

*Wednesday,
5th March, 1913*

ABSTRACT OF THE PROCEEDINGS

OF THE

Council of the Governor General of India,

LAWS AND REGULATIONS

Vol. LI

April 1912 - March 1913

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THE COUNCIL OF THE GOVERNOR GENERAL OF INDIA

ASSEMBLED FOR THE PURPOSE OF MAKING

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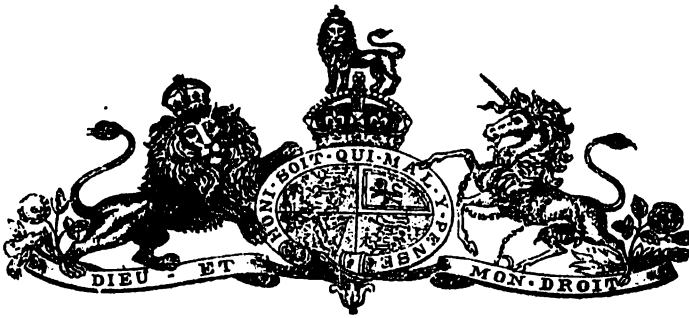
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GOVERNMENT OF INDIA.
LEGISLATIVE DEPARTMENT.

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
to 1909 (24 & 25 Vict., c. 67, 55 & 56 Vict., c. 14, AND 9 Edw. VII, c. 4).

The Council met at the Council Chamber, Imperial Secretariat, Delhi, on
Wednesday, the 5th March, 1918.

PRESENT :

The Hon'ble SIR GUY FLEETWOOD WILSON, G.C.I.E., K.C.B., K.O.M.G., Vice-
President, *presiding*,
and 59 Members, of whom 52 were Additional Members.

GOLD COINAGE.

The Hon'ble Mr. Gillan: "Sir, on behalf of the Hon'ble the
Finance Member, I beg to lay on the table the two despatches* relating to
gold coinage in India mentioned in the Financial Statement."

QUESTIONS AND ANSWERS.

The Hon'ble Sir Gangadhar Chitnavis asked :—

"Will the Government be pleased to state how far the scheme for serial
entry and loading of goods, discussed at the meeting of inquiry recently held at
Cawnpore by the President of the Railway Board has proved a success, and, if
successful, whether it is proposed to carry it out on all the systems of Indian
Railways?"

The Hon'ble Sir T. R. Wynne replied :—

"The new system for serial entry and loading of goods is still under trial
on the Great Indian Peninsula Railway and it is proposed, later on, to hold a
conference of trade and railway representatives to consider whether the system
has proved itself a sound one, and, if so, whether any modification in any speci-
fic direction is desirable.

"If the general opinion is that the system is a satisfactory one, other railways
will be addressed with the view to its adoption."

The Hon'ble Sir Gangadhar Chitnavis asked :—

"Will the Government be pleased to state if there is any proposal
before them for an increase in India's annual contribution to the naval defence
of the British Empire, and if before any final step is taken the members of
this Council will be given an opportunity of submitting their views about any
proposed increase in the burden?"

* *Vide* Appendix A.

[*H. E. the Commander-in-Chief; Khan Bahadur Mir Asad Ali; Sir Harcourt Butler; Rai Sita Nath Roy; Mr. Gillan.*] [5TH MARCH, 1913.]

His Excellency the Commander-in-Chief replied:—

“The answer is in the negative.”

The Hon'ble Khan Bahadur Mir Asad Ali asked:—

- (a) Will the Government be pleased to state whether any portion of the Imperial Durbar grant of Rs. 50 lakhs a year is to be expended on Muhammadan education?
- (b) If so, will the Government be pleased to state what amounts were allotted to different provinces of the Indian Empire?”

The Hon'ble Sir Harcourt Butler replied:—

“The Imperial Durbar grant of Rs. 50 lakhs was distributed under general Educational heads as already announced in the Council. The expenditure of any portion of the sums so allotted upon specifically Muhammadan education (as distinguished from education open to Muhammadans in common with other communities) is a matter for decision by each Local Government.”

The Hon'ble Rai Sita Nath Roy Bahadur asked:—

- (a) Is it a fact that the abolition of the practice hitherto observed of keeping memorandum in currency offices of the numbers of currency notes valued at Rs. 50 and over reported to be lost or stolen has created a sense of insecurity in the minds of the people respecting the use of currency notes?
- (b) Has Government considered the question whether the abolition of the former practice is or is not likely to facilitate encashment of lost or stolen currency notes and thereby create an impression that thefts of currency notes may be committed with impunity?
- (c) Will the Government be pleased to state whether they have received any communications indicating that their present action has had the support of the Indian Commercial Community of any Province?
- (d) Will the Government be pleased to state whether they propose to re-introduce the former practice?”

The Hon'ble Mr. Gillan replied:—

- (a) The Government are unaware that the abolition of the stopped note list has had the effect suggested.
- (b) If the Hon'ble Member will refer to the Resolution No. 523-F., dated the 12th November 1912, a copy of which is laid on the table, he will see that the question referred to was fully considered.
- (c) The answer is in the negative.
- (d) The answer is in the negative.”

The Hon'ble Rai Sita Nath Roy Bahadur asked:—

- (a) Will the Government be pleased to state whether schemes for the canalisation of Tulley's Nullah in Calcutta and the construction of a direct canal connecting the Madaripur Bheel route with the river Hooghly have been submitted to this Government by the Government of Bengal?”

[5TH MARCH, 1913.] [*Rai Sita Nath Roy; Sir Robert Carlyle; Mr. Vijiaraghavachariar; Sir Reginald Craddock; H. E. the Commander-in-Chief; Sir Gangadhar Chitnavis.*]

“(b) Is it a fact that a direct canal would considerably shorten the journey and minimise the risk which a journey by the Sunderbans or the outer route entails, and would greatly reduce transport charges and facilitate transport of jute and other commodities from Eastern Bengal to Calcutta?”

“(c) Do the Government propose to sanction the above schemes?”

The Hon'ble Sir Robert Carlyle replied :—

“The schemes referred to in question (a) have not yet been received by the Government of India.

Questions (b) and (c) cannot be answered until the schemes have been received and considered.”

The Hon'ble Mr. Vijiaraghavachariar asked :—

“Will Government be pleased to state whether they propose to publish the latest despatch of the Secretary of State for India on the question of the growth of an independent medical profession in India?”

The Hon'ble Sir Reginald Craddock replied :—

“The Government of India do not propose to publish the despatch to which the Hon'ble Member apparently refers.”

The Hon'ble Mr. Vijiaraghavachariar asked :—

“Will Government be pleased to state what are the recommendations of the Committee presided over by Admiral Slade on the Royal Marine?”

His Excellency the Commander-in-Chief replied :—

“The recommendations are being considered by Government, and while in this stage no useful end would be attained by publishing them.”

The Hon'ble Sir Gangadhar Chitnavis asked :—

“Has any report been submitted by the Town-planning experts, Captain Swinton and others, on the location of the new Imperial capital? If so, will Government be pleased to lay on the table a copy of the report?”

(2) Will the Government of India be pleased to make a statement about the duties which these experts are performing since their return from England this cold weather?

(3) Have any references been made or are any references proposed to be made to the Committee of Architects consisting of Messrs. Baker and Lutyens? If so, will Government be pleased to furnish the Council with a statement of such references? Do Government propose to consider the advisability of associating with these architects an European architect of Indian experience and also a qualified Indian with necessary experience?

(4) Is it a fact that there is a widespread feeling among all His Majesty's subjects in India that the dominating feature of the new capital should be oriental style?

(5) Will Government be pleased to state whether any opportunity will be afforded to this Council for discussion before any decision is arrived at in respect of the site and architecture of the new capital?”

[*Sir Robert Carlyle ; Rai Sita Nath Roy ; Mr. Clark.*] [5TH MARCH, 1913.]

The Hon'ble Sir Robert Carlyle replied :—

- "(1) The Government of India have not yet received a final report from the Town-planning experts.
- (2) The experts have been and are engaged in considering various alternative sites and lay-outs for the new city.
- (3) The Government of India have not framed definite terms of reference to the Committee of Architects. Mr. Lutyens is associated with the Town-planners and both he and Mr. Baker, with the assistance of Sir Swinton Jacob, an architect of much experience in the design and construction of buildings in this country, will submit designs for two buildings of importance and will advise the Government of India on the designs of all other new buildings and on any other matters regarding the new Capital that may be referred to them.
- (4) The question of the style of the architecture of the new city, as the Hon'ble Member is doubtless aware, has formed the subject of considerable discussion, both in England and in India, in the course of which various opinions have been expressed. The best available advice will be taken in regard to all architectural questions, and all local conditions affecting them will be fully considered before any final decision is arrived at.
- (5) Government do not propose to put forward the question of the site and architecture of the new Capital for discussion in their Legislative Council."

The Hon'ble Rai Sita Nath Roy Bahadur asked :—

- "(a) Is it a fact that cases of theft of postal articles have largely increased of late ?
- (b) Will the Government be pleased to lay on the table a statement of such cases of theft for the last five years ending with the year 1912, and the amounts of loss sustained thereby ?
- (c) In the event of there being a considerable increase in the numbers of such thefts, do the Government propose to appoint a committee to inquire into the matter with a view to devise means for providing safeguards against such thefts in the future ? "

The Hon'ble Mr. Clark replied :—

"Government have no reason to believe that cases of theft of postal articles have largely increased of late. They regret that no statistics showing the number of cases of theft of all classes of postal articles are available. A statement, however, has been prepared and is laid on the table showing for the last five years the number of registered and insured articles stolen or damaged and the amount of compensation paid. The statement does not include unregistered articles as no record of losses in such cases is possible. It includes not only cases of theft by postal officials and others, but also cases of loss or damage caused by negligence, accident and highway robbery. The Post Office does not keep a separate record of cases of theft.

"The statement shows that while there has been an increase in the percentage of cases of loss, or damage to, registered articles, there has been a decrease in the case of insured articles.

"The value of inland registered and insured articles is not declared at the time of posting. The amount of loss sustained by theft cannot therefore be stated ; but if the total amount of compensation paid is taken as a guide, the value of the contents of the articles lost was comparatively insignificant.

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[*Mr. Clark; Mr. Vijiaraghavachariar; H. E. the Commander-in-Chief.*]

“ In the circumstances Government do not consider that there are grounds for the appointment of a special committee of inquiry.”

Year	Total number of articles registered.	Number of registered articles for which compensation was paid.	Percentage of registered articles on which compensation was paid.	Total amount of compensation paid for registered articles.	Total number of articles insured.	Number of insured articles for which compensation was paid.	Percentage of insured articles on which compensation was paid.	Total amount of compensation paid for insured articles.
1907-08	21,788,824	110	000504	1,437	856,886	89	00455	9,715
1908-09	23,071,936	182	000702	2,212	958,189	53	00550	10,483
1909-10	25,078,990	227	000905	3,197	1,044,957	59	00564	8,711
1910-11	25,401,408	258	000997	3,304	1,169,428	51	00436	8,634
1911-12	20,189,667	347	001722	4,467	1,856,002	72	00387	16,354

The Hon'ble Mr. Vijiaraghavachariar asked:—

“ Will Government be pleased to make a statement informing this Council as to what progress has been made in the matter of the proposed amalgamation of the Indian Post and Telegraph Departments ?

Have Government matured any scheme upon the subject and, if so, will they be pleased to state whether they propose to place it upon the table before finally adopting it ? ”

The Hon'ble Mr. Clark replied:—

“ I propose to explain to Council what progress has been made in the matter of the proposed amalgamation when I introduce the head of Posts and Telegraphs in the discussion of the Budget on the 7th instant, on which occasion it will be possible to deal with the matter more fully than in reply to a question ; and in these circumstances perhaps the Hon'ble Member will not object to waiting for the more complete statement which I shall then be in a position to make.”

The Hon'ble Mr. Vijiaraghavachariar asked:—

“ Will Government be pleased to state whether the Committee, presided over by Field Marshal Lord Nicholson on the Indian Army has finished its labours, and whether its report has been received by Government? If not, will Government be pleased to state whether it will be in a position to give this Council information as to the probable financial effect of its recommendations before the discussion of the Budget in March next ?

“ Will Government be pleased to state the estimated cost of the Committee during the current financial year ? ”

His Excellency the Commander-in-Chief replied:—

“ The answer to the first portion of the question is in the negative.

The cost of the Committee during the current financial year is estimated at £15,000.”

THE INDIAN COMPANIES BILL.

The Hon'ble Mr. Clark :—" Sir, I beg to present the Report of the Select Committee on the Indian Companies Bill. It is not our general practice at this stage in the passage of a Bill for the Member in charge to discuss its progress, and I do not propose to take up the time of the Council by any reference to the various amendments made in the Bill which are set forth in the Report, and which will be considered by Council when the Bill comes up for final discussion on the 18th March. But I think it will be of assistance to Council if with your permission, Sir, I say a few words of explanation on one matter. I refer to the paragraph in their Report in which the Committee deal with the proposals relating to Directors and Managing Agents which I adumbrated in Council when moving for the Committee on this Bill. I want to make it quite clear what the effect of the Committee's recommendations will be. The Committee have unanimously accepted the principle that there is room for the imposition of certain wholesome restrictions in connection with the management of companies by Managing Agents in this country; they think on the one hand that the clauses submitted to them provide a reasonable measure of disclosure and secure to a reasonable extent the principle that directors of a company should be independent from the Managing Agents; and, on the other hand, they see no ground to suppose that these provisions would impose any undue restrictions on legitimate transactions. They consider, however, that in view of their intrinsic importance, and as they have not been formally before the country, they should be circulated before taking their place in the Company law of the land. They therefore have not included them now in the Bill, but they have taken the opportunity of recording their view that the ultimate incorporation in the law of such provisions is highly desirable.

"Government have made no difficulty about accepting this view. They have always recognised that these clauses stand on a different footing to the rest of the Bill in that they have been introduced at a later stage without that previous circulation which is a part of our usual legislative procedure when dealing with important and not exceptionally urgent measures. While this Council has every right to consider itself representative of India, we cannot yet press the theory of representative Government too far, and when Hon'ble Members ask that important provisions of this kind which have not been before their constituencies by the usual method of circulation or publication, should be submitted to those constituencies, Government have no desire to stand in the way. It happens also that in this particular case there is no great difficulty about the matter, though it involves a somewhat cumbrous procedure. The clauses are complete in themselves, and cannot be said to be an absolutely essential part of the general body of Company law. It is therefore easy enough to publish these clauses for examination and consideration, and to incorporate them subsequently in the law, either as they now stand, or if experience so indicates, with suitable modifications. Probably it will be possible to do so before the main Bill, which will be passed into law this session, actually comes into operation, so that the whole law—that is, the main Bill based on the English law, together with such clauses as may be incorporated hereafter relating to Managing Agents—would come into force at one and the same time. We have found it necessary to allow a fairly long interval between the passage of the main Bill and the date when it comes into operation, in order to set up satisfactorily the necessary machinery for working the Act. It is particularly important to strengthen registration in this country in view of the larger powers and responsibilities which have been placed on Registrars, and machinery must be created for that purpose. We have also to take up with Local Governments the question of the training of auditors, and there are other minor matters to arrange. The Committee therefore have decided to recommend that a year should be allowed between the passage of the Bill and the date of its coming into operation which will be on the 1st of April, 1914. I see no reason why these clauses relating to Managing Agents which will now be published for criticism, should not be passed into law during next cold weather, and, as I have said, incorporated in the Company law before the end of the financial year. Government could not have agreed to the re-publication of the

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Bill as a whole. No adequate grounds have been shown for its re-publication, and it would be preposterous without such grounds to postpone the passage of a measure which is very necessary to India, with the obvious corollary that the date of its coming into operation would also have had to be postponed. The present arrangement avoids this necessity and at the same time enables the new clauses to be published before they become law.

“There is just one other thing which I should like to say about these clauses before we part with them for this session. In the last few days they have been violently attacked in certain quarters, and Government have been criticised for venturing to bring them forward in this Committee. I do not complain of that; nor am I concerned now to discuss or to defend the merits of the clauses themselves. It is enough for me that they will be published with the imprimatur of an exceptionally strong Committee which is representative of legal experience in different parts of India and of widespread commercial interests both European and Indian. But it is difficult not to see a certain significance in the fact that these attacks all emanate from one quarter and that what is greatly exercising Calcutta appears to leave Bombay and other commercial centres unmoved. Within the last week or ten days, three of the great Chambers of Commerce in India have held their annual meetings, and it is at least remarkable that neither in Bombay nor in Cawnpore, where there are also Managing Agents whose interests can hardly be much less important than those in Calcutta, whose honour we may well suppose to be just as sensitive, was there any animadversion on these proposals. I cannot help connecting this circumstance with another—that when I offered only a few days ago to go down to Calcutta to talk over these clauses and other amendments in the Bill, the offer was met in a way which amounted to something very like a refusal to discuss them with me. Yet I think discussion at that point might very possibly have brought about an arrangement which would have enabled these provisions, as well as the rest of the Bill, to be passed into law without further delay, and would have saved Council some trouble and inconvenience in the future. I cannot but regret, Sir, that it should have been thought desirable to take up this attitude. It is not fair to Government, nor is it even business-like. Government’s one wish in this matter has been to work in co-operation with the commercial community. They have had no desire, as I have explained repeatedly, to throw any slur on any person or body of persons. If I may speak of myself, I am fortunate enough to have many friends in business circles in this country, some of them friends of a standing far older than my time in India, and I should no more dream of casting any shadow of doubt on their probity than I should expect them to doubt mine. But nobody will deny that there are abuses in connection with these agencies; and in these clauses we have endeavoured to make a very modest beginning towards meeting them. We have had no desire to impose unnecessary or harassing restrictions. To avoid this, we have spared no pains in consulting commercial opinion before framing these amendments, and I think members of the Committee will testify to my readiness, both on these clauses and throughout the Bill generally, to accept the views of the commercial representatives wherever Government could possibly do so. I take no special credit for this; it was the only prudent and reasonable course; but we can truly say that we have done our best on our side to bring about a satisfactory solution, and in return we had a right to expect that we should be met in something of the same spirit.”

THE INDIAN CRIMINAL LAW AMENDMENT BILL.

The Hon’ble Sir Reginald Craddock :—“Sir, I beg to introduce a Bill to amend the Indian Penal Code and the Code of Criminal Procedure, 1898, and to move that it be referred to a Select Committee consisting of the Hon’ble Mr. Syed Ali Imam, the Hon’ble Maharaj-Kumar Gopal Saran Singh, the Hon’ble Mr. Montearth, the Hon’ble Sir Gangadhar Chitnavis, the Hon’ble Mr. Ebrahim, the Hon’ble Mr. Rayanagar, the Hon’ble Mr. Malaviya, the Hon’ble Sir William Vincent, the Hon’ble Mr. Wheeler, the Hon’ble Mr.

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Kenrick, the Hon'ble Mr. Kesteven, the Hon'ble Mr. Meredith, the Hon'ble Mr. Walker, the Hon'ble Major Blakeway, the Hon'ble Mr. Das, the Hon'ble Maharaja Ranajit Sinha and myself with instructions to report by the 11th instant.

"It has devolved on me to introduce in this Council a Bill further to amend the Indian Penal Code and the Code of Criminal Procedure and to move that it be referred to a Select Committee.

"This Bill is intended to introduce into the Criminal Law of India a new offence, the offence of criminal conspiracy. Now when it is sought to introduce a new law, especially a law which creates a new offence, the first and most important consideration is a clear comprehension of the purpose and scope of the proposed law. When the purpose and scope of the new law have been made clear—for until this is done, it is obvious that no opinion of any value can be formed upon it,—the next point that will arouse questioning will be, is this law necessary? That is the question of principle which the Council have to decide to-day. Thirdly, there remains for consideration, the question whether the proposed law, as drafted, succeeds in fulfilling the object that it has in view, or whether it is open to adverse criticism on points of detail on the ground that it either fails to secure its object, or that it entails other undesirable consequences. It is for this last purpose that I am moving that the Bill be referred to a Select Committee.

"To-day, however, I am only concerned to explain exactly what the proposed Bill is intended to effect, and to ask the Council to approve of the principle that this Bill is necessary, leaving for subsequent examination, according to our usual practice, the precise drafting which is best calculated to give effect to the principle when it has received the approval of this Council.

"The text of this Bill was published 8 days ago, and the most important clause in it is clause 3, which proposes to add to the Indian Penal Code a new section, 120(a) containing the definition of criminal conspiracy. All the rest of the Bill is subsidiary to that definition. I will read clause 3. The new section 120(a) will be as follows, according to clause 3.

'When two or more persons combine and agree to do or cause to be done, (i) an illegal act, or (ii) an act which is not illegal by illegal means, such agreement is designated a criminal conspiracy, provided that no agreement except an agreement to commit an offence, shall amount to a criminal conspiracy, unless some act besides the agreement is done affecting the object thereof by one or more parties to such agreement.'

Explanation :—'It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.'

"The Council will observe that there are several ingredients in this new offence. In the first place, to constitute a conspiracy, it requires the combination in agreement of two or more persons, and to make that conspiracy criminal requires either that the object in view or the methods employed should be illegal. The word 'illegal' is defined in section 43 of the Indian Penal Code as being 'applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action.' Although by this definition the term 'illegal' includes things which are offences and things which are illegal, but not offences, the Council will observe that this Bill contemplates a distinction between an agreement to commit an offence, and an agreement of which either the object or the methods employed are illegal but do not constitute an offence. In the case of the former, the criminal conspiracy is completed by the act of agreement; in the case of the latter, there is a further agreement required before the offence is complete, namely that some act must be done by one or more of the parties to the agreement to effect the object thereof. There must in such cases be what is commonly termed an overt act.

"Similarly, the punishment provided for a criminal conspiracy may be more severe if the agreement is one to commit a serious offence, and will ordinarily be less severe if the agreement is to commit an act which is not a serious offence, or an act which, although illegal, is not an offence. That is the law to which I am asking the general consent of the Council at this stage.

"I will now pass on to explain why it is not only expedient but necessary that this offence of criminal conspiracy should be included in the Indian Penal

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Code. With a few small exceptions, the criminal law of India is based on the criminal law of England, and though the offence of conspiracy may, to a large extent, be new to the law of India, it is a very old law indeed in England. The original law of Conspiracy in England goes back at least to the time of Edward I, when the Ordinance of Conspirators was promulgated in 1305. It has formed part of the common law of England, and during succeeding centuries has developed under the interpretation of judges from being a law originally to deal with conspiracies to promote false and malicious indictments, into a law which includes conspiracies for the doing of any criminal offence, and also conspiracies to do injuries to third persons.

“A comparatively recent exposition of the law is to be found in *Quinn v. Leatham*, 1901, in which Lord Brompton ruled that an offence consisted not merely in the intention of two or more but in the agreement of two or more to do an illegal act by legal means, or a legal act by illegal means. The result of this development of the law has been to render a purpose an offence which is criminally punishable when concerted by several, which would only be an actionable wrong if entertained merely by an individual.

“As was said by the Queen’s Bench in *Scott versus Brown*, 92, ‘this distinction rests on the very solid ground that though every wrong may not be dangerous to the public, yet every coalition to promote wrong is manifestly of that character.’

