THE

LEGISLATIVE ASSEMBLY DEBATES

(Official Report)

VOL. III.

PART III.

(1st February, 1923 to 20th February, 1923.)

THIRD SESSION

OF THE

LEGISLATIVE ASSEMBLY, 1923.

SIMLA
GOVERNMENT CENTRAL PRESS
1923.

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LEGISLATIVE ASSEMBLY.

Wednesday, 7th February, 1923.

The Assembly met in the Assembly Chamber at Twelve of the Clock. Mr. President was in the Chair.

GOVERNOR GENERAL'S ASSENT TO BILLS.

Mr. President: I have to acquaint the Assembly that His Excellency the Governor General has been pleased to give his assent to the following Act:

The Criminal Tribes (Amendment) Act, 1923.

THE CODE OF CRIMINAL PROCEDURE (AMENDMENT) BILL.

Mr. President: The Assembly will now proceed to the further consideration of the Bill further to amend the Code of Criminal Procedure, 1898, and the Court-fees Act, 1870, as passed by the Council of State.

Rao Bahadur P. V. Srinivasa Rao (Guntur *cum* Nellore: Non-Muhammadan Rural): Sir, as a result of the formal conference we have had and the agreement we have come to, I request your permission for moving, in place of the amendment which stands in my name, another amendment with some modifications. That amendment runs thus:

"That in clause 77, sub-clause (*a*), before the word 'evidence' the word 'oral' be inserted.

And for the proviso the following be substituted, namely,

'or (*c*) with the permission of the Court when any document which does not need to be proved is produced by any accused person after he enters on his defence:

Provided that in the case referred to in clause (*c*) the reply shall, unless the Court otherwise permits, be restricted to comment on the document so produced."

Sir, the principle involved is that the accused should have a right of reply in all cases tried in a Court of Sessions or a High Court. This principle has been recognized by the Lowndes Committee and also by the Joint Committee. This amendment goes a great way in giving the accused a right of reply. I therefore hope that the amendment will commend itself to this House.

Mr. President: The amendment moved is:

"That in clause 77, sub-clause (*a*) before the word 'evidence' the word 'oral' be inserted."

Mr. H. Tonkinson (Home Department: Nominated Official): I accept that amendment.

The amendment was adopted.

Mr. President: The further amendment moved is:

" And for the proviso the following be substituted, namely,

' or (c) with the permission of the Court when any document which does not need to be proved is produced by any accused person after he enters on his defence:

Provided that in the case referred to in clause (c) the reply shall, unless the Court otherwise permits, be restricted to comment on the document so produced."

Mr. H. Tonkinson: I accept that amendment.

The amendment was adopted.

Mr. President: The question is that clause 77, as amended, stand part of the Bill.

The motion was adopted.

Clauses 78, 79 and 80 were added to the Bill.

Clause 81 was added to the Bill.

Clauses 82, 83 and 84 were added to the Bill.

Mr. K. B. L. Agnihotri (Central Provinces Hindi Divisions: Non-Muhammadan): Sir, I beg to move:

" That in clause 85, sub-clause (1) omit the figures ' 211 '."

Mr. H. Tonkinson: Sir, I understood that my Honourable friend was not going to move the amendment in this form. We are prepared to accept an amendment on the following lines:

" That in clause 85, in the proposed new sub-section (*i*), after the words ' ten years ' the following be inserted, namely, ' or any offence punishable under section 211 of the Indian Penal Code with imprisonment which may extend to seven years '; and further that the figures ' 211 ' be omitted."

The reason for this, Sir, is that under section 211 there are three classes of courts which may try offences . . . .

Mr. K. B. L. Agnihotri: I accept the amendment suggested by the Honourable Mr. Tonkinson.

Mr. President: The amendment moved is:

" That in clause 85, sub-clause (*i*) omit the figures ' 211 '."

A further amendment to the amendment moved is:

" That in clause 85, in the proposed new sub-section (1), after the words ' ten years ' the following be inserted, namely, ' or any offence punishable under section 211 of the Indian Penal Code with imprisonment which may extend to seven years '; and further, that the figures ' 211 ' be omitted."

The question is:

" That the original amendment be amended by that addition."

The motion was adopted.

Mr. President: The question is that that amendment be made.

The motion was adopted.

Rao Bahadur T. Rangachariar (Madras City: Non-Muhammadan Urban): Sir, my amendment has been altered slightly. In place of the amendment on the printed sheet, I move:

"That in clause 85, to proposed new sub-section the following be added:

'And shall on application made by the accused furnish him with a copy of such record:

Provided that the accused shall pay for the same unless the Magistrate for some special reasons thinks fit to furnish it free of cost."

Mr. President: The question is that that amendment be made.

The motion was adopted.

Clause 85, as amended, was added to the Bill.

Clause 86 was added to the Bill.

Dr. H. S. Gour (Nagpur Division: Non-Muhammadan): Sir, in place of the printed amendment, I beg to move the following:

"That in clause 86-A in the proposed new section 339-A, for the words 'to whom a pardon has been tendered', the words 'who has accepted a tender of pardon' be substituted."

The motion was adopted.

Dr. H. S. Gour: Sir, in place of the printed amendment, I beg to move the following:

"That in clause 86-A, for sub-section (2) of the proposed new section 339-A, the following be substituted:

'(2) If the accused does so plead the Court shall record the plea and proceed with the trial, and the jury or the Court, with the aid of the Assessors or the Magistrate as the case may be, shall before judgment is passed in the case find whether or not the accused has complied with the conditions of the pardon, and if it is found that he has so complied the Court shall, notwithstanding anything contained in this Code, pass judgment of acquittal."

The motion was adopted.

Clause 86-A, as amended, was added to the Bill.

Bhai Man Singh (East Punjab: Sikh): I move, Sir:

"That in clause 87 in sub-section (2) of section 340 before the word and figure 'Chapter X' the word and figures 'Chapter VIII' be inserted."

The object of my amendment, Sir, is that any person against whom proceedings are taken under Chapter VIII of this Code may be a good witness who should be examined on oath in those proceedings. As you will see, Chapter VIII, sections 107, 108, 110 and so forth, concern the proceedings for maintaining good behaviour and for keeping the peace, etc. After all, as we have seen, they don't consist of offences themselves but mostly consist of quite other things. The man might be asked not to commit a breach of the peace. The man might be asked to furnish security for giving seditious lectures. Or the man might be bound down because he had sought to be obnoxious, or his speeches might be so dangerous that anybody would pick a quarrel with him and there might be a breach of the peace and so forth. There is absolutely no reason why that person should not have the chance of appearing as soon as the statement is made and giving his own statement on oath as a witness. I hope in these circumstances that my amendment will be accepted.

Dr. H. S. Gour: Sir, it will be obvious to the House that I am in evident sympathy with my friend Bhai Man Singh's amendment when I have given notice of an amendment much wider in terms. The object of the Honourable Mover of this amendment is to allow the person against whom proceedings have been instituted for being of good behaviour or for keeping the peace to give evidence in his own behalf. In England, by a recent Statute, the accused is now empowered to give evidence on his own behalf, and I intended to extend the provisions of the English Statute to certain offences under the Indian Penal Code. However, on maturer consideration I do not propose to move my amendment; but I think there is a great difference between offences under the Indian Penal Code and proceedings under the Code of Criminal Procedure. Honourable Members will find that this Chapter VIII is a part of Part IV of the Code of Criminal Procedure which is headed "Prevention of Offences." Consequently all proceedings under Chapter VIII are of a preventive character. They may be regarded as of a quasi-criminal character, and I think the rule which obtains in England might well be tried in this country by enabling the non-applicant in all cases of security for peace and good behaviour to be able to give evidence on his own behalf. He will not be compelled to do so. It is purely permissive and optional. If he desires to explain a point which has been proved against him by the Prosecution there is no reason why he may not give evidence on his own behalf. He will no doubt be subject to cross-examination. As Honourable Members are aware, all accused under the present law are entitled to make a statement, and as a matter of fact they have to make statements in answer to questions put by the Court, and all that the present Code provides is that such statements shall be considered by the Court. But they have not quite the same value, evidential value, as the sole statement of the accused who has explained away the points that have been proved against him by the prosecution and who has submitted himself to the cross-examination of the prosecuting counsel. I submit that this procedure in England has been successful, and I do not see why in all cases of this character the accused should not be at liberty to give evidence if he is so minded. I therefore support the amendment.

The Honourable Sir Malcolm Hailey (Home Member): Sir, I am quite prepared to admit that there is a difference between the action taken under the Indian Penal Code and the action taken under our present section; but I will put it to the House that if we are to embark on a procedure which gives the accused the right of giving evidence on his own behalf we ought to treat the question as a whole. The question is one which has had a long history behind it in England; it has a history of considerable controversy behind it in India also. I need not go into the history of the English case; those who have read the proceedings which led to the passing of the English Act will realise how strong were the differences of opinion on the subject. When it has been discussed in India there have been equally strong differences of opinion. Generally speaking, the Indian Bar, when we previously circulated the matter for opinion, as a whole was against it. Obviously in a country where an accused person cannot always afford to obtain first class advice, he is in a very dangerous position if he is exposed to cross-examination on any statement that he may make in his defence. So far we have admitted the accused to give evidence in his own behalf only in regard to cases arising out of those sections of the Criminal Procedure Code which I may describe as of a semi-civil character—Chapters X, XI, XII, XXXVI, the last of course being that which refers to the

maintenance of wives and children, and I think that before we go beyond this distinct category of semi-civil cases and give that right in criminal cases, pure and simple, for there is no doubt that section 110 for instance partakes of that character, we ought to reconsider the question as a whole. It is for that reason that, though I admit there is substance in the points put forward by Bhai Man Singh and Dr. Gour, I think we should be well advised not to follow their proposal, but to leave the whole question over for consideration anew, when public opinion and the Courts have come to some more clearly defined views as to the advisability of admitting the accused to give evidence on his own behalf.

