Saturday, June 15, 1861

INDIAN LEG. COUNCIL DEBATES

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1861

Agreed to.

Section 360 was passed after a verbal amendment.

Forms A to E were passed as they stood.

Form F was passed after verbal amendments.

The Schedule was passed after an amendment in the 5th explanatory note.

The consideration of the Bill was then postponed, and the Council resumed it sitting.

POSTPONED ORDERS OF THE DAY.

The following Orders of the Day were postponed :—

Committee of the whole Council on the Bill "for licensing and regulating Stage Carriages."

Committee of the whole Council on the Bill "to amend Act VIII of 1859 (for simplifying the Procedure of the Courts of Civil Judicature not established by Royal Charter)."

Committee of the whole Council on the Bill "to amend Act XIV of 1843 (for regulating the Customs Duties in the North-Western Provinces)."

Committee of the whole Council on the Bill "to make certain amendments in the Articles of War for the Government of the Native Officers and Soldiers in Her Majesty's Indian Army."

Committee of the whole Council on the Bill "to extend to the Straits Settlement Act XXIII of 1840 (for executing within the local limits of the jurisdiction of Her Majesty's Courts legal process issued by authorities in the Mofussil)."

FINES FOR RIOTS.

MR. HARINGTON said, in the early part of to-day's proceedings a Select Committee had been appointed on the Motion of the Honorable Member for Madras to take into consideration and report upon some papers which had been sent to the Council from the Office of the Secretary to Government in the Home Department, on the subject of a very serious outrage which had recently been committed by a large body of villagers in one of the Districts of the Madras Presidency, and he had now the honor to move that it be an instruction to the same Committee to consider the existing laws generally relating to the responsibilities of landowners and the occupiers of land in connection with Police matters, and to submit a report thereon at the same time that they reported on the matter which had been ordered to be referred to them on the Motion of the Honorable Member for Madras. He observed that for some time past the Police responsibilities of Zemindars and other holders or occupiers of land, had been under the consideration of the Council with a view to the consolidation and amendment of the existing law ; and it seemed desirable that whatever provisions of law on this subject were adopted, should be embodied in the Code of Criminal Procedure now passing through a Committee of the whole Council. He understood that this was what was contemplated by the Honorable Member for Madras in respect to any law which might be proposed by the Select Committee appointed that day to meet cases such as that which had lately occurred at Madras, and he thought that the same Committee might conveniently consider the whole question of village responsibilities in connection with Police matters, and submit a general proposition which would greatly assist the Council in coming to a decision on the subject.

Agreed to.

The Council adjourned.

Saturday, June 15, 1861.

PRESENT:

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

Hon'ble Sir H. B. E. Frere.	C. J. Erskine, Esq.,
Hon'ble Major Genl. Sir R. Napier,	Hon'ble Sir C. R. M. Jackson, and
H. B. Harington, Esq.,	W. S. Seton-Karr, Esq.
H. Forbes, Esq.,	

MALACCA LANDS.

THE CLERK reported to the Council that he had received a communication from the Governor of the Straits Settlement regarding the Bill "to regulate the occupation of land in the Settlement of Malacca".

MR. SETON-KARR moved that the communication be printed and referred to the Select Committee on the Bill.

Agreed to.

SUITS AGAINST GOVERNMENT.

MR. ERSKINE presented a communication received by him from the Bombay Government regarding the trial by District Moonsiffs of suits against Government, and moved that it be printed.

Agreed to.

CRIMINAL PROCEDURE.

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 Criminal Judicature not established by Royal Charter," the Council resolved itself into a Committee for the further consideration of the Bill.

Section 268 which empowered the local Government to "order that the trial *of all offences*, by any Court of Session, shall be by Jury in any District," &c., was at first passed as it stood. But subsequently, on the Motion of the Chairman in consequence of the amendment carried in Section 272, the words "or of any particular classes of offences" were inserted after the words "of all offences" so as to meet the case of Districts where a Jury could not be formed for the trial of all offences.

Section 269 provided as follows :—

"Criminal trials before the Court of Session, in which a European (not being a British subject) or an American, is the accused person or one of the accused persons, shall be by Jury, of which at least one-half shall consist, if such accused person desire it, of Europeans or Americans, if so many of such races are on the Jury list of the District."