“The development of the Law of Conspiracy in England illustrates a most important truth which has a very significant bearing on the present circumstances of India and on the modern developments which have taken place in this country. In a crude state of society men resort to sudden violence to attain their ends. They may coalesce rapidly to form a mob following like sheep at the instigation of a few leaders, or they may combine themselves into a criminal gang whose objects and means of subsistence are a particular kind of crime; but as society develops, co-operation and combination among evil-doers assume much more insidious shapes. On the one side there may spring into existence secret organisations and secret conspiracies animated by dangerous designs; on the other, men put their heads together to gain their ends by crooked and devious means by which they seek to coerce the free will, and interfere with the liberty, of individual citizens. Education and intelligence among the evil-minded, from which no society, whether it be in Europe or whether it be in Asia, is free, merely bring into use more intelligent means, including even the perversion of the law itself, towards the ruin of an enemy. The crude conspiracy of engaging a few men to way-lay and beat or murder an enemy is supplemented by something more cunning, with more elaborate precautions to conceal the design, more secret methods for carrying it out, and better organization for escaping when it is carried out. The greater the success which is achieved, whether it be gained by better organisation, by more effective methods of silencing witnesses or informers, or by hiding even the nature of the wrong under the cloak of legality, the greater becomes the danger to the peaceful citizens and to society at large. Conspiracies of this kind may be aimed directly at the State and be frankly revolutionary in character; or they may be actuated by hostility to the State, but be carried out merely to the loss and danger of private individuals; or they may be entirely unconnected with the State and be entered upon merely for the gratification of personal spite, or to secure unlawful gains from private individuals or from the public at large. The more complex the state of society, the more elaborate its laws, the more subtle and dangerous become the methods open to the evil-minded for victimizing and persecuting the innocent.

“In addition to conspiracies to do personal violence of various kinds, there may be conspiracies to defraud, conspiracies to levy blackmail, conspiracies to defame, conspiracies to ruin, all of which may be levelled against individuals by unscrupulous persons combining together. The English law makes such conspiracies *per se* penal; the Indian law does not. And it is this serious flaw in the Indian Penal Code that this Bill, for which I ask the whole-hearted support of this Council, is designed to remove.

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“The Council will certainly wish to know how such an omission came to be made in the Indian Penal Code, and whether it was deliberate or unintentional. Old records of that time throw no clear light upon this point, but from the fact that although the Penal Code became law in 1860, on the very morrow of the mutiny, it did not render penal, as such, even a revolutionary conspiracy against the State,—an omission which ten years later was rectified by the enactment of section 121 (a), it seems to be extremely probable that conspiracy *per se* was not made a separate offence in the Indian Penal Code originally because it was thought that the law of abetment contained in Chapter V of the Code would be sufficient to secure the punishment of conspirators. The enactment of section 121 (a) proved that it was not sufficient, but, while this omission in the Indian Penal Code of 1860 was corrected by the Amending Act of 1870, so far as conspiracies against the State were concerned, in regard to all other offences and in regard to conspiracy as generally known to the English law, the omission has remained uncorrected to this day, and the time is more than ripe for this omission to be rectified without any further delay. The law of abetment is contained in section 107 and the following sections of the Indian Penal Code. It is as follows.—It contemplates three alternative methods; (1) instigation, (2) conspiracy, and (3) aid. But in the case of abetment of conspiracy, some act or illegal omission must take place in pursuance of the thing which is abetted. It is true that abetment of the commission of an offence, including abetment by way of conspiracy, is ordinarily punishable even if that offence is not actually committed, but some further step must have been taken than the mere agreement towards the commission of the offence before conspiracy will constitute an abetment. If it does not constitute abetment, the law can take no cognisance of it. Thus, if a band of conspirators were surprised or overheard plotting the crime of murder, but they were caught before there was time for any of them to put into execution any of the steps necessary for the act, however guilty their intentions, however diabolical and well-conceived their plot, they will have committed no offence in the eyes of the law. Not only this: but even if with the clearest evidence of conspiracy such as I have described above, the actual crime was committed by some third person, it would be impossible to bring the conspirators to book unless it was possible to show by evidence the connection of the man or men who carried out the crime with those conspirators. So that, a band of conspirators may carry out a series of crimes with complete impunity if they took care to employ others whose connection with the conspirators could not be established. Again, you may have the most indubitable evidence that a band of men had agreed together to murder any class of subject; many murders may have occurred; but the actual perpetrators might not be caught or traced; yet, unless it could be shown that one of the band had actually taken any steps in the prosecution of the common object of that conspiracy, the conspirators would not come within the clutches of the law. In England, the mere conspiracy to commit murder is punishable with ten years’ penal servitude: in India, it is not an offence at all. It is within the knowledge of this Council that of recent years such conspiracies have come into existence. It is impossible for the Government to disclose all that it may know of their continued existence, but that it has the knowledge that they do exist, this Council must take on trust. Surely the Council needs no argument from me to convince them that this is a state of things which cannot be tolerated a day longer than is necessary. I go further and I say that even if the events of the past few years had shown no evidence of the existence of criminal conspiracies the assimilation of the law of India to the law of England, the removal of this flaw in the Indian Penal Code would be a precautionary measure of the utmost importance, and, just as it is with murder, so it is with other offences. The punishment for conspiracy *per se* may properly vary with the gravity of the crime contemplated, but to allow wicked conspiracies for the commission of offences to be undertaken with impunity is dangerous alike to the interests of the State and to the interests of the individual. There are many heinous crimes short of murder for which men may plot together; to burn down houses, to injure or maim men or cattle, to destroy property, to kidnap minors, to bring false charges, these are all serious crimes to which the

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considerations that I urge in respect of murder apply in a greater or less degree : and I cannot imagine for a moment that any Member of this Council will shrink from supporting this Bill so far as these are the objects which it has in view.

"I next come, Sir, to that section of criminal conspiracy as defined by the Bill, which deals with cases which are not in themselves offences under the criminal law. In respect of these we have considered it wise and proper to make the law less stringent than is the case in England. Conspiracies to do illegal acts or legal acts by illegal means when neither the object of the conspiracy nor the means to be used constitute an offence, under the English law requires no overt act to make the offence complete. In this Bill it is provided that an overt act is necessary to make such conspiracies criminal. In the case of these conspiracies, the wrong to be inflicted, if committed by a single person, would merely be illegal. As long as it is a case of a private wrong between two individuals, the party aggrieved can be left to his civil remedies ; but when the wrong is inflicted upon him by a combination of his neighbours or his enemies, or by a class of persons acting against a member or members of another class, the consequence may become so serious as to require the intervention of the State with power to punish not only because such a conspiracy may lead to acts of lawlessness and conduce to a breach of the peace, but also on account of the great importance of protecting the individual in the exercise of his private rights as a citizen. The ordinary civil law may suffice to protect him against one opponent, but he may easily be driven to surrender his lawful rights by a combination of many opponents. There may be a conspiracy to wrong a man in the exercise of his trade or profession, a conspiracy to deprive him of his common rights, and a conspiracy on the part of one sect or class to cause persistent annoyance to another sect or class ; these are all instances of conspiracies which it is desirable to render punishable by law if once they go beyond the stage of mere agreement. There are many other ingenious devices for coercing and annoying an unpopular person or a member of another creed, to which the great diversities of race, class and creed that prevail in India render India peculiarly liable. Such minor persecutions are bound to lead to bad feeling, and must eventually tend to serious crime, and it is of the utmost importance that the State should have the power of stepping in at an early stage to check such combinations before they assume serious proportions or entail serious consequences. It is not a rash assertion to make that in India many crimes that are committed have had their origin in ill-feeling engendered by wrongs of this type, and the records of our police-stations and our criminal Courts are full of wrongs reported in which a resort to the civil Court is the only remedy that can be suggested. No one desires to punish conspiracies to do private wrong with the same severity as conspiracies to commit serious offences, and the Bill therefore provides for no more than a maximum penalty of six months' imprisonment with the option of a fine in cases which fall within the category that I have just described.

"The point that I wish to impress upon this Council is that these petty persecutions may possibly lead to petty crime, from petty crime to organised crime, and from organised crime to a state of terrorism and demoralisation, which is subversive of all peace and justice and is harmful to all interests, public and private. What this Bill is intended to do is to confer on the authorities power to check these movements in their earliest stage of persecution and wrong-doing before their other and more serious consequences shall have time to ensue. My firm contention is that the principle of this Bill is a right principle, and the powers it confers are urgently necessary in the interests of peaceful and quiet government. I do not for one moment admit that these powers were not necessary fifty years ago when the Penal Code first came into force ; but even if they were not necessary then, they are necessary now. If they were, as I contend, necessary even then, they are doubly necessary now. The more complex social life becomes, the more safeguards are required. The law of conspiracy is the counterpoise to the growing risk that both the private individual and the State may find themselves confronted more and more by unscrupulous and dangerous combinations, or by combinations which may at any time become dangerous. Sir, I am not asking this Council to agree to a law

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which has been imported from a barbarous or semi-civilised country. It is not because India is backward that I am asking the Council to accept this Bill. It is rather because India is developing so rapidly that I ask this Council to accept it. It is not because Indians have an extra dose of original sin or any special inherent wickedness, that I press this Council to agree to this Bill. Rather I would urge upon you the advisability of making good that flaw in your penal law, the removal of which will assimilate, though with somewhat less stringency, the law of India to a law which has been found most necessary and most salutary in so advanced and law-abiding a country as England—a law which has been interpreted and administered by a succession of the most eminent English Judges, and the soundness of the principles of which have been affirmed and re-affirmed by the greatest among them from a period which extends from some centuries back up to the present day.

“If the motion which I am moving is carried in this Council, it will be possible afterwards to examine in detail the provisions of this Bill and to see if there are any flaws and blemishes in it, or if there are any safeguards required to prevent its abuse; but subject to this examination on behalf of Government, I stand firmly on the ground that this Bill is a necessary Bill, a wise and prudent measure, and that the public safety demands that this provision should be included in the criminal law of this land without delay. And, it is because it embodies in the Indian criminal law the law which has stood the test of long experience in England, that I ask this Council to agree to the principle of this Bill without the formality of a prior reference to the Local Governments and the public. Sir, I beg to introduce this Bill to amend the Indian Penal Code and the Code of Criminal Procedure, 1898, and to move the motion which stands in my name.”

The Hon'ble Mr. Surendra Nath Banerjee :—“Sir, I beg to move the amendment which stands against my name. It runs in these terms—‘that preparatory to the Bill being referred to the Select Committee it be circulated to public bodies and the High Courts for their opinion.’ Sir, in this connection I desire to call attention to Rule 19 of our Rules for the introduction and publication of Bills. Rule 19 says that when a Bill is introduced, or on some subsequent occasion, the Member in charge of it shall make one or more of the following motions :—

(a) that it be referred to a Select Committee.

That is the motion that is now made.

(b) that it be taken into consideration by the Council either at once or at some future date to be then motioned; or

(c) that it be circulated for the purpose of eliciting opinion thereof.

“The rule lays down three kinds of procedure, and it is open to this Council to adopt any of them. The Hon'ble Member in charge of the Bill has recommended the procedure under clause (a). I recommend the adoption of the procedure under clause (c). It is for the Council to decide which they will prefer. It seems to me, Sir, that the procedure I suggest is the more suitable in view of the contentious character of the Bill and in view of the fact that by following such a procedure the Select Committee before submitting its Report would be in a position to obtain the views of the different public bodies representing different public interests and looking at the matter from different points of view. It seems to me that in a case of this kind, where controversy is likely to be keen and acute, the possession of the amplest information would be a distinct advantage to the Select Committee. The object of my amendment is to give the public time for the fullest discussion of this measure. As I have already observed, this measure is likely to give rise to animated discussion. Already in the public prints a note of dissent has been raised. Time, Sir, is a factor—an important factor—in allaying the acerbities of heated controversies. With the lapse of time passions subside, feelings disappear and the truth appears in the cold, clear, colourless atmosphere of pure reason. The Government may be right or the Government may be wrong. If the Government be right a full

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discussion of the measure will only strengthen their position. If the Government be wrong, a full discussion of the measure will lead to a modification of their attitude. For a great and responsible Government like ours cannot persist in an error when that error has been discovered. Thus, Sir, look at the matter from whatever point of view you please, it seems to me that it is wise, it is desirable and even necessary that the fullest opportunity should be given to the public for the discussion of this measure. Sir, in this connection I am reminded of the circumstances associated with the enactment of the Vernacular Press Act of 1878. That measure gave rise to very considerable agitation. The irritation caused by it was largely due to the suddenness with which it was sprung upon an unwary public and the precipitancy with which it was rushed through this Council. One fine morning in the month of April, 1878, the people of Calcutta rose from their beds and found in the newspapers that a Bill was to be introduced that day for the better control of the Vernacular Press. Before the sun had set, it had become the law of the land. I do not for a moment suggest that anything of the kind has been done in connection with this measure, for we have had a week's time for its discussion. All the same I plead for time—reasonable time—for the consideration of this important Bill, and recommend that it be circulated among public bodies and the High Courts for their views thereon. Apart from these general considerations, I take my stand upon official precedent and practice in analagous cases.

“ Under the terms of the English law to which the Hon'ble Member has adverted in the course of his observations in another connection, under the terms of the English law, even a petty bye-law affecting a particular local area cannot become operative, cannot receive the assent of the Local Government Board unless and until it has been published in the newspapers and the local public have had an opportunity of considering it. The same practice prevails with more or less modification in this country. While in the case of bye-laws affecting local areas such latitude of discussion is allowed to the local public, may I not claim with some confidence at the hands of this Legislative Council that the same facilities and the same opportunities should be given to us in connection with a Bill of a highly controversial character affecting the population of a great and vast Empire? Sir, it is an elementary principle of procedure that it is incumbent on those who propose a law, specially a law of this kind imposing a restriction, that they should make out their case. The Hon'ble Member in charge of the Bill has referred to three points, which he thinks and all of us agree with him in thinking, that it is necessary to establish before the fullest justification can be found for this Bill. In the first place, it should be shown that there have been new developments, secondly, that the existing law cannot cope with these developments, and lastly, that the present Bill supplies the deficiencies of the existing law. Now, Sir, with regard to new developments, I confess that the statement of the Hon'ble Member in charge is exceedingly meagre and scanty. We are asked to take it on trust that the situation is such that a law of this kind has become necessary. Well, Sir, I have great faith in the Government of India, great confidence in the Hon'ble Member in charge of the Bill, but surely around this table we are called upon to give an intelligent vote upon information which is supplied to us. Sir, for my part I am not prepared to give a vote on any matter which I have not thoroughly tested by evidence which I consider sufficient. I cannot think that I shall be adequately and conscientiously discharging my duty in this Council unless I feel on any question that may be brought before us by the Government that the fullest and amplest details are placed before us, so that the vote that we may record may be approved by our judgment and may be in accordance with the dictates of our conscience. Sir, in 1908, I admit there were dangerous combinations, but since then things have taken a turn and a turn for the better. There has been a distinct improvement in the attitude of public opinion, in the temper of the public in regard to the Government and the measures and the servants of the Government. Barring the recent deplorable incident, which has convulsed the country from one end to the other and has filled it with horror and detestation, the shame and humiliation of which I confess we have yet to atone for and

yet to wipe out, Sir, barring this incident I ask where is the evidence to point to the existence of dangerous conspiracies? With all my admiration for the sleuth-hound sagacity of the Criminal Investigation Department, I am not prepared to accept its *ipse dixit*. In no part of the civilized world is the testimony of the thief-catcher considered to be decisive of the guilt of the thief. Sir, I find that when Governments are in a tight corner confronted with horrible crimes which they are not able to explain and the clue to which they cannot obtain, they are apt to fall back upon the conspiracy-theory.

"I was in London in 1909 and I remember the storm of indignation which was aroused by the murder of Sir Curzon Wylie. The Prime Minister from his place in Parliament declared that it was due to a conspiracy. Before many weeks had elapsed the statement had to be withdrawn, as it was proved in the highest Court of law, by evidence that was incontrovertible that the misdeed was the act of a half-demented young man brooding over his imaginary wrongs, having no friends, no associates, no colleagues. Sir, on this occasion I may perhaps be allowed to refer for a moment to a statement which has, more than once, appeared in the newspapers, responsible organs of public opinion, and which has more than once been referred to in our Legislative Councils. It has been said in connection with these cases that the Indian public do not help the authorities; that they stand aloof and do not give such information as might lead to the detection of the crime. Sir, if there is any truth in this allegation, it implies the gravest reflection upon the honour, the credit, the loyalty and the citizenship of the great community to which I belong. I desire to record my protest against it with all the emphasis that I can command and with a full sense of my responsibility as a Member of this Council. These conspirators, these pests of society, are a class apart, they form a class by themselves, mixing with no one, holding communion with no one. We know nothing of them. They know nothing of us. They burrow away underground, away from the light of the sun and the gaze of the public. Never was the truth of this statement more strikingly illustrated than by the incidents which have been disclosed in connection with what is known as the Wari trial in the Dacca District. In this case the son of a Deputy Magistrate, a trusted and honoured servant of the Government, who at one time was Additional Magistrate of Dacca, was charged with the illegal possession of arms and ammunition and with complicity in one of the dacoities in Eastern Bengal. His parents, his brothers, and the members of his family, living in the same house, under the same roof, in daily and hourly contact with him, knew nothing of these extraordinary proceedings; and when they came to know of them, it was too late, the young man had been entangled in the meshes of a great crime. The father deposed against the son. The poor man nearly broke down in Court, tears trickled down his cheeks, his evidence was interrupted by sobs. But he concealed nothing, he extenuated nothing. He spoke the truth, the whole truth and nothing but the truth, a father deposing against his son, signing away his freedom for a number of years; and yet we are told that the Indian public do not co-operate with the authorities in ferreting out these dens of crime and iniquity. Whatever weaknesses we may have, sympathy with murder is not one of them, and the doctrine of pity and compassion preached in the morning of the world by one of the most illustrious of our race has sunk deep into our hearts and has become the abiding heritage of our race.

"Sir, I cannot admit for a moment that sufficient cause has been made out to show that there have been new developments to justify this Bill. Assuming that the Bill is justified on this ground, where is the evidence to show that the existing law is inadequate to meet the requirements of the situation? Has there been any report by any competent Court, any complaint that the present law is inadequate? If there have been any cases, I hope the Hon'ble Member in charge of the Bill will be able to refer to such cases, if there have been cases where persons who ought to have been punished have not been punished by reason of the absence of a law such as is now proposed to be enacted, will the Hon'ble Member refer to such cases in support of his measure? Then again in regard to the alleged insufficiency of the present

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law and of the sufficiency of the Bill which it is proposed to enact, the opinion of the High Courts is of the utmost value. The High Courts command the unstinted reverence of the public and are in daily contact with the administration of justice. The opinion of the High Courts if in support of this Bill would be a source of enormous strength to the Government; the opinion of the High Courts in opposition to the Bill must lead to its modification. In any case I earnestly hope that the Hon'ble Member will see his way to accept at least this part of the suggestion which I have made, *viz.*, that before the Select Committee makes its final report, the High Courts may be consulted with regard to the Bill.

"Sir, we have been told—and the Hon'ble Member in charge has laid special stress upon this point—we have been told that this is a part of the English law. We are asked to accept it and even to welcome it as an approximation to the law of England. Sir, I have the greatest respect for the law of England. England has furnished models of jurisprudence to the rest of mankind; England is the legitimate successor of Rome in the domain of Empire and of legislation. Nothing has contributed so much to the greatness of the English people, to the stability of their institutions, as the marvellous system of English law and the noble institutions by which they are administered. To say that a particular law is borrowed from the English law is indeed a great recommendation in favour of it. But, Sir, if we are to have a part of the English law, let us have the whole of it; let us have it with the English safeguards; let us have it with the eager solicitude for justice and the liberty of the subject which forms the crowning feature of every part of the English legal system. In England this law is administered with the aid of juries; in our country it will be administered without the aid of juries. When we have the rough, let us have the smooth; when we have the English restrictions, let us have the English safeguards.

"And, Sir, notwithstanding the very learned explanation of the history of conspiracies which the Hon'ble Member has placed before this Council, I hold in my hand the opinion of two very learned Judges condemning the expansion of the law of conspiracies. Sir, I am no lawyer, but there is the fact that distinguished legal authorities hold that the law of conspiracy is a dangerous law, that it is out of the run of the ordinary law; and I cannot help feeling that its expansion is fraught with peril to the subject. In the words of Fitzgerald, J. in the Irish State trials of 1867:—

'The law of conspiracy is a branch of our jurisprudence [to be narrowly watched, to be jealously regarded, never to be pressed beyond its true limits. For, in the prudent words of the greatest of American Judges, it was more safe that punishment should be ordained by general laws formed upon deliberation, under the influence of no resentments without knowing on whom they are inflicted, than that it should be inflicted under the influence of those passions which a trial seldom fails to excite, and which a flexible definition of the crime or a construction that would render it flexible, might bring into operation.'

"Sir, I do not know whether I am entitled to enter into details, but the law seems to me to be fraught with serious risks. An agreement entered into by two or three persons to commit any offence under the Penal Code or any local or special Act, however trivial may be the offence, is criminal conspiracy. Here a civil wrong is magnified into the proportions of a criminal offence. I am afraid, Sir, the provisions of this law would be taken advantage of for the purpose of satisfying private grudge and spite. Let me take two or three illustrations. Suppose A and B combine to persuade C who has entered into a contract of service with D not to perform his contract, and C in consequence does an act in repudiation of his contract. D may charge A and B with criminal conspiracy. It is a civil matter, but it is magnified into the proportions of a criminal offence. Take another case, and this is a class of cases which frequently occurs in the eastern districts of Bengal. A and B combine to erect a hut, we shall say, or settle a tenant on a newly-formed *chur* which they believe is an appurtenant to their estate."

The President:—"I am afraid I must interrupt the Hon'ble Member. I am anxious that he should adhere to the point which is now before

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the Council which is the circulation of the Bill. As soon as his amendment has been voted upon, it will be open to the Hon'ble Member to discuss the main principles of the Bill."

The Hon'ble Babu Surendra Nath Banerjee:—"Very well, Sir, I will drop this part of my observations. Just one other matter which I want to refer to in this connection. The Schedule of the Bill is exceedingly vague and elastic, and is liable to be attended with serious results. Sir, the offence of criminal conspiracy is to be a cognisable offence or is to be a non-cognisable offence according to the object with which the conspiracy is formed, and the police is armed with the power of arresting in the case of a cognisable offence. Now, how are the police to know whether in a particular case the object of the conspiracy is a cognisable or a non-cognisable offence? Take the Dacca Conspiracy case. In that case, after months of deliberation, the learned Judges of the High Court discovered the objects of the *Anusilan Samiti*. This Bill leaves the power of detecting the objects of a conspiracy which in one case took months on the part of High Court Judges to discover, the power of determining whether a case is cognisable or non-cognisable to the police, and this seems to me, Sir, to be a dangerous innovation which will arm the police with powers liable to grave abuse.

