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PROCEEDINGS

OF THE

LEGISLATIVE COUNCIL OF INDIA,

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deposition. So that, in any point of view, he very much doubted whether the making of the memorandum ought to be required.

MR. LEGEYT'S amendment was accordingly withdrawn and the further consideration of the Section postponed.

Section 144 was passed after an amendment.

Sections 145 and 146 were postponed.

Sections 147 to 149 were severally passed as they stood.

Sections 150 and 151 were severally passed after amendments.

Sections 152 to 166 were severally passed as they stood.

Section 167 was postponed.

Sections 168 to 170 were severally passed as they stood.

The consideration of Chapter IV was postponed.

Sections 1 to 15 of Chapter V, Sections 1 to 16 of Chapter VI, and Sections 1 to 4 of Chapter VII, were severally passed as they stood.

The further consideration of the Bill was postponed, and the Council resumed its sitting.

NOTICE OF MOTION.

MR. FORBES gave notice that he would, on Saturday the 9th Instant, move that Section 145 of Chapter III of the above Bill be omitted, in order that the following Section may be substituted for it; namely :—

"Before any witness is examined, the Court shall administer to such witness such oath as it may consider to be most binding on the conscience according to the religious persuasion of such witness, requiring him to speak the whole truth and nothing but the truth."

EXCLUSIVE PRIVILEGES TO INVENTORS.

MR. PEACOCK moved that Sir James Outram be requested to take the Bill "for granting exclusive privileges to Inventors" to the President in Council, in order that it might be transmitted to England for the sanction of Her Majesty.

Agreed to.

AHMEDABAD MAGISTRACY.

MR. LEGEYT gave notice that he would, on Saturday the 9th Instant, move the second reading of the Bill "to empower the Governor in Council of Bombay to appoint a Magistrate for certain districts within the Zillah Ahmedabad."

The Council adjourned.

Saturday, October 9, 1858.

PRESENT:

The Honorable the Chief Justice, *Vice-President*, in the Chair.

Hon'ble J. P. Grant,	Hon'ble Sir A. W. Buller,
Hon'ble Lieut.-Genl. Sir J. Outram,	H. B. Harington Esq.,
Hon'ble H. Ricketts,	and
Hon'ble B. Peacock,	H. Forbes, Esq.
P. W. LeGeyt, Esq.,	
E. Currie Esq.,	

STAMP DUTIES (BENGAL.)

THE CLERK presented to the Council a Petition of Rammohun Bannerjee and Guddadhur Bannerjee, Zemindars of West Burdwan, concerning the Bill "to amend Regulation X. 1829 of the Bengal Code (for the collection of Stamp Duties.)"

MR. PEACOCK moved that the above Petition be printed.

Agreed to.

ENDOWMENT OF MOSQUES, HINDOO TEMPLES, AND COLLEGES.

THE CLERK presented a Petition of Protestant Missionaries praying for the repeal of the Regulations of the Bengal and Madras Codes providing for the maintenance of endowments for the support of Mosques, Hindoo Temples, and Colleges.

MR. CURRIE moved that the above Petition be printed.

Agreed to.

CHURRUCK POOJAH.

THE CLERK also presented to the Council a Petition of Protestant Mis-

sionaries praying for a legislative enactment to suppress all those public practices at the Churruck Poojah, whether nominally religious practices or not, which are in themselves cruel and inhuman.

MR. CURRIE moved that the above Petition be printed.

He said that in making this motion he did not pledge himself to take any farther steps in the matter, for it appeared that the subject had already been considered by the Court of Directors, and the Honorable Court had expressed an opinion against the expediency of any direct interference on the part of Government. The Lieutenant-Governor of Bengal, after a careful review of the question, had also come to the same conclusion. With the permission of the Council, he would read a statement of what had been done in the matter from the general Administration Report of the several Presidencies for the year 1856-57:—

"The Honorable the Court of Directors having remarked that, if the practice of swinging on Churrucks was found to be attended with cruelty, and liable to be enforced without the free consent of parties submitting to it, they doubted not that the Government would consider what measures should be adopted with reference to it —the Commissioners of the South-Western Frontier and Assam, and the Superintendents of Police Lower Provinces, Chittagong and Cuttack, were requested to report on the subject, and to state whether the existing law was sufficient for preventing the crime, or whether, in their opinion, any special measures were required.

"Intermediately however, the order calling for the opinions of the Officers above-mentioned, was reviewed by the Honorable Court, who recorded the following remarks regarding it:—

"'We observe that enquiry has been instituted by the Lieutenant-Governor with a view to the authoritative suppression of the practice of swinging on the Churruck, as it is stated that it would be regarded with satisfaction by the sensible part of the Hindoo Community, and with indifference by the rest.

"'We should prefer, however, that your endeavors for the suppression of this practice should be based on the exertion of influence rather than upon any act of authority.'

"Subsequently also to the issue of the Circular to the Commissioners, a memorial regarding the Churruck Poojah was received from the Calcutta Missionary Conference."

Then followed the Memorial, which no doubt was much to the same effect as the Petition now presented.

"After careful consideration, the Lieutenant-Governor came to the conclusion that, as the case was one of pain voluntarily undergone, the remedy must be left to the Missionary and the School Master, and that, as stated by the Honorable Court, all such cruel ceremonies must be discouraged by influence rather than by authority."

Such were the opinions which had been recorded. It would however be for the Council to consider whether the Petitioners had now made out such a case as seemed to call for legislative interference.

The motion was carried.

FALSE WEIGHTS AND MEASURES.

THE CLERK reported to the Council that he had received a communication from the Chairman of the Madras Chamber of Commerce, representing that the provisions of the Police Act, XIII of 1856, were not a sufficient check against the fraudulent use of false weights and measures inasmuch as they restricted a Police Inspector entering a shop or premises to inspect the weights and measures used therein only upon complaint made to him.

MR. FORBES moved that the above communication be referred to the Select Committee on "the Indian Penal Code."

Agreed to.

MERCHANT SEAMEN.

MR. CURRIE presented the Report of the Select Committee on the Bill "for the amendment of the law relating to Merchant Seamen."

AHMEDABAD MAGISTRACY.

MR. LEGEYT moved the second reading of the Bill "to empower the Governor in Council of Bombay to appoint a Magistrate for certain Districts within the Zillah Ahmedabad."

MR. RICKETTS said, he would submit to the Council that, on the whole, it would be better, instead of legislating for the particular districts in question, to provide for all districts in the same position throughout the Bombay Presidency. The Zillah of Ahmedabad was a Regulation district. The neighbouring Province of Kattywar was a non-Regulation district under the control of a Political Agent. For some reason or another, not ex-

plained in the annexures to the Bill, the Magistrate of Ahmedabad had been unable to manage the people of a Pergunnah called Bhownugghur, which was on the confines of Kattywar; but the Political Agent of Kattywar was able to manage it. The Bombay Government, therefore, had appointed the Political Agent Magistrate of the districts in Bhownugghur, in lieu of the Magistrate of Ahmedabad; but shortly after, questions arose regarding appeals from the districts from the Magisterial decisions of the Political Agent, and the Sudder Adawlut discovered that the Rules of Bombay were so strict that there could be but one Magistrate in each Zillah, and therefore recommended alteration of the Law. Regulation XII. 1807 of the Bombay Code enacted that the duties of Police in each Zillah should be conducted by the Collector of that Zillah, and further, that the Collector of each Zillah should, under the denomination of Zillah Magistrate, perform the functions of Police. The Legislature had long ago provided for cases of that nature on this side of India. Regulation XVI. 1810 of the Bengal Code provided as follows:—

"The Governor General in Council, whenever he may deem it advisable, will invest the Magistrate of any Zillah with a general concurrent authority as Joint Magistrate in any contiguous or other jurisdiction, or in any part thereof."

An enactment of this kind would exactly meet the case which had induced the Honorable Member for Bombay to bring forward the present Bill. Under Regulation XVI. 1810, the Collector of a Zillah in Bengal could and did exercise the jurisdiction of a Magistrate.

But it appeared to him that there was another point to be provided for. It was the intention of the Bombay Government that the Political Agent of Kattywar should be Magistrate of Bhownugghur. It could not be intended that, if appointed such Magistrate, he should leave the district of Bhownugghur and go to Kattywar. Probably the intention might be that people should be brought from Bhownugghur to the office at Kattywar; and in that case, it would be necessary also to enact that it should be lawful for that Officer to exercise his Magisterial duties beyond the confines of his jurisdiction.

He should therefore move as an amendment that the second reading of the Bill before the Council be postponed until this day three months, and suggest to the Honorable Member to bring in a Bill to the following effect in the meantime:—

"It shall be lawful for the Government of Bombay to appoint a Joint or Assistant Magistrate, with the powers of a Magistrate, in any District subject to the Bombay Government, and to give such Joint or Assistant Magistrate concurrent jurisdiction with the Magistrate over any part or over the whole of the District, or to place any portion of the District exclusively under such Joint or Assistant Magistrate.

"A Joint or Assistant Magistrate so appointed shall be subject to the jurisdiction of the Sessions Judge of the Zillah within which the local jurisdiction assigned to him may be, and to the Sudder Court in like manner with the District Magistrate.

"It shall be lawful for the Governor in Council in Bombay to authorize any Magistrate or Joint or Assistant Magistrate to hold trials at a place beyond the confines of his jurisdiction."

THE VICE-PRESIDENT said, the more general course in this Council had been to vote against the second reading.