Rao Bahadur T. Rangachariar: Sir, the Honourable the Home Member admits it is a case needing inquiry. How is this inquiry to be made? You must begin somewhere and make an experiment and see how it works before we can come to a conclusion on a matter of this sort. These proceedings against persons calling upon them to furnish security either for keeping the peace or for good behaviour are evidently fit cases where the persons are in the position of quasi-accused; they are not really accused of offences, but they are suspected as persons likely to commit offences. Therefore in such cases there are very many instances to my mind where this procedure will be very apt. In calling upon persons, especially educated persons to give security for keeping the peace as has been frequently done in the last two or three years when politicians have been called upon to give security for keeping the peace, I think it is but right that they should be allowed to give evidence in their own behalf to explain what they are doing, explain the meaning of words which they have uttered or which they are about to utter. I do not think any risk is run by allowing them to go into the box if they so like. No doubt it is a risk—I quite appreciate it—no doubt ignorant persons who are called upon to give security will run a risk, but I take it we can prevent it by giving discretion to the Magistrate. If the Honourable the Home Member would admit it, I would with your permission add the words " wherever the court so permits " or some such words so as to safeguard it further. Not only it is the option of the accused, but also in order to protect ignorant persons from being harassed by cross-examination I would suggest ' with the permission of the court.' That will be an additional safeguard in order to prevent miscarriages of justice. Now, the Code permits a court to put questions to accused persons under trial for explaining circumstances which appear in evidence against them. I know, Sir, that the power is judicially exercised; it has often been of great use in enabling courts to get at the truth of a case. Honourable Members, if they have read the report of the Racial Distinctions Committee, will have noticed Mr. Carey's minute there. Mr. Carey makes it a point that accused persons where, for instance, they are in distant plantations where the occurrence takes place known only to the accused and the person injured, they ask for a right that the accused should go into the box. Mr. Carey insists on it in his minute, so that it is apparently a privilege valued by Englishmen, a privilege which has been on trial in England for some time and while Dr. Gour is quite right in giving up his amendment and not extending it to all accused persons, yet I think, Sir, we will not be making any very dangerous experiment by allowing it in this case. The law now proposed allows it in certain other chapters of the Code, such as inquiry into urgent cases under sections 144 and 145 and inquiry into maintenance cases—in such cases also the persons against whom proceedings are taken stand in an analogous position as in this case under chapter VIII. Perhaps if there is serious objection

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to this, then, Sir, why not limit it to cases where a person is called upon to give security for keeping the peace, instead of extending it to persons who are called upon to give security for good behaviour? Probably cases where persons are asked to give security for good behaviour may be said to be more serious cases, because habitual offenders and other cases might come in there. Therefore I think if not the whole of Chapter VIII at least the first portion of it—cases coming under section 107—may be taken; that is persons called upon to give security for keeping the peace under section 107 may be given the option. If the Honourable the Home Member accepts it I will propose it as an amendment—proceedings under section 107 instead of Chapter VIII. I think, Sir, a beginning should be made, and I hope, Sir, the Honourable the Home Member will see his way to accept my suggestion; and I propose, Sir, formally to substitute the words " proceedings under section 107 " for the words " Chapter VIII."

The Honourable Sir Malcolm Hailey: I am quite prepared, Sir, to agree to section 107 being substituted.

The amendment to the amendment was adopted.

The original amendment, as amended, was adopted.

Mr. J. Ramayya Pantulu (Godavari *cum* Kistna: Non-Muhammadan Rural): I move, Sir:

" That in clause 87, in sub-section (2) of the proposed new section 340, for the words ' if he so desires, be examined ' the words ' offer himself ' be substituted."

That section runs as follows:

" Any person against whom proceedings are instituted in any such Court under Chapter X, Chapter XI, Chapter XII, or Chapter XXXVI, or under section 552 may, if he so desires, be examined as a witness in such proceedings."

If my amendment is carried out it will read " Any person against whom . . . . . may offer himself as a witness in such proceedings." I believe, Sir, that this amendment of mine improves the wording of the section, if I may say so without egotism, and I hope the Honourable the Home Member will accept it.

Sir Henry Moncrieff Smith (Secretary, Legislative Department): I agree to this amendment.

The amendment was adopted.

Clause 87, as amended, was added to the Bill.

Mr. K. Ahmed (Rajshahi Division: Non-Muhammadan Rural): Sir, I move:

" That after clause 87 insert the following clause . . . ."

Sir Henry Moncrieff Smith: Sir, before the Honourable Member moves his amendment, I want to ask your ruling as to whether it is within the scope of the Bill. The Honourable Member proposes to amend section 342 which is not in the Bill, and never has been in the Bill.

Mr. President: Does the Honourable Member agree with that statement of fact?

Mr. K. Ahmed: Sir, it is admitted by all . . . . .

Mr. President: Order, order. Before the Honourable Member proceeds to discuss the merits of his amendment, I should like an answer to my question.

Mr. K. Ahmed: The answer is in the negative, Sir.

Mr. President: Objection by the Honourable Sir Henry Moncrieff Smith is upheld.

Mr. K. B. L. Agnihotri: Sir:

"In clause 88 sub-clause (*i*) after the word 'substituted' insert the following:

'and in the table in the said sub-section, the following amendment shall be made.'

After entry relating to 'Criminal Intimidation' add the following entries:

Act caused by making a person believe that he will be an object of divine displeasure.	508	The person against whom the Act was committed."

Mr. President: I have not been able to follow the Honourable Member. I don't know which portion he proposes to omit.

Mr. K. B. L. Agnihotri: I want to omit the sub-clauses (*a*) to (*f*) and start with (*g*) only.

Mr. President: Amendment moved:

"That in clause 88, sub-clause (*i*) after the word 'substituted' insert the following:

'and in the table in the said sub-section, the following amendment shall be made':

'After entry relating to 'criminal intimidation', add the following entries:

'Act caused by making a person believe that he will be an object of divine displeasure.	508	The person against whom the act was committed'."

Is that what the Honourable Member wants?

Mr. K. B. L. Agnihotri: Yes, Sir, only that portion.

Mr. President: The question is that that amendment be made.

The motion was adopted.

Mr. President: Then the Honourable Member does not move the rest of his amendment?

Mr. K. B. L. Agnihotri: Sub-clause (*ii*) will come in, Sir:

"In this clause in the proposed table in sub-section (2) of section 345, the following amendment be made.

"Insert in their proper places the following entries:

Criminal misappropriation of property.	403	Owner of property which was misappropriated."

Mr. President: Further amendment moved:

"In sub-clause (*ii*) in the proposed table in sub-section (2) of section 345 make the following amendments:

"(*b*) Insert in their proper places the following entries:

Criminal misappropriation of property.	403	Owner of property which was misappropriated."

Sir Henry Moncrieff Smith: Sir, we are prepared to accept this amendment if the Honourable Member on his part will accept the substitution of the word "dishonest" for the word "criminal," so that it will read "dishonest misappropriation" instead of "criminal misappropriation." That is the proper description of the offence.

Mr. K. B. L. Agnihotri: I accept it, Sir.

Mr. President: Amendment moved:

"In the proposed amendment to substitute the word 'dishonest' for the word 'criminal'."

The question is that that amendment be made.

The motion was adopted.

The question is that the amendment, as amended, be adopted.

The motion was adopted.

Mr. K. B. L. Agnihotri: Sir, I now come to the other amendment, namely, criminal breach of trust in respect of property not belonging to the State which is in sub-section (2) (*c*). This amendment relates to the section of the Penal Code which deals with criminal breach of trust in respect of property. My object in moving for the inclusion of this section under this provision of the Code is that in such cases also the accused and the complainant should be permitted to compound the offence. There may be cases, in which several parties may be aggrieved, the whole public or a number of persons or bodies besides the complainant, be concerned, and in such cases the composition of such offences would be undesirable and objectionable. But this has been safeguarded by putting section 406 in the second sub-section of section 345 which enables the compounding of offences with the permission of the Court only. Were the Court of opinion that permission in such a case should not be given, then it could stop compounding of the offence and there will be no hampering of justice. I would propose therefore that this amendment be accepted. I will just put before the House a case to show how harmful would be the omission of this offence from the list of the compoundable sections sometimes. In one case a lady and her husband's brother were sitting together. Her husband's brother asked the lady for the loan of her wedding ring for a day or two, the request was acceded to by the lady. Thereafter the man went to college and did not return the ring. In the meantime the husband and wife fell out and the wife started proceedings for judicial separation. The brother returned the ring to the husband and declined to return it to the lady, and she in her annoyance filed a complaint against him under section 406 for criminal breach of trust. After the case was filed, the friends and pleaders on both sides thought that the husband and wife should amicably be brought together and reconciled; but this could not be possible unless the case was withdrawn or compounded which was absolutely impossible under the present law. The lady had to take shelter behind a subterfuge that she had no witnesses to offer, and absented herself from the case and the court was kind enough to stop the proceedings. But if the Court had thought otherwise, it could have proceeded with the case and the relations between husband and wife would have been further estranged. Therefore, I submit, that there are also cases in which only individual persons are concerned and in such case there will be great hardship, if we do not insert such a provision but where the accused is one of a bad character, a scoundrel, or has been in the habit of committing breaches of trust, or where there are many persons aggrieved, then certainly he should not get the benefit of this section, and that could be done by vesting the Court with the power to allow the composition of the offence only when it thought desirable.

Mr. President: Amendment moved:

"In the proposed table in sub-section (2) of section 345 make the following amendments:

"(*b*) Insert in their proper places the following entries:

'Criminal breach of trust in respect of property not belonging to the State.	406	Owner of property in respect of which the offence was committed'."

Dr. H. S. Gour: Sir, I have the misfortune to oppose this amendment. The Honourable Member has given an illustration by no means an apt one, and I think if my Honourable friend assumed in the case which he cited that it was a case in which the accused had committed a criminal breach of trust, he is under a wrong impression. If my friend will only turn to the definition of "Criminal breach of trust" in section 405, he will find that the foundation of the offence lies in dishonesty. There must be a breach of trust and there must be dishonesty. In that case there was no dishonesty.

Now, Sir, cases of breach of trust are of a most serious character, and my friend himself admits in omitting to make the rest of the cases compoundable under sections 408 and 409 that all cases of criminal breach of trust are not fit to be compounded. What reason has he then given for making a case under section 406 compoundable? Honourable Members will find that an offence under section 406 is not bailable and if it is made compoundable it will set a premium on blackmail. A man will complain against a person who is immediately arrested and sent to jail and for the purpose of extricating himself out of jail he will open negotiations with the complainant, pay him the money and get out of the clutches of the law. There is no harm done, so far as the complainant is concerned, because he has compounded with the accused, but let us look at the question from another point of view. I employ a porter at the railway station and ask him to carry my baggage to a carriage standing outside. He walks off with it. That is criminal breach of trust. He comes to me and says he will pay me a certain amount of money and I should let him go. Out of misapplied kindness I let him go. I confirm him as a habitual station thief. He goes about as passengers alight from the train, he keeps on committing offences of a similar character, and becomes a licensed thief at the railway station and keeps on swindling people by hundreds, it may be by thousands. Does my Honourable friend think that an offence of such an egregious character should be allowed to be compounded at the instance of the complainant? I give other cases. A person is entrusted with a sum of money. It is his duty to take it to the Bank. Instead of taking it to the Bank, he decamps with it. That is criminal breach of trust. I lay him by the heels. He then asks me to forgive him. I forgive him. He goes again and gets employment with other people and, knowing that the offence is compoundable and he can always purchase his liberty, he keeps on swindling other people. I have been very fortunate in catching him. There may be other people less fortunate and he may decamp with their money. A person who is guilty of such atrocious crimes should, I submit, be not permitted to go free at the instance of a private complainant. He is a danger to society and to the public. Honourable Members will also see that the offence of criminal breach of trust is little, if at all, distinguishable from the general offences of theft and cheating. They all belong to the same genus, and my friend has not suggested—in fact it has never been suggested here—that the offence of cheating or of theft should

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be compounded. (*Mr. K. B. L. Agnihotri*: "It is already provided by the Government.") The offence of theft certainly has not been provided for and if they have provided for the offence of cheating they have done so in spite of our protest. But whatever may be the question, we have to deal with the specific case of criminal breach of trust and I submit that he is not an offender against the individual but an offender against the public justice. He is an offender against society and therefore I submit he should not be permitted to be freed at the instance of the complainant. I therefore oppose this amendment.