"One word more and I am done. It seems to me, Sir, that this Bill is in direct conflict with the principles and the policy which have been laid down by His Excellency the Viceroy. Nothing, Sir, has so effectually touched the hearts of our people or enthralled their imagination as, if I may be permitted to say so without impertinence or irreverence, the calm, the noble, the dignified bearing of His Excellency in the crisis of the tragedy and ever after. Despite the shock to his feelings, the bitter disappointment which he must have felt, he declared that his feelings towards the people of India remained unchanged and unchangeable, and that his policy would undergo no transformation. Sir, what is the basic principle, the key-note of that policy? The words conciliation and co-operation are written deep on every line of that policy. I venture to think that if this Bill be passed into law, it will seriously interfere with the steady progressive development of that policy, create a sense of mistrust and add to the unrest where it exists. My educated countrymen would feel a sense of abatement of that confidence which has hitherto been reposed in them by the Government. Sir, trust begets trust; mistrust, or even a show of it, engenders suspicion. Sir, the Government of India has recently filled its armoury with formidable weapons for the suppression of crime. They have not touched the conspirators. The arm of the law is not long enough to reach them. Is it wise to add to them and create a feeling of alarm and anxiety in the minds of the loyal, the peaceful, the well-behaved section of the community and they form the majority? In 1908, a law of this kind was not felt to be necessary. It seems to me that the present law is absolutely without the semblance of a justification. If we could persuade ourselves to believe that a law of this nature would be useful in the interests of peace and orderly progress, we should unhesitatingly accord it our support. But, Sir, repressive measures have been tried in India and they have failed, as they have failed everywhere. Conciliation is the sovereign remedy and it is already bearing golden fruits.

"Lord Hardinge will go down to posterity as the pacifier of India. I pray that nothing may be done to interrupt the fruition of that beneficent policy which will for ever be associated with his honoured name, or mar the glory of an achievement which will place him in the front rank of Indian Viceroys, by the side of the Bentincks, the Cannings and the Ripons of Indian fame.

"With these few words, I beg to move the amendment which stands in my name."

The Hon'ble Malik Umar Hayat Khan:—"Sir, I cordially welcome this measure and thank Government that they have taken steps towards

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[*Malik Umar Hayat Khan; Sir Gangadhar Chitnavis.*]

checking this extraordinary and new crime by amendments of the old law. It is premature now to go into the details of the Bill, as it may be altered in the course of Select Committee. I had long ago contemplated of bringing in a new Bill to check the new movement of sedition, but I did not bring it forward as people might have accused me of bringing in a Bill when they thought that the situation had changed. I actually drafted a rough sketch of a Bill to check sedition which is perhaps a little more severe than the Bill which is now put before the Council.

"The fears of the Members who may say that the present change in law can be abused though however natural may it be, I think it is more fanciful than practical. Such Hon'ble Members should remember that the law of capital punishment is already in existence. But no one can say that that law is being abused, and how can one say of these very ordinary amendments introduced, that they will be abused to prejudice an accused when the provisions of the Bill will be enforced by the same authorities who administer the old and previous law. If the present authorities are capable to administer one, they are equally capable to administer the other. If these authorities are incapable, then they are incapable for exercising any legal powers at all. I hope that the Select Committee will see that, when they mean to have the law effective for certain purposes, it is such that it meets the requirements for which it is contemplated. The Government of which we are a part should not legislate for to-day, but they should also do so to check the crime which is likely to come into existence in future.

"Finally, I would like to add that if conspirators plan for taking a life, and do their best to do so, they ought to receive the same punishment of the same nature specially for political crimes, as any big movement resulting from it will involve thousands of innocent people who did not intend to get involved, and thousands of lives will be lost uselessly. It is for this reason that I hold them more responsible. I would like the same sentence for a man who puts up another as a tool to commit a crime as for the criminal himself.

"With these few words I support the motion before the Council."

The Hon'ble Sir Gangadhar Chitnavis:—"Sir, I do not oppose the reference to Select Committee; not that I am unaware of the comprehensive nature of this Bill, or of the risk that there undoubtedly is of its abuse in the hands of the subordinate Police, but in the exceptional state of things caused by the recrudescence of anarchy and other political crimes, Government might be excused for seeking wider legal powers of control and punishment. Government, it seems, have come to the conclusion that the law of conspiracy requires revision in the light of the facts revealed in the course of investigations of such crimes. The statements made in Council to-day by the Hon'ble the Home Member will disarm extreme opposition to an amendment of the law of conspiracy. *Prima facie* there is a case for amendment. That the amendment has taken the present form must be due to causes which must have been well considered by Government. And when the English law supplies the precedent very strong reasons founded upon facts alone could justify any serious opposition to the underlying principle of the Bill. One will look in vain for such reasons in the history of the past few years, streaked as it is with innocent blood.

"But while I do not object to the principle of the amendment, I cannot but feel that modification of the Bill in several particulars is necessary in the interests of the great Indian community, peace-loving and law-abiding, which has nothing to do with political crime and which abhors anarchy as much as the Government do. These changes, I have every hope, the Select Committee will make, and ampler safeguards against misapplication will in the end be provided in the Bill. The facts that this measure has been introduced only after such diabolical, but happily abortive, attempt on the life of the august and respected Head of the Supreme Government and that indiscriminate arrests have not followed the outrage, prove, if anything, Government's anxiety to spare the people all avoidable trouble and harassment. And so considerate a Government can well be expected to make the weapon harmless to the inoffensive public.

[*Sir Gangadhar Chitnavis; Mr. Ghuznavi.*] [5TH MARCH, 1913.]

"I hope that the amendment of the Criminal Law now proposed will be one of those measures which will not be put into operation except under sheer necessity, and that it will remain on the Statute-book only to be used in extreme measures to prevent exceptional crimes against public safety. I believe if such measures are wanted by the executive, any delay in legislation is likely to be prejudicial to the interests of good government. I accordingly wish that necessary amendments safeguarding public interests may be put in, but the powers required should be forthwith given. I do not agree with those who think that the people do not willingly co-operate with the authorities in tracking political offenders. I know there is a general desire among them to co-operate with Government in eradicating the evil. These political crimes are detested by the general public as much as by the authorities, and as a member of that large public which abhors such crimes, I give the present Bill my humble support."

The Hon'ble Mr. Ghuznavi :—"Sir, I have no hesitation in supporting the principle of the Bill which is about to be introduced in this Council by the Hon'ble the Home Member. I am sure we all regret that, during the very first sessions of this Council held in the new Capital of India in this historic city of Delhi which is yet destined perhaps to eclipse her former glories, it should be found necessary to introduce a measure of this kind; yet the exigencies of the times are such that no blame can be attached to the Government of India for forging a fresh weapon to be kept in the legislative armoury to cope with the requirements of the case. This country has unfortunately for the last few years witnessed the results of many dangerous conspiracies which have cast a stain on her fair fame, and which, if they could have been dealt with while they were being hatched, would have come to nought and would have preserved her name untarnished. But with the law as it stood no action could be taken with regard to such conspiracies. It is to deal with such nefarious plots that I understand this Bill is chiefly and primarily intended. It is no use disguising the fact that the new measure will make our law more stringent and more drastic than it is, but facts are stubborn things and we have to look them squarely in the face and to prepare the drug to suit the disease. During the latter end of Lord Minto's régime repressive measures were enacted one after the other till they culminated in the Press Act which roused a storm of indignation wrongly or rightly throughout the country. While the very first acts of his successor, I say, were those of clemency and reconciliation. And it was hoped that with the change of policy a change would come over the land. But alas, bombs and revolvers are still in the air. Burglaries and dacoities perpetrated by those who ought to know better are still apace. And this morning's telegram brings us yet another news of the circulation of seditious leaflets in the erstwhile capital of India. When we consider that all these culminated in the most dastardly and detestable crime perpetrated on the historic occasion of His Excellency's State Entry into this city, in the attempt against the person of the direct representative of our most gracious Sovereign which sent a thrill of horror and indignation throughout the length and breadth of this country, language, Sir, wants to break through all conventional bounds. No one, Sir, I say, who is on the side of law and order will hesitate for one instant to support Government in its present legislative attempt. It is now abundantly clear that there is an infinitesimally small section that nothing will conciliate. We are convinced however that they are a microscopically small set of crazy, isolated, anarchical maniacs, and it is to reach these that the long arm of the law has to be made still longer."

"The law of conspiracy as it stands at present can only be put into operation against any one who conspires to wage, or to attempt to wage war, or to abet the waging of war against the King-Emperor or conspires to deprive the King-Emperor of the Sovereignty of British India or any part thereof or conspires to overawe by means of criminal force or show of criminal force the Government of India or any Local Government. This Sir, exhausts the whole list. It will therefore be seen clearly that the existing law is inadequate to deal with present day developments. Again the law under abetment as per section 107 of the

[5TH MARCH, 1913.] [*Mr. Ghuznavi ; Mr. Madhu Sudan Das.*]

Indian Penal Code is equally inadequate for it requires association for an object which must be a criminal offence, added thereto there must be an overt act or illegal omission. Hence there is no remedy in the Indian Penal Code at present against offences which are the outcome of latter day developments. Such being the case, I can assure you, Sir, that the Mussalmans of Bengal, whom I have the honour to represent, have firmly resolved since that fatal day when every Mussalman lip uttered a prayer for His Excellency's speedy recovery and at the same time a curse on that miscreant who threw that cruel bomb to co-operate most whole-heartedly with the Government, not only in word but in deed in any measure or measures which the Government might take to completely eradicate this evil which was hitherto foreign to the soil of India.

" Sir, there is, however, another side to this picture. In the Statement of Objects and Reasons it is stated that what was intended was merely to bring our law into conformity with the law of England. But India, Sir, is not England. There are conditions here which do not prevail in that happy island home. And I am afraid if the Bill, as it stands at present is passed into law, it would not only be confined to a legitimate use as a constitutional weapon in the hands of the authorities, but I am afraid it will lead to many abuses. Persons will be found both among private individuals as well as subordinate officials who to serve their own ends or to feed fat their own grudge or enmity would turn this Act into an engine of oppression often of the innocent. I, therefore, venture to hope that when this Bill comes up for consideration before the Sub-Committee it will be found to introduce ample safeguards and it would be possible to amend it and mend it in such a way that abuses of the kind indicated may not be possible. With your permission, Sir, I would like to make just one or two suggestions here to illustrate my meaning. In section 120 A, sub-section (1) the words 'an illegal act' are to my mind extremely vague. If in the place of those words the following are substituted, namely, 'an offence which is punishable with death, transportation or rigorous imprisonment for a term of two years or upwards', I am inclined to think that they would meet all those cases which we all have in view. If that were not possible, I would urge the consideration of the advisability of altogether omitting sub-section (2) of clause 120 B. If even this is found not possible, then I would urge that the 'illegal act' mentioned in sub-section (1), clause 120 A, be defined to state which acts would be considered illegal for the purposes of this Act. I mean a schedule such as would show that the 'illegal act' for the purposes herein mentioned would include (1) offences against the Government, (2) offences against public order, (3) offences against the person, a sort of schedule which is to be found for instance in Halsbury's Laws of England.

" Lastly if the Bill were to remain as it is, then I would urge the consideration of the advisability of enacting this measure provisionally for a limited period after which, according as conditions then prevail, this Act would be repealed or re-enacted.

" With these words, Sir, I beg to support in principle the Bill before us."

The Hon'ble Mr. Madhu Sudan Das :—" Sir, the motion which has been put before the Council by the Hon'ble Mr. Banerjee, asks this Council to refer the matter to the High Courts and to the public generally, for eliciting their opinion. My Hon'ble friend has very clearly in his speech set before us the questions which are really at issue in the present stage of the discussion. He has brought the real cardinal questions, as it were, to a focus. The first question is this,—(I almost quote his words as I took them down).—Has there been any new development in the state of things in this country which requires new legislation? During my Hon'ble friend's speech he said that such a state of things did exist in 1903; since then things have become better, things are quiet; so that Sir, we have it that in 1903 there was sufficient reason and a state of new developments which would have justified new legislation. The only question is, whether the facts that have transpired during this interval—between 1903 and this day justify the inference that that state of things has disappeared, the storm has cleared up and the state of society is calm and

normal. My Hon'ble friend also has referred to what he calls,—‘except that one deplorable incident in connection with the outrage in Delhi.’ Sir, I was present here on the 27th January when His Excellency, from his seat there, made a remarkable speech. My Hon'ble friend refers to the conciliatory policy of Lord Hardinge. I saw something more in that remarkable speech. I saw the Viceroy of India classing himself amongst the fellow-subjects of the Empire and giving expression to his love for India, and an earnest desire to raise India from her present fallen condition. But when that speech came to that part of it which referred to his sufferings during several weeks and to an appeal to us Indians to restore India to her lost fame,—that part of his speech, Sir, made me hang down my head with shame. I saw the hand which was in a sling,—the hand which was stretched forth to give a lifting hand to India—to raise her to a higher position,—had been bitten, as the hand was bitten in the fable by the snake, that tried to feed it in order to save it from starvation.

“That may be one deplorable incident, but that deplorable incident, one though it be, has a great significance. But is it a fact really that we have had only one incident since 1908. Have there not been more incidents during this interval in East Bengal? So the question is that between 1908 and this day there is no evidence to show that the state of society has so changed that there is no justification for legislation at the present day. Legislation of such a character would have been perfectly justifiable in 1908. The next question is whether this law, this Bill, which is now before this Council, is calculated to remedy the existing evil. Of course many suggestions have been made in the shape of amendments. I don't think they are in order. The only question of course—(as I have been informed that I am on the Select Committee I should not like to have a sort of prophetic soliloquy on what my views are likely to be;) what form the legislation should take. This much is certain that while there should be an attempt on the part of this Council to strengthen the hands of the Legislature to adopt such measures, to pass such laws as will put down offences of this nature, at the same time it should be the part of the Legislature to see as much as possible that innocent persons should not suffer on this account. Of course it will be generally said against the Bill and it has been said that it will arm the Police with greater powers than they now possess; but the state of society is such now that whatever powers the police may possess—however great may be the power of the police—the police have not been able to bring to justice the criminals who have committed some of the most dastardly crimes in India, so that the police are powerless against a certain class of criminals, and it is really the intention of the Legislature to reach that class of criminals. My Hon'ble friend says that these crimes form a class by themselves; my Hon'ble friend says that these criminals form a class by themselves. If they do so what is necessary is that some power should be given to some authority in order to ferret them out of their hiding-places, bring them into the light of the law Courts and send them to the place where they ought to be in order that they may be removed from surroundings where they are dangerous to society at large. The Hon'ble mover of the Resolution has referred to certain remarks made by some Judges. Be sure that if this English law is introduced in this country, or I should say, translated into this country, we shall have no doubt the safety which the remarks of English Judges always have provided in the application of this law. The remarks that he quoted from certain Judges go no further than this, that very great care should be used in the application of this law, and those safeguards can only be secured in the law Courts in the careful sifting of evidence. In the construction of the substantive law those safeguards cannot be done away with by this Council. If this Council adopts the English law, the law will certainly be interpreted here as it has been interpreted always in England. I have no recollection at the present moment but I think it was a case decided in 1891—it was in one of the cases—a later decision—in which one English Court laid down a very learned interpretation of the law so as to safeguard the interests of persons who may be brought into the clutches of the law by malice, fraud, etc. The only point of importance in this discussion is as to whether this Bill ought to go to the High

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[*Mr. Madhu Sudan Das ; Rai Sita Nath Roy Bahadur ; Mr. Vijiaraghavachariar ; the President ; Babu Surendra Nath Banerjee ; Sir Reginald Craddock.*]

Court for its opinion. If this Bill in its provisions were of such a character that they were quite novel, that they had no existence in any Code, that they were altogether unknown, certainly it would be very desirable that such a piece of legislation should go to the High Court for their opinion as to whether it would conflict with any existing law, or whether it would conflict with any known principles of law which have been recognised through ages to safeguard the interests and safety of the people. The High Court cannot certainly be in a position to know the danger which this new development has created for society. The Hon'ble Member in charge of the Bill who introduced it, and the Hon'ble gentleman who moved the amendment both agree that if there is a new development a new law is necessary. If it is a new development it calls for a new law, and the High Court cannot be in a position to have any information as regards the new development—its nature, its extent, or to what extent it is a danger to society. Certainly of course it will be for the Select Committee to make such safeguards as shall prevent an abuse of the provisions of the Bill. I am sorry therefore on those grounds I cannot support the amendment."

The Hon'ble Rai Sita Nath Roy Bahadur :—"Sir, with your kind permission, I desire to make a few observations regarding the Bill before us. I deplore—"

The Hon'ble Mr. Vijiaraghavachariar :—"Sir, may I call attention to your ruling that the amendment should be disposed of first, and that the principles of the Bill should be dealt with afterwards."

The President :—"Mr. Vijiaraghavachariar has quite correctly interpreted my ruling. I have endeavoured to impress upon the Council that the subject-matter for discussion at present is the amendment moved by Mr. Surendranath Banerjee. I found, however, that as everybody had prepared a speech on the Bill, it would entail nearly everybody in this Council being called to order the moment he got up to speak. My ruling was absolutely clear and I shall be very glad if Members will observe it. If the Hon'ble Member proposes to speak on the main subject of the Bill itself, he should wait until the amendment has been dealt with and then make his speech."

The Hon'ble Rai Sita Nath Roy Bahadur :—"I bow to your decision, Sir."

The Hon'ble Mr. Surendranath Banerjee :—"Am I entitled to a reply?"

The President :—"Yes."

Sir Reginald Craddock :—"Sir, with reference to your ruling, I propose to reserve any remarks I may have to make by way of reply on the general principle of the Bill until this amendment has been disposed of, and therefore I would like to safeguard myself if I give no answer at this moment to certain criticisms by the Hon'ble Member who moved the amendment. I reserve my right in that respect to reply at a later stage. But for the present I will only confine my remarks to the question of urgency, it is the one on which the amendment is based. At present I am glad to find that there has been no support of this amendment, and therefore perhaps it is unnecessary for me to go into the matter at any great length, but as the Hon'ble gentleman who moved it has still to reply, I think I had better say what I have to say on the question of urgency and not rely too much on the fact that Hon'ble Members who have spoken have expressed already their support of the principle of the Bill and their unwillingness to agree to the amendment.

"Now the proposal (to postpone the consideration of the Bill) is not one that the Government can accept. It is in no sense a tentative measure. It is in no sense an experiment. It is merely a case of filling in an obvious gap

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in the criminal law for which there are the best precedents and the highest authority in the law upon which the Indian Penal Code is based. Now what can be gained by waiting a year? To begin with the High Courts are always very reluctant to express any opinion as to the administrative necessity of a measure. They may, it is true, criticise the details of a draft, but on the administrative necessity they are almost invariably unwilling to express any opinion. Now it seems scarcely likely that if we are to wait for a year which, if we accepted this amendment, would be the amount of delay entailed, that Local Governments and High Courts will tell us that crimes of this kind ought not to be punished. The proposed law is really comprised in a single definition, and is based on the English law as expounded by English Judges. It is not a case therefore in which a great deal of circulation, discussion and opinion are necessary preliminaries. What did Sir James FitzJames Stephen say?—'If you find a gap in your criminal law, stop it as soon as you find it, in a quiet time if possible, in troubled times if you must.'

"Because our predecessors have not filled up this gap, are we to hesitate and wait a year when we are convinced that it ought to be filled up at once? It is not merely because of the dastardly outrage of the 23rd of December that the Government have put forward this Bill. It is because the continued existence of the spirit, of which that outrage was the outward manifestation, is the surest indication to us that the matter is one that will not brook any delay. The spirit which plotted the many crimes committed in Bengal during the period of unrest, the spirit which planned the murder of Mr. Jackson at Nasik, of Mr. Ashe in Tinnevely, the spirit which inspired the murder of so many faithful servants of Government, and of those men who, through fear or penitence, gave information to the State,—that spirit is still alive in the land. It might certainly have been hoped that the generous reforms which were devised by Lord Minto and Lord Morley, that the gracious visit of His Majesty a little more than a year ago, would have exorcised this demon of anarchy. Even at that time of general peace and rejoicing that spirit of anarchy was not wholly subdued. On the eve of the great Durbar a trusted servant of the Government lost his life by the pistol of the assassin. After that there was a temporary lull, but it proved temporary. In May there was a dacoity committed by hands of young men in the Backergunge District. In July two more dacoities of the same kind occurred in Backergunge and Dacca; in September Head constable Rati Lal Roy was shot in Dacca. Shortly before the outrage at Delhi, there was discovered a reoccurrence of conspiracy in Bengal, an instance of which the Hon'ble Mr. Surendra Nath Banerji himself has given, in which a father found that his son was mixed up in these conspiracies and did his duty in giving information. On the 17th December the house of an informer at Midnapur was blown in by a bomb which was identical in composition with the bomb thrown at the Viceroy six days later. Three weeks after that a man suspected of having given information regarding conspirators was murdered in cold blood in the streets of Comilla. During the following weeks two more serious dacoities have been committed by organised bands in Dacca and Mymensingh. Twelve young men are at present under arrest for having made preparations to commit a dacoity, but in their case the matter is still *subjudice*.

"Sir, when a spirit of this kind is still abroad are we to defer the passing of a measure simply for the purpose of a discussion which will be almost entirely academic? Are we to allow evil conspirators to pursue their dark designs with the knowledge that they can escape punishment so long as they can find tools whose connection with their conspiracies cannot be established, while we give them a year's grace and are merely discussing when the result of the discussion can already be foreseen?

"I would go further and I would say that it is in the highest interests of these young men and men like them that the promptest steps should be taken to check this form of crime. How many of these young men have been led away by false advice and false adjurations to combine themselves for crime in the name of pseudo-patriotism, which brings ruin and shame to the young men themselves and to their families. Sir, had the lull which followed the Royal Visit proved to be a final subsidence of anarchy and anarchical crime then even

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[*Sir Reginald Craddock; Babu Surendra Nath Banerjee; the President.*]

the need for this legislation would not have been less, though it might have been less urgent. But, as it is, the urgency is plain to all who read the signs of the times and who desire the welfare of the State and of the country. The gap in the Penal Code was filled up as regards the State in the year 1870, and it remains for us to fill it up without delay in regard to society. Sir, I do not wish to revive any of the bitter memories of the time of unrest, but every Member of this Council must know full well that that was a time in which every kind of persecution, petty and grave, was launched against those who served the State honestly and declined to associate themselves in movements which had for their objects the coercion of individuals, and hostility towards the State and the authorities. Such a time might at any time recur, and it is incumbent upon the Government to provide against such a recurrence without delay.

“It is undeniable, as I have already pointed out in my former speech, the first steps to crime may begin in petty persecutions of this kind; crimes may originate in the infliction of civil wrongs; and it is the duty of Government to take its measures promptly not only that the victims of these crimes, of these persecutions may be protected betimes, but that the persecutors themselves may be subjected to checks before they have time to take the further steps which will lead them into crime and shame and disaster.

“Sir, as I have already said, there are other points upon which the Hon'ble Mr. Banerji criticised the principles of the Bill, and upon these I reserve my answer until the main motion comes up. For the present, I trust that the Council will accept what I have said as to the urgency of this measure and the necessity of not delaying this matter for yet another year.”

