stain inseparably connected with that form of punishment, and as it had the tendency to prevent the return of the culprit to an honest course of life ; it was condemned as not being in consonance with the principles of enlightened legislation, incompatible with the rules of civilization, and shocking and brutalizing in scenic effect, as also for the firm and well-established opinion that, instead of reclaiming offenders, it not infrequently drowns them in the abyss of moral turpitude and degradation. I have shewn above that corporal punishment remained actually abolished from 1834 to 1837, and that the opinion of the Law Commissioners was given after a long experience of that form of punishment and nearly after four years' experience of the effect of its abolition. It was partially re-introduced in the year 1844; subsequently, during the Mutiny, when prisons were broken open and destroyed, the limitations which had been placed on that form of punishment had to be temporarily suspended ; later on, it was incorporated in the draft of the Indian Penal Code only to be excised from it during consideration. Mr. Harrington's Flogging Bill did not linger long but died a speedy death, and Sir Cecil Beadon's Bill, which subsequently became the law of 1864, made a great change and incorporated corporal punishment permanently and finally in the Criminal Law of this country. It was very properly remarked by Sir Charles Trevelyan that 'there has been a see-saw legislation on the subject adapted to the circumstances of the times '.

" My Lord, I have not been able to gauge the reasons or to ascertain the policy that have led the Government to embark now upon this legislation in its present form. I have read the opinions expressed by several High Courts and District Officers, many of whom speak with their intimate acquaintance with the subject. Their observations, wherever founded on experience, are entitled to serious consideration. I find that the general body of official opinion is opposed to the amendments contemplated in the Bill. My Lord, though my personal feelings are against any system of corporal punishment, I must state that the present law has a deterrent effect on *old* and ***habitual*** offenders. I need not be reminded that a hardened criminal makes light of the prospect of flogging ; that is ordinarily the case to be sure. But I have known of many cases where the criminals have begged for a commutation of sentence and for a further term

of imprisonment in lieu of flogging. It is true that on the general question of penal whipping, there have been and there always will be divergent opinions there are two sides to the question, one the practical and the other sentimental. Some people frankly appreciate its deterrent effect, the good results it yields, the suitability of the punishment in certain cases in lieu of imprisonment, and the economy from a State point of view, and admit that slight physical pain is preferable to months and years of undesirable incarceration in jail and association with hardened criminals. There are others again who see nothing but the degradation pure and simple, the deterioration in the moral tone, the indelible infamy, the gross moral turpitude and the physical suffering. Unfortunately the right point of view is not always taken. We fail to consider the nature of the man, and what is best calculated to bring him round. On proof of guilt we ought to consider what will be best for him, what will prevent him from repeating the act and persisting in his former evil course, and what punishment will best serve to protect society from similar offences. I hope I shall be pardoned if I venture to say that the present solicitude of the Government of India for the criminal classes is entirely misplaced. It is giving way too much to sentimental objections, and rather unduly restricting the operation of the Whipping Act. It is true that in England at the present time the force of public opinion has practically abolished the punishment of whipping, but it would be hardly correct to compare England with India where there is not much of healthy public opinion and social refinement, both being confined to educated classes and the professions. Philanthropists, proceeding only upon *à priori* reasoning, in season and out of season, decry the degrading and demoralizing effect of whipping on society, especially on the criminals undergoing flogging. But experience shows it has a wholesome effect upon some criminals, and a decidedly deterrent effect upon juvenile offenders.

"My Lord, I gravely doubt if whipping is altogether wrong on principle. In determining the question of the comparative effects of whipping and imprisonment the fact must not be lost sight of that the jail of the present day is not an inconvenient place to live in for a class of habitual offenders. These usually belong to the lowest classes. Jail life to them is comparatively more comfortable, the food provided is decidedly better than what they are accustomed to, the most scrupulous care is bestowed upon their health, and sanitary and labour regulations are based on an approved and enlightened principle. Much as I detest the system of flogging I am afraid further restrictions upon whipping will remove in certain cases almost the only form of punishment which is regarded with some degree of fear by habitual and professional convicts. I