SIR BARTLE FRERE said, it had been suggested whether this Section might not be modified, so as to give the benefit of it to persons other than Europeans (not being British subjects) or Americans. There were many classes of persons who, though of European descent, might not be able to establish their status as Europeans. There was a large community of European origin at the Cape and elsewhere, in Africa and Australia, as well as in various parts of Asia, for example, in Ceylon, Mauritius, Bourbon, and the Eastern Islands. The principle followed in England was entirely in accordance with natural justice, namely, that no person who was not a native of the United Kingdom, could be tried, except by a Jury composed of half of his own countrymen. The same principle, he thought, ought to be extended to this country. He should propose the omission of this Section, and the substitution of the following :—

"Criminal trials before the Court of Session, in which a person not being a native of India, is the accused person or one of the accused persons, shall be by Jury, of which at least one-half shall consist, if such accused person desire it, of persons not Natives of India, if so many persons not Natives of India are on the Jury list of the District."

MR. ERSKINE said, he doubted if the amendment would meet the object of the Honorable Member which, as he understood it, was that a prisoner should be tried by a Jury of which at least one-half should be his own countrymen. Under the amendment, however, as it was now framed, a Frenchman, for instance, might be tried by a Jury of which one-half might be Chinese or any other Foreign race, having probably no sympathy with the accused.

MR. HARINGTON objected to the Committee being called upon without any previous notice and without their being allowed sufficient time for consideration to vote upon the very important amendment which had been moved by the Honorable Member of the Government (Sir Bartle Frere). The first objection that occurred to him to that amendment was that it would give to a Turkish Mahommedan an advantage which would not be enjoyed by a Native of India of the same persuasion. For this he could see no reason. The amendment was, no doubt, open to other objections, and

he apprehended that difficulties, not anticipated or seen by the Honorable Mover, would be found in the way of its adoption. He (Mr. Harington) was unwilling off-hand to commit himself to a vote, either against or in favor of the amendment, and he hoped that the Honorable Member would not object to the consideration of his amendment being deferred until Saturday next.

SIR BARTLE FRERE having acquiesced, the consideration of the Section was accordingly postponed.

Section 270 was passed after amendments.

Section 271 was ordered to stand over for the purpose of being considered in connection with Section 269.

Section 272 provided as follows :—

"In trials by Jury before the Court of Session, the Jury shall consist of such number of persons, not being less than four, as the Court shall direct."

SIR CHARLES JACKSON said, he thought that four was too small a number, and that the decision of a Jury of four would not carry sufficient weight. As Section 268 provided that the local Government should declare in what Districts trial by Jury should be introduced, he thought they had a sufficient guarantee that the Jury system would be introduced only in Districts where a sufficient number of Jurymen were obtainable. He also thought an even number was objectionable in so small a number as four. He would propose to substitute seven for four.

MR. HARINGTON said, the subject was fully considered in 1859, and it would be found from the Debate which then took place, that it was proposed to fix the number at six, but that the number was ultimately reduced to four, because it was thought that there might be difficulty in many places to get the half of a Jury of six composed of Europeans or Americans.

MR. ERSKINE said that the remark of the Honorable and learned Judge as to the decision of a Jury of four not carrying weight, was rather in favor of the Section as it now stood, because it was proposed to give force to the verdict of a majority, which, if the Jury consisted of four, must be three to one.

MR. SETON-KARR remarked that, if any part of the country was fitted for trial by Jury at all, it would be desirable that as little as possible in the way of decision on the facts should be left with the Judge, and that an uneven number of Jurymen should always be summoned. For this reason he should be prepared to support the amendment of the learned Judge for an uneven number of seven or five.

THE CHAIRMAN said, he was afraid that, if an even number was not fixed, the Council would have to alter all those Sections which spoke of one-half of the Jury consisting of particular races.

SIR CHARLES JACKSON then proposed to fix the number at six, but soon afterwards said that he had just been informed of a strange objection to that number. He had heard from good authority that natives considered six an unlucky number, and would deem themselves to be delivered over to certain conviction if tried by a Jury of six. That was no doubt a very silly objection, but still the Council must have some respect for the feelings of those for whom they were legislating. He was further told that the natives were accustomed to the number five in their Punchayets and liked that number, and he should therefore go back to that number. He objected also to the words "not being less than," as being indefinite, and should therefore propose the substitution of "five persons" for the words "such number of persons not being less than four as the Court shall direct."

MR. HARINGTON said, he had never heard of the objection just stated to the number six, but he presumed that the Honorable and learned Judge had good authority for what he had stated. The only objection he (Mr. Harington) had to the number five was that, when persons of certain classes were under trial, it would necessitate that the majority of the

Jury should always be of particular races, and there might often be a difficulty, if not an impossibility, in obtaining the number requisite to form such majority. He had no objection to the maximum number being fixed, but he would leave the Court to fix the number within certain limits, that is, taking five (if that number should be preferred to four) as the lowest, and nine or some other number as the highest.

MR. ERSKINE said, perhaps the objection of the Honorable and learned Judge might be removed if the words "as the local Government shall from time to time direct" were substituted for the words "as the Court shall direct." He decidedly objected to the power lying with the Court.