The Hon'ble Babu Surendra Nath Banerjee:—“I desire to repeat what I have already observed, *viz.*, our sense of horror and detestation at the crimes to which the Hon'ble Member in charge of the Bill has referred, and our eager desire to co-operate with the Government in all legitimate measures the Government may take for their suppression. But our difficulty, at least my difficulty in the matter, is this that we do not think that a Bill like this is likely to reach the conspirators. Sir, you have tried measure after measure with a view to punish these conspirators, but you have not been wholly successful. I do not admit that there has been no sensible improvement in the position. I think there has been, and I believe that if Mr. Meishead's last report on the Police Administration is carefully perused—there was an article on it in the ‘Indian Empire’ on Saturday last—it will be found that in that part of Bengal which suffered most from the excitement and the unrest, there has been a distinct and sensible improvement. Improvement or no improvement, the position which I take up—and I believe it is the position shared by many of those who think with me—is that this is not the way to put down these unhappy developments. What is needed, Sir, is more of defective ability in the police. I fear, Sir, and the remark has been made elsewhere, that murder is one of the safest crimes to commit in Bengal. I know of cases of murder—”

The President:—“The Hon'ble gentleman is discussing the merits of the Bill. He will have an opportunity of doing that presently.”

The Hon'ble Babu Surendra Nath Banerjee:—“Sir, I was just trying to point out that there was no need for the urgency which was referred to by the Hon'ble Member in charge of the Bill. My contention is that, as the situation has steadily improved, the question of urgency has disappeared, and I venture to submit that my remarks are perfectly relevant.”

The President:—“The Hon'ble Member is not entitled to question my ruling. If his remarks had been relevant, I should not have called him to order.”

The Hon'ble Babu Surendra Nath Banerjee:—“Very well, Sir. I submit, however, that as our Statute-book has been without any such law for such a length of time, it seems to me that a year's delay would not make any

[*Babu Surendra Nath Banerjee; the President.*
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difference, especially in view of the steady improvement in the situation. Sir, I may refer the Hon'ble Member in charge to Mr. Lovet Fraser's book on Lord Curzon. In that book he discusses the question of anarchical developments here and elsewhere, and he says that when anarchy has taken a hold anywhere it stays there for sometime: it is got rid of slowly, step by step; its complete disappearance is not at once to be expected. Therefore we must to some extent rely on the invisible forces of time, the invisible forces of public opinion, the social forces which are all operating with the Government, all operating with the loyal, the dutiful section of the community for the complete eradication of this evil which we all deplore. Therefore, Sir, I think no great harm would be done if six months' time were given for the circulation of the Bill and the High Courts were consulted thereon.

"I do not know whether I would be in order in referring to some of the observations made by my friend to my left and my friend behind."

The President:—"The speaker on the Hon'ble Member's left did speak on the main question, and I did not like to stop him for the very reason which I have already indicated; but I hope that the Hon'ble Member himself will do his best to support my ruling and reserve any observations which he has to make on the main question till such time as the main question comes up. He will then have an opportunity of saying all he has to say."

The Hon'ble Babu Surendra Nath Banerjee:—"Very well, Sir."

The Council then divided and the result was as follows:—

Ayes—2.

The Hon'ble Mr. C. Vijjaraghavachariar, the Hon'ble Babu Surendra Nath Banerjee.

Noes—57.

His Excellency the Commander-in-Chief, the Hon'ble Sir Guy Fleetwood Wilson; the Hon'ble Sir Robert Carlyle; the Hon'ble Sir Harcourt Butler; the Hon'ble Mr. Syed Ali Imam; the Hon'ble Mr. Clark; the Hon'ble Sir Reginald Craddock; the Hon'ble Mr. Hailey; the Hon'ble Sir T. R. Wynno; the Hon'ble Mr. Meugens; the Hon'ble Mr. Ghuznavi; the Hon'ble Raja of Mahmudabad; the Hon'ble Raja Kushalpal Singh; the Hon'ble Mr. Saunders; the Hon'ble Sir Henry McMahon; the Hon'ble Mr. Wheeler; the Hon'ble Mr. Enthoven; the Hon'ble Mr. Sharp; the Hon'ble Mr. Porter; the Hon'ble Sir E. D. MacLagan; the Hon'ble Mr. Gillan; the Hon'ble Major-General Birdwood; the Hon'ble Mr. Michael; the Hon'ble Surgeon-General Sir C. P. Lukis; the Hon'ble Mr. Gordon; the Hon'ble Mr. Maxwell; the Hon'ble Major Robertson; the Hon'ble Mr. Kenrick; the Hon'ble Mr. Kesteven; the Hon'ble Mr. Kinney; the Hon'ble Sir Wm. Vincent; the Hon'ble Mr. Carr; the Hon'ble Mr. Sree P. Rama Rayaningar Venkataranga Bahadur; the Hon'ble Khan Bahadur Mir Asad Ali Khan; the Hon'ble Sir Ibrahim Rahimtoola; the Hon'ble Khan Bahadur Rustomji Jehangirji; the Hon'ble Mr. Fuzulbhoy Currimbhoy Ebrahim; the Hon'ble Mr. Macpherson; the Hon'ble Raja Saiyid Abu Jafar of Pirpur; the Hon'ble Mr. Maude; the Hon'ble Mr. Madhu Sudan Das; the Hon'ble Maharaj Kumar Gopal Saran Narain Singh of Tikari; the Hon'ble Mr. Qumrul Huda; the Hon'ble Mr. Arthur; the Hon'ble Major Brooke Blakeway; the Hon'ble Mr. Jinnah; the Hon'ble Malik Umar Hayat Khan of Tiwana; the Hon'ble Raja Jai Chand of Lambagraon; the Hon'ble Sardar Daljit Singh of Jullundur; the Hon'ble Mr. Meredith; the Hon'ble Mr. Walker; the Hon'ble Rao Bahadur V. R. Pandit; the Hon'ble Sir G. M. Chitnavis; the Hon'ble Mr. Arbuthnott; the Hon'ble Srijut Ghanasyam Barua; the Hon'ble Mr. Eales; the Hon'ble Maung Myé.

So the motion was rejected.

[5TH MARCH, 1913.] [The President; Mr. Jinnah.]

The President :—“ It may be convenient for Members to know, in case they have not understood, that it is now open to any one to speak on the main question, either for or against the proposed Bill. ”

The Hon'ble Mr. Jinnah :—“ Sir, I want first of all to put it before the Council very clearly that nobody more readily would respond to the appeal that has come from the Hon'ble Home Member than I would; also I wish to express that nobody condemns in stronger terms the misdeeds of which a long list was given to us a few minutes ago by the Home Member. I also wish to express that every attempt on the part of my countrymen to undermine the authority of Government and to disturb the law and order in my opinion deserves the strongest condemnation and the highest punishment. Those men who have a desire to undermine the authority of the Government; those men who have a desire to disturb law and order, are in my opinion the biggest enemies of my country and my people. They are to-day doing the greatest harm to the cause of India. Sir, why is this measure brought before this Council to-day? It is brought because of the doings of some of my countrymen. Repressive measures that have been brought in in this Council have been brought because of the misdeeds of some of our countrymen. I remember, Sir, in 1910, when the Press Bill was introduced at Calcutta, much as we felt that a severe blow was going to be dealt at the liberty of the Press, much as we felt that our most prized liberty, namely the liberty of the Press, was going to be curtailed, our hands were tied, our mouths were closed by the misdeeds of some of the misguided men who belong to our country, and we almost as a body, non-official Members, realised and felt that the Government were bound to take certain measures to maintain order and law; and reluctant as we were we felt that, although we were losing what we prized most, namely the liberty of the Press to a certain extent, we not only supported it, but we supported it with every power that was in our possession.

“ Sir, I believe in criticising Government. I believe in criticising Government freely and frankly, but at the same time I think that it is the duty of every educated man to support and help the Government when the Government is right. On this occasion I feel that having regard to the history of political crimes, my hands are tied, my mouth is closed, and my countrymen, who are responsible for these deeds are responsible to-day for my position, which I occupy in this Council at this moment. Let those men who still have these misguided ideas, let those men who have these hallucinations realise that by anarchism, by dastardly crimes, they cannot bring about good government, let them yet realise that those methods have not succeeded in any country in the world, and are not likely to succeed in India. Let those men yet realise before it is too late, and before they bring their country into a position which may be most regretted by every patriot who feels for and loves his motherland: let them yet realise that those are not the methods. Sir, if I may say so, I represent a class, an educated class and Young India in this country. Representing the modern India and the young educated class in this country, I feel that I am expressing their sentiments on this occasion, and I feel that there is a large body of men who feel exactly as I am feeling to-day. The Hon'ble the Home Member said, we have got cause, we have considered our position, and we ask the Council to take us on trust, and support Government. Having regard to the position that I have described, I have no alternative, Sir, but to take the Government on trust on this occasion. I therefore think, Sir, that so far as the principle of this Bill is concerned, I am not in a position to resist it. With regard to the merits of this Bill, I wish, Sir, to make certain observations. This Bill, as the Hon'ble Home Member said, is nothing but the English law. I beg to take the opportunity of pointing out to the Hon'ble Member few things especially for him to consider, and I have no doubt that in Select Committee the members who will be on the Select Committee will consider the few suggestions that I wish to make to-day. I shall not be here any more in this Council, therefore I shall not be able to take any part in the various stages through which this Bill will go: and therefore I draw the most earnest attention of the Hon'ble the Home Member and the members who are on the Select Committee to consider those suggestions that I shall make. The first

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suggestion that I wish to make, and which is an obvious error, that occurs often. It is made, not only in this case, but speaking from experience, in several cases when you come to enact a Statute following or copying English Statute or law which is distributed in and covered by different Statutes or branches of law. You have to be most careful when you are copying English law as you propose to do in the present case. Sometimes you come to enact a Statute and you are dealing with substantive law, but along with the substantive law you have the law of procedure or evidence, and while you are rectifying and amending or enacting the substantive law, you lose sight of the law of procedure or evidence, and when it comes to be worked actually in a Court of law, there is almost an impasse, and the result is almost startling. A very recent case from that point of view arose in Bombay with regard to the Indian Companies Law that will perhaps interest the Hon'ble Member in charge of the commercial portfolio. It was with regard to the position of the secured creditor, whether he should be allowed to prove for the full amount of his claim or debt or not. The English Companies Act of 1862 was enacted and afterwards there came the Judicature Act of 1875, which altered the position of the secured creditor. But when we came to enact our law of 1866, the Indian Companies Act, we took it bodily from the English Act, having lost sight of the Judicature Act of 1875, and when we came to amend it in 1882, we were still asleep, having lost sight of the Judicature Act of 1875 again, and we only woke up when the present Bill which is pending came up before the Council the other day, and that was because when the English consolidated Act came into force in 1908, the section in the Judicature Act was incorporated in substance in the English Act. Therefore, Sir, with regard to this Bill now, I point out the provisions embodied in section 10 of the Indian Evidence Act which have most important bearings on the Bill under discussion.

“The substantive law is laid down in clause 120 A. That any agreement between two or more persons to do or cause to be done an illegal act, that agreement *per se* is a conspiracy; or an act which is not illegal, but by illegal means such an agreement is designated a criminal conspiracy. When you come to consider the rule of evidence in India, section 10 of the Evidence Act is a most important section to bear in mind, because in the English law of evidence as laid down, you will find it different. It lays down clearly that no evidence is admissible to prove the offence against the accused, unless some act, omission or declaration, something done or written by one or other of the conspirators was done in furtherance of the common object or purpose, *viz.*, ‘conspiracy.’ ‘In furtherance’—those are the words to which I wish to draw the attention of the Hon'ble Member; whereas in the Indian Evidence Act you will find that the words are ‘in reference’ instead of ‘in furtherance.’ Now, clearly you are changing the substantive law in India and bringing it into line with the English law. But it will leave the Indian law of evidence untouched, and I submit it will lead to very great hardship and danger. Remember, that when you are enacting a penal Statute your object is to arrest the evil—your object is to punish the guilty. But, Sir, legislating as we are doing in this Council for 300 million of people, you must not forget your responsibility to the innocent and the law-abiding subjects of His Majesty. Such cases have the greatest claim to your consideration. Therefore I say, while you are bringing this law into line with the English law, follow it strictly in all its bearings. I will only refer to that section 10 just to show that—it says this :

‘Where there is reasonable ground to believe that two or more persons have conspired together to commit offences, etc., anything said, done or written by any one of such persons *in reference* to their common intention at the time when such intention was first entertained by any one of them is a relevant fact as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy, as for the purpose of showing that any such person was a party to it.’

“The Hon'ble the Home Member has pointed out, and very rightly pointed out, conspiracy in India *per se* is not an offence except under section 121 A, and therefore unless something was done in furtherance of the common intention

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it was not an offence. But this Bill now goes much further. Now, Sir, the English law of evidence in cases of conspiracy to which I would like to draw the attention of the Hon'ble Member is laid down in Taylor on Evidence. I give a reference to paragraphs 590, 591, and 593. There you will find,—I do not wish to weary the Council because really this is a highly technical subject, and I daresay it is not very interesting to most of you here; but I only wish to draw the attention of the Hon'ble Member that there he will find very clearly laid down that any act, omission or declaration or something said, done or written by one of the conspirators, before it can be admitted as evidence against the accused conspirator it must be in furtherance of the conspiracy. Then there is another point to which I wish to draw the attention of the Hon'ble Member. It is this: the explanation to clause 120-A of the Bill seems to me to go much beyond the English law, and is likely to create mischief when you come to interpret that clause. I entirely agree with the Hon'ble Member that without this explanation the law as reproduced in clause 120-A is substantially the English law; but the explanation in my opinion goes a little further, and it might and will, I think, create the greatest mischief if left as it stands now, and I am of opinion that this explanation should be dropped. Then the third point is with regard to how the prosecution should be launched. Remember, if you pass this Bill you are really making conspiracy an offence, although it may not be an offence against the Government, the State or the King, in the sense, namely, of undermining Government or the authority of Government, and therefore you are going much beyond those offences which are known as offences against the State or Government. A criminal breach of trust or theft and many other offences are covered by this Bill. If A and B agree to commit a theft in the house of X, the moment they agree to do that and nothing more by way of overt act, and if you can prove they agreed, then simply because there happen to be two or more persons who agreed to that effect is conspiracy and an offence and they are certainly punishable by this Bill. Therefore you are going far beyond your purpose, which is to punish offences against the State or Government. I take it that the main object of this Bill is really to reach those cases which are strictly speaking offences against the State, and the Act ought to be restricted to those offences. You will find the practice in England in such cases laid down in Halsbury's Laws of England. I am reading from the 'Laws of England,' Volume X, page 292, paragraph 602, which says it is the duty of the Attorney-General to institute prosecutions for crimes which have a tendency to disturb the peace of the State or to endanger Government. Therefore the prosecution is really instituted in England by the Attorney-General and not by any private or irresponsible person. Therefore I earnestly draw the attention of the Government to this point, Sir, that when you are undertaking a prosecution of an offence which is directed against the State or the Government, it must have the previous sanction of a responsible body before such a case can be launched against any citizen; and in my opinion either it must be done with the previous sanction of the Advocate-General or with the previous sanction of the Local Government or the Government of India, and not otherwise.

“Therefore I say that this safeguard is absolutely necessary. The main object of this Statute as I said before is to deal with offences against the State. When you are dealing with a Bill of this character I submit, Sir, that two or more persons is much too small a number. It cannot be a conspiracy of any importance in which there are only two persons connected. You will generally find in conspiracies that are of any really serious character there are more than two persons, and therefore I say the number of two is much too small and is likely to cause mischief in practice. You have got the definition of an ‘unlawful assembly’, and there you find mention of five or more persons. Therefore I say that you should increase the number to five or more persons. I think you will find that in the case of certain serious offences in England a conspiracy of three or more persons is referred to. Here it ought to be at least five or more persons and not only two. These are the suggestions I would make, namely section 10 of the Evidence Act to be considered, then you have the explanation to clause 120 A, then you have the manner of prosecution. It should not be

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allowed unless it has the previous sanction of the Governor General in Council or the Local Government, or the Advocate-General. Then I say that the number should be five or more persons and not as it stands now at two.

"With these remarks, Sir, I will again say that this is a very serious moment—a moment at which I do not think it would be right for us to in any way embarrass the Government, but there is one thing which I wish to say that just as there are in India certain people who are responsible for a great deal of mischief so you have certain people who claim to be supporters of or belong to the rank and file of Government who are also responsible for a great deal of mischief. I wish to draw attention to what I read in a newspaper the other day, and that is an extract from the London 'Times,' a paper that calls itself the leading paper in Europe. The heading is 'Congress Party and Sedition' 'drastic proposals offered.' I will read an extract and the Council will allow me to ask how a paper of this standing, a paper of this character should allow an article so ill-considered or so ill-advised and calculated to hurt the feelings of many of us in India who I assure you, Sir, are as anxious to maintain the authority of the Government of India and are as anxious to maintain law and order as any Member of the Government present here. The article is levelled against those stalwart men, those patriots who head the Congress and have been serving their country. I say, Sir, that I am proud that I belong to the Congress party. That such an article should be written with these insinuations and these aspersions is likely to cause as much mischief as any thing that I can think of. The article runs as follows :—

CONGRESS PARTY AND SEDITION.

DRASTIC PROPOSAL OFFERED.

Strong comments in "Times" Article.

'A London cablegram says :—An article in the March number of the *Round Table* on the Delhi outrage, argues that 'as the Nationalist leaders' opposition to the Government influences the extremists in the direction of political crimes, the leaders themselves must seek out the sources of conspiracy and prevent their further activity, otherwise the Government may be compelled to say that if political murders recur all representative institutions must be suspended.'

'The *Times* says :—'The threat of suspension is obviously impossible. It would not be fair to ask the constitutional politicians of India to join in a hunt for the criminals, but it is reasonable to tell them that they cannot for ever evade responsibility, if by opposition they even unconsciously foment disorder, which finds expression in crime. They must either modify their attitude or do something more than express pious horror when outrages occur. By precept and active influence they must set themselves to create a strong feeling of antagonism to conspiracy and must inculcate the duty of helping the Government to detect the offenders. Should they continue to fail in these responsibilities, the verdict must go against them, and anyhow it may be safely said that there can be no further extension of political reform in India while anarchism remains unextirpated.'

'The *Times* adds :—We are not satisfied that the duty of repressing crime in India is at present efficiently performed, though whether the fault lies chiefly with India or England is open to question. The fact that India is only now bringing its law of political conspiracy into line with Britain, shows that the element of precaution has been lacking. Much more might have been done if the police had been better supported and shielded from undeserved attacks, if criminals had been caught red-handed and received swift and sharp punishment, if the scandals of interminable political trials had been summarily rectified, and if foolish and mistaken clemency had been less frequent.'

"Now, Sir, the threat is held out to us that we must find out the culprit. If we do not find out the culprit our political institutions must be suspended."

The President :—"I am very loth to interrupt the Hon'ble Member but he has quoted a document which is not a Government document, and one which in no way pledges the Government or the policy of the Government."

The Hon'ble Mr. Jinnah :—"Yes, Sir, I know that, but I only wish to point out that there is this kind of mischief going on. My appeal to Government is this—I want the Government to take and give expression to this view, that just as you wish us to co-operate with you, just as you expect us to stand by you, in the same way you must stand by us and condemn those

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who are creating this mischief. Just as you condemn those among us who are guilty of misdeeds, just as you expect us to join and co-operate with you in condemning our own men who are guilty of misdeeds so you must condemn your men who are also guilty of misdeeds. That is a point which I wish to make clear and that is the reason why I am drawing the attention of the Council to the writings of what is known as the leading journal in England. With these remarks I have no alternative but to support the principle of the Bill and I trust it will emerge from the Select Committee in a manner that it will not go beyond the English law, and that the safeguards I have indicated will be provided for."

The Hon'ble Rai Sita Nath Roy :—"Sir, with your kind permission I desire to make a few observations regarding the Bill before us.

"I deplore that it should have been found necessary to so widely extend the scope of original conspiracy, and it is indeed very unfortunate that occasions should have arisen to make the mere agreement between two or more persons to commit an offence, however trivial, though it may not be followed by an overt act or to do an act though not illegal by itself by illegal means indictable. But however we might have on occasions other than this differed from the principles of the Bill, however much we may deplore the occasions which have brought forth this Bill, we are bound to bend our will to the exigencies of the situation and to humbly bow to the decision of the Government. In view of the detestable, dastardly and extremely deplorable outrage on the person of His Imperial Majesty's Viceroy who has done so much to conciliate and humour all classes of people and who has been so indulgent even to the anarchists themselves.

"In view of the numerous other heinous crimes hitherto committed and in view more particularly of the numerous political dacoities already committed and which are still being committed almost every week in different parts of Eastern Bengal, from which I have the honour to come, and in view of the desirability of arming Government with plenary powers for effectively stamping out these heinous and despicable crimes, we, as loyal subjects, are bound to give our humble support to the Bill. But, before concluding, I beg leave, with your kind permission, to make a suggestion which I trust and hope may be acceptable to the Government. My suggestion is that it may be found possible to limit the scope of the proposed amendment to all State offences, as defined in Chapter V of the Indian Penal Code or at least to such offences as are exclusively triable by a Court of Sessions; and I particularly pray that the operation of this Bill when it is passed into an Act may be to limit the operation of the Act to three years in order to allow Government an opportunity of judging how the Act works. With these few words I beg to support the Bill. But, at the same time, I find that there is not one Indian lawyer included in the Select Committee. The suggestions made by the Hon'ble Mr. Jinnah are indeed very reasonable, especially the one regarding the mere agreement between two or more persons which should make them liable to punishment. It should be, as suggested by him, that, in order to complete the conspiracy, it must be a conspiracy of four or five persons, as defined in the Indian Penal Code in the case of unlawful assembly. I also beg to suggest that the offence of conspiracy should not be launched without sanction from the Government. I therefore wish that an Indian lawyer, a non-official Indian lawyer, should be included in the Select Committee."

The Hon'ble Mr. C. Vijiaraghavachariar :—"Sir, I beg leave to make a few remarks on the principles embodied in the Bill before us. Short as it is, I think this Bill is a most important measure. It is a substantial addition to the Indian Penal Code and it fundamentally modifies its principles. A every competent critic, Sir James Stephen, has pronounced the Indian Penal Code as the most remarkable and as the most enduring monument of Lord Macaulay's works. Then having regard to the very careful examination and revision of the draft Code by Sir Barnes Peacock in its final stages in the

Council of the Governor General, he says "It is an ideal Code drawn by a Bacon and settled by a Coke." It is this ideal Code which the Hon'ble the Home Member proposes to alter. It has stood the test of 50 years and has been the admiration of the civilised world and its provisions have been copied more or less in several countries. It has thus become a venerable institute. I am entitled to ask for some reason stronger and more convincing than a mere statement that Government has information which justifies it in starting this measure and starting it so suddenly. I do not deny the soundness of the *ex parte judgment* formed by Government, but having regard to the fact that we have no access to the materials on which that judgment rests, I am entitled to raise the question whether this subjective necessity is really identical with the objective necessity of the situation. I do not merely complain that the public has not been taken by Government into its confidence before it has found it necessary to start this piece of highly dangerous legislation. But I beg leave to state there is absolutely no evidence disclosed to us that would justify the remarks made in the Council to-day connecting the measure before us with the dastardly outrage that took place here on the 23rd December last. The Hon'ble Member in charge of the Bill has not stated anything to-day to warrant such remarks. I beg to decline to associate myself with these views so easily put forward. In dealing with this measure, therefore, I would deprecate any allusion to this most deplorable incident. If it was only possible for the country to have foreseen it, millions and millions of people would have sacrificed themselves, if that was necessary to avert that outrage. But I repeat my question and ask what connection is there between this Bill and outrage? Let us take this test. Let us suppose that this law had been originally embodied in the Indian Penal Code. Would the Hon'ble the Home Member go so far as to say that the present political situation would have been saved? Would he say, would any Hon'ble Member rise and say that if Lord Macaulay had not omitted this, Bengal and India would have been saved from anarchism and outrages; That is a fair way of putting the question, I think. I believe that it is futile to entertain a sanguine hope of getting rid of anarchism, if it still prevails in this country, by adding more and more to its repressive laws. I submit that such a policy is the outcome of lack of imagination, and if it is permissible for me to say so, is not consistent with high statesmanship.