MR. LEGEYT said, he did not think the Honorable Member (Mr. Ricketts) had given quite a correct version of Regulation XII. 1807. If he had understood the Honorable Member aright, the Honorable Member had stated that, under the present law, the Governor in Council of Bombay had no power to allow any one but the Magistrate of a Zillah, as described in Section III of Regulation XII. 1807 of the Bombay Code, to perform the duties of a Magistrate within his Zillah; but if he would look farther on, he would see that the 3rd Clause of Section III of the same Regulation provided for the appointment of Assistant Magistrates, and that subsequent Sections provided for vesting Assistant Magistrates with the full powers of a Magistrate. Then there were other Acts for appointing Joint Magistrates in Zillahs. If the Governor in Council of Bombay had considered that either Assistant Magistrates with full powers, or Joint Magistrates, or Deputy Magistrates, appointed under the existing Regulations, would have answered for the Bhownugghur villages, he would doubtless not have sent up

this Bill for the approval of the Legislative Council. But he (Mr. LeGeyt) thought the Governor in Council did not consider that such appointments would have answered, and considered that, for political reasons, the Political Agent of Kattywar should exercise Magisterial powers in the districts of Bhownugghur. It would hardly do to appoint the Political Agent of Kattywar, who was an officer of equal rank with, and perfectly independent of the Magistrate of Ahmedabad, Assistant to the Magistrate with full powers. Nor, he (Mr LeGeyt) apprehended, was it intended that he should be appointed Joint Magistrate; for although as Joint Magistrate he would exercise powers concurrently with the Magistrate, yet in some portions of his duties he would be subject to the control of the latter. He believed it was to avoid these inconveniences that the Governor in Council preferred to meet the exigency now felt by appointing the Political Agent of Kattywar Magistrate of Bhownugghur. If he (Mr. LeGeyt) had rightly understood the draft Act which the Honorable Member proposed to substitute for the present Bill, it would do no more than allow the Governor in Council to appoint a Joint or Assistant Magistrate. That would entail an alteration of the whole procedure laid down in the Bombay Code. The object of the Bill he had introduced was that the Governor in Council should have power, without creating a new Zillah, of appointing an Officer with the full powers of a Zillah Magistrate. If the Political Agent of Kattywar should be appointed a Joint Magistrate or an Assistant Magistrate, he would, in a certain degree, according to the present Law, be subject to the Zillah Magistrate. He (Mr. LeGeyt) could not see how the arrangement proposed in this Bill was in any way calculated to lead to the inconvenience of the Public. The Bombay Government thought it calculated to further the administration of Justice. They had the power of appointing Assistant Magistrates with full powers, and Joint Magistrates, but had not thought it expedient to exercise that power in this instance, and he, for his own part, did not see why the Bill should not pass into Law.

MR. CURRIE said, he thought it would be as well if the Honorable Member for Bombay would himself consider, and also consult the Bombay Government on the expediency of extending to that Presidency the general powers now conferred in Bengal by Regulation XVI. 1810. It was very convenient that the executive Government should have those powers, and as occasion had arisen for them in Bombay, he thought it would be better if the Regulation for Bengal were extended to it.

The question being put, the Council divided :—

Ayes 8.	*Noes* 2.
Mr. Forbes.	Mr. Currie.
Mr. Harington.	Mr. Ricketts.
Sir Arthur Buller.	
Mr. LeGeyt.	
Mr. Peacock.	
Sir James Outram.	
Mr. Grant.	
The Vice-President.	

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

CIVIL PROCEDURE.

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

THE postponed Section 92 of Chapter III provided that a defendant desiring to set-off any demand against the plaintiff's claim must tender a written statement containing the particulars of such demand, the excess of set-off over claim being abandoned.

MR. HARINGTON said, in consequence of a remark which fell from the Chair at the last Meeting of the Council, and which had reference to the law or practice of what was called a set-off as it obtained in the Courts in this country, whether established by Royal Charter or by the local Governments, he had been led, in the course of the week, to look into the English law on the subject, and to consider whether it might be acted

upon with advantage in framing any amendment of the Section before the Committee. He observed that in Blackstone and other English law books it was stated that a set-off, when used as a mode of defence to a suit or action, was of that nature that it admitted the claim of the opposite party to be just, only insisting that the debtor was also a creditor in some other manner in respect of which the opposite debt was counter-balanced either wholly or in part. He did not know whether this was still the law in Her Majesty's Courts; but whether it was so or not, a rule which required that a defendant who desired to set-off against the claim of the plaintiff a demand for which he might sue the plaintiff separately, should first acknowledge the justice of the plaintiff's claim, appeared to him to be strictly equitable and reasonable, and to be consistent with the real meaning of the term "set-off;" and, accordingly, in the first of the two amended Sections prepared by him, he had proposed it for adoption. When a defendant in an action of debt, assumpsit, or the like, not only pleaded a set-off to, but also denied the justice of the plaintiff's claim either in the whole or in part, there would be two causes of action which might have accrued on different dates, and the proofs upon which they severally rested would often be found to be quite distinct. In such cases, so far as he could perceive, no advantage could result to either party from doubling up the two claims and treating them as a single suit, while in practice he thought that much inconvenience might ensue from such a proceeding. There could, of course, be no objection, but the contrary, to the two claims proceeding step by step together to a decision, and to the decision of the one following immediately upon the decision of the other, though in all other respects they should be dealt with as distinct actions which in reality they were. Such was indeed the present practice which was found to be very convenient, while it gave to either party the full benefit of any claim which he might succeed in establishing against the other. Under these circumstances it did not appear to him that any thing would be gained by allowing a defendant, who denied the justice of the plaintiff's claim, to meet that claim with a counter-demand by way of set-off, which he might make the subject of a separate action, unless the Committee should be of opinion that the counter-claim of the defendant should not be subject to the stamp duty imposed upon petitions of plaint, and which the defendant would have to pay if he appeared in the character of plaintiff. When, however, a defendant, acknowledging the justice of the plaintiff's claim, assigned as his only reason for not satisfying it that he had a counter-demand against the plaintiff, which, if proved, should be allowed to counter-balance the plaintiff's claim either wholly or in part, the case was very different. By such admission the matters in dispute between the parties were at once reduced to a single controversy, and the Court, instead of having to investigate and determine the claim of the plaintiff as well as the claim of the defendant, would be required to look to the claim of the latter only; and as by acknowledging the justice of the plaintiff's claim, the defendant would relieve the Court from the labor and responsibility of adjudicating upon it, he thought that the stamp duty paid upon the plaint might fairly be allowed to cover the counter-claim of the defendant, and that the Court should proceed to determine the single action remaining to be decided, provided, of course, it had jurisdiction over the demand of the defendant in respect of its value or amount. The first of the two amended Sections prepared by him had been framed in accordance with these views. The second amended Section, which he should not have occasion to bring forward should the Committee agree to the first Section, was nearly the same as the Section which he had proposed on Saturday last. To that Section it had been objected by the Honorable Member for Bengal that, when a suit was brought against a person who had a counter-demand against the plaintiff, which, but for the plaintiff's suit, might never come into Court, it

would be hard to charge the defendant with a stamp duty on his demand, and the Honorable and learned Member of Council on his left (Mr. Peacock) had made a further objection to the latter part of the Section, which pointed out what was to be done in the event of the counter-demand of the defendant exceeding the jurisdiction of the Court in which the suit was brought. It appeared to the Honorable and learned Member that the provision contained in this part of the Section might encourage the defendant to increase any demand that he might have against the plaintiff beyond the jurisdiction of the Court in order to cause the removal of the suit to another Court, whereby the plaintiff might be harassed and subjec ed to heavy expense. He (Mr. Harington) was not prepared to say that this might not happen, but he thought such a case would be of very rare occurrence. It must be remembered that the counter-demand of the defendant would be chargeable with a stamp duty proportionate to its amount, which he would not recover from the plaintiff in the event of his failing in his proofs, while after all the suit would not be removed to a different district, but only from one Court to another Court of the same district, and that a superior Court. It was unnecessary, however, for him to notice these objections further at present, as the first of the two amended Sections prepared by him was free from them. He would only further remark that both Sections contained words to show that it was not every demand of a defendant which would constitute a valid or legal set-off to the claim of the plaintiff, and that, when a set-off was pleaded, it would be the duty of the Court to consider whether it was of such a nature that, if proved, it should be allowed to counter-balance the claim of the plaintiff. Her Majesty's Commissioners appeared to have taken it for granted that there was already some law of set-off in the Mofussil, and they had contented themselves with providing that, when a set-off was pleaded in a Moonsiff's Court, its character or amount should not be looked to, but that if the claim was considered to be established, the Moonsiff should decree for the amount. There was, however, no law of the kind, and as the rule proposed by Her Majesty's Commissioners was obviously open to serious objections, he thought that the Select Committee had acted wisely in refusing to adopt it. With these remarks he begged to move that Section 92 should be omitted, with a view to the substitution for it of the first of the two amended Sections prepared by him, which was as follows:—

"If the defendant admit the claim of the plaintiff but desire to set-off against it any demand for which he might sue the plaintiff in the same Court, he shall tender a writen statement containing the particulars of such demand, and if the Court be of opinion that the demand of the defendant is of a nature which, if proved, should be allowed to counterbalance the claim of the plaintiff either wholly or in part, it shall proceed to investigate the demand of the defendant in the suit before it. When a defendant may be allowed under this Section to set-off a demand against the claim of the plaintiff, he shall be debarred from bringing a separate suit in respect of the same cause of action."

MR. CURRIE said, he had given notice of an amendment on this subject, having some objection to those proposed by the Honorable Member for the North-Western Provinces. The amendment before the Committee appeared to him to be open to two objections. He thought first that the defendant should not be required to admit the plaintiff's claim, at least in the whole; and secondly, if the counter-claim exceeded the amount cognizable by the Court, he thought the defendant should not on this ground be debarred from pleading it. He had prepared a Section which avoided these objections. He also proposed that the defendant should not be liable for stamp duty in respect of a set-off; but if he sought for judgment for a sum in excess of the plaintiff's claim, it seemed right that the written statement containing the particulars of his demand should be upon such stamp paper as would be required for a plaint for the amount of such excess.

THE CHAIRMAN thought that the Honorable Member for the North-Western Provinces went on a correct principle in requiring admission of plaintiff's claim to some extent; but he went too far. For instance, two persons having mutual dealings came into Court; the plaintiff said that a large sum was

Mr. Harington

due to him; the defendant might be prepared to admit half, and to insist that he had a demand which ought to be set-off. The amendment seemed to require that he should admit the plaintiff's claim to the full extent. He begged to suggest the introduction of the words "either wholly or in part" after the words "if the defendant admit the claim of the plaintiff." He was not prepared, considering the preliminary examination of the parties, and the verification of the pleadings that were proposed, to give the defendant that latitude which he had in the English Courts, or to let him both deny the existence of any demand on the part of the plaintiff, and meet it, if proved, by a plea of set-off. He observed that the Honorable Member's amendment proposed to leave it in the discretion of the Judge to say whether the cross-demand was proper to be admitted by way of set-off. It might be better that the law should define the nature of the counter-claims which should be allowed to be set-off, rather than that the Court should have this power. He was clear, however, that there should be some limitation to the defence of "set-off." It would be very inconvenient to admit, besides money demands, claims founded on assault, slander, &c.; many false claims would thus be brought forward, by which plaintiffs would be harassed and the hearing of causes inconveniently protracted. The limitation of the English law of set-off might not be the best; but it was better than admitting all claims whatsoever as matter of set-off.