MR. FORBES said, he thought the less the Government had to do with fixing the number of the Jury the better.

MR. SETON-KARR said that he should support the view of the Honorable and learned Judge, but with the alteration suggested by the Honorable Member for the North-Western Provinces. He thought it would be very undesirable to leave it to Government to decide on the precise number of the Jurymen, whether five, seven, or nine. The discretion as to numbers might remain with the local Court. The circumstances of the District might so vary that different numbers of Jurymen would be available at different times or seasons, and the very importance of a great trial would facilitate the assemblage of a larger number. The occasion, in fact, would call forth the very power required.

SIR ROBERT NAPIER said, it would be a pity to limit the number of Jurymen in cases where they could easily be obtained. He had no objection to there being a minimum; but he thought that, if procurable at all, the larger the number of Jurors the better.

The question to omit the words "such number of persons, not being less than four, as the Court shall direct" was put and carried.

SIR CHARLES JACKSON'S amendment to substitute the words "five persons" for the words omitted, was then proposed.

MR. HARINGTON moved as an amendment on the above amendment, that the following words be inserted instead of the words proposed to be substituted:—

"such number of persons, not being less than five, or more than nine, as the Court shall direct."

MR. ERSKINE moved, as a further amendment on the above amendment, the insertion of the following words in lieu of those proposed:—

"five persons, or of such number being an uneven number and not being less than five or more than nine as the local Government, by any General Order applicable to any particular District or to any particular classes of offences in that District, shall direct."

MR. ERSKINE'S amendment being proposed—

MR. FORBES said, he had two objections to make against the amendment of the Honorable Member for Bombay. He thought, in the first place, that it would be objectionable to put it out of the power of the Judge to assemble as large a number of Jurymen as he at any particular time might be able to summon, and as on some particular occasion it might be desirable to summon, which would be the case if this amendment should be carried, because if the Court were situated in a District where under ordinary circumstances the Judge would not be able to summon a Jury of more than five, the order of Government would probably limit the Juries in that District to that number. But there might be particular cases, a case of murder for example, in which a European might be supposed to have been concerned, in which either by the temporary residence of Europeans at the station, or by troops marching through his District, it might be in the power of the Judge to summon a larger number of Jurors than could ordinarily be obtained, and then it would be a pity, in his opinion, that the Judge should be limited to the ordinary number, and not have it in his power to enlarge the Jury for the particular occasion. Another and

a stronger objection which he had was that it would put it in the power of the Government to fix the number of the Jury for the trial of any particular case, since if Government were to be enabled by law to fix the number of a Jury in each District by an order in Council, they must be presumed to have the power to alter that order, and he thought that words had fallen from some of the Honorable Members who had already spoken to the effect that a power to recall and alter the order should be included in the Section which gave the Government power to make the order originally. If so, it would obviously be in the power of the Judge to write and tell the Government that a case was coming on in which the Government was interested, and the Government would be able to alter the number of the Jury to suit the particular case. He did not at all say that the Judge would make such a recommendation, or that the Government would pay attention to it if it were made, but he was strongly of opinion that the less the Executive Government had to do with Juries, and the less that it even appeared to have to do with them, the better, and that when the Council was legislating on so important a matter as trial by Jury, they should not leave it possible that the institution should be tampered with by the ruling power under any circumstances that could possibly be supposed. He (Mr. Forbes) had always understood and always considered that trial by Jury was the great safeguard of the people against a powerful and despotic Government, and he could not consent to any law which should put in the power of the Government to alter the number of a Jury whenever it might suit their purpose, however little likely it might be that the power would ever be exercised.

MR. HARINGTON said, he objected to the amendment proposed by the Honorable Member for Bombay, and should vote against it. The amendment had its origin in a feeling of distrust. It was just this feeling of distrust of public officers holding responsible situations, which so often stood in the way of reforms and improvements in this country. And who were the objects of their distrust on this occasion? Why, the Judges of the Courts of Session. They were quite willing to entrust those Officers with large powers of punishment, even to the extent of sentencing persons to death, or of commuting that punishment to imprisonment for a number of years or to transportation for life, but they were afraid to give them the power of fixing the number of the Jury at six, seven, eight, or nine, according to circumstances, or to the number of persons available, because they might abuse the power. This was the only ground that had been assigned for the amendment. No other reason had been given for it. Now he contended that this was not a good reason, and that there was no foundation for the apprehensions which had been expressed that, if the Court of Session was allowed to fix the number of the Jury between five and nine, abuses might arise;—the Judge of the Court might make a bad use of the power given to him. He felt quite sure that no Session Judge would ever dream of attempting to secure the conviction or acquittal of an accused person, by having either a smaller or a larger number of persons on the Jury. He at once rejected such an idea. Let them appeal to the result of experience. What did that tell them? For thirty years the power of determining the number of the Jury in cases tried by Jury had been vested exclusively in the Sessions Judges, and he would confidently affirm that the power had never been abused. Could any Honorable Member say that it had been abused?