Rao Bahadur C. S. Subrahmanayam (Madras ceded districts and Chittoor: Non-Muhammadan Rural): Sir, this question of compounding an offence may be stated simply in this form. For instance, in breach of trust, the complicated case is of a clerk or a cashier who is entrusted with money and is found not to account for the sum entrusted to him. Then a prosecution is lodged. Proof of the embezzlement is not always easy when it has occurred over a period of time. Oftentimes, owing to the difficulties of proof, men get off. Sometimes, the prosecution itself, *i.e.*, the complainant finds it is very difficult to pursue the case and he tells the Court: "I am not in a position to prove it." That is one form in which an offence like this is allowed to be dropped. Now, whatever may be the heinousness of it, this is a case between two persons and the proof of the offence is within the knowledge and within the control of the complainant. As the law at present stands, the Court has to depend for the proof of the offence on the complainant and if the complainant does not choose to prosecute the case vigorously, then the case must fail because there is no intervention of the police, there is no intervention of a public officer in the prosecution in such cases. Now, that is the position which I think every businessman will understand. Now, in such a case, if the parties have come to some kind of understanding, that is a restoration has been made or the accounts have been settled or, through the interference of other people, what the complainant does is he goes to Court and tells the Magistrate: "Well, I cannot prove it. No doubt I believe the man is guilty but I have not sufficient proof." The Court cannot take up the case from that point. It is not in a position to pursue the case. Now, in cases where there is this settlement between the complainant and the accused, what happens is that this form, which probably everyone in the Court knows is practically compounding of a non-compoundable offence, is going on. Now, instead of allowing people to do this thing in an indirect and secret fashion, what the amendment suggested by my friend, Mr. Agnihotri, seeks to do is, with the permission of the Court, to allow the parties to compound. Now, I don't see any difference between the two. This one is what happens in practice when it is a case between party and party the other is with the permission of the Court to allow the case to be compounded. And therefore the argument of my friend, Dr. Gour, does not apply. If the prosecution is started by the police or by a third party, that is a public body or the State, then it is a different thing. But all that the amendment seeks to establish is that what is done now secretly and *sub rosa* should be expressly set down, and that, with the consent of the parties and with the permission of the Court, the case should be dropped. Therefore, there is a great deal to be said in support of the amendment which my friend, Mr. Agnihotri, has moved.

Sir Henry Moncrieff Smith: Sir, I oppose the amendment very much on the same ground as those already adduced to the House by my friend, Dr. Gour. The real criterion in these cases, in deciding whether an offence should be compoundable or should not, is this: " Is the offence one that affects two persons only? Does it just affect the complainant and the accused or may the effect of the offence go beyond that?" As Dr. Gour suggested, if there is any chance of an offender being a public danger, then in the case of that particular offence there should be no question of composition. I should just like to refer the House to two of the illustrations in the Penal Code under section 405: A is a warehouse-keeper. Z, going on a journey, entrusts his furniture to A. A dishonestly sells the goods. Now, that is a matter between A and Z. But the warehouse-keeper has other goods than Z's. Suppose the warehouse-keeper is able to appropriate the goods for his own use and then, by handing back the value of the goods to Z, is allowed to go scot-free. There is a public danger in that, he may do it again and there is no guarantee that he will not do it a second time. Another illustration, Sir. " A, a revenue officer, is entrusted with public money, which he is required to pay into a treasury . . . "

Dr. Nand Lal (West Punjab: Non-Muhammadan): Section 406 will not be applicable to that case.

Sir Henry Moncrieff Smith: May I read the illustration from the Code? " A, a revenue officer, is entrusted with public money and he is either directed by the law or bound by a contract . . . . "

Dr. Nand Lal: May I point out, Sir, that you are reading the illustrations under section 405 which gives the definition?

Sir Henry Moncrieff Smith: Where else am I to get the illustrations but in this section?

Mr. K. B. L. Agnihotri: Under section 405 which defines Criminal Breach of Trust, but the illustrations cover cases under sections 407, 408 and 409.

Sir Henry Moncrieff Smith: I see that the Honourable Member has doubts about it. The point really is that a person who commits criminal breach of trust is a danger to the public. I think there can be no question about it. It is not just a matter between the man who loses his property and the criminal who takes it, and in such cases I feel perfectly convinced that there should be no chance of composition.

Dr. Nand Lal: Sir, I most heartily support this amendment and it is no less than a wonder to me that an able lawyer like Dr. Gour has opposed it. Sir, the complainants, who go to court with their complaint under section 406, as a matter of fact, go to court, in some cases, with a view to extort money from their clients, customers or dealers, and therefore the criminal machinery in those cases is abused. The dispute is of a civil character and that civil character is wrongly and unlawfully twisted into a criminal case. My learned friend, Dr. Gour, says that it affects the community and it will give rise to blackmailing. I cannot understand how it would. Supposing A gives two or three clothes to his washerman to wash, but unfortunately the washerman uses those clothes for himself or his children use them, though eventually he returns them. According to the definition as given in section 405, he will come within the clutches of the law and section 406 will be applicable. I ask Dr. Gour what sort of dishonesty has been committed in that action? According to the definition of dishonesty, which means wrongful loss to one person and wrongful gain to

[Dr. Nand Lal.]

another, there is no dishonesty in this case. And yet, that washerman may be prosecuted and most probably he may be convicted of having committed an offence under section 406, because he has used those clothes against the term of his contract. The provision of section 405, Sir, you will be pleased to see, runs as follows, and section 406 is dependent on section 405:

"Whoever being in any manner entrusted with property"—the washerman is entrusted with property—" or with any dominion over property "—he has got dominion over property . . . .—it cannot be denied—that he converted to his own use that property," because he has used those clothes or he has allowed his children to wear them. Taking the technicality of the law he will be considered guilty. Will Dr. Gour countenance this view that there should be so many criminal cases, and that for ordinary things criminal complaints should be lodged? Therefore, the amendment suggests that, in such cases, the complainant, who is the owner of those clothes, and who unfortunately went to court, should be able to say that he will compound it or compromise it. There is no harm done by his doing so. The community does not suffer at all. I cannot understand in what way the community suffers. This is a kind of contract between the complainant and the accused, that is, between the owner of the clothes and the washerman. Then, Sir, section 405 goes on:

"or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged."

Now, Sir, suppose A has been asked to go to the bazar and purchase a pair of shoes. Well, unfortunately, he uses for his own purpose the money which was given to him. The next day he borrows money from his friend and purchases the pair of shoes as was ordered or desired by his friend or relation or associate. Then, that friend or associate who gave money to him may say " why are you so late?" And he replies " unfortunately I spent the money which you gave me ". He will be within the clutches of the law, because he has not acted according to the directions given by the man who had entrusted the property, that is the money, to him.

The Honourable Sir Malcolm Hailey: Read Explanation 1.

Dr. Nand Lal: I have read that. He will be within the clutches of the law.

The Honourable Sir Malcolm Hailey: Read it to the House.

Dr. Nand Lal: He has used that money for himself, so far as the wording of this definition goes. Has he not used it, Sir? Rs. 5 were given to him, as I have already submitted, to purchase a pair of shoes. He did not spend that money in buying shoes but utilised it for his own use. Technically, taking the letter of the law, he comes within the clutches of section 406 and he may be prosecuted and convicted for that. Then my learned friend, Dr. Gour, says, it will give rise to blackmailing. I cannot understand that. Rather it will be a weapon in the hands of those dishonest creditors, those dishonest dealers who will force other people to be dragged to the criminal courts instead of suing them in the civil court. Supposing there is a contract between A and B to make a chair within two days. Unfortunately, he fails to act up to it and therefore he is unable to execute the contract. According to this definition he will be within the clutches of law, because he has not acted in accordance with the terms of the contract. Contracts and engagements should not be considered a subject matter for

determination or decision in criminal Courts. That is why the Magistracy are crying that so many civil cases are given the garb of criminal complaints and the Courts are flooded with cases. My learned friend, Dr. Gour, says " Supposing you have entrusted property to a coolie to carry " I may tell him that section 406 will not be applicable to that case. It is section 407 which will apply. If anything is handed over to a carrier, he may carry the thing from Delhi to Lahore or from Delhi town to the Railway station. He will be called a carrier. Further, I may point out to my learned friend that section 406 will not, as I submitted before, apply.

Dr. H. S. Gour: A porter is not a carrier.

Dr. Nand Lal: A porter is not a carrier?

Dr. H. S. Gour: Of course not.

Dr. Nand Lal: What is he then? He is not a repository.

Dr. H. S. Gour: He is a porter.

Dr. Nand Lal: Then, Sir, Sir Henry Moncrieff Smith says, supposing money is entrusted to a revenue officer, then also, I may submit, section 406 is not applicable. That is quite a different offence. If a public servant criminally misappropriates money, he will be tried under a separate section. If a clerk or a servant in a company or office commits criminal misappropriation as such, he will be tried under section 408 or 409, but not under section 406. Section 406 is of a very mild character. It relates to the transactions which we find every day in life. (*Dr. H. S. Gour*: " It is non-compoundable, and three years imrisonment.") There are a number of offences which are non-compoundable, no doubt about that. The illustrations which have been given from the Government Benches are not of sufficient force, so far as the present debate goes. Therefore, in brief, I submit that this amendment which commends itself should be accepted, unless the Government Benches wish that all civil suits and civil contracts should be given the garb of criminal cases.

1 P.M.

Mr. B. S. Kamat (Bombay Central Division: Non-Muhammadan Rural): I move that the question be put.