Sir ARTHUR BULLER said, he did not see why an admission of the plaintiff's claim should be the condition of the plea of set-off. Why might not the defendant say, "I don't admit that the plaintiff has any valid claim against me; but even if I am mistaken in my law, I have a set-off?" These two defences were certainly not incompatible according to English law. Technically speaking, the mere plea of set-off would, as the Honorable Member for the North-Western Provinces said, admit the plaintiff's claim, but then the defendant always fortified his case by another and perfectly admissible plea of denial of the plaintiff's claim altogether. But what he (Sir Arthur Buller) most objected to was the leaving it to the Judge to determine what sort of set-off he would allow. One Judge might have no hesitation in admitting a set-off for damages for assault, or libel, or criminal conversation. Another might make it a rule to admit of no set-off except for a fixed ascertained debt, and one Judge's practice would not be binding on another. It never would do to leave this, which should be settled by substantive law, to the caprice of individual Judges; and in his opinion the original Clause was far better than this or any other amendment which was before them; but he had no very strong opinion one way or another, as to whether the right of set-off should extend to all demands, or whether it should be in some degree limited.

Mr. PEACOCK preferred Section 92 as it stood, though it might require some amendment. The expression "along with the claim of the plaintiff if it shall consider it reasonable so to do" did not mean that the Judge had the option whether to try or not; it compelled him to try the question of set-off some time or other before the suit was determined, for that was provided by the Section relating to the decree (161). He preferred the present Section, because it did not oblige a defendant to admit the plaintiff's demand if he set up a counter-claim. A defendant might honestly deny that he owed any thing; he might state the facts truly, and submit whether he was indebted. He might say, "I contend I am not indebted; but if I am, I have a cross-demand." He ought not to be obliged to admit the whole claim which might depend on some difficult question of law which might be decided against the plaintiff. He thought that the Honorable Member for the North-Western Provinces had made a slight mistake as to the English law. The plea of set-off must admit the demand, but there might be a denial of liability in a separate plea. A defendant might say, "If you determine against me on this claim, then I ask you to investigate my case against him; he is insolvent—

do not compel me to pay his demand, when I have a larger claim against him." If the words "if it shall consider it reasonable so to do" were applicable to the whole Section, he would prefer to omit them. According to English law, a set-off was allowed only in cases of debts and liquidated damages. Vindictive damages, as for assault, &c., could not be matter of set-off. This Section went farther and provided that, if one man sued another and there was a counter-claim, the plaintiff should not issue execution until the counter-claim had been determined; therefore, if the subject of the counter-claim was within the jurisdiction of the Court, it ought to be investigated, whatever it might be. The principle adopted in Act IX of 1850 (for the more easy recovery of small debts and demands) was this. If there were cross-judgments between the same parties, execution was to be taken out by that party only who had judgment for the larger sum, and for so much only as should remain after deducting the smaller sum. It mattered not what were the nature of the claims. The defendant was not to be imprisoned, nor was his property to be seized if he held a decree against the plaintiff for an equal or larger amount. Suppose a suit for rent and a cross claim, not for a debt, but for unliquidated damages, say a sale of Indigo seed to the defendant, which, though warranted good, had turned out to be worthless; the Judge would decide that the rent was due. Was he to permit execution to issue before deciding upon the other question? It might be that the defendant had sustained damages by the loss of a crop far beyond the amount of the rent. It ought not to be discretionary with the Judge to investigate that: he should be bound to do so. If both cases were within his jurisdiction, he should try both before execution issued. Section 92 might easily be amended if his view were wrong. He referred to the latter part of the proposed Section:—

"When a defendant *may be* allowed under this Section to set-off a demand against the claim of the plaintiff, he shall be debarred from bringing a separate suit in respect of the same cause of action."

Mr. Peacock

It meant, if there should be a decree for or against the defendant or that the suit was pending. This was not sufficient, because plaintiff might abandon his suit; in that case the defendant should nevertheless have the benefit of his set-off.

MR. HARINGTON said that, when the jurisdiction was limited, it was necessary that the set-off should also be limited. The latter part of the amended Section had been introduced for this reason. He referred to Blackstone's Commentaries and said that there were various grades of Courts with different jurisdictions, and that they could not properly exceed their respective jurisdictions. The question must also be considered with reference to the stamp laws in which the Government had an interest. It occurred to him that, if the defendant admitted the justice of the plaintiff's claim, the Government might fairly forego the stamp duty on the defendant's counter-demand; but if the defendant disputed the plaintiff's claim, as already noticed by him, there was no advantage in doubling up the two claims. They had better be tried as separate suits.

MR. GRANT asked, if it was meant that a Judge must suspend judgment in one action because another was pending? If this were so, a plaintiff in a very simple case might never get a decree at all. Suppose, for example, the simple case of a ryot not paying his rent. The Zemindar must get his rent; if not, he cannot pay his revenue, and he loses his estate. An action is brought, the ryot has no defence to the claim, but states that last year the Zemindar slandered him, and that he has an action for damages which must be tried in the way of a set-off, it matters not whether in the same suit or not. He demands that judgment be stayed till both actions are determined. The slander case might require months to get up the proof. Should the other simple case, which might be decided in five minutes, be postponed until the tedious and complicated slander-suit, which had no connection with the other matter, should be settled? His own opinion was that the practice of the

Supreme Courts was better, which as he understood, restricted claims of set-off to cases of debt. If the dispute was all one matter of account, that might conveniently be decided at once, and the balance ascertained. But this would not be possible, if many claims, for various unascertained amounts, arising out of quite different transactions, were to be heard together. He was uncertain, from the terms of Section 92, what was actually the intention.

THE CHAIRMAN said, it would be better to abandon the whole principle than open a door to a flood of sets-off arising in respect of claims of all descriptions. He thought that his Honorable and learned friend (Mr. Peacock) proceeded on a greater presumption of fair dealing in litigation than existed in this country. Such a provision would be for the encouragement of false claims; and when it was found that execution could not be taken out while a counter-claim was in litigation, the plaintiff would be harassed by false claims. If the principle could be limited to cases of money and liquidated damages, convenience might require that it should be admitted. He could put no other construction on the Section than that it meant to give the Judge a discretion. "Along with the claim of the plaintiff" meant not of course that he was to hear simultaneously, but *in the same suit*, and that one decree would determine the whole. Such a discretion might be objectionable. If there were difficulties, the Section might be abandoned and provision made in the Chapter relating to execution of decrees for a set-off of cross-judgments. But such a provision should not go to the extent of suspending one judgment for an indefinite time until all possible questions should have been determined. It should be limited to judgments actually recovered. One party might push on his action while the other was pending; but there should be a strict limit of the time during which the judgment should be suspended.

MR. CURRIE suggested that the Section might be limited to such cases of debt &c. as had been referred to.

MR. PEACOCK said, the objection that false claims might be brought forward applied as much to a set-off on account of a debt as to a set-off of other matters. It was said that Zemindars might be delayed; but they should not legislate only for them. Every one (whether Zemindar or not) had to pay his just debts. A more probable case than that supposed, had been suggested to him. It was much more likely that a forged bond should be attempted to be set-off than a case of slander. The forged bond would fall within the rule, if a set-off for debt were allowed, for the validity of the claim must be tried before it could be rejected. But it was said that the case supposed was that of a good cause of suit as a trespass, slander, &c., but one requiring long proof. It might be inconvenient to admit such a case to be tried as a set-off. He should be content to confine the set-off to debts, and to introduce a Clause like Section LVII of Act IX of 1850:—

"If there be cross-judgments between the parties, execution shall be taken out by that party only who shall have obtained judgment for the larger, and for so much only as shall remain after deducting the smaller sum; and satisfaction for the remainder shall be entered, as well as satisfaction on the judgment for the smaller sum; and if both sums shall be equal, satisfaction shall be entered upon both judgments."

Where there was a counter-claim, it might be left to the Judge's discretion not to allow execution to issue on one decree if he thought it reasonable to delay it until another claim should be determined. If this should be the opinion of the Council, he would prepare a Section.

MR HARINGTON'S motion to omit Section 92 was then carried, and the motion to substitute the proposed Section was by leave withdrawn.

The postponed Section 107 of Chapter III being read by the Chairman—

MR. LEGEYT moved that the following words be added to the Section:—

"But in every such case, a copy, properly certified and made at the expense of the applicant, shall be substituted for the original in the record of the suit."

The motion was agreed to, and the Section then passed.

The postponed Section 108 of Chapter NI being read by the Chairman—

MR. LEGEYT moved that the Section be left out, and the following new Section be substituted for it :—

"Whenever an exhibit once received by a Court of Justice and admitted in evidence is returned, a receipt shall be given by the party receiving it, in a receipt book kept for the purpose.

Agreed to.

The postponed Section 143 of Chapter III being read by the Chairman—

MR. PEACOCK moved that it be omitted, in order that the following new Section might be substituted for it :—

"On the day appointed for the hearing of the suit, or on some other day to which the hearing may be adjourned, the evidence of the witnesses in attendance shall be taken orally in open Court in the presence and hearing, and under the personal direction and superintendence of the Judge. In cases in which an appeal lies to a higher tribunal, the evidence of each witness given upon such examination shall be taken down in writing, in the language in ordinary use in proceedings before the Court by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer but in that of a narrative, and when completed shall be read over in the presence of the Judge and of the witness and also in the presence of the parties to the suit or their pleaders, or such of them as are in attendance, and shall be signed by the Judge. If the evidence be taken down in a different language from that in which it has been given, and the witness does not understand the language in which it is taken down, the witness may require his deposition as taken down in writing to be interpreted to him in the language in which it was given. It shall be in the discretion of the Court to take down, or cause to be taken down, any particular question and answer if there shall appear any special reason for so doing, or any party or his pleader shall require it. If any question put to a witness be objected to by either of the parties or their pleaders, and the Court shall allow the same to be put, the question and answer shall be taken down, and the objection and the name of the party making it shall be noticed in taking down the depositions, together with the decision of the Court upon the objection. The Court shall record such remarks as it may think material respecting the demeanor of the witness while under examination. In cases in which the evidence is not taken down in writing by the Judge himself, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what such witness deposes, and such memorandum shall be written and signed by the Judge with his own hand, and shall accompany the record. In cases in which an appeal does not lie to a higher tribunal, it shall not be necessary to take down the deposition of the witnesses at length, but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what such witness deposes, and such memorandum shall be written and signed by the Judge with his own hand, and shall form part of the record. If the Judge shall be prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and in cases not appealable shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same, and such memorandum shall form part of the record."