I shall now proceed to a very superficial examination of the provisions of this Bill. I would only draw attention of the Hon'ble Members to two or three points. The Hon'ble the Home Member has rightly emphasised the necessity for a clear comprehension of the provisions of the Bill. I will try. Firstly it is claimed that the measure before us has been entirely borrowed from the Common Law of England. We all know what the Common Law of England is. It is distinguished from the Statute Law being a creature of Parliament. It is a mixture of Celtic and Anglo-Saxon customs moulded by Norman lawyers, not very sympathetically always, and developed subsequently by English Judges often driving a Coach and four through the ancient customs in order to adapt them to the varying conditions of society from time to time. It is exceedingly doubtful whether conspiracies in England were merely Civil injuries or Criminal offences as well before the time of the Star Chamber. But certain it is that it was under the auspices of the Star Chamber that this branch of the Common Law of England was formally established as a substantive Criminal Law. From that time forward it began to be extended in various directions and Sir James Stephen says that it became, henceforth, a new head of law capable of indefinite extension. I am quoting without the book.

The conspiracy branch of the English Common Law has not yet been codified. Several attempts were made from time to time to codify the criminal branch of the Common Law and several commissions were appointed for the purpose. An observation made by one such commission is very interesting. It is to the effect that the criminal branch of the Common Law is so defective a system that it can be reformed only by being entirely taken to pieces and a new system reconstructed out of the materials thereof. This observation occurs in a

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letter of the commission addressed to Lord John Russel. The Macaulay commission approved of this observation. Now it is this common law a portion of which we are called upon to borrow and to codify. It is the characteristic of the common law of England that there are no uniform and authoritative definitions of the offences dealt with by it. Criminal conspiracy in England is usually defined as a combination and agreement of two or more persons to do an unlawful act by unlawful means. Again the word "lawful" has not been precisely defined. Sir James Stephen says that the word implies immorality coupled with injury to the public. The Bill avoids the use of the word "unlawful" and substitutes the word "illegal." And this word "illegal" is defined in the Indian Penal Code and comprehends three things as the Hon'ble Member in charge of the Bill has rightly pointed out. An illegal act is either an offence, or an act forbidden by law or an act which can be made the basis for a civil action. It is thus clear that an unlawful act and an illegal act are not always synonymous and identical. What is unlawful may not be always illegal, and what is illegal may not be always unlawful. I believe therefore that the similarity between the English Law and the proposed law is not as great and complete as it is claimed on behalf of the measure before us. I submit that on the whole the proposed law is much more comprehensive than the corresponding English law. While the latter is very flexible, our measure proposes a very rigid law. I am not sure that a combination and an agreement to commit civil injuries is invariably an indictable offence under the common law. Lord Ellenborough declined to consider that an agreement to commit a civil trespass is an indictable conspiracy. The Bill before us might well have added a few cases by way of illustrations. I beg permission to illustrate the law before us by one or two hypothetical cases. Suppose the Hon'ble the Home Member and I—I hope the Hon'ble Member will not resent this illustration—walk along the road and see a ruffian about to insult a lady not far away from us; next suppose that I propose to run and knock the fellow down and to protect the lady; I take it that the Hon'ble Member would easily agree that my proposal is right and proper. But to knock down that ruffian under the circumstances would be an illegal act, because while our law gives the right of private defence as against offences relating to property and affecting the body, there is no right of private defence conferred by our law, by the exercise of which one could protect the lady against the rude insult. But instead of insulting her, if the fellow threatens to pick her pocket and rob her, our law allows that we can go and knock him down. If, in spite of our law, the Hon'ble Member and I run to protect the lady, we certainly commit an offence under the law. But this act on our part would not, I submit, be unlawful but it would certainly be illegal, because the act would be an offence under the proposed law as the agreement to run and protect the lady would be an offence. We need not actually run and protect the lady. As no overtact is necessary in such a case, the mere agreement to protect is an offence, punishable with six months' imprisonment under the coming law. This is illustration No. 1. Next let us suppose that the Hon'ble Member and myself were on our way to attend a meeting of this Council, and that if we take the usual road we find we shall be late. So to be here in time we agree to take a short cut across a private man's field, and we propose to jump over the hedges, and we do so, and reach the Council meeting in time. This won't be an offence under the common law of England, but it would be an offence under the coming law in this country, for our action in jumping over the fences and walking across the field of a private owner though not an offence is certainly a civil trespass and the owner can maintain an action against us for damages. An agreement to do this illegal act would thus be an offence, if the Council passes this measure into law. It is not even necessary to convert the agreement into an offence that we should actually jump over the hedges and cross the fields. If we both run some distance towards the hedge of the field it would be enough, for such running with the intention to cross the field is an overt act which is all that the new law demands to make the agreement penal. I do not think that I need multiply illustrations. These two illustrations clearly show how much more comprehensive and far-reaching is the proposed law than the Common Law of England.

The Hon'ble the Home Member makes a point of the fact that the Indian Penal Code omitted to include the conspiracy law when it was first enacted 50 years ago, and says that he in vain looked into the ancient records and papers to find out how the omission occurred. And he is of opinion that the omission was accidental and not intentional. I am sorry to be obliged to contradict the Hon'ble the Home Member and I do so without the book and subject to subsequent verification. The omission was clearly intentional and avowed. As well as I can now remember there is passage some where in the report or notes of the Macaulay Commission, but which we can easily detect to be in the language of Lord Macaulay. In that passage Lord Macaulay makes a clear distinction between political offences and the other offences for the purpose of making mere conspiracies penal offences. Almost all the other offences are based upon this principle, namely that mere criminal intention and preparations do not constitute any penal offence until they reach the stage of an attempt to commit the intended offence. The Macaulay Commission while recognising the soundness of this principle, makes an exception in the case of political offences. The commission say that in the case of a man committing offences other than political, his danger begins the moment he commits the crime successfully while in the case of a rebel or any one committing a formidable State crime his immunity is always almost secured from the moment of his success; hence Lord Macaulay says that in the case of State crimes he has made mere designs, consultations and preparations not matured into attempts, offences under the Penal Code. The principle clearly is that in State crimes both policy and necessity demand that the intending criminal should be secured by law long before he completes the plan enabling him to commit the offences successfully. It is thus clear that the omission from the Indian Penal Code of any provision as to conspiracies in the preparatory stage, except when those conspiracies were formed in view to commit State offences, was intentional, well considered, and not accidental, as the Hon'ble the Home Member would make us believe. The Penal Code was most carefully prepared. It was 25 years in the making. It was begun in 1835 and passed in 1860. The draft code prepared by the Macaulay Commission was subjected to the scrutiny of another Commission. Before it was introduced in the Legislative Council constituted under the Act of 1853 it was referred to a Select Committee of the Council. After it was read as 1st time and a 2nd time in the Council it was again referred to another Select Committee, and the Select Committee's report was considered by the whole Council resolving itself into a Committee and the deliberations lasted many days. I call special attention of the Hon'ble Members to the fact that during all the time the outrages of 1857 were going on, the draft Penal Code was in the hands of the Select Committee of the Council of the Governor General for making Laws and Regulations. The further and entire consideration of the whole Code was after the mutiny during a period of two or three years and it was finally passed in 1860. The Government thus had an immense and even a provoking opportunity to embody in the Indian Penal Code the law now proposed for our adoption or any portion of it. The successor of Lord Macaulay, at this time was Sir Barnes Peacock, the distinguished Chief Justice of the Supreme Court of Calcutta. And it cannot be pretended that Sir Barnes Peacock was ignorant of the Conspiracy Branch of English Common Law. Besides, bo it remembered that in those days it was the Criminal Law of England that was administered in the Presidency towns. Thus in these circumstances to say that Lord Macaulay and Sir Barnes Peacock were ignorant of the nature of the Conspiracy Law of England and hence did not consider whether it ought to be imported into the Indian law or not, is too great a demand upon our credulity. The next important stage in the history of the penal legislation of India was in the seventies, when Sir James Stephen was the Law Member. Then certain important amendments were added to the Indian Penal Code. Of the portions thus added was 121 (A) of the Indian Penal Code. We all know that this section embodies the law as to conspiracy to commit certain State offences. Sir James Stephen says in his speech that he was personally responsible for the introduction of this section. And we all know that Sir James Stephen is the author of several standard works and a great authority on the English Criminal Law. Besides, he gave important reasons for introducing the provisions of this

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section 121 (A) and among the reasons he especially alluded to the serious conspiracies which led to the Indian Mutiny of 1857, and to the Wahabi conspiracies that had been recently formed in several villages owing to the preaching of jehads. Sir James stated with very much warmth that it required no arguments to justify the extension of the conspiracy law as embodied in the provisions of section 121(A) in the light of the serious conspiracies on these two occasions. Could it be seriously maintained that Sir James Stephen did not consider on this occasion the desirability of introducing in the Penal Code the remaining portion of the conspiracy law of England? It is thus conclusively clear that the authors of the Indian Penal Code and the Government and the legislature have hitherto intentionally omitted the introduction into the system of criminal law of this country the whole of the English Law of Conspiracy, and they must have had excellent reasons for the omission, seeing that the framing and perfecting of the Indian Penal Code and its further amendment covered a period of exceptionally serious conspiracies. I am unable to accept the statement that the conditions to-day are different from and worse than the conditions in 1857 and 1870.

"I would trouble Hon'ble Members in calling attention to one more point. To meet the present conditions special provisions have been enacted and made during the past six or seven years and made permanent part of the Indian Statute Book. And I have not heard one word of explanation as to the effect of the working of these enactments upon the dangerous conspiracies and modern conditions, alleged to exist. It would have been more satisfactory if the Hon'ble the Home Member had told us how the existing law in all its various forms has been unable to reach the particular persons and the particular forms of crime he has in view in asking for the enactment of this measure. Some days ago I requested the Hon'ble the Secretary to the Council to furnish me with information touching this legislation. I asked for information touching the subject of dangerous conspiracies and modern conditions mentioned in the statement of Objects and Reasons. It has not been found possible as yet to furnish the information to me, and I have not even had the benefit of a reply. In all these circumstances I desire to state that unless a strong case is made out, that a Law like this would really help the Government in putting down fresh crimes, I submit that the proposed measure is not merely inexpedient but worse than useless.

"So far as the deplorable Delhi outrage is concerned I venture to submit that, far from accentuating the present political situation it has tended greatly to improve it. If it is ever true that God in his inscrutable providence hides a smile behind a frown, it is specially true in the present instance. Many a prince and many a president of republics who came to violent ends or who are threatened with violent ends might, if that be possible, well have envied the misfortune that befell Lord Hardinge. By his calm and courageous suffering as well as by his adherence to his benevolent policy in ruling over the country, he has done an enormous service to our Sovereign and the country, but which he is not conscious of. He has thereby evoked a degree of loyalty in India which has not been, I fear, thoroughly comprehended and appreciated, and that loyalty continues to grow in volume and intensity. I protest therefore emphatically against any attempt, however faint, at connecting this measure, repressive and far-reaching in consequences, with the outrage. The outrage itself is still under investigation. How far the investigation has progressed, whether any reliable clue towards finding out the culprits has been obtained, and whether all the circumstances connected with the actual commission of the offence have been traced, are all kept and very rightly kept still a secret. The Government is not in a position to disclose what is the degree of certainty reached in the course of the investigation, still pending, as regards the origin and development of the plot which culminated in the deplorable outrage even though the culprits themselves may not be reached. While therefore I desire to deprecate any attempt to connect his measure with the Delhi outrage on the one hand, I venture to submit, on the other hand, that the introduction of this legislation is most inopportune. It is calculated to prejudicially affect the fast and further growth of national loyalty. There are one or two minor

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points on which I need not dwell particularly. The Bill, as it is, is capable of improvement in the drafting and in the provisions. The punishment provided for the new offence is the same as the punishment provided for the abetment of the principal offence. This is not clear to me. There are two sets of punishments provided for the abetment of an offence. Successful abetments are more severely punished than unsuccessful abetments. I do not understand therefore which punishment is intended for a conspiracy to commit the offence under the Bill. I surely do not believe that the intention of Government is to wait and see whether any crime flows from the conspiracy and then award suitable punishment. There is also the question of sanctions for the prosecution of the new offences. I shall be told that all these points will be attended to during the further progress of the Bill in the Select Committee and in the Council. Perhaps, these defects and reservations are intentional, for I am aware that side by side with the reforms of the Legislative Councils a strategic policy has been developed by the Secretariat. Now every Government measure, and every controversial measure specially, is composed of two parts, the kernel and the shell. The kernel is what the Government wants and it is enclosed in a shell for the Non-official Members to bite and to scrape and do what else they can with it. This is a process in which the Hon'ble Member in charge of the Bill very often co-operates. He often thanks us, Non-official Members, very warmly for our assistance in pointing out the defects and retires, after accepting our amendments as to these defects, I do not say with mock humility but with dramatic humility. In the measure before us, there is the usual kernel and shell well combined. I am pretty sure the shell will be allowed to be knocked out. The question is what should be our attitude as regards the kernel which the Government ultimately desires to have out of this Bill. And that kernel is that an agreement to commit any one of the three sets of the acts is an offence; and these three sets of acts are: all acts amounting to an offence under the existing criminal law of the land whether it be the Indian Penal Code or any special or local law; secondly, all acts prohibited by law; and, thirdly, all acts which would furnish matter for basing civil actions upon. It will thus be seen the proposed law takes us a long way beyond the existing English conspiracy law. I am sorry, I am compelled by every consideration to oppose it. If the Bill confines itself to conspiracies to commit offences of a political nature, that would have been a different matter. But as it is, it will place innumerable people in the country in the hands of the police and informers, and it would be sorry consolation to be told, as we are told now and then, that those who inflict the suffering upon us would be our countrymen, too. We must not forget that the administration of this law will be in the hands of a machinery which is absolutely imperfect and greatly unreliable when compared with the machinery existing in England for the administration of criminal justice. While thus the machinery and the safeguards for securing the liberty of the subjects is different and inadequate when compared with the corresponding administrative agency in England, it is of no use to say that the proposed law is similar to the law in England, which, by the way, is not quite accurate. Again this similarity argument should not be carried too far. Will the Hon'ble the Home Member and the Government of India think of recommending for introduction into England some of our laws such as the Deportation Law, the Punitive Police Law, the Seditious Meetings Law, and the Press Law? The Parliament that would attempt to enact any such law would be the last parliament in England. The talk about equality between Englishmen and Indians in relation to criminal law is somewhat novel and startling. For the purpose of knocking us down we are told that we are simply equal to Englishmen, but when we cry for anything like equal privileges we are reminded that the conditions in India are totally different from the conditions in England. We ask you to let us enter the Civil Service from India, from Bombay. You say "no." You say that such few of us as are able may enter *via* London. London is the political purgatory for an Indian to enter into the heaven of the Indian Civil Service. And when these pilgrims return to India, some of whom equipped with political indulgences for entering the Civil Service, returning *via* Paris it may be, some

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germs perchance travel into India in their wake, and if these germs germinate and produce novel and dangerous conditions here and there, now and then, Government in revenge for its own sins accumulates repressive laws and subjects the teeming millions to those laws. I respectfully beg to enter my humble but firm protest against this kind of profession of equality between Indians and Englishmen. The vaunted equality begins at the wrong end. You would not only not let us into the Civil Service but you would not let us enter the army or navy either, in defence of the country and the Empire."

The Hon'ble Sir A. McMahon:—"Sir, I rise to a point of order. Is the Hon'ble Member in order in dealing with these points?"

The President:—"I can quite understand that at first sight the Hon'ble Member may appear to be travelling outside the question, but I think what the Hon'ble Member is endeavouring to show is that the argument in regard to this particular Bill is not used in other cases and that therefore it should not be used as an argument in regard to this particular Bill, and taking that view I do not think I can move the Hon'ble Member out of order."

The Hon'ble Mr. C. Vijayaraghavachariar:—"Thank you, Sir, you have stated the object of my remarks clearly. While the Bill professes to deal with special and emergent conditions, the provisions are intended as a permanent addition to the Indian Penal Code. This is not a short special measure devised to meet a particular political situation and to be of a temporary nature. On the other hand, it is not only to be permanent but of so wide and comprehensive a scope that it is impossible to conceive that it is the outcome of a simple desire to meet the special present political situation. Sir, having regard to all the circumstances I have urged above, I venture to submit that the measure before us is at once most dangerous and most inopportune."

The Hon'ble Babu Surendra Nath Banerjee:—"Sir, I feel tempted for a moment to analyse the sort of support which has been accorded to the principle of the Bill. Sir, what is the principle of the Bill? The principle of the Bill, so far as I have been able to make out, is an addition to the permanent law of the land in respect of the offence of conspiracy which further is to include all crimes whether against individuals or the State. Now what is the sort of support that this principle has received at the hands of those Members who have supported the Bill? My friend on the left says that the Act ought to be a temporary measure. My friend, Mr. Sita Nath Roy, says the same thing. My friend, the Hon'ble Mr. Jinnah, says that the scope of the Bill ought to be restricted, and that it ought to be confined only to State offences. Therefore, Sir, we have got these three distinct positions in the matter of the support of the Bill. The Hon'ble the Home Member wants it to be a permanent part of the Statute of the land. The supporters want it to be provisional. The Hon'ble the Home Member wants the law of conspiracy to affect all offences. The Hon'ble Mr. Jinnah wants it to be confined only to State trials, and further, according to him when any trial is to be started under this law, the sanction of Government, as in State trials, must be obtained. Therefore if you analyse the measure of support that has been accorded to the Bill, it seems to me to dwindle into proportions which reduce it to the vanishing point. The arguments which we have urged against the Bill and the principles of the Bill remain unanswered, and to me they seem unassailable, and therefore once again, Sir, I desire to record my protest against the principle of the Bill."

The Hon'ble Mr. Kenrick:—"Sir, we have listened with interest, and possibly with some amazement, to those who oppose this Bill. After the statement of principles and objects of the Bill by the Hon'ble the Member in charge, it is difficult to understand how any one who sincerely desires to serve the interests of order can find any argument against this measure. Personally, I have listened with care, but I confess without success, to discover any objection raised which might prove unanswerable.

Such objections as have emerged from the lips of the various speakers who have opposed the Bill I will endeavour to face and to answer. Of course it is obvious that this measure certainly demands full and careful consideration, calm discussion, and I will add plain speaking. I would therefore ask the Council to consider with me calmly and if possible, judicially, the facts justifying the Bill, the principles underlying the proposed legislation, and, lastly, whether there is any real substance in any of the objections raised by the opponents of the measure. Now, in a word, the justification of this measure is the absence of the English law of conspiracy from the Indian Penal Code. On the one hand, its absence has been found to be a defect in coping with organized crime of a serious character in this country. On the other hand, the common law of conspiracy in England has been proved by actual experience of more than two centuries to be of the utmost value and benefit to the State and to the public; for I would ask you to recollect that the interests of the Government and of the people are coincident in the prosecution and suppression of crime.

"Now whether, as seems probable, this branch of the Common Law of England relating to conspiracy was potentially available in the Presidency-towns before Lord Macaulay's Penal Code of 1860 I do not think we need stop to consider. It probably was a branch of the Common Law potentially available in the Presidency-towns. But, as I said, we need not specially consider it, for what we have to face and consider are the facts and the needs of the present day. Now to start with some clear conception of this Bill. I assume that every Member here, even the most virulent opponent of the Bill, will accept it as an axiom that it is the imperative duty of Government—of every civilised Government—to protect to the utmost of its ability the liberty of the subject by the suppression of organised crimes, whether crimes of violence or crimes against property. That such organised crimes unhappily are only too prevalent in this country at the present time, and that they are increasing rather than diminishing the columns of the daily Press make notorious. Take, for instance, the appalling number and frequency of dacoities, carefully organised gang robberies in Bengal. It is a matter of common knowledge, and it is a matter to be deplored by every one. Now consider what this means: each one of these many dacoities, to take this illustration alone, involves deliberate organisation, planning, plotting, agreement, combination, confederation, conspiracy. Yet the Hon'ble Member who first opposed this Bill said: 'I fail to find any evidence of dangerous conspiracies.' He has only got to study the columns of the Press and he will find weekly, if not daily, accounts of the most atrocious and disastrous crimes in various parts of Bengal, every one of which involves agreement and conspiracy. Strange, indeed, it is, or so it appears to me, that the Indian Penal Code provides no means for the prosecution of such crime while it is in the stage of conspiracy. Yet, obviously, it is to the advantage of the community that an agreement or conspiracy to commit such crimes should be capable of being prosecuted at the earliest stage before, if possible, it has culminated in actual preparation or attempt. Remarkable indeed it seems, in the face of frequent and systematic crimes which are the outcome of combination and agreement, that conspiracy, as a substantive offence, finds no place in the criminal law of India.

"It being conceded that the welfare of the people, as well as of the Government, involves the preservation of order and the suppression of crime, it necessarily follows that to afford this protection, the State must be armed with an adequate Penal Code. Now, I would remind Hon'ble Members here that in England the Common Law, in particular the Common Law of Conspiracy, has been amplified from time to time by judicial interpretation so as to meet new conditions and exigencies. On the other hand, in India the Codes, as you are all aware, can only be adapted to expanding conditions, or novel or developing conditions of society by legislation. It is for this reason that the Government propose to amend the Penal Code by the inclusion of a modified form of the English Common Law of Conspiracy. I say a modified form because there are certain respects in which the provisions fall short of the Common Law of Conspiracy. I ask the Council to recollect that this is no mere experimental legislation. It is a valuable branch of our Common Law. It has been formed

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in England by the wisdom of centuries, and it has long stood the actual test of experience, so that this cannot be stigmatised as experimental or tentative legislation. And after centuries of experience in no way has it been found in England to be subversive of the liberty of the subject, which, indeed, it, as the rest of the criminal law, is designed to protect.