Munshi Iswar Saran (Cities of the United Provinces: Non-Muhammadan Urban): I entirely agree with Sir Henry Moncrieff Smith that you should not allow offences to be compounded with which only the complainant is not concerned but the public at large is concerned. That is a very sound proposition to which I think no objection can be taken. But I am afraid he has not carefully considered the proposition that has been placed before us by Mr. Agnihotri. If you refer to section 407 there you find criminal breach of trust by a carrier. If you refer to section 408 you find criminal breach of trust by a clerk or servant. Again if you go to section 409, you find criminal breach of trust by public servant, or by banker, merchant or agent. The amendment which has been moved by Mr. Agnihotri does not refer to these sections but only refers to section 406. In section 406, then it is obvious that the two persons concerned are the man in respect of whose property a criminal breach of trust has been committed and the man who has committed it. Now, the point is—should the parties be allowed to compound the case? Sir, we find that the clause requires that you can compound it with the permission of the Court. It is not as if these two persons could compound it without giving the Court any chance of deciding whether or not that offence was compoundable. I

[Munshi Iswar Saran.]

submit, if there be any objection to it, it is removed by the provision that this case can be compounded only with the permission of the Court and not without it. It is rather difficult for a humble individual like myself to express any opinion with confidence when two distinguished and learned doctors disagree. We find Dr. Nand Lal on the one side haranguing with his usual force. We find Dr. Gour maintaining his position with equal vehemence. He says, if you allow these cases to be compounded, what is to happen? The man gets into the habit of doing the same thing over and over again. If you refer to clause 88 you find one offence, which can be compounded, is marrying again during the lifetime of husband or wife. Apply Dr. Gour's remarks. If you allow a man to compound that offence, then according to the learned doctor, he gets into the habit of repeating that offence.

Rao Bahadur T. Rangachariar: I wish to point out the grave danger in allowing such cases to be compounded. Take the case of a goldsmith. It is a very common case in almost every village or town. You entrust him with gold or silver for making ornaments and he does work for the public generally, for the village public or the town public. If the man commits a criminal breach of trust and you allow it to be compounded you offer a premium to such dishonest fellows to carry on that trade. Take the case of a tailor. You entrust him with valuable cloth to be converted into clothes. He carries on the trade for the benefit of the public and for his own benefit. If you allow such cases to be compounded, I think you will be running a very grave danger. The safeguard that you do it only with the permission of the Court is an illusory safeguard. The Court is not likely to know of the circumstances or the antecedents of the people. The Court is not omniscient. I think it is allowing too much in the hands of the Court, and the Court has only to dispose of the *particular* case before it. On the other hand, probably, the Court will be very glad that one case is out of its hands. (*A Voice*: "No, no.") The Court may say "I am saved the bother of trying this case," or as Mr. Subrahmanayam said, it may be a complicated case requiring investigations. So I think we are running a serious risk in allowing such cases to be compounded.

Mr. President: Clause 88 Amendment moved:

"In the proposed table in sub-section (2) of section 345 insert the following entry:

"Criminal breach of trust in respect of property not belonging to the State.	406	Owner of property in respect of which the offence was committed '."

The question is that that amendment be made.

The Assembly then divided as follows:

AYES—26.

Agnihotri, Mr. K. B. L.	Lakshmi Narayan Lal, Mr.
Ahmed, Mr. K.	Mahadeo Prasad, Munshi.
Ahsan Khan, Mr. M.	Man Singh, Bhai.
Asjad-ul-lah, Maulvi Miyan.	Misra, Mr. B. N.
Ayyar, Mr. T. V. Seshagiri.	Mukherjee, Mr. J. N.
Barua, Mr. D. C.	Nag, Mr. G. C.
Bhargava, Pandit J. L.	Nand Lal, Dr.
Chaudhuri, Mr. J.	Neogy, Mr. K. C.
Hussanally, Mr. W. M.	Ramji, Mr. Manmohandas.
Ikramullah Khan, Raja Mohd.	Reddi, Mr. M. K.
Iswar Saran, Munshi.	Sarvadhikary, Sir Deva Prasad.
Jatkar, Mr. B. H. R.	Subrahmanayam, Mr. C. S.
Kamat, Mr. B. S.	Venkatapatiraju, Mr. B.

NOES—47.

Abdulla, Mr. S. M.	Joshi, Mr. N. M.
Ahmed Baksh, Mr.	Latthe, Mr. A. B.
Bagde, Mr. K. G.	Ley, Mr. A. H.
Blackett, Sir Basil.	Moncrieff Smith, Sir Henry.
Bradley-Birt, Mr. F. B.	Muhammad Hussain, Mr. T.
Bray, Mr. Denys.	Muhammad Ismail, Mr. S.
Burdon, Mr. E.	Percival, Mr. P. E.
Cabell, Mr. W. H. L.	Pyari Lal, Mr.
Chatterjee, Mr. A. C.	Ramayya Pantulu, Mr. J.
Clow, Mr. A. G.	Rangachariar, Mr. T.
Cotelingam, Mr. J. P.	Samarth, Mr. N. M.
Crookshank, Sir Sydney.	Sarfaraz Hussain Khan, Mr.
Dalal, Sardar B. A.	Sassoon, Capt. E. V.
Davies, Mr. R. W.	Singh, Mr. S. N.
Faridoonji, Mr. R.	Sinha, Babu L. P.
Ginwala, Mr. P. P.	Spence, Mr. R. A.
Gour, Dr. H. S.	Srinivasa Rao, Mr. P. V.
Haigh, Mr. P. B.	Tonkinson, Mr. H.
Hailey, the Honourable Sir Malcolm.	Townsend, Mr. C. A. H.
Hindley, Mr. C. D. M.	Tulshan, Mr. Sheopershad.
Holme, Mr. H. E.	Webb, Sir Montagu.
Hullah, Mr. J.	Willson, Mr. W. S. J.
Innes, the Honourable Mr. C. A.	Zahiruddin Ahmed, Mr.
Jamnadas Dwarkadas, Mr.	

The motion was negatived.

Mr. J. Ramayya Pantulu: I move the following amendment:

"In clause 88, sub-cluase (*ii*) in the table in proposed new sub-section (2) of section 345 omit all the entries relating to the offences of (1) Cheating, (2) Cheating a person whose interest the offender was bound by law or by legal contract to protect, (3) Cheating by personation, (4) Cheating and dishonestly including delivery of property or the making alteration or destruction of a valuable security, and (5) Marrying again during the lifetime of a husband or wife."

These offences which I want to omit are offences punishable under sections 417, 418 , 419, 420 and 494 of the Indian Penal Code. These are not compoundable at present under the existing law but they are made compoundable with the permission of the court, in the Bill. My proposal is that they should not be made compoundable even with the permission of the Court. Taking the cases of cheating first, they constitute a very serious batch of offences. No doubt, the persons immediately affected are particular individuals and every offence, in the first instance, is a tort, but it is more than a tort. The crime affects not merely the individual but also society at large. It is an offence against society. Therefore a man who commits the offence offends not only against a particular individual but also against society and society has a right to be protected against criminals. Therefore, to make an offence compoundable really amounts to this. You settle the dispute between the criminal and the person who is immediately affected by the crime but the society at large which is also offended against by the commission of the crime is left unprotected and that is the reason why the more serious offences are not made compoundable, because it is not only the party who is immediately affected by the crime that is involved but also the society at large. There is another aspect of this case. The complainant in these cases may not always be the person who is cheated, because the law does not require that the complaint should be made by the person cheated. Suppose the prosecution is conducted by the police and behind the back of the police the accused goes and compounds the offence with the man who is cheated. The prosecutor may know nothing about it. I think that is a very undesirable state

[Mr. J. Ramayya Pantulu.]

of things. The police prosecute a man for the commission of an offence and the offence is compounded without the knowledge of the police. I think, Sir, that there is a great danger in allowing such offences to be compounded. Again, take the case of bigamy, marrying again during the lifetime of a husband or wife. It is an offence against public morality. I do not think such offences should be allowed to be compounded even with the permission of the court. Some of my friends may say, 'You have got the guarantee of proper discretion being used by the Magistrate in refusing to allow the offence to be compounded.' Well, most of these cases come in the first instance before the Magistrates and during all these days we have been trying our very best to show that the Magistrates cannot be trusted to use their discretion properly. That is the game which we have been playing. We now want to believe that these Magistrates will use their discretion properly. Is it not likely, as has been pointed out by Mr. Rangachariar that there may be some Magistrates who would be anxious to get these cases compounded, so that they may not have any more trouble with these cases? We hear of Civil Judges, District Munsifs and Sub-Judges who bring pressure to bear on the parties to compound their cases, and when a party does not want to come to terms, well, generally he is supposed to labour under a disadvantage to that extent. And so it is not at all unlikely that there may be Magistrates who wish to get rid of their cases, who wish to show a clean sheet at the end of the quarter or at the end of the year, and to show all these cases as disposed of. I for one, Sir, would not trust even a Judge to exercise his discretion in allowing such very serious cases to be compounded. I would not give power even to a Sessions Judge to allow these cases to be compounded. I well remember, Sir, a case of cheating in which no less a person than my Honourable friend, Mr. Seshagiri Ayyar, was a victim. There was a man, Sir, who appeared under a false name and cheated my friend, Mr. Seshagiri Ayyar, and not only he but a number of other prominent gentlemen in Madras were cheated by that man. I had the satisfaction of sending that man to jail. Would Mr. Seshagiri Ayyar allow that man to be let loose on society? I think, therefore, in all the circumstances, these offences should not be allowed to be compounded either with or without the permission of the Court.

Mr. President: Amendment moved:

"In clause 88, sub-clause (*ii*) in the table in proposed new sub-section (2) of section 345 omit all the entries relating to the offences of—(1) Cheating, (2) Cheating a person whose interest the offender was bound by law or by legal contract to protect, (3) Cheating by personation, and (4) Cheating and dishonestly inducing delivery of property or the making alteration or destruction of a valuable security."

The question is that that amendment be made.

Mr. K. B. L. Agnihotri: Sir, I rise to oppose the amendment moved by the Honourable Mr. Pantulu. He has given certain reasons for moving the amendment. One of them is, how would you allow cases prosecuted by the police to be compounded behind their back? If my Honourable friend had taken the trouble of going through the whole of sub-section (2) of this section, he would have found that it is not only those cases which are non-cognizable that have been made compoundable, but there are also other cases which are cognizable and which have been so provided by the Government, and which my Honourable friend has not objected to and has accepted them to remain as compoundable. For instance, sections 324, 325, 327, 328, 343, 346, 347,—all these cases are compoundable and all

these cases are cognizable cases. So, may I ask, how can such cases be compounded with the permission of the Court behind the back of the police? The police ceases to have any right in a case the moment they put up the case before the Magistrate. They have taken cognizance, they have brought it to the notice of the Magistrate that the cases are of a nature in which the public is interested and the offences are such in which the State is interested. When the Honourable Mr. Pantulu would authorise a compromise in such cases, why should he not allow a compromise in cases under sections 417, 418, 419 and 420? The second point advanced in support of his argument for his amendment is that they affect many persons and if you were to allow the compounding of such offences with one man, the other persons would have a grievance against the accused. My humble submission is that in such cases leave it to the discretion of the Court: The Court may or may not permit the compounding of the offence.

Mr. J. Ramayya Pantulu: You trust the Court now.