The question that the words proposed to be omitted be omitted was put, and agreed to.

The question that the words proposed to be substituted be substituted being proposed—

SIR ARTHUR BULLER moved, by way of amendment, that the words "if necessary be corrected, and shall" be inserted after the word "shall" in the 21st line of the proposed Section.

Agreed to.

SIR ARTHUR BULLER moved that the words "Where all the parties to the suit present and the pleaders of such as are absent, consent to have such evidence as is given in English taken down in English, the Judge may so take it down in his own hand" be inserted after the word "given" in the 28th line of the proposed Section.

Agreed to.

MR. HARINGTON moved that the words "In cases in which the evidence is not taken down in writing by the Judge himself, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what such witness deposes, and such memorandum shall be written and signed by the Judge with his own hand, and shall accompany the record" after the word "examination" in the 45th line of the proposed Section, be left out.

He said, the Honorable Member for Bombay had stated at the last meeting of the Council that some of the Judges, unmindful of the moral and legal obligation which the present law imposed upon them of requiring the evidence of every witness to be reduced into writing in their immediate presence and hearing, and under their personal direction and superintendence, allowed the evidence of witnesses to be taken in their Courts in a most careless and slovenly manner, it being not an uncommon practice for the Judge to engage in other business or

duties while the examination of a witness was going on, whereby the intention of the law was entirely defeated; and in order to put a stop to this practice, and to insure the evidence of every witness being taken in the manner prescribed by law, the Honorable and learned Member proposed to insert the words which he had just read. The sole object of the rule proposed by the Honorable and learned Member was to compel the Judges to do that which, but for such a rule, it was thought probable that some of them might fail to do. But were they sure, or had they good reason, to believe that the rule proposed by the Honorable and learned Member would be more efficacious than that contained in the earlier part of the Section. What was there to prevent a Judge, if so disposed, from evading the duty prescribed in the proposed rule in the same manner and with the same ease as it was said that some Judges violated the obligation imposed upon them by the existing law; and if the proposed rule failed to produce the effect intended, he thought that the Honorable and learned Member would agree with him that it would not only be useless, but that it might be mischievous, inasmuch as the appellate Court, having the memorandum, which the Judge of the Court of first instance was to write with his own hand, before it, might be led to suppose that the evidence had been taken in the manner prescribed by law, that is, in the hearing and under the personal direction and superintendence, as well as in the presence of the Judge, and might be induced in consequence to place greater reliance upon it; whereas, in truth, at the time the witness was being examined, the Judge might have been engaged in some other business, or giving his attention to some other matter. It was not pretended that the memorandum which the rule required, would be in itself of any use to the Judge who was to write it, in deciding the case, or to the Judges of the appellate Court who might have to hear an appeal from that Judge's decision, as a means of testing the correctness of the record, which would still have to be made of the examination in full of each witness. The object aimed at was simply what had been already stated. As had been pointed out by the Honorable Member for Bengal, there would be nothing to prevent the Judge from preparing the memorandum required of him, not at the time that the evidence was being taken, but when it was being read over to the witness for the purpose of being attested, or, indeed as remarked by him, after the rising of the Court at the Judge's private residence; and when, as was too often the case, the Judge cared more for the number of cases disposed of by him within a given period, than for the manner in which they were decided, this would probably be the general practice. It had often been remarked that they ought not to distrust their Judges, and this was one of the reasons assigned for doing away with appeals in cases of a simple character, and of a small amount. He (Mr. Harington) thought that no Judge had a right to complain that his decision in every case was open to appeal; but whatever distrust might be involved in an appeal, it appeared to him that every Judge might fairly protest against the distrust which would be implied, and the slur which would be cast upon his judicial character if the rule proposed by the Honorable and learned Member should be adopted. There appeared to him to be other objections to the proposed rule, one of which was that it would have the obvious effect of greatly increasing the size of the record, but this was comparatively a trifling matter, and he should resist the introduction of the words in question on the broad ground that they would be ineffectual; and that, if they failed in their object, they would not only be ineffectual, but might be mischievous.

MR. GRANT asked, if the objection felt by the Honorable Member to the Section was a substantial objection? Did the Honorable Member object to the process prescribed by it?

MR. HARINGTON said, he objected to the proposed memorandum because it would be of no use either to the Court of first instance or to the appellate Court in deciding the suit, and was intended only to make the Judge do what the Section as it now stood required him to do.

MR. RICKETTS said, the Section directed the Judge to take the evidence, and the addition to which the Honorable Member for the North-Western Provinces objected, directed him how to do that.

MR. GRANT said, according to the first part of the Section, the evidence in appealable cases may be taken down either by the Judge or by some Officer of the Court. If it is not taken down by the Judge, the Section provided that the Judge "shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the Judge with his own hand, and shall accompany the record." If the Judge took this record home to frame his memorandum, he certainly would do what the law told him not to do. His (Mr. Grant's) opinion was that the course prescribed by the provision in question was what every Judge ought to follow. He thought it a useful provision that every Judge, Civil or Criminal, should take a memorandum of the evidence as the examination proceeds. That being the proper course, he did not see why the law should not require it to be taken. If the law did require it, and a Judge violated the law, he did not see why the authorities who had dominion over Judges should not call him to account.

MR. HARINGTON said, the Honorable Member for Bombay had declared that in the Courts of the East India Company the evidence, instead of being taken as the law required, was generally taken in a loose manner, and he was bound to state that within the last few days he had been assured by a Judge of the Calcutta Sudder Court, and one of the ablest pleaders in that Court, that in the Moonsiffs' Courts two or three cases were usually tried at the same time, the excuse given being that, unless this was done, the prescribed number of cases could not be disposed of nor the file kept clear. No doubt, that was a serious violation of the law, but he did not think that the proposed amendment would correct it.

MR. GRANT said, it would add another provision of the law—another check.

THE CHAIRMAN said, he did not look on the proposed new Section as implying any distrust of the Judges who would administer the Code. A memorandum made by a Judge of the substance of the evidence taken before him might often be of material use to Judges of the appellate Courts, as a check on the fuller record taken down by his omlah (which it might be desirable to have done if the evidence was given in Bengali), and would also be valuable as showing to the appellate Court the mode in which the evidence had struck the mind of the Judge. Therefore, disclaiming any intention of implying distrust of the Judges for whose guidance the Section was designed, he thought the provision a useful provision, and should vote against the amendment.

MR. LEGEYT said, he thought the provision a most useful one. If it had been in force now, it never would have allowed a state of things which admitted of evidence being taken, in some Courts at least, in a careless and slovenly manner. In all Courts in Bombay, whether Civil or Criminal, which were presided over by Europeans, it had been for many years a rule that every Magistrate and Judge should decide cases upon evidence taken down in the Vernacular language, and that they should also note down the proceedings with their own hands. In cases of appeal these notes were always sent up to the appellate Courts as part of the record, and were looked at by the Judges in appeal. He observed that such a rule was contemplated, and indeed enjoined, so long ago as 1827. Regulation IV of that year, Section XXXVII, provided as follows:—

"If both parties in a suit should express in writing such to be their wish, the recording of the evidence and proceedings at length shall be dispensed with, and the Court's notes alone shall be preserved; if a suit so tried be appealed, the said notes shall be held to be the record of the suit, and the fact therein recorded shall be deemed to be determined, the appeal being admitted only (so far as such facts are concerned) on the deductions drawn from them."

He did not think that in the Native Courts in Bombay, the practice here required was much resorted to; nor

did he believe that it was the practice in Native Courts generally, to take these notes, which it would be under the Section before the Council, and which, he thought, would have the effect of making Judges hear cases with much greater care and attention than, it was to be feared, were now always bestowed.

MR. PEACOCK said, the Section required the Judges who would exercise jurisdiction under this Code, to do no more than the Lord Chancellor, and every other Judge in England who performed his duty, did. The Honorable Member for the North-Western Provinces said that the memorandum of the Judge would be of no use. To him (Mr Peacock), it appeared that it would be of very great use. If the Judge should take full notes of the evidence himself, it would doubtless be of no use; but if the notes were taken by an Officer, the memorandum by the Judge would be valuable in showing whether the record by the Officer had been taken correctly or not. If he (Mr. Peacock) thought that any Judge was capable of making his memorandum from the notes of the evidence at home, when the law expressly required him to make it independently of the notes as the examination proceeded, he should certainly insert a clause to guard against the abuse; but he could not conceive that any Judge could be guilty of such conduct, and it would be casting an unmerited slur upon an honorable body to make any provision on the subject. But the Council would cast no slur upon that body in pointing out its duty to it, and it merely did that when it provided that, in all appealable cases, where the Judge did not take down the evidence of the witnesses himself, he should make a memorandum of the substance of each deposition as it was being given. The law required a Judge to take an oath of office. There was no slur implied in that. Whether an oath of office was a good thing or not, was not the question; but it cast no slur upon the person who took it; nor did he think it would be casting any slur upon the Judges who were to administer this Code to insert in it a Section which would prevent two or three witnesses in the same suit being examined at the same time.

MR. HARINGTON said the amendment was proposed to be inserted at the last Meeting of the Council simply and solely on the ground that some of the Judges did not do their duty, and that it was therefore necessary to impose this additional check upon them. It was quite true that Judges and Juries were sworn before they entered upon the duties of their respective offices, but they did not tell them that this was done because if they were not sworn it was believed that they would be corrupt or dishonest. Had the amendment proposed by the Honorable and learned Member formed part of the Section as it was originally framed, he (Mr. Harington) might not have had the same objection to it as he had now by reason of the ground upon which it was proposed to introduce it.

MR. HARINGTON'S motion was put and negatived.

MR. PEACOCK'S new Section as amended, was put, and carried.

THE postponed Section 145 of Chapter III provided that witnesses should be examined without oath or affirmation, and prescribed a form of admonition to be used preliminary to their giving evidence.

MR. FORBES moved that this Section be omitted, and that the following be substituted for it:—

"Before any witness is examined, the Court shall administer to such witness such oath as it may consider to be most binding on the conscience according to the religious persuasion of such witness, requiring him to speak the whole truth and nothing but the truth."

He said that, in rising to move an amendment to the Section, he must commence by an expression of the wish he so strongly felt, that some other Honorable Member more competent than he was to do justice to so important a subject had been willing to bring it forward for discussion; but as he stood alone among those Members of the Select Committee who usually attended its Meetings in protesting against the principle which it was now sought to introduce into our Courts of Justice, he felt

that, unless he put himself forward on this occasion, the matter, important though it was, might not be discussed at all. He felt sure that he should not look in vain for the indulgence of the Council, and that he should not ask in vain that this question might be decided on its own merits only, and might not be prejudiced in the judgment of Honorable Members by the very imperfect treatment it would receive at his hands.