would not be surprised if, as the result, crime against property would increase. I am not aware, neither has the Hon'ble Home Member informed us, if there has been any general abuse of the powers under the Whipping Act during the last few years. If my memory does not fail me, I believe the punishment of whipping is not even at present freely inflicted. I have also no hesitation in stating that as far as I am aware no recognized or well-informed public opinion is opposed to the infliction of such punishment on old and confirmed offenders. I have never heard it said that subordinate Magistrates as a class freely award this punishment; but rather it is the experience of many that they shrink slightly, if not too much, from resorting to this method of punishment. I have often heard Divisional and District Magistrates complain that the jails are crowded with undesirable people who could have been discharged with a few stripes. I think any one with any knowledge of our jail system is bound to admit that, except for the educated and the respected classes, prison life is not so trying or distasteful as it might on abstract considerations be supposed to be, and that to the average convict of the lower class imprisonment is not a punishment, but practically a small inconvenience; if life in jail does not offer him greater comforts and smaller hours of labour than life outside it, at any rate the jail affords him a shelter and saves him from starvation. Imprisonment alone does not sufficiently deter the criminal from committing serious offences against person and property, and I must confess I am not wholly in favour of the Bill as amended by the Select Committee. In my opinion the country has not yet attained to such a state of advancement and refinement as to entirely or in a great measure render unnecessary the retention of whipping as a judicial punishment. I cannot blink the fact that the Bill when it becomes law will remove in some cases a very effective deterrent, practically the only deterrent in the present low state of the depressed classes, both materially and morally. My Lord, I am fully prepared to admit that the amendments now embodied in the Bill are justifiable on grounds of humanity in so far as they narrow the groups of offences for which the punishment of whipping should be awarded and place the power of whipping in the hands of a more limited number of officials. Admitting as I do that, I cannot shake off the conviction that the proposed changes will materially weaken the arm of the law without appreciably ameliorating the system of punishments. It is an open secret that the present amendment is the outcome of representations by men, doubtless estimable and philanthropic, but a bit too much influenced in their opinions by general ethical principles, and apt to overlook the condition of the society to which criminals belong.

"My Lord, I beg I should not be misunderstood. I welcome just, reasonable and salutary restrictions on the Whipping Act; I am not averse to a reasonable and judicious curtailment of powers. In my observations about the desirability of whipping as a judicial punishment I have only the criminal classes in view. They do not apply to the case of the unhappy men who have perchance got into trouble in a Criminal Court. Their case is entirely different, deserving of the utmost care and consideration. All I deprecate is the abolition of the punishment for some of the heinous offences. It has not been shewn that the Whipping Act has been misused to any appreciable extent, and proper data have not been placed before this Council for a correct judgment as to the propriety of the deletion of some of the salutary provisions. I warmly appreciate the motives of Government in undertaking legislation on the subject, impelled as it obviously is by a just and humanitarian desire to mitigate the severity of the existing law by curtailing the scope of its operation and placing the administration of it in the hands of senior and capable officials who may be expected to be possessed of larger experience and greater knowledge of the condition of the people. I am not opposed to the Bill in so far as it tends to mitigate the severity of the existing Statute. I shall welcome the day when whipping is wholly abolished, not only in England, but also in this country. I am fully aware that if any branch of the Criminal Law deserves the best and serious consideration of Government, it is the Whipping Act, as the people here are by nature sensitive and sentimental, and by tradition and habit disposed to look upon with horror and abhorrence on this form of punishment. But I cannot help stating that the compromise which the revised Bill makes between the existing law of whipping and the total abolition of that form of punishment is not one which will commend itself to many in this country. The Bill utterly emasculates the Whipping Law so as to render it useless for deterrent purposes, so much so that it is a question whether it might not be simpler to abolish whipping altogether except for juveniles. It is open to the charge of incompleteness; it is also assailable on the ground of inconsistency. It can be urged with a great deal of force and reason that the policy of abolishing whipping for certain offences while retaining it for kindred offences is illogical and objectionable. It is true that in certain directions the Whipping Act stands in urgent need of liberal revision, but the Bill under review, though an improvement on the first, does not come up to general public expectation, at the same time that it proposes to abolish whipping in many cases where it has a very wholesome and deterrent effect. I fail to see why a starving man who steals a loaf from a baker's shop should get stripes, while a clerk who systematically defrauds his master and tampers with his