MR. ERSKINE said that such might be the law in Bengal, but it was not so in Bombay.

MR. HARINGTON said, he was speaking of Bengal. He afterwards pointed out that the Bombay law was the same as the Bengal law.

MR. ERSKINE said, he dissented entirely from that interpretation of the Bombay law. The system of trial by Jury had never been introduced into

the Bombay Presidency. The persons who might be employed under the Bombay law "more nearly as a Jury" were merely Assessors, whose opinion, even when they were unanimous, might be over-ruled by the Judge, who alone was responsible for the finding.

MR. HARINGTON resumed, considering the amendment merely as a matter of convenience, he thought the rule proposed by the Honorable Member for Bombay would be found in practice very inconvenient. In large Districts where the number of commitments was great, if the Government fixed the number of the Jury at the maximum, and it was found necessary to convene nine Jurors in every case, he feared great difficulty would be experienced in securing the attendance of this number without seriously harassing and inconveniencing the people. On the score of convenience, therefore, he considered it would be better to leave the matter in the hands of the Judge, and to allow him in every case to summon a Jury of from five to nine, according as he might think proper, or found convenient. In comparatively trifling and unimportant cases the Judge would probably be satisfied with the smallest number. In important or difficult cases he would doubtless generally have a Jury of nine persons, if so many were procurable. It was quite a new principle to declare that the number of the Jury should depend upon the character of the offence to be tried, and he thought that some difficulty would be experienced in carrying out that part of the proposed rule which declared that the local Government should fix the number of Jury for the trial of particular classes of offences. Upon what principle would the Government proceed in declaring that the offence of dacoity should be tried by so many Jurors; rape by so many; adultery by so many; and so on throughout the catalogue of crimes. Was murder, he would ask, of necessity or as a rule, to be tried with a Jury of three in one District, and with a Jury of nine in an adjoining District. This might be the effect of the proposed rule, and of tying the hands of the Judge as intended instead of leaving him a discretion to be exercised within certain limits. If the principle was a sound one, and they could properly declare that the number of the Jury should be proportioned to the offence to be tried, then he contended that it was the duty of this Council to determine of what number the Jury should consist for the trial of the different classes of offences. They had no right to devolve that duty upon the Executive Government. He had another objection to the proposed amendment. He contended that in requiring that the Jury should always be of an uneven number, the rule would often operate unfairly towards the natives in cases in which Europeans or Americans were concerned. It would give a preponderance in the Jury to persons of those races, and would prevent the Judge from having on the Jury an equal number of the classes of persons interested in the trial which was what justice in such cases seemed to require, and what a Judge anxious to act impartially would obviously desire. He thought the rule as proposed would cause much dissatisfaction in cases in which Europeans and Americans were on their trial, and that the people at large would not have confidence in the verdict given by the Jury as proposed to be constituted in such cases. The amendment which he had proposed was not open to any of the objections which appeared to him to exist to the amendment of the Honorable Member for Bombay.

SIR CHARLES JACKSON said that, as he understood the objections of the Honorable Member for the North-Western Provinces, they might be divided under two heads. *First*, the Honorable Member said that we should not distrust our Judges; and *secondly*, he objected to entrust Government with the power of directing what number of persons Juries should consist of for the trial of particular offences. As to the first point, he (Sir Charles Jackson) did not wish to say anything personal with regard to the Judges.

Notwithstanding that he thought them to be untrained men, he believed them to be very honest and high-minded gentlemen and that there was no occasion why they should be distrusted in this respect more than other Judges. But the question now before the Council was whether, as they were now about to introduce the Jury system for the first time into this country, they ought not to provide all proper and constitutional safeguards. The question was whether they ought to lay down proper general rules applicable to all cases rather than to allow the Judge to interfere in fixing the number of the Jury in each particular case that was to be tried before him. The amendment proposed to authorize the local Government to direct of what number the Jury should consist in a particular District and not in a particular case, and that was the advantage which this amendment possessed over the other proposed by the Honorable Member for the North-Western Provinces. The Honorable Member said that they entrusted the Judges to try questions of life and death, and yet they would not trust them to direct whether in a particular case there should be five, six, seven, eight, or nine Jurors. But that was not the question. The delivery of the judgment was the proper duty of the Judge, and the question was whether it was wise, just, or proper to allow the Judge to determine what should be the proper number to try a particular case. He did not mean to insinuate that such a thing would be done ; but if the Judge were allowed to fix the number, inasmuch as he would probably know every person in his District, he might possibly call such a number as would ensure what he thought a right decision of the case.