He did not intend on this occasion to enter on a discussion of the general abstract question of oaths. Whether or not it was ever right and expedient to demand an oath, was not now the question; but assuming that, in proper places and on proper occasions, an oath might properly be demanded, the question was, whether a Court of Justice was a proper place, and the delivery of evidence was a proper occasion on which an oath might be demanded?

All evidence was taken on oath prior to the passing of Act V of 1840. The Preamble to that Act stated that it was passed because obstruction to justice and other inconvenience had arisen in consequence of persons of the Hindoo and Mahomedan persuasions being compelled to swear by the water of the Ganges or upon the Koran, or according to other forms which are repugnant to their consciences or feelings.

Now, although the Act which abolished oaths was founded on the impression that it was the objection which they felt to an oath that made respectable men unwilling to appear in our Courts, it was, he believed, now very generally admitted that that impression was wholly and entirely erroneous. It was to appearance in our Courts at all, and not to being sworn when there, to which the native gentry objected, the objection being grounded on a feeling that exemption from attendance was the sign and mark of a particular position in society. But as some Honorable Members might take their stand on this Act, and be unwilling to repeal a law passed for the relief of conscientious scruples, it might be well to see what was on record by those most competent to form an opinion on the subject regarding the impression under which Act V of 1840 had been passed.

In his notes on the Code of Civil Procedure prepared by the Commissioners in England, the present Chief Justice of the Supreme Court had said:—

"I must beg to express my dissent from the proposal to abolish judicial oaths, and every sanction in the nature of one. I think the measure proposed in itself inexpedient, and the reasoning by which the Commissioners support it (*see* note at page 57 of the Report) seems to me to proceed, in part at least, upon an erroneous assumption of matters of fact. They determine to throw over every sanction because one class of suitors (the Hindoos) are supposed to object to a particular sanction. It is assumed that it is this objection which keeps what are called respectable natives out of Court. If this were so, one would expect them to be more ready to appear in the Courts of the East India Company, where the evidence is taken on solemn affirmation, than in the Supreme Court. Yet the contrary is, I believe, the fact. That an unwillingness to be sworn may occasionally keep a respectable native out of Court, I do not deny; but I believe that the repugnance of that class of persons to appear in Courts of Justice is far more frequently caused by a foolish notion of personal dignity more prevalent in the Provinces than in Calcutta, and an unwillingness (for which there is sometimes a more rational foundation) to submit themselves to cross-examination."

In their annual Report on the administration of Civil Justice for 1845, the Sudder Court at Agra remarked, with reference to Act V of 1840:—

"That there was no necessity for the Act in reference to its proposed end of removing the obstruction to justice, arising from persons of the Hindoo and Mahomedan persuasions being compelled to swear by forms repugnant to their feelings and consciences, because former Regulations provided for the exemption of those whom, according to the usages of the country, it would have been improper to subject to such compulsion, by simply prescribing a declaration or *kalufnamah*."

"*2ndly.*—That, though repugnance to be sworn might be the ostensible reason of the unwillingness of certain persons to appear as deponents in our Courts, it is not the real one, which is connected with other and distinct considerations, not removed or removeable by the Act in question. The disinclination of certain classes to appear in Court was attributable rather to the ideal consequence attached by them to a position, which, they supposed, set them above the summons of a Magistrate or other Officer, the privilege of not appearing in Cutcherree being considered the distinguishing line between the higher and middle classes."

But this was not all that was on record regarding the impression under which Act V of 1840 was passed. In February 1847, the Government of

Mr. Forbes

the North-Western Provinces called upon the Sudder Court to obtain the opinions of the Native Judges on the operation of the Act, and in their reply dated in November of the same year, the Court submitted an abstract of the opinions they had received, to which he would again refer. It was now necessary only to quote so much of the Court's Report as stated that, in the opinion of the highest Native Judicial Officers,

"the educated and respectable classes were not, as it was once supposed, deterred from giving evidence by the necessity of submitting to the requisition of that oath, but by a repugnance to personal attendance in Court, which the substitution of the declaration for the oath has, of course, been ineffectual to remove."

And lastly, in a Minute recorded by Mr. H. Lushington, a Judge of the Agra Sudder Court, that Officer said—

"It has been supposed that respectable Natives formerly objected to appear in Courts as witnesses on account of aversion to swear upon the Koran or upon the Ganges water. The reports now before us show that this was an erroneous supposition. Respectable Natives are *not* more willing to attend now than they were prior to the passing of Act V of 1840; they object to attending the Courts, not to taking the oaths; and if they could be examined in their own houses, they would seldom object to give their evidence. The supposed aversion, then, of respectable Natives to the taking of an oath cannot be urged as a reason *against* the repeal of the Act."

We had, therefore, the testimony of the Sudder Court in 1845; we had the same testimony repeated after mature deliberation in 1847; and we had the concurrent testimony of all the Native Judges who must be admitted to be the best evidence on such a subject—that the grounds on which Act V of 1840 was passed had never had any real existence, and that the respectable classes were not, as was once supposed, deterred from giving evidence by the necessity of submitting to an oath, but by repugnance to personal attendance in our Courts—a repugnance which the abolition of oaths had, of course, been ineffectual to remove.

As, therefore, the grounds on which Act V of 1840 was passed, never had any real existence, they could not be brought forward as arguments against its repeal, and before the question was definitively settled by the enactment of the Section now before the Committee, it would be well to consider whether its repeal would or would not be a desirable and expedient measure.

For what purpose were Courts established? He apprehended that they were established in order that justice might be done between man and man—he apprehended further that truth and justice were inseparable, and that without the one, we could not hope to do the other. If this were so, the question arose whether all reason, experience, and the recorded evidence of those most competent to judge, did not lead to the conclusion that the requisition of an oath did, or did not, increase the probabilities of our obtaining the truth, and consequently improve our means of doing justice.

He maintained that it did; but as his opinion would carry no weight with the Council, he would, at the risk of being somewhat tedious, read to the Committee some extracts from the evidence that had been laid before the Council on the subject—evidence, let it be remembered, that was not of his collection, but which had been obtained from the records of the Government of India, and had been printed and referred to the Select Committee on the motion of the Honorable and learned Gentleman (Mr. Peacock).

The first extract which he would read was from the notes of the learned Chairman, who said—

"I admit that a really conscientious and intelligent witness will speak truth without being sworn, as he will speak truth after taking an oath. I admit that very many who do take an oath are foresworn. But I nevertheless believe, that there is a large class of men who are more likely to give their evidence truthfully and cautiously when they give it on oath, than they are when they give it without that sanction, and I am not prepared to abandon any innocent mode of getting at truth, however unphilosophical. With that object I would break a plate over the head of a Chinaman, or put a tiger's skin on the back of a Cole."

The Calcutta Supreme Court had said—

"It became speedily apparent from the increasing discrepancies between the statements of these witnesses in the Supreme Court and their statements before the Magistrates in the same cases, that some evil had resulted from the change. It has happened on several occasions that a witness, on being asked why his statement in Court varied from that before the Magistrate, gave as an explanation, which he seemed to consider as satisfactory, that he was not on his oath in the latter case; and ex-

perience leads us to think that some will speak truth under the influence of their oath, who will depose falsely if that restraint be moved. The general principle of the Draft Act substitutes in all judicial proceedings a solemn declaration for an oath. If the former be as high a security that truth will be spoken as an oath, it is on all accounts to be preferred. We think, however, that it is not so high a security: though, if all men reasoned or felt correctly, it would be. We cannot conscientiously recommend this substitution in the Supreme Court."

The Chief Justice of the Bombay Supreme Court had said—

"I have no doubt many a witness would be more deserving of belief if he were sworn than if he merely made the affirmation in question."

The Honorable Mr. Willoughby had said—

"But uncertainty in the administration of justice, the success of fraud, and impunity of crime by legal process are evils so grievous and demoralizing to society, and so encourage the disposition to commit the crimes which produce them, that I think we are justified in availing ourselves of every aid of passion or prejudice, however absurd it may appear to a higher intelligence and better knowledge, which may in any way or degree tend to prevent such evils. Many Native witnesses who will, without hesitation, and for a very little profit, perjure themselves in our Courts, acknowledge some form or ceremony of adjuration which would have restrained them from the offence; and I think our old Regulations very wisely directed a judicial admonition to the witness, and gave the Judge a discretion to adopt such form of oath as was known to be most binding on his conscience."

The Sudder Court at Madras had declared their belief

"that a mistake was made in abolishing the old form of oath which was often effectual where the present was not, and that the objectionable state of things described can be remedied only by a return to the former system of administering oaths, a course of proceeding which they also would support with their strong recommendation."

The Sudder Court at Bombay had said—

"The Court is of opinion that the oath was more binding than the affirmation, from the allusion to and connexion with, however slight, the religion of the witness, and from its being in conformity with usage; but that neither is effective, and that, to command truth, the placing of the hand on the Geeta, the Cow, the Child, or the Grain must be reverted to; and under this view, the Judges would strongly recommend a reversion to the former system of oaths as prescribed by the Bombay Code, to be administered in such manner as may appear to the trying authority desirable."

The Sudder Court at Agra had said—

"The Court having their attention particularly directed to this subject, have caused a comparative statement to be compiled from the records of their Office; and it appears that from 1836 to 1839, both inclusive, the commitments in all the districts of the North-Western Provinces amount to 332 during the four years extending from 1842 to 1845, the total number of commitments was 456, or 124 more than in the four years antecedent to the operation of Act V of 1840. These facts are of themselves sufficient to favor the presumption that perjury has been fostered by the new law; but when it is considered that a very large proportion of evidence is taken and recorded in the Native Courts, that the officers presiding in those Courts do not attach the same degree of moral turpitude to false swearing that it conveys to an educated and well ordered mind, and are slow to appreciate the importance and bear the opprobrium of exposing it, and that consequently not two-thirds of the perjuries actually committed are made the ground of a criminal prosecution, the comparative increase in the number of commitments for the offence in question carries with it an irresistible proof of its greater prevalence, and justifies the Court in proposing a reconsideration of the law's provisions. It seems clear, from all the evidence available, that the formula which the Act prescribes does not bind the conscience; and any observance that fails to procure this principal object of an oath, that fails to impose upon the deponent an obligation to depose truly, may be as well abandoned altogether. 'The present apology for an oath,' observes Mr. Thomas, 'is, to say the mildest of it, a failure; for three-fourths of the witnesses do not understand it, and so cannot feel its force, whilst those who can comprehend its meaning do not regard it as an oath, but treat it with contempt.' Mr. H. B. Harington, when officiating Judge of Jounpore, commenting on the operation of the Act, took occasion to lament the daily increase of perjury; and the Court are persuaded that, were the local officers generally consulted, it would be found that the experience of the last four or five years has not altered the unfavorable opinion formerly expressed of the law's provisions and effects."