“Approaching this matter with any understanding of it and with some sense of proportion, it must be realised that this Bill merely introduces a branch of criminal law which has long figured in what is admittedly the most enlightened and humane juridical system which the world has ever seen, a system which it is scarcely necessary for me to remind you all is characterised by its vindication of, and regard for popular rights. Yet this Bill it is which has raised an opposition of more or less impassioned oratory and protest. It has evoked apprehension—or expressions of apprehension—as to the safety and liberty of the subject in this country if it passes into law. It has been described by a leading journal of Bengal in its issue of the 1st of this month—a journal, I believe, not altogether unassociated with a certain Hon’ble Member who has opposed this Bill to-day—as ‘an additional weapon in the armoury of repressive measures.’ An additional weapon in the armoury of repressive measures! And if the speeches of some Hon’ble Members here to-day have any meaning, not only do they ask the Council to regard this as a repressive measure, but they ask us to consider it as an oppressive measure.

“Well, if it be repressive to prohibit seditious conspiracy against the Crown and other criminal conspiracies against the subjects of the Crown, then this may be described as a repressive measure. It is repressive of crime. Only in that sense can it be described as repressive, only in that just and proper sense, and in no sense, with any regard to propriety, can it be described as oppressive.

“The article to which I have just referred asserts that ‘the mischief-makers will not be touched,’—and I make reference to this article because it may be taken to represent the views of a section of the Press, and presumably the views of a certain section of the public, and certainly it also crystallizes the views which have been again expressed here by the Hon’ble Mr. S. N. Banerjee. The article says that ‘the mischief-makers will not be touched’ and adds, somewhat to the detriment of its argument, that ‘the arm of the law has seldom been long enough to reach them.’ Surely if that be so, it demonstrates the need for legislation. I accept the phrase that ‘the arm of the law has not been long enough to reach them.’ Then surely it is incumbent on a wise Government to extend that arm of the law so that it shall be able to reach them effectively.

“There is only one other matter in that article that I was going to mention. The article continues, ‘it will be the innocent, the peaceful, the loyal citizen who will feel that he is not trusted.’ Now that is a sample of the mental pabulum on which the people are fed.”

The President :—“Order, order, I must ask the Hon’ble Member to address himself to the remarks made in this house and not to the remarks made in a newspaper.”

The Hon’ble Mr. Kenrick :—“Certainly, Sir, I bow to your ruling, but I was putting this forward as an expression of opinion on the Bill from a certain section of the Press as representing the views of a section of the public. It was for that reason I ventured to refer to these remarks, but I pass on merely with this observation; I would remind those who oppose the Bill that the liberty of the subject can best be protected, and, indeed, can only be protected by an adequate Criminal Code.

“Now let us consider the arguments that have been adduced here against this Bill. The main objection urged, as I understand, is that the existing law is sufficient and that a law of conspiracy is unnecessary in India. Secondly, it is said that the law of conspiracy is unsuitable to India; and, thirdly, we have had the old argument as to the imperfection of the Police in India, or the subordinate police. Now, apart from the cogent facts of recent history, the first two objections are directly refuted by the views of Sir James Stephen. That

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eminent English judge and jurist, who was Law Member of the Council, had, of course, personal experience of India. Now if you turn to the third volume of his 'History of the Criminal Law,' you will see that he refers to the Indian Penal Code and he discusses it with all that breadth of knowledge for which he was distinguished. He says this in regard to the Code: 'The Indian Penal Code may be described as the criminal law of England freed from all technicalities and superfluities systematically arranged and modified in some few particulars—and they are surprisingly few—to suit the circumstances of British India,' and he points out this in regard to the particular matter which we have now got under discussion. He points out that 'a mere conspiracy to wage war was not an offence under the Code unless some act or illegal omission was done in pursuance of it.' He mentions that an Act amending the Code was passed when he was Law Member which asserted in the Code the substance of the English Treason Felony Act, and he adds significantly, 'it was found to be required by circumstances.' Well that, at any rate, would be a complete answer to the argument of one of the Hon'ble Members that this Criminal Code should be accepted as a whole as it is without amendment. The section to which Sir James Stephen referred was of course section 121A, which embodied the offence of conspiracy to wage war against the Crown, or attempts to commit that offence. Now that, namely, conspiracy to wage war against the Crown, is the only offence of conspiracy under the Code. There have been, as we are all aware, in recent years successful prosecutions under that particular section; but the section has been found not to go far enough. Conspiracies to commit offences or to do acts prejudicial to the State or to the public, or to individuals, are left untouched by the Code. With regard to this Sir James Stephen observed:—'The law relating to riots and unlawful assemblies is very full and elaborate, but it is remarkable that the Penal Code contained no provision at all as to seditious offences not involving an absolute breach of the peace. It says nothing of seditious words, seditious libels, seditious conspiracies, or secret societies,' and he continues that 'the additions made in 1870 provided to a certain extent for the punishment of such offences, but they did so very imperfectly.' These are the words of Sir James Stephen, that the additions of 1870, that is section 121A of the Code constituting the offence of conspiracy to wage war against the Crown are not sufficient. That is the Code is admirable so far as it goes, but the legislation is imperfect. Well, I submit with confidence that a defect, and such a defect, of the Indian Penal Code, pointed out by a jurist of such eminence as Sir James Stephen would alone justify the amending legislation which is at present before this Council.

"Elsewhere in that same 'History of Criminal Law' Sir James Stephen makes this observation. He says: 'In the present day the law of seditious conspiracy is of greater practical importance than the law of seditious libel. Political combinations are so common, and may become so powerful, that it seems necessary that a serious counterpoise should be provided to the exorbitant influence which, in particular circumstances, they are capable of exercising.' Although he points that out, that the law of seditious conspiracy is of greater practical importance than other branches of the law, we have in the Indian Penal Code no element of the law of seditious conspiracy other than the one offence of conspiracy to wage war against the Crown. Any combination of circumstances falling short of that extreme act but which, nevertheless, are in every possible sense offences against the State, are not so by law at present in India. And when he says, as I just told you, that political combinations are so common and may become so powerful that it seems necessary that a serious counterpoise should be provided to the exorbitant influence which, in present circumstances, they are capable of exercising, I say that that advice is as applicable in India as it is in England, if, indeed, local conditions do not indicate an even greater need here for such a counterpoise. Notwithstanding that there is no law of seditious conspiracy in India, with the sole exception of section 121A relating to waging war against the Crown.

"In England, the application of the law of conspiracy to political and seditious offences dates from the 18th century. It was elaborately discussed and enunciated by the House of Lords in an important case, O'Connell's Case in 1844

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when Chief Justice Tindal delivered the opinion of the whole of the Judges of England before the House of Lords. In that case it was definitely laid down by the House of Lords that the crime of conspiracy is complete if two or more agree to commit an illegal thing, that is a wrongful act not necessarily amounting to a crime, and if there is seditious intention, the offence is that of seditious conspiracy.

"In that case to which I am referring the accused were charged, among other matters, with conspiracy with the intent to raise discontent and disaffection among the subjects of the Crown, and to stir up hatred and ill-will among various classes of Her Majesty's subjects. Under the existing law in India such an offence would escape prosecution.

"Passing now from the law of seditious conspiracy—I have only sketched it as shortly as possible to show the points on which the English law is more effective in dealing with organised crime than the law here in India—I desire to emphasise the fact that the utility of the Bill which we are now considering is by no means confined to what in India are termed political offences. That law of seditious conspiracy will certainly be introduced by this measure, but it has a far wider range of utility, and probably few, if any, here are aware of the practical utility, the practical value of the English law of conspiracy in its application to various classes of crime. It ranges, as I have said, over the whole field of criminal law. Conspiracy to commit a crime, under the English law, is in some sense analogous to an attempted crime, but there is this distinction, that the offence of conspiracy is complete when the agreement of two or more conspirators is formed, as the agreement to commit the crime, and before any attempt to commit the crime is actually made, before even any preparation is made to commit the crime which is the object of the conspiracy. And to any reflecting individual it is apparent that this should be so. That in a right and properly constituted system of law the agreement with intention to commit an offence, if demonstrated and proved by the evidence which is required in the Courts, should constitute an offence which is capable of being prosecuted and punished, no one can doubt. To realise the full value of the common law as to conspiracy involves of course a familiarity not only with the English text-books upon criminal and constitutional law, but also a familiarity with the practice in English Assize Courts and other criminal courts in England. But to demonstrate the utility of the proposed legislation it is only necessary for me to mention the more important instances of the application of the law in the English Courts.

"A conspiracy to commit any crime, that is, an offence punishable by law is a substantive offence punishable like any other misdemeanour at common law, with a maximum of two years' imprisonment. There you immediately get a distinction between the Bill which in the ordinary course provides merely a maximum of six months' imprisonment for other than specific classes of conspiracy, and the English common law, which imposes a penalty of two years. There are some classes of offences, the offence of conspiracy to commit murder, punishable by ten years' penal servitude, and yet, as the Hon'ble Member in putting this Bill before the Council pointed out, there is no similar provision in the Indian law whatever. It will fall within the Indian law and will constitute a substantive offence so soon as this Bill is passed.

"Passing from the first class of conspiracy which I have referred to the conspiracy to commit any crime which constitutes in itself a substantive offence, another class of case the prosecution of which is perfectly familiar in Assizes in England, is the case of conspiracies to cheat and defraud. Instances of this would be the agreement of two or more persons to defraud the public or to defraud any person or any class of persons. Within quite recent years this branch of the law has been before the Courts in two or three very important prosecutions—important in the public interest—namely, the prosecution of certain Poor Law Guardians for conspiracy to defraud the rate-payers. These prosecutions, which were of the most vital importance in the interests of public morality, would not have been possible in this country. They now, under the

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Bill which is before this Council, could be prosecuted if we had the same crime in this country, and it might of course occur that a combination of persons might agree to defraud the rate-payers. That is only an illustration. Other instances of a conspiracy to defraud would be afforded by conspiracy to obtain money by false pretences, conspiracy by the promoters of a company to cheat and defraud by false pretences those persons who might buy shares in the company, and so on. Now none of these offences—the subject is such that I could give you any number of illustrations, but I refrain from doing so because one is anxious to make the points as short as possible—none of these offences can be prosecuted under the present law, unless, indeed, they come within the law of abetment, or, in other words, unless there is some act which it can be proved has been done in pursuance of the conspiracy. However clear the evidence which is available to demonstrate the fact that the conspiracy exists, it could not be prosecuted.

“Another very important branch of the law of conspiracy is that dealing with conspiracies which are comprised under the head of conspiracy to defeat justice. This comprises conspiracy to do anything to obstruct, prevent, pervert or defeat the cause of justice, such as agreement to pervert the cause of justice by perjury; an agreement by two or more individuals, or conspiracy to accuse any person falsely of any crime, or to prevent witnesses from giving evidence in the cause of justice; all these come into the same category. They would seem obviously to be matters which should be offences under any Penal Code so as to be capable of being prosecuted. They are not so here.

“Conspiracy in restraint of trade forms another class. This consists of any agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade. This, however, is subject to special considerations which I do not propose to discuss at this stage.

“Now the last class of conspiracy to which I want to draw the attention of Hon'ble Members is the conspiracy to injure individuals by wrongful acts not amounting to crime. Thus conspiracy to injure, coerce or molest an individual, or to prevent him from carrying on business is indictable. If two or three agree among themselves to inflict injury, or to procure injury to be inflicted, upon a third party, that in the English law is a conspiracy; but it is not a conspiracy capable of being prosecuted here. That branch of the law of conspiracy has been considered in very important cases in England, but I do not think it is necessary for me to weary the Council by referring to them in detail.

“It was accepted as recently as 1881 in the case of the Queen *versus* Parnell and others that it was a criminal conspiracy where two or more persons agree among themselves to injure, coerce or molest an individual in such circumstances that an injury done by any one of those means would not be a crime, but would be simply an injury not amounting to crime. I refer to this because it will require a little explanation for the Council to appreciate it. A wrong inflicted by a combination of persons assumes a formidable and aggravated character, because though you may assert your rights against one individual you cannot defend your rights against a number of persons who combine to inflict a wrong upon you. In the case to which I have referred, following earlier decisions of the House of Lords, it was considered that even a lawful act carried out by unlawful means—that is to say, where two or more persons agree to effectuate their object by unlawful means—is conspiracy. As this forms a branch of the law as introduced by the Bill before Council it might be desirable to give an illustration of what is really meant by it. The common illustration is this: supposing an individual has a right to certain property, and two or more persons agree to support that right. Their action is so far proper. But if these individuals are willing to support him—agree to support him—by unlawful means, as by the production of fabricated evidence, then there is an indictable conspiracy. Now that concludes my very brief review of the various classes of crime which are prosecuted in English Courts under the head of conspiracy. The very variety of the

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subject-matter of prosecutions shows the utility of the law in England. As I have already pointed out, in none of these cases can a prosecution be instituted under the existing law of this country. The absence of any means of prosecution for such a large variety of offences constitutes undoubtedly a great defect in the otherwise admirable Penal Code of this country, and the proposed legislation will do nothing more than remove that defect. The effect of it, as you have heard, will be to bring the law of conspiracy in India into line with the English law in some respects, though even when this Bill has been passed the law in India will be less stringent than the law in England.

"I want to refer to certain arguments which have been used against this measure. One Hon'ble Member raised the point as to the imperfection of the police here in India. Well, it may be that the subordinate police here are still below the standard of efficiency and integrity which has been attained in the West. Assuming that to be so, is that any sound reason why the substantive criminal law of the country should not be improved? And I would remind you that the danger of false charges, if there is any danger, is no greater than under any other provision of the Indian Penal Code. No legislation can remove altogether the possibility of corrupt action by unscrupulous individuals. The existing law of abetment which already obtains under the Indian Penal Code would facilitate to the same extent as the proposed law of conspiracy any unscrupulous action. Then, as to sanction. There seems to be some misunderstanding as to the prosecution of an offence of conspiracy, and, indeed, I think it was said by the Hon'ble Mr. Jinnah that in England prosecutions in respect of conspiracy against the Government can only be instituted by the Attorney-General. I think I am right in my recollection of what he said as to that. Now that proceeds upon a misunderstanding—a very pardonable misapprehension of the law of England. It is perfectly true that in England the Attorney-General *ex-officio* has the right of instituting prosecutions and in a peculiar way—that is, by filing a criminal information, which is a means of putting a man upon trial for certain offences, including the said offence of conspiracy, or indeed any misdemeanour at common law, without adopting the ordinary course of indictment, under which the individual before he comes for trial must be sent for trial on an indictment found by a Grand Jury. So the Hon'ble Mr. Jinnah in saying that in England conspiracy prosecutions can only be instituted by the Attorney-General is not correct. The real explanation is that conspiracy prosecutions may be, and, indeed are, instituted on indictment in the ordinary way, but in the case of common law conspiracies the Attorney-General has the additional power by *ex-officio* information of putting a man upon trial without being indicted at all.

"With regard to the suggested safeguard put forward, I think also by the Hon'ble Mr. Jinnah, that it would be desirable that there should be a sanction by the Government, I have only got to point this out, that in the case of any prosecution for conspiracy under section 121 (A) the sanction of the Government is already required under another section of the Code as antecedent to prosecution for that class of conspiracy.

"Another suggestion made by the Hon'ble Mr. Jinnah was that two persons only should not be regarded as being capable of the offence of conspiracy, but that five—he suggested the number five—should be substituted for two. Well, to put in five as an arbitrary number in place of the definition of the common law of England would be an entire innovation, and an unjustifiable innovation. It would undoubtedly have the effect in certain cases of defeating the very object of this measure, *i.e.*, the introduction of the ordinary common law of conspiracy under which any two or more individuals who come to a common agreement as to the commission of a crime are capable of being prosecuted as conspirators.

"There is one other point which I think is rather a matter to be dealt with when the Bill arrives before the Select Committee, as I have no doubt it will,

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and that is, the suggestion made also by the Hon'ble Mr. Jinnah, regarding the law of evidence in conspiracy cases. I could explain the matter here, but I think it would be taking up the time of the Council, and I think it would be more properly dealt with in Select Committee than here. He referred to the well-known section 10 of the Indian Evidence Act, which provides for particular rules of evidence in conspiracy cases.

"Speaking popularly, the effect of this section of the Evidence Act is to introduce into India the English law of evidence applicable to any cases of conspiracy, in other words, again speaking popularly, it makes admissible in cases of conspiracy evidence that would not be admitted in ordinary cases; that is to say, the acts, doings or words of any one of the conspirators in relation to the subject-matter of the conspiracy. The English law and the Indian law are rendered closely similar by section 10 of the Evidence Act. There is, however, a slight difference between the two which I need not trouble the Council with. All I can say is that at present, as regards section 10 which the Hon'ble Mr. Jinnah suggested might require alteration, I venture to think he has overlooked the fact that in the prosecution of cases under section 121 (A) in the case of conspiracy to wage war against the Crown, that section has been and is of use. This matter of the law of evidence under section 10 is one which would be more properly dealt with in Select Committee.

"Well, Sir, I will advert to the fear expressed by the Hon'ble Member in opposition to the Bill that this addition to the Penal Code will prejudicially affect the liberties of the subject. I venture to think that if the subject is approached with a serious conception, it will be seen that on the contrary this measure will tend, far from curtailing or infringing the liberty of the subject, to protect them in the best sense. It will facilitate the prosecution of cases of organised crime which at present are beyond the reach of the law in India. To say that alone, should be sufficient to justify this legislation, which, if administered in accordance with British judicial traditions, I have no hesitation in saying will be of undoubted benefit to the community. For these reasons, Sir, I have every confidence in asking the Council to send this Bill to Select Committee and ultimately to pass it."

The Hon'ble Mr. Syed Ali Imam:—"Sir, the lucidity with which the principle of the Bill that is before the Council has been discussed and put forward by the Hon'ble the Home Member is sufficient in itself for me not to have taken any part whatsoever in the debate to-day. Since those principles were put forward, Hon'ble Members have further considered the law of conspiracy and distinguished that law as it exists in India from the one that exists in England. Under these circumstances, and at this late hour, I do not propose in addressing the Council to take up the line that aims at an exhaustive and elaborate criticism on the law of conspiracy. I refrain from doing so because it is possible that hereafter I may have to place in a concise form before the Council such aspects of the law of conspiracy as may conceivably be left obscure even after the Report of the Select Committee has been presented here, should the motion that is before the Council be accepted. In the circumstances, I will very shortly confine myself to a very few observations upon this important Bill. The first and foremost thing to consider is, that any reference that has been made to the English law and any argument that has been advanced on the consideration that the law of England is now in some form or another being introduced into India are not put forward under the plea that because it is the English law therefore its acceptance by the Indian legislature is a matter of necessity or of obligation. The Hon'ble Mr. Vijiaragavarchariar opposite put forward with some warmth his argument when he referred to certain things that he thought were given on the plea that they were in England and that other things were withheld without the same plea receiving any consideration. The Hon'ble Member in his address suggested that because it was the law in England, therefore it should be forced upon us is not a good reason. But the reference to English jurisprudence is intended to

[*Mr. Syed Ali Imam.*]

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serve only one purpose, and that purpose is that the Bill as put forward before this Council is something that is not unfamiliar, a law which is not novel. The proposition as advanced is not an invitation to the Council to take a leap into the unknown. What is urged is that a law similar to this is in existence elsewhere, and that, as a matter of fact, it has worked well in another country, the sole object of the suggestion that the Bill is framed considerably upon the principles of the English law of conspiracy lies in the consideration that this law has been enforced with advantage in a great and civilized country. The next point to which I would like to allude very briefly is that the expansion of the law of conspiracy, as at present contained in the Indian Penal Code, is in no way a departure as has been apprehended from the principles of a Code which is the handiwork of one of the greatest lawyers of the world and a great genius. My submission before the Council is that the Bill cannot for a moment be regarded as a reflection on or as if it were bringing to light any unconscious omission in the handling of the law of conspiracy by such an illustrious lawyer and statesman as Macaulay, one whom I revere as a great predecessor of mine in the office that I have the honour to hold. But what is suggested and what is placed before the Council for consideration is that whatever may have been the reasons for his not having transplanted in India in its entirety the law of conspiracy as it existed in his days in England, the time has or has not come to consider and see whether that law may or may not largely be applied to India now in order to cover certain new conditions. The law of conspiracy that the Government proposes to introduce by this Bill, as has been said already, is not exactly on the lines on which the law exists in England; it is in a much modified form that the Bill has placed it before the Council.

"If the object of an agreement between two or more persons is the commission of an offence mentioned in section 121-A of the Indian Penal Code the existing law is common to both the countries. The Bill provides for no change so far as that goes. It only aims at carrying the same principle a little further by applying it to all offences. Their agreement to commit a crime would therefore become a criminal conspiracy, but the Bill takes leave of the English law when it deals with cases where the object or the means to effect that object is or are only a civil wrong. Here unlike the English law the Bill imposes the condition of an overt act or illegal omission. This is a very important reservation which has been made with some purpose.

"What is that purpose? The purpose is no more than that the law that we make for India should apply to Indian conditions, otherwise a wholesale importation of the English law might have been effected, and that would have been easy. But those who have the responsibility to legislate have realised that each country has got its own conditions, and the law of that country must have a strong correlation to those conditions. Therefore, at the time that the Indian Penal Code was originally framed this law was not in existence, and since then, when later on, the amendment in the form of section 121 (a) took place, the requirements of the country presented no such difficulties as at present, and so only that which was absolutely necessary was done. There was no departure in 1871 no more than there would be a departure to-day if this Bill is accepted and passed by the Council. The whole question therefore is, is or is not there a demand for legislation? As to that I am very glad to find that the Hon'ble Mr. Jinnah, who certainly was perfectly right in claiming to represent young educated Indians and who to my knowledge has always been absolutely frank in his criticism and ever bold, has in the Council without the slightest hesitation asserted that he does feel that the principle of this Bill is a perfectly valid and correct one. Why does he say so? He says so, because he feels that in India at present law and order that we are all bound to uphold stand in danger of disturbance.

"This legislation therefore is a measure that will give us strength to overcome the difficulties presented by the present situation. Arm the Government with the necessary power and make it possible that we might thus meet them squarely. The Hon'ble Mr. Jinnah in this connection made certain

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suggestions and, I am glad to find those suggestions were not at all such as touched any of the principles of the Bill. As a matter of fact, I find that the Council in the various speeches that have been made by Hon'ble Members, so far as the principle of the Bill is concerned, is practically agreed. Suggestions have come from one quarter or another in regard to details only. Excepting the Hon'ble Mr. Vijiaraghavachariar who totally refused to accept the principle of the Bill and the Hon'ble Babu Surendra Nath Banerji, as far as I can see, there is a sense of agreement as to the principle of this Bill. Now in this expanded Council, we have got Hon'ble Members who represent very large constituencies, and it seems to me that any indication on their part of a disposition to accept the principle of the Bill is a fair criterion by which to judge and say that there is something wrong in the country, and that that wrong must be removed in the interest of the safety and the prosperity of India. Therefore, it seems to me that it is not at all too much to say that here is a Bill which really is not at all a departure from any principle of law; it is a Bill to meet the unfortunate circumstances of the country, and as such has got a fair claim on the acceptance of the Council.

"I will not at all refer at present to any of those matters that have been urged regarding some details, such as subjecting prosecutions to previous sanction, the territorial application of the new law and its place on the Statute-book only for a time. These are all matters that may be fairly considered in Select Committee, and, as Chairman of the Select Committee, all I can say is that any proposals that are made in that Committee will receive at my hands and I have not the least doubt also at the hands of the Hon'ble Members who will sit in that Committee the fullest and most careful consideration.