Then the Honorable Members objected to the power proposed to be given to the Government to regulate the number of the Jury according to the class of offences. Now, the object of the Council was to extend the Jury system as widely as possible and to avoid every thing calculated to throw impediments in the way of its introduction, and if they were to lay down that a Jury was always to consist of nine, what an enormous Jury list would have to be prepared ? That would be importing a great difficulty into the measure. But if it were to be provided that in petty cases a smaller number would be sufficient, while in serious cases, such as murder and homicide, a larger number should be called, the opportunity would be afforded to the Government of extending the benefits of trial by Jury sooner and farther than they otherwise would be able to do. For these reasons he should support the amendment of the Honorable Member for Bombay

MR. HARINGTON said, he thought that it was the duty of this Committee to declare the number of the Jury in particular cases, and that it was not fair to throw that duty upon the Government.

SIR CHARLES JACKSON said, that was just the practical difficulty the Council were laboring under, as they had not the means of determining what number of Jurymen particular districts could furnish.

MR. ERSKINE said, he did not think it necessary to say much in support of his amendment, for most of the arguments which had been advanced against it had already been fully and ably answered by the Honorable and learned Judge. But there were one or two minor points on which it might be well that he should say a few words. He confessed he had not quite followed the Honorable Member for Madras in his remarks as to the danger of giving the local Government power to decide by a general order the number of which the Jury should consist in particular Districts or particular classes of offences in such Districts. The Honorable Member seemed to be apprehensive—although he did not so far distrust the local Governments as to think that they would be apt to resort to such an expedient—that at least they might in some particular case be induced, on the report of the Judge, to cancel any general order which they might previously have

issued, and have recourse throughout the District generally to a smaller or larger number of Jurors, not because they thought this would be generally expedient, but in order to meet their own views in connection with some particular trial. But what was the remedy proposed for this possible, though improbable, abuse of power? The Honorable Member apparently would leave it to the discretion of every Judge to adopt a larger or smaller number of Jurors at his discretion in every trial. This would surely be to enhance the risk of abuse, and to enable many an individual—without breaking through or altering any general order—to fix the strength of a Jury with reference to the circumstances of an impending case; and this although it was regarded as dangerous to allow the Government to exercise such a power even if they could do so only by altering for that purpose the rule permanently applicable to the whole District. If, therefore, a selection must be made between these two arrangements, it seemed to him that the balance of safety and security was all on one side, and that it was certainly in favor of the method recommended by him. All our history, moreover, seemed to show that it was through the infirmities of Judges rather than any direct influence of Government, that obstruction to the free action of Juries was to be apprehended. He thought we need not go far back in the history of our own country, to be convinced how much of our freedom was due to restrictions on the undue interference of presiding Judges in such circumstances.

MR. FORBES said that he might perhaps be allowed to offer a very few words in explanation. He, for his part, had no doubt that it would be better that the matter of determining the number of the Jury should rest with the Judge rather than with the Government, and he thought that trial by Jury was the very thing of all others connected with Criminal Justice with which the Government ought to have the least to do. It might be of great importance to a Government to obtain a conviction, but it could seldom, if ever, be of any importance to a Judge; and when the Honorable Member referred to our own past history, he confessed that many cases occurred to him in which an entirely independent Jury had stood between the accused and a powerful Government in a way in which a Jury would not have done had the Government had any thing to do with its constitution. He, therefore, had no hesitation in saying that it *was* his opinion that the matter was one that on principle should rest with the Judge rather than with the Government.

MR. ERSKINE resumed.—Then the Honorable Member for the North-Western Provinces declared that this amendment had its origin in distrust. He (Mr. Erskine) must say however distinctly for himself that it was not a feeling of distrust towards any class of Judges, that suggested this Motion. There was no doubt a feeling that the law, as it stood, would impose on Judges responsibilities and confer on them power, which ought on general considerations to be withheld. But the main objection to it was that all arrangements connected with the empanelling of the Jury should not only be beyond censure, but beyond suspicion; and he feared that, however pure might be the considerations which determined a Judge to employ a smaller or larger number of Jurors in any case, sudden and unexplained changes might give occasion to those who surrounded him—those subordinate employees who in this country were too often so prone to misrepresent the purest acts—to excite suspicions and bring the proceedings into disrepute. It seemed to him that this was a real and practical danger, and furnished a valid argument in favor of the alteration now proposed. Again the Honorable Member said that he did not see why one class of offences should be tried by a larger number of Jurors, and another class by a smaller number. He (Mr. Erskine) saw no practical difficulty in this. He did not see why the local