The opinion of the Native Judges was given as follows in a letter from the Sudder Court at Agra, to the Government of the North-Western Provinces:—

"I am desired accordingly to submit an abstract of the replies received from the several Principal Sudder Ameens in the North-Western Provinces, and it will be observed that, with few exceptions, the highest Native Judicial Officers of the country declare that the oath on the Koran and Ganges water, was more binding on the consciences of their countrymen, than the present declaration; that though the educated classes regard this declaration with the respect which an invocation of the deity should command, the ignorant and superstitious, who mostly frequent our Courts as witnesses, do not understand or feel its sacred obligation; and that the crime of perjury is now more prevalent than it was under the system which Act V of 1840 abolished. It will likewise be observed that, with one exception, all the functionaries who have been consulted either advocate a return to the former practice of swearing deponents on the Koran and Ganges water, or deliver it as their opinion that, owing to the multitude of sects both among Mussulmans and Hindoos, no one form of attestation can be prescribed, and that consequently a discretion should be left to the Court to swear each witness in the manner that may be most binding upon his conscience."

Mr. H. Lushington, in a minute recorded at the same time, said:—

"If it be once indisputably established that witnesses now lie more than they used to do, and that, in the opinion of a vast majority of those most competent to judge, means may be found to make them lie less, these means ought to be employed; the unanimous declaration of the Principal Sudder Ameens, the opinion of nearly all the Judges, and the well-known verdict of all the Public, must be held to have established these two points. Why do we hesitate to apply the remedy? Of what use are Laws and Courts in a country where facts cannot be ascertained? Why require unceasing labor, why incur enormous expense, why accumulate and record the results of experience, if national falsehood defies the application of our principles? The wisdom of the wisest tribunal is laughed to scorn by the perjury of a single scoundrel. But it is superfluous to dwell upon the self-evident truth that the character of evidence is the most important consideration in all civilized societies; and we are therefore bound, if we value the happiness of the millions whom Providence has committed to our care in this country, to improve its character whenever we can discover how to accomplish so desirable an object. If we continue to administer injustice when we might administer justice; if we persist in doing wrong when we might do right—we incur a fearful responsibility, both in this world and in the next. The objection made to a return to the Koran and Ganges water is generally thus worded—'we cannot go back.' Why not? If we have taken a step in the wrong direction, it is the very best thing we can do. The act of retrogression is not objectionable *per se;* and, upon the data now before us, we are compelled to admit that we ought to retrograde. Should the Government ever make up their mind to yield so much to the peculiarities of their subjects, I should not hesitate to go even farther, and in conformity with Section VII Regulation III. 1803, to authorize the Courts to use any form of oath which they considered most binding upon the conscience of the witness about to be examined. I would purchase truth at any price; nor would I hesitate, if so I might obtain it, to place the koran in the hands of the first witness, the Ganges water in the palm of the second, a plate to a third, the name of some long departed sage to a fourth, the tail of a cow to a fifth, his son's head to a sixth, burnt ghee to a seventh, and so on. Let the natives be educated by all means, let their morals be improved, and let them be invited to walk in that path which we believe to be conducive to their future welfare; but let us in the mean time give security to their persons and to their property, and await the hour when these Pagan ceremonies may be more safely abandoned.'

The Sessions Judge of the Saugor and Nerbudda Territories had said—

"With the tangible oath in a witness's hand, especially among the lower classes in India, I have generally found that some adherence to veracity can be enforced. From two and a half years' experience of the working of Act V of 1840, I do not hesitate to record my conviction that the affirmation is not held to be so binding as the tangible oath by nine-tenths of the witnesses; and I will mention two inferential proofs. When a witness's veracity is questioned, the common answer is—'I would say the same even if you put Gunga-jul into my hand.' And in the decision of Civil claims in these territories, where an appeal to the opposite party's oath is very common, the request is now almost invariably accompanied with a condition that 'the affirmation be not substituted for a formal oath."

The Sessions Judge of Dharwar (Mr. W. E. Frere), now a Member of the Bombay Government, had said—

"The natives of this country generally are, as timid people are elsewhere, deficient in veracity; but that they still have, every one of them, oaths which they respect, is constantly apparent to all who have ever noticed the effect of referring a Civil suit for decision to the oath of the opposite party. Men who have urged or denied claims when pleading in Court and have consented to swear to the truth of their assertions, have, when taken to the temple to swear, quailed, and refused the oath which the other party then has readily taken. With several of these cases in my mind, I cannot join in the opinion that oaths are not binding upon the natives of this country; and I fear that it is by abolishing them in our Judicial proceedings that we have opened the door to perjury, and that we have thereby incurred an awful responsibility."

The Session Judge of Poona had said:—

"I do not believe that the Act in question has in any way added to the crime; though every Native that I have spoken to on the subject latterly, holds that it has."

And lastly there was a statement of the crime of perjury in the Magistracy of Candeish for the years prior and subsequent to the abolition of oaths, from which it appeared that, since their abolition, the crime had increased in the ratio of 148 to 18.

Now from these extracts which he had read, the Council would have learnt that the Supreme Courts were against the abolition of oaths, that the Sudder Courts were against it, that the Sessions Courts were against it, and that the Native Judges were unanimously against it. But the Council would have learnt something more, and a fact of the very first importance, namely, that the crime of perjury had increased in the ratio of 148 to 18 since oaths were abolished by the passing of Act V of 1840. It might be thought that this fact would have been alone sufficient to carry conviction to the minds of all, and to have led to an immediate recurrence to former practice, for Honorable Members would at once see that much more was implied in the statement than at first sight ap-

peared. He asked the Council for one moment to reflect on the great injustice of which our Courts must have been the unconscious instruments when made the tools of such a mass of perjury as was implied in an increase of detected cases from 18 to 148. It was, he believed, generally admitted that certainty of punishment was one of the best preventives of crime; if, therefore, any crime increased greatly in extent, it was to be assumed that detection and punishment had become less certain. Let this principle be applied to the statement now in question, and he thought we must conclude that the vast increase in the number of detected cases of perjury proved beyond a doubt that a far greater number had remained altogether undetected.

If, however, these facts were not sufficient to decide the question, and if the evidence of all the Courts, whether established by Royal Charter or presided over in the Mofussil by Europeans or Natives, were insufficient to decide the question, by what should it be decided? These facts and this evidence could not be set aside; there were no facts and no evidence on the other side to show that good had resulted from the abolition of oaths; but he would anticipate the answer that would be made to the present motion. It would be admitted that it was to be regretted that Act V of 1840 had ever been passed; but having been passed, it would be said that it was inexpedient to go back, and that as the same oath was not equally binding on all, if oaths were admitted, a discretion must be allowed to the Courts to administer whatever oath it considered to be most binding upon each witness, that much trouble and inconvenience might arise, and that a Judge might here and there be found, who would resort to unbecoming means of testing the credibility of evidence.

If this were to be the defence of the Section as it now stands, he would take leave to say that it would be no defence at all, for in the first place he agreed with what Mr. Lushington had said in the Minute from which he had just now read an extract, that if a false step in legislation had been made, it was a plain and simple duty to retrace it; it was a false pride that induced us to be consistent in error. As regarded any fear that might be felt regarding the discretion of some one or two Judges, he submitted to the Council that they could not legislate for individual and exceptional cases, and that it would be doing a grievous wrong to the people of this great country, if they were deprived, as regards their persons and property, of the safeguard which evidence delivered on oath was admitted by all to afford, by a vague indefinite fear that, here or there, at sometime or other, a Judge might possibly arise whose zeal in the pursuit of truth would outrun his discretion. Such a case, if ever it did arise, should be dealt with at the time by whatever authority might have the supervision of our Courts, and the people should not be deprived of what was inexpressibly valuable to them from a vague apprehension of a very remote contingency. He would ask, if no discretion were used by the Judges now? Were all punishments so exactly defined that a Judge could exercise no discretion whether to recommend a capital punishment or a mitigated punishment of transportation? Was there no discretion as to length of imprisonment or amount of fine? There was a discretion in all these matters, and should it be said that we could trust our Courts with discretion in matters of life and death and liberty, and yet would not trust them with a discretion in the administration of an oath?

As regarded any trouble that might arise from administering different oaths to different people, it was not necessary to say much. Was trouble worth more consideration than truth? Ought we to allow a little trouble to weigh even as a dust in the balance in comparison with the immense benefit which that trouble was to gain? If it were the part of wisdom to select the less of two evils, could there be a moment's hesitation as to the choice that should be made between a little trouble on one hand and boundless perjury on the other?

But how stood opinions in this Council? He would ask the learned

Mr Forbes

Judges of the Court that was here established by Royal Charter, if they would consent to the abolition of oaths in the Court over which they so honorably and ably presided? if they said no, he would ask them if they could consistently refuse to the Mofussil what they believed to be of such value to the Metropolis? He would ask the Honorable and gallant gentleman—whose services, long and arduous though they had been, had not been longer than they had been brilliant, or more arduous than they had been chivalric—if from his experience of Courts-martial he was of opinion that unsworn testimony was as valuable as that which was declared on oath? and if he said no, he would ask him to vote on this motion accordingly.

[Sir Jas. Outram. Decidedly not.]

He would ask the Honorable and learned gentleman—whose distinguished career at the bar had fairly earned for him his present high and influential position—if his experience of Courts in England led him to believe that oaths might be safely abandoned there? and if he said no, he would ask him if the people of this country were more moral and more truthful than were the people of England? He would ask all those Honorable Members who, in their several careers, had presided in Courts and Cutcherries, if they really and seriously believed that oaths were of no value? He would ask the whole Council, of what use was this Code on which they were engaged, if, after all, its most elaborate simplicity was to end in our Courts deciding on perjured evidence? What was the use of our Courts, if they were to be only Courts of Law and not Courts of Justice? To what end would it be that the plaint was made out according to form, that the witnesses and defendant were summoned *secundum artem*, and that throughout the whole record every *t* were crossed and every *i* dotted according to strict rule, and then a wrong judgment were to be given? It was his firm conviction that the utmost confusion of procedure, if it ended in a right judgment, would be preferable to the most rigid uniformity, if perjury were allowed to run riot in our Courts and utterly to confound all right and wrong.