Mr. K. B. L. Agnihotri: Certainly, the Government gives discretion to the Courts and trust them; I may or may not trust the Court at all, but that does not matter. That is another matter, whether I trust the Court or not, but I can at least claim to use that argument against you who had implicit trust in them so long. Sir, if many persons are affected by any offence which has been put up by the police, and if the complainant on whose complaint the police prosecuted that man compounds the offence with the accused, what barrier is there to bring up the accused again, where is the barrier to prevent the Magistrate or Judge from proceeding against that accused and for not granting that permission which is made indispensable under this clause? My Honourable friend has given a case in which some of our Honourable friends were affected. In that case it was a very right thing that such a man was convicted. Supposing one of them was kind-hearted enough to compound that offence, would the police have been debarred from prosecuting the man again? Would any other person or my Honourable friends have been debarred from prosecuting him again for that? Supposing the charge was framed when such a composition would have amounted to an acquittal of the accused; in that case the Court could not have permitted such composition when many persons were concerned, or when the man had cheated many other persons. The cases in this section refer only to cases which are more or less of a technical nature. It is not only that the present Joint Committee accepted this amendment, and brought it into the Code, but even the Lowndes Committee, which consisted of very eminent lawyers and Judges, considered it desirable that these cases should be included in this clause of the section. My Honourable friend has also referred to section 494—so far as morality is concerned, everyone would certainly admit such a contention, but there are customs and customs prevailing in the different parts of the country, and are not uniform in all parts of the country. Take the case of portions of the country which are in a very backward condition where the man, the husband, may be satisfied with coming to the Court . . . .

Mr. President: Order, order. That question is not before the House.

Mr. K. B. L. Agnihotri: So on these grounds I beg to oppose the amendment moved by my Honourable friend.

Mr. R. A. Spence (Bombay: European): I move that the question be put.

The motion was adopted.

Mr. President: The question is that that amendment be made.

The motion was negatived.

Mr. President: Further amendment moved:

" In clause 86, sub-clause (*ii*) in the table in proposed new sub-section (2) of section 345 omit all the entries relating to the offence of marrying again during the lifetime of a husband or wife."

The question is that that amendment be made.

The motion was negatived.

The Assembly then adjourned for Lunch till Fifteen Minutes Past Two of the Clock.

The Assembly re-assembled after Lunch at Fifteen Minutes Past Two of the Clock.

Rao Bahadur P. V. Srinivasa Rao: Sir, with Mr. Agnihotri's permission and on his behalf I move the amendment standing in his name:

" In clause 88 for sub-clause (*iv*) substitute the following:

(*iv*) For sub-section (5) the following sub-section shall be substituted, namely:

(*v*) Notwithstanding anything contained in this Code any case instituted on a complaint, not being one by a public officer as such, may be compounded by the person aggrieved."

Mr. H. Tonkinson: Sir, in rising to oppose this amendment, I think it will be only necessary for me to remind the House of the discussion which took place upon the amendment No. 226 which was moved by my Honourable friend, Mr. Agnihotri, yesterday. My Honourable friend then proposed that in section 259 the words " and the offence may be lawfully compounded " should be omitted. The effect of that, Sir, would have been that in proceedings instituted upon complaint, if the complainant was absent then the Magistrate would be able to discharge the accused. Now, Sir, in substance the present amendment is exactly on all fours with that amendment. When my Honourable friend moved his amendment I believe he secured the support of himself alone. I hope, Sir, that the present amendment will secure the same measure of support.

Mr. President: The question is that that amendment be made.

The motion was negatived.

Rao Bahadur T. Rangachariar: Sir, I do not move my amendment No. 264, but I move No. 265:

" After clause 88 (*v*) insert the following sub-clause:

' (*vi*) to sub-section (7) after the word ' section ' the words ' The composition of an offence under sub-section (1) if made out of Court may be allowed to be proved by any other evidence ' shall be added '."

Sir, Honourable Members will notice that there are two ways of compounding an offence. The first clause provides for composition by the parties concerned without the intervention of the Court. The Court takes no part in the composition of an offence when it takes place under the first

clause. Under the second clause the Court's permission has to be obtained. Now, a composition means, not a mere withdrawal, not a mere non-prosecution, but an agreement come between both parties, *i.e.*, the complainant and the accused. They meet out of Court, come to terms as regards how they are going to compose the difference between them, and that forms the composition. So that, invariably it has to take place outside the Court. The complainant receives money or some other consideration for his agreeing not to prosecute the offender for the offence which he alleges the accused has committed. Now, it some times happens that the complainant after receiving consideration, whether it be in the shape of money or otherwise, wants to back out of it. It happens in civil cases; it happens in criminal cases. In civil cases, as Honourable Members know, compromise or adjustment of a suit can take place outside a Court and the Court is asked to record it under section 373. So also compositions are really allowed under the Criminal Procedure Code, because they are more or less quasi-criminal but partaking of a civil nature. That is why the law allows composition. Therefore there is nothing in the section as it stands to prevent the procedure which I have indicated in my amendment. In fact all the rulings recognise that the procedure which I have indicated in my explanation, or rather in my sub-clause, should be adopted. In a case in XXI Calcutta page 103, it was laid down that it is competent to the Court in which the charge is pending to take evidence as to whether there was in fact a composition outside the Court when one of the parties to it refuses to abide by it when the case comes on afterwards for hearing. That is in XXI Calcutta 103. That was followed in Madras in a case reported in XVIII Madras Law Times, page 602. It was also followed in the Patna High Court in I Patna 21. And I do not find any case to the contrary. In fact, almost every Court has followed that. And after all it is only natural that composition should take place outside the Court because the Court does not sit there as an arbitrator between the parties and say "Now come on, you complainant, you accused, what are your terms, how are you going to settle this business?" Composition then must take place, in the very nature of things, outside the Court. And human nature being what it is, sometimes these agents who are hovering round the criminal courts get hold of the parties, and the peace already effected is disturbed by these agents and they try to induce one party or the other to back out of the compromise already effected. And in such cases one party or the other, often times the complainant, after taking the money outside the court, comes forward and says "Very well, I will still insist on prosecuting the accused person." Honourable Members will agree with me that it is not right to permit him to adopt such a course. There must be some way out of it. In Civil cases there is no difficulty. One party or the other puts in a petition to the Court saying "we have adjusted our differences" and wants the Court to record it, and the Court makes an inquiry and records the adjustment if it is satisfied that it is a lawful adjustment. So also here. As the composition takes place outside the Court, one party or the other will inform the Court that we have adjusted our differences, and the procedure is the Magistrate puts a question to the complainant "Have you adjusted it?" When he admits it, the Magistrate records that the case has been compounded. I only want to make it clear in this section that a composition made outside the Court can be, may be allowed to be, proved by any other evidence—that is, the evidence may be in writing, the evidence may be that of a respectable pleader or a family friend, who might have intervened and effected a compromise. If one party backs out of it, then there will be evidence called. I think it is

[Rao Bahadur T. Rangachariar.]

but right that we should allow this evidence to be given. It is the practice. I am only trying to introduce what is the practice to-day and what has been recognised to be the rightful practice.

The object of these changes which the Government have introduced in their various amendments is to introduce into the Code matters on which there have been judicial decisions; if there have been divergences of opinion the Legislature makes it clear what it intends. If the judicial decisions have made a certain position clear the amendments which have been introduced hitherto are to make it clear what the Legislature intends. So also, I am not here doing violence to existing practice; I am only seeking to introduce into the Code a practice which is recognised to be legal and regular. I therefore move the amendment as it stands in my name.

Mr. H. Tonkinson: Sir, I rise to oppose the amendment. I think, Sir, that in these cases the position which we must take is that normally unless the complainant or the person who has power to compound the offence appears in Court and admits that he has received compensation, composition should not be permitted. We do not wish, Sir, to increase by any means the number of cases in which Courts have to inquire as to whether a composition has been effected outside the Court. As regards the rulings which my Honourable friend referred to, I notice that the leading case was to the effect that when an accused person alleges that an offence with which he has been charged has been compounded, so as to take away the jurisdiction of the Criminal Court to try it, the onus is on him to show that there was a composition valid in law. Well, Sir, I am not at all clear that if the amendment proposed by my Honourable friend is accepted we shall be in fact giving effect to that ruling. My Honourable friend says that this is the present practice. Well, Sir, if it is the present practice, we would prefer to leave it at that without adding these words to the section.

Mr. Pyari Lal (Meerut Division: Non-Muhammadan Rural): Sir, I oppose this amendment and my reason is this: we would not only be turning a Criminal Court into a Civil Court for the purpose of decising as to whether a composition has taken place or not, but we would be introducing any amount of delay in the disposal of criminal work. What is after all the object of allowing these offences to be compounded? The object is that the dispute or enmity between the parties which has arisen thereby may for the future be put an end to. But if it has to be proved whether composition has taken place, the same state of things which existed before will continue for ever. So by allowing this amendment, that is, by allowing proof of composition, we will be simply defeating the object of this section. My learned friend, Mr. Rangachariar, says this is the practice usually followed. With all respect for his wide experience and learning I must join issue with him on this point. I have never yet come across a case where a Criminal Court has gone into the evidence as to whether a real composition between the parties has taken place or not. From the mere fact of the section being silent on that point, the Patna High Court or the Madras High Court or the Bombay High Court might have put that interpretation on it. Otherwise to me this state of things, at least as far as my province is concerned—and I am aware of the practice that pevails there—this state of things does not exist; and I therefore think that it will be simply delaying proceedings *ad infinitum* to allow an amendment of this kind.

Mr. J. N. Mukherjee (Calcutta Suburbs: Non-Muhammadan Urban): Sir, I also rise to oppose the amendment, and I wish to supplement what has fallen from my Honourable friend, Mr. Tonkinson, and my Honourable friend who has just spoken. Taking into account the comprehensive character of the amendment proposed, I shall presently proceed to consider its effect. The amendment as it is worded says in its first portion " the composition of an offence under sub-section (1), if made out of court, may be allowed to be proved." What my Honourable friend, the Mover of the amendment, evidently means is that the composition must be such as may be lawfully effected. But as it is, it includes all possible cases of composition, lawful and unlawful.

Rao Bahadur T. Rangachariar: Under sub-section (1).

Mr. J. N. Mukherjee: Quite so. Composition of course is doubtful under sub-section (1). But as the amendment is worded it may be taken to suggest all possible cases of composition, lawfully or unlawfully made.

Rao Bahadur T. Rangachariar: Under sub-section (1).

Mr. J. N. Mukherjee: Quite so. But the words " composition of an offence under sub-section (1) " may be taken to throw some doubt as to whether the amendment proposed contemplates even such compositions as those which although mentioned in sub-section (1) are, however, unlawfully made.