Government should not be allowed to lay down by a General Order that all cases of a serious nature should be tried by a specified larger number of Jurors, but that petty cases should be disposed of by a Jury consisting of a specified smaller number. Where it would be difficult to secure a sufficient number of qualified persons, there seemed to be no necessity for obliging a large number to attend at minor and simpler trials. He saw no more difficulty in arranging this than in providing that certain classes of offences must be tried by a regular Jury of twelve, and that others might be tried summarily by a single Magistrate. The Honorable Member next objected to constituting Juries of an uneven number, on the ground apparently that, in cases in which at least one-half of the Jurors were to be of the race of the accused, it would thus be necessary to have a majority of that race. But he (Mr. Erskine) saw no objection to that arrangement. The words of the Honorable Member might be so interpreted as to suggest that he regarded it as the *ne plus ultra* of goodness in such Juries, that exactly one-half should be likely to be swayed in one way, and the other half in the other; in which case the decision would, in fact, be that of the Judge. He could not however concur in such a view. He would prefer that there should always be a verdict by a majority of the Jurors, and he thought that in many cases where persons of the excepted classes were tried, it would even be an advantage to have the entire number of Jurors of that class if possible. Indeed there was nothing in the Bill as now drawn to provide that a person of an excepted class should be tried by a Jury of whom one-half only should be of his own class. The provision was that at least one-half should be of that class; but it did not provide that more than half should not be. It seemed rather to contemplate that as many as could be assembled, should be of that class. Instead, therefore, of regarding this as a disadvantage, he looked upon it rather as an incidental advantage of his proposal, which at all events would secure that in all cases there should be a verdict by a majority of Jurors, which was an important consideration. He was not therefore prepared to admit that the objections to his amendment were valid.

MR. SETON-KARR said, he would merely add one word more. It was the constitutional aspect of the case, which had been so strongly and learnedly argued by the Honorable and learned Judge, that convinced him of the propriety of leaving the choice with the Judge, rather than with the local Government. The local Government could only act on the representations of its Executive Officers, and was not in a condition to interpose with the same impartiality as the District Judge.

THE CHAIRMAN said, his opinion was rather in favor of the amendment proposed by the Honorable Member for Bombay. The Code, as originally prepared by Her Majesty's Commissioners in England, provided as follows :—

"In all trials, whether before the High Court at Calcutta or before the Session Judge, the Jury shall consist of not less than three, nor more than nine persons, and unanimity, or a majority of not less than two-thirds with the concurrence of the Judge, shall be necessary for a verdict of guilty, and in default of such unanimity, or of such majority with the concurrence of the Judge, the defendant shall be acquitted."

According to the amendment of the Honorable Member for Bombay, the minimum number three would be increased to five. It might be inconvenient to provide that in all cases the lowest number should be higher than five, for in many Districts more than that number might not be procurable. The following were the reasons given by the Law Commissioners for leaving the number to the discretion of the Governor-General in Council. They said :—

"In regard to the number of the Jury, it is proposed that in Calcutta the Jury shall always consist of nine, and at all other places of such number of persons, not more than nine and not less than three, as the Governor-General in Council shall from time to time direct. The number in different places must be regulated

by the number of available qualified Jurors; and in many places the number of three will be procured with greater difficulty than nine in Calcutta."

He had no doubt that there would be great difficulty in getting a Jury, if we fixed a higher number than five; because when we considered how the Jury would be constituted, and that the Sessions would be held at least once a month, and that we could not make the same Jurors serve every Sessions, it was obvious that five was as high a number as we could safely fix. It would not be fair to take away the same persons from their business month by month, for the purpose of serving on the Jury, merely because you had a small number in the neighbourhood eligible to serve as Jurors. Then the Jurors were to be selected by ballot, and to do this, there must be a larger number of persons summoned to attend each Session. He thought that at least double the number required to form a Jury should be in attendance; so that, if five be the number of the Jury, the Jurors summoned should be at least ten. Then when the Jury was selected by ballot for a particular trial, both the prosecutor and accused would have the right of challenging any particular Jurors; and if their objections were allowed, other persons would have to be substituted for those challenged. It might therefore be a great difficulty in particular cases to have a larger number than five. But he quite agreed with the Honorable and gallant Member that, if we could, we should have a larger number than five. That however depended on the circumstances of each District, and it would be very inexpedient to require a larger number in all cases. Then the question as to the number of the Jury must be left to some one. Was it to be left to the Judge or to the Government? The Honorable Member for Madras had said that the Government ought in no case to be entrusted with the power. Then was it to be given to the Judge, and to be exercised at each trial? Whatever we did, we must do it by a general order. He did not know if the Honorable Member for Madras supported the amendment of the Honorable Member for the North-Western Provinces, but the principle of his argument was this. If the Judge could get nine by reason of troops marching through his District, he would take nine. But he (the Chairman) thought that, in legislating, we ought to deal with generals, and not with particulars. He would not allow the Judge to take nine because troops were passing through his District at a particular time, or only five at another time because the troops had gone. The man who would be tried by a Jury of five would be sure to say that he would have been acquitted, had he been tried by a Jury of nine. Therefore he agreed with the Honorable Member for Bombay that the course of justice must not only be pure, but must not be open to suspicion. Then the Honorable Member for Madras had said that, if this amendment were carried, we should be placing in the hands of the Government a power which we ought not to entrust to them. But he (the Chairman) apprehended that the manner in which the Government would act in the matter would be this. They would call upon the Judge or probably on the Collector of each District to report how many persons in that District were qualified to serve on the Jury, and then the number would be fixed by a general order. But the Honorable Member for Madras said that the Government might alter the order on the report of the Judge to answer their own purposes in a particular case. Now could any one conceive a more flagrant instance of abuse of power than this? Even if the Government could feel disposed to take such a course, they would never be so foolish as to do it. He therefore thought that we were not putting too large a power in the hands of the Government, and even if it were so, he would rather entrust the power to the Government than to the Judge.