He would not resume his seat without apologizing for the length of time he had occupied, and without tendering his acknowledgments for the attention that had been accorded to him; and anxious to leave on the minds of Honorable Members a good impression upon the subject of this motion, he would, in place of concluding with any words of his own, read an extract from a report sent in by his Honorable friend on his left (Mr. Harington) when Judge of Gorruckpore. It was as follows:—

"Courts of Justice are established for the good of the public at large, and for the protection of the lives and properties of the people; but when it is found that they are made the instruments of oppression and injury by designing and dishonest men, the Government are surely justified, after having tried all ordinary means in vain, in having recourse to extraordinary measures, not inconsistent with a civilized Government, to render their Courts of Justice a blessing and not an evil to their subjects."

SIR ARTHUR BULLER said, if he were called on to give a vote on the present occasion, he should vote for some provision which would require that Native witnesses should be required to swear by some practicable binding oath rather than that they should give their evidence under no religious sanction at all, because it appeared to him, from the annexure in circulation, that beyond all question the preponderating weight of opinion was in favor of testimony upon oath rather than upon solemn affirmation, and therefore *à fortiori* in favor of such testimony rather than of testimony given under no sanction whatever. The Native Officers were unanimous in that view: no doubt all were also agreed as to this, that do what you will, invoke what sanction you please, neither the fear of Divine vengeance nor of temporal punishment would universally avail to check the fatal propensity to lying. Nevertheless, if it could be shown that one witness out of ten would tell the truth under the sanction of any oath who without that sanction would tell a lie, how, as guardians of public justice, would they be justified in dispensing with it? If called upon to vote now, he had said he should support the amendment, or at all events the principle of it;

but he trusted that he should not be driven, on the present occasion, to a final expression of opinion, but that his Honorable friend would consent to leave this great question to be considered at another time and on a more appropriate occasion. He thought that it should be made the subject of a separate Bill, which should deal generally with the subject in all its bearings. The provision under discussion was limited to the examination of witnesses in Civil cases in the Mofussil Courts. The same question would again arise when they were dealing with witnesses in the Code of Criminal Procedure and with Juries; and no doubt the principle adopted then in the Mofussil would, he presumed, be adopted in the Supreme Courts. It was, therefore, far better to consider in one separate Act the whole question. It might be said that the principle must be the same in all; therefore why not settle the question at once? His answer was that they were not in a proper position now to settle it. They had not before them all the information which they might have. The printed papers before them only contained the expression of opinions as to the working of the Act of 1840 from its passing up to about 1846. Since the latter date they were comparatively uninformed upon the point. But why throw away the experience of the last ten years, during which time opinions might have been modified or confirmed or possibly changed altogether? Why not enquire first what the most experienced persons thought now, and they must not forget that they had never collected opinions upon the broad question with which they were now dealing. They had never put it to any one—"What do you think of doing away with all oaths and affirmations and declarations alike"? He thought it could be hardly said that the publication of this Bill, with a provision to that effect in it, was tantamount to an invitation to the public to express their opinion upon it; for the provision, contained as it was in Section 145 of Chapter III and buried in such a heap of other Sections, was not likely to have attracted many eyes, and in fact the Council could form no idea as to the state of public opinion upon the precise question on which they proposed to legislate. He hoped and trusted, therefore, that they would not come to a conclusion now, but reserve for further and more solemn consideration the whole question—and he would suggest that, in place of the proposed amendment, they should adopt an amendment to the effect that witnesses be examined upon oath or affirmation or otherwise according to the law for the time being in force in relation to the examination of witnesses.

MR. FORBES said, he would assent to what appeared to be the general wish on the subject, and withdraw his amendment upon the understanding that a separate Bill would be introduced at no very distant date.

MR. CURRIE said, a Select Committee was appointed for the express purpose of considering the project of Law relating to oaths and affirmations, but it had been discharged, and the papers had been referred to the Select Committees on the Civil Procedure Code.

SIR ARTHUR BULLER said, the Select Committee had expressed no very conclusive opinion one way or the other upon the point, and at all events they had before them no further evidence or communications by which a new light was thrown upon the subject.

MR. CURRIE said, he merely meant to observe that, in the event of the Honorable and learned Member's suggestion being adopted, it would be well to bring this controverted matter to a decision, either by appointing another Select Committee for its consideration, or in some other mode.

MR. HARINGTON said, he agreed with the Honorable Member for Bengal. Some steps should be taken for obtaining the opinions of the local Officers since the date of the last communication; unless that was done, they would gain nothing by the postponement.

SIR ARTHUR BULLER said, he would undertake to bring in a Bill himself, or, what would be much better, he felt sure that his Honorable friend, the Member for Madras, would do so.

MR. FORBES said, upon that understanding he would withdraw his amendment.

THE CHAIRMAN said, he hoped that whoever undertook to frame the measure would provide for what appeared to have been an omission in the amendment proposed by the Honorable Member for Madras—the reception, upon affirmation or otherwise, of the evidence of those who conscientiously objected to take an oath. He had, as the Honorable Member for Madras had shown, expressed an opinion favorable to the retention of oaths in judicial proceedings generally. But he had never advocated a system whereby those who had a conscientious objection to take an oath, might be subjected to what they might fairly think persecution in the shape of penal consequences; and valuable testimony might be lost to the parties to the suit.

MR. FORBES explained that he had not thought such a provision necessary, with reference to the following remarks on the subject by the Chairman, which he had found in the printed papers:—

"To support their theory on this point, the Commissioners somewhat hastily assume that the discretion given to the Court by the 9 Geo. IV, c. 74 s. 36 has had considerable practical effect. On this point I can only say that I have sat nearly eight years on the Bench of the Supreme Court, and that I cannot call to mind that, during that space of time, the discretion in question has been exercised in the case of eight *different* witnesses."

On referring to the Report of the Municipal Commissioners for 1857, he found that the population of Calcutta was set down as 4,15,000, and it appeared, from what the learned Chairman had said in the remark just now quoted, that the exemption had not been claimed even so frequently as eight times in eight years. It certainly had appeared to him that a question that would affect only one man in 4,15,000, was one to which the legal maxim of *de minimis non curat lex* would apply. He was, however, sure that whoever undertook to prepare the Bill, would be careful to attend to the suggestion now made by the learned Chairman.

SIR ARTHUR BULLER then moved that the following new Section be substituted for Section 145:—

"All witnesses shall be examined upon oath or affirmation or otherwise according to the provisions of the law for the time being in force in relation to the examination of witnesses."

Agreed to.

The postponed Section 146 of Chapter III (providing punishment for false evidence) being read by the Chairman, it was moved by him that it be left out.

The Section was put and negatived.

The postponed Section 96 of Chapter III was passed after amendments.

The postponed Section 167 of Chap. III being read by the Chairman—

MR HARINGTON moved that it be left out.

Agreed to.

Sections 1 to 7 of Chapter IV were severally passed as they stood.

MR. LEGEYT said he had a new Section to propose after Section 7. Under the Bombay Code, it had been the law, in executing decrees, to exempt from attachment property of the defendant by which he gained his livelihood. Section 62, Clause 2, of Regulation IV. 1827 provided as follows:—

"But it is to be clearly understood that, if the defendant shall point out any of his property for sale in preference to that specified by the plaintiff, the property so pointed out shall be first sold, and that such implements of manual labor, and such cattle and implements of agriculture, as may, in the judgment of the Court from which the process issues, be indispensable for the defendant to earn alivelihood in his respective calling, or cultivate any land that he may hold for that purpose, shall be exempt from attachment."

This exemption had been in force in Bombay for the last thirty years, and he believed it had also been in force previous to the enactment of the existing Code. The Code now before the Council was a deviation from that law, for it rendered all property belonging to a defendant, including implements of trade, liable to attachment and sale. This would be considered as a very great hardship. It might be said that, when a man incurred debts, it was a just principle to make all the property he had in the world pay those debts; but when it came to be a question of utter ruin to the

defendant, it had been held by the framers of the existing Code, and by the distinguished Statesman who presided over the Government of Bombay when it was under preparation, that he was entitled to some consideration. The Council would observe that, though it was not the law in Bengal to exempt implements of trade from attachment under decrees, it was the practice to exempt them from distraint.

Then, he thought there was another right which ought to be secured to a defendant. Suppose that, in the case of a small debt, execution was sued out, and the plaintiff went with an order for general attachment, or that he went with an order for especial attachment, and attached a horse belonging to the defendant. The horse might be worth a great deal more than the claim, and might be sold at a sacrifice at such a sale, but the defendant might have a bullock, which would fetch a price that would satisfy the decree. The defendant ought to have the power of compelling him to sell the bullock instead of the horse. He should, therefore, move that the following be inserted as a new Section after Section 7 :—

"But if the defendant points out any of his property for sale in preference to that specified by the plaintiff, the property so pointed out shall be first sold Such implements of manual labor and such cattle and implements of agriculture as may, in the judgment of the Court from which the process issues, be indispensable for the defendant to earn a livelihood in his calling or trade, shall be exempt from attachment."

If this Section should be adopted, he should move two others, which he had taken from Section LXIX of Regulation IV. 1827, which were as follows :—

"Land and its crop, of whatever kind, shal not be attached and sold separately until after the crop has been reaped or gathered.

Second. When corn or other production of khalsa land paying anpual rent to Government is attached and sold, the Collector or his officers may prevent its being sold or carried off such lands, unless the purchaser shall pay the amount due on account of the revenue ; but in no case shall the purchaser be liable for more than one year's revenue.

Third. The same right of detention for arrears of rent, similarly restricted, shall be exercised by a land-holder where his tenant's corn or other production of the soil is attached."

He brought forward these Sections with considerable diffidence ; but it did appear to him that they ought to be inserted. They now stood in what was regarded at Bombay as the Civil Code of that Presidency ; and if this Bill should pass, that Code would be repealed. He therefore threw out to the Council that, certainly with respect to Bombay at least, the three new Sections he proposed should be inserted. He did not know how far they would be applicable to the state of things in the other Presidencies. In Bombay, they would protect principally the Government, who, in these cases, was the direct landlord.