books should be exempted from that form of punishment, or why a stray pickpocket who denudes the passer-by of his gold chain should be more severely treated than the unscrupulous, but withal prosperous, goldsmith who receives it for a song and melts it down in the security and privacy of his family furnace, or why, again, a notorious city *budmash*, who battens on the inoffensive populace by acts of extortion, should be less severely dealt with than the perpetrator of a petty theft. On principle, my Lord, it is difficult to see any moral difference in the acts of a man who commits a petty theft and the receiver who has probably instigated him to commit the offence. I am unable to follow the reasoning that the thief who is a servant or a clerk should be, in the eye of the law, regarded differently to and more considerately than the thief who is not a clerk or a servant. I should have thought that the offence of the receiver and the servant was much more heinous and there was a greater degree of moral turpitude in it. An instigator of theft or dacoity trading in ill-gotten property and a trusted clerk or servant abusing the confidence placed in him and defrauding his master in that capacity is a far more despicable offender than the thief employed or an ordinary cheat. On principle the extortioner and the receiver of stolen property are worse pests to society than an ordinary thief; and it may be fairly said that the policy of abolishing the sentence of whipping for those offences is one of questionable expediency. But, curiously, and any one conversant with the administration of Criminal Law in this country will bear me out that whipping is very rarely awarded by Magistrates for the offences of extortion and receiving stolen property. The proposed amendment of the law thus follows the line adopted by the Magistracy generally in practice so far as these offences are concerned. In my professional experience, not unlike others, I have found that a large percentage of cases under section 411 of the Indian Penal Code are really acts of theft and burglary, and only started because it is often difficult to obtain conclusive evidence of theft even when property has been fully traced. I must also confess that it is very difficult to understand the principle on which dacoity may be punished with corporal punishment while robbery is exempted from the operation of the Act. It is true that robbery is, generally speaking, a less aggravated form of offence and less heinous than dacoity; but it is difficult to understand why five men who commit a dacoity should be whipped while four men who commit a robbery, perhaps with the same degree of intrepidity, organization, and preparation should escape that form of punishment. I am surprised to see whipping abolished for assaults and use of criminal force upon women with intent to outrage their modesty. That is a very necessary direction in which the punishment can be inflicted with wholesome

effect, and clause 5 of section 4 of the Act of 1864 has the sanction and approval of the Indian public. The absence of that clause in the Bill can only be viewed with disappointment. I am glad to find that the Bill deals with acts of rape and dacoity which are in the nature of very serious offences. But, my Lord, it is only in a few of such cases that a sentence of less than five years' imprisonment is passed on conviction. If the sentence of imprisonment exceeds five years, under the provision of section 395 of the Code of Criminal Procedure, it is not permissible to pass any sentence of whipping. It is clear that despite the most anxious desire of Government to deal severely with offenders in cases of rape, in practice section 4 of the Bill will be rendered impotent, as its provision can scarcely be resorted to in view of section 393 of the Code of Criminal Procedure. My Lord, it would therefore be necessary, in order to give full effect to section 4 of the Bill, to repeal so much of clause (*b*) of section 393 of the Code of Criminal Procedure as prohibits the infliction of whipping in addition to a sentence of imprisonment for a term exceeding five years in cases of rape and dacoity. It may be argued that whipping in lieu of or in addition to any other punishment as provided by sections 3 and 4 of the Act of 1864 is ineffective as a deterrent. However much old and confirmed offenders may detest and dread the punishment of whipping, its salutary effect as a deterrent, when it is combined with a sentence of imprisonment, will wear off by the period the sentence runs out, and flogging in addition to imprisonment is scarcely useful and may safely be dispensed with. But whipping in addition to other punishments in case of habitual offenders will, ordinarily, prove a very valuable means of increasing the terror of the punishment. It is doubtful, however, if the system of concurrent punishments has any appreciable effect on the minds of incorrigible offenders. But be that as it may, I certainly approve of the retention of that form of punishment in cases of rape and unnatural offences. I would go further and advise the infliction of whipping, as pointed out above, for offences under section 354 of the Indian Penal Code. Women always require extra protection, and when the utter helplessness of Indian women is considered the need for extra severity becomes acuter. The repeal of section 3 of the existing Act appears to be a reform in the right direction; but the action is slightly inconsistent with the principle of section 4 of the Bill. Whipping will still remain an additional punishment for other offences under that section; and if it can be inflicted on accused under section 3 for certain offences in lieu of imprisonment, and in lieu of or in addition to any other punishment under section 4, it seems illogical, if not questionable, to exclude it from the punishments for the same offence committed again and again. But if we accept the principle that the

number of offences for which whipping can be awarded in lieu of or in addition to imprisonment must be reduced, I am decidedly of opinion that the curtailment of the power in case of second conviction will be neither injudicious nor unsafe. I welcome the exclusion of political offences from the purview of the Bill. I do think the educated but misguided people who alone are likely to commit such offences are not the right sort of persons to receive this punishment. The limitation of the number of stripes to fifteen in the case of juvenile offenders is wise and humane alike.