Then it was asked, whether we ought to give the Government the power to determine, whether the num-

ber should be nine in some cases, and five in others. He thought that we might very properly do so. For instance, one District might be able to afford nine Jurymen for the trial of serious or important cases which were of rare occurrence, but no more than five for all other cases. In such instances the Government might order that, in all capital cases and in cases punishable with transportation, the Jury should consist of nine; while in cases punishable with four year's imprisonment, the Jury might consist of five, if a larger number was not procurable. Thus we should leave the Government as fair a discretion as possible to deal with the circumstances of the country, and we should at the same time frame our laws on general principles. Then the Honorable Member for the North-Western Provinces had said that we ought to specify what offences were to be tried by nine Jurors, and what offences by five Jurors. But if we did so, we should be falling into the very difficulty we were endeavoring to avoid, because we had not the means of obtaining the information necessary to enable us to deal with the matter. He therefore thought that we could not do better than adopt the principle laid down by the Law Commissioners in England, of leaving it to the discretion of the Government to declare by a general order what the number of the Jury in each District should be. The only difference between the proposal of the Law Commissioners and the present amendment would then be that, instead of fixing the minimum number at three, we fixed it at five; and instead of leaving the discretionary power to the Governor-General in Council, we left it to the local Governments. Instead of being obliged to make constant reference to the Governor-General in Council, the local Governments would be better able of their own motion to deal with the circumstances of the country; and if we should hereafter find that five was too high for the minimum number, we could easily pass a law reducing the number.

The Chairman

For these reasons he should vote in support of the amendment of the Honorable Member for Bombay.

The question being put, the Council divided as follows:—

Ayes 4.	*Noes* 4.
Sir Charles Jackson.	Mr. Seton-Karr.
Mr. Erskine.	Mr. Forbes.
Sir Bartle Frere.	Mr. Harington.
The Chairman.	Sir Robert Napier.

The numbers being equal, the Chairman gave his casting vote with the ayes. The Motion was accordingly carried, and the Section as amended, then passed.

Section 273 provided as follows:—

"If the Jury are unanimous in a verdict of guilty, or if a majority of the Jury find a verdict of guilty, and the Court concur in such finding, the accused shall be convicted. If the Jury be equally divided in opinion, the Court shall decide whether the accused shall be convicted or acquitted. In all other cases, the accused shall be acquitted."

SIR CHARLES JACKSON said, he objected to this Section on two grounds. First of all, he objected to the phraseology of the Section, and next to the principle of a part of it. With regard to the former, he thought it would make it clearer if the words "the accused shall be convicted" were inserted after the words "if the Jury are unanimous in a verdict of guilty" in the beginning of the Section. His second objection had reference to the words "or if a majority of the Jury find a verdict of guilty, and the Court concur in such finding, the accused shall be convicted." He saw no reason why, when a majority of the Jury found a verdict of guilty, the accused should not be convicted without the concurrence of the Court.

THE CHAIRMAN said, the principle upon which the Law Commissioners framed this Section was that "unanimity, or (with the concurrence of the Judge) a majority of not less than two-thirds, shall be necessary for a verdict of guilty."

MR. SETON-KARR said, that he was rather inclined to agree with the Honorable and learned Judge on his right (Sir Charles Jackson), that the

principle of a part of the Section was very questionable. But if the Council did not think that this point should be now entertained, he still thought that the Section was capable of considerable verbal amendment. He would suggest the insertion of the words "If a majority of the Jury find a verdict of guilty, and the Court shall not concur in the finding, the accused shall be acquitted" after the word "convicted" at the close of the first sentence. The rest of the Section might then be struck out.

