Saturday,
12th March, 1898

ABSTRACT OF THE PROCEEDINGS

OF THE

Council of the Governor General of India,

LAWS AND REGULATIONS

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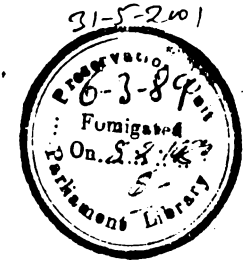

CALCUTTA
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1899

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., Cap. 67, and 55 & 56 Vict., Cap. 14).

The Council met at Government House, Calcutta, on Saturday, the 12th March, 1898.

PRESENT :

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

His Honour Sir Alexander Mackenzie, K.C.S.I., Lieutenant-Governor of Bengal.

The Hon'ble Sir J. Westland, K.C.S.I.

The Hon'ble Sir J. Woodburn, K.C.S.I.

The Hon'ble M. D. Chalmers.

The Hon'ble Major-General Sir E. H. H. Collen, K.C.I.E., C.B.

The Hon'ble Sir A. C. Trevor, K.C.S.I.

The Hon'ble Rahimtula Muhammad Sayani, M.A., LL.B.

The Hon'ble Pandit Bishambar Nath.

The Hon'ble Joy Gobind Law.

The Hon'ble C. C. Stevens, C.S.I.

The Hon'ble Sir H. T. Prinsep, KT.

The Hon'ble H. E. M. James, C.S.I.

The Hon'ble M. R. Ry. Panappakkam Ananda Charlu, Vidia Vinodha Avargal, Rai Bahadur, C.I.E.

The Hon'ble Sir G. H. P. Evans, K.C.I.E.

The Hon'ble J. J. D. LaTouche, C.S.I.

The Hon'ble F. A. Nicholson.

The Hon'ble Rai Bahadur Pandit Suraj Kaul, C.I.E.

The Hon'ble Gangadhar Rao Madhav Chitnavis, C.I.E.

The Hon'ble Allan Arthur.

The debate on the Criminal Procedure Bill was resumed this day.

The Hon'ble MR. JAMES moved that in clause 147 of the Bill as amended by the Select Committee, for the words " (including any right-of-way) " the words " (including any right-of-way or other easement over the same) " be substituted. He said :—" This suggestion has been made by the Bombay Government at the

motion of Mr. Justice Parsons of the Bombay High Court, who states—'I do not consider the terms of the section wide enough: frequent dangerous disputes arise about buildings and easements other than rights-of-way. I would substitute "for right-of-way," "buildings or easements over the same."'

"I submit to the Council that, when a High Court Judge himself states that the law is weak and does not deal with cases which ought to be provided for under it, the Council cannot go far wrong in accepting the amendment. The experience of other Hon'ble Members will doubtless recommend the amendment to them. I think I need say no more."

The Hon'ble MR. CHALMERS:—"I see no objection to the words proposed by my Hon'ble friend."

The motion was put and agreed to.

The Hon'ble MR. JAMES moved that in clause 162, sub-clause (*1*), of the Bill amended by the Select Committee, all the words after "such writing and", in line 12, be omitted, and that the words and figures "may itself examine the witness thereon, and such writing may then be used in the manner and to the extent provided in section 172 in regard to police-diaries" be inserted. He said:—"My Lord, this clause has, I believe, been very carefully and exhaustively debated by the Select Committee, and I feel that some apology may be needed, if I venture to comment on or attempt to improve their draft, or, if I may call it so, their compromise. But I hope to justify my amendment. I call the clause a compromise because it tries to reconcile two almost irreconcilable principles. One of these, accepted in English Courts and English procedure, is that police papers are absolutely privileged, that the accused is not entitled to see the brief for the Crown, that he must be judged by the evidence given in Court, and by that only, because it is given on oath and in his presence, and that he must trust to his own mother wit, or his counsel's, if he has one, to cross-examine the witnesses and get off if he can. The other principle is an Indian one, *viz.*, that we want the Court to get at the truth, no matter whether counsel appears on either side. A criminal case in India is not, as in England, a duel between two counsel, but the Magistrate or Judge holds himself personally responsible for getting at the facts whether they are in favour or against the accused. Allied to this principle and (though it is the fashion of Native gentlemen and some High Court Judges in Bengal now-a-days to assume that every Lower Court is *biassed*)—they never dared insinuate such a thing thirty years ago—we want to give the accused every fair chance (as in England). We know that chicanery of every kind, lying,

perjury, subornation of false evidence, bribery, permeates all our judicial proceedings in India, and we feel (I am speaking for myself, but I believe every Judge and Magistrate feels it too) that till a witness' evidence, however plausible and apparently straightforward, has been corroborated by *something*, it is not to be relied upon. We, therefore, in our endeavour to get at the truth, and punish the accused if he is guilty, or let him off if he is the victim of a false accusation, grasp at every *scintilla* of proof for or against him that we can get hold of. It is in this respect that police depositions become important.

"How came the police depositions to exist? They are meant to be a check on our police, who, though it is the fashion for the Native Press to abuse them, are themselves natives, with the like passions and attributes of other natives, and I should like to say here that there are as good men amongst them as in any department of the State. When a Native policeman goes to investigate a crime that has been reported, we make him keep a diary in which he records all his proceedings from day to day—(otherwise he might stay at home and send up perfectly fictitious accounts),—and, recorded in his diary and forming a portion of it, in some parts of India,—separately from his diary in other parts, he sends up rough statements of what the complainant and other persons who can throw light on the affair have said to him. These police papers are sometimes sent up with the charge-sheet, or chalan, to the Magistrate who first tries the case, and though this may not always be the rule, still the substance of what the witnesses are presumed to be going to say is entered in the charge-sheet. The police (at any rate outside Bengal) are usually illiterate (I find in Sind the greatest difficulty in getting intelligent men of the stamp I want, who can even write). The depositions, or notes, or memoranda of witnesses' evidence which they take, are usually of the roughest kind, recorded under circumstances of great difficulty, and are frequently not written up at all till nightfall, when the policeman (who will however always swear he wrote them up on the spot) has done his day's work. The custom is for him, after his evening meal, to sit down and write out fair, from his notes or from memory, the substance of what the various people have told him. Sometimes, of course, he writes them out in full as the witnesses make their statements (just as a Court does), but this is rare.

"Consequently these depositions can very often have very little reliance placed upon them; and it would be unfair either to convict or acquit a man upon them. They are taken in the most informal manner. Sometimes (for a consideration) they are written so as to tell in the accused's

favour, sometimes in order to strengthen the case and gain, if possible, credit for the policeman, they may be improved, so as to tell against the accused. Sometimes —and I believe in by far the largest majority of cases—for the bulk of the police, as like the bulk of other natives, are simple and honest till tempted to be otherwise, and a good policeman takes pride in his profession like other people—the depositions contain, making allowance for the policeman's own illiterateness and for the exaggerations and inaccuracies and lies of the witnesses themselves, a very large substratum of truth—very often they are perfectly accurate records of what the witnesses have said.

"Now a good Magistrate or Judge always looks for any finger posts to guide him through the tangled mass of truth and lies that inaccurate-minded, inobservant and often interested witnesses tell in every case. And, of course, the statements that are first made, whether in India or elsewhere, after a crime or an alleged crime has happened, are, if reliable, the best testimony that can be got, because they are the freshest and *cæteris paribus* most likely to be true. Sothese depositions taken by the police, worthless though they very often may be, are frequently referred to by the Court for its own information to find out how the investigation grew, and as a check on what the witnesses and police say in Court. But from the Court using them for this purpose, for its own help and satisfaction only, a system has grown up for the accused or his pleader to be allowed to see them, especially if they tell in the accused's favour, till gradually, under the ægis of the High Court of Bengal principally I believe, (though I am open to correction on this point,) the rough notes made by policemen, whether good, bad or indifferent, have come to be treated as genuine evidence in every case. I will read the Council an extract from a Bengal Magistrate's report (and I desire here to say what very valuable papers on the Code have been sent in by Bengal officers, far and away the best in India) to show to what a pitch this irregular use of papers (written solely for the satisfaction of the policeman's superiors, and also to give the Court a clue in advance of the case) has been allowed to grow in Bengal. This officer approves of the clause as in the original Bill :—

'If it were a case of debarring the accused from the advantage to be derived from the statements of the prosecution witnesses, recorded by a competent and reliable officer immediately after the occurrence, there might be more to be said against the amendment. But statements of witnesses as recorded by the police are anything but reliable, as any one who has witnessed a police-enquiry is well aware. The police-officer usually stands in the middle of a circle, all talking at once and prompting one another ; he has no system in asking questions and no compulsion to record the answers as given, or to see that the answers are fully given. With diaries as at present used it practically amounts to this,

that the accused is tried on the evidence as recorded by the police, as, if it can be shown that he has said more in Court than contained in the police version in the diary, the Appellate Court will seldom travel beyond the latter. I recollect a riot case of my own where the police reached the spot about 9 P.M. and recorded by the light of a lantern what was supposed to be the full statement of four men, all badly wounded, lying on the roadside near the scene of occurrence. What the men were in a position to state, or what detail it was probable that the police would enquire into under the circumstances can be imagined. Yet on appeal the prosecution was held strictly to the limits of what appeared in the diary entry then made. This misuse of diaries will always be the possible consequence of the law as it stands at present. It is true that Native witnesses are liable to add to cases between their institution and hearing in Court, but the remedy is rather in insisting on prompt and speedy enquiries. It will always be open to the Court, moreover, to examine the diaries.'

"And I am indebted to my Hon'ble friend Sir Henry Prinsep, who has just shown me a judgment of the Allahabad High Court, so very apposite and graphic, that I must venture to trouble the Council by reading part of that also. It is an authoritative statement of the facts and law as they exist:—

'Still more extraordinary is a permission given before the case came on for trial by which the accused were granted copies of statements recorded by the police during the investigation. Such statements are recorded by police-officers in the most haphazard manner.

'Officers conducting an investigation not unnaturally record what seems in their opinion material and, it may be, of supreme importance as the case develops. Besides that, in most cases they are not experts of what is and what is not evidence. The statements are recorded often hurriedly in the midst of a crowd and confusion, subject to frequent interruption and suggestions from bystanders. Over and above all, they cannot be in any sense termed depositions, for they are not prepared in the way of a deposition, they are not read over to, nor are they signed by, the deponents. There is no guarantee that they do not contain much more or much less than what the witness has said. The law has safeguarded the use of them, and it never can have been the intention of the Legislature that, as in this case, copies of them should have been without question and as a matter of course made over to the accused or their counsel.

'It is obvious that such statements, if used at all, should only be used after proper proof of them and of the circumstances under which they were recorded, and under the direct sanction of the presiding Judge.'

"The Government of India therefore, I understand, resolved in the first instance to stand upon a judgment of that very sound, strong and able Chief Justice, Sir John Edge, whose departure is a grievous loss to India, *viz.*, that statements of the police are to be considered as part of the police-diary, *i.e.*, open

to the Court to see, but to no one else, unless used to contradict the police-officer only, when an extract can be shown to the accused. The Select Committee, however, no doubt from the desire to be fair to the accused, have thought that the depositions (whether forming part of or separate from the diary) should be open to the accused or his pleader if he likes. They are at the same time obliged to recognize this,—that however fair to the accused this may be, it is not fair to the witness, as he is not bound by anything a police-officer chooses to write down and *say* he said, and that it is not fair to the Crown, which (as representing society at large) is interested in the conviction of true criminals, and does not want its brief used by the opposite side. They therefore have agreed, if I understand the amended Bill rightly, that, to save the witness, he shall not be held responsible for anything the policeman says he has deposed to,—and even though the accused shall have the right to call for all the police-depositions, he shall not use them except for impeaching the credit of the witnesses,—and to save the Crown its brief is not to be used against it, and the police-depositions are not to be used as evidence in the case. But the Council will at once see what an immense advance this is upon the present law as laid down by Sir John Edge. They give the accused the absolute right to call for the deposition of each witness that may have been recorded by the police, the moment he enters the box. Now this is merely legalising the irregular practice of Bengal, and it seems to me wrong in several respects. The brief for the Crown is put into the hands of the adversary—that is the first thing—and the pleader can ask for it and must get it, and whether he uses it or not to impeach the witnesses' credit or not, he has got information he has no right to (unless used against his client), even if it may not be used technically as evidence. And in regard to that particular safeguard I don't see how the Court is to get the police-depositions out of its head, especially if the witnesses' statements, as recorded at one time by the police and the next time in Court, are divergent. It will begin to say 'I believe or disbelieve witness A because the two statements made by B, who was with him, given to the police and in Court, agree or disagree.' In other words, it will, it must, use the police-statements as evidence to a certain extent. Courts may be trained in course of time no doubt to the very restricted use of the depositions contemplated, but think of our thousands of third class Magistrates—how are they to grasp such a refinement? And look on the effects of the measure. If a Court does in ever so small a degree use the statements as evidence, the High Court will instantly quash the proceedings, or the Appellate Court will let a guilty man off because the statements have been used improperly. Think of all the trouble and miscarriage of justice this will cause. Another result will

be that the police-authorities will simply tell the police to make the depositions as short and with as little detail in them as possible. Now this will operate to deprive the Courts of what, if I have made myself understood, is really often most helpful to them. It deprives them of materials to get at the truth. I should like to read to Council what a District Judge in Bengal says, who seems a very fair-minded gentleman indeed :

'It may perhaps be desirable to make statements recorded by a police-officer part of the diary, and therefore not open to inspection by the accused or his agents. At the same time I cannot help saying that reference to statements made by witnesses before the police often prevents most serious miscarriage of justice. On the other hand, I have met with cases in which the police had apparently deliberately misrecorded statements made to them by witnesses, and subsequently informed the accused or his friends of having done so, thus enabling them to avail themselves of the police-officer's misconduct for the purpose of cross-examination. In such cases it is frequently found that the accused or his agents are in possession of copies of the police-diary, which have been given to them for the purpose above mentioned, doubtless for a handsome consideration.

'All cases in which such copies are found with the defence require most careful attention, and I invariably take serious notice when I find cross-examination being conducted with the help of them.

'The Courts, the inferior ones more especially, do not refer to police-diaries sufficiently often. The result of referring to them is frequently to prevent miscarriage of justice, and I would suggest that if it is intended to deprive the accused or his agents of the right to inspect statements recorded by the police, provision should be made in clause 172 (2), declaring that upon application being made to a Court for that purpose the Court *should* ordinarily send for the police-diaries of a case under enquiry or trial in such Court and use them to aid it in such enquiry or trial, and that in case of refusing to do so, a Court shall record its reasons for such refusal. I would also suggest that clause 172 (2) should make provision for the Court using a diary, not only for the purpose of contradicting the police-officer who made it, but also for that of contradicting a witness by asking him whether he made any particular statement before the police contradictory of, or inconsistent with, statements made in Court, or by calling the police-officer before whom the statement was made, it being clearly laid down of course that this is to be done on behalf of an accused only, and not for the purpose of making evidence against him. It is very important to take steps to prevent police-papers from being changed or tampered with after they have been submitted to the office of the District Superintendent of Police.'

"The real difficulty which I see, in the clause as it stands, comes, I am sorry to say, from our old friend's 'may' and 'shall,' which the Hon'ble Mr. Chalmers could not define the meaning of last year in the General Clauses Act.

"On the application of the accused the Court *shall* refer to such writing, and *may* then direct that the accused be furnished with a copy thereof". The second 'may' means 'shall.' If the Hon'ble Legal Member would allow me to insert the words 'if it thinks fit' after 'may,' that would be a solution of the question. That would leave the Court, as the original Bill intended it should, and as the present law enacts (according to Sir John Edge's judgment, which I think perfectly right), to use depositions at its discretion. Then you would get proper and full depositions from the police, not abbreviated and scamped ones.

"Failing the words 'if it thinks fit,' the effect which I anticipate from my amendment is this: The accused can require the Court to call for the statements, and the Court may, *i.e.*, shall, examine the witness thereon. But, till the Court uses a deposition for contradicting a witness, the accused cannot see it or get a copy.

"Now, how would my amendment work? In cases, like those which the District Judge refers to, where the police-depositions have been fudged beforehand, a wary Sessions-Judge, alive to the possibility of such a conspiracy, will put such depositions on one side. He will examine on the depositions but not impeach the witnesses' credit, and dispose of the case, as they do in England, on the evidence given in the Court, without using the fudged depositions at all, or letting the accused use them. On the other hand, if, as often happens, a witness has been got at by the accused's friends and he retracts what he said before, the police can be cross-examined about it by the Court, and in that case it is fair enough to give the accused's pleader a copy.

"To sum up. According to the Select Committee, the accused can get a copy of every police-deposition—you throw over Sir John Edge's judgment altogether—you place the brief for the Crown into the hands of the accused, you encourage the police either to make fudged depositions for the benefit of the accused, or to make such short ones as will deprive the Court of valuable materials for getting at the truth, and you hamper yourselves in getting guilty parties punished. According to my amendment, you leave it to the Court to judge whether the depositions should be put in or not, and the Court can use its own judgment as to how to examine on them or not.

"Personally, if it were a choice of evils, I think it would be fairest to the Crown and witnesses, and the police and even the accused, to keep these depositions out of Court altogether. I include the accused, because frequently a witness

is bribed to contradict what he said to the police and contradicts the evidence of witnesses for the Crown, and by keeping the police-depositions out, such a witness cannot be contradicted, and the accused gains. But you *cannot* altogether exclude these statements in India: you must *not* stint your Courts of an atom of material from which they can elicit even one grain of truth. What then is the middle course? I say, let each Court decide for itself in each case. Let it see the brief for the Crown and judge for itself whether to use it or not and whether to give it to the accused or not. You can surely trust your Courts—in fact you must trust them—to be fair. What use are they otherwise? Any other policy simply ignores the whole system on which your administration is built.

"Pleaders no doubt in Bengal will dislike my amendments. They are far more interested in defending than in prosecuting criminal cases, so their opinion on a point of the kind is not disinterested, and deserves, I submit, but little weight. I am bound to say there is one point in the clause as it stands which I have not alluded to and which I dislike very much, that is, the power you put into the hands of pleaders to order the Court to produce the police-record, whether the Court likes it or not, and thinks it desirable or not. Of course, the parties always have a right to copies of the Court's own proceedings, but these are not Courts' proceedings. You will be doing what most of your Courts will dislike extremely and consider a grave mistake, and it will lead to many criminals escaping justice. You practically enlarge the record, and the more you do that the more tampering with it there will be.

"If the Hon'ble Legal Member will accept 'if the Court thinks fit,' I will withdraw the amendment. Otherwise, subject to any correction of my reading of the law as it stands, or as I think it ought to be, which Hon'ble Members who are better interpreters of the law than I can pretend to be may be able to point out, I think it right to press it. It is long since I tried a case myself and my legal knowledge is rusty. It may easily be that I am really tumbling out of the frying-pan into the fire, owing to my having overlooked some point or section in the Evidence or other Act. But I venture to think that the question is of sufficient importance to be thoroughly thought out and discussed before the Bill is passed. It is for that reason only that I have ventured to trouble the Council with my views at such length."

The Hon'ble MR. CHALMERS:—"This certainly is an amendment which I am very glad to have discussed in Council. The question was discussed at great

length in the Select Committee, and with considerable difficulty we arrived at what we thought would be a fair rule. But I am glad that the whole matter should be considered and discussed by the Council at large. I should like to call the attention to some of the points involved in the case, and I am very glad that I have the assistance here of my Hon'ble friend Sir Griffith Evans, who has practical experience of the Courts from the point of view of the Advocate ; and we have others here who can speak from the point of view of the Judge ; we want both sides to be represented in a case of this kind. Now this preliminary point I wish to refer to. As we drafted the proviso it runs :—

'When any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the Court shall, on the request of the accused, refer to such writing, and may then direct that the accused be furnished with a copy thereof ; and such statement may be used to impeach the credit of such witness in manner provided by the Indian Evidence Act, 1872.'

"My Hon'ble friend Mr. James says that we have not said what we have said, but that we have said that the Courts shall refer to the document and *shall* give a copy. It seems to me that the words are as clear as they can be, and that when you put 'shall' and 'may' in juxtaposition, no human being can mistake their meaning. However, my friend Mr. James says we have not made our meaning clear. I do not know in what clearer form we can put it than by saying that the Court *may* do one thing and *shall* do another. I should like to know how it strikes my Hon'ble friend Sir Griffith Evans. At home no difficulty can arise if you put in juxtaposition *shall* and *may*, but as I have said the rules at home observed in construction are not always followed here, and there may be difficulties here which do not arise at home.

"Now, as to the merits of the case, I should like first to point out that no question of evidence arises. It is a question of discovery. When a witness is called you are always entitled to impeach the credit of that witness by showing that on a previous occasion the witness made a statement inconsistent with what he is now saying in the witness-box. That is English law, and I believe it to be Indian law also. There is no question about that, but the point is this. In order to show that the witness on a previous occasion made a statement which was inconsistent with what he is saying now you must have some material to go upon, and there has been on the construction of the old section a conflict between the decisions of the Courts. In the Punjab and in the North-West it has been held that you have no right to look at statements alleged to have been made to the police for the purpose of founding your cross-examination on them. In

Bengal the opposite has been held. Well, it is quite clear that the old section is ambiguous. It is quite clear that we have nothing to do with the construction put upon the old section, but that we have to lay down a rule for the future, that we are not concerned with the construction which the Courts may have felt themselves obliged to put upon the old section, but that we are only concerned to lay down for the future what seems to be a fair and proper rule. The difficulty is this, and it is a difficulty which the Committee have felt the whole way through. You have conflicting interests to deal with, and these conflicting interests cannot be entirely reconciled. First of all, you have to consider the interests of the public, which are concerned with the detection and punishment of crime, and it is an universal rule as far as I know, that in the interests of public justice the names of people who give information to the police and the substance of their information concerning crimes are privileged from disclosure. It is quite clear that the course of justice would be paralysed if this were not so. I do not know what may be the case in India, but as regards England I will take one example. The police get most of their information as to the whereabouts of stolen property from the prostitutes with whom the thieves consort. If the names of those informers, the women who inform, were published, in the first place the women themselves would be murdered, and in the second place, that source of information would be stopped for ever, and very little stolen property would be recovered. Well, naturally in other classes of crimes the police have to employ detectives and to depend on the evidence of detectives to get the first information of the crime. If the names of the detectives and their identity were disclosed that source of information would be at an end for ever. So that it is perfectly clear that informers of that kind must be absolutely protected, but the proviso as framed by the Select Committee does not touch that class of information. The informers that I have spoken of would not be called as witnesses. We have only provided that in certain cases, and subject to the discretion of the Court, copies may be given of the supposed statements of a witness where the witness is himself called. It is clear that, when a witness himself is called, his name, identity and the substance of his information is to be given to the Court, and therefore there is no objection to any previous statement made by that witness being accessible to the accused.

"The next point we had to consider was a very difficult one. It is a point which my friend the Hon'ble Mr. James has enlarged upon and which Sir John Edge in his judgment very clearly pointed out. These statements given by witnesses to the police are not depositions. The policeman goes down

to investigate a crime; people who know something about it crowd round him; he takes rough notes as best he can on the spot. He is not taking the depositions of these people; he is asking for information which will enable him to carry further his investigation into the crime which has been committed. He probably asks two or three questions, whereas when the case comes on for trial the witness will be asked two hundred questions. It is ridiculous to say that what the policeman takes down in his rough notes, and probably some other policeman fairs out, is to be treated as a deposition; and that a man's evidence is to be impeached because what the policeman, perhaps *bonâ fide*, perhaps carelessly, perhaps *mala fide*, chooses to jot down at the time, does not agree in every respect with what the witness says when he is examined at length on oath in Court. Well, we felt that difficulty, and of course we had to deal with it as best we could, but we were pressed with another point. Very often in this country, and by no means rarely at home, witnesses do make inconsistent statements at different times. They may make them from folly; they may make them from bad motives; but it is most important to the accused when he is being pressed by the evidence of a witness to be able to show that the story told by the witness in the box is not the story told by the witness when first he was asked about the affair when his memory was fresh and the facts were fresh in his recollection, and when he had no time to think out the consistent story which he afterwards tells. I can recollect several cases at home in which I have been concerned where the inconsistent statements made by witnesses were most material evidence in favour of the accused. I remember one case where a woman was undoubtedly robbed and maltreated; there was no doubt of the fact. She first accused one man, and then she accused another, and I am by no means sure that either of the two persons she accused was the real person who assaulted her. That is only a single instance. There are any number of cases of a similar nature. It is important to know what the witness said at the time when the facts were fresh in his memory, and when he had not had time to piece together a careful story. Well, the conclusion the Committee came to was this, that the right thing was that the Court should always, on the request of the accused, or his counsel, refer to any statements made to the police; that the Court should then have a discretion—but a discretion which I hope will be very freely exercised—of giving copies of these statements to the counsel for the accused to found his cross-examination on. How are those copies to be used? As I have said, they are not depositions, you have no right to assume that what the policeman chooses to take down was the full, fair, unfettered statement of the witness. The right way is to examine the witness—I am speaking of English law, and I

assume the Indian law is much the same—the right way, the only way in which you could act in England, would be this. In cross-examining a witness you ask him if he did not make this or that statement to the police. If he admits it, well and good; if he denies it and you want to contradict him, then you must call the policeman. The statement itself cannot be evidence. The witness has not signed it; he has not taken his oath to it. You call the policeman; you put this statement into his hand, and you say 'look at that, did you take down this witness' statement?' And he says 'yes.' Well, then, you have the statement corroborated. The writing itself is not evidence, but it is matter by which the policeman can refresh his memory, and by which he can say, 'looking at this writing I made at the time I can now swear that the witness said so and so.' Then of course the policeman can be cross-examined. You can say to him, 'well, what question did you ask the witness? Did you ask the witness this, and did you ask him that?' In this way the policeman's evidence can be tested as to how far the statement he took down is a complete statement. This is rather an important point, and I must apologise for detaining the Council so long upon it. It is a question which has raised a good deal of feeling and on which it is important to arrive at a fair determination. Supposing a question arose in a Court of law as to what I said at the last meeting of the Council; supposing I am called as a witness in a Court of law and I am asked what I said; well, I could give my account of what I said. But supposing the person who asks me, the counsel cross-examining me, was not satisfied with my statement and wished to contradict me. How could he do it? He might produce a newspaper in which there was a report of my speech. He might ask me if I accepted that as correct. But if I said it was incorrect, the newspaper itself, or even the reporter's notes, would not be evidence against me. All he could do would be to call the shorthand reporter and put the notes into his hands and say to him 'were you present in Council on this particular day? Did you take a note of what the witness said? Are you now prepared to swear that, looking at your shorthand notes, they correctly represent what Mr. Chalmers said in Council?' Well, exactly the same principle applies to these police notes. They are not documents that can have any force or effect by themselves, but they are contemporaneous writings which may be used to refresh the memory of the policeman, and from which he can swear, looking at them, that a certain conversation did take place on a certain day. Well, I think that as the Committee framed their proviso we have met as far as we can what we thought would be the justice of the case. I am not sure that my friend's amendment will give the same sense of security to accused persons. I believe in practice it would give some amount of security, but there is always an objection to turning

the Court into a counsel for the accused. The Court ought to be holding the balance impartially between the two parties when there are counsel on both sides. Of course, if the accused is not represented, the Court must represent the accused. When the accused is represented, it is better that the Court should stand aside, and that witnesses should be cross-examined by the Crown and by counsel for the accused. On the whole, I think that is the most effective way of getting justice done. Of course the Court supplements cross-examination by putting itself any necessary questions. The best attitude of the Court, however, is to stand aside and let the counsel for the accused put the questions himself. I have no doubt that under what the Hon'ble Mr. James suggests the right questions would be asked, but it is more satisfactory for the accused to have those questions put by his own counsel at the time his own counsel thinks the most convenient. The only question here is, as I have said, what right of discovery will it be advisable to give? I may say at once that in framing this proviso we were influenced to a large extent by an English case. The exact matter itself hardly arises in England. It does not arise with regard to information given to the police, but it was discussed some little while ago with reference to a written statement given to the Public Prosecutor. That was a statement given by the witness himself, it was not taken down by the Public Prosecutor behind the witness' back, but it was given by the witness to the Public Prosecutor. In a subsequent civil action the Public Prosecutor was called and asked to produce that statement. The Public Prosecutor declined and the Court upheld his refusal; but it laid down a rule which we have tried substantially to reproduce here. I will just refer for a moment to the terms in which that rule is stated—

'A prosecution instituted or carried on by the Director of Public Prosecutions is a public prosecution, and the Director of Public Prosecutions, if called as a witness at the trial or during any proceedings arising out of the trial, is entitled to refuse to disclose the names of persons from whom he has received information and the nature of the information received, unless upon the trial of a prisoner the Judge is of opinion that the disclosure of the name of the informant, or of the nature of the information, is necessary or desirable in order to show the prisoner's innocence.'