"My Lord, I fail to realize what urgency there was to disqualify Second Class Magistrates for the exercise of the powers of whipping under the present law. It is only when specially empowered by the Local Government that a Magistrate of the Second Class can pass sentence of whipping. Has it come to pass that the Local Governments have failed to exercise sound discretion in vesting Second Class Magistrates with powers under the Act, or has any doubt been felt about the competency of that class of Magistrates as a body to exercise powers under the Act judiciously? It does not stand to reason that it would not be possible for Local Governments to empower carefully-selected Magistrates of the Second Class to pass sentence of whipping. If discretion is left to Local Governments to empower officers fit for the proper exercise of the special powers, it is more likely that a selection would be made on a basis of merit and qualification than in cases where powers are earned by Magistrates by superiority of class only, albeit many among them are wanting not only in tact and judicial ability but often in experience and knowledge of local conditions. I have heard it said that in the present condition of things it would be highly undesirable to curtail the powers of Magistrates. I attach no importance to such apprehensions, and I entertain no misgivings as to the capacity and the strength of the Government to cope with crime, appear as it might in ever so serious a form. I do not plead so much for the Magistrates concerned. I deplore this change in the interests of the victim himself, and I submit this amendment is wholly unnecessary and open to grave objection. I can speak with some degree of authority so far as the Province I have the honour to represent in this Council is concerned, and I unhesitatingly say that the power of delegation has been used with great success and discrimination in the past, and the Second Class Magistrates specially empowered generally use their powers with discretion. I can also state that they as a body seem rather to err on the side of leniency and are more reluctant to inflict whipping than to resort to it. There is no suggestion of an abuse of powers by Second Class Magistrates. Disqualification of the

whole class will obviously be an unmerited slur upon them and a source of considerable trouble and harassment to the poor offender. It is therefore as much in the interests of the unfortunate victim of whipping as out of regard for the fair name of the Subordinate Service that I deplore the proposed modification of the law. In practice almost all cases in which whipping would be preferable to imprisonment in the first instance generally come up for trial before Second Class Magistrates, and imagine the inconvenience, the delay, and the dislocation of administrative work that will ensue upon references under section 349 of the Criminal Procedure Code to First Class Magistrates for sentence. In times of famine and periodical rioting, which are not infrequent in this country, whipping has been considered a most appropriate punishment for petty thefts and assaults, especially in the case of juvenile offenders ; and it will certainly cause a great deal of inconvenience if that class of offenders have to be sent up for the sole purpose of receiving punishment in consequence of the limitation of the power to First Class Magistrates only. In effecting this alteration in the law the fact has been overlooked that most of the offences contemplated in section 3 of the Bill under review will be triable only by Second Class Magistrates. There will be considerable difficulty for officers, and the escort duties of the police will become far more onerous in view of the unavoidable increase in the number of references under section 349 of the Code of Criminal Procedure. The work will probably increase tenfold ; it will divert the attention of First Class Magistrates from far weightier judicial and administrative work. These will be called upon to dispose of petty cases which should always be left to the Subordinate Magistracy. It will be so much waste of valuable time and money. And the effect of the change upon the accused will be that the chances of whipping will be enormously increased, and untold hardships, inconvenience, and undesirable incarceration will be entailed upon them. They will be practically in police custody for a week or ten days, and will have to submit to the attendant evil consequences. Local Governments will find it not only imperative to increase the strength of the police, but will require a much larger number of Magistrates with First Class powers. In the case of juvenile offenders the inconvenience and hardship and misery will be still greater and out of all proportion to the petty nature of the offences. Imagine the misery of a boy under 12 years taken by the police several days' journey away from his native village for no other purpose than to receive half-a-dozen stripes for stealing an anna worth of sweets or fruit in the local bazar. What a misery to his relations also. My Lord, I deprecate the change because the precious time of First Class Magistrates will be wasted in dealing with petty cases, because juvenile offenders will be put to inconceivable harassment and hardship and will not be set at liberty with the