MR. CURRIE said the greater portion of the first Section proposed by the Honorable Member could hardly be inserted in this part of the Bill, supposing that the Section were inserted at all. The Bill in this place merely declared what property belonging to a defendant was liable to seizure and sale. The first part of the proposed Section might be a suitable provision ; but it could only be inserted among the provisions relating to sale. It had nothing to do with this part of the Bill which declared what property should be liable to attachment and sale.

With respect to the second part of the Section, he thought it might be reasonable to insert some provision respecting implements of trade. In the Small Cause Courts Bill, the following Section was inserted on that subject :—

"In executing a writ of execution against the moveable property of a debtor liable under this Act, the Nazir shall except the tools and implements of the trade or business of such debtor and seed intended for the sowing of land cultivated by him."

At the end of Section 7 of Chapter IV of the present Code, a similar exception might be inserted.

That would probably meet the object which the Honorable Member had in view.

MR. HARINGTON asked, in reference to the first part of the first amendment proposed by the Honorable Member for Bombay, who was to answer any objection which might be made by a third party to the sale of any property which the defendant might, under the rule contained in that part of the amendment, require to be

sold in preference to the property seized and attached by the judgment creditor. It would frequently happen that the defendant, to save his own property, would point out property not belonging to him, but to some other person, and as the owner of the property so pointed out would certainly object to the proceeding, who was to answer the objection? The judgment creditor could not be expected to do so. He might fairly say that he had not pointed out the property to which the objection referred, and he did not wish that property, but some other property which he knew to belong to the defendant, to be sold; and if the defendant was required to answer the objection, delay and further obstruction to the execution of the decree could only be looked for. However, taking the case of the horse and the cow put by the Honorable Member for Bombay, if the defendant thought that it was more for his interest that his cow should be sold than his horse, what was there to prevent him from selling the cow himself and appropriating the proceeds to the liquidation of the decree. He was not aware that there was any particular advantage in a forced sale; on the contrary, people generally went to auctions to get bargains. He should oppose the amendment.

After some further discussion, Mr. LeGeyt, with the leave of the Council, withdrew his motion.

Sections 8 to 13 were severally passed as they stood.

Section 14 was postponed.

Sections 15 to 22 were severally passed as they stood.

Section 23 provided as follows:—

"If the decree be for land or other immoveable property not in the occupancy of ryots or other persons entitled to occupy the same, delivery thereof shall be made by putting the party to whom the land or other immoveable property may have been adjudged, or any person whom he may appoint to receive delivery on his behalf, in possession thereof, and, if need be, by removing any person who may refuse to vacate the same."

MR. LEGEYT said, the Sudder Adawlut at Bombay had sent up a remark in relation to this Section which he desired to lay before the Council. Their remark was on Section 17 of the Bill as published for general information. They said they "would leave out the provision 'and if need be, by removing any person who may refuse to vacate the same' at the end of the Section, as giving too much power to the Bailiff or other proper Officer, and as, in some degree, opposed to the provisions of Section 19."

The provisions here alluded to as contained in Section 19 of the original Bill stood in the amended Bill as Section 26, which said:—

"If, in the execution of a decree for land or other immoveable property, the Officer executing the same shall be resisted or obstructed by any person, the person in whose favor such decree was made may apply to the Court at any time within one month from the time of such resistance or obstruction. The Court shall fix a day for investigating the complaint, and shall summon the party against whom the complaint is made to answer the same. If reasonable ground shall be shown to the satisfaction of the Court for believing that the obstruction or resistance in question was occasioned by the defendant or by some other person at his instigation, the Court shall also issue a summons to the defendant, calling upon him to appear on the day appointed for the investigation."

It appeared to him that Section 23 and Section 26 of the present Bill were inconsistent with each other, and he should move that the words "and, if need be, by removing any person who may refuse to vacate the same" be left out of the former.

MR. HARINGTON said, where the Court had adjudged property to the decree-holder, and the defendant refused to give possession, the Court would, under Section 26, have the right to put him out of the property, and give it to the decree-holder. If the party dispossessed thought that he was wrongly removed, he could come in and dispute the right of the decree-holder to remove him under Section 29, but in the meantime he thought the Court ought to have the power of removing the person in possession.

After some further discussion, Mr. LeGeyt, with the leave of the Council, withdrew his amendment.

THE CHAIRMAN moved that the word "land" after the word "for" in the 1st line of the Section be left out, and the words "a house" substituted for it.

Agreed to.

THE CHAIRMAN moved that the words "ryots or other persons entitled to occupy the same" after the word "of" in the 3rd line of the Section be left out, and the words "a defendant or of some person in his behalf" substituted for them.

Agreed to.

THE CHAIRMAN moved that the word "land" before the word "or" in the 7th line of the Section be left out, and the word "house" substituted for it.

Agreed to.

The further consideration of the Section was postponed.

Section 24 was postponed.

Sections 25 to 27 were severally passed as they stood.

Section 28 provided as follows:—

"If it shall appear to the satisfaction of the Court that the resistance or obstruction to the execution of the decree has been occasioned by any person, whether a party to the suit or not, on the ground that the property is not included in the decree, or by any person claiming *bonâ fide* to be in possession of the property on his own account, or on account of some other person than the defendant, the Court shall, without prejudice to any proceedings to which the defendant or other person may be liable under any law for the time being in force for the punishment of such resistance or obstruction, proceed to investigate the claim in the same manner and with the like powers as if the claimant had been made originally a defendant to the suit, and shall pass such order for staying execution of the decree, or executing the same, as it may deem proper in the circumstances of the case."

THE CHAIRMAN said, on this and several other Sections, he wished to observe that they did not appear to him to give the Courts all the necessary power which he thought should be given to them. The Section now before the Committee gave a Court the power of investigating a claim made by any person claiming to be in possession of the property taken in execution, and "pass an order for staying execution of the decree, or executing the same, as it may deem proper in the circumstances of the case." Section 29 authorized the Court to investigate the claim of the party dispossessed although no resistance or opposition should have been offered, and "pass an order for restitution," "or such other order as it may deem proper in the circumstances of the case." Then Section 30 provided that "any order passed by the Court" under either of the last two preceding Sections, shall not be subject to appeal; but the party against whom the order may be pronounced shall be at liberty to bring a suit to establish his right at any time within one year from the date thereof. Here, the Code pre-supposed conflicting claims made by persons not parties to the suit. What he desired to know was the reason for making these orders not subject to appeal, but leaving the dispossessed party to bring a regular suit for the recovery of the property. He could not see why, under the procedure which the Code provided, the Court should not deal with all these claims very much as the Supreme Court deals with similar claims under the Inter-pleader Act. A Court acting under this Code, would, in this respect, be exactly in the same position as in an original suit if the question were one of title between the execution creditor and a person not a party to the suit in which the execution had been decreed. If that was so, why did not the Code give to the unsuccessful party the same right of appeal which he would have had if the question had been decided in an original suit, and to the successful party the same right which he would have had under the decree, confirmed on appeal, instead of leaving him uncertain during a whole year whether he might not have again to litigate his title in a regular suit. It was possible, however, that the Select Committee had been influenced, in dealing with the question, by reasons which were not present to his mind.

MR. HARINGTON said, the Code, as framed by Her Majesty's Commissioners, took away the right of appeal, and continued a right of suit only. Under the present practice, after the summary decision, there might be two appeals, a summary and a special appeal, in the miscellaneous department, and, subsequently thereto, the three stages of a regular suit, namely, the original suit, a regular appeal, and a special appeal, which certainly appeared to him to be more than the ends of justice required; and upon the whole, he was disposed to

agree with the Honorable and learned Chairman.

THE CHAIRMAN then moved that the further consideration of Sections 28, 29, and 30 be postponed.

Agreed to.

Sections 31 to 34 were severally passed as they stood.

Section 35 was passed after an amendment.

Section 36 was postponed.

Sections 37 to 43 were severally passed as they stood.

The further consideration of the Bill was postponed, and the Council resumed its sitting.

CRIMINAL PROCEDURE.

MR. HARINGTON moved that a correspondence received by him from the Secretary to the Government of the North-Western-Provinces regarding the present system of investigation into Criminal offences by Darogahs and other subordinate Officers of Police be laid upon the table, and referred to the Select Committees on the Bills for extending the jurisdiction of the Courts of Criminal Judicature of the East India Company, for simplifying the Procedure thereof, and for investing other Courts with Criminal jurisdiction.

Agreed to.

MR. HARINGTON moved that certain correspondence relating to prosecutions for perjury and subornation of perjury and forgery, and knowingly issuing forged deeds in Civil proceedings, be laid upon the table and referred to the Select Committees on the above Bills.

Agreed to.

AHMEDABAD MAGISTRACY.

MR. LEGEYT moved that the Bill "to empower the Governor in Council of Bombay to appoint a Magistrate for certain Districts within the Zillah Ahmedabad" be referred to a Select Committee, consisting of Mr. Harington, Mr. Forbes, and the Mover.

Agreed to.

The Council adjourned.

Saturday, October 30, 1858.

PRESENT:

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

Hon'ble Lieut.-Genl. Sir J. Outram,	E. Currie, Esq.,
Hon'ble H. Ricketts,	Hon'ble Sir A. W. Buller,
Hon'ble B. Peacock,	H. B. Harington,
P. W. LeGeyt Esq.,	Esq., and
	H. Forbes, Esq.

CONTINUANCE OF CERTAIN PRIVILEGES TO THE FAMILY &c, OF THE LATE NABOB OF THE CARNATIC.

THE VICE-PRESIDENT read a message informing the Legislative Council that the Governor General had assented to the Bill "to continue certain privileges and immunities to the family and retainers of His late Highness the Nabob of the Carnatic."

DELHI TERRITORY.

THE CLERK reported to the Council that he had received from the Home Department a communication from the Secretary to the Government of India with the Governor General, suggesting that, as the greater part of the Delhi Territory is now administered by the Chief Commissioner of the Punjab, an Act be passed for the formal repeal of Regulation V. 1832 of the Bengal Code.

MR. PEACOCK moved that the above communication be referred to the Select Committee on the Bill "to remove from the operation of the General Laws and Regulations the Delhi Territory and Meerut Division, or such parts thereof as the Governor General in Council shall place under the administration of the Chief Commissioner of the Punjab."

Agreed to.

SMALL CAUSE COURTS (MOFUSSIL.)

MR. HARINGTON moved the first reading of a Bill "for the establishment of Courts of Small Causes beyond the local limits of the jurisdiction of the Supreme Courts of Judicature established by Royal Charter". He said, the title of the Bill of which he was now to move the first reading, would probably lead some Honorable Members