"Well, that substantially is the rule which we have laid down in this proviso, but I agree that the point is an open one and eminently fitted for the consideration of the Council, and I hope they will carefully consider the arguments *pro* and *con* and come to a determination on the amendment which has been moved."

The Hon'ble MR. NICHOLSON said:—"I concur with the amendment, by which these statements will be treated after the fashion of the police-diaries in section 172, and I do so not because the papers are or should be *privileged*, but because they are not depositions and there is no sanction whatever for their correctness of detail. They are in general merely pencil notes or memoranda taken down by the enquiring constable in more or less loose fashion in very bad note books, and these notes, written in the third person, are then incorporated into the station house crime register and into the daily station house reports. While then they are not ordinarily documents of which formal copies can or should be given or which should be demandable as of right, even before an enquiry begins, in the hope that something may be discovered in them, yet they have a certain value in discovery as pointed out by the Hon'ble Mr. Chalmers, and they should therefore be accessible to and consulted by the Court, and where useful for materially contradicting a witness should then, and then only, be at the disposal of the accused but not for any other purpose than material contradiction; for instance, if a witness in the course of a trial identifies an accused, while the police-notes show that this witness had told the police that he could identify no one, the statement should obviously be at the service of the accused. The Hon'ble the Legal Member has pointed out that the statement by itself is useless, and that the police-officer who made it should be called to testify upon it; that I think is evidently what the Hon'ble Mr. James proposes, *viz.*, to put the *original*, not a copy, into the hand of the police-constable as provided in section 172, and that the officer should be examined thereon to contradict the witness. The proviso when amended as proposed by the mover, will prevent the indiscriminate use of so-called statements made to the police, while affording the accused every reasonable facility for contradicting a lying witness. I therefore support the amendment."

The Hon'ble SIR GRIFFITH EVANS:—"Two principles come into conflict—one is that police information should be secret; the other that the truth should be got at if possible and the innocent should not be convicted. The history of the matter is somewhat peculiar. Originally, in Bengal at least, these statements taken under section 162 were kept separate and not put in the police-diaries. They could always be called for. This was found inconvenient, and an ingenious Police-officer whose name I will not mention gave directions, I believe, to the police to put them all into the diaries so that they might come under section 174 and not be accessible. It was held however that, ingenious as the Police-officer had been in putting statements taken under section 162 into the diary kept under section 172, he had not succeeded in his last object, and the High Court held that,

though these statements were in the diary under section 172, they were not part of it; that they were really statements under section 162 and they could not be kept by putting them into the diary under section 172. And so the law remains, and in Bengal free use has been made of it by having the diary called for on the allegation that there has been in it a statement under section 162. This is the way it has been worked. Then there are, I quite agree, uncertainties with regard to the value of these statements. They are very often taken very roughly. There is a crowd of people, and the policeman only just wants to get some clue. The witnesses are jabbering away and telling long stories, and the policeman says 'I have no time to listen to all this nonsense' and takes down only what he thinks useful. It is very common to use this statement as though it was the whole statement the man had made. It may be all that he made because it was all the police-officer allowed him to make or it may be what the police-officer thought important only. But although there may have been some abuse of the use of these statements, there are certain cases in which they are of enormous value as in the case quoted by the Hon'ble Mr. Chalmers where the man was asked on the spot, 'could you identify any of these people' and says 'no, it was too dark, I could not see any of them,' and then comes in at the trial and says 'I was able to see so and so.' Of course in these cases they are exceedingly important, and they are enormous aids to the discovery of the truth. The two conflicting principles have to be reconciled some way or other. The Court has to be entrusted in making a proper use of these things, but we must remember that in a number of these criminal cases it is very difficult to get at any truth at all, that it is unwise to throw away any possible test, anything that is recorded in any sort of way at or about the time. I must remind the Council that there are two different classes of criminal cases altogether. There is the ordinary case with no money or *zid* on either side. In that class of case no doubt the proceeding is, as the Hon'ble Mr. James says, that you have to have a patriarchal sort of trial and the Magistrate sits there and tries to find out the truth, and he wants to see whether the accused has committed any offence, whether there is enough evidence against him, and in this class of case he can be left to look at the police-diaries or anything else and try to get at the truth as best he can. But there is another class of case altogether. The persons accused and the persons apparently prosecuting may be only servants or chaprassies: they are people of no importance. But behind them there are two rich men, who are having out this battle with these servants as pawns, like in a game of chess. In that case there is a pleader or counsel for the prosecution and pleader or counsel for the defence. And there,

as the Hon'ble Mr. Chalmers says, it is for the Court to see fair play and keep its eyes open and have the materials laid before it, by these pleaders on either side who know very much more about the cases and value of any particular piece of evidence than the Judge. In these cases if cross-examination has to be done, it must be done by the pleaders and not by the Judge. The only thing the Judge can do is to avoid taking sides for either party; the evidence in this sort of case is only a very small percentage of its truth. In these cases you will understand that the accused and the prosecution generally all have copies of the statements and of any part of the police-diary they wish. They have bought it from the police, and the accused's pleader is not such a fool as to go and ask for the police-diary and the police-statements unless he has got the unauthenticated copy of it or knows what is in it, as it would not do for him to ask for it and find that the statement made by the witness was exactly the same as he made before. But it is difficult even to cross-examine on this information without bringing the police who have supplied it into trouble. Then under those circumstances he asks the Court to send for the statement and after having cross-examined on it he is then at liberty to call the police-officer to prove that the witness made this statement. Here again you must remember that this is a perfect game of chess, and that the witness for the prosecution generally knows perfectly well what he is alleged to have said, and therefore directly he is examined he is quite ready with his answer. He says 'I have not the remotest idea what I said' or else he says 'I said so and so,' and adds two or three words to it according to what his instructors think is the best thing for him to say, and so the game goes on. Of course it is very difficult to get at any truth at all with the witnesses going on in this way. I remember coming across an admirable judgment given in 1825 by an old Principal Sadr Amin. He tried a civil case upon documents which gave a history of the property; it was an excellent and luminous judgment upon the past history of the property. He dealt with the witnesses in this way:

'About one hundred witnesses have been called on each side. But as both sides are powerful zamindars it is not difficult for them to call any number of witnesses to depose according to their wish. I need, therefore, make no further remark upon the oral evidence.'

(*Quotation.*)

"But in criminal cases you have nothing but oral evidence to go upon as a rule. The task of discovering the truth, the task of finding out whether it is a bogus case, or whether though there is a real case at the bottom of it, yet innocent men have been dragged in and accused with the guilty is very difficult

It is therefore undoubtedly not wise to shut out any source of information. I am prepared to accept the compromise come to by the Select Committee as probably being, on the whole, about the best thing that could be done. It does, no doubt, leave discretion. The words 'shall' and 'may' when they are opposed to each other cannot be the same thing. What fetters the High Court may put upon this discretion it is impossible for me to say, but I think it is enough to leave it as it is now. I do not think that it is possible to shut these things out without causing great dissatisfaction to the public, and dissatisfaction which has good grounds for it; but on the other hand it does not do to let them have a roving Commission to look over the diaries. But the Council will remember that, if any real information is intended to be kept secret, the only way to keep it secret in India is not to put it down on paper, because, as the Council is probably well aware, no Government papers are secret in this country, and as for police-papers being secret, one has only got to pay a few rupees for them. It is true one has to pay a little higher for Government papers, but they also can be procured without any insuperable difficulty."

The Hon'ble RAI BAHADUR P. ANANDA CHARLU:—" I do not wish to add anything to the remarks made by the Hon'ble Sir Griffith Evans."

The Hon'ble SIR ARTHUR TREVOR:—" I am disposed to support the amendment, for the reason that as far as I can see it would serve all the purposes which the proviso as drafted by the Select Committee is intended to serve and that it tends to emphasize a point which I think needs emphasizing in India more than is, perhaps, the case in England, that is, that it is the business of the Court to ascertain the truth and not to content itself with deciding whether the accused or the prosecution has the best of a game in which they are pitted against each other. The clue to the truth is very often to be found quite outside any evidence that either side may be able or willing to produce. This is more especially the case in big trials in which party feeling is strongly enlisted, such as those referred to by the Hon'ble Sir Griffith Evans."

The Hon'ble SIR JOHN WOODBURN:—" My Lord, I have followed the discussion upon this point with a great deal of interest, and I am bound to say that the conclusion I have come to after listening to it is very much the same as that of my friend Sir Arthur Trevor. I cannot help thinking when one comes to look at the clause of the proviso as it has been drafted here, that it is not in fact a compromise at all. I think that most of the people who know subordinate

Magistrates in India will say with me that the effect of the discretion that is nominally left by the proviso will be that the discretion will not be used at all.

"The Hon'ble Mr. Chalmers used the expression that he hoped that that the discretion would be freely used by the Magistrates. I do not know exactly what he meant by that: whether he meant that they should not give copies of the papers or that they should freely do so."

The HON'BLE MR. CHALMERS:—"I meant that they should freely do so."

The Hon'ble SIR JOHN WOODBURN continued:—"That is what I understood, and I am quite certain that if the proviso was passed as it stands, the result would be that no Magistrate would ever refuse to give copies of the statements made by the police. Put yourself in the position of a Magistrate. The pleader for the accused demands copies of the statements. The Magistrate does not think it necessary, but his action would be misinterpreted if he refused to give copies of the depositions, and I am myself assured that the result of passing the proviso as it stands would be, as I have said, that the statements would be practically given in all cases. Now this has not been the practice in the greater part of India up to the present time. It has been the practice in Bengal, and we have no better means of coming to a conclusion as to whether it would be expedient or proper that copies of the statements should be freely given to the accused than in the experience of Bengal officers themselves. The Hon'ble Mr. James has quoted some of them, but I myself was particularly 'fetched' with what was said by one of the Judges in Bengal, Mr. Staley, the Judge of Hughli, who has given a very careful and well-considered opinion upon the point and whose experience ought to be of very great value to the Council in coming to a conclusion upon this matter. He says:—

'Such memoranda are often written up at the close of the day from memory or brief pencil notes. The statements recorded have not been read by, or read over to, the witnesses making them, and admitted by them to be correctly recorded. They are not, as a rule, recorded by very careful and well-trained officers, nor are they detailed. I think such memoranda are of small value. But used as they often are, to contradict or support witnesses, they have a value out of all proportion to their real worth in the eyes of juries and assessors.'

"That is his experience, and I daresay, and I think it is probable, that his experience included some of that class of cases to which the Hon'ble Sir Griffith

Evans drew our attention. But I gathered that the conclusion the Judge of Hughli arrived at after his experience of large cases and small cases was that it was not an advantage to the administration of justice that these statements should be brought habitually to the notice of the accused and made the subject of cross-examination in Court. I cannot help myself thinking that legislation which is directed expressly for the cases of big zamindars is legislation directed for the meeting of specific cases such as the Hon'ble Mr. Chalmers yesterday very rightly deprecated. But there is another reason I have in my mind for supporting the amendment of the Hon'ble Mr. James which has only been very gently hinted at by the Hon'ble Sir Griffith Evans, and that is this. If the police find that the depositions they take are to be habitually shown to the accused and to be habitually made a means of cross-examination upon small points of discrepancy, the police will exercise the ingenuity which the Hon'ble Sir Griffith Evans has described, and they will refrain from making those records which are so useful to the Court at the present time. What they will do will be to make some record which will not be disclosed to anybody and which will be used by the District Superintendent of Police for his own assistance in the conduct and investigation of cases, but it will be kept carefully from the purview of Courts, pleaders and the accused. We know how the village-bania baffles the operations of the income-tax officers by keeping private accounts separate from the public ones, and I have no doubt that if we pass a law of this kind it will result in the preparation of secret records which is very much to be deprecated. The whole of the question is as to whether the view taken by the Allahabad High Court or the view taken by the Calcutta High Court is the best in the interests of justice, and when I find from the Report of the Select Committee themselves that the Governments of Bengal, of the North-Western Provinces, Madras and Burma, and most of the authorities concerned were of the opinion that the line taken by the Allahabad High Court was the proper one to adopt, I think we should be incurring serious responsibility in overriding them and refusing to accept the amendment of Mr. James."

His Honour the LIEUTENANT-GOVERNOR :—"After the Hon'ble Sir John Woodburn's speech there is very little left for me to say. There can be no doubt that the great weight of official opinion was in favour of the section as it originally went before the Select Committee, and for my own part I give my cordial support to the Hon'ble Mr. James's amendment and mainly for this reason : I do not accept the theory of a Magistrate's duties as enunciated here by one or two Hon'ble Members to-day. I deny that it is the sole duty of the Magistrate

to sit as what Sir George Campbell called a petty Judge and weigh the evidence put before him. That is not the theory which lies at the bottom of our Indian magistracy. It is a Magistrate's duty in all cases, it is his business, to get at the truth, and that is his function, and he is bound to use every means in his power to get at the truth. I would be quite content therefore that these statements should be considered by him as the police-diaries have to be considered, and if he in the exercise of his discretion sees anything in them which tells in favour of the accused or in favour of the prosecution then he should have authority to make use of them. I think it is a perfectly fair adjustment to say that the Court should inspect these diaries and itself cross-examine the witnesses upon them."

The Hon'ble MR. JAMES :—"I would only make one remark and that is about the words 'shall' and 'may'. As the Hon'ble Sir Griffith Evans has pointed out, there are absolutely two interpretations. The Hon'ble Mr. Chalmers pointed out that 'shall' and 'may' are antagonistic, and the Hon'ble Sir Griffith Evans will not say what a High Court may not do, but he thinks, in fact, that they will read the word 'may' as 'shall."

The Hon'ble SIR GRIFFITH EVANS—"No, I did not say that the High Court would say 'may' meant 'shall'. I said they might lay down rules as to the proper principle by which the discretion given by the word 'may' should be exercised."

The Hon'ble MR. JAMES—"Well, I venture to think, my Lord, that it would be better, if my amendment is less ambiguous than the Select Committee's draft to adopt it.

The Council divided:—

Ayes—10.

The Hon'ble Allan Arthur.
The Hon'ble Gangadhar Rao Madhav Chitnavis.
The Hon'ble Pandit Suraj Kaul.
The Hon'ble F. A. Nicholson.
The Hon'ble H. E. M. James.
The Hon'ble Sir A. C. Trevor.
The Hon'ble Major General Sir E. H. H. Collen.
The Hon'ble Sir John Woodburn.
The Hon'ble Sir James Westland.
His Honour the Lieutenant-Governor.

Noes—10.

The Hon'ble J. J. D. LaTouche.
The Hon'ble Sir G. H. P. Evans.
The Hon'ble Rai Bahadur P. Ananda Charlu.
The Hon'ble Sir H. T. Prinsep.
The Hon'ble C. C. Stevens.
The Hon'ble Joy Gobind Law.
The Hon'ble Pandit Bishambar Nath.
The Hon'ble Rahimtula Muhammad Sayani.
The Hon'ble M. D. Chalmers.
His Excellency the President.

His Excellency THE PRESIDENT :—The division is equal. I therefore give my casting vote for the proviso as amended by the Select Committee."

His Honour THE LIEUTENANT-GOVERNOR :—" May I ask that to clear up any ambiguity about the word 'may' the words 'as he may think fit' be inserted in the proviso."

The Hon'ble MR. CHALMERS :—" Or 'may if the Court thinks just'. It is not a question of what the Court thinks exactly fit but what the Court thinks the justice of the case requires. Those are almost the words of the English Case."

The Hon'ble MR. JAMES :—" That would certainly meet my position, my Lord."

His Honour THE LIEUTENANT-GOVERNOR :—" How would it do to say 'If the Court thinks it necessary for the ends of justice'? "

The Hon'ble MR. CHALMERS :—" I will accept the words that the Court shall on the request of the accused inspect such writings, and may then if the Court thinks it expedient in the interests of justice. "

His Excellency THE PRESIDENT :—" This is an amendment of which no notice has been given, but it can be put by suspending the Rules of the Council. "

The amendment was then put on the motion of the Hon'ble MR. JAMES and agreed to.

The Hon'ble PANDIT BISHAMBAR NATH moved that in the proviso to clause 162, sub-clause (1), of the Bill, as amended by the Select Committee, the words and figures " in manner provided by the Indian Evidence Act, 1872," be omitted. He said :—" Whether it is a question of discovery or evidence, the sections 162 and 172 have formed a theme for much discussion, and are, as they stand, calculated to deprive the accused of the right, which he now possesses, of calling for and inspecting statements made previously by witnesses to police-officers, and reduced into writing by them.

" I am aware that generally no previous statement can be used to impeach the credit of a witness subsequently examined, without proving such previous statement in manner provided by the Indian Evidence Act. But the right of an accused person to cross-examine the witnesses for the prosecution on their previous statements, is one to which he is in fairness entitled, and is essential in

the interests of justice. The Calcutta Bar, in their note dated the 24th February last, have, I think, observed rightly that the statements under section 161 ought to be, and, as a matter of fact, are, altogether separately recorded from those under section 172; and no clue is conveyed by them, as the Select Committee would seem to imagine, as to the names of informers or detectives, or the nature of their information. They are nothing more than the statements of witnesses who depose as to their knowledge of the occurrence."

The Hon'ble MR. CHALMERS:—"I must oppose this amendment and on very simple grounds. My hon'ble friend proposes to give these statements taken down by the police a weight in evidence which they have not got under the Evidence Act. We do not propose to amend the Evidence Act. I have already stated the reasons why no special weight should be given to these statements taken down by the police behind the witness's back, but my friend now wants to go further than the Evidence Act, and to elevate them into the position of depositions solemnly taken down by a Court of Justice and signed by the deponent."

The Hon'ble MR. LATOUCHE:—"The phrase 'in manner provided by the Indian Evidence Act, 1872,' refers to section 155 (3) of that Act and means that a previous statement must first be proved before it is used to impeach the credit of a witness. The Hon'ble Mover of the amendment wishes to dispense with the necessity of proof, and to use unproved statements to impeach credit. The Evidence Act is not being altered, and if these words be omitted it will be necessary to say 'and such statement *when proved* may be used to impeach the credit of such witness.'"

The Hon'ble SIR GRIFFITH EVANS:—"My Lord, I fail to understand the amendment altogether. I do not understand how any statement can be used except as provided in the Evidence Act, which is the only law in India as to evidence, and unless the Hon'ble Member is prepared to move to have the law of evidence amended in order to give additional credibility to these unverified statements, I really do not understand how they can be used, except under the Evidence Act."

The Hon'ble RAI BAHADUR P. ANANDA CHARLU:—"As far as I understand the amendment, it seems to be this. In every criminal case besides what the complainant or his witnesses say to the police, the manner in which the record

is prepared by the police is very often to be taken into account in judging of the prosecution as a whole. If it can be shown that the police-officer has been taking down the evidence of four people on a particular day and subsequently dropped those four and had four other people who he says were present at a particular offence, and by-and-by he mentions some other names, such discrepancies in the statement he has taken down would have a value in determining how far the account given by the police has been satisfactory or can be relied on. So far as the accused is concerned he is protected when he is given the right to impeach the credit of the witnesses when they are called, but apart from the purpose of impeaching the credit of the witnesses to impeach the manner in which the police themselves manipulating the case often helps the accused. For this purpose the entire record, apart from the truth or falsehood of the contents must be admissible. To secure this, as I understand, is the meaning of the amendment."

The Hon'ble SIR JAMES WESTLAND:—"I entirely agree with my friend the Hon'ble Rai Bahadur Ananda Charlu that if such or such a thing can be shown, then certain consequences should result. As I understand the amendment, the proposal is to accept the facts without their being shown at all. Under these circumstances I do not see my way to accept the amendment."

The motion was put and negatived.

The Hon'ble MR. JAMES moved that in clause 167, sub-clause (2), of the Bill as amended by the Select Committee, for the words "in the whole", in lines 6 and 7, the words "any one time" be substituted. He said:—"When an accused person has been arrested, the police are not allowed to keep him in custody for more than twenty-four hours and the Magistrate can remand him while the police are completing the enquiry, the object being to enable the Magistrate to be informed of what the police are doing, and irregularities may be prevented which the unfettered discretion of the police in keeping accused persons in custody might lead to. The original Bill, as circulated to the Local Governments, proposed that when the Magistrate remands a prisoner he should have the power to remand him for fifteen days at a time. The Select Committee have altered this to fifteen days on the whole. The Bombay Government consider this restriction very undesirable. I am using their own words:—'Since important cases arise in which the police require time for investigation and for the collection of evidence, while such cases would frequently be prejudiced by any such proceedings in Court as are contemplated by section 344 of the Code.'

"In other words, if Magistrates remand an accused for fifteen days you force the Crown to bring some evidence against him after fifteen days. Now of course the Bombay Government's opinion is very much greater than mine, but one can imagine that in many important cases like murder, where dark conspiracies, networks of wickedness have to be unravelled, it may be extremely undesirable to show your hand to the public, I say public, because the public are very much interested in bringing murderers and conspirators to justice, and as the Government of India at one time (judging from the clause in the original Bill) was of the same mind as the Bombay Government, I venture to hope that on reconsideration it will still remain in the same mind and leave it to the magistracy to remand the accused for fifteen days at a time until the prosecution is ready to produce its evidence. Cases will not be very numerous, but those cases which would come under the section are probably extremely important, and, I venture to think, that the idea which the Government of India first had was the right one."

The Hon'ble MR. CHALMERS:—"This is no doubt a matter for the Council to determine. It is a question which was discussed carefully by the Select Committee. The Select Committee have not cut out anything that was in the Bill. We have simply added the words 'in the whole':—

"The Bill merely reproduced the provisions of the Code of 1882. In revising it at Simla we made no alteration whatever in the Code of 1882, but when we got into Select Committee we found that different interpretations had been put on the words of the Code of 1882. We had consequently to put in words to decide as to which of these conflicting interpretations of the High Courts ought to be followed. We found that the High Courts of Madras and Calcutta had both decided that the meaning of the old section was this. A Magistrate may from time to time authorise the detention of the accused for a term not exceeding fifteen days in the whole. You might remand, say for two days, two days, and two days, but the total period was not to exceed fifteen days. On the other hand, in other parts of India it had decided in this way: a Magistrate may remand the accused in police-custody from time to time for periods not exceeding fifteen days at any one time, and the point for consideration in the Select Committee was whether we should say that he was to be remanded from time to time for a term not exceeding fifteen days as a whole or whether we should say that he was to be remanded from time to time for a term not exceeding fifteen days at any one time. After considerable discussion we came to the conclusion that we had better confirm the decisions of the Madras and Calcutta High Courts,

but it is a question upon which personally I can form no opinion whatever. It is a matter for people with Indian experience whether that is sufficient. Of course in England a man must be brought up before the Magistrate. The Magistrate can remand him as often as he likes, but if a man is arrested you must give some evidence to justify his arrest. The difficulty in India seems to be this that when he is brought up before the Magistrate and formal evidence is given—in England very often the only evidence given is evidence of the arrest—he cannot be remanded to police-custody, but has to go to the Magistrate's lock-up and not to the police lock-up. As to which is the most desirable course to pursue I cannot say; it is a matter for people with Indian experience."

The Hon'ble MR. NICHOLSON said:—"I oppose this amendment. Section 167 merely provides for the detention of a suspected person in custody of the police during the investigation which precedes the placing of such person before a Magistrate with some statement of the case against him, and for such purpose any Magistrate, whether he has or has not jurisdiction to try the case, may, for reasons duly recorded, authorize such preliminary detention. The Bill as amended by the Select Committee requires that such preliminary detention should not exceed fifteen days in all, at the expiry of which period the suspect must either be released or placed before the Magistrate having jurisdiction, with a report. Such report, however, need not be the final charge sheet and, in fact, is usually an occurrence report, nor is it necessary for the Magistrate to begin enquiry thereon: on the contrary, by section 344 he is expressly empowered to postpone such commencement and to give any reasonable number of remands of fifteen days at a time if reasonable cause is shown, and the *explanation* to section 344 expressly states, that if there is evidence creating a suspicion that the accused has committed an offence, and that further evidence may be procurable if a remand be granted, that is a 'reasonable cause' for remand. A man arrested, perhaps merely on suspicion, ought not to be detained indefinitely in custody under section 167 while the police are running round hoping to find out something: if they have found out something which casts reasonable suspicion on the person in custody, he may, under section 344, be detained for any reasonable time if there is a reasonable chance of strengthening the suspicion into proof; if they have *not* found out evidence which gives ground for action under the *explanation* to section 344, he should be released."