"Before I close my observations, I should just like to mention something about this Select Committee that was said by my Hon'ble friend, Rai Sita Nath Roy Bahadur. Probably it was a mistake or perhaps the Hon'ble Member did not look into the Agenda. We have done our very best to give non-official lawyers representation on that Committee. The Hon'ble Member will observe that my Hon'ble friend Pandit Madan Mohan Malaviya, who is a lawyer of repute and long standing, will be on that Committee. My Hon'ble friend will also see that the Hon'ble Mr. Dass, who is himself a lawyer of considerable experience, will also be on that Committee. And when the Hon'ble Member said that there was no Indian lawyer at all on that Committee, I began rather to wonder whether the Chairman of that Committee could claim to be a lawyer. Therefore, it seems to me that, taking the Bill as it stands there is nothing in it which is repugnant on principle, and so far as the Select Committee goes, there is not much to discourage us. It is perhaps a difficult measure, perhaps it is a measure that may at first sight appear to have the terrors of the unknown. But when you examine it carefully you see that it really promises to be of service to the country, and that its principle is sound. I submit, Sir, that the Bill deserves the support of the Council.

"With these observations, and abstaining absolutely from embarking upon any disquisition upon the law of conspiracy, I beg to support the motion."

Sir Reginald Craddock :—"Sir, I do not desire to detain the Council long in summing up what has been said on both sides."

"In so far as the law is concerned my original speech introducing the Bill contained a concise statement of it. To that additions have been made by the speeches of my Hon'ble Colleagues the Law Member and the Hon'ble the Advocate General, and I do not want to touch on the law of the matter again, beyond saying that, to sum up, the position is that there is a gap in our criminal law. It is expedient to fill that gap, and we have the English precedents to show how that gap should be filled. That the general principle of the Bill has found acceptance with Hon'ble Members is shown from the very fact that, by a large majority, they have rejected an amendment even to postpone the Bill until it could be circulated. By those votes they demonstrated as clearly as they could their approval generally to the principle of the measure, although some of them reserved a final opinion as to details. That was what I had invited them to do

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because I said that details of drafting, details of safeguards and details of the removal of anomalies that might arise, would all be carefully considered in Select Committee. Consequently it may be said that there are only two Hon'ble Members in this Council who are opposed to the Bill on principle.

"Now it seems to me that there is a considerable fallacy underlying the main grounds of their opposition. They put forward such pleas as this, that if the law as we suggest it should be made, had existed for 50 years, can we prove that these outrages would not have occurred? No, Sir, I cannot prove that these outrages would not have occurred, nor can any Hon'ble Member prove that; because it is impossible for us to say what would have been the effect on society of the existence of a law which enables certain things to be punished; it is impossible to say what mitigating effect or what effect in reducing the amount of crime such a provision of law would have had. But what I can say is that, although this law may not render any easier the detection of conspirators, it will certainly tend to the prevention of conspiracy, because it will enable conspirators, when they are detected, to be punished when they cannot be punished now. And I care not, Sir, I care not to urge in this Council that the omission then made in the law was intentional or unintentional. It seems to me that that matter is irrelevant. The point is whether that omission in the law ought or ought not to be corrected now. I do not wish to discuss any further the principles of this law, or to quote in support various dicta of eminent jurists and judges which show and dwell on the importance of, making preparations for crime criminal at as early a stage as possible if you wish to prevent it. There are many dicta and many able treatises which explain the principles on which this law is based.

"I will now refer only to some of the side objections that have been taken by the opponents of this Bill. It is said that our desire to pass this Bill contravenes the solemn words of His Excellency the Viceroy in his speech at the opening of the Council in Delhi in which he indicated that, even after the attempt made on his life, he was not going to deviate from the path of progress which he had set before himself. But, Sir, the path of progress does not connote any tenderness to crime or criminals, nor can the assimilation of the Indian law to the law which prevails in England be regarded as any deviation from the path of progress. Indeed no State can progress along the path of peace and prosperity whose tranquillity is liable to be disturbed for want of adequate machinery to cope with those who conspire against society.

"The last objection taken was that this law will open the door to police oppression. In so far as there is a new offence created, power is given to investigate that offence and to take all necessary action for the prosecution of the offenders, but the Bill creates no special procedure; it bestows no drastic powers, which are not to be found in the Code of Criminal Procedure in the case of cognisable offences. Conspiracy by this Bill is merely put on the same plane as abetment, and objections which might be based on the powers of the police to investigate conspiracy would be equally applicable in the case of the law of abetment. That is to say, if we put it in the shape of an example, if under the existing law A instigates B to murder C, the police have the power to search his house, arrest him, investigate the case and so on, even if B had never murdered C; but if A and B conspire to murder C, then, under the present law, the police would not have had these powers; but under the law now proposed they will. It seems to me entirely absurd to suggest that this small change, important in its results, but small in the matter of the powers that it gives, is going to upset society in any way or increase appreciably the dangers of misuse of law which is possible under any system of criminal procedure.

"If the argument that crime should not be punished because charges may be falsely laid were to prevail against the benefits to society from the punishment of crime, why then the vast majority of offences which are defined in the Penal Code would have to be expunged from the Statute-book and there would be an end of law and order throughout the land.

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"Mr. Vijiaraghavachariar took up a point and elaborated it with some detail, that while we were anxious to take a law from England in order to 'knock them down,' in other respects we denied to this country the benefits of the English law. Well Sir, I do not know how this law wants to 'knock them down.' It does not want to knock down law-abiding persons like the Hon'ble Member, or any law-abiding person in this country. What it is aimed at is conspirators, and to 'knock down' conspirators ought to be considered a favour and a benefit by all those who desire the protection of the law and the peace of society.

"It has been finally said by the Hon'ble Mr. Surendra Nath Banerji that this is the sort of measure that creates mistrust. Well, Sir, I do not know what kind of mistrust he is referring to. Does he wish us to conciliate conspirators by putting trust in them in the vain hope that they will abandon their designs, or does he wish us to conciliate the law-abiding generally by allowing conspirators to prey on society for a little longer? It seems to me, Sir, that the surest way for the Government to win the trust of the people is to convince the people that they will be protected from the lawless in the exercise of their rights. And it seems to me that the best way in which the law-abiding can win the trust of Government is to show Government that they will support it in its measures against the lawless. There is one kind of trust which I for one do not want to encourage, one kind of trust which ought to be rudely shaken, and that is the trustfulness of the criminal that, owing to the weakness of the Government, its long arm cannot reach far enough to catch him.

"Sir, I have nothing more to add to all that has been said by Hon'ble Members on the subject of this Bill. It has been most gratifying to find the support that the Council generally have given to the principle of this measure, and I have only to ask you, Sir, that the question may now be put to the Council."

The motion was put and agreed to.

THE WHITE PHOSPHORUS MATCHES PROHIBITION BILL.

The Hon'ble Mr. Clark :—"Sir, I move that the Report of the Select Committee on the Bill to prohibit the importation, manufacture and sale of matches made with white phosphorus be taken into consideration.

"No amendments of any importance have been made in the Bill during its passage through Committee. Council will remember that when I introduced the Bill, the Hon'ble Sir Charles Armstrong asked that the dates on which it was to come into operation should be postponed for another twelve months on the ground that the understanding arrived at last year had not been fully appreciated by merchants and that contracts had been entered into ahead for a considerable period. The Hon'ble Member was unfortunately unable to be present at the meetings of the Committee in order to make good his case; but I had a letter addressed to the Bombay Chamber of Commerce pointing out that Government could not properly depart from last year's understanding unless a very strong case were made out, and suggesting that they should supply us with much fuller and more specific information on the subject. The reply which we received cannot be said to have been conclusive, and, in these circumstances, I scarcely felt justified in asking the Committee to alter the dates of the Bill, and the Committee unanimously agreed that no further postponement should be given."

The motion was put and agreed to.

The Hon'ble Mr. Clark :—"I beg to move, Sir, that the Bill to prohibit the importation, manufacture and sale of matches made with white phosphorus, as amended, be passed."

The motion was put and agreed to.

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[Mr. Jinnah.]

THE MUSSALMAN WAKF VALIDATING BILL.

The Hon'ble Mr. Jinnah:—"Sir, I move that the Report of the Select Committee on the Bill to declare the rights of Mussalmans to make settlements of property by way of wakf in favour of their families, children and descendants, be taken into consideration.

"In moving this, Sir, I have only got to deal with a very few points, and all that I have to say is with regard to the objections that have been raised by the different provinces, particularly the High Court Judges, the District Judges and non-Mussalman opinion. The one objection which has been urged against the Bill is the question of public policy. Now, the answer to that, Sir, is a very simple one, and as I have already explained in my speech when I introduced the Bill, what we have got to do is to administer the Muhammadan law to the Mussalmans, and therefore to introduce the question of public policy which is foreign to the Islamic jurisprudence, to my mind, is outside the question, and there is no such thing as public policy of any kind, so far as Muhammadan jurisprudence is concerned, to which the provisions of this Bill are in any way opposed. I therefore give that simple answer to that point.

"Another point was that we must protect the creditors, and with regard to that, as the Council knows, the Bill, as it was originally introduced, contained certain clauses, which were intended to prevent fraud against creditors. Those clauses, when they came to be considered in Select Committee, we, on careful consideration, found it very difficult to maintain without in any way infringing upon the personal law that governs the Mussalmans in this country. That being so, it was after very careful consideration, decided by the Select Committee unanimously that the registration clauses should be dropped. But so far as this point—and this is the second point and the only point really with which we are concerned—and the criticisms are concerned, it seems to me, Sir, that the Muhammadan law, as it stands to-day, provides certain safeguards against fraud upon creditors. The fraud upon creditors may be divided into two parts: first, a fraud which may be practised when the wakf is created: so far as that part of the law is concerned, there are safeguards, as I said already, in the Muhammadan law. Then, with regard to the frauds which may be practised upon the creditors after the wakf has been actually created, it seems to me that we have got already the Registration Act, which lays down that every wakf that is made in writing must be registered, and that notice by virtue of its being registered is a sufficient safeguard to that extent. No doubt a Muhammadan may make an oral wakf, and in that case it may prejudice the creditor to a certain extent. The answer to that is, that that is Mussalman law and you cannot over-ride the Mussalman law. If you compel the Mussalman to make wakf in writing and in no other manner, you are, to that extent, over-riding the Mussalman law, and therefore I for one am not prepared to accept any provision which is in any way likely to over-rule or affect the personal law of the Mussalmans. A man stands in a very serious position indeed if he makes an oral wakf when he comes to prove it in a Court of law, and therefore now-a-days people do not make oral wakfs. Thus, the apprehended fear is so very small, whereas, in order to rectify that fear the danger of infringing upon the Mussalman law is so great, and taking the two considerations the one over-balances the other to such an extent, that I felt that I could not possibly have that provision.

"One word more, Sir, and I have done; and that is this, — that my Hindu friends must remember that although one of these provisions, *viz.*, the last provision which I have mentioned, the regulating of oral wakfs, is the only danger, so far as I can see. With regard to that, my Hindu friends must also understand this, that it affects the Mussalmans to a much greater extent, it prejudices them to a much greater extent than it would the creditors who may happen to be Hindus; for this reason, that it will depreciate the Mussalman's title to the property to a great extent. Therefore, remember, Sir, that in not being able to accept this provision or this suggestion, *viz.*, to prevent the Mussalmans from making oral wakfs, the fear being very small, I am not only

[*Mr. Jinnah; Malik Umar Hayat Khan.*]

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guided by this fact, that my Hindu friends will suffer, but the Mussalmans will equally suffer: if not more therefore, we would certainly like if we could possibly do it, to have this provision in our own interest because otherwise it certainly depreciates the title to moveable property so far as the Mussalmans in this country are concerned. Therefore my Hindu friends will, I know, sympathise with me that I am tied down by my law to such an extent that although to a certain extent that I am unable to alter it. And the position of the Government is still more difficult because by their Charter they have undertaken and pledged themselves to administer the Muhammadan law to the Mussalmans and the Hindu law to the Hindus, and therefore, these being the difficulties in our way, we had eventually to abandon the registration clauses.

“With these remarks I hope and am confident the Council will pass this Bill unanimously. I will only say one word more, Sir, and that is this: I wish on my own behalf and on behalf of the Muhammadans of India to express our sincere gratitude to His Excellency the Viceroy and his Government for the manner in which they have received and treated this Bill in this Council.

“It has made us feel that the Government in this matter has acted as if it was our Government in every sense of the word. Their spirit, their feeling, their help have enabled me to pilot this Bill through the Council. I trust the Government will always make us feel that it is our Government, and if we have got a reasonable complaint, a reasonable grievance to put before you fairly and properly, you will meet us fairly and properly; and I trust that in other matters that may come hereafter before this Council or outside this Council, the Government will extend the same spirit and the same attitude towards us.”

The Hon'ble Malik Umar Hayat Khan :—“Sir, on the 17th February, on the motion that the Bill be referred to a Select Committee when I addressed this Council, I said that I desired to defer expressing a definite opinion on the measure until I had more completely ascertained the views of the Muhammadans of the Punjab in regard to it. I have now received opinions from various leading members of the community in the Province which I represent, and I am in a better position now to state that the Bill meets with their approval.

“The real question in issue is whether Wakfs-ul-Aulad are permitted by Mussalman law and the answer to this question must, I think, be in the affirmative, provided that there is an ultimate, if remote, dedication, to the poor or for some other charitable purpose of a permanent character. Some people apprehend that under the Bill wakfs which are not in accordance with the ordinary Mussalman law of inheritance will be created and there are, it must be admitted, dangers that wakfs might be created under the Bill which may favour particular members of a family unduly; but, as I understand the Bill under consideration, it is based on the sacred books and is in no way opposed to them, and therefore it must be approved by all good Muhammadans. The statement that the Bill accurately represents the Mussalman law is one which I could defend if necessary with texts from various sacred books, but I doubt if it is advisable to occupy the time of the Council now in this way. Every man has two great obligations to perform, and after a man has done his duty to his fellowmen, he has a right to dedicate other property to charity. It is for this reason that in the case of testamentary wakfs a man is only allowed to leave one-third of his property for religious or charitable purposes including the benefit of particular descendants, while the remaining two-thirds is reserved for the payment of his debts and for the benefit of his legal heirs. This principle of Muhammadan law is not, as I understand it, affected by the Bill as now amended. In this view therefore holding as I do that the Bill is in accordance with the basic principles of Islamic jurisprudence, I think that I shall not be justified if I did not vote in favour of it, the more so as I find that it is approved by men of light and leading in the Mussalman community of the Punjab. Accordingly I support the motion before the Council.”

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[*Mr. Mir Asad Ali; Mr. Fuzulbhoy Currimbhoy Ebrahim.*]

The Hon'ble Khan Bahadur Mir Asad Ali :—“ With your permission, Sir, I wish, as a representative of the Mahomedans of the Madras Presidency, to support this important Bill which was introduced on the 17th of March, 1911, by the Hon'ble Mr. Jinnah. As the Hon'ble Members are aware, the Mahomedans of India as a community have for a long time held strong views as to the difficulties created by the Privy Council decisions which this Bill is intended to overcome.

“ Representations in various forms have been made to the Government, clearly indicating that Mahomedan opinion in the country has been gathering in volume and strength against what is considered to have been an innovation in Islamic jurisprudence. Opinions of Mahomedan lawyers and Ulama of considerable repute have almost unanimously ranged themselves against the doctrine enunciated by the Privy Council. Apart from individuals, public bodies and institutions like the Moslem League and many others have pronounced strongly in favour of restoring the Mahomedan law on the subject to the position which it occupied before these decisions were given.

“ I desire, therefore, on behalf of the Mahomedans of Madras to express the sincere gratitude of my community to the Imperial Government for its sympathetic attitude towards the principle of this Bill, and I venture to think, Sir, that the Wakf Bill, when passed into law, will be an abiding proof of statesmanship and wisdom of the British Government in its undoubted desire to preserve intact to the different communities of India the observance of their religious laws and institutions. I may also offer a word of congratulation to the Hon'ble Mr. Jinnah who has taken such a leading part in this important measure, and who by his self-sacrificing labours has done a valuable service to his community.”

The Hon'ble Mr. Fuzulbhoy Currimbhoy Ebrahim :—“ Sir, the introduction of this Bill marks an important step in the annals of Legislation in India. In the first place, it shows the practical value of the wise and liberal provision, giving non-official Members the right of introducing measures of legislation in the enlarged Legislative Council. In the second place, it offers the strongest refutation of the apprehension entertained in some quarters on the occasion of the enlargement of the Council, that the increased facilities would tend to promote only political activities. Experience has shown that so far from this being the case, the expanded Councils have roused the social consciousness of the people in a remarkable manner. This Bill, when passed into law, will have far-reaching effects on the fortunes of the Islamic community of India. I especially welcome it as a proof of the earnest desire of non-official Members to promote beneficial and wise legislation and to co-operate with Government in the improvement of the social and economic condition of the people. While welcoming the Bill, I congratulate my Hon'ble friend Mr. Jinnah on his success in piloting through the Council a measure so rich in its immense possibilities of good to the Moslem community. This is the first legislation undertaken and enacted at the instance of a non-official Member, and I am sure Mr. Jinnah has earned the warmest gratitude of his co-religionists for devoting his time and energy to the study of the complicated subject of Wakf, and for bringing the Bill to such a happy termination. This measure is calculated to place on a satisfactory basis the institution designated in the Islamic system as Wakf-alal-Aulad. While declaring the true law, that is, the law laid down by the Founder of Islam, it provides adequate safeguards against fraud. It recognises a principle which is of supreme importance to the Mussalmans, as it will prevent their impoverishment by the transfer of their estates into other hands. The Founder of our Faith ordained a division of property among the heirs of the deceased owner; and at the same time with his wonderful and divinely inspired genius, he laid down a rule which provided a remedy against the consequences of infinite sub-divisions among a succession of heirs.

“ The decision of the Privy Council was considered a blow at the institution, and by this measure it is sought to reverse the effect of the principle laid down by their Lordships. This Bill meets with the approval of not only the

[*Mr. Fuzulbhoy Currimbhoy Ebrahim; Mr. Qumrul Huda.*] [5TH MARCH, 1913.]

reformers but of orthodox people also, and as it is for the greatest good of the Moselm society and in accordance with the religious sentiments of the community, I beg to support it most cordially."

The Hon'ble Mr. Qumrul Huda:—"Sir, after the learned speeches delivered on this Bill in this house just prior to its being referred to the Select Committee, almost all of us were convinced that as far as the principle of the law of *wakf-alal-aulad*—settlement of property in favour of one's own children and descendants and ultimately for the benefit of the poor—was concerned all doubts were removed and there were no two opinions about it. The Hon'ble the Law Member in supporting the Bill had concisely but lucidly placed the history of such wakfs among Mussulmans. But to my regret and surprise I find that still there are one or two among the Mussulmans who are in doubt as to the truth of the correctness of this well-established principle of Mussulman law of wakf. It is more surprising to notice that some members of my own community are still not willing to join us whole-heartedly on this point. Therefore, Sir, I may be excused were I to traverse again the ground which was well-trodden on the last occasion. It is an admitted fact that there is not a word about wakf in the Koran. But this is also admitted that the observance of Mussulman religion and law does not depend solely and wholly on the Koran alone. The Prophet's words and acts have great reverence in the eyes of a Mussulman. They are held in reverence second to none but the ordinances of the Koran. The Prophet's sayings and the acts done by him have reached us in collections known as Hadises, *i.e.* traditions. Mussulmans have reverence for these collections next to the Koran alone. Bokhari's collection of Hadises are regarded the most authentic and genuine. Bokhari himself says that institution of wakf rests on the foundation of Hadis, and both moveables and immoveables are fit subject-matter of wakf. He (Bokhari) dates this institution from the time of the Prophet himself: He relates that the Prophet created a wakf of his own property and advised his companion (afterwards Khalif Abu Bakar to make a wakf of his garden. Bokhari, Fathul Quadir, Hidayat, Durra Mukhtor, Fatawa Alungiri and many other authorities support the principle of *wakf-alal-aulad*. The principles of wakf laid down in these works have not only been accepted as true and correct, but have been acted upon by the Mussulmans for the last over 1300 years. In Turkey and Egypt there are Government Departments of Wakf. *Wakf-alal-aulad* to this day is prevailing and is customary in Turkey, Egypt, British African Colonies, French Possessions in Africa, Morocco and Persia. In India, such wakfs are recognised valid by law in Hyderabad, Bhopal and other Mussulman States. Need I repeat that all the Provincial Governments of India are in favour of the principle of this Bill barring Bengal and Bombay. These two do not oppose the Bill because the settlement in wakf in favour of the descendants are invalid in Mussulman law but on public policy and other grounds. Sir, this is for the Government and this Council to judge whether this is a fit case in which Government should intervene in the enjoyment of the religious right of a community on the ground of public policy. I have only to submit, Sir, that the enjoyment of this right of ours is neither inhuman, nor immoral, nor it affects adversely to the interest of any other community living in India.

"It has been said of this Bill that when enacted it will interfere with the sacred Mussulman law of inheritance as ordained by the Koran. How this baseless fear crept into the imaginative but timid mind of some people, one cannot understand. As a friend I tell them plainly that it is a phantom of their own creation which is haunting them. This Act will be only a permissive Act. It will concern only to those who are to create a settlement in wakf in favour of their descendants and ultimately for the benefit of the poor. It will have nothing to do with the rest of the world. When this Bill by its saving clause—section 5—has exempted any custom or usage prevalent in any locality or among Mussulmans of any particular class or sect, how can it be expected to attack the sacred law of inheritance sanctioned by the Koran.

"A criticism against the present form of the Bill is that it is not in declaratory form. I must confess, to me this charge appears to be vague. The Bill

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begins with declaring the 'rights of Mussulmans to make settlement of property by way of wakf in favour of their families, children and descendants.' If by its not being declaratory is meant that it should have declared this much only that certain decisions of Privy Council on the Mussulman law of wakf were erroneous, I am afraid it must have left the Mussulman community in mid-sea. Is it not wise and better to lead the community to shore than to leave it bewildered at sea? Any such declaration alone would have hardly been of any good to the community or of any advantage to the Courts.

"To some minds doubts have arisen as to the position of *wakfs-alal-aulad* created before the existence of this Act. Though this Bill does not contain a retrospective clause, it may reasonably be admitted that such wakfs should be governed by this Act. This Bill establishes the correct principles of the Mussulman law of Wakf. When once those correct principles are enacted, they should be applied to all such wakfs whether they were created before or after this Act.

"Before I sit down, I congratulate the Hon'ble Mr. Jinnah for successfully steering this Bill to this final stage. The whole Mussalman community of India are grateful to him for the benefit and good he has done to it by having this disability removed.

"With these few words, I strongly support the Mussalman Wakf Validating Act."

The Hon'ble Mr. Ghuznavi:—"Sir, I was waiting to know whether the Hon'ble Rai Sita Nath Roy would move his amendment, because if he intends to move his amendment, I should like to speak after he has finished."

The President:—"The proper time for dealing with the amendment is when the amendment is put.

The motion was put and agreed to.