least possible delay, because it will entail not only extra work on Magistrates of the First Class but expense and loss of energy on the State and inconvenience on the convict himself, further, because the amendment will have the effect of unnecessarily transfering to the Sub-Divisional Magistrate petty cases under the Forest and other special laws in which whipping would appear to be the most appropriate form of punishment, and, lastly, because it has the effect of condemning the whole body of the Subordinate Magistracy, many among whom I have found from my personal observation are men of sufficient learning and experience, and fit to be trusted with powers under the Act, and who may be depended upon to use them with circumspection and judicial discretion. The difficulties of the new arrangement appear to me so great, so varied, and so troublesome that Government will sooner or later have to choose between the alternatives of either altogether abolishing the punishment for petty offences or of reverting to the present system.

"My Lord, the striking peculiarity of the present Bill is that, despite the desire of Government to mitigate the severity of the existing law, no provision is made for the revision by the Appellate Court of erroneous sentences of whipping. In almost all criminal cases, except in summary trials and in cases where the punishment of imprisonment awarded by First Class Magistrates is one month or the fine inflicted is Rs. 50, the accused is allowed the right of appeal ; but it seems to be an anomaly of the law that he is not permitted to appeal against a sentence of whipping. The sentence is carried out immediately on conviction. This is one of the main reasons why a sentence of whipping is so much in disfavour with the general public. I feel convinced that if the right of appeal be granted, this form of punishment would cease to be so odious and unpopular. It would at the same time save the Magistrate from adverse criticism, and give general satisfaction. The law, as it stands at present, is obviously incongruous. It is difficult to understand why section 391 of the Code of Criminal Procedure should provide for stay of execution for a fortnight or till the result of appeal in cases where the accused is sentenced to whipping in addition to imprisonment, and refuse a similar concession in cases where the sentence is one of whipping only. There is provision in the law, it is true, for revision by the High Court of all sentences, but the concession is unreal so far as whipping is concerned. The whipping, under section 390 of the Code of Criminal Procedure, is inflicted almost forthwith ; at any rate, long before the High Court can even be moved. And once the punishment is inflicted it is a matter of comparative indifference to the accused if the sentence is ultimately reversed by the High Court. It

must be a matter of common knowledge that in not a few cases the sentence of whipping is eventually either wholly set aside or altered or modified, but the accused having already undergone the punishment, after the fortnight contemplated in section 391 of the Code of Criminal Procedure, the result is that many people, though found innocent by the Superior Court, suffer for the indiscretion of the Lower Courts. The setting aside of the order in many cases thus proves infructuous and illusory. The ultimate acquittal cannot help the poor victim ; it cannot undo the wrong done to him ; it cannot make any reparation for the suffering and the degradation undergone, for the stigma left permanently by that punishment. It also happens, not unoften, that people dissatisfied with and aggrieved by perverse convictions, who would otherwise have gone up to higher tribunals for redress, have perforce to submit to their hard lot. It seems to me to be a peculiarly unfortunate and inexplicable arrangement that while time is granted for payment of fines, there is unceremonious haste in executing a sentence of whipping. My Lord, I have heard it stated in connection with this that a demand for an appeal is based on a misconception of the object of a sentence of whipping only. Whipping is supposed much lighter than a short term of imprisonment, and since it is given to save the accused from harassment and degradation through association with hardened criminals in jails and since the risk of error of judgment is so small, it is only proper that finality should attach to the orders of the Magistracy on this head. It is therefore that under sections 413 and 414 of Act V of 1898 no appeal lies against a sentence of whipping only. I am afraid I cannot accept the proposition that the risk is very small where a First Class Magistrate inflicts a sentence of whipping. It would certainly increase the salutary effect of this form of corporal punishment, both as a wholesome deterrent and as the means of saving the accused from contamination in jail through association with criminals, if the accused realizes the justice of the sentence by an appeal to a Superior Court. It will not matter much if execution has to be suspended till the result of the appeal. If Courts are apt to err with regard to bigger offences and severer sentences, there is no reason to imagine they would not err in their decisions in cases of comparatively smaller offences. These decisions are of equal importance to the persons immediately concerned. I am therefore of opinion that the strong public feeling in favour of the stay of execution of a sentence of whipping only to allow time for the testing of the correctness of the decision is not without ample justification. Some sort of oppurtunity ought certainly to be given to the victim of establishing his innocence and averting, if possible, the physical suffering and the mental agony which that punishment necessarily inflicts.