The Hon'ble MR. LATOUCHE:—"I also am opposed to this amendment. The Select Committee which revised the Code of 1882 has left it on

record that their intention was that power under section 167 should be exercised up to a maximum of fifteen days in the whole. For other postponements section 344 provides, and a Magistrate having jurisdiction may under that section remand the accused to any custody he thinks fit."

His Honour THE LIEUTENANT-GOVERNOR:—"I am quite satisfied, my Lord, with the provisions of section 344."

The motion was put and negatived.

The Hon'ble PANDIT BISHAMBAR NATH moved that in clause 172, sub-clause (2), of the Bill as amended by the Select Committee the words "but to aid it in such inquiry or trial" be omitted. He said:—"In moving this small amendment I may be permitted to refer to the remarks I have made in my note of dissent appended to the Report of the Select Committee. It is to be found at the bottom of page 8 of the Bill as printed here. It runs thus—

'*Clause 172* (2).—In this sub-section (2) the words "*but to aid it in such inquiry or trial*" should be eliminated. It is not just that a document, forming a part of the "brief" for prosecution, should be permitted to be looked into by a Court conducting an enquiry or a trial, in absence, or without the knowledge, of an accused person, when he or his agent can have no access to such a document, it being a "sealed book" to him.'"

The Hon'ble MR. CHALMERS:—"I must oppose this amendment on this ground. In the first place, if it were carried the section could not be construed at all. My hon'ble friend has not moved the proper words to carry out his intention. That is one ground; another ground is this. I think this is depriving the accused of a most useful safeguard. The Court is not to use the sediaries as evidence. It is to see if they will throw any light on the case which will help to attain the ends of justice. The ends to attain are two in number: one is the protection of the innocent and the other is to find out the guilty."

The Hon'ble SIR GRIFFITH EVANS:—"I think the amendment is based upon the idea that the Judge is the prosecutor, and that it is unfair to give him any advantage. I cannot accept that at all. I did suggest that where counsel is engaged on both sides the Judge should sit still and keep his eyes open, but I never suggested that he is the prosecutor. This section provides that he is to take these diaries to aid him in the enquiry; it means that he should aid himself for the purposes of justice, and there is no reason to suppose that he will use them for any other purpose."

The motion was put and negatived.

The Hon'ble MR. JAMES moved that sub-clause (3) of clause 195 of the Bill as amended by the Select Committee be omitted and that the figures 3, 4, 5, and 6 be substituted for the figures 4, 5, 6 and 7, respectively, at the commencement of the remaining sub-clauses. He said.—"The amendment I have given notice of is the omission of sub-clause (3) of clause 195. Under that section persons committed of giving false evidence in any Court cannot be prosecuted without the permission of that Court. Now apparently for no particular reason but merely with that passionate love of symmetry in code-drafting which actuates the Legislature very often, it is proposed to apply this rule to the abetment of such offences. It sounds symmetrical, but we too often find, I think, my Lord, that an amendment may go farther than we think, and if I might invite attention to a case, a very interesting one at page 122 of the Bengal papers, Your Excellency will see exactly what this amendment might lead to. The Magistrate in this instance points out that the persons who lay false cases and give false evidence in false suits in Court are the puppets, the tools, of some clever scoundrel who keeps in the dark, in the background, just as Sir Griffith Evans remarked just now that when two great zamindars go fighting they put up their servants as the nominal complainants or defendants. So in Bengal at the present moment there are persons who make it a trade to get up false cases, keeping themselves well out of the way, their names not appearing, and the Court which tries the suits knowing nothing about them. In this instance the Magistrate seems to have been energetic; to have been able to put salt on the man's tail and to get him two years' rigorous imprisonment; for the man had been instrumental in fabricating a false suit, a fact of which the Court that tried the issue was absolutely ignorant. I think, my Lord, that when a man goes into Court straight, gives his deposition, and makes claim, it is perfectly right, whether he lies much or whether he lies little, that it should rest with that Court that he should not be prosecuted without that Court's sanction; but the abettor of these offences, the man who stays behind and does not go into Court, he is like a person lurking with intention to commit any other offence; it seems to me that the Magistrate should have the power, especially as in this case, where the abettor hides in a different district and the Court knows nothing about him, to catch him and run him in. Unless any other great principle of which I am unaware is bound up in sub-clause (3), I venture to hope that the Hon'ble the Legal Member will accept the amendment."

The Hon'ble MR. CHALMERS:—"I think my hon'ble friend has spoken against the whole section and has missed the point of the particular sub-section he wishes to omit. In dealing with the whole section I am bound to say that the

Committee felt the greatest possible difficulty. They drafted it and redrafted it, and eventually—perhaps I may say in despair—they determined to leave it in the form in which it was in 1882. I agree that the whole section is somewhat anomalous. In ordinary cases anybody may prosecute anybody for any offence. But in the case of perjury or forgery the Indian Codes have laid down that the prosecution is not to be commenced without the sanction of the Court before which the perjury was committed, or before which it was attempted to use the forged document. They have further provided that, if the sanction of the Court is not granted, there may be an appeal. There are many advantages and many disadvantages in this, but as long as that rule is kept on the Statute-book and is to be observed I cannot see why, when you require the sanction of the Court to prosecute the principal offender, you should be allowed to prosecute the abettor without sanction. Under my hon'ble friend Mr. James's amendment, anybody would be able to prosecute an abettor, but no body excepting with the leave of the Court could prosecute the principal offender. It seems to me that his amendment is illogical as well as unsymmetrical."

The Hon'ble SIR GRIFFITH EVANS:—"I oppose this amendment. As pointed out by the Hon'ble Mr. Chalmers, if you keep the section at all this is the proper corollary, because it would be absurd to say that you were not to prosecute the principal and yet might prosecute the accessory. But in order to make out the significance of it, I must draw the attention of the Council to what is the real object of the section. In this country the Criminal Courts are habitually resorted to for private purposes, simply to bring a man into trouble and screw money out of him; to make him give up a claim or something of that sort, and one of the most frequent methods is to charge a man with having perjured himself in Court by making contradictory statements. Well, if they were allowed to go freely before some Magistrate who knew nothing about that case and bring these charges, the poor man would have to be tried. It is not a question of whether he would be acquitted or not, but a trial is an enormous cost to him. It is a very heavy business for him. It is everything for the man who wants to make a move in this game to be able to start. If he can start he does not care very much what comes of it in the end. He can bring enough discredit and cause enough loss to his adversary. The consequence is that it has been thought desirable in regard to offences said to be committed in Court to make the prosecutor get the leave of the Court which tried the case. An alternative charge of perjury is made. In one place he said something happened on Monday, and then at the end of about three hours cross-examination he says it was Tuesday, and then they want

to indict him on alternative charges of perjury. The Court that heard his evidence is able to form some judgment whether it was a case of wilful perjury or not, and will refuse sanction if it thinks the charge unfounded, and thus save the accused from shame and expense and the Courts from being made instruments of extortion. It is on account of that that we have section 195, and if we have section 195, it is quite evident that, if the Court is to give sanction before there can be a prosecution for the offence, it would be absolutely absurd to leave the prosecutor free to go at any man as accessory or abettor. Therefore there is no possible ground for this amendment."

The Hon'ble SIR HENRY PRINSEP :—"I also agree with what has been said against this amendment. My hon'ble friend who has proposed this amendment relies upon a solitary case, and he cites it as an example of the incapacity of the Civil Courts, or of the insufficiency of the Civil Courts to act in this matter. Now, my Lord, I have read this case very carefully, and my curiosity was excited by the amendment. I ventured to ask my hon'ble friend if he would tell me what was his object, and he gave me this particular case as reported by the Magistrate of Bogra, who seems to take great credit to himself for having to use an expression which I have heard to-day—'run in' the malefactor. Now, if you look at the facts of this case, there is no reason that I can see why the sanction of the Civil Courts should not have been obtained. The case was this: there was a man who brought a bogus pauper suit against an alleged debtor; and there was this Mephistopheles behind him. When the case was tried by the Subordinate Judge the former plaintiff disappeared, and the Subordinate Judge was very much impressed by what had taken place. He said there had been foul play in the case. Well, then, what happened? This Mephistopheles pursued this unfortunate defendant and tried to worry him and extort money. So the Magistrate says. He failed, and the man who was so persecuted and so evilly treated never took the trouble to complain on the subject. He is said to be afraid. Well, I am very sorry that the Magistrate who is so strong did not take compassion upon him, did not take him under his wing, and assist him to get justice. Now comes in the Magistrate, and he says that he heard something about the subject and he took it upon himself to act. He never tried the Civil Court at all. He had that contempt for the Civil Courts which some Magistrates unfortunately have in the mufassal. He says 'it was no use asking the Civil Courts, I will do it myself.' He started the case without any complaint before him and succeeded in convicting the accused. We do not know what the result of the appeal was, but we must take

it that justice was done. But if justice was done there was no reason why justice should not have been done if the sanction of the Civil Court had been applied for and obtained, and there is nothing to show that the Civil Court would not have given that sanction. It seems to me, therefore, that this case is not a sample case on which this sub-clause should be destroyed. It seems to me rather that the sub-clause is consistent with the whole frame of this section, and should therefore be retained, and I would especially draw attention to the next sub-clause that enables sanction to be given when an offence has been committed without even knowing the name of the person who may have committed or abetted any of the specified offences, supposing that the Court was satisfied that an offence has *primâ facie* been committed. The sub-clause says that the Court in giving sanction is not bound even to give the name of the accused. Therefore it seems to me there is no case made out against the law as it stands amended by sub-clause (3)."

The motion was put and negatived.

The Hon'ble SIR GRIFFITH EVANS moved that for sub-clause (2) of clause 222 of the Bill as amended by the Select Committee the following be substituted, namely :—

"When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 234 :

"Provided that the time included between the first and last of such dates shall not exceed one year."

He said :—"The object of this amendment, my Lord, is to amend the clause as it stands in the Bill in these points. As it stands in the Bill it is said it shall not be necessary to specify particular items *misappropriated*. Misappropriation does not cover quite the whole of the offences that are covered by the two sections, of breach of trust and dishonest misappropriation, and therefore it is desirable to have the wording slightly altered for that purpose. The only important alteration is a further addition of the words that any such charge shall be deemed to be a charge of one offence within the meaning of section 234. Section 234 provides that, when a person is accused of more offences than one of the same kind committed within twelve months, he may be charged with and tried at one trial for any number of them not exceeding three. Now I must explain to the Council what the difficulty is that has to be met. Now, in England there was an

offence called embezzlement, and this had technical rules of its own, and they arose from the archaic character of the old English common law, which was modified greatly to meet the exigencies of increased civilisation and the increase of property, and the various dealings with property. But it still retains many of its old characteristics, and the English Judges, in dealing with this question, are hampered with a great many old decisions with regard to larceny and embezzlement that they are bound to follow; but in the Penal Code there is nothing of the kind. Criminal breach of trust is committed when a man is entrusted with money and he deals with it wrongfully or in a manner opposed to the terms of the trust with a dishonest intention, and that it is all you have to prove. But in the English law it was different, and the reason of it was this—first of all they had larceny, and for larceny or theft it was necessary that there should be a specific thing stolen and that the taking should be wrongful. Now, when they came to deal with sums of money, of course they could not identify the actual shillings or sovereigns, but it was necessary to specify that a certain sum had been stolen, not to specify merely the number of shillings or pounds, but identify the sum in some way. Then, when they came to embezzlement, it was held that that differed from larceny in this, that the original taking was lawful. The money came lawfully into the hands of the man who afterwards converted it to his own use wrongfully and dishonestly, and that was the offence of embezzlement; and they held that he was to have the same particularity with regard to the sums embezzled, but there was very great difficulty in convicting where there was a running account, and where you could not put your hand on the specific item which had been misappropriated, although there might be no doubt of the misappropriation. Under these rulings you would have to specify the sums. There might be 500 sums, varying from one rupee up to Rs. 100. You had to take out some of these sums and say he has misappropriated these sums. In many cases, however, it is impossible to do that. A man may have your money as your agent, in *a till or a bag*, all mixed up together. He receives 500 different sums in the course of the month, and one day a creditor comes to him and says: 'I will put an execution in your house if you do not pay me what you owe me.' He puts his hand into the bag and pays the creditor Rs. 200 out of your money. You must say, out of all the 500 different sums he put into the bag, to which of these sums the Rs. 200 he took out was attributable. The criminal himself could not tell you that. He could only say: 'I took out Rs. 200, and God only knows — for no one else can tell you — to which of the 500 sums I had received in the course of the month it was attributable. All I know is that it came out of the bag.' Now that was one difficulty. This was got over to a certain extent by case law. Where there had

been a weekly or monthly accounting, you were allowed to charge - although there might be 500 items in the weekly account—the prosecutor was allowed to charge one offence committed by failing to account at the end of the week, although he was not able to say on what day the accused had taken the money, or which particular items he had taken. But when there was no weekly accounting or anything of that sort, the difficulty still arose, and then there came this further difficulty that you were not allowed under section 234 to have more than three offences of the same kind, and so in a recent case in the 24th volume of the Calcutta Series you will find a most interesting case in which there was a charge of embezzling Rs. 9,000. It appeared from the depositions that the Rs. 9,000 must have been made up of many hundred items, and the counsel for the prisoner took objection that the charge was bad. The learned Judge could not make up his mind, so he went and consulted the Chief Justice. Then he came back and said that he found, according to the ruling and practice of the Court, that it was impossible to have this charge, because it was uncertain which particular items the accused had embezzled. It was evident, however on the depositions that there must have been very many more than three items to make up the Rs. 9,000, and therefore the charge was not admissible. In order to meet these difficulties the section 222, as it stands in this present Bill, was introduced, and on looking at it I thought these two points could be altered for the better.

"It has been objected to this whole section, and not merely to my amendments, that we are throwing the onus upon the accused by bringing a charge against him of a deficit in his accounts. But the answer, I apprehend, is this, that the Penal Code says what the elements of the offence are, and unless you prove the dishonest intention to the satisfaction of the jury, a man cannot be convicted, and it is not right to say that you throw the onus on him by saying that there is a deficit in his accounts. It is for the jury to judge whether what you have shown amounts to a *prima facie* case. I can represent it in this way: a man is my agent, he has ₹50,000 a month passing through his hands. He sends me his account, and apparently is 8 annas short. Well, no Judge would consider that there was any evidence of an offence there to go to the jury. But if he spent ₹20,000 out of ₹50,000 and could give no account of it, the Judge would take a very different view of it, and so would the jury."

The Hon'ble MR. CHALMERS:—"I am quite willing to accept this amendment. The Hon'ble Member and the Select Committee have one and the same

object in view. I think the amendment proposed by the Hon'ble Member carries out that view a little more effectually perhaps than the amendment suggested by the Select Committee. On that ground I have no hesitation in accepting the amendment, and I further agree with him in this that the object of our amendment is not to amend the Penal Code, but merely to get rid of a technical difficulty in framing a formal document, *viz.*, the charge. The offence with which a man is charged is dishonestly misappropriating trust money or money otherwise entrusted to him, and the jury or the Judge who tries the case must be satisfied that he has dishonestly misappropriated the money. If the Court is satisfied on the evidence that the man has had the money entrusted to him, and has dishonestly converted it to his own use, then no technical difficulty in drawing up the charge ought to stand in the way of punishing that man. The act which is made an offence by the Indian Penal Code must be proved, but when it is proved we do not wish any technical difficulty to stand in the way of stating the offence, and this section only relates to the stating of the offence and not to the proof of it."

The Hon'ble SIR HENRY PRINSEP:—"I fully recognise and appreciate the necessity for some legislation in regard to this matter, but I recognise also from the tone of the address to this Council of my hon'ble friend who has proposed this amendment that he anticipates some difficulty in putting this portion of the law into operation. I also have some apprehensions, and my apprehensions are that it will operate severely against the defence of a person under trial. Now I do not wish it to be supposed that I have any particular sympathy with a man who has committed embezzlement or any other criminal offence; still I maintain that he is entitled to have a fair trial, and it seems to me that by enabling the prosecution to lump into one offence transactions that may extend over one year, and to charge him with not any specific act such as constitutes an offence, but to charge him in the lump with having failed to account for or to deilver a certain lump of money which is found deficient on the taking of his account may lead to serious complications in the criminal trial, and will call upon a Court of Session as an Accounting Office to decide many intricate issues, which may be more properly tried in a civil suit. I am not prepared to oppose this amendment, but I venture to state some of the difficulties which have occurred to me. I shall be glad to give such a new law a fair trial, and if it succeeds I shall be the first to acknowledge that my apprehensions were groundless."

The Honbl'e MR. STEVENS:—"The criticisms of the Hon'ble Member who has spoken last are of a purely negative character, and I think it would have

been more satisfactory if he had favoured the Council with some suggestions as to how the difficulty in question might be got over."

The Hon'ble SIR GRIFFITH EVANS:—"I beg to say one word in regard to the apprehensions of the Hon'ble Sir Henry Prinsep. He is afraid that it will bear hardly on the accused if he has a vague charge like this brought against him, but I wish to point out that if you can bring a more specific charge against him, you can actually find out that he has embezzled a particular sum of money, you will always charge, that because it is so much easier to prove. But there are certain cases as I have said in which it is not possible to find the particular items embezzled, and it is not possible to find that there has been any accounting within the year. Then the matter stands as I said, that you have got the rupees as it were in a bag and no human being—neither the criminal himself nor anybody else—can say to which particular items what he took is attributable. Under these circumstances there should be some means of prosecuting; there must be some charge which the Courts cannot throw out. As soon as the Magistrate or Judge finds that it ought to be a civil case he will dismiss it and tell the prosecutor to go to a Civil Court for his remedy."

The motion was put and agreed to.

The Hon'ble MR. JAMES moved that in clause 227, sub-clause (*2*), of the Bill as amended by the Select Committee, after the word "alteration", in line 1, the words "or addition" be inserted.

He also moved that in clause 228 of the Bill as amended by the Select Committee, after the word "alteration", in lines 1 and 9, the words "or addition" be inserted.

He also moved that in clause 229 of the Bill as amended by the Select Committee, after the word "altered", in line 1, the words "or added" be inserted.

He also moved that in clause 230 of the Bill as amended by the Select Committee, after the word "altered", in line 2, the words "or added" be inserted.

He also moved that in clause 231 of the Bill as amended by the Select Committee, after the words "such alteration", in line 6, the words "or addition" be inserted.

He said:—"These amendments are entirely verbal amendments. They are recommended by the High Court of Bombay and the Government of

Bombay, and I am induced to move them to save the time of High Courts in the future from giving divergent opinions upon what otherwise is very plain English. The charge, My Lord, under certain circumstances may be altered, and the Select Committee have very properly inserted the words that the alteration may include an addition. Under the following sections when a charge has been so altered or added to certain consequences ensue. If it is unfair to the accused to go on with the trial on the new charge, the trial may be postponed, so that he is given time to prepare his defence. Throughout the sections the words 'altered' and 'alteration' are used. A plain man would think that a charge which had been added to was altered, but the High Courts will not say so. They will say—at any rate, the Bombay High Court seems to think—that the words 'add to' having been used in clause 227, that unless the corresponding words run through all the remaining sections, a Court may say that sections 228 and 229 do not apply to a harge that has been added to, and that consequently an accused may be deprived of the benefit which sections 228 and 229 undoubtedly give him. It is a purely verbal amendment. As the Government of Bombay have thought fit to recommend it, I venture to lay it before the Council for their consideration.'

The Hon'ble MR. CHALMERS :—"I see no objection to the Hon'ble Mr. James's amendment. I should have thought myself that an addition was an alteration. If I had an old house, and built a new wing to it, I think that would be an alteration. But I have no objection to adding these words. I should have thought that 'alteration' included 'addition', but as doubt is expressed about it by the Bombay High Court I see no objection to my Hon'ble friend's words."

The Hon'ble SIR HENRY PRINSEP:—"I think it necessary in explanation of the Report of the Select Committee to remind my friend who has just spoken that several of its members were in favour of these words being added. Mr. Chalmers was against the insertion of these words as unnecessary in consequence of the new definition of 'charge'. It was the absence of such a definition which induced the Bombay High Court to put the interpretation which has been alluded to by my Hon'ble friend to the right (Mr. James). The Select Committee on this representation did not adopt what is the subject of this amendment, though some of us then thought, and still think, that the Bill in this respect was obscurely expressed, and that it would be more convenient that the words should be added to prevent any possible misunderstanding."

The motion was put and agreed to.

1898.] [*Mr. James.*]

The Hon'ble MR. JAMES moved that to clause 247 of the Bill as amended by the Select Committee the following proviso be added, namely :—

"Provided that, where the complainant is a public servant and his personal attendance is not required, the Magistrate may dispense with his attendance, and proceed with the case."

He said :—"My Lord, this amendment is asked for by the Government of Bombay. It is partly to relieve public servants from unnecessary waste of time, and partly to prevent cases in which prosecutions are laid on behalf of Government —for instance in the case of offences against stamp, excise, forest and other laws—from being thrown out at once because the prosecuting official has got duties elsewhere. One of the Bombay officers whom I may quote remarked on the section :—

'When public servants are the complainants the "shall" is too strong. Take the case of a District Ábkári Inspector, or a Forest Ranger, who lays a complaint, against some one, of an ordinary abkári or forest offence. Under section 247 that Government servant has to abandon his other and more important duties and dance attendance at the Magistrate's Court on *every* day on which the case may go on. The Magistrate cannot excuse his attendance after the first day, he cannot dispose of the case in his absence, the most he can do is to adjourn the case to some other day when he *will* be present. I know at least one Magistrate—and a First Class one too—who, if the original public servant who laid the complaint is transferred, will not accept the new incumbent as the 'complainant," but demands that the transferred man shall attend, or the accused will be acquitted. This is no doubt an extreme case. But, nevertheless, the section should, I think, be so altered as to *empower* the Magistrate to acquit because the complainant is absent, but not to *compel* him to do so. And a paragraph should be added that when a public servant lays a complaint in his official capacity, his successor or *locum tenens* is to be considered the complainant for purposes of this section.'

"And from the Punjab comes a similar complaint :—

'There is no definition of complainant, so, read strictly, if the person who makes the complaint is absent on any day of hearing, the complaint is dismissed. It is advisable that the section be drafted in accordance with its meaning as it particularly affects cases under the Municipal Act. Such cases have to be instituted on complaint by some officer of the Municipality concerned, for instance, the Secretary. It has been held by some Courts that should the Secretary not appear, although the case is being conducted by the Municipal Pleader, the complaint must be dismissed. Though section 495 (2) allows a prosecution to be conducted by a pleader, yet section 247 insists that the complainant must be present.'

"The amendment is a small one, My Lord. It will enable the complainant having laid his complaint to go about his business, and if the Magistrate wants him the Magistrate can send for him at any time, but to make him waste his time dancing attendance on the Court is conducive neither to public convenience nor is it necessary in the interests of justice."

The Hon'ble MR. CHALMERS:—"This proposition seems to be a question for the Council to consider. It seems to me a reasonable proposition. It gives a Magistrate discretion where a public servant's evidence is not required to dispense with his attendance. Of course if his evidence is required the Magistrate must decide to adjourn the case or dismiss it."

The Hon'ble MR. NICHOLSON said:—"I concur with this amendment but on a ground different from those mentioned by the Hon'ble Mover of the amendment. In forest, excise, and similar cases a great number of unnecessary adjournments are given by Magistrates, with infinite annoyance and expense to parties and witnesses, simply because the complaining officer, who may have no direct knowledge of the affair, is not present, being detained by public duty elsewhere. The amendment will take away one great source of hardship to parties under prosecution for petty offences."

The Hon'ble MR. STEVENS:—"My Lord, I beg to support this amendment, which commends itself to me as highly desirable in the interests of the public service."

The motion was put and agreed to.

His Honour THE LIEUTENANT-GOVERNOR OF BENGAL moved that in clause 254 of the Bill as amended by the Select Committee, after the words "taken and made" the words "or at any previous stage of the case" be inserted. He said:—"The amendment which I propose in section 254 is most important. It is admitted on all hands that the privilege of recalling witnesses for the prosecution now freely accorded to the defence is constantly abused in the mufassal Courts, and it affords opportunities of tampering with witnesses and bringing the pressure of inconvenience to bear upon them, and that it ought to be restricted. The section as amended does something to remedy this evil, but I venture to think that a suggestion thrown out in the letter of the Bengal Government offers a further and reasonable safeguard:

"Mr. Bolton wrote:—

"I am to invite attention to the suggestion of some of the officers, to which the Lieutenant-Governor sees no objection, that the Magistrate should be authorised to frame the charge as soon as he is satisfied that a *primâ facie* case exists against the accused without necessarily first completing the examination of all the witnesses for the prosecution. The remarks made by Mr. Nolan, the Commissioner of Rajshahi, on this point are here reproduced:—

'The provision made in section 257 for diminishing the abuse of the right to recall witnesses for a second cross-examination will be of special use in Bengal. If it is not too late to offer such a suggestion, I would propose a further change with the same object. At present a Magistrate cannot frame the charge until the evidence for the prosecution is complete (section 254), and the defence has a right to reserve cross-examination until the charge has been prepared. It very commonly happens—indeed, it is the rule rather than the exception—that all the witnesses for the prosecution do not attend at the first hearing, and it is then in the power of the counsel for the prisoner to send those present away subject to the obligation of attending again for the cross-examination. It is the fixed policy of many mukhtars to exercise this privilege whenever they can, with the effect of increasing expenses and giving a chance for their clients to get at the witnesses, to arrange a breakdown in cross examination. I would give the Magistrate the power to prevent this practice by framing the charge as soon as the crime imputed has been accurately ascertained, although the evidence by which it is to be established has not been completely heard. It ordinarily happens that the imputation is patent on the face of the complaint; it has been entered in the summons or charge sheet of the police; perhaps special sanction for its entertainment has been given under the Criminal Procedure Code, sections 195, 196, 197, 198, 199, or Chapter XXXV. Except in the rarest cases, the accusation has been thoroughly ascertained at the end of the first day's hearing, and the Magistrate is then in as good a position as he will ever be to prepare the charge. Why, then, should he be precluded by law from doing so? I see no advantage in this; and the disadvantages are obvious. The witnesses are harassed by two journeys when one would suffice, expenses are accumulated, there is some risk that they may not again be forthcoming when required, they may be tampered with in the interval, and the cross-examination, when it comes at last, is always bad, the mukhtars having forgotten what was said in the examination-in-chief. If it be said that the Courts may abuse their discretion by framing the charge at too early a stage, I would reply that the tendency of Deputy Magistrates is in the opposite direction to postpone this troublesome process as long as they can.'