After some conversation, amendments were carried, which made the Section as finally passed stand as follows:—

"If the Jury are unanimous in a verdict of guilty, the accused shall be convictedi. If a majority of the Jury find a verdict of guilty, and the Court concur in such finding, the accused shall be convicted. If only a majority of the Jury find a verdict of guilty, and the Court does not concur in such verdict, the accused shall be acquitted. If the Jury or a majority of a Jury find a verdict of not guilty, the accused shall be acquitted.'

Section 274 fixed the age of persons capable of serving as Jurors and Assessors from twenty-five to fifty-five years.

MR. SETON-KARR suggested that the age of twenty-one be substituted for the age of twenty-five. Seeing that Natives generally attained their majority at either sixteen or eighteen years of age, and seeing that they were generally more precocious than Europeans at that age, and quite competent to discharge the duties of Jurors, he thought that twenty-one was a very safe limit.

MR. HARINGTON said, he should gladly support the amendment. On a former occasion he had proposed that the minimum age should be reduced to twenty years, but he was out-voted in Committee.

After some conversation the limits of age were respectively fixed at twenty-one and sixty years, and the Section, thus amended, then passed.

Section 275 was passed after the substitution for the words "infamous offence," of the words "other offence which in the judgment of the Collector renders them unfit to serve on the Jury."

Section 276 specified what persons were exempt from liability to serve as Jurors or Assessors.

The words "or Customs" were added to the Clause "Commissioners and Collectors of Revenue."

The following Clause was introduced, on the Motion of Mr. Harington:—

"All persons engaged in the Preventive Service in the Customs Department."

The following Clause was introduced on the Motion of Mr. Forbes:—

"All persons engaged in the collection of the Revenue, whom the Collector may think fit to exempt on the ground of official duty."

SIR CHARLES JACKSON moved the substitution of the word "Persons" for the words "Brahmins, Mollahs, and others" before the words "actually officiating as Priests in their respective religions."

The Motion was carried, and the Section, as amended, then passed.

Section 277 was passed after verbal amendments, and the Clerk was authorized to make similar amendments in other Sections.

Section 278 was passed as it stood.

Section 279 related to the revision of the Jury list.

After an amendment on the Motion of the Chairman—

MR. SETON-KARR said that he would suggest the addition at the close of this Section of some such words as the following:—

"Any order of the Collector in preparing or revising the list shall be final,"

in order to set at rest the question of an appeal which in this, as in almost every case, was sure to arise.

The Motion was carried, and the Section, as amended, then passed.

Section 280 related to the summoning of Jurors by the Court.

MR. SETON-KARR suggested that it should be made clear by what officer the summons should be served, and

who was to pay for it, if payment were necessary.

After some conversation, an amendment was carried, requiring the Court to "cause *the Magistrate* to summon" the Jurors; and after some further amendments, the Section was passed.

Sections 281 and 282 were passed after amendments.

Sections 283 to 286 were passed as they stood.

Section 287 provided for the names of Jurors being called, &c.

MR. SETON-KARR said that the decision of the Court should be final on the objections raised, and that words to that effect should be inserted in the Section.

The suggestion was adopted, and some further amendments were carried incorporating Sections 287 and 288 into one Section.

Section 289 specified the grounds on which objection might be taken to a Juror, the second and fourth of which were as follows :—

"(2.) Relationship to the person alleged to be injured or attempted to be injured by the offence charged, or to the person on whose complaint the prosecution was instituted, or to the person accused."

"(4.) Any circumstance that shows either prejudice against or favor to either of such persons."

MR. SETON-KARR asked if the word "relationship" was intended to comprise connections by marriage.

After some conversation, the second Clause was omitted, and the fourth Clause was amended as follows :—

"Any circumstance which in the judgment of the Court is likely to cause prejudice," &c.

Sections 290 to 292 were passed as they stood.

Section 293 related to the mode of summoning Jurors when the accused person belonged to one of the specified races.

After some amendments, the further consideration of the Section was postponed.

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

POSTPONED ORDERS OF THE DAY.

The following Orders of the Day were postponed :—

Committee of the whole Council on the Bill "for licensing and regulating Stage Carriages."

Committee of the whole Council on the Bill "to amend Act VIII of 1859 (for simplifying the Procedure of the Courts of Civil Judicature not established by Royal Charter)."

Committee of the whole Council on the Bill "to amend Act XIV of 1843 (for regulating the Customs Duties in the North-Western Provinces)."

Committee of the whole Council on the Bill "to make certain amendments in the Articles of War for the government of the Native Officers and Soldiers in Her Majesty's Indian Army."

Committee of the whole Council on the Bill "to extend