"My Lord, I approve of the decision arrived at by the Select Committee, in view of the extensive changes contemplated, to repeal wholly the Act of 1864, and to present a complete and consolidating Bill. Since 1864 at successive periods many important changes have been made in the Act, and it is expedient now to re-enact the law on the subject of whipping as a judicial punishment instead of further amending the old Act. It is certainly more advantageous to give the country a consolidated Whipping Act than to put Judges and Magistrates to the necessity of constantly looking into a Statute replete with amendments and excisions. I would also suggest in connection with the re-enactment of the law the expediency of carefully considering the rules regulating the mode of inflicting whipping which are now in force. My Lord, I had intended to move amendments on the lines suggested above, but desist, knowing as I do that the general feeling among the Hon'ble Members is opposed to them. I am reluctant to further take up the time of the Council by proposing amendments that are sure to fall through.

"My Lord, before I close I must allude to one other point intimately connected with the present subject. I feel I should not be doing my duty if I failed to draw your attention to it. Whipping is also inflicted inside the jails under the Prisons Act. Certain acts of convicts are declared to be prison offences, and the law empowers the Superintendent to inflict, among other forms of punishment, whipping, provided the number of stripes do not exceed thirty. It is a well-known fact that this punishment is frequently awarded as a disciplinary measure for misbehaviour, disorderly conduct, neglect, disobedience, and dereliction of prison duties. In my humble opinion no amendment of the Whipping Act can be complete or can produce any appreciable good, or can attain the end which the Government has in view of conciliating public opinion, without a corresponding modification of the Prisons Act. Such a modification is urgent on grounds of uniformity and consistency in legislation as much as on those of humanity. Any abuse of the powers under the Whipping Law can be checked and corrected by a strong expression of public opinion, inasmuch as the sentences are executed and the flogging is administered in the broad light of the day ; but where this punishment is given by jail authorities inside the jail precincts the Jail Superintendent is the master of the situation and the sole judge of the propriety of the order ; his acts are not open to public observation and criticism. There is, therefore, a considerable risk of this power vested in him by the Prisons Act being exercised in an injudicious, improper, and indiscriminate manner. My Lord, it seems to me an anomalous departure in legislation to deprive of the power Second Class Magistrates of experience and judicial training, who can only act after recording

evidence and giving reasons for a conviction, and to leave the Jail Superintendent in possession of plenary powers to summarily pass orders of whipping on the testimony of his warders and ill-educated assistants. Though the amendment of the whipping legislation has been undertaken in deference to public opinion, and not so much for the intrinsic merits of the subject and from considerations of administrative necessity, it may well be expected that the work of humanity in which the Government is engaged will be done thoroughly and carried to its logical and legitimate end. It is true there has not been a loud demand for an amendment of the Prisons Act. From the necessities of the case there could not be. So few people know of all that passes inside the jail. But if the philanthropic work which the Government has taken in hand cannot be done satisfactorily without a corresponding amendment of the Prisons Act, that amendment becomes exigent, notwithstanding the comparative indifference of the public to this important matter. A considerate concession by Government will be appreciated by the people, will take away much of the odium of whipping, and will ensure popular co-operation in the administration of this somewhat unpopular law. I fail to see how Government could possibly avoid a considerable modification of the powers under the Prisons Act after it has once decided to recast the Whipping Act on more humane lines. I confidently trust that in the same spirit in which this legislation has been undertaken the Government of India will now move without delay for the mitigation of the severity of flogging under the Prisons Act, and thereby justify its traditional claim to justice, humanity, consistency, and benevolence and earn the gratitude of the nation."

The Hon'ble SIR KHWAJA SALIMULLA said:—"My Lord, I shall vote for the passing of this Bill, but I cannot allow it to be passed without recording my humble protest at the way this piece of legislation has been, virtually, forced upon the Government at the instance of irresponsible members of the Ultra Radical Party in the House of Commons, who hold the brief for, what I may term, the Home Rule Party in India; for we all know that when the Presidency Magistrate of Calcutta used his powers under the Whipping Act against certain youthful political offenders, agitation in this country was set on foot and a furore was created in the House of Commons, and in a moment of weakness the Secretary of State promised that this power would be removed.