"There is a very good article on the subject in the *Statesman* newspaper for the 12th March, 1897, from which I should like to read a few extracts as showing the effect which the provisions of the Code have had even in the presidency-towns (I have ascertained that the Public Prosecutor entirely confirms the statements made):—

'In 1877 the Legislature, in order to regulate the procedure and increase the jurisdiction of the Courts of the Magistrates in the presidency-towns, passed the Presidency Magistrates Act (IV of 1877). By this enactment, in cases in which a Magistrate had power to impose imprisonment for a term exceeding six months, a formal charge was necessary, and it could be drawn up *as soon as the Magistrate was of opinion that a primâ facie case had been established against the accused person*. It was not necessary for a Magistrate, before drawing up a charge, to examine more witnesses than were sufficient to

convince him of its truth. He could then draw up the charge and call upon the accused to plead. If the accused claimed to be tried, he then had to enter upon his defence, and to commence *there and then* to cross-examine the witnesses for the prosecution.

'Now, it is right and proper to secure to the accused a full opportunity of cross-examining the witnesses for the prosecution *after* he has been informed of the nature of the specific charge which he is required to answer; and it will be observed that, under the Act already mentioned, this opportunity is afforded him at an early stage of the case. But the Legislature has, by the present Criminal Procedure Code, made an entire alteration in the law, and opened a door to temptation, bribery, and a host of other evils. Any guilty man can, with the assistance of an unscrupulous and dishonest practitioner, not only inconvenience and harass the prosecution, which is a small matter, but what is worse, defeat the ends of justice.

* * * * * * *

'A prosecutor is, under the present law, at this disadvantage, namely, that he has practically to prove his case up to the hilt, and then close it, without the possibility of knowing what defence is going to be set up. When, in the course of the defence, he does discover the case set up by the accused, and wishes to rebut it by further evidence, he is told that he has already closed his case. There is no provision in the present Criminal Procedure Code empowering a prosecutor to call further evidence to contradict the case set up by an accused; but by section 540 a Magistrate conducting a trial in a warrant-case has the power to call any person as a witness at any stage of the trial.

'Now let us see what advantages the foregoing procedure places in the hands of an accused person, and how he can avail himself of them if he wishes. We will assume, for the sake of argument, that he has really committed the offence charged against him. Having heard the whole of the case for the prosecution, all he has to do is to apply for an adjournment and get a day fixed for the cross-examination of the witnesses for the prosecution. In the meantime he can, with the aid of his friends and advisers, more especially if he has money or influence, tamper with and buy over the witnesses for the prosecution, or the most important of them, and then proceed to concoct such false defence as may seem best suited to the occasion.

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'Applications to recall witnesses are made to cause delay, harass the prosecution, and in the event of the Court refusing to comply with the request, to raise a ground of appeal.

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'Now, what we maintain is this: that the abuses to which we have called attention are the result of the legislation which compels the Magistrate to frame a charge at so late a stage of the trial and puts it in the power of an accused person to reserve cross-examination of the witnesses for the prosecution till the close of the case for the prosecution. Cross-examination might safely be reserved in enquiries into cases exclusively triable by a High Court; but in all other cases the proper and legitimate time for cross-examination of a witness is directly after his examination-in-chief. If a man is innocent, he knows from

the first what his defence will be, and he cannot therefore be prejudiced by disclosing it. On the other hand, a guilty man has everything to gain by delay, and the Code of Criminal Procedure, in its present state, affords him that advantage.'

"It seems to me perfectly reasonable that the Magistrate should frame the charge as soon as he sees what the nature of the offence imputed to the accused is, and I propose to empower him to do so, just as under section 253 (*2*) he can discharge the accused at any stage. The amendments in section 256 are merely consequential."

The Hon'ble MR. CHALMERS :—"This is clearly a matter for the Council to consider, and I certainly sympathise strongly myself with the arguments His Honour the Lieutenant-Governor has put forward. At home the procedure adopted by section 251 is unknown. If a Magistrate is going to try a man himself, the man is charged as soon as he is put into the dock. The information gives the nature of the offence the man is going to be tried for, and I myself cannot see why a distinction has been drawn in India between trial on summons and warrant-cases in this respect. I quite agree that in warrant-cases you want a full record of the evidence. But why the procedure should be different I cannot myself understand. The difference is an arbitrary one. In a summons-case the man is told when he is brought into the dock what he is charged with, and I do not see why the same procedure should not be followed in warrant-cases. I brought this matter to notice of the Select Committee, but the members said that the procedure under which a man first of all took the evidence of the prosecution, then framed a charge, then, so to speak, committed the accused to trial before himself, as though he was a different person altogether, was so sanctioned by usage in India, that it would be impossible to go back on it. However, the amendment proposed by His Honour the Lieutenant-Governor seems to me to be a reasonable compromise between what I venture to think is the proper procedure and the procedure which long usage has sanctioned in India. There may be reasons that I am not aware of why, when a warrant-case is being tried by a Magistrate, that Magistrate should be considered to be two different persons, and should commit the case to himself. But I have no doubt that various Hon'ble Members who have Indian experience will be able to throw some light on this doubtful, and to me somewhat obscure, question."

The Hon'ble SIR GRIFFITH EVANS :—"I quite agree with His Honour the Lieutenant-Governor's amendment."

The Hon'ble RAI BAHADUR P. ANANDA CHARLU:—"I have serious doubts about the soundness of the amendment.

"The following are my reasons. It is a principle of criminal law that no accused person shall be called upon to state what his defence is before he is charged. But it is the duty of the accused to indicate his defence by the line of his cross-examination. To call upon him to finish his cross-examination before a charge is framed, as he must do if the amendment is accepted, is virtually to take away his right not to divulge his defence if possible and get rid of the prosecution. The difficulty is removed by his being allowed to conduct so much of his cross-examination as is directed to show the prosecution is unsustainable on its own merits. Thus there is in reality a great saving of time. This is my experience. Very often, many Magistrates go into the defence when it is once indicated, even when the prosecution is rotten, to avoid revision by High Court and remand. Thus there is often a considerable waste of time and needless expense to the parties. I can give a number of cases which I know of, but I think it is unnecessary."

The Hon'ble MR. JAMES:—"I only wish to say how very strongly indeed I support the amendment of His Honour the Lieutenant-Governor. If it leads to the defeat of justice in Calcutta, the Council may think what it means in the North-Western Provinces or the Punjab—countries of vast distances and terribly severe heat. In Calcutta the Public Prosecutor or the Counsel for the Crown can easily get a man from round the corner, but what the Bill as it stands means is that the evidence for the prosecution may be taken, the charge made, and then it is to be at the option of the counsel for the prisoner to recall all those witnesses from fifty or sixty miles away. As the Code at present stands the Magistrate is not to make the charge until he has taken all such evidence as may be produced in support of the prosecution, and also all such other evidence as he himself may consider will throw light on the case. Now it must be familiar to every gentleman here who has ever tried cases in the mufassal that very often we have cases up with a complainant and four or five witnesses, and everything looks satisfactory, so satisfactory indeed that the Magistrate does not quite know whether it is true or whether it is all false from beginning to end, and he says 'Well, I won't charge the man until I have sent for one or two respectable persons who must know something about it.' In the meantime the witnesses have gone home, perhaps fifty or sixty miles, to sow their fields and attend to their irrigation operations, and then as soon as the Magistrate is satisfied about the nature of the offence it rests with the

accused, who had the opportunity all the time of cross-examining the witnesses, it rests with him to send for them back from their villages again. Now, my Lord, it is very easy to legislate, but you do not very often see what it means. It means in nine cases out of ten ruin to respectable people if they are not to look after the irrigation of, say, 10,000 acres at a critical time. It means ruin to them to be dragged about, and the result will be that when a case of cattle-theft or murder occurs in a village the zamindar will have the people up, and will say to them, 'You know what happened in the last case: my neighbour from the next village caught a professional, stealing camels. He collared him, sent for the Police, and went up to the sahib's camp thirty miles away. The sahib could not examine the first day: the second day his evidence was taken and he came back again, and then when he was in the middle of opening his canals he was sent for back again at the bidding of the accused, and then he had to go to the Sessions Court after that.' 'Now,' he will say, 'Why should we put ourselves to this enormous trouble for the sake of the Government? Let us give the man a thrashing, or fine him or fine his people. Anyhow, let us settle it amongst ourselves'. That will be the result, my Lord. You will simply not get crime reported, witnesses will refuse to give evidence at all, and crime will be suppressed and go unpunished. Vakils are past-masters in the art of using the provisions of the law to defeat it. When a case comes up, and the complainant and his witnesses are waiting outside the Court, the Vakil or his clerk will siddle quietly up to them, and say 'You are going to give evidence against so-and-so, are you? Very well, I shall not cross-examine, and you will all have to come back next week. Better think over what you are going to say,' and we know what the result will be. So I hope both for the protection of witnesses and in the interests of justice that His Honour the Lieutenant-Governor's amendment will be accepted. I have got two extracts from the Bengal papers which prove—the papers reek with proof—of the way in which the existing law is abused.

"A Magistrate says:—

'I am absolutely in favour of restricting this right of cross-examination, which, as far as I have seen, is utilised in nine cases out of ten, purely for purposes of delay or to create an imaginary case of hardship on its refusal. The way this section is abused in Suburban Calcutta Courts is remarkable. I would even make section 257 (2) stronger and say "unless the accused can show to the satisfaction of the Magistrate that some new point has arisen since such cross-examination or opportunity of cross-examination which it is necessary for the purposes of justice to elucidate."'

"And the Judge of Durbhanga says:—

'The amendment (that is as originally proposed in the Bill) will, if carried, be one of the most satisfactory pieces of legislation ever enacted in India. The way in which witnesses were recalled in Durbhanga, for example, for cross-examination, weeks, sometimes months, after the affair had happened, was simply scandalous. I am, however, afraid that the effect of the amendment will be whittled away, under the concluding portion of sub-section (*2*), section 257, and I would therefore omit the words "unless the Magistrate considers that such application should be refused on the ground that it is made for the purpose of vexation or delay, or for defeating the ends of justice." If this is not done, witnesses will be recalled as freely as ever.'

"The Lieutenant-Governor's amendment, I imagine, means that as soon as the witnesses have given their depositions and the Magistrate knows what it means—the stealing of a watch or knocking a man down or whatever it is—that the charge will be framed, and that the accused can cross-examine on that charge, and that afterwards when the accused is making his defence he shall not have the right to call for them, as the Bill gives it to him, without the sanction of the Magistrate. I trust therefore that the Council will pass this amendment, as it is one very urgently required in the interests of those poor creatures, the witnesses, who receive far too little consideration at the hands of the law or the Courts."

The Hon'ble SIR HENRY PRINSEP:—"In the course of a long service I have, had many instances brought to my notice of the annoyance and harassment that witnesses are unnecessarily put to, and I have realised the injurious effect it must have upon the administration of justice by making persons reluctant to assist in it by becoming witnesses. When the preparation of this Code was commenced, my first care was to try to relieve persons who from the accident of their having in some way come in contact with the commission of an offence had become witnesses before a Criminal Court. My attention was principally directed to the amendment of section 257 so as to prevent, if possible, a witness before a Magistrate being unnecessarily summoned twice for the purpose of being cross-examined. There is no part of this Bill that has received such opposition, and I may say such unreasonable opposition, as this section as it was originally drafted. It certainly in its terms went a little farther than I desired, but it was sound in its original intention, and I was much disappointed when the Select Committee accepted in the place of the section as originally drafted, the section as suggested by the High Court of Calcutta. I should have preferred to leave the law as it was in the Code of 1882. The Lieutenant-Governor's amendment is, in my opinion, a decided improvement on the Bill, but I think that

there are difficulties in the way of putting it into practice, and I wish the Council to consider these difficulties so as, if possible, to meet them. The matter requires some consideration. The Hon'ble Law Member has given me an opportunity to explain our practice in regard to the trial of cases before a Magistrate, and especially the distinction between the trial of a summons-case and of a warrant-case, and the reason for this. Now, the first reason is that a summons-case relates to an offence punishable with fine or imprisonment for a term not exceeding six months. Such an offence is therefore, from its nature, a comparatively trivial offence, to be tried ordinarily by a somewhat summary procedure, and when a Magistrate is vested with special powers, he can try such an offence under what is termed summary procedure—a procedure more summary even than the ordinary trial of a summons-case. On the other hand the trial of a warrant-case is more formal and perhaps more complicated, because it relates to an offence for which a Magistrate can pass sentence up to two years ; and not only that, it often relates to a very grave offence for which the extreme imprisonment allowed by law may be for ten years. There is not in Indian law a broad distinction, such as in England, between felonies and misdemeanours. We have three classes of offences,—the first class consists of offences triable only by Magistrates, which, as a rule, are summons-cases ; the second class consists of offences triable both by Magistrates and Courts of Session, which are warrant-cases, and for some of these offences the law declares that the punishment may be imprisonment for ten years ; the third class consists of cases triable only by a Court of Session. The Legislature has declared that the trial of an offence of the second class, a warrant-case, shall be more elaborate than for a summons-case ; and that, except in some instances specially provided for by section 260, it shall not be in the form of a summary trial. The reason for this seems to be that, as for the nature of the offence an appealable sentence will almost always be passed, the accused is entitled to have placed before the Appellate Court a record which fairly represents the whole evidence against him. It also not unfrequently happens that from the development of a case, as the evidence is being taken, the offence assumes a greater gravity than it originally presented, and the Magistrate who, in the first instance, may have thought that he should himself try it, finds himself compelled to commit it for trial by the Court of Session. In such a case it is always necessary that the Court of Session should have before it a more complete record than that of a summary trial, so as to be able to compare the evidence given in the Magistrate's Court before commitment with that on the Sessions trial. Moreover, it must not be forgotten that in some parts of India Magistrates are specially empowered to pass

sentence up to seven years which may be in transportation, and some regular procedure not of a summary character must be prescribed for such trials. Under the present law such Magistrates hold these trials under the form prescribed for warrant-cases.

"The difficulty which presents itself to me in the amendment arises in the trial of cases regarding offences which are triable by a Magistrate or Court of Session. The Magistrate has jurisdiction to convict or acquit, but until he has heard the entire evidence for the prosecution he is not in a position to determine whether he shall hold the trial or commit the case to the Court of Session. If he draws up a charge he must convict or commit or acquit He cannot then discharge the accused. Now, it has frequently happened that in cases of this description a Magistrate takes an erroneous view of the evidence, and under the present law discharges the accused. The present law provides an easy remedy to repair such an error, for it enables the High Court, Court of Session or District Magistrate to consider such cases as Courts of Revision, and, if necessary, to order a further inquiry to be held, which means that the proceedings are reopened. A charge can then be drawn and a trial held as of a warrant-case, but that would happen only after all the evidence of the prosecution had been taken and a *primâ facie* case had been established for the accused to meet or the case may be committed to the Court of Session. But this will not be possible, if under the amendment a charge is drawn before the Magistrate is in a position to judge whether he shall try the case himself as a warrant-case or deal with it as a case in which he is holding an inquiry as in a Sessions case, and if on an erroneous view of the evidence he finds that no case has been made out by the prosecution he must acquit, and then the only course to remedy a failure of justice from his having acted on an erroneous view of the evidence will be either by an appeal on the part of the Local Government against the order of acquittal or by application to the High Court as a Court of Revision. The remedy will be much more difficult. The Local Governments very properly are reluctant to appeal against orders of acquittal, and I believe refuse to do so except in cases of importance or of gravity. On the other hand, in an application to the High Court as a Court of Revision against an order of acquittal, the Prosecutor is in a very different position from what under the present law he would be if he were moving that Court, or even an inferior Court, against an order of discharge. The result of this amendment if it be accepted in its present form, will, I fear, be that justice will suffer from placing too large a discretion in the hands of a Magistrate to deal with such a case before he has become acquainted with its real character after hearing the

whole of the evidence for the prosecution; and if he acts precipitately or yields carelessly to the importunities of a pleader for the accused so as to draw up a charge before the evidence of a case has become developed, a failure of justice will frequently occur, for which it will be almost impossible to obtain a remedy. On the other hand, under the present case, an easy remedy is provided, the order challenged being a discharge, and not an acquittal. If some course could be devised for meeting this difficulty, I should heartily welcome the amendment of His Honour the Lieutenant-Governor, because it would remove what has become a scandal to the administration of justice, the harassment to which witnesses are often unnecessarily subjected by allowing an accused to recall them for a second cross-examination, and for no other purpose than to entangle them and to take advantage of defects of memory which from the lapse of time are inevitable."

The Hon'ble PANDIT BISHAMBHAR NATH :—"I beg to oppose the motion, as, in my opinion, the insertion of the words suggested to be put in by His Honor the Lieutenant-Governor of Bengal would operate to the prejudice of the accused. I would, therefore, leave the clause to stand as it is."

His Honour THE LIEUTENANT-GOVERNOR :—"I will only say that I am well satisfied with the course of the discussion. I would point out, with reference to the remarks of my Hon'ble friend Mr. Charlu, that what we have provided for is simply that the Magistrate should have discretion to frame a charge as soon as he knows the nature of the offence, and that the amendment has not exactly the force the Hon'ble Member attributed to it. There is no doubt, as the Hon'ble Sir Henry Prinsep has pointed out, that the effect of an order of acquittal is different from the effect of an order of discharge. If after the charge is framed the Magistrate finds the accused not guilty, he must record an order of acquittal. As far as the Government and those interested in the administration of justice are concerned, I am prepared to accept the inconvenience, because I consider the inconvenience caused by the present practice is very much greater. I see no reason to grieve if the accused gets the benefit of a full acquittal instead of a discharge. The Government has the right of appeal against the order of acquittal, and there is also, as was pointed out, the power of revision, but the case could be fully met if it were thought desirable by adding to section 258 these words. Section 258 stands thus :—

'(1) If in any case under this chapter in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal.'

'(2) If in any such case the Magistrate finds the accused guilty, he shall pass sentence upon him according to law.'

"Then you might add 'i he is not satisfied of such guilt he shall discharge the accused.' But I do not think really it is necessary myself. I am quite content to leave my amendment as it stands."

The motion was put and agreed to.

The Hon'ble RAI BAHADUR ANANDA CHARLU moved that to clause 255, of the Bill as amended by the Select Committee, the following proviso be added, namely :—

"Provided that in cases under section 124A of the Indian Penal Code the accused shall be committed to the sessions if he claims to be tried by such a Court or he be tried with the help of a jury, if he claims so to be tried."

He said :—"We have been alternating during this session between two propositions, *viz.*, (1) what in England is sound and good law must be good law for India ; (2) diversity of the conditions in England and in India makes a law good for the former, not necessarily so for the latter. One or other of these was brought before the eye as the legislative thaunmetrope revolved before us. I for one unconditionally accept the truth in each of these. There can be no dispute about them so long as they are enunciated in the abstract. But the hitch is felt in their application to concrete cases. The solution, however, is perfect and simple if we go on the right path. Where cognizance has to be taken of special data, characteristic of the one community and totally or substantially absent in the other community, the second proposition is true and ought to be decisive. In every other case the first proposition is true and must command ungrudging acceptance as the upshot of a well-attested experience and dependent mainly, if not solely, on the fundamental and immutable features of human nature. To submit to a trial by one's own peers and unhesitatingly to bow to their verdict is a disposition, as to which the question has been asked whether it depends on anything peculiar to the Western communities, or whether it is based on ultimate facts of human nature, common to mankind at large and conducive to good everywhere. There is an opinion that it is of the former kind ; but with all deference to those who hold it, I have good reason to demur to it. That opinion to which I do not agree is the unconscious expression of national egotism and of unconsidered dogmatism. This may sound like a bold assertion. But it is nevertheless an assertion, as to the soundness of which I am quite convinced on a solid basis in facts. To begin with, let us formulate to ourselves what is the essence of a faith

in trial by jury and what is at the root of it. In a passage which I have already quoted more than once, an eminent English Judge thus describes trial by jury:—

'It is one of the peculiar advantages of our (English) jurisprudence that the conclusion is to be drawn by the unanimous judgment and conscience of twelve men conversant with the affairs and business of life.....and not of one or more lawyers whose habits might be suspected of leading to the indulgence of too much subtlety and refinement.'

"I ask, in all humility, whether there is in the above statement any reference to anything *special* to the English *nature* and not equally predicable as to the Indians? To the best of my lights I discern none.

"The twist that the mind of the lawyer, pure and simple, receives is here noted as tending to lead him astray. No less is this the case in India than elsewhere. The business capacity, the sturdy commonsense and the unsophisticated conscience of a body of men of ordinary intelligence, chosen irrespective of their likes and dislikes, are set down as fairly infallible guides to truth and as safeguards against error. These features are no less patent and no less potent in the fairly cultured Indians, from among whom the jurors are drawn. So far there are no appreciable grounds to differentiate between the Britisher and the British Indian. What is thus manifest from an analysis of human nature is capable of being established by abundant illustration. What is the Indian's traditional trust in the *panchayat* as a tribunal of last resort? What is the very meaning of the term *panchayat*, except this, that the person complained against is ready unconditionally to abide by what *five* men of his choosing, without any special leanings for or against him, might decide? What again is at the root of the peculiarly Indian system of disputants submitting to the arbitrament of men freely elected by them but a confidence in their decision? What is the underlying principle of the method known in Hindu society as excommunication, if it is not that the offender has belief in, and is therefore ready to bow to, the united vote of his brethren in his caste or creed. What again is the overruling force in the deliverances of bodies known as *parishats* in matters social and even spiritual, but an unqualified credence in the sense of justice and fairness in the guilty man's cultured fellow-countrymen. With so many and so palpable manifestations of the Indian's fidelity in the rectitude of the *four*, the *five* and the *ten* of his own fellows, as the public are called in various parts of the country, it is somewhat grotesque to ignore them and proceed to work as if to the Indian the system of leaving his guilt or innocence to be decided by his brethren is unsuited. What is called trial by jury in legal nomenclature is in essence nothing new to this country. It is only an indigenous plant, pruned and trimmed according to the modern methods

and christened with a modern name. These considerations ought to put an end to all dispute on the subject. But there are other valid grounds as well to entitle the Indian to this privilege, hoary as regards him and consonant to the genius of his people.

"Those in the legal profession, who have had an extensive practice in the Original Courts, must have been struck, as I have been, as to how a suitor, who believed in the justice of his case, readily and cheerfully submitted to arbitration by his own countrymen, and how the opposite party with a dubious case resolutely fought shy of them and preferred the toss-up in the regularly-constituted Courts where technicalities play an impo rtant part. This single fact, if people had used their eyes and their wits, ought to suffice to carry conviction to the most sceptic hearts as to the value of the jury in discovering truth and minimising the chances of grievously missing it. It would be a great pity if the Indian should lose his customary advantage by becoming a British Indian."

The Hon'ble MR. CHALMERS:—"On behalf of the Government I must oppose this amendment, and I may point out that my friend's argument in support of it, if it is valid at all, goes much farther than he intends to carry it. If my friend's argument is carried to its logical conclusion, no case must be ever tried by a Magistrate at all. Every case of every sort, of every character, of every kind, must be tried by a jury. That is the logical result of my friend's argument. As regards this particular case, it is part of the policy of the Government that small and trivial offences under section 124A should be capable of being disposed of before a Magistrate. I am not going to follow my friend into his eloquent panegyric on the jury system, but speaking for myself, and myself only, I will say this, that I have tried a very large number of cases as a Judge with juries in England, and as the result of those trials I have formed the very highest opinion of English juries. In all the many cases I have tried with juries I can only recollect two in which I disagreed with the verdict of the jury, and in those two cases I had materials before me which were not accessible to the jury, which led me to come to the conclusion that the jury had arrived at an erroneous verdict. But it so happens that I have tried a certain number of jury cases outside England, and I can only say that my experience in trying cases with juries outside England is that they are a dismal failure. For the success of a jury trial you require certain conditions, and those conditions are, as far as I am aware, that you have a homogeneous people, a people who make their own laws, and who, moreover, are determined that those laws shall be enforced. With those conditions present I know of no better tribunal than a Judge and a Jury, and with those conditions

absent I know of no worse form of trial than a jury trial. I need not, however, go into the general question upon this amendment. The proposal of the Government is that certain cases under 124A which the Magistrate does not think fit to commit should be triable before a Magistrate. I must oppose the amendment."

The Hon'ble MR. SAYANI :—"I am in favour of the amendment. It will make the law practically the same both for Europeans and Natives. At the same time, where the offence is trivial or the offender is an unimportant person, it is highly probable that the application contemplated by the proposed amendment will not be made. I trust, therefore, the proposed amendment will be agreed to. In fact, the proposed amendment appears to me to be in the nature of a compromise. As to the objection that every accused person will under the proposed amendment if adopted claim to be tried by the Court of Session or by a jury, it does not appear to me to be well founded. Cases under the section will not be trials of strength between two subjects. On the one hand, there will be the Government represented by the District Magistrate, on the other hand, there will be a subject. The probabilities, therefore, are that, except in important cases, which will be very few indeed, Government will be satisfied if the accused person is bound over or nominally punished, and there will be no necessity for having the trial transferred to the Court of Session or being decided by a jury. On the other hand, where the offence is a grave one or the offender is an important person and Government considers it desirable in public interests to make an example of the accused person, it will be satisfactory for Government itself to have the case tried before a Court of Session or by a jury. Accordingly, from whatever point of view the matter is looked at, I humbly think the proposed amendment is a desirable one and will, I trust, be accepted, inasmuch as the object Government have in view, namely, of having a workable procedure whereby offenders may be promptly brought to book will be fairly accomplished, whilst those cases which ought to be formally tried will be tried accordingly."