The Hon'ble Rai Sita Nath Roy:—"Sir, I do not like at such a stage when the Bill is nearly ready for being passed into law to stand in the way of my Moslem brethren. At the same time I congratulate them on the singular unanimity of views they have displayed on the subject. I also congratulate the Government on the magnanimity it has shown in giving sanction to a project of creating wakfs, some of which were questioned by the Privy Council. At the same time I beg to urge Government that, in giving sanction to the Wakf Bill, it does not overlook the interests of the other communities."

The President:—"Is the Hon'ble Member going to move his amendment?"

The Hon'ble Rai Sita Nath Roy:—"No, Sir."

The President:—"Then he is out of order in discussing the question."

The Hon'ble Rai Sita Nath Roy:—"I wish to make a suggestion."

The President:—"It is open to you to move your amendment if you think fit. If not, I will proceed with the further stage of the Bill."

The Hon'ble Rai Sita Nath Roy:—"I do not intend to."

The President:—"Then the amendment falls to the ground."

The Hon'ble Mr. Jinnah:—"I beg to move that the Bill to declare the rights of Mussalms to make settlements of property by way of wakf in favour of their families, children and descendants, as amended, be passed. I have nothing more to say."

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The Hon'ble Mr. Ghuznavi :—“ Sir, with your permission I should like to express my gratitude to my Hon'ble friend Mr. Sita Nath Roy for having withdrawn his amendment, and I should also like to add my quota of approval and support to the Bill as it has now emerged from the Select Committee. There is nothing in it to which I can now take objection. At the time when this Bill was referred to a Select Committee, I took the privilege of criticising it at some length, and I desire with your permission to express my thanks and obligations both to my friends the Hon'ble Mr. Jinnah and the Hon'ble the Law Member for having given their careful consideration to the points I then raised as well as to those which I raised subsequently, and for having amended the Bill with regard to them. But there is one and only one matter which I should just like to mention, and it is this : On both the occasions referred to above, I urged the desirability of the necessity of making a provision in this Bill for the validity of wakfs already created and existing ; in other words a retrospective clause. I have since been explained and am now firmly convinced that since this is nothing more and nothing less than a declaratory Act stating what our own Islamic law of wakf actually is as interpreted by our own Ulemas and jurists from Bokhari down to Moulana Shibli of our own times, it is quite unnecessary and superfluous to add a clause of that nature. For as this is no new law or no new Act that we are enacting, and as the Supreme Legislature is doing merely for English and Indian Judges what Bokhari and the rest of them did for our Kazis, it stands but to reason that any wakf of future or past has to be interpreted *ipso facto* by the British and Indian Judges according to the correct version which is now laid down by the Supreme Legislature under your benign auspices.

“ One word, Sir, and I have done, and that is to thank my friend on behalf of the Bengal Mussalmans for the care and skill and the assiduity with which he has piloted this all-important measure.

“ Our thanks and gratitude are no less due to the Government of India for having redressed this long-standing grievance of the Mussalman subjects of His Majesty who holds sway within the British Empire over the largest Moslem Empire now extant in the world, inasmuch as India has since the very beginning of British rule been a land of Darul Islam for British Indian Mussalmans. ”

The Hon'ble Mr. Vijiaraghavachariar :—“ Sir, I wish cordially to support the motion before us and I desire to explain my reasons why I shall vote for it. I am sorry that I have to differ from the Hon'ble Mr. Jinnah and all the others that agreed with him that the measure before us is absolutely Mohammedan law. The volume of opinions collected on the circulation of the Bill reveals a state of things which it is most interesting to study. It is a sort of poetical license to claim that there has been unanimity of opinion as to the merits of the Bill. It will be seen from the collection of these opinions that Hindus, Mohamedans and Englishmen, that judges, pleaders and laymen, have taken very different views as to the decisions of the judicial committee of the Privy Council upon this important branch of Mahomedan law. The question is simple. It is whether a settlement by way of wakf made by a Mussalman in support of himself, his family and descendants, with a very remote provision in favour of the poor in the event of all his descendants becoming extinct, is or is not a charitable disposition within the meaning of the Mohammedan law. Their Lordships of the Judicial Committee of the Privy Council have held that it is not. They refused to accept that such a disposition was Wakf and contemplated by the prophet as a charitable endowment when there is no self-denial involved in the disposition. Thus when so many eminent authorities including distinguished Mussalmans differ from each other, it is open, to use a well-known phrase “ when doctors differ, it is open to a patient, especially a chronic patient to take sides and to claim to have a voice of his own.” Exercising this right I have no hesitation in making my choice. I venture to agree with their Lordships of the Judicial Committee of the Privy Council and believe that the decisions arrived at by them after considerable and elaborate arguments before them and after a most careful examination of all the authorities on the subject, remain correct and

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sound, and that it is impossible successfully to assail the position established by those decisions. Therefore I take it that the Law that is now proposed cannot be seriously claimed to be a Law by way of Legislative correction of erroneous decisions arrived at by the Privy Council. In my humble view it is not Mahomedan Law but a new law altogether. I consider it is absolute fiction to say that the proposed law is Wakf, as much a fiction as the fiction of loss of service as a basis for actions for seductions but without the same reason or excuse. But it is immaterial for me whether it is Mahomedan Law or a new law altogether. There is a growing feeling amongst the advanced party of our Mussalman friends and fellow-subjects whose motto is "excelsior" that they should have a law of primogeniture of an enabling kind. I most cordially sympathise in this new spirit. I had a talk with one of my enlightened Mussalman friends only very recently. He is against this Bill on the ground on which it purports to rest and he distinctly told me that it is not Mahomedan law; but all the same he likes it because it would enable the Mussalmans to secure, if they like, to provide for a special devolution of their property. He told me that England was conquered by Angles, Saxons and others because of the law of primogeniture under which all but the eldest sons were left unprovided for; I said England, I beg pardon, I meant the country called England since. Now where these disinherited and unprovided Mussalmans will go in search of lands to conquer my friend did not inform me, nor can I quite imagine. Perchance it may be in the far south where a new continent looms which is going to be named after our Gracious Sovereign. If our Mussalman fellow-subjects desire to colonise that land I wish them success. Be all this as it may, I am sure I am right in my view of this new feeling. That this is not Mahomedan law but a new law based on the fiction that it is Mahomedan law is borne out by the speech of my friend the Hon'ble Mr. Ghaznavi made the other day when the Currimbhoy Ibrahim Baronetcy Bill was before the Council. He said that if the Wakf Bill had been passed earlier that Baronetcy Bill would have been unnecessary. That is to say a Mussalman can dexterously use this law like the law of primogeniture and hand down his property tied up for ever descending to his posterity in the line of his eldest son or any other son. I was talking to another Mussalman gentleman, and I decline to say whether he is a Member of this Council or not, on this subject. He very facetiously told me that he was not at all sure that the settlement would always be in favour of the eldest son and his descendants. He seemed to think that the youngest wife of the Wakf would have the best of it in the scramble. That is no reason for me to withhold my consent. It is immaterial for me to consider whether this law would benefit the eldest son or the favourite son of the youngest wife.

"Nothing shows more clearly that the advanced party of the Mahomedans do not themselves treat this measure as Mahomedan Law than the attitude they have judiciously taken in view to pilot this legislation through; among those whose opinions had been invited on the Bill is a distinguished Mussalman gentleman who, while holding that courts of justice are wrong in their interpretation of the Law of Wakf, deprecated interference of the Legislature and suggested an attempt at a revision of the current of decisions by the Privy Council, itself now that the Right Hon'ble Mr. Amir Ali, who advocates this popular view, is a distinguished Member of it. But the forward party of our Mussalman friends have been as shrewd as they have been enthusiastic; they know full well the scope of the influence of the Right Hon'ble Jurist on Mahomedan Law. They are aware that the influence of the Right Hon'ble Mr. Amir Ali would not in the least affect English judges. English judges are unbending and sternly independent and they still continue to act on the divine doctrine: Let justice be done though the heavens fall. The Right Hon'ble gentleman's influence in other quarters is an undoubted and settled fact. He may capture "The Times"; he may capture the India Office; and he may capture the Cabinet, but he may not capture the English judges. Hence our Mahomedan friends, conscious of the nature of their case, did not think of accepting the suggestion somewhat gilelessly made of getting the Privy Council to revise its own series of decisions. And they have wisely gone to the Government and have wisely come to this Council.

I welcome this new spirit. I welcome this new enthusiasm and I also welcome the shrewdness throughout apparent. But let us not blind ourselves to the real facts and imagine that it is Mahommedan personal law that we are declaring and enacting. It is a law of a primogeniture under the name of wakf. But for the name of wakf, Mahommedans are not entitled to have this power of disposition of property under their personal law. Very much like the Hindu Law, the great Prophet has directed division of one's property into innumerable portions. As I said before, the Bill embodies a law of primogeniture and it does offend the law as to perpetuity. But we have such special laws which are a departure from generally recognised principles of law. There is the law of primogeniture and entail in England which offends against the law of perpetuities. In India we have special laws, such as the Impartible Zemindari Act, the Punjab Land Alienation Act, and others, all of which more or less tie up properties and offend against the general law. In these circumstances I am able to welcome this new spirit on the part of our fellow Mussalman subjects. It augurs well not only for the Government but also for Hindus that advanced Mussalmans should evolve this new spirit and this new attitude. They belong to a community who are not only intensely religious but also believe that man has been created for the sake of religion and not religion bestowed upon him for his guidance in his progress towards his destiny here below. Now the enlightened new leaders of such a people practically say "save us from our religion," but say so in the name of their religion. It is a most wholesome attitude and I desire to accord my hearty welcome to it.

"A word or two as to the details of the Bill. There is one disquieting provision in it. Clause 8 provides that, where the Wakif is a Hanafi Mussalman, he could make a wakf and settle his property for the maintenance of himself and his descendants and also for the payment of his debts out of the income of the property dedicated and I do not know how this provision has come into this Bill at all. As far as I know and I have read the whole volume of literature on the Bill including the speeches made by the Hon'ble Mr. Jinnah and others in this Council no question has arisen as to its nature and no doubt has been created in reference to it in consequence of any decision of a court of justice. Then how does it come in? This clause is either a Mahommedan law or it is not. If it is Mahommedan law how does it happen to come into this Bill as no doubts appear to have been entertained about it owing to any decisions by courts? But if it is not Mussalman law how and why has it found its place there. I therefore respectfully submit that the Bill is not an expression of real Mahommedan law. As regards this Bill considered exclusively in reference to the debts of the Wakif, no doubt the secured creditors are safe. But as to his unsecured creditors I fear I cannot accept the statement of the Hon'ble Mover in its entirety that they are also quite safe. On this point there are considerable doubts. It is exceedingly difficult to say and more difficult to prove that in creating a wakf the settlor necessarily intended to delay or defraud his unsecured creditors. I, therefore, maintain that this provision is a disquieting one. Yet I am willing to accept the argument of the Hon'ble Mr. Jinnah that it is somewhat self-acting. If it is found that Mussalmans under the name of wakf largely take to defrauding their creditors they are sure to suffer in credit not only from Hindu creditors from all other creditors as well, Jewish, English and others. The Mussalmans are a commercial and a most enterprising people in India and they are most unlikely to impair and endanger their credit by abusing their powers as to creating wakf.

I notice that when leave was asked for the introduction of this Bill in this Council Government declared that its attitude was one of benevolent neutrality. We all know that but a thin partition wall divides benevolent neutrality from active co-operation and by the time the Bill was introduced in the Council after previous circulation, the benevolent neutrality easily became active co-operation and now I am glad to find that every Hon'ble Member is prepared to vote for it. As I am not against the provisions of the Bill, while I believe it is not Mahommedan Law, I am not called upon to ask pardon of my convictions in supporting this measure. Moderating myself to

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the temper of every one I desire to support this Bill. It is a great thing to be in harmony and I congratulate this Council and Government on the courageous harmony in respect of this legislation."

The Hon'ble Rai Sita Nath Rai Bahadur :—"Sir, I do not at this stage like to strike a discordant note, but at the same time I must point out to the Government and also appeal to the sense of justice of the mover to see that the Government, as the custodian of the rights and privileges of different classes of people does not abandon its duty to see that in passing this Bill, the interests and rights of other classes of people are not injuriously affected. And I beg to point out, Sir, that though I have not ventured to move the amendment that I propose to move, as wakf may be created simply by word of mouth, it will open a wide door—kindly pardon me if I use such an expression—it will open a wide door to frauds. Mahommedan gentlemen, for instance the Hon'ble Mr. Shamsul Huda and other honourable gentlemen and Judges of the High Court and District Judges, have all unanimously been of this opinion that if a wakf is to be created, it must be created by an instrument in writing witnessed by two or more persons and specially registered. That is the unanimous opinion of distinguished Mahommedan gentlemen and of the Civil District Judges. Here are the views of several distinguished Judges, and even of Sir William Vincent when he was acting as District and Sessions Judge of Mozufferpore and of Mr. Chapman, the Legal Remembrancer to the Government of Bengal. I need not take up the time of the Council by going through the quotations which I hold in my hand, but I should like to read the opinion of the Hon'ble Moulvi Syed Shamsul Huda, while he was acting as Honorary Secretary, Bengal and Provincial Moslem League. His opinion is as follows :—

'They however consider it desirable that every settlement of property by way of wakf should be in writing and registered.'

"Otherwise there would be no protection. This is the unanimous opinion of every District Judge. There would be no protection to would-be purchasers of property from Mahommedans. Suppose a Hindu or a European or a member of any other community purchases property from a Mahommedan, and a few years after his death, his son turns round and says that the property was a wakf one and produces his own tenants who are under his clutches, as witnesses to support his statement that the wakf was created by words of mouth by his father, and he shows that he was in possession of the property as *mutwali* and not as proprietor

"Under these circumstances of course I do not raise any objection to the passing of this Bill what but I do say is that if, after the working of this Act for some years, we see that the interests of other classes are prejudicially affected, then we should be allowed to approach Government for the modification of the Act to give protection to those classes in matters where they require protection, that is, that wakfs shall be created by instruments in writing and be duly registered.

"With these observations, I beg to support the Bill."

The Hon'ble Babu Surendra Nath Banerjee :—"As a Hindu Member of this Council, Sir, I feel that I ought not to be giving a silent vote, especially in view of the observations which have fallen from some of the Members who have gone before me. I desire to associate myself thoroughly with the congratulations which have been offered to the Hon'ble Mr. Jinnah for his successful pilotage of the Bill. It is worthy of note, and the fact has been referred to, I believe, by more than one Member, that this is the first time that a law has been added to the Statute-book on the initiative of a private Member. It is still more worthy of note that the honour and the distinction is claimed by a Muhammadan non-official Member of this Council. It is an object-lesson which I trust will not be lost upon the representatives of the Hindu community. Sir, I confess I am not able to follow my Hon'ble friend opposite through the mazes of his legal arguments. Sir, it is enough for me and for most laymen, I

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think, to know that the Government want this Bill and the Muhammadan community want it. That, I think, ought to settle the controversy. I am very glad that my Hon'ble friend Rai Sita Nath Roy has withdrawn his amendment. When the Muhammadan community want a particular Bill in a particular form, when they are practically unanimous about that matter, and when the Government has extended its approbation to their proposal, I think it is not for us, as representatives of the Hindu community, to stand athwart their path and say to them 'this amendment you shall accept' or 'that amendment you shall not accept.' I am very glad indeed that my friend has seen his way to withdraw his amendment. I accord my most cordial support to the Bill."

The Hon'ble Mr. Syed Ali Imam:—"Sir, the Hon'ble Mr. Vijiaraghavachariar has discoursed upon this Bill in a strain that reminds me of the man who adopted a child but for a very long time dwelt upon its ugliness. I don't intend to enter again upon the controversy as to whether this Bill is or is not consistent with the provisions of the Muhammadan law, as on the day this Bill was referred to Select Committee I had put forward a number of authorities showing that those were the provisions of the Muhammadan law. But I do not for a moment question the right of the Hon'ble Member, Mr. Vijiaraghavachariar, or for the matter of that, any other Hon'ble Member to have his own views on the subject. On behalf of Government, however, I may say that it is satisfied—has been satisfied—on the evidence that came before it, that the Bill embodies the provisions of the Muhammadan law. As a matter of fact, the reason why the Government gave its sanction to the measure was that finding it to be consistent with the provisions of the Muhammadan law, and there having been a demand from the Musulman community for its recognition, the Government saw no objection in meeting the wishes of the Muhammadans when it was possible to do so.

As regards the work of my Hon'ble Colleague Mr. Jinnah in regard to this Bill I should very much like in this Council, to testify, from my personal knowledge, to the great amount of assistance and help that he has given us right through, and especially in the Select Committee in which I was presiding and now that the Bill has reached that stage when soon—perhaps in a few minutes—it will be passed, I wish, on behalf of myself, and, if I may say so on behalf of my colleagues, to express our satisfaction at the manner in which Mr. Jinnah has rendered help to us in piloting this Bill through; and at the end I wish to add one word of congratulation to Mr. Jinnah in that, although he is not the first non-official member who has been able to introduce a private Bill in this Council, as has been assumed by the Hon'ble Babu Surendra Nath Banerjee, at any rate he is the first non-official Muhammadan member to do so, I am glad to find, and the record of Council proceedings will show it that another Hon'ble Member, a non-official Hindu Member, brought in a private Bill, *viz.*, the Anand Marriage Bill, which became the law of the land some years ago."

The Hon'ble Mr. Jinnah:—"Sir, first of all I must thank Hon'ble Members who have spoken of me in very kind terms, and I also thank the Government and the Hon'ble Law Member who has expressed his kind feelings towards such work as I may have done in this matter: but I specially and particularly welcome the congratulation from my old and revered friend, the Hon'ble Babu Surendra Nath Banerjee, who represents a volume of opinion in Bengal, and, coming from him as a Hindu, I particularly appreciate it and I wish to thank him very much for it. With regard to his support, I feel most grateful to him.

"With regard to the Hon'ble Mr. Vijiaraghavachariar, I must say that the Hon'ble Member to-day happens to be in a mood of opposition. While opposing the provision of the Bill, the Hon'ble Member was good enough to wind up by supporting it. While finding fault with the provisions of the Bill and saying that the Mussalman are getting a law which is going to give them a system of primogeniture, he supported it. I now appeal to the Hon'ble Member; his suggestion was that we want to do these things under the guise of the fiction

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of Mussalman Law; we do not want to face the Privy Council; although we have got there the Right Hon'ble Mr. Amir Ali, we are afraid to face the Privy Council because of the English Judges. Really I appeal to the Hon'ble Member and his experience. He knows perfectly well that never in the history of the Privy Council has that tribunal ever revised its judgment. And Sir, is it right for a lawyer of his experience to tell me why is it that I do not go to that tribunal which has already decided this point and ask for a revision?

"Then the Hon'ble Member criticised, very firmly and said that this Bill was not the Mussalman law, that the Privy Council decision was the Mussalman law. Well, with very great respect for him, he is entitled to his opinion. Every man is entitled to his opinion. With very great deference, I may point out to him that the highest authorities, Mussalman and English Jurists of eminence, have declared, with the utmost deference for that great tribunal, the Privy Council, that their decision is not in accordance with Mussalman law. The whole of my community, with a few exceptions,—for whom, also, I have respect, because each man is entitled to his own opinion—are of opinion that the Privy Council decision is not the correct exposition of the Mussalman law. Therefore, Sir, our only remedy was to appeal to the Government, appeal to the legislature, and the Government have come to our rescue. That ought not to excite any jealousy; that ought not to excite any envy of any kind whatever, that ought not to entitle any one to say that by these circuitous methods we get a system of law, namely primogeniture, and not Mussalman law.

"However, I do not wish, Sir, to go into these details because the Hon'ble Member has given me his support. I appreciate the support he has given, no matter the manner in which he has given it. Then he says with regard to clause 3, how does that clause come in at all? I have explained to the Hon'ble Member myself, and if he looks up any text-book on Muhammadan Law, he will find that what is reproduced in clause 3 is nothing but Muhammadan law, namely, that one of the purposes recognised by Mussalman law as purposes for which you can make a wakf is if a man happens to be Hunufia for his own support, maintenance or payment of debts—that is a purpose for which he can make a wakf; and the Privy Council decision was that if you postpone the dedication to charity for a certain period—and if the dedication to charity is proposed to be given at any period too remote—then that wakf is invalid. Therefore if a Hunufia Mussalman makes a wakf for payment of his debts, and if this clause is not inserted, the Privy Council decision will stand and you have only got to take it to any Court of law to set aside the wakf. Therefore, it is absolutely essential that this purpose, which was so say over-riden by the decision of the Privy Council, must be specifically mentioned in the clause to show that it is a purpose for which you can make a wakf. Then the last point was the point about creditors. Well I have already told the Council as to what the position is. The Hon'ble Mr. Sitanath Roy Rai Bahadur had amendments about this on the Agenda List which he was good enough to withdraw. Now I can only assure the Hon'ble Member that so far as the first amendment is concerned, I have not the slightest doubt in my own mind, and I appeal to any lawyer, that secured creditors cannot be affected by the making of a wakf after the security is given. The only question, as I pointed out, is the question of unsecured creditors, and if a man while he is making his wakf is in an insolvent condition, and he makes his wakf in order to defraud, defeat or delay his creditors, then I say without any hesitation that that wakf will be set aside by any Court of law under Muhammadan law. If you can prove that the wakf is created in order to defeat the creditors, or defraud the creditors or delay the creditors, you have only got to prove that and the wakf will be set aside. There is the Provisional Insolvency Act and there is the Presidency Towns Insolvency Act. If a man in any way goes against those provisions, the Court of Bankruptcy will set aside his wakf. But the difficulty that does arise—and I do recognise that there is a difficulty—and that is in the case of testamentary wakf or an oral wakf, that is to say, the wakf may have been made when the man was in a perfectly solvent state and not intended to defeat, defraud or delay his creditors; but an oral wakf perfectly good at the time it was made. His heirs may suppress the fact

[*Mr. Jinnah.*]

[5TH MARCH, 1913.]

of any wakf having been made and dispose of the property as they like. A second or third generation may come up and attempt to prove that an oral wakf had been made. I say if a man comes to a Court of law after one or two generations and attempts to prove an oral wakf, I appeal to you—not as lawyers but as men of common sense—what Court of law would accept such proof; and the consequence will be that he will never succeed in proving the wakf. But that small danger is there, and the danger affects Mussalmans a great deal more than any other community.

“ It affects Europeans but Europeans as a rule do not purchase or deal with immoveable property. That danger is there, and very small danger though it be it affects us much more seriously than other communities, because as the Hon'ble Member admitted very frankly it depreciates the title to Mussalman property. Our difficulty is how are we to override the provision of Muhammadan law which empowers a Mussalman to make an oral wakf. We are unable to do it, and therefore what little apprehension there may be among the other communities I ask them to that extent to bear with us who are suffering along with the others to a much greater extent. One word more and I have done. Before I sit down I wish to offer my personal thanks to the Hon'ble the Law Member for the most able and valuable help he gave me in the Select Committee to get this Bill through, and in that I include our able Secretary Sir William Vincent who gave us equally valuable help in the matter before the Select Committee, after the Select Committee and during the Select Committee.”

The motion was put and agreed to.

The Council adjourned to Friday, the 7th March, 1913.

W. H. VINOENT,

Secretary to the Government of India.

DELHI :

The 13th March, 1913.