Now, Sir, the question that arises in the case of money-payments, referred to by the Honourable Mover of the amendment, comes to this. In all such cases, it must be supposed that it is the accused who pays the money to the complainant as an inducement for the composition; and it may be taken in some cases, that the complainant is made to accept the sum by hook or by crook. Here the accused cannot be a poor man, but he is able to pay, in order to be out of the scrape, and it may often happen that the complainant is not given any *locus penitentia* as it were. The matter may have been simply rushed in such case or a trick may have been played upon the complainant. If the composition was a voluntary one brought about without any undue influence being brought to bear upon the situation, why is it that such a composition, it may be asked, could not last for a short space of time? One would find an element of suspicion in that. It might not be a case of denial after deliberate cheating, after all. Therefore, I submit, Sir, that if the inquiry is to be made following a positive direction of the law, and the composition is enjoined to be proved in all cases of denial, in the way suggested, there is no doubt litigation will considerably increase. There is every chance, in such event, of a crop of cases arising, under the circumstances, which will be extremely undesirable to have. Again, where a monied man happens to be the accused and the complainant is poor, the monied man can always be expected to devise means, by the employment of his money or influence, to make the complainant agree, at least temporarily, to a proposal of settlement and in that way the accused can always have a side-issue as to composition raised in course of a trial in a Criminal Court, and have it decided, one way or another. I think, Sir, that is not desirable. The trial of the case itself being protracted in this way will exhaust the complainant and will ultimately defeat the ends of justice. Apart from other points, it must be remembered that the *ratio decidendi* of

[Mr. J. N. Mukherjee.]

a judgment is always surrounded by facts which govern the conclusion arrived at, in every case, and the conclusion if it be detached from and be shorn of the circumstances of the case, and then be put in an abstract form for purposes of general application, a source of danger of error is likely to creep in by the very process itself of generalization from concrete to abstract. I submit that if it is the meaning of the case law on the point that the Court can consider and decide upon any question of disputed composition, upon the interpretation of the law as it now stands, it can always do so, in a proper case. But it is undesirable to have such cases adjudicated upon in a criminal trial as a rider to the criminal case that is before the Court. This will be the result if the amendment in question be made part of the Statute.

As regards the last part of the amendment proposed, namely, the part which says: "If made out of Court may be allowed to be proved by any other evidence," it is difficult to understand what this "other evidence" is. These are verbal matters no doubt, but the amendment, as it is, apart from the question of drafting is open to objection, as I have submitted, on the ground of the principle underlying it. I therefore, Sir, oppose the amendment.

Dr. Nand Lal: Sir, only a couple of hours back, I was of opinion that this amendment was of no use and that it was futile, but after my deep study of the whole question I now stand converted. I have given my serious thought to it, and I think that this is a very useful amendment. Now the ground which has been taken in opposition to this amendment is simply this, that it will prolong the proceedings in the Criminal Court, and that the Criminal Court shall have to determine whether there was any composition outside the Court, and if so, whether it is lawful or unlawful. Now, Sir, supposing the argument of the opposition holds good and the composition is not accepted. The case proceeds on, the complaint or the chalan as the case may be is proceeded on with, and then naturally it will take greater time.

But, if the composition is accepted, if it is held by the Court that in reality there was composition and the complainant had backed out on account of some dishonest motive, naturally, Sir, you will agree with me that it will nip the whole proceedings in the bud and time will be saved, and, at the same time, the promise which was held out, the contract which was effected outside the Court between the complainant and the accused will be substantiated and will be held as true. It may happen in a good many cases. There is some sort of valid agreement between the accused and the complainant, Sir, outside the Court, and a clear understanding has been arrived at that, when the complainant appears before the Court, he will make a statement that the case has been compounded, but, on account of some dishonest intervention or on account of the inducement held out to him, he backs out. When he appears before the Magistrate, the accused says: Sir, the case was compounded. The complainant says: No. Then, naturally, Sir, it would be better if evidence be recorded in order to determine whether really there was compromise or not. The case is compoundable. It has been allowed by the new provision that certain offences, in regard to which this amendment is moved, are compoundable. So far as the composition goes, it is lawful. Then the question which is the crucial question of the whole case would be whether that composition has

been brought about or not. That point could easily be determined. So, therefore, the ground which has been advanced that there will be delay in the criminal proceedings I may respectfully submit, with due deference, has got no force.

The other point which has been urged by the other speakers on this amendment is this. That, as a matter of fact, it will give rise to a number of points which could naturally arise in a Civil Court and that a Criminal Court should not be called upon to determine those points. In reply to that, my submission is, why not. We have got in any case an analogy. That in civil cases, if the case is compromised and one of the parties says that the compromise was not effected, then there is a clear Statutory law that the Court will take evidence and, if it finds on the ground or on the strength of that evidence that in reality there was a compromise between the parties, then the adjustment of the claim, as it is technically called, will be recorded. So it ought to be in the criminal case which is compoundable. I cannot find in what way it will hamper the work of the Criminal Courts. One of the arguments which was advanced by the Honourable Mr. Mukherjee was that most probably it will give rise to animosity between the parties, that the underlying spirit, which has actuated the Government to incorporate this provision, is that the parties may become friends, and that if the decision is given by the Court again on the same point, then there will be no room for friendship. I say this argument does not hold good. Rather, if this composition is accepted as it has been urged by the accused in the Court before the Magistrate, then there will be friendship again, namely, friendship will be revived. Dishonesty should never be countenanced—we should never set a premium on dishonesty. If the complainant has given an undertaking to the accused outside the Court why should he not be asked to adhere to it? In the interests of honesty, I very strongly support this amendment which will be of great utility both to the Government and to the public.

Sir Henry Moncrieff Smith: Sir, Dr. Nand Lal devoted most of his arguments to showing that there would not be any delay or any prolongation of proceedings if this amendment were accepted. But, Sir, for the most part he confined himself to the one case in which the parties come up and the accused is able to prove that there has been a composition and the Court holds that there has been a composition and therefore acquits the accused. He did not explain, Sir, how delay would be avoided or the proceedings would be expedited in the converse case, which would probably be quite 50 per cent. of the cases, in which the accused was not able to prove that there had been a composition. I wish to put it to the House in another way. Should we not, by introducing this new provision into the Code, be supplying the accused with what in effect would be an additional false defence? The accused person sees the case is going against him. He goes into the Court and says: You cannot go on with the case: we have compounded it. The Court asks the complainant if that is so and the complainant denies it. However, we are going to compel the Court to inquire into it and to give the accused an opportunity of proving his statement. Up comes the accused with all his friends and tries to prove that he did pay the complainant Rs. 5 or Rs. 10 and that the complainant agreed to withdraw the case. Sir, there is a very very grave danger of this resulting in further prolongation of proceedings in this respect. You are giving the accused an opportunity of providing himself with an additional defence which I venture to suggest in 90 per cent. of the cases will be a false one.

Mr. T. V. Seshagiri Ayyar (Madras: Nominated Non-Official): Sir, with your permission, I wish to move a verbal amendment to the amendment moved by Mr. Rangachariar, namely, to omit the words "by any other evidence." These words are unnecessary and I ask that they should be omitted.

Rao Bahadur T. Rangachariar: I accept the amendment, Sir.

Mr. T. V. Seshagiri Ayyar: I wish to say a few words with regard to the arguments which have been put forward. I am sorry I was not here when the discussion went on, but I have been able to understand enough of the gist of the arguments against this amendment to speak on it. Sir, Sir Henry Moncrieff Smith just now told the House that the acceptance of the amendment would result in the prolongation of criminal proceedings, and that it is the essence of these trials that they should be expedited. Sir, there is an equally important conservation in regard to criminal trials. We should not give room to a person to blackmail or to behave dishonestly. If a complainant and an accused compose their difference outside the court and if as a result the complainant receives some money but he does not want to report it to the court, what is the position of the accused? The complainant, after receiving money on the understanding that he would not press the prosecution, would persist on prosecuting. Does it not encourage him to blackmail? Does it not encourage him to behave dishonestly? And is it in the interests of justice that we should give room for such a state of affairs? If a man after having agreed to abandon the prosecution and after having received consideration for the abandonment, still goes on pressing the prosecution, in the hope that he may be able to induce the poor accused to pay more money, is it in the interests of justice that he should be encouraged to do so? Sir, I understand it was said that this is unnecessary because there have been some decisions upon the matter. If I understand the position aright, I believe the Lowndes Committee were trying to introduce amendments into the Code with a view to embodying decisions of courts. No doubt there are two decisions of two courts. The matter had to go to the High Court and two High Courts accepted the principle underlying the amendment. Some lower court in other provinces may take it into its head not to follow the decision of the two High Courts. Is it in the interests of justice that we should embody in the section language which would make it unnecessary to parties to resort to the higher court? I think having regard to the two decisions and having regard to the object of the Lowndes Committee, it is desirable to make the position clear, so that there may be no doubt in the minds of the Magistrates who have to try these cases. Under these circumstances, I think this amendment ought to be accepted. Having regard also to the analogy of civil courts, where, if a composition is entered into outside the court, the court allows proof to be given of such composition, I think that we should provide a similar remedy in criminal cases if only to prevent persons behaving dishonestly and blackmailing others.

Mr. P. E. Percival (Bombay: Nominated Official): Sir, I rise to oppose the amendment. I wish to support the statement of my friend Mr. Pyari Lal, as I have never come across a case in which an accused person has come to Court and has said that he has compounded the case, although the complainant is not there or denies having compounded the case.

I have never known a case in which the Courts have approved of the compounding of a case in such circumstances, and I do not think they would do so. I find in a Bombay case that:

"When the parties to an offence compoundable without permission of Court produce before the Court a writing signed by them the Court is bound to act upon it and is not at liberty to call upon the parties to adduce further evidence that the case has been compounded."

This is a decision in favour of the accused. If the accused produces a document signed by both parties, or approved of by both parties, saying that the case has been compounded, the Court does not go behind that. It is not right on the one hand that the accused should be allowed to come forward and say that the case has been compounded, and at the same time that the complainant should not be allowed to come forward and say that the case has not been compounded. The fact is there is no analogy between the civil procedure and the criminal procedure in connection with these proceedings. You cannot expect the Court to go into inquiries entirely outside the criminal proceedings, and say, "I shall inquire into the question whether A paid B Rs. 10 or Rs. 15, or whether they came to an agreement at all." Besides this the Court does not go into the question whether a proper or full amount has been paid for compounding the case or not. All that it considers is that the complainant says in Court "I have compounded the case;" and the Court need not trouble any more about the matter. For these reasons, I suggest there is no reason to make the amendment proposed.

Mr. President: Amendment moved to the original amendment:

"To omit the words 'by any other evidence'."

The question is that that amendment be made.

The motion was negatived.

Mr. President: Original amendment moved:

"To insert the following sub-clause at the end of clause 88:

'(*vi*) to sub-section (7) after the word 'section' the words 'The composition of an offence under sub-section (1) if made out of Court may be allowed to be proved by any other evidence' shall be added'."

The question is that that amendment be made.

The motion was negatived.

Clause 88, as amended, clauses 89, 90, 91, 92 and 92A were added to the Bill.

Mr. J. Ramayya Pantulu: I move:

"In clause 93, in the proposed new sub-section (2-A) of section 356, after the word 'hand' insert the words 'or cause it to be taken down in that language in his presence and hearing and under his personal direction and superintendence."