The Hon'ble SIR JAMES WESTLAND :—"My Lord, it is not my intention in discussing this subject to follow my Hon'ble friend Mr. Ananda Charlu into high disquisitions upon the subject of human nature, or to point out that human nature in the West and human nature in the East correspond in their elementary properties. But when he says that in matters relating to this particular amendment, and matters relating to trial by jury the same qualifications which exist in England also exist in this country, I distinctly join issue with him. The reason why trial by jury is an eminently successful system in England is that the

Englishmen are born with a respect for the law because it is the law, and that by long tradition they have a reverence for the tribunals in which that law is administered. We have had an object lesson before us during the last six months which shows what a vast difference there is in this respect between the feelings of certain people in this country and the feelings of the people of England. The Hon'ble Member proposes to apply the system of trial by jury specially in regard to the offences under section 124A. It is with respect to this section that that object lesson during the last six months has been read to us. Has there been, I would ask, in the discussions in the Native Press, any symptom of that respect for the tribunals in which justice is administered which will be found in the English Press? For six months past a constant stream of invective has been directed against the learned Judge—not who found the prisoner at Bombay guilty, for that was not his business—but who presided at the trial where he was found guilty. That stream of invective is even at the present day continually recurring. Nay, more, the High Court of Bombay, one of the supreme tribunals in this country, has been attacked in the same unmeasured terms only because it supported that Judge in his decisions. Even beyond this has the Press in this country ventured to carry its attack. A paragraph that appeared in a newspaper not long ago asserts that the Lord High Chancellor of England, the supreme representative of the judiciary of the empire, from corrupt motives went out of his way to take part in the trial of the Tilak case in the highest tribunal of the Empire—the Judicial Committee of the Privy Council, and that he was rewarded for having done so by having an Earldom bestowed upon him by Her Majesty the Queen, of course at the instance of Her Majesty's Ministers. I am not quoting from any hole-and-corner paper; I am quoting from what on this side of India puts itself forward as the leading organ and chief representative of what is termed the Congress party. If Members will turn to the columns of the *Indian Mirror* of Thursday, 27th January, they will find that I am giving a correct account of the aspersions there cast upon the highest judicial officer in England. My Lord, I do not deny that there are newspapers of a low grade even in England; newspapers which fortunately I never see; but I doubt altogether whether, even in those newspapers, aspersions of this sort upon the highest tribunals would be tolerated. Well, my Lord, I bring forward these instances as evidence of the principal difference that exists between the attitude of the people of England towards their tribunals and the attitude of the people of this country. When a jury is selected from English people to sit upon a case in England, they feel themselves influenced to some extent by the glamour of their judicial position; they feel the responsibility that is cast upon them, and they do their best

according to their lights to deliver a verdict which shall be impartial and not based upon their own sympathy ; but in this country what is it that we have seen before us ? Writers in newspapers who, socially at least, are drawn from the same class from which our juries in this country are chosen, have made it manifest in their writings and stated practically in so many words that they do not trust the tribunals, that they do not approve of the law, and that if they had it in their power they would have given a decision in the case which would have been based upon their own sympathy with the accused and not upon the law as it stands. Their notion rather is that if they do not approve of a law, they ought to take it that it is their duty as members of a jury to interfere with its operation, and although I am sure that the Hon'ble Member who proposed this motion is very far above any feelings of that kind, yet I am perfectly convinced in my own mind that if his motion were carried, the only result of it would be that the administration of the law in this country would be over-ridden and the decisions on questions tried under the section referred to in the amendment would not be decisions according to law but decisions according to the sympathies of the members of the jury. "

His Honour THE LIEUTENANT-GOVERNOR :—" One great objection I have to this proposal is that it seems to me as it stands by itself not to give effect to the intentions of the Hon'ble Member. Trials in Courts of Session are not always held with juries, and in a great majority of districts they are only held with the aid of assessors, and therefore I infer that he proposes that the Magistrates should act only with the aid of juries.

" But in the opinion of a great number of authorities that is as applied in the case of European British subjects, probably the most unsatisfactory feature in the whole administration of justice at the present time. I think to give effect to the Hon'ble Member's proposals we should have to *tear* up the Code and provide a large number of sections which he does not attempt to move. I am not going into the general question of the system of trial by jury. We have it here in the country, and in certain classes of cases I am perfectly prepared to admit that juries have done extremely well. I have never been one of those who have objected to jury trials in certain cases, for instance for offences against property, but I have no doubt whatever that there are many other classes of cases in which jury trials are not satisfactory ; and, if there are any classes of cases to which that description applied, I should say it would be those under section 124 of the Indian

Penal Code. We do not wish our jury trials to be converted into political demonstrations."

The motion was put and negatived.

His Honour THE LIEUTENANT-GOVERNOR OF BENGAL moved that for clause 256, sub-clause (1), of the Bill as amended by the Select Committee, the following be substituted, namely :—

"(1) If the accused refuses to plead, or does not plead, or claims to be tried, he shall be required to state whether he wishes to cross-examine any, and if so which, of the witnesses for the prosecution *whose evidence has been taken.* If he says he does so wish, the witnesses named by him shall be re-called, and after cross-examination and re-examination (if any) they shall be discharged. *The evidence of any remaining witnesses for the prosecution shall next be taken, and after cross-examination and re-examination (if any) they also shall be discharged.* The accused shall then be called upon to enter upon his defence and produce his evidence."

He said :—"This is merely a consequential amendment to give effect to the motion which the Council have adopted with respect to clause 254."

The Hon'ble MR. CHALMERS : "It is a consequential amendment, and the Council have already practically agreed to it."

The Hon'ble PANDIT BISHAMBAR NATH : "I am not in favour of the amendment. I am rather in favour of the clause as it stands in the Bill."

The motion was put and agreed to.

The Hon'ble MR. JAMES : "With Your Lordship's permission I will withdraw the amendment I have given notice of, *viz.*, that clause 256, sub-clause (1), of the Bill as amended by the Select Committee stand as in the original Bill, namely :—

'256. (1) If the accused refuses to plead, or does not plead, or claims to be tried, he shall be called upon to enter upon his defence and to produce his evidence, and shall, at any time while he is making his defence, be allowed to re-call and cross-examine any witness for the prosecution present in the Court or its precincts who has not previously been cross-examined as to the facts constituting the charge.'

Defence.

"I only proposed it in case His Honour the Lieutenant-Governor's amendment were not agreed to."

The amendment was accordingly withdrawn.

The Hon'ble MR. CHITNAVIS moved that in clause 259 of the Bill as amended by the Select Committee the words "and the offence may be lawfully compounded" be omitted. He said:—"I beg to propose that the words 'and the offence may be legally compounded' be omitted from the section 259. My personal experience goes to show that in the mufassal there often happen cases which are of such trivial nature that it is not worth while summoning the complainant to produce his witnesses and to go on with the case when evidently by his absence he shows that he intends withdrawing from it. What I mean is this, that the dismissal of a case ought not to depend on the case being a compoundable one. In the majority of cases, when the complainant does not wish to continue the prosecution, the parties make matters up between themselves, through the influence of friends who are very often the witnesses in the case, so that the evidence which the Magistrate gets is of a very flimsy nature. The case is dismissed as usual, only the time of the Court is taken up, and that, too, for no purpose whatsoever. Again, even if the words 'and the offence may be legally compounded' be omitted, the section leaves discretion to the Magistrate to go on with the case should it be an important one and justice require that the case should be proceeded with in spite of the complainant's desire to withdraw from it. I therefore think that the words 'and the offence may be legally compounded' may be safely omitted from the section."

The Hon'ble MR. CHALMERS: "I do not think this amendment ought to be accepted. If the offence is compoundable, there is no objection to the parties making an arrangement out of Court."

The motion was put and negatived.

The Hon'ble MR. CHITNAVIS moved that in clause 260, sub-clause (1) (i), of the Bill as amended by the Select Committee, between the figures "448" and the words "of the same Code" the words and figures "and offences under sections 451, 456 and 457" be inserted. He said:—"I beg to propose that offences under sections 451, 456 and 457 of the Penal Code be included in the list of summarily triable offences, as enumerated in section 260 of the Criminal Procedure Code. My reason is this: generally cases that occur of house-breaking are of a very simple nature—the lifting of a small bamboo screen often comes under this category. I think it would be wise to make such petty offences summarily triable, for it would save much valuable time of the Courts which have many important cases to try. In support of my statement, I would beg leave to quote what the Additional Sessions Judge of Nerbudda Division says on the subject:—

'Much of the crime against property,' writes he to the Chief Commissioner of the Central Provinces, 'consists of petty house-breakings, with intent to commit theft,

Except in towns, the walls of houses are usually built of mud, and the house breaking is accomplished by digging a hole in one of them. As only Magistrates of experience have powers under section 260, offences punishable under sections 451, 456 and 457, Indian Penal Code, might be added to the list.'

"I may add, my Lord, that the Chief Commissioner of the Central Provinces thinks that this suggestion of the Sessions Judge is a good one and its adoption would effect a great saving in the time of the Courts.

"I do not say that at times serious offences do not come under these sections, but the addition of the new proviso 2 to section 260 which makes it discretionary with Magistrates to try the cases summarily or otherwise is an ample safeguard for important cases being tried in a regular manner."

The Hon'ble MR. CHALMERS: "I venture to think that this is an amendment the Council might very well consider. So far as I myself am concerned I see no objection to it: but I would rather have the opinion of those experienced Magistrates who are present as Members of this Council."

The Hon'ble Mr. NICHOLSON: "I agree with the Hon'ble Mr. Chitnavis in his amendment, and for the reasons stated by him."

The Hon'ble MR. LATOUCHE: "I also support the amendment."

The Hon'ble MR. JAMES: "I also beg to support it."

The Hon'ble SIR HENRY PRINSEP: "It appears to me, My Lord, that this amendment goes rather beyond the original scope of the section. In some respects it includes offences which are triable by a Court of Session and in which the maximum punishment which can be awarded may be so far as seven or even ten years. Now, if you come to look at the section, you will see that its operation is extremely limited in the case of theft which is a cognate offence, and theft is an offence of very much less gravity than any of the offences covered by the amendment. For house-trespass in order to commit theft, the maximum term of imprisonment is fixed at seven years; and although the extreme sentence for lurking, house-trespass or house-breaking by night is imprisonment for three years, the offence is triable by a Court of Session; while an offence under section 457 is punishable with imprisonment for five years, and if it is committed in order to commit theft, the sentence may be one of imprisonment for fourteen years. Now, if the Council will turn to the offence of theft so far as it is made to form the subject of a summary trial, it will be seen that the jurisdiction of the Court is

limited to theft in which the value of the property does not exceed ₹50; that is a case of a very petty character, whereas the offences under 451, 456 and 457 seem to me to be offences of great gravity, which should not form the subject of a summary trial."

The Hon'ble MR. STEVENS : "I concur entirely with what has fallen from Sir Henry Prinsep. It appears to me that these cases are far too serious to be tried summarily."

His Honour THE LIEUTENANT-GOVERNOR : "I agree with Sir Charles Lyall that these cases may be serious or not. Very often one of the most trivial offences that can come before the Courts is what is termed in the Code house-breaking by night. Many such cases ought to be tried summarily. I would leave the Magistrate to suit his procedure to the nature of the case. If the Magistrate sees fit he will try it in the ordinary way. I support the amendment."

The motion was put and agreed to.

The Hon'ble MR. SAVANI moved that in clause 275 of the Bill as amended by the Select Committee after the word "Session," in line 2, the words "or the High Court" be inserted. He said :—

"If my amendment is accepted, the law regarding the constitution of juries in the mufassal and in the presidency-towns will be the same. It will be generally admitted that the native inhabitants of a presidency-town are more advanced in education than their fellow subjects in the mufassal. If so, it necessarily follows that they are better qualified to act as jurors. It is difficult, therefore, to understand why in a presidency-town the accused person should not be allowed to be tried by a jury the majority of which consists of his countrymen. My amendment, therefore, is, *primâ fa ie*, a reasonable one. It was contended that the jury question is a large question, and had been recently considered, and that it was not desirable to re-open it. I submit that as the Criminal Procedure Code is now being consolidated, this is the proper time to consider the jury question which forms a part of the Code. I am not fully aware of the exact grounds on which the jury in the presidency-towns was allowed to remain in its present state when the question was last considered. But it seems to me that such grounds could not be strong or reasonable, for after all the main ground can only be with reference to the qualifications of the native jurors to be able to discharge their functions properly, and *a fortiori* the native inhabitants of the presidency-towns are better qualified for this duty than those of the mufassal. It is stated, however,

that the accused person in the presidency-towns has certain advantages over the accused person in the mufassal regarding the constitution of the jury in the way of challenging a certain number of jurors and otherwise which counterbalance the disadvantages. I humbly submit that that is not the proper way of approaching the subject. The only consideration ought to be whether, if an accused person in the presidency-towns is allowed to be tried by a jury, the majority of which are his countrymen, will the trial be prejudiced? I am not aware of any circumstances which will so prejudice the trial, in other words, enable the accused, although really guilty, to escape. On the contrary, I think, there are stronger safeguards against this danger in the presidency-towns. The High Courts' Sessions are presided over by the best Judges in the land, there is the Press, both Anglo-Indian and Vernacular, and also public opinion. I humbly trust, therefore, my amendment will be accepted."

The Hon'ble MR. CHALMERS: "I must oppose this amendment. We do not propose in this Code to cast the existing jury system into the melting pot. It would involve the breaking up of an illogical compromise perhaps, but one which at this stage of the Bill we are not at all inclined to enter upon. I would only point out this to my hon'ble friend with reference to his remark about the distinction between juries in the presidency-towns and juries in the mufassal. In the presidency-towns all trials in the High Court are conducted with juries. In the mufassal the jury system is only extended by order to certain Courts, and when the jury system is extended to certain Courts the order defines what particular classes of offence are to be tried by the juries. The Local Government in extending the jury system to Sessions Courts considers what classes of cases are to be tried by a jury and what are not. There is, therefore, no real analogy between the system of jury trial in the mufassal and in the presidency-towns, which latter is practically the English system. In the presidency-towns, as I understand, the juries are chosen from one general list of capable citizens, and it is desirable that the juries should be chosen from the general list as at present."

The Hon'ble SIR GRIFFITH EVANS: "I would only observe this, that I do not think any inhabitant of a presidency-town ought to vote for this amendment. The jury system in the presidency-towns is very old indeed. It goes back to the time of the old Supreme Court, and it is the English jury system. As a matter of fact in the mufassal it is a recent introduction with many limitations, and if once it were to be held that whatever was right in the mufassal was right in

Calcutta, the consequence would be that we should be in the same precarious state as regards the jury system as they are in the mufassal. There would be no reason why certain offences should not be excluded from jury trial in the presidency-towns as in the mufassal. Those who are not satisfied with the privileges they enjoy in the presidency-towns are hard to please. They are like the dog who dropped his bone to catch its shadow.

The Hon'ble Sir HENRY PRINSEP: "In addition to the arguments which have been advanced against this amendment, I would point out, as mentioned by the Hon'ble Sir Griffith Evans, that the law in respect of juries on trials in the sessions of the High Court has hitherto been uniform ever since the original constitution of the old Supreme Court more than a century ago. A native, that is to say, a person who is not an European or an American or an European British subject, can be tried by the High Court Sessions, first, if he is amenable to the ordinary criminal jurisdiction in the presidency-towns, or, second, if he has been committed for trial with an European British subject charged in the same proceeding. Now there is no reason why the practice which has been in force in the presidency-towns for more than a century should be altered. If, however, his case comes under the second category, that is to say, if he is brought under trial together with an European British subject, he will get a trial in the High Court and he can claim a separate trial, so that he is not tried by a jury of an alien race. He will be tried by the High Court just as if the offence had been committed in a presidency-town, and he would therefore be placed on the same footing as those who live in presidency-towns, and who are supposed to enjoy special privileges, if they are charged with offences committed in the presidency-towns. He has moreover been brought into a Court of higher jurisdiction, and he can have a separate trial and a peremptory right of challenge which he would not have enjoyed if he had been tried in any ordinary Sessions Court, and, as has already been pointed out by the Hon'ble Mr. Chalmers, if he were committed for trial in a Sessions Court, he would not necessarily be tried by a jury at all. I therefore ask the Council to consider why, if he happens to be committed for trial under these special circumstances to a superior Court, such as the High Court of a presidency-town, he should be placed in a better position than if he had been amenable to the ordinary jurisdiction, or why he should be placed in a better position than those who are now residents of presidency-towns."

The motion was put and negatived.

The Hon'ble PANDIT BISHAMBAR NATH moved that in Chapter XXIII-L.—*Special Provisions for High Courts*—of the Bill as amended by the Select Committee, it should be provided that "in a trial by jury before the High Court in a presidency-town of a person not being an European or an American a majority of the jury shall, if he so desires, consist of persons who are neither Europeans nor Americans." He said :—"I see no necessity for expatiating upon the reasons I have already submitted in regard to composition of the jury, or an extensive application of their powers in trials before High Courts in presidency-towns, of persons not being Europeans or Americans. The distinction hitherto observed is, to say the least, illogical ; and the sooner it is removed the better. It is not at all a valid argument that the jury system is not suited to the peculiar conditions of this country. It has been tried long and worked well with this one exception, that it has unfortunately proved disastrous in a majority of trials held with the help of a mixed jury, where Europeans or British-born subjects were concerned in the commission of offences against native Indian subjects. But its partial failure there, however deplorable it may be, does not argue that it should not be extended further or utilised to a legitimate extent, with all its privileges and without any racial distinctions."

The motion was put and negatived.

The Hon'ble MR. JAMES moved that in clause 345, sub-clause (*2*), of the Bill as amended by the Select Committee, the word and figures "section 325", in line 3, be omitted. He said :—"The Bill originally proposed that several dangerous forms of mischief should be made compoundable, as well as grievous hurt under section 325. I am glad to see they have all been withdrawn except one, and that is clause 325, which I suggest to the Council should also be withdrawn. It is perfectly true that many offences are only technically grievous hurt. A blow that makes a permanent mark on a man's face, tripping a man up so as to knock out a tooth, is grievous hurt, and with the permission of the Court there is no valid reason why such should not be compounded, but if you allow very trivial cases of grievous hurt to be compounded with the permission of the Court, you will also have to allow most serious ones to be compounded. Now, my Lord, it will save time if I read an extract from one of the Bengal papers :—

'Most native races are not at all vindictive when there is no old standing personal quarrel. A man nourishes no enmity to the hired clubman who has nearly killed him, though he may be never so well inclined to murder the clubman's employer. He will

therefore compound, if he can get money by doing it, and, as I have said, the vast majority of Native Magistrates will never oppose his doing it.

'I have seen horrible cruelty inflicted by burning, and in other dreadful ways upon little girl children, and I have found Native Magistrates, men generally of sound judgment, so oppressed by ideas of saving family honour, and the general tendency to compromise everything, that they would allow these horrors, things only adequately punished by long imprisonment, to be compounded.

'It is to be remembered, too, that cruelty to children is to be compounded by payment to some other persons [clause (4)], and that in the very worst cases that have ever occurred, the offender is the child's mother-in-law, and the person who compounds the offence is her own son, the child's husband living in commonsality and probably maintaining her.

'I trust that the Legislature will not do anything to make easy the ways of torturers and of such assassins as merely fail of complete success.'

"I, my Lord, have seen myself the tortures on children alluded to, and there can be no doubt that, excellent as most Native Magistrates are, in matters like these they are weak. Only the other day I had an atrocious case of attempted murder, where a Magistrate, a most respectable man of long service who had recently retired on his pension, was undoubtedly conniving, to say the least, in hushing it up because the murderer was a lad with respectable connections in the town.

"It is really a matter for the opinion of the Council. Those members who have risen from the lower grades of the Magistracy like myself will see, I think, that these arguments are extremely powerful, that by allowing Courts to compound, although I am all in favour of trusting our Courts, yet in some instances it is well that the case should be dragged to the light of day and fought out to the bitter end. Compounding is always a matter that requires careful looking after, and for myself, although I say that if my tooth was knocked out I should be allowed to compound for payment to get a false one, yet when it comes to the cases of little helpless children being tortured, and their relations compounding for them, the Legislature should interfere and prevent such offences being compounded."

The Hon'ble MR. CHALMERS : "I must oppose this amendment ; it is a matter purely for the Council. I am not opposing it as a member of the Government, but simply as Chairman of the Select Committee. We considered this question very carefully, and we came to the conclusion that the offence of

voluntarily causing hurt or grievous hurt was eminently one where the Court should exercise its discretion. My friend Mr. James has quoted one or two cases where the Court has erroneously exercised its discretion. Well, we cannot help that. What we must look to is not individual hard cases, but what is a sound general rule. In most cases of hurt the offence is eminently one which ought to be compoundable. In England most of these cases in which prosecutions are brought here would be treated as the grounds of a civil action for damages. If by negligence serious hurt is inflicted by one person on another, no doubt he has committed a criminal offence, but if he makes an adequate compensation to the person injured and if the Court is satisfied that public justice is not being defrauded by the case being stopped, I see no reason why the compensation should not be accepted and why the offence should not be compounded. This is one of those matters where one has to legislate for the general rule and not for particular hard cases. In particular cases you must trust to the Magistrate's discretion not to allow compensation to be accepted."

The Hon'ble MR. NICHOLSON said: "I oppose the amendment. As stated by the Hon'ble mover himself, many cases falling under the definition of 'grievous hurt' are of a trifling character and may be the result of a petty assault; most cases are of no public interest, but affect only an individual and arise out of some private and perhaps sudden quarrel.

"Moreover, cases under this section are only compoundable with the permission of the Courts, who may be trusted to deal discreetly with cases which ought not to be compounded. If cases come up in which the offence is the result of a public breach of the peace or where persons unable to protect themselves or their interests are the object of injury, the Magistrate will doubtless refuse his consent to compensation. I do not see why we should prevent the compounding of these cases in general, because of some possible cases of hardship."

The Hon'ble MR. LATOUCHE: "I think the Hon'ble Member who has moved this amendment has given us quite as many and as strong reasons for rejecting it as for accepting it. The Magistrate's opinion which he read was fully considered by the Select Committee, and we came to the conclusion that there are many trivial offences which come under the definition of grievous hurt, and we thought that we ought to trust to the ordinary good sense and discretion of the Magistrates."

The Hon'ble SIR GRIFFITH EVANS: "I also oppose the amendment. In most of these cases unless the complainant rushes into Court at once these matters are settled by compensation. Money compensation is the only thing that will do any good when the man is injured. If the offence is such and is so deliberate that he does not wish to take money for it, the case can go on. The case of the little children is a very exceptional one, and one would trust that the Magistrate would not allow cases of that kind to be compounded. There is no doubt that as regards most bodily injuries money compensation is the best thing for the man who is injured. Many of these cases of grievous hurt are cases of negligence or sudden passion in which the man who committed the offence is afterwards very sorry and is quite ready to make compensation, and the injured man is ready to accept it. The question is whether he should be debarred from receiving it by the fact of his having instituted the case."

The Hon'ble MR. STEVENS: "My sympathies are entirely with the Hon'ble Member who moves the amendment—in his motives—but I am not able to support the amendment. Strong reasons have already been given why this amendment should not be accepted. I would merely point out that the arguments of my hon'ble friend Mr. James apply with only less force to the offence of causing hurt, and with more force in this respect that in the Code we have provided that the offence of causing hurt may be compounded even without the consent of the Magistrates."

His Honour the LIEUTENANT-GOVERNOR: "I am not able to support the Hon'ble Member, because his speech logically ought to have led to the removal of this entire sub-section. Logically he ought to have moved the omission of the clause. However, I am quite content to leave the thing to the discretion of the Court, which will deal with petty cases in the proper way and serious cases in the way in which they ought to be dealt with."

The motion was put and negatived.

The Hon'ble MR. JAMES moved that in clause 349, sub-section (*1*), of the Bill as amended by the Select Committee, the words "and forward the accused," in line 12, be omitted, and that in sub-clause (*2*) of the same clause, after the words "if he thinks fit" the words "transfer the proceedings to another Magistrate having jurisdiction and direct that the accused be forwarded to such Magistrate, or he may direct that the accused be forwarded to his own Court, and he may, or the Magistrate to which such proceedings are transferred may, if he thinks fit,"

be inserted. He said :—" This is an amendment of the Government of Bombay, and personally I feel great interest in its being passed, because of the very great convenience it will be in the Punjab and Sind. I suppose, my Lord, I may explain that in my own province at least, the Subdivisional Magistrate always for four or five months in the year comes into head-quarters, and possibly the most extreme point of his division is 100 or perhaps 150 miles away. A man is caught thieving and is brought before the local Magistrate, who can only give him a month or perhaps six months. The Magistrate tries the case, and finds possibly that the man has been convicted before or that there are some circumstances which make it necessary that the convicted person should have a greater punishment than he himself under the powers given him by the Code is able to inflict. He therefore sends the proceedings to the Magistrate to whom he is subordinate, who goes through them thoroughly, as if he were an Appellate Court so to speak, calls for further evidence if he considers it necessary, and then passes sentence. By the Code, as amended by the Select Committee, it is necessary that the Magistrate who convicts the accused should forward him at once to the Magistrate to whom he is subordinate. The effect of my amendment will be that the accused need not be sent at once. The proceedings will be sent to the Magistrate 100 or 150 miles away, and the Magistrate will then go through the proceedings, and if he considers it necessary will send for the accused, and such evidence as he requires, and dispose of the case, and give the sentence required. But—and it is an arrangement we have been endeavouring to extend of late years—we have been in several instances, on account of the very great distances, placing Magistrates of high powers far away in remote corners. These Magistrates are First Class Magistrates, who have passed precisely the same examinations to get their first class powers as ordinary Covenanted Civilians. They all speak English, and while the Civilian and the Native Magistrates are on precisely the same footing as regards tests, the Natives are also chosen on account of their general capacity. Well, the result of my amendment would be that in the hot weather, when the thermometer is 128° in the shade, instead of the prisoner being sent straight off to the Subdivisional Magistrate who may be very many miles away, the papers will be sent by post to the Subdivisional Magistrate, and he will probably say, after looking at them, 'Oh, well, the Sub-Magistrate who tried the case can only give him a month, and he probably ought to have three, so I will send back the papers to the First Class Magistrate on the spot having jurisdiction.' Then he will take the place of the Subdivisional Magistrate and he will call for any further evidence required, and will pass sentence. It will be a very great convenience indeed to the witnesses and everybody concerned that the case should be

disposed of on the spot, and the Government of Bombay have asked for the amendment on those grounds."

The Hon'ble MR. CHALMERS: "This is purely an amendment for the Council to consider. I do not remember that we discussed the point in Select Committee, but I myself can form very little of an opinion on it. Personally, I suppose my prejudices as an English lawyer are against the Indian system, under which one Magistrate tries a case and another Magistrate who has not tried the case passes the sentence. My own personal prejudices are against extending jurisdiction under that system at all, but it is a system which has a deep root in India, and how far this amendment may work for the convenience both of Magistrates and accused persons I do not know. It is a question which I must leave to those who have practical experience in the matter."