"We find no valid or tangible reason has been advanced by my Hon'ble friend who has backed this Bill; we cannot, however, deny that consolidation of certain Acts such as the one before us, is desirable, but there are many other Acts of the legislature which need this process more than the various Acts this

Bill, when passed, will consolidate. Not only do we find no reasons given, but we see from the papers before us that no one in India appears to have demanded the amendments now to be made, while some of the Governments have gone so far as to openly protest against the change. We find the principal amendment of the Bill to be strongly opposed by all the most competent Magistrates and authorities in the country, some of whom have boldly stated that the Act to be passed is the outcome of representation from England by people arguing on general principle and with no experience of the East; and I agree with the Magistrate of Jhansi that 'the proposal to abolish whipping in clauses 2 and 3 appears to be merely pandering to a spirit of mawkish sentimentality that has grown up in a certain class in England owing to their having lived so as to be absolutely unacquainted with the classes that commit the crimes, whipping for which it is proposed to abolish; a spirit which a certain more or less educated class in India has chosen to imitate.'

"That the Government of India, fully aware as they are of the great public inconvenience these modifications of the Whipping Act will entail, such for instance as the taking away of the authority of Government to confer the power of whipping on competent and able second class Magistrates, should nevertheless at the bidding of the Home authorities pass a piece of legislation quite unsuited to the present time, when the hands of the Magistracy ought rather to be strengthened than crippled, is a matter against which I desire to record my protest and to express my hope that the Government will not make it a precedent. I am respectfully of opinion that legislation in this country should take its initiative from the Government of India and not at the instance of the Home authorities. I had intended to criticize this Bill in detail, but my Hon'ble friend Mr. Dadabhoy has left nothing for me to add to the observations I have just made."

The Hon'ble SIR HARVEY ADAMSON said:—"My Lord, I have listened with close attention to my Hon'ble friend Mr. Dadabhoy, but I confess that I do not quite understand his attitude towards the Bill, and I am not sure whether he thinks that the Bill goes too far or that it does not go far enough in relaxing the severity of whipping. He says that he is not opposed to the Bill in so far as it tends to mitigate the severity of the existing statute, but he then goes on to cite a number of offences for which he would prefer to retain the punishment of whipping. He says that the Bill is open to the charge of incompleteness and that it is assailable on the ground of inconsistency. In introducing the Bill I explained the general principles which guided the Government of India in determining whether the punishment of whipping should

be attached to an offence, and I may here briefly recapitulate them. They are—

(1) that so long as the system of prison administration in India is one of association and not of segregation, it is necessary, for the protection of first offenders from contaminating influences, to retain whipping as a punishment for theft and kindred offences;

(2) that whipping is an unnecessary punishment for offences that are not of an active or daring character;

(3) that whipping should not be inflicted in cases where it is likely to outrage self-respect;

(4) that whipping is peculiarly suited to brutal, cruel and sordid offences involving personal violence;

(5) that where offences are not of this nature it is unnecessary to add whipping to imprisonment on a second conviction;

(6) that whipping is a suitable punishment for juvenile offenders when administered with moderation.

"These principles are intelligible, and I venture to think that they commend themselves to public opinion. But when it comes to apportioning in accordance with abstract principles the offences under the Indian Penal Code, each of which contains many varying shades of moral obliquity, it is evident that mathemetical precision is unattainable, and I daresay that whatever apportionment may be made there will be some colour for a charge of inconsistency. Applying these principles to the specific instances in which the Hon'ble Member twits us with inconsistency, I think it will be found that they considerably enlighten the situation. They explain for instance why the common thief should be whipped while the clerk is exempt, and why the active thief is distinguished from the passive receiver of stolen property. It is not, as the Hon'ble Member has put it, a question of the heinousness of the offence. I fully admit that the trusted clerk or servant who defrauds his master commits a more heinous offence than the common thief, and that the receiver often deserves severer punishment than the person whom he has instigated to steal. It is a question of the nature not of the severity of the punishment. The clerk and the receiver can still be punished with greater severity than the casual thief. But I submit that under the principles which I have stated, which are reasonable and proper principles, the nature of the punishments should differ.

"The Hon'ble Member, and many others, have objected to the exclusion from whipping of offences under section 354 of the Indian Penal Code, which relates to assault or the use of criminal force to women. The reason for the exclusion is that the section comprises many offences of a very petty character. Touching a woman's cheek or grasping her hand may be offences under this section, and I do not think that any one will urge that such trifling misdemeanours should be punished with whipping. Those who desire the inclusion of whipping have in their minds the more aggravated forms of assault, amounting to attempt to ravish a woman. I quite admit that an offence of this nature would be appropriately punished with whipping, but it is not properly an offence under this section. It is an attempt to commit rape which under clause 4 of the Bill is made punishable with whipping in lieu of or addition to other punishment.