I move this amendment to meet the case of a Magistrate or Judge who does not know the language in which the evidence is given. In such cases, it will be necessary for the Magistrate or Judge to have the statement recorded in the language in which the evidence is given. I trust the amendment will commend itself to the House.

Mr. H. Tonkinson: I accept that amendment.

The motion was adopted.

Mr. K. Ahmed: I move:

"In clause 93 for the words 'following sub-section' substitute the words 'following sub-sections' and at the end of the clause insert the following, namely:

'(2-B) In trials before the High Court the evidence of each witness shall be recorded under the direction of the presiding Judge'."

Sir, it is desirable that the presiding Judge should see that the evidence is recorded. Otherwise, it is very, very difficult for the Court of revision or a higher Court, for instance, a Full Bench, to come to a decision and see whether a case has been made out or whether it is a fit case for the Full Bench to interfere with the decision of the Lower Court. In the absence of that, it is very very difficult for any Judge or any court of law to decide a case because the particulars of that case are not before the court.

Sir Henry Moncrieff Smith: I think it will save the time of the House if I am allowed to make one brief remark. I think my Honourable friend has overlooked section 365 of the Code. That section, as amended by the present Bill, lays down that every High Court shall make rules prescribing the manner in which evidence is to be taken and will also lay down that the evidence shall be taken down in accordance with those rules. I think, Sir, that will surely meet the point of my Honourable friend.

Mr. K. Ahmed: That argument is only for amendment No. 277, to clause 96, on the top of page 38 . . .

Sir Henry Moncrieff Smith: I move that the question be now put.

Mr. President: The question is that the question be now put.

The motion was adopted.

The amendment was negatived.

Mr. President: The question is that clause 93, as amended, do stand part of the Bill.

The motion was adopted.

Mr. K. Ahmed: I move:

"In clause 94 (*iii*) for the words from 'it shall not be necessary' to the word 'charge' the words 'the Magistrate shall record the evidence briefly' be substituted."

Honourable Members will see that in section 362 of the Code of Criminal Procedure, item No. 4, I want the words put in, namely, "the Magistrate shall record the evidence briefly." May I read the section with your permission? "In cases other than those specified in sub-section (1) it shall not be necessary for a Presidency Magistrate to record the evidence or frame a charge." My amendment is that the Magistrate shall record the evidence briefly. This House has got the representatives of the people and they will see the difficulty. The matter is entirely at the discretion of the Magistrate to take down the evidence if he likes or not to take it down if it does not suit him. He could convict a man then and there on the substance of the evidence he may have taken down and

the higher court cannot decide a case properly as it has no other evidence except that material on which the man has been convicted. It is the rule of nature, Sir, and no doubt any Magistrate convicting a man must apply that theory and if that theory is applied, then you can appreciate the position of the unlucky accused who is tried and convicted on that portion only of the evidence, the evidence the important part of which has been missed. My amendment is a very important one suggested by able grey-haired lawyers and experienced men of the world and that you must not give discretion to the Magistrate to make note of a portion of the evidence only because it is not safe at all (in this country). Unless you get this down, unless the Magistrate takes it down, records it, word for word, and if the Magistrate records it only briefly, if the more important parts are not taken down, it is for the Revisional Court to see those most important parts, and if these important parts are missed, the poor man is wrongly convicted, and therefore it is for the higher Courts to see that justice is done to him, and under the circumstances, Sir, it is the duty of the Revisional Court under section 439 of the Code of Criminal Procedure, or probably under section 15 of the Charter Act or under the Government of India Act, 1907 and so on, we should make the High Court, revisional side, satisfy itself as to the correctness or propriety of the order. Sir, if there are provisions of the Criminal Procedure Code that appeals should be heard, and cases should be revised, and in the hearing, under those sections, Sir, if the full material is not placed before the Court, is there any purpose which will be served by simply getting a Bill, which has been passed by the Council of State, passed here, if the important portions are missed in the Bill. I ask that this House will see its way, I ask each and every Honourable Member of this House to consider the point, that whether it is a sound theory, a sound principle of law, that it must provide sufficiently that if a man is going to be tried, he must be tried properly. Possibly the Government Member in charge will find that it will be a miscarriage of justice if a Magistrate is given that discretion, if the law does not provide for the safety and protection of the people in the administration of justice, a fair and impartial trial should be held according to the soundest principle of law, that the offence adduced against the accused by the prosecution should be taken down, and it is for the revisional Court to see whether this man has been convicted according to law, rightly or wrongly, properly or improperly. If that is so, Sir, I do not find any difficulty for my Honourable friend to accept it, because that will certainly make the law more reasonable than it is by leaving it to the discretion of the Magistrate, to the sweet will of the Magistrate, and that he should only take down the substance of it and not the real part of the evidence upon which this man is convicted: and it is no use getting a number of Judges, getting a number of appeals and revisions, when you have not got the materials before them, and therefore, you are really doing injustice, because you are supposed to provide everything and all for those higher Courts to revise the cases under revision, but they have not the full material before them, and still you come and say, ' here is your appellate Court, the Judge says that your conviction is right or that your conviction is wrong '—but you have not given that opportunity of a fair trial that was expected. I suppose, Sir, it will be wanting,—in the Bill, it will affect the administration of justice in this country as far as the Criminal Procedure Code is concerned. I ask, Sir, most humbly that the Government will find themselves able to accept it, because, Sir, there is not so much difficulty in it. I would not saddle, Sir, the Government Bench with important rulings of the High Courts, but, Sir, it is

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commonsense. But, Sir, it is a commonsense that if the Government of this country convict a man of an offence and the taking down of the evidence is left to the discretion of the Magistrate, then if the man goes in appeal to the High Court and to the Privy Council, and they will say, " We are sorry; the learned Magistrate did not take down the real essence of the evidence, the important words that you rely on for the defence of this man." Is that, Sir, a sound principle, leaving so much discretion and liberty with the Magistrate? I leave it entirely, Sir. I move the amendment.

3 P.M.

The Honourable Sir Malcolm Hailey: I do not intend to go into the merits of the motion that Mr. Kabeer-ud-Din Ahmed has put forward, and for a simple reason. The law regulating the procedure of our Presidency Magistrate has remained unaltered for many years, but it has come under a good deal of criticism. There are many who have expressed the view that the procedure now applicable to Presidency Magistrates is not suitable in view of the present composition of the Presidency Magistrate's Courts and their modern developments. We have been invited at different times to go into the whole of this question; and for myself I think that it would be better if we had an opportunity of investigating it as a whole, and consulting both Local Governments and the High Courts concerned, before we proceed to make any change at all in the law regulating procedure. If changes in procedure are required, they would come better as the result of such an investigation into the whole question, and I would deprecate making small modifications at present in the procedure applicable to the Courts. For this reason, Sir, I hope Mr. Kabeer-ud-Din Ahmed will see his way to withdrawing the amendment before the House.

Mr. K. Ahmed: I beg to withdraw the amendment.

The amendment was, by leave of the Assembly, withdrawn.

Clauses 94, 94-A and 95 were added to the Bill.

Mr. K. Ahmed: I suppose, Sir, that this amendment is not included in the promise given by the Honourable the Home Member in which he is going to bring these matters into conformity with the laws. This refers not to Presidency Magistrates' Courts but to a Court called the Honourable the High Court. Sir, I move:

" After sub-clause (*ii*) of clause 96, insert the following sub-clause:

' (*ii*) (*a*) To the proviso to sub-section (5) the following shall be added, namely:

' In trials before the High Court the heads of the charge shall be recorded under the direction of the presiding judge and shall be signed by him."

Members will kindly see that if a case (called a Sessions case) is tried by the Quarter Sessions of the Honourable High Court of Calcutta, Sir, that case is tried like this: 9 jurors sit to try that case, and then the case is put before the gentlemen of the jury and the case is made out by the Public Prosecutor. It is heard no doubt at great length, but the difficulty that we come across when we go against the order of the learned Judge, against sometimes the verdict of the gentlemen of the jury, and file an appeal before the Full Bench composed of sometimes five of the learned Judges of the High Court or three of them at least if not more. Then, Sir, the learned Judges who preside over the Session no doubt hear our appeal, but they generally find it very difficult to follow the case, because

the evidence is not before them, because the most important portions of the documents are not before them, the heads of the charges are not even signed by the learned Judge, nor recorded at all by him, and the result is that many of them are censured, and even the Advocate General is censured, because the Advocate General has given his sanction or fiat which can only apply to that sort of trial. We approach the Advocate General for the sake of getting this fiat, and we move the full Bench with this result. In a case reported in XXIII Calcutta Weekly Notes at page 426 (my Honourable friend, Mr. Chaudhuri, is the proprietor of this Report), five learned Judges of the Honourable High Court in 1919 comprising the Chief Justice, Sir Lancelot Sanderson, Sir John Woodroffe, Sir John Chitty, Mr. Justice Fletcher and Mr. Justice Teunon, made the following remarks. I shall read an extract of the actual words that fell on that occasion from the mouth of the Honourable Chief Justice we have got at present. The learned Chief Justice says:

"Before I conclude my judgment I desire to refer again to the fact that there were no notes of the learned Judges summing up taken by the learned jury and Counsel for the prosecution. In my judgment it is most desirable that in these cases, specially in an important case like this, the learned Counsel for the Prosecution should take a note of the summing up of the learned Judge. It is impossible for the learned Judge himself in his summing up to take a note. What has happened in this case is an instance of how desirable it is that these notes should be given. It may be that if in this case adequate and reasonable notes of the learned Judge's summing up had been taken a great deal of time and expense might have been saved. At all events, I hope that in future regard will be had to what has been said, and that proper notes of the learned Judge's summing up will be taken."

Now, Sir, it is not a Court or Bench where we get a certified copy of the order that you are moving there against the order of another Court or a Judge or a Magistrate or certified copies of deposition that you had applied for and have taken from and enclosed in a memorandum of appeal or have got a certified copy to show to the Full Bench that this is the evidence adduced in the case against you. Nothing of the kind. I hope the majority of the Honourable Members will understand and that this is an extraordinary kind of trial that you have in Calcutta where you do not get a copy of the evidence upon which a man is sent to jail. This is a procedure by which the Court will not take down under what section you are charged, the offence you are charged with and of which you are convicted for so many years. It is a curious part of the law, as the learned Chief Justice has found—as I read out just now. I hope that we will also see, Sir, that this extraordinary procedure should no longer be allowed to continue. Six years have gone when the matter was under contemplation since 1916 and to-day, Sir, in 1923 on the 7th of February we shall have something which is reasonable and which is a sound provision of law; it is high time that we should not be tried under any law which is wrong and in which there is no sound principle laid down. Here we have the assistance of lawyers from all parts of the country and the benefit of all these opinions, and here are amendments brought forward by the representatives of the people, and I ask, Sir, that this amendment, which I shall repeat again, should be accepted, *viz.*, that in trials before the High Court the heads of the charge shall be recorded under the direction of the presiding Judge and shall be signed by him. Thereby we shall be able to get a signed copy and we shall get copies of the deposition and we shall get thereby what Honourable Members will see, is obtained in other parts of the country. Justice is nearer perhaps in the rural districts than in the town of Calcutta. In that place everything can be had, we have got a High Court and a number of Judges; but justice is not accessible to us. I hope this is the high time

[Mr. K. Ahmed.]

when the Government Bench will probably accept my amendment. I therefore move my amendment and hope it will be accepted.