The Hon'ble SIR HENRY PRINSEP "I have already pointed out that the amendment aims at altering the section, which has never been questioned at the present day. It seems to me that the result of this amendment will be to keep the person who is under trial a longer time under trial than would happen under the present law. I think this alone is a great objection to the amendment. In the next place, the law contemplates that the case shall be at once sent to the superior officer having local jurisdiction, that is to say, either to the District Magistrate, or, in the event of there being smaller local jurisdiction, to the Subdivisional Magistrate, and that the case should then and there be decided by that officer or, if necessary, by some officer at that station who may have jurisdiction to deal with it. In that case if, as is contemplated by the finding of the first Magistrate, a sentence of imprisonment be passed, the imprisonment will at once commence at that place where the gaol would be situated. I do not understand why it should be necessary, as proposed by the Government of Bombay, that it should be provided that the cases submitted by a Third Class Magistrate should be triable by a Second Class Magistrate. It seems to me that the law is sufficiently wide to provide for such a case. It might happen that the Second Class Magistrate might find himself unable to pass an adequate sentence."

The motion was put and negatived.

The Hon'ble PANDIT BISHAMBAR NATH moved that, at the end of clause 406 of the Bill as amended by the Select Committee, the words "or the Sessions Judge, respectively," be added. He said: "I think it is desirable that when a person is ordered to give security for good behaviour under section 118

of the Criminal Procedure Code, by the District Magistrate, such person should have the right of appeal to the Sessions Judge, subject, of course, to a further right of revision by High Court. The law, as is now proposed to be passed, makes an order of the kind, if made by District Magistrate, subject to revision by the High Court. But the High Courts, as a matter of general practice, do not, in the exercise of their revisional powers, enter into an examination of questions of fact or those of appreciation of the weight of evidence. The effect substantially of the rulings of those Courts upon the point, is that the probative force or effect of evidence is a question of fact; where there is evidence to be considered and weighed, a judgment of conviction will not be set aside by a Court of Revision."

The Hon'ble MR. CHALMERS: "I must oppose this amendment. The proposal, as I understand it, is that instead of the appeals from the orders requiring security for good behaviour under section 118 going to the District Magistrate they are to go to the Court of Session, or there is to be an option to appeal to the Court of Session. But the District Magistrate is the person responsible for the peace of the district and not the Sessions Judge, and it must be borne in mind that the District Magistrate is an officer of equal or even superior standing in the service to the Sessions Judge. There is no reason whatever for altering the law and giving the appeal from a Subordinate Magistrate to a Sessions Judge, instead of to, his own superior, the District Magistrate."

The motion was put and negatived.

The Hon'ble MR. CHALMERS moved that in clause 408 (*c*) of the Bill as amended by the Select Committee the word "District" be omitted. He said:—"I propose to omit the word "District" in clause 408 (*c*). The present clause runs as follows:—

> (*c*) when any person is convicted by a District Magistrate of an offence under section 124A of the Indian Penal Code, the appeal shall lie to the High Court."

"I propose to omit the word "District" because of an amendment which I am going to propose later on. I need not discuss that amendment at the present stage; the omission of the word "District" here will have no effect. This clause will have the same effect whether the word "District" remains in or not, but I propose the omission with reference to the amendment that will be discussed later on."

1898.] [*Pandit Bishambar Nath ; the Lieutenant-Governor ; Mr. Chalmers ; Sir Griffith Evans.*]

The Hon'ble PANDIT BISHAMBAR NATH: "Without meaning any disrespect at all to the Hon'ble the Legal Member, whose sense of forbearance and courtesy towards others is remarkably exceptional, I observe that the high position he occupies in the Council often compels him, I believe against his own inclination, to assume, out of necessity, an unenviable attitude of a hostile critic or opposer in relation to amendments that are moved by his colleagues. It is not, therefore, in any other spirit than that of consistency on my own part, that I regret, I must oppose the amendment moved by the Hon'ble the Legal Member.

"There is no question, if I may be permitted to say so, of 'raising or lowering the elevation of martyrdom'; the question is really one of a fair trial before an independent tribunal. District Magistrates, being ordinarily local Executive Officers too, would generally be concerned in advising or initiating proceedings under section 124A of the Indian Penal Code; while First Class Magistrates do not, as a body, command the same amount of confidence, in point of experience or competency, as District Magistrates would otherwise do. The proper tribunal for trial of offences involving sedition under section 124A of the Indian Penal Code would therefore be the Court of Session aided by a jury or assessors, as difficult or complex questions of interpretation of a Vernacular language are most likely to arise in connection with such trials."

The motion was put and agreed to.

His Honour THE LIEUTENANT-GOVERNOR OF BENGAL moved that in clause 411 of the Bill as amended by the Select Committee, for the word "three" the word "six" be substituted. He said:—"This amendment merely gives effect to the scheme of restoring the jurisdiction of Presidency Magistrates which I referred to yesterday and is consequential on that proposal."

The Hon'ble MR. CHALMERS: "It is consequential on what has already been done and we can certainly accept it."

The motion was put and agreed to.

The Hon'ble SIR GRIFFITH EVANS moved that in clause 435, sub-clause (*3*), of the Bill as amended by the Select Committee, the words and figures "Chapter XII and" be omitted. He said:—"These words were not in the Act of 1882 nor were they in the Bill submitted to the Select Committee. But they

have been inserted by the Select Committee, and the effect of them is to take away the revisional power of the High Court in cases falling under Chapter XII. That Chapter deals with cases under sections 145, 146 and 147 of the Code. The discussion we had yesterday must have satisfied the Council that there are a great many difficult questions arising under these sections. The question of what constitutes possession in law is not an easy one. Then again the questions arising under section 147, disputes regarding easements, right of way and all other kinds of easements, are often difficult; but in addition to this I must call the attention of the Council to another thing, which is that Magistrates do not always exercise their powers in accordance with the sections at all. I had a case the other day of a *char* and the Magistrate examined all the papers, and took a good deal of evidence, and he said, proceeding under section 145, 'that it is impossible with regard to new *chars* ever to find out who is in possession of them, and therefore I will hand it over to the man on whose estate I think it has arisen as a re-formation.' That is not the thing the Act told him to do. The Act told him that he was to ascertain possession, and if he could not do that, he was to attach the *char*. Then when the High Court called upon him to explain, he said, 'I did not attempt to ascertain who was in possession, because it is a waste of time to do so.' Now, some people think this is quite right: that Deputy Magistrates with first class powers should go about, and affect to go about and pass orders dead in the teeth of the sections which they are supposed to be proceeding under, and thus deprive persons of the property and yet that there should be no means of quashing these manifestly illegal orders. Some revisional powers are necessary, for if these people find there is no revising power of any kind whatever, it will be very difficult to keep them straight at all. Now it must be remembered that at the present time the orders under section 144, which alone are exempted from revision and which can only be made by a first class Magistrate if he has been specially entrusted with these powers, are the urgent orders, temporary orders in urgent cases of nuisance or of apprehended danger. They are *quasi*-executive orders which can be made without examining witnesses. But it is quite evident that section 145 was never meant to enable a Magistrate to give one of these *quasi*-executive orders. It is there provided that the parties should send in their statements of each side of the case, and it is also provided that there should be a full examination of all the witnesses, these orders can be made by any Magistrate with first class powers because they are safe-guarded by the power of revision. Now it is proposed to take away in these particular cases the power the High Court has

with regard to all judicial proceedings. With regard to all proceeding judicials they have the power to see that they are taken according to law. I quite admit that there have been cases in which some Benches of the High Court have sometimes interfered with orders under section 145 which they would have done better if they had left alone. But I do not think a sufficient case has been made out for taking away the power of revision which has existed for all these years, for if it is taken away, nobody whatever will have any power to see that all these delicate provisions which we have been discussing are ever carried out at all. The Magistrate, as in the case I have quoted, will make some sort of summary order, and whether it is according to law or not will be quite immaterial. It is said, on the other side, that this is merely a summary order of possession, and it is followed by a civil suit. But with regard to these matters, it must be remembered that the man who is out of possession may have his civil suit go on for years, and by the time it has gone up to the Privy Council and been finally settled it may be four, five, six or ten years. Take, for instance, a case where a man has sown indigo on a *char*, and another man has sown mustard on the top of it—it is a very common case. It is not much use to say to the man who has sown the indigo, 'Oh you will have your civil suit.' It will be perfectly impossible to assess his damages. The Magistrate may say that he thinks the *char* belongs to so and so, and will give his decision accordingly; but he may also say that, 'I do not know which was sown first, the mustard or the indigo, and I am not going to enquire who was in possession last year.' Now what I want to put to the Council is this, these orders are generally made by an inferior class of Magistrates. At present there is power in the High Court, the Sessions Judge and the District Magistrate to call for the record and exercise control over the inferior Magistrates. It is the basis of our system, and is the only way they are kept straight. But by this change you sweep away all control and supervision. Neither High Court, Sessions Judge nor District Magistrate can say anything however outrageous or scandalously absurd the order may be. Such uncontrolled powers have never before been entrusted to inferior Magistrates involving the disposal of property frequently of immense value. If you are afraid of the High Court, cannot the District Magistrate be trusted to see fair play? It is easy to foresee the results. *Char* districts ought to be much sought after by the inferior Magistracy."

The Hon'ble MR. CHALMERS :—" This is an important question, and it is one for the Council to consider. It is a matter on which I have no personal experience, and on which my opinion is absolutely useless. But I must point out, and I hope Hon'ble Members with personal experience will point out, that

there are strong arguments on the other side. My Hon'ble friend Sir Griffith Evans points out that this particular provision which he proposes to expunge was not in the copy of the Bill submitted to the Select Committee, but a corresponding provision was inserted in section 145. That provision was taken out of section 145 and was moulded into the form which this provision now takes in section 435. This was one of the points which was carefully considered by my Hon'ble friend Sir Henry Prinsep in Simla, and Sir Henry Prinsep in his original memorandum very briefly stated what I may call the arguments on the other side. Perhaps I may read three or four lines of that memorandum which put the other side better than I can put it myself. He says :

'It has been considered necessary to make the Magistrate's order in such a case final. It is very desirable that such matters should be summarily dealt with, and that any party disputing a Magistrate's order should seek redress at the Civil Court as is contemplated by the law, and that recourse should not be had to a Court of Revision whose interference only tends to prolong the termination of the dispute and a final summary adjudication of rights raised.'

"I do not know if anything that has taken place since has altered my Hon'ble friend's opinion, but if it has altered his opinion, I have no doubt he will give us the benefit of the reasons which he thinks now ought to prevail."

The Hon'ble Mr. LATOUCHE :—"Something may be urged in favour of the view that Magistrates should not have the summary powers conferred on them by clause 145. This question was fully debated yesterday and the Council decided that Magistrates should exercise these powers. That being so the order of the Magistrate should be summary and final subject to the ultimate decision of the Civil Court. In Bengal there has been a tendency to bring all these cases before the High Court on revision, and to attempt to make the High Court a Court of appeal before which the whole question may be litigated afresh. This practice should, in my opinion, be stopped."

The Hon'ble MR. JAMES :—"I thoroughly agree with what has fallen from my Hon'ble friend Mr. LaTouche."

The Hon'ble SIR HENRY PRINSEP :—"My Lord, my object in recommending for the consideration of the Hon'ble Member in charge of this Bill—and he has accepted my recommendation—alterations in section 145 in the Code and also the amendments which are now called in question, was to endeavour to

ensure a summary final decision of the Magistrate, so as to put an end to disputes so far as his Court was concerned, and to leave the ultimate decision of the matters in contention between the two parties to a competent Civil Court. It must be recollected that the order of the Magistrate is a very special order, justified only by the special circumstances of the case, that is, to prevent a breach of the peace, and to remove the disturbing element by declaring and maintaining in possession one of the disputing parties. The Council in the debate we had yesterday did not accept the principle that I contended for, which was that there should be a simple matter in issue at the time of actual possession; what I desired was that there should be a simple issue such as would be understood by the parties, and could be easily decided. Under sub-section (5) as has been already mentioned by the Hon'ble Member in charge of the Bill, I have succeeded in obtaining the approval of this Council—for that part of the Act has already been assented to—to this principle that the High Court shall not get behind the proceedings on the ground that they are *ab initio* bad from some preliminary flaw in the Magistrate's proceedings. Now what has taken place in many reported cases is that the High Court has invariably considered, even when raised before it at the ultimate stage of the case, whether the Magistrate had sufficient grounds for initiating the proceedings, that is to say, whether there was sufficient material before him to be satisfied in the terms of the law that there was an imminent breach of the peace. I have always myself, in the cases which have come before me in that Court, refused to attend to such a plea raised at the ultimate stage of the case, and I wish I could have succeeded in getting other Judges to follow an excellent decision passed many years ago by Couch, C.J., who held that, after the parties had submitted to the Magistrate's jurisdiction and obtained an order from the Magistrate, one of them could not reasonably complain that the whole proceedings were without jurisdiction. That to my mind has always been a sound principle to go upon, and it was with that view that I have succeeded in obtaining the alteration of the Bill in so far as to prevent the interference of the High Court, where without any objection the Magistrate had proceeded on grounds upon which he was satisfied that a breach of the peace was imminent. It was open to either party in the course of the proceedings to call this in question by showing that the Magistrate had no grounds to proceed upon, and if he did not choose to do so, it seemed to me that he should not be allowed to do so when he had submitted to jurisdiction and had objected simply because he had been defeated by an adverse order on the merits. The object in view is to obtain finality on proceedings under Chapter XII, in which only an *ad interim* order can be passed and to

make the parties have recourse to the Civil Court to which admittedly they must ultimately go. I should have been glad to have had the benefit of my Hon'ble friend Sir Griffith Evans' arguments yesterday when I was trying to convince the Council that the Magistrate's jurisdiction was very often dangerously exercised, for I am quite sure that what he said to-day in endeavouring to show that the Magistrates do not exercise a proper discretion in such cases and mischievously interfere in matters more properly cognizable by the Civil Courts, would have been of the greatest assistance to me then. However, the Council will, on the other hand, believe that although I endeavoured to restrict the jurisdiction of the Magistrates yesterday within what I considered legitimate bounds, I am in no way in favour of restricting their jurisdiction when it has been so exercised without objection raised at the proper time. Sir Griffith Evans has referred with great sorrow to a case which was brought before him of possession of a *char* in which the Magistrate refused to consider the question of possession. In regard to this I have no doubt that the Magistrate had facts before him to justify his opinion that in a newly-formed *char* it was really impossible to ascertain who was in possession of it. Of course he ought to have endeavoured to do so. I do not mean at all to justify his action. I do not know the number of years that Magistrate had been in the service, but I should say he had been reading Act IV of 1840, section 5, for he followed the law as there expressed. That section I submitted to the Lieutenant-Governor for his opinion in connexion with the matter under discussion. It is a section that expressly declares that in the case of a *char*, or newly-formed lands, the Magistrate should decide in accordance with the right of the parties. That section was repealed when the Code of 1861 came into force, but it was to some extent replaced by the section which now appears as 146, which enables the Magistrate to attach property if he should find on the evidence that neither party has satisfied him that he was in possession. Instead, therefore, of enabling him to exercise the rights of civil jurisdiction, the law empowers a Magistrate summarily to attach the property and hold it until the conclusion of the suit before a Civil Court. I wish now to refer to the case upon which the Hon'ble Sir Griffith Evans laid great stress yesterday, and I am not quite sure whether he mentioned it as against the High Court or that it had his approval. It is the case known as the Katras Jherriah case. The parties were in possession, some of one portion of the property and some of another, and the learned Judges came to the conclusion that it was quite impossible to say who was in possession of any particular portion, and so they attached the entire property. In that case it was not the Magistrate but the Judges of the High Court who refused to decide, or considered that the evidence was not sufficient to enable them to decide, who was in

possession. The long and short of this matter is that the contending parties must eventually go to the Civil Courts, and they will have before them an order of the Magistrate on facts submitted for his decision as to actual possession. If the party to whom that order is adverse desires to get it set aside he should do so by some suit in the Civil Court. It may be that he can obtain relief only by proof of his own title to the property. But the sooner the parties leave the criminal jurisdiction the better. I can point out cases which have been before the High Court in which there have been remands for further inquiry by Magistrates, certainly once if not twice, and that these proceedings which profess to be summary, and should be summary, have extended over years. No doubt such cases are exceptional, but they should not be possible."

The Hon'ble MR. STEVENS said:—"My Lord, I am pleased to find myself to-day on the same side as the Hon'ble Sir Henry Prinsep.

"I trust that nothing which I said in discussing section 145 of this Bill implied, and that nothing which I am about to say will imply, any disrespect to the High Court or any depreciation of the immense value of the Court in supervising and keeping straight the Courts which are subordinate to them. But it must be owned, I think, that with regard to Chapter XII of the Code the interference of the Court has had far from satisfactory results.

"I shewed when dealing with section 145 that the High Court's predecessor, the Nizamat Adalat, had no power whatever to review an order passed under Act IV of 1840, which was analogous to Chapter XII, and it was only after the passing of Act XXV of 1861 that the High Court for the first time claimed the power to revise such an order.

"As to the general nature of the interference now exercised, I cannot do better than refer the Council to a note in Sir Henry Prinsep's edition of the Criminal Procedure Code.

'Thus' (it is said) 'the result of proceedings inconsiderately taken by a Magistrate is sometimes to disturb a long and uninterrupted possession and to be the means of at least seriously imperilling titles to valuable properties. It will be observed that in reported cases the High Court, probably for these reasons, has shown a great inclination to restrain the action of Magistrates, and to set aside their orders on grounds which are sometimes very technical.'

"In other words, because Magistrates sometimes make mistakes in working the law, the High Court set themselves to render the law generally inoperative.

" I think that a Magistrate required to act rapidly in the preservation of the public peace should not be subject to this sort of restraint.

" In speaking on section 145 I quoted a ruling of the Court in which it was said that 'the law contemplates that the time of the institution of proceedings and the time of deciding the case is practically identical.' I will now read some observations made by the Court in case of *Read* v. *Richardson*, printed in I. L. R. 14 Cal. 362 :—

'We have considered this case at great length, and, departing from the ordinary rule which the Court prescribes to itself in cases of revision, we have thought it desirable to go into the whole of the evidence in the case, with the view of putting ourselves in full possession of all the facts appearing upon it, and we have also kept in mind the circumstance which is constantly brought before us in these cases that, as between the two parties to the present dispute, section 145 of the Code of Criminal Procedure is being used for a purpose wholly alien to that for which it was originally intended, and one calculated to produce, in whosoever's favour it is made, very unexpected and unfair results; in fact, that a squabble about sown grass is to be turned into an important judicial decision as to the boundary of two large estates. That is a state of things which we regard with great disapproval, and which it is the object of this Court to discourage as far as possible; and as we see in this case that the decision, whichever way it went, is calculated to have this effect in a very high degree, we have felt it necessary to scrutinize with great minuteness the legal grounds upon which the decision rests, and the adequacy of the evidence which supports the decision at which the Magistrate has arrived.'

" In other words, the learned Judges appear to have had regard entirely to the private interests of the parties, and to have disapproved of their being put in jeopardy by proceedings under section 145; they therefore 'scrutinized with great minuteness' the legal grounds of the Magistrate's order and examined the adequacy of the evidence. This is a case in which, as the Hon'ble Mover of the amendment will see, the High Court has gone into the evidence.

" At one time it is held that a separate case should, strictly speaking, be instituted in respect of each plot held separately by any person or persons. Yet we have it on Sir Henry Prinsep's authority (which I have not thought it necessary to examine further) that in another case 109 plots held by various tenants of different contending villages were dealt with in the same proceedings, and in another that the right to receive rent from land comprising more than 300 villages in two parganas was in dispute and dealt with in one case.

" The Court examines a case with the object of seeing if the breach of the peace is 'imminent,' that is to say, of seeing if the dispute has been allowed

to go so far that the danger is great and serious. They see whether the Magistrate's action is technically justifiable by the sufficiency of the information on paper.

" In short, if the purpose of the revising authority has not been done to restrict and render nugatory the law which is intended to give the Magistrate a rough and ready means of ensuring that the peace shall be kept, that has certainly been the result of their action.

" I cannot dispute that Magistrates are sometimes careless and inconsiderate ; and I should never think of denying that the High Court may sometimes detect errors, and that upon the whole their deliberate judgment formed with the assistance of a powerful Bar is likely to be more accurate than that of an officer who has to consider rapidly rather the immediate good of the public than the effect of his order on the private rights of the contending parties. Yet, I think, that a body so unfriendly to the administration of the law by the Magistrates, as the High Court admittedly has been, is not well suited to control that administration.

" One unfortunate result of the system of revision, which has grown to be very nearly a system of appeal, has been greatly to protract enquiries under this chapter, and to deprive them of that summary character which was so much, and so rightly, insisted on yesterday by my Hon'ble friend Sir Henry Prinsep, and which to me also appears to be essential to the useful working of the law. However rapid may be the proceedings before the Magistrate, the case is not over till the High Court has done with it. But the Magistrate himself is likely to elaborate proceedings which will possibly be subjected to acute and hostile criticism. Upon the whole, and admitting that there is something to be said on the other side, I think it is better to risk mistakes on the part of some Magistrates than to perpetuate the condition of perplexity and difficulty in which all are kept under present conditions. I am constrained to vote against the amendment."

The Hon'ble PANDIT BISHAMBAR NATH :—" I am entirely in favour of the amendment moved by the Hon'ble Sir Griffith Evans. I must say I have heard with great surprise some doctrines enunciated in this Council recommending as it were the establishment of a ' benevolent despotism." With due deference, I beg I may be excused for taking exception to the remarks that have unfortunately been made reflecting upon the character and duties of lawyers as a body, or upon the position of confidence and trust which the Chartered High Courts in the country have, ustly occupied."

His Honour THE LIEUTENANT-GOVERNOR :—"My Lord, I do trust that nothing will be done to take away the summary character of the proceedings under section 145. We passed yesterday the section which declared that the Magistrate's orders were to be final, and, although it may be said that revision is different from appeal, we have the evidence of the High Court itself to show that the effect of dealing with these cases on revision is the same as dealing with them on appeal. I will not trouble the Council with long quotations—we have had perhaps enough of them—but if Hon'ble Members refer to the opinion of Mr. Justice Rampini they will see why there ought to be no powers of revision under this section.

"The Hon'ble Mr. Stevens' amendment was yesterday negatived though much has since transpired to show that the mere fact of the Magistrate having to carry back his enquiry a few weeks makes little practical difference in the proceedings. For instance repeated mention has been made of the Khattras Jherriah case. I will only say that the curious fact in connexion with that case is this that the Judges said then that no hard-and-fast rule, as to the exact point of time to which an enquiry should be directed could be laid down : and they pointed out the absurdity of precluding the Magistrate from enquiring into anything before the date of his order, especially as the Magistrate had recorded that he ought to have recorded this 13 days sooner than he did."

The Hon'ble SIR GRIFFITH EVANS :—"I hope I may have misheard the Hon'ble Mr. Stevens, but his words as I took them down were that 'the High Court was hostile to the administration of the law.' I do not know whether he meant this law or the law in general."

The Hon'ble MR. STEVENS :—"Unfriendly to the administration of this law by the Magistrates."

The Hon'ble SIR GRIFFITH EVANS :—"Even that seems rather a strong thing to say. However I will let my Hon'ble friend settle his account with the Hon'ble Member of the High Court who is next to him, and I will proceed to the other matters. I am very much obliged to the Hon'ble Member for having recalled to my memory Richardson's case, in regard to which the High Court did depart from their usual rule and scrutinised carefully the evidence in the case. It was, as you will find on looking at it, a case in which there had been a *malâ fide* and very improper use made of this section. Under the circumstances the High Court made an exception of the case. I do not think that is a case in which the High Court should be quoted as having wrongly exercised its powers of revision considering the nature of the case, and the fact that they substituted for the erro-

neous order another order equally effective for keeping the peace. Then the other case the Hon'ble Member has presented me with is a still more startling instance of the absolute necessity for revision. It is what is known as the Bijni case, and I am glad my Hon'ble friend has recalled it to my mind. The case was this : there were three hundred and odd villages, the whole of the Bijni Raj covering two very large Parganas. The Magistrate had simply considered who was in possession of the central cutcherry and had not considered the evidence of possession in the various villages and the order was manifestly wrong. My Hon'ble friend has also reminded me of another case. I have known all these cases because I have been in a great many of them and my Hon'ble friend has refreshed my memory. It was a case of over one hundred separate plots of land. The High Court said the order was entirely contrary to the true meaning of the Code. Now the point of it is that these orders were absolutely wrong and irregular. According to the view of some Hon'ble Members it does not matter what is done : but once let the Magistrate dispossess you of your land, and what is the result. In these *char* cases the question of who is in possession will frequently determine the fate of the case, because in regard to many of these *chars* it is often impossible to establish a title. The man who has possession keeps them for ever, so that you must remember that in sending him to law which you do so gaily by means of these absolutely wrong orders—orders in contravention of the law—you are in many cases depriving a man of the land altogether. If it seems to the majority of this Council right to arm the inferior Magistrates with these despotic and uncontrolled powers of dealing with property, they have the power to do so. It will be interesting to watch the result."

The Council divided :—

Ayes—6.	*Noes—12.*
The Hon'ble Gangadhar Rao Madhav Chitnavis.	The Hon'ble Rai Bahadur Pandit Suraj Kaul.
The Hon'ble Sir G. H. P. Evans.	The Hon'ble F. A. Nicholson.
The Hon'ble Rai Bahadur P. Ananda Charlu.	The Hon'ble J. J. D. LaTouche.
The Hon'ble Joy Gobind Law.	The Hon'ble H. E. M. James.
The Hon'ble Pandit Bishambar Nath.	The Hon'ble Sir H. T. Prinsep.
The Hon'ble Rahimtula Muhammad Sayani.	The Hon'ble C. C. Stevens.
	The Hon'ble Sir A. C. Trevor.
	The Hon'ble Major-General Sir E. H. H. Collen.
	The Hon'ble M. D. Chalmers.
	The Hon'ble Sir John Woodburn.
	The Hon'ble Sir J. Westland.
	His Honour the Lieutenant-Governor.

So the motion was negatived.

The Hon'ble PANDIT BISHAMBAR NATH moved that sub-clause (*5*) of clause 439 of the Bill as amended by the Select Committee be omitted. He said: "In moving this amendment, which also stands in my name, I need not expatiate upon the reasons that I have assigned in its support. I may be permitted to call attention to my note of dissent, appended to the Report of the Select Committee, which forms a part of the proposed Bill as printed. The paragraph bearing upon the point runs thus:—

'*Clause 439* (*5*).—This sub-section (*5*) tends to deprive the accused of the benefit of double remedy, which has been allowed to him under the existing law. It is rather unreasonable that while the High Court is to exercise, on its own motion, the power of revision, even in a case of this description, the party aggrieved is denied the right of moving it for the same purpose.'"