"In answer to the Hon'ble Sir Khwaja Salimulla, I may say that I have no faith in the argument that such mitigation of the severity of whipping as we have embodied in this Bill will weaken the hands of the authorities in the suppression of crime. This is the old stock argument that has been put forward on every occasion and in every country in which attempts have been made to relax the severity of punishment, and the history of crime has shown that it is quite fallacious.

"The Hon'ble Mr. Dadabhoy urges that there should be provision for an appeal against sentences of whipping, where whipping is the sole punishment. An appeal of course already lies in all cases where whipping is combined with imprisonment. I may be permitted to rectify a slight ambiguity in the Hon'ble Member's language with regard to these cases. When an appeal has been presented the sentence of whipping cannot in any case be carried out until it has been confirmed by the Appellate Court, and this is quite independent of the period of fifteen days mentioned in section 391 of the Criminal Procedure Code. But a sentence of whipping alone is on entirely different ground. When a person is sentenced to whipping he must obviously be kept in custody until the sentence has been inflicted. A provision for appeal would thus have the effect of adding imprisonment to the sentence of whipping. It would also defeat the object of whipping in such cases inasmuch as it would subject the prisoner to the contamination of jail life, the very thing which it is desired to avoid. The only condition under which a sole sentence of whipping can be justified is that it shall be inflicted summarily.

"Two Hon'ble Members have taken strong exception to the provision of the Bill which excludes specially empowered Second Class Magistrates who now

exercise powers of whipping from doing so in future. Local Governments also take exception to this provision, which I may say was initiated by the Secretary of State and not by the Government of India. The objections were fully represented to the Secretary of State, who after considering them adhered to his original view, and left no option to the Government of India in the matter. I cannot conceal my apprehension that the restriction will cause considerable inconvenience. It can be met to some extent by a freer resort to the power of releasing first offenders upon probation of good conduct under the provisions of section 562 of the Criminal Procedure Code, a power which might well be used more frequently than is done at present.

"The Hon'ble Mr. Dadabhoy has expressed the opinion that no amendment of the Whipping Act can conciliate public opinion without a corresponding modification of the Prisons Act. I venture to think that the Hon'ble Member cannot have the slightest conception of the vast strides in the path of humanity that have been taken during the past thirty years in the jails of India in respect of corporal punishment. The Prisons Act of 1894 provides that no punishment of whipping shall be awarded until the Superintendent has recorded the substance of the evidence of the witnesses, the defence of the prisoner, and the finding with the reasons thereof. The Jail Manuals forbid recourse to whipping except for serious offences or continued recalcitrant behaviour. The exercise of his whipping powers by a Superintendent is most jealously watched by his departmental superiors. The whole tendency of the jail administration is to make as little use of this form of punishment as possible, and no part of a Superintendent's work receives closer scrutiny at the hands of his Inspector General and the Local Government than the way in which he exercises this power. I will not content myself with general statements but will add statistics, and I think the figures which I am about to quote will be a complete surprise to the Hon'ble Member. In 1878 and 1879 the total numbers of whippings in Indian jails were 21,015 and 21,757 respectively. In 1905 and 1906 they were 799 and 668. It is, therefore, abundantly clear that no fresh legislation is required in order to secure moderation in the infliction of corporal punishment in jails. The remarkable mitigation of the severity of whipping in jails has, as I stated in introducing the Bill, been accompanied by an improvement of discipline. I hope that these facts and figures may tend to allay the fears of those who think that the moderate relaxations contained in this Bill will imperil the maintenance of peace and order."

The motion was put and agreed to.

AMENDING (ARMY) BILL.

His Excellency THE COMMANDER-IN-CHIEF moved that the Bill to amend certain enactments relating to the army be taken into consideration.

The motion was put and agreed to.

His Excellency THE COMMANDER-IN-CHIEF moved that the Bill be passed.

The motion was put and agreed to.

The Council adjourned to Monday, the 29th March 1909.

J. M. MACPHERSON,
Secretary to the Government of India,
Legislative Department.

CALCUTTA ;
The 22nd March 1909.

S. G. P. I.—No. 886 L. D.—24-3-1909—600—P. O. G.