The Assembly then divided as follows:

AYES—17.

Abdulla, Mr. S. M.	Mahadeo Prasad, Munshi.
Agnihotri, Mr. K. B. L.	Mukherjee, Mr. J. N.
Ahmed, Mr. K.	Mukherjee, Mr. T. P.
Asjad-ul-lah, Maulvi Miyan.	Nag, Mr. G. C.
Bagde, Mr. K. G.	Neogy, Mr. K. C.
Barua, Mr. D. C.	Reddi, Mr. M. K.
Gulab Singh, Sardar.	Sarvadhikary, Sir Deva Prasad.
Ibrahim Ali Khan, Col. Nawab Mohd.	Venkatapatiraju, Mr. B.
Jatkar, Mr. B. H. R.	

NOES—42.

Ahmed Baksh, Mr.	Hussanally, Mr. W. M.
Ahsan Khan, Mr. M.	Innes, the Honourable Mr. C. A.
Akram Hussain, Prince A. M. M.	Joshi, Mr. N. M.
Allen, Mr. B. C.	Ley, Mr. A. H.
Blackett, Sir Basil.	Misra, Mr. B. N.
Burdon, Mr. E.	Moncrieff Smith, Sir Henry.
Cabell, Mr. W. H. L.	Muhammad Hussain, Mr. T.
Chatterjee, Mr. A. C.	Muhammad Ismail, Mr. S.
Chaudhuri, Mr. J.	Percival, Mr. P. E.
Clow, Mr. A. G.	Pyari Lal, Mr.
Cotelingam, Mr. J. P.	Ramayya Pantulu, Mr. J.
Crookshank, Sir Sydney.	Rhodes, Sir Campbell.
Davies, Mr. R. W.	Sarfaraz Hussain Khan, Mr.
Faridoonji, Mr. R.	Sassoon, Capt. E. V.
Gajjan Singh, Sardar Bahadur.	Singh, Mr. S. N.
Gidney, Lieut.-Col. H. A. J.	Sinha, Babu L. P.
Haigh, Mr. P. B.	Tonkinson, Mr. H.
Hailey, the Honourable Sir Malcolm.	Townsend, Mr. C. A. H.
Hindley, Mr. C. D. M.	Tulshan, Mr. Sheopershad.
Holme, Mr. H. E.	Webb, Sir Montagu.
Hullah, Mr. J.	Willson, Mr. W. S. J.

The motion was negatived.

Rao Bahadur T. Rangachariar: Sir, it has been suggested to me that this amendment* will be coming up under section 497. So, I do not move it now.

The Honourable Sir Malcolm Hailey: We shall be glad to discuss it then.

Clause 96 was added to the Bill.

Mr. President: Clause 97. The amendment† standing in the name of Mr. Kabeer-ud-Din Ahmed is beyond the scope of this clause.

Clauses 97 and 98 were added to the Bill.

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* "In clause 96 (*iii*) for the words 'following sub-section' substitute the words 'following sub-sections' and at the end after the word 'judgment' insert the following:

'(7) Nothing in this section or section 366 shall be deemed to prevent the Court from setting the accused at liberty after the conclusion of the trial and before the judgment of acquittal is pronounced'."

† "After clause 97 insert the following clause:

'97-A. In sub-section (*1*) of section 371 of the said Code after the word 'judgment' the words 'of the trial and appellate courts' shall be inserted'."

Dr. H. S. Gour: Sir, the amendment I propose:

"In clause 99, in proposed section 386 (1) (*b*), omit the words 'or immoveable' and the words 'or both'"

raises a very important question of law. Honourable Members will see that under the existing Code of Criminal Procedure, section 386, fine is only recoverable by distress and sale of moveable property. Under the amendment proposed by Government it is intended to extend the recovery of a fine by sale of both moveable and immoveable property. Now Honourable Members will find that the object of levying fines is not to supplement the State revenues but to punish the offender. Consequently, fine must be levied not with reference to the property which the accused possesses but with reference to the gravity of the offence and due regard being had to the fact that the fine would act as a deterrent sentence. The law up to now has worked, so far as I can see, satisfactorily. I do not know why the Government now wish to take the power of recovering fine both from moveable and immoveable property. Honourable Members will see that recently the Government introduced a measure abolishing the sentence of forfeiture of property as a substantive punishment. Under the Indian Penal Code the forfeiture of property could be ordered only in a very few cases. Offences against the State, like waging war against the King, and extreme cases of murder and a few other cases of that character. When the amendment of the Indian Penal Code was before this House, I pointed out that the punishment by way of forfeiture of property had been abolished in England. It had a peculiar history. Honourable Members will remember, I pointed out that in the feudal law a person who had committed high treason was regarded as having corrupted his blood and that in consequence all property in England which was held in fee simple, or as a tenant from the Crown, he was held no longer entitled to hold. But the law of property in this country is quite different. The subject in England is at best a tenant. The ownership vests in the Crown and consequently he has a peculiar relation to the Crown. In India, the right of absolute ownership has been conferred upon the people of this country, and therefore, the owner of immoveable property is under no peculiar obligations as he is in England. But, even as it is, in England the sentence of forfeiture as a substantive punishment has been abolished and it has been abolished now in this country. It was suggested in the Select Committee on the Indian Penal Code abolishing the sentence of forfeiture, that the abolition of forfeiture as a substantive sentence might be sanctioned if fine could be levied both from moveable and immoveable property, and I presume that this amendment is the outcome of that recommendation. But Honourable Members will not accept this amendment because it has been recommended by any Select Committee. They will examine and consider it upon its own merits. Now, let me turn to a very short question that arises in this connection. Take, for instance, the case of a Hindu joint family and assume a case that one member of that joint family has been sentenced to pay a certain fine. Honourable Members know that a member of a coparcenary has no specific property of his own. He has a certain interest in the joint immoveable property. As a matter of fact, if the family is joint and undivided, he is not likely to have any moveable property of his own. In a case like this what will be the procedure? The procedure would be to attach and sell his share, because that would be regarded as immoveable property, and consequently the courts would hold that it is liable to seizure and sale. Now, if this is the view of the law, it will make an inroad upon an ancient and well-established doctrine which

[Dr. H. S. Gour.]

the courts in this country and the Privy Council have enunciated for the last hundred years. Let me refresh the memory of the Honourable Members in this connection. The existing law on this subject is this. Leaving out of account the High Courts of Bombay, Madras, Central Provinces and Berar where a coparcener can alienate his undivided share for valuable consideration, take the case of those who follow the orthodox *Mitakshara* law—the High Courts of Bihar, United Provinces, part of Bengal and the Punjab. What is the position there? An individual member has merely an interest in immoveable property. He cannot predicate that any portion of the joint property belongs to him. That property cannot be sold as such. If there is a decree, if the member sells that property and makes an express representation and the alienee takes it without notice then the High Courts lay down that equity comes into force in favour of the alienee which gives him certain rights, namely, to ask the court that in a partition, the specific share of the estate sold to the alienee may be allotted to his alienor which may be ultimately transferred to the alienee and he may obtain a declaration of his right as an alienee, and if a partition takes place, he can then enforce that equity. I do not wish to take this House through the extremely complicated question of law which surrounds the Courts in this connection. I will rest content with saying that in the case of an undivided *Mitakshara* coparcener, no alienation of immoveable property can take place. But if the coparcener has the misfortune to be convicted of an offence and to be fined, the Code now provides for the sale of his immoveable property. That must of necessity lead to a forced partition or it must of necessity lead to the sale of right, title and interest of the delinquent, in which case his share will be sold for a mere song and in which case the rights of his sons and grandsons will be destroyed, though the *Mitakshara* lays down that every son and grandson has, upon his birth, a vested interest in coparcenary property. I can picture to the Honourable Members far more complicated cases than I have given by way of illustration. I have no doubt my Honourable friend, Munshi Iswar Saran, who has practised and is practising in the Allahabad High Court, will be able to enlighten you upon the numerous difficulties which this clause, if passed into law, will give rise to. I therefore submit that this clause should not be inserted, because it is vicious in principle, it is unprecedented, it did not exist in the previous Codes of Criminal Procedure, and no case has been made out why a departure should be made from the existing law, because the burden is on the Government to show if there have been any cases, in which fines levied by the Court have not been recovered. Lastly, I submit it would lead to the imposition of fines which would be out of all proportion to the nature and gravity of the offence committed. If it is the intention of the Treasury Benches to make a bargain with this part of the House by suggesting that because Government will lose some money as the punishment of forfeiture has been punished it must be now compensated by being empowered to recover fines out of immoveable property, then I have no doubt, Sir, that Honourable Members here will prefer the lesser evil of forfeiture to the greater evil of having fines recovered out of immoveable property. (*Sir Deva Prasad Sarvadhikary*: "Has that been suggested?") That evil affected an infinitesimally small number of people. It was a practice which was almost abolished and the abolition of forfeiture has merely followed the existing practice which obtained in this country where they did not order forfeiture because they considered the sentence as obsolete. I therefore dismiss that question out of consideration.

The question that because forfeiture was abolished this sentence has been allowed in substitution therefor is wide of the mark. Let us, therefore, examine the question upon its own individual merits. What is there to suggest, what is there to reinforce the arguments of the Government that fines must henceforth be levied both out of moveable and immoveable property? I ask Honourable Members to reflect. I have not given here cases of wives and children. Take the case of Muhammadans. Take the case of even Christians. The fact that the father commits an offence and his property is all sold, will deprive his wife, his children and other dependants of the only means of livelihood. Members must also remember how tenaciously the people in this country cling to their ancestral soil. Let them remember there is land to lose, not because of any wrong they have committed but because some members of the family may go astray and may be convicted and fined and thereupon the whole property may be brought to the hammer. Let them also remember that joint family property may be disrupted. The whole property may be sold for a song. If the intention of the Legislature is, as indeed it must be, of selling the right title and interest of the offender, there are weighty practical considerations which stand in the way of this amendment and I hope Members will pause and reflect upon the great injury that they will do to themselves and to the public at large by voting against this amendment. Sir, I move my amendment.

Mr. President: Mr. Tonkinson.

Rao Bahadur T. Rangachariar: This is a rather important question. May I move that the discussion be taken up later?

Mr. President: I was assuming that this was an important question on which Honourable Members might wish to speak, but nobody rose except Mr. Tonkinson. We had better take up the discussion on the next day on which this Bill is set down.

The Assembly then adjourned till Eleven of the Clock on Thursday, the 8th February, 1923.