The Hon'ble MR. CHALMERS:—"I must oppose this amendment. This is a matter which was very carefully considered by the Select Committee. The Committee came to the conclusion that where the law gave an express appeal then that the person to whom that appeal was given ought to take advantage of it and ought not to have, so to speak, two barrels to his gun. The clause as amended by the Select Committee is carefully drafted so as not to interfere with the power of the High Court to move *ex proprio motu*. It is only where an accused person has an appeal, that the section provides that he shall not proceed by an application for revision. The High Court can still interfere of its own motion if it thinks fit."

The Hon'ble MR. SAYANI:—"I am in favour of the amendment."

The motion was put and negatived.

The Hon'ble MR. JAMES moved that the following proviso be added to sub-clause (*6*) of clause 439 of the Bill as amended by the Select Committee, namely:—

"Provided that applications from parties for the exercise of the High Court's powers of revision shall be in writing and be submitted in the first instance to the Court which passed the order or sentence complained of, and that that Court shall be bound to forward them forthwith direct to the High Court with such comments or report thereon as may assist the High Court in coming to a conclusion."

He said:—"My Lord, I invite the Council's attention to the proviso proposed for this reason. The sub-clause emphasises and brings to notice the enormous

powers of revision the High Courts have got. Scattered all over the Code are allusions to the High Court's powers of revision. Now, one of the blots on our system is that there is no finality in our judicial proceedings. There is the first appeal, the second appeal, and then an application for revision. Now by the original Code the High Court—then called the Sadr Court—could only revise at the instance of a District Magistrate or a Civil Court. It could only pass orders on proceedings called for of its own motion on a point of law. Gradually the powers of the High Court have been enlarged, and the result is that in many places a person dissatisfied with the way his case is going rushes off at once to the High Court and gets an *ex parte* order to stay proceedings. Now, my Lord, it seems to me that this is hardly judicious. At any rate the High Court might wait until the proceedings in the Lower Court are ended, and supposing a Magistrate has convicted a man of a crime and an appeal has been brought to the Sessions Court, and the Sessions Court has rejected it, the case should ordinarily end there. But the convicted person being made aware by his pleader of this sub-clause will, if he is rich enough, probably apply to the High Court for revision. I admit that for extreme cases the power exists already, it would be difficult now to limit it, as at first, to points of law only, but the use of the power is becoming something like an abuse. It appears to me, therefore, only reasonable that the High Court should not issue orders in too great a hurry, assuming that the Lower Court is probably wrong, and on *ex parte* statements, but that when an application is made by a private person to revise a Lower Court's proceedings, it should not interfere with those proceedings until it has heard what the Lower Court has got to say first. The new sub-section is sure to greatly stimulate applications for revision. Therefore I venture to suggest that the proviso of which I have given notice should be added to the sub-section."

The Hon'ble MR. CHALMERS:—"I do not myself think that the amendment ought to be accepted, and will very briefly state the reasons. In the first place, the High Court have ample powers to make rules, and if this is a desirable rule to make they could include this provision in a rule. But then I do not see the necessity for it at all. If I understand the Hon'ble Member, the point seems to be this, when an application for revision is made he wants the application to be made through the Lower Court which passes the order so that that Court may have an opportunity of giving any explanation that is necessary. Well, I think that amendment must be proposed under a misapprehension. I cannot imagine a Court of Justice listening to any reflection on a judicial officer

without giving that officer the most ample opportunity of explanation. I cannot imagine a Court of Justice doing it, or a body of English gentlemen doing it. I am perfectly certain that the practice of the High Court must be that, if they take notice of any allegation against a Magistrate, if they do not dismiss it as absurd and ridiculous, that they would call upon the Magistrate for an explanation and give every weight to that explanation. It seems to me that this proposed amendment of my Hon'ble friend's must be founded on a misapprehension as to what takes place."

The Hon'ble MR. NICHOLSON said :—"There are several objections to this amendment, but I will only mention two, *viz.*, that it is both unnecessary and burdensome.

"The object of the amendment is that due representation of the Magistrate's view of a case shall be laid before the High Court before it proceeds to dispose finally of an application for revision. Now, as presumed by the Hon'ble the Legal Member, this is amply provided for in practice ; in the Calcutta and Madras High Courts to my knowledge, and presumably therefore in all other High Courts. That practice is as follows : when an application for revision is actually admitted, the High Court addresses proceedings to the District Magistrate having jurisdiction, calling upon him to submit the record and to show cause why the application should not be granted. The District Magistrate accordingly submits the record with the observations of the Magistrate whose order is in question, supplemented by his own. This is not all ; the High Court simultaneously sends to the Public Prosecutor (Government Solicitor or Legal Remembrancer) a copy of its proceedings addressed to the District Magistrate ; the Public Prosecutor addresses the District Magistrate for instructions as to opposing the application, and it is, I believe, understood that in all such cases the Public Prosecutor may, and in all important cases that he should, appear in support of the order. Hence there is the amplest provision that no order shall come under revision without the fullest representation of the Magistrate before the High Court ; the amendment is therefore unnecessary.

"The amendment would also be burdensome on the Magistracy, who would have to report upon *every* case in which application for revision might be made, whereas at present they have to report only upon such cases as are actually admitted and referred for records ; these, of course, are far less numerous than applications, of which large numbers are rejected upon mere presentation.

"I therefore oppose the amendment."

The Hon'ble SIR GRIFFITH EVANS:—"The Hon'ble Mr. Nicholson has correctly stated the practice as it is in the Calcutta High Court. What happens is that no order is made calling for the record unless a good case is made out. It has to be made out on affidavits, and in almost all the cases it is necessary to have copies of the various orders which are relied on and which are alleged to be erroneous, and they are laid before the High Court. Then, if the Court considers that a sufficient case has been made out, it issues a rule on the opposite party, if there is one, and on the District Magistrate to show cause. Then cause is shown in due course with the explanation of the Magistrate. But of course the fate of an enormous number of these applications for revision is that they never come to anything at all, being rejected. Now the effect of this amendment is that these frivolous applications, instead of being rejected, should be sent down, in the first instance, to the local authorities, and that they should report upon them before the High Court should be at liberty to reject them."

The Hon'ble RAI BAHADUR P. ANANDA CHARLU:—"The Hon'ble Mr. Nicholson has stated the practice in Madras most accurately, and I have no other remarks to make on the subject."

The Hon'ble SIR HENRY PRINSEP:—"I would point out that there are two classes of cases which come before the High Court for revision. One is where a case is referred by a Sessions Judge or District Magistrate to the High Court for the correction of some order which has occasioned a failure of justice. The other is when the High Court is moved either on the application of one of the parties or acts of its own accord. Now, in the first instance, under the orders of the High Court of Calcutta, the explanation of the Magistrate concerned should be submitted along with the reference or report. In a case of the other class that is when action on revision is taken directly by the High Court, it is the invariable practice to give a rule on the District Magistrate or the Sessions Judge. By this means in both classes of cases before any order in revision modifying or setting aside an order by an inferior Court is passed the High Court in revision has either the explanation of the particular Court concerned or has presented before it that explanation if it be desired to defend that order. The rule is directed to the District Magistrate rather than to the inferior Magistrate who may have passed the order in position, because the District Magistrate is responsible for the whole work of the district; and he invariably obtains, if he thinks it necessary, the explanation of the particular officer concerned, or he asks the Legal

Remembrancer through the recognised Government Law Officers to appear to defend the order. The practice of the Calcutta High Court is, as my Hon'ble friend on the right (Mr. James) would have it. I am not able to speak of the practice of other High Courts. But the amendment seems to me to be open to first objection as it would interpose great delay before an order which is undoubtedly illegal and most unjust could be set aside : it would fetter the action of the High Court : and it would interpose great delay which can easily be avoided under a practice such as I have described as in force in Bengal."

The Hon'ble MR. STEVENS :—" I do not know that I can add much to what has been said already, but I may say that, in the course of an unusually long experience as a District Magistrate, I have never known a case in which the procedure described by the Hon'ble Sir Henry Prinsep has not been followed. Therefore I think this amendment is unnecessary. I think it is open to objection as causing a great deal of unnecessary work for, and I might almost say imposing needless anxiety on, subordinate officers."

The Hon'ble SIR ARTHUR TREVOR :—" I would ask the Hon'ble mover of the amendment whether he did not intend his proviso to refer to applications for transfer rather than to applications for the exercise of the power of revision."

The Hon'ble MR. JAMES :—" I certainly, as I mentioned to the Hon'ble Sir Arthur Trevor, intended moving that a similar proviso should be added to clause 526, where it is even more wanted than to this clause ; but after discussing it with other Hon'ble Members I thought that it would only be a waste of the time of the Council to attempt to limit the power of the High Court in that particular, and therefore I abandoned my intention."

The Hon'ble SIR ARTHUR TREVOR :—" I should have been prepared to accept an amendment of section 526 in the sense proposed, but I see no occasion for such an amendment in connection with applications for revision."

The motion was put and negatived.

The Hon'ble MR. STEVENS moved that sub-clause (*6*) of clause 439 of the Bill as amended be omitted. He said :—" My Lord, it is not necessary that I should detain the Council by arguing at any length regarding this amendment. Sub-clause (*6*) was inserted in the Bill (as the Report of the Select Committee

shows) in order to make it clear that orders passed under section 108 of the Code should be subject to the revision of the High Court. I believe that the Committee were unanimous in thinking that they ought to be subject to such revision. On looking again at clause 435 of the Bill, I find that the High Court or any Sessions Judge or District Magistrate or duly empowered Subdivisional Magistrate may call for and examine the record of any proceeding before any inferior Criminal Court for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court. This appears to me clearly to cover the case of proceedings under section 108 of this Code ; if I am right, the necessity for sub-clause (*6*) does not exist. It is open to objection in that it seems likely to have a more far-reaching effect than was intended by the Select Committee. Since it is apparently superfluous in any case, it is better that it should be omitted from the Code. Accordingly, I move the amendment which stands in my name."

The Hon'ble MR. CHALMERS :—"I think that, on the whole, this amendment is right and that sub-section (*6*) is unnecessary. If you look at the opening words of the section,—sub-section (*1*) runs :—

> 'In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise its powers of revision.'

"Well, those proceedings are referred to in the section quoted by the Hon'ble Mr. Stevens, and I think the newly-added section may be open to objection from two different aspects. In the first place, it may seem to imply that in the case of any order the High Court is bound to exercise its powers of revision and is not merely authorised to exercise them as in the case at present. It would seem to override the existing discretion of the High Court in dealing with applications for revision. But there is another objection to the sub-section. It might be held to limit the powers of the High Court in revision. There are many proceedings which cannot be correctly described as orders which the High Court has power to revise. As the sub-section stands it might be contended that the revisional jurisdiction of the High Court was intended by this to be confined to orders, and not to proceedings which may not necessarily involve an order. For these reasons, I am inclined to agree with the Hon'ble Member's amendment."

The Hon'ble SIR GRIFFITH EVANS:—"I agree with the amendment. It seems to me that the sub-section is absolutely unnecessary when the fullest powers are given in section 435. You cannot make them fuller, and the only result of this will be to introduce confusion. It cannot possibly do any good."

The Hon'ble PANDIT BISHAMBHAR NATH:—"Without meaning to oppose the motion I think I may be permitted to remind the Hon'ble the Legal Member, that the sub-section now proposed to be cut out, was added in the Select Committee, by the Hon'ble Member himself with the object of making it positively clear that the revisional powers of High Courts were to be exercised generally, unless expressly prohibited by any specific provision in the Bill. I have a distinct recollection of the fact, and consider it desirable simply to allude to it."

His Honour THE LIEUTENANT-GOVERNOR:—"Much of what I intended to say has been anticipated by the Hon'ble Members who have spoken, and I will be as brief as possible. The sub-section is not required and its introduction is open to serious objection. There is, however, no room for doubt that the High Court will possess the requisite power without any express provision. Its revisional powers are very wide. Under section 15 of the Charter establishing the High Courts (24 and 25 Vict., c. 104), these Courts are vested with superintendence over all the subordinate Courts, and may set aside any order made by such Courts without jurisdiction. Under section 435 of the Code of Criminal Procedure, the High Courts may call for and examine the record of *any* proceeding before an inferior Court, and, under section 439, may, on such inspection, set aside any order which is incorrect, illegal, or otherwise improper. Any limits to the interference of the High Courts are such only as the Judges themselves may think fit to impose, and it rests with them, on consideration of the circumstances of each case, to decide whether or not they should interfere. Individual Judges make large use of this discretion in rejecting applications which appear to them trivial or which relate to orders that do not, in their opinion, affect the just decision of the particular case. It is much to be desired that the Court should lay down for itself sound rules of practice on this and many other points. At present there is great dissimilarity between the practice of different Benches, and I trust the present Chief Justice will find time to deal with the matter. Meantime I may observe that, there being no provision in the Bill to the contrary, the High Court will obviously possess, in respect of orders under section 108, the same powers as it is competent to exercise in regard to all other orders under the Code, and any express provision, vesting it with such powers, would be superfluous. In

any case, such provision, if insisted on, should have reference *specifically* to that section, and should be added to it. The new sub-section to section 429, being of a general character, thus goes beyond the requirements of the case. It is further calculated to have far-reaching effects which are not contemplated. It declares *every* order of an inferior Court subject to the revisional jurisdiction of the High Court, and cannot but encourage the filing of applications for revision in respect of many orders which have hitherto been usually acquiesced in. This encouragement it is not desirable that the Code should give. Already the privilege of moving the Superior Courts in their revisional jurisdiction is greatly abused. The High Court's last Annual Report on the Administration of Criminal Justice, that for 1896, shows that, in that year, motions for revision were made to the High Court in 722 cases, of which no less than 404 were rejected summarily, while 59 were rejected after the issue of a rule. In the Courts of the Sessions Judges and District Magistrates, the applications of 5,291 persons, out of a total of 7,731 who applied for revision, were rejected summarily, or after the issue of notice on the opposite parties. These figures indicate the extent to which the time of the superior Courts is wasted by groundless applications for revision; and they imply, besides, much needless harrassment and expense to the prosecutors, who feel constrained to appear and resist such applications. This evil would be greatly aggravated if the new sub-section is passed into law. The provision would be appealed to when the High Court is indisposed to grant rules on motions; Counsel or Pleaders would be able to argue justification for pressing for a hearing in respect of any and every order of the inferior Courts, even say, an order for remand, by pointing to the express declaration that *every* order is subject to revision by the High Court; and the Judges might often feel embarrassed in exercising the discretion of summarily rejecting applications, which may now be freely exercised. The disposition, already sufficiently marked, to disregard the authority of the lower Courts, would be increased, and this, combined with the probability that the High Court would have to yield and grant rules in a larger number of cases than hitherto, could not fail to affect injuriously the administration of criminal justice in the districts. Respect for the law has already been weakened throughout the Province by the latitude which is afforded, for contesting the orders of the Lower Courts, however correct, and it is of the greatest importance, in the interests of good administration, that this latitude should be curtailed rather than extended. The new sub-section should, therefore, be removed from the Bill."

The motion was put and agreed to.

The Hon'ble MR. JAMES moved that in clause 498 of the Bill as amended by the Select Committee, the words " or Court of Session," in line 6, be omitted. He said :—" Among other powers that Superior Courts have is that of interfering with the powers of Magistrates refusing bail. Personally, I submit that the whole question of bail in the Code of Criminal Procedure is very unsatisfactory, but as this is only a consolidating Act, and as it would take up the Council's time unnecessarily, I shall not enter into that. The Government of Bombay request that, in accordance with the general policy of reducing unnecessary interference with the Lower Courts, the words 'or Court of Session' should be cut out of clause 498 of the Bill. It is only part of a very great question, but I submit the amendment for the Council's opinion. I notice in one of the Bengal papers one of the officers recommends the same thing as the Government of Bombay. He remarks :—

'The words "a Court of Session" should, in my opinion, be omitted. There is a tendency to an overcarefulness of the liberty of the subject at the expense of the community shown by the Sessions Court: and it is to be remembered that the Magistrate, who in the majority of cases represents the Government interest, is never given a chance of representing the peculiar cases which led him to refuse bail.'

" Personally in my experience the power has not worked satisfactorily. I think, on the whole, when a man has been convicted or committed for a non-bailable offence, and is in prison, he ought to stay there and not to be allowed out on bail except on the special order of the High Court. The provision is mostly worked in the favour of wealthy offenders."

The Hon'ble MR. CHALMERS :—" It is a matter for the consideration of the Council. The law as it stands has been the law of the land for a good many years. I quite agree that the law as to bail is not in a very satisfactory state. That is a very large question into which we are not going to enter. We are asked to alter this provision which has been in force for a great many years, and I do not think the Hon'ble Member has brought forward any very cogent reasons for the change."

The Hon'ble MR. NICHOLSON said :—" The law has not been altered by the present Bill, and no good case is made out for omitting these words. As the Hon'ble Mover has himself stated, the provisions regarding bail are difficult and not altogether satisfactory and should be dealt with as a whole, while the present amendment deals only with one small item. I think that we should not meddle unnecessarily and by scraps with such a matter. Moreover, my own experience is that the power of the Superior Courts to admit to bail is very useful, and one

which could not with propriety be denied to a Court of the status and authority of a Court of Session."

The Hon'ble SIR GRIFFITH EVANS :—"I oppose the amendment; no case appears to me to have been made out for it. The most the Hon'ble Member has said is that he has known several cases where it has worked unsatisfactorily, but he has not informed the Council what he means by its working unsatisfactorily. He has not told us that the men have absconded—absconding is a very difficult matter in this country, and if they appear at the trial, what is the object in keeping them in jail, as my Hon'ble friend desires to keep them whether they are innocent or guilty? They say they are innocent men when they appeal, they give bail and they say we shall appear at the trial, and they do appear. But my friend says not that he fears they will not appear but that he prefers them to be kept in jail; why he wants them to be kept in jail I am at a loss to understand."

The Hon'ble RAI BAHADUR P. ANANDA CHARLU :—"It will be a great advantage to the parties appearing at the trial, in the part of the country to which the Hon'ble Member belongs. He has been referring to long distances for various parties. If it is to be one Court the parties have to go very long distances."

The Hon'ble SIR H. PRINSEP :—"I will only add to what has passed before that the law has remained in its present form since the Code of 1861 without any alteration."

The Hon'ble MR. STEVENS :—"I have one other objection and that is, that the effect of the amendment would be to throw a very large amount of comparatively unimportant work upon the High Courts."

The Hon'ble SIR ARTHUR TREVOR :—"My Lord, it seems to me that even if the amendment were carried, the Court of Session would still be able to take action of the kind to which objection is taken in the exercise of their power of revision under section 435."

The Honb'le SIR JAMES WESTLAND :—"I agree in opposing the amendment."

The motion was put and negatived.

The Hon'ble SIR HENRY PRINSEP moved that to clause 522 of the Bill as amended by the Select Committee, the following sub-clause be added, namely :—

> "(2) If the conviction is set aside on appeal or otherwise, the order under sub-section (1) shall become void."

But after the Hon'ble Mr. Chalmers drew his attention to section 423 (*d*) of the Bill as amended, he, with permission, withdrew his amendment.

The Hon'ble PANDIT BISHAMBAR NATH moved that in clause 526, sub-clause (*δ*), of the Bill as amended by the Select Committee, the words "(unless it is of opinion that the application is made for the purpose of delay or otherwise prejudicing the course of justice)" be omitted. He said:—"In moving this amendment, I have to submit that it is neither expedient nor wise to allow such a discretion to the Magistrate to whom the application for leave to transfer is to be made. For further reasons, I may be permitted to point to my note of dissent attached to the Report of the Select Committee, which forms a part of the Bill, as printed."

The Hon'ble MR. CHALMERS:—"This is a matter for the Council to consider. It is not a matter of which I have any personal experience, but when my Hon'ble friend Sir Henry Prinsep and I were considering this Bill in Simla, he called my attention to certain cases which I see he mentions in his note, where this privilege of asking for a transfer and asking for an adjournment in the meantime had been grossly abused. I have no doubt he will be able to give us particulars of these cases."

The Hon'ble SIR GRIFFITH EVANS:—"I do not deny that this power given in 1884 is liable to abuse, and has been abused. In fact, I pointed out at the time in the debate that it was a statutory power of delay that would make in favour of the long purse. At the same time I do not propose to vote against the amendment, for this reason: it was granted under very peculiar circumstances; it is embodied in the Act of 1884, and although it is not part of and has no relation to that compromise, I would sooner not meddle with that Act if I could help it. Unless the trouble was very serious, indeed I think it wiser to leave it alone. The power was granted after great deliberation. The conclusion the Government came to was that they would take the chance of its occasional abuse, and as I say, not on account of its merits but for other reasons, I do not oppose the amendment."

The Hon'ble RAI BAHADUR P. ANANDA CHARLU:—"For some years after this section was enacted it was thought that the adjournment, intended for the purpose of moving the High Court, worked out a complete stoppage of the trial. If that is still the law, it may work with difficulty. I believe the Courts have

laid down that the trial may go on during the period granted by that adjournment. The only thing is the point up to which the trial might proceed."

The Hon'ble SIR HENRY PRINSEP:—"The objection which has been raised by the Hon'ble Sir Griffith Evans that this is a portion of what is known as the Ilbert Bill compromise."

The Hon'ble SIR GRIFFITH EVANS:—"It is not a portion of the compromise."

The Hon'ble SIR HENRY PRINSEP:—"I should correct myself. The fact that this portion of the Code formed part of the amendment of the law which was the result of what is known as the Ilbert Bill was not present in my mind when I suggested to Mr. Chalmers that in view of some reported cases it was necessary to amend the law in this respect. I have no desire to press the retention of this matter."

The Hon'ble MR. SAYANI:—"I am in favour of the amendment."

The Council divided:—

Ayes—10.	*Noes—9.*
The Hon'ble Gangadhar Rao Madhav Chitnavis.	The Hon'ble H. E. M. James.
The Hon'ble Rai Bahadur Pandit Suraj Kaul.	The Hon'ble C. C. Stevens.
The Hon'ble F. A. Nicholson.	The Hon'ble Sir A. C. Trevor.
The Hon'ble J. J. D. LaTouche.	The Hon'ble Major-General Sir E. H. H. Collen.
The Hon'ble Sir G. H. P. Evans.	The Hon'ble M. D. Chalmers.
The Hon'ble Rai Bahadur P. Ananda Charlu.	The Hon'ble Sir John Woodburn.
The Hon'ble Sir H. T. Prinsep.	The Hon'ble J. Westland.
The Hon'ble Joy Gobind Law.	His Honour the Lieutenant-Governor.
The Hon'ble Pandit Bishambar Nath.	His Excellency the President.
The Hon'ble Rahimtula Muhammad Sayani.	

So the motion was agreed to.

The Hon'ble MR. STEVENS moved that in the *explanation* to clause 556 of the Bill as amended by the Select Committee, for the words "material to an inquiry or trial is alleged to have occurred" the words "material to the case is alleged to have occurred, and made an inquiry in connection with the case be substituted." He said:—"My Lord, I am inclined to think that the *explanation*

as it now stands is somewhat defective. I fear that the Courts would construe 'viewing' a place as not including any inquiry whatever. Those who have had mufassal experience will bear me out when I say that inspections of localities are often most valuable aids to the decision of criminal cases, but they would often be deprived of much of their value if the Magistrates who made them were debarred from making any inquiry. It would indeed be difficult for him to make a useful inspection without some inquiry.

"I may mention a few instances within my own experience. One party declared that a path was a boundary of a certain field in the possession of a second party. The second party said that the path passed through his land, and had been recently made in order to allow the first party to make good his encroachment. A visit to the spot disclosed in a moment that the path had been recently made in the middle of a field which had been sown with peas, and the Magistrate found the remains of plants which had recently been destroyed in making the path.

"On going to the place where a burglary had been alleged to have been committed, the Magistrate found clear marks of digging on the inside, instead of the outside, of the wall.

"The Magistrate went to see the place where a murder had been committed. He saw the places where the witnesses were said to have been, and the information gained assisted him in proving eventually that the case as against the accused before him was entirely got up by the police.

"A charge was brought against a certain person of having illicit opium in his possession. An inspection of the locality shewed that the opium could easily have been put by another person from the outside in the place where it was found on searching the house.

"Now I maintain that none of these visits, all of which involved a little inquiry, ought to be regarded as disqualifying a Magistrate from passing orders in the cases in question.

"It is quite conceivable that there may be cases in which the inquiry might have been such as to disqualify the inquirer from giving an impartial judgment; in such circumstances he ought to stand aside. The proposed amendment will not have the effect of bringing it about that any Magistrate who has made an inspection and inquiry shall try the case, but will merely provide that, if there be no

valid reason to the contrary, the mere fact that the Magistrate has made an inspection and an inquiry he shall not on that mere technical ground be prevented from trying the case.

"I think that the amendment of which the Hon'ble Mr. James has given notice goes too far, because a Magistrate who has been trying to quell a disturbance, and has perhaps been threatened or assaulted, is not likely to take a calm and dispassionately judicial view of the case. Even if he were right as to the facts, which would be scarcely likely, it would be imposing a very invidious task on him to expect him to award punishment.

"My own amendment seems to include what is necessary, and I beg to move it."

The Hon'ble MR. CHALMERS :—"I have no objection to this amendment. It is a matter for the Council."

The Hon'ble MR. NICHOLSON said :—"I entirely concur with the amendment of the Hon'ble Mr. Stevens, and for the reasons given by him."

The Hon'ble MR. JAMES :—"I agree with the Hon'ble Mr. Stevens. I should like to point out to the Council that this section is a standing example of the mistake of making unnecessary laws. In 1882, some wise persons discovered that though there was no law in England that Magistrates interested should not try cases in which they are not, personally, but privately interested, such a law would be a useful thing in India. A Magistrate in England may not try a case against a Railway, of which he is a director, or try a tramp caught stealing his own fruit, or cases of that sort. There is no law against it, however, and if a Magistrate misbehaves in England it takes no little trouble before he is taken off the Commission of peace. Here there is no trouble at all. The Magistrates are all appointed by Government, and are removeable by Government, and if any Magistrate tried a case in which he was privately interested he could be reported and gazetted out of his office at a moment's notice. The result of putting this section in is, that some Judges of the Calcutta High Court have held under it that an officer carrying out the ordinary duties of his office in keeping down crime is a person interested, and they actually so far strained the common meaning of the English language as to say that a person only officially interested has a personal or private interest in the case. The main objection

I have to the High Court's proceeding is that it means to say that you do not trust your officers. As every officer here will tell you, it is the business of the Magistrate to take cognizance of and put down crime. Now, when a Magistrate takes cognizance of a case there is a section under which the accused has the power of objecting to be tried by the Magistrate who is taking cognizance of it, and though that is a section which personally I should like to see amended, it gives ample protection to an accused. As a matter of fact, I know parts of the country where the Calcutta High Court's interpretation of what personally interested means, Districts where Magistrates do not grow behind every hedge as they do in Bengal, would prevent the law being enforced at all. Two years ago the District Magistrate and two Assistants, the only First Class Magistrates in a District in Sind, spent a year in hunting dacoits, eight of whom had to be shot down, and three of whom were caught and hung. And there was no one else but the three Magistrates to try, and commit, the prisoners when once they were caught. I think, however, it will save the time of the Council if I say that I will accept the Hon'ble Mr. Stevens' amendment instead of that of which I gave notice."

The Hon'ble SIR HENRY PRINSEP:—" I did not intend to speak on this amendment, but there is one statement made by the hon'ble mover which calls for an explanation from me. The Hon'ble Mr. James says that the Judges of the High Court in acting on this section have shown a distrust of their Subordinate Courts. He has not, however, understood the reason why the Judges have made use of this section. They have not been actuated by any distrust of their officers, but they have acted on the principle laid down in numerous English cases in which it has been held that it was of the highest importance that the Courts should have the confidence of the public, that regard should be had not so much to the motive which might be supposed to bias a Judge or Magistrate as to the reasonable susceptibilities of the parties concerned ; and that it was a most important object to clear away everything that might engender suspicion and distrust of a tribunal so as to promote the feeling of confidence in the administration of justice which is so essential to social order and security. Wherever therefore any case has come within this rule the Judges have removed its trial to some other Court. The particular officers concerned should not feel aggrieved and regard such an order as any slight. They should rather appreciate the object contemplated and recognize also that orders under this section are not made lightly and without some good reason to attain that object."

The motion was put and agreed to.

The Hon'ble MR. CHITNAVIS said :—"My Lord, I beg to propose that the newly introduced words 'or otherwise concerned therein in a public capacity' be omitted from the *explanation* to section 556. These words make the scope of the section too wide, and their retention, I am afraid, may at times interfere with the impartiality of the administration of justice. For instance, there is nothing to prevent a Magistrate who has acted as the president or responsible head of a municipality from ordering the prosecution of a person and trying the person himself. Again, a Magistrate who has acted in a particular case in his executive capacity as head of the police, may, if the words be retained, safely try any case initiated by himself as a Judge—a proceeding which cannot be too strongly condemned.

"Any interest, however small, ought in my opinion to disqualify a Magistrate or Judge from trying a case in which he is interested.

"I therefore think that, in the interests of justice, the words 'or otherwise concerned therein in a public capacity' should be omitted."

The Hon'ble MR. CHALMERS :—"I must oppose this amendment. I do not put the same construction on the section as the Hon'ble Member does."

The motion was put and negatived.

The Hon'ble MR. STEVENS moved that for clause 557 of the Bill as amended by the Select Committee the following clause be substituted, namely :—

Practising pleader not to sit as Magistrate in certain Courts.

"557. No pleader who practises in the Court of any Magistrate in a Presidency-town or district shall sit as a Magistrate in such Court or in any Court within the jurisdiction of such Court."

He said :—"My Lord, I think the members of the Select Committee were unanimous in regarding it as improper that a pleader should alternate between his practice as a pleader and active participation in judicial work in the jurisdiction within which he pleads.

"I believe that in England the law is more strict than the proposed section 557 would make it. But I think that we may safely relax it still further. There are many pleaders (using the term in the widest sense) who do not take criminal practice at all, and I see no reason why they should be excluded. Again there are others who may practise in one part of a district, who need not be debarred from sitting as Magistrates in another.

"Pleaders form such a very large proportion of the educated public of Bengal that the District-officers expect of them, and receive from them, very considerable help. I think it would be practically inconvenient to take stronger measures than are necessary to avoid the scandal at which the section is aimed. I therefore move the amendment in my name."

The Hon'ble MR. CHALMERS :—"This is an amendment which may be accepted. Speaking for myself I should have preferred the clause as it stood. I think the clause as it stands and as framed by the Select Committee is right in principle, but in the peculiar circumstances of the mufassal there is no doubt it might give rise to a certain amount of difficulty, and therefore I am prepared to sacrifice a certain amount of principle to practical convenience and to accept the clause proposed by my Hon'ble friend Mr. Stevens."

The Hon'ble MR. LATOUCHE :—"The principle of the clause as framed by the Select Committee is unquestionably sound, but in the Provinces practical difficulties arise if all practising pleaders are prohibited from sitting on Benches. The amendment of the Hon'ble Mr. Stevens will be a convenience in outlying Districts."

The Hon'ble SIR GRIFFITH EVANS :—"I have been desired to bring before the Council the state of affairs in Calcutta with regard to the Presidency Magistrates. The facts I have been asked to lay before you are these :—It appears there are some of the attorneys of the High Court who have sat as Honorary Magistrates—one of them, I think, for about twenty years—and I believe they have done very good work. They are attorneys of the High Court, and of course, so far as their being attorneys of the High Court is concerned, it might be all right so long as they do not practise in the Police Courts, but, as a matter of fact, two of these gentlemen who have been Honorary Magistrates for a very long time do practise before the Stipendiary Magistrate, and the difficulty was as to what should be their proper course, there being no law about it at all. I am told they obtained opinions from the Advocate General to the effect that probably they would be within the spirit of the rule, having regard to the peculiar state of things in Calcutta, if they abstained from ever appearing before any Bench of Magistrates and only appeared before Stipendiary Magistrates. That is what they have done for a good many years. They have not appeared before any Benches, they themselves sitting on some of the Benches. I thought I should bring this to the notice of the Council because the change may cause a certain amount of inconvenience. As regards the principle of the thing, I am entirely at one

with the Hon'ble Mr. Chalmers. The principle must be observed, the only question is, how far we can really observe the essential principle and, at the same time, cause as little inconvenience as possible."

The Hon'ble PANDIT BISHAMBAR NATH :—" Clause 557 as amended by the Select Committee is, I submit, open to a practical objection. In the North-Westen Provinces and Oudh, distinguished practising vakils or pleaders are generally appointed as Honorary Magistrates in districts within the local limits of which they are respectively engaged in carrying on their profession, without any restraint or limitation. Such legal practitioners must now be prepared either to give up their practice or cease to aspire to the distinction of being selected as Honorary Magistrates. It is desirable, therefore, that the amendment moved by the Hon'ble Mr. Stevens should be adopted and carried. The clause as amended by the Select Committee, and as I did point out to it, would also interfere with the free exercise of a patronage in the gift of the Local Government."

His Honour THE LIEUTENANT-GOVERNOR :—" The amendment proposed by my Hon'ble friend Mr. Stevens has been prepared in consultation with myself and has my entire support. We are very much indebted, and the Bengal Government is particularly indebted, to the large number of gentlemen of the legal profession who have served as Honorary Magistrates throughout the mufassal, and generally I may say that, although these gentlemen have occasionally been persons practising in the Criminal Courts, there have been very few cases indeed in which, even in the shape of anonymous communications, aspersions have been cast upon their honour. But there is no doubt that the principle now to be inserted in the Code is a sound one, that a man should not shift between the Bench and the Bar, and that he ought to make his election between the two, and Mr. Stevens' amendment will not deprive us of the services of gentlemen who do not practice in the Magistrates' Courts. I am well aware of the cases in Calcutta to which my Hon'ble friend Sir Griffith Evans has drawn our attention. The gentlemen to whom he refers have done a large amount of good work on the Bench, and I should be sorry to lose their services, but, on the other hand, it has been pressed on me from various influential and well-informed quarters that considerable scandal has been caused in Calcutta by certain other persons executing that manœuvre which I call shifting about from the Bench to the Bar. It is very

desirable that that practice should be stopped, and if the gentlemen to whom my Hon'ble friend Sir Griffith Evans has referred do not see their way to abandoning what little practice they may have in the Magistrate's Court, I am afraid we shall have to lose their services, though I hope under the Hon'ble Mr. Stevens' amendment we shall be able to see our way to retaining their services as Honorary Magistrates if they give up their practice in the Magistrates' Courts."

The Hon'ble MR. STEVENS:—"I wish to say that in drafting this amendment I made several efforts to reduce this clause of the Bill to the minimum compatible with the principle which we wish to embody in the Bill. I feared that the introduction of this principle might cause inconvenience and even in some cases what might be termed hardship. The terms of the amendment were arrived at after much thought and trouble.

The motion was put and agreed to.

His Honour THE LIEUTENANT-GOVERNOR OF BENGAL moved the following two amendments: that in clause 563, sub-clause (*1*), of the Bill as amended by the Select Committee, for the words "a Court having power to deal" the words "the Court which convicted the offender, or a Court which could have dealt" be substituted; also that at the end of sub-clause (*2*) of the same clause the words "Such Court may, after hearing the case, pass sentence" be added. He said:—"These amendments are practically only verbal amendments. A new procedure has been introduced dealing with first offenders, and it is only to make the sections a little more clear for the officers who have to work them that I suggest these additions. It is not at present expressly provided that a sentence is to be passed when the terms of the conditional release are violated, or that when the Magistrate who passed the original sentence is transferred another Magistrate may take the case up on violation of the bond."

The Hon'ble MR. CHALMERS:—"I quite agree in the principle of these amendments, only a doubt has occurred to me as to the words of the second amendment—'Such Court may after hearing the case pass sentence.' Some doubt might arise as to the words 'after hearing the case,' because there is no case to be heard.

"I should like to ask my Hon'ble friend Sir Griffith Evans if he would consider with me for a moment the wording of this second amendment. The English Act contains no such words as it is proposed to insert here. The

sentence is passed as a matter of course by the Court before which the motion is brought, but this is a new procedure in India, and it may, therefore, be necessary to go into details which are not gone into in England."

After some further discussion the motion was put and the amendments were agreed to.

The Hon'ble MR. JAMES moved that in the heading to clause 565 of the Bill as amended by the Select Committee, for the word "Habitual" the words "Previously convicted" be substituted, and that in the marginal note to the same clause for the word "habitual" the words "previously convicted" be substituted. He said :—"My Lord, this amendment will only need two words of explanation. The marginal note says 'habitual offenders.' For many years past the term 'habitual offenders' has in Chapter VIII of the Code been used for describing a different class of offenders altogether. I would refer Hon'ble Members to the margin of section 109. The Bombay Government deprecate the expression being used for both classes. In the one case they are previously convicted persons, and in the other case persons who are by repute known to misbehave, and the Bombay Government fear that, by applying the same title to both, ultimately confusion may arise and difficulties occur. In order to prevent anything of the sort it is proposed to change the term in this chapter from 'habitual offenders' to 'previously convicted persons.' I understand that no objection is likely to be raised, so I have the honour to move it."

The Hon'ble MR. CHALMERS :—"I do not see any necessity for that amendment ; it can do no harm. A person who has been previously convicted is very like an habitual offender, and it seems to me that the difference between the two is rather like the difference between tweedledum and tweedledee. It is wholly immaterial whether it is done or not."

The motion was agreed to.

The Hon'ble PANDIT BISHAMBAR NATH moved that, in Schedule II to the Bill as amended by the Select Committee, column 8, opposite the entry relating to section 124A, the words "Chief Presidency Magistrate or District Magistrate" be omitted. He said :—"It is highly desirable in the ends of justice that offences falling under section 124A should be made triable by the Court of Session with the aid of a jury or assessors. The alteration made in

column 8, Schedule II, whereby such offences are made triable by District Magistrates as well, is open to objection on the grounds stated in my note of dissent."

The Hon'ble MR. CHALMERS :—"I must oppose this amendment. The Government desire the small cases to be dealt with by Magistrates. It is undesirable that small offenders who contravene the law should have their weak and silly sayings made more public than is necessary. I remember being struck by an expression of my Hon'ble friend Sir Griffith Evans in the previous debate. He said that, when you have to disinfect infected linen, you do it as far as possible away from the busy haunts of men. Our object is that where there is a petty offence by a petty offender, which does not call for a great punishment, that that offence should be promptly dealt with, subject of course to the power of revision by the High Court. We do not want first of all an inquiry in which the offence is gone into before the Magistrate, and a second inquiry in which this nonsense is circulated by a trial before the High Court. The object is that a small punishment should be meted out as promptly as possible."

The motion was put and negatived.

The Hon'ble MR. CHALMERS moved that in Schedule II to the Bill, as amended by the Select Committee, column 8, opposite the entry relating to section 124A, the words "or Magistrate of the first class specially empowered by the Local Government in that behalf" be added. He said :—"In this case, on behalf of the Government, I have to move an amendment which goes back to what I originally gave notice of, and which to some extent alters the amendment proposed by the Select Committee. I will very briefly state the reason why the Government cannot accept what seemed to be the right thing to the Select Committee. The Select Committee proposed that these powers should be confined to Chief Presidency Magistrates and to District Magistrates, but I must call attention to the fact that the exercise of this jurisdiction is safeguarded by section 196. That section provides that no prosecution can be instituted under section 124A without the sanction of the Local Government or of the Government of India. Well, now what would be the effect of requiring that previous sanction ? It will be this, that before proceedings are instituted under this power, the attention of the Local Government would have to be called to the offence. Now, who is the person who will call the attention of the Local Government to the offence, and who will more or less advise the Local Government as to the necessity or propriety of instituting proceedings ?

That person will necessarily be the District Magistrate. The consequence is that, by virtue of the provisions of section 196 which require the consent of the Local Government, the District Magistrate will have to interfere in the case in an early stage. He will have to make up his mind whether there is a case to report to the Local Government or not, and no doubt in reporting the case to the Local Government he will to some extent form an opinion on the matter, and therefore in the interests of the accused it is better that he should not try the case. The fact that he has reported the matter, that he has called the attention of the Government to the matter, may be held to give him a bias in the matter, which would render it advisable that he should not himself both report the case to Government and subsequently try it. Well, that being so, the Government think it is necessary that there should be other Magistrates who would have power to try these cases and who will not have that possible bias which a previous enquiry into the case may have given to the District Magistrate. We propose that the Courts empowered to try cases of this kind should be not only the Chief Presidency Magistrates and District Magistrates, but also Magistrates of the first class specially empowered by the Local Government in this behalf. I beg to move the amendment which stands in my name."

The Hon'ble PANDIT BISHAMBAR NATH:—"With great diffidence I have to submit I am against the amendment."

The motion was put and agreed to.

The Hon'ble MR. CHALMERS moved that in Schedule IV to the Bill as amended by the Select Committee, page 235, after clause No. (14) the following be added, namely:—

"(15) Power to try cases under section 124A of the Indian Penal Code."

He said: "This amendment is merely consequential, its object being to include in the powers with which the Local Government may invest Magistrates of the first class the power to try cases under section 124A. It is merely consequential on the last amendment, and is enumerative of the powers already given."

The motion was put and agreed to.

The Hon'ble MR. CHALMERS moved that the Bill as amended be passed.

The Hon'ble SIR GRIFFITH EVANS :—" There is one observation I wish to make on this matter which is more or less of a personal character. The Maharaja of Durbhanga in his long speech, which was an excellent speech, but which we did not have the advantage of hearing yesterday, but which I have had the advantage of reading this morning, points out that there are a very large number of amendments put forward in the Bar memorial, and he asks why neither the Legal Member nor I had noticed them, or why none of them had been brought forward by me. I was unable to sit on the Select Committee because it was impossible for me to do so with the limited time at my command. It is a very intricate and cumbersome Bill, and it was absolutely impossible for me to spare the necessary time to go through all the amendments that had been proposed and brought before the Select Committee or the suggestions which had been made after the report. I knew the Select Committee contained many experts—including Pandit Bishambar Nath and Mr. Sayani—and also outside it there was Mr. Ananda Charlu, who had his whole time at his disposal, which I, unfortunately, had not, and who were well able to look after the interests of the accused persons if it be supposed that the official Members did not do so and to criticise these matters in detail. It is impossible for a professional man to undertake to form an opinion or to put forward an amendment upon, these matters of drafting without going right into the root of the thing and examining the history of the amendments and the original sections. It would have taken me a very long time to do so, and I am sorry to say I had not the leisure to do it. There are certain portions of this Code that I am familiar with, and can give an opinion on, almost off-hand, but there is a great deal in the Code that I do not pretend to be familiar with as I practise very little in the Criminal Courts. There are many members of the Council with more leisure than myself who have no doubt gone into these matters and considered them."

The Hon'ble SIR HENRY PRINSEP said :—" I share with the Hon'ble Member who has been in charge of this Bill a keen feeling of relief that its ultimate stage has been reached, and with all the members of this Council I venture to hope that we have been able to present a consolidating and amending Act relating to a subject of the highest importance which it is hoped may in its operation be found to be a substantial improvement on the existing law, so as to assist all those who may be called upon either to administer it or to submit to its terms in the practice of our Criminal Courts.

" I shall not be out of place and shall not uselessly expend the time of this Council if I shortly recall previous legislation on this subject.

"I am one of those few still in the public service who can recollect the state of the law before the Code of 1861 was passed. We were guided by a few useful but fragmentary rules issued from time to time either by the Legislature or by the highest Courts of the country, and I am not sure whether we were not able to do justice as well with their assistance as successive generations of Judges and Magistrates under the very minute codes which have since become law. I share in the opinions expressed by the Hon'ble Law Member in charge of this Bill and by others in our discussions on it that the first Code of 1861 was generally a more workable Code than any of its successors, though I do not wish to be understood as holding that it was not capable of being improved, as in course of time its defects and omissions became exposed in practice. Still it had one great merit. It avoided many unnecessary matters of detail and it confined itself principally to laying down broad principles on which our Courts were to act and which they were to adapt to the varying circumstances which arose.

"I would here quote Sir Henry Maine's words on this subject. Sir H. Maine, in dealing with objections to a codification of the law, stated that the only possible remedy for the state of things he had described was a code which without going over much into detail should set forth fundamental principles with as much simplicity as was compatible with accuracy; and I venture to express my regret that in subsequent legislation on this and many other subjects this rule has been too often departed from. At the same time I fully admit that from the material from which our Judges and Magistrates are taken it may be necessary occasionally to legislate on matters of detail on which our Courts may have erred or on which difficulties may have arisen from a conflict of opinions expressed even by our highest Courts. But it appears to me, and I know that this opinion is very generally entertained, that while legislation may serve to ensure uniformity of practice, and to prevent failures of justice from imperfect declarations of the law, it has too often unnecessarily undertaken the task of endeavouring to prescribe too minutely matters of detail so as to defeat its object. It has caused embarrassment by inviting criticism which may be described as hair-splitting, and in spite of the safeguards which it has provided that no technical defect shall affect the merits of a case unless it has occasioned a failure of justice, the law reports show that in their sensitiveness our Courts have too often allowed non-observance of matters of form to affect the final result of a trial. It has often struck me that there are serious objections to a law which, while it deals minutely with matters of detail (and I here refer to our present Codes of Procedure) and also expressly

requires their observance in the course of proceedings held under those Codes at the same time declares that their non-observance through the carelessness or even incompetence of a judicial officer shall be immaterial if a fair trial has been held. It has often seemed to me to encourage careless work and unduly to throw upon the highest Courts in its exercise of powers of revision the duty of defining the consequences of transgression of the law, whereas, if that law had been expressed more broadly in matters only of principle, such difficulties might not have arisen. But it is too late to recall the past. We can only act on the lines adopted by our predecessors, and endeavour from time to time by careful legislation to meet difficulties brought to notice by expressing that law more clearly, even though we may diverge into minute matters of detail. These are the main difficulties which have to be encountered in any amendment of any of the Codes of Procedure.

"The Code of 1861 was amended and re-enacted by the Code of 1872. It consisted of 445 sections and had been only once amended in the interval in 1869 by an Act which amended either wholly or in part 76 sections.

"The Code of 1872 expanded the 445 sections of the Code of 1861 into 541 sections, and as one of those whose duties called upon him to administer it I can speak feelingly of the difficulties felt from a law recast on entirely different lines. We had to make ourselves familiar with an entirely different law, and we were puzzled and wearied in our attempts to find a familiar point hidden in that law under a different arrangement of the subject. I am aware of Sir James Stephen's remarks on justifying the change and his condemnation of the manner in which the subjects dealt with by the Code of 1861 had been arranged, but we who had to administer the law never appreciated the change, and we often bitterly lamented the valuable time lost in finding out where the old law had been re-enacted.

"The Code of 1872 was followed by the Code of 1882, having been intermediately amended only by one Act in 1874 in respect of 74 sections out of the 541 sections which it contained. So far therefore we had little room to complain after we had once mastered the Codes of 1861 and 1872. Each of these Codes was only once amended, and then completely, and, I may say, once for all.

"The Code of 1882 contained 558 sections, an increase over those of the Code of 1872, but a small increase in comparison to that of the Code of 1872 over its predecessor of 1861. But here we had to deal with a Code in many respects recast and different from the former Code in many respects also; for while professing

to re-enact the former law it expressed it in different terms so as to cause much difficulty and complication. As an instance of this I would point to the use of the concise term 'tangible immovable property' in section 145 instead of the familiar and well-understood words of the former Codes and previous law.

"The Code of 1882 is now to be replaced by the Code of 1898. But intermediately we have had sixteen amending Acts; of these, I find that two were passed in the same year, in another year three amending Acts were passed, while in another year no less than four were passed, and it has astonished those who presided in Criminal Courts to find that two Acts were passed in the same year, both amending the same section; all this constant amending Legislation without any attempt at consolidation has necessarily caused confusion which might have been avoided. In mentioning this I hope that our difficultles in the past will be appreciated and that in the future there will be less frequent amendment and more consolidation. Sir James Stephen in his well-known minute on the administration of justice recommended consolidation at short intervals of all great Codes; as far as I can recollect, at intervals of five years. Hitherto a decennial consolidation of the Code of Criminal Procedure has been the rule, and I venture to confess to express a hope that this will be done in the future. A consolidation and reconsideration of previous legislation so as to embody and settle case-law with then become necessary. I can feelingly speak of the consequences of such delay in accumulating a greater mass of material scattered over sixteen years which had to be arranged and separately considered in the preparation of the present Code, and I have also had experience of the confusion caused by such long-deferred legislation in the work of our Courts.

"We have the satisfaction of feeling that in Your Excellency's Government the mistakes of the past have been recognized. We have now a consolidated Code which was due before Your Lordship assumed office, and we have this Code scrupulously on the lines of the Code of 1882. The Hon'ble Law Member in charge of this Bill, whose reputation as a draughtsman stands quite as high as that of any of his predecessors, has resisted all temptation to display his art, and has, if I may say so, too often sacrificed neatness in form to his desire not to alter the numbers of the sections of the Code of 1882 with which practice had made us so familiar. So far he is entitled to the warm congratulations of all Judges and Magistrates. Personally I am inclined to think that his object might have been sufficiently attained if the sequence of the law had been maintained, and that in its re-enactment the new parts should have appeared as interpolations. In adding to the bulk of a section so as not to alter the

numbers of the following sections some difficulty must always arise in finding what is required and in quoting a law expressed in one section and sub-divided into many sections, for although all these sub-sections may relate to the same subject they deal with different branches of it; they may properly form separate sections; and when compressed in one section they often form a small sub-chapter. I fear that when the next consolidated Code is passed these sections will be broken up, so that reference to the old law will become a matter of greater difficulty. Still we of the present generation will be saved, for we shall have passed away, and we may be allowed, selfishly perhaps, to congratulate ourselves on this self-negation of the Hon'ble Mr. Chalmers.

"I hope that I may be permitted now to refer to a somewhat personal matter. I have been associated with Your Lordship's Government in the preparation of this Code, and I am most grateful for the terms in which my work has been referred to. I do not desire to avoid any responsibility in my work, but I desire to state the extent of my responsibility because I have the strongest reason to know that I am in all ill-informed quarters held to be directly responsible for all that is contained in this Code. This is rating my work too high and at the same time is imposing on me a responsibility which is more than my due.

"As Your Lordship's Government is aware, my duties have been to assist in the preparation of this Bill, to collect material for that purpose, and to lay it before the Hon'ble Law Member for his consideration. In this task I have been responsible for not misleading him and for not overlooking or misrepresenting anything, and I have throughout in the preparation of this Bill discussed with the Hon'ble Member in charge of the Home Department the details of this Bill. Having done this my responsibility, except as a Member of this Council, has ceased. The Bill is the Bill of the Government of India in the hands of the Hon'ble Member who has had the carriage of it through this Council. In some respects it does not altogether express my opinions, and in others it is expressed in terms which I have ventured to state in Select Committee have seemed to me to be not altogether appropriate or easy for interpretation by the bulk of our Magistrates. But I have subordinated my own opinions on these points to the judgment of the majority of those with whom I have been associated in dealing with this subject, and I have only on one matter which I consider of great importance ventured to offer any substantial objection. In adopting this course I have considered that I was acting in a manner best calculated to promote the administration of Your Excellency's Government."

The Hon'ble MR. CHALMERS said :—"I have only two words to say, first, with regard to what fell from my Hon'ble friend Sir Griffith Evans in which he referred to the various valuable suggestions made in the Hon'ble Maharaja of Durbhanga's speech. Unfortunately that speech was not delivered in the Council, and therefore I have not had access to that valuable information. I did not know that it was published in the papers, and I have not had the benefit of seeing it. I suppose like many other valuable things I shall see it when it is too late. As regards what fell from my Hon'ble friend Sir Henry Prinsep, I have only got to thank him for the assistance which he has given us in revising this Code He says he thinks that every Code ought to be consolidated every five years. I should be delighted that this Code should be consolidated at the end of five years, for I shall not be here. In the meantime I hope we have done something to make its meaning clearer. We have done something by consolidating sixteen Acts into one. My task is over and I can only say I am very glad that my Hon'ble friend and not myself will have the laborious work of editing 'the new Code'."

His Excellency THE PRESIDENT :—"I congratulate the Council on finishing this very long Bill ; and in doing so I would only say with my Hon'ble friend Sir Henry Prinsep and my Hon'ble friend on the left (Mr. Chalmers) that I hope that much advantage will accrue to the public from the time and labour expended in the first place and pre-eminently by themselves in the revision of this Code, and also by the Select Committee and the Council itself. The only other word I will say, and I am sure I shall say it on behalf of the whole Council, is to express our admiration not only of the ability but the untiring tact and temper which my Hon'ble friend Mr. Chalmers has displayed in the heavy task which has fallen upon him in the conduct of this Bill."

The motion was put and agreed to.

The Council adjourned to Monday, the 21st March, 1898.

CALCUTTA,
The 25th March, 1898.

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

Government of India Central Printing Office.—No. 689 L. D.—29-3-98.—328 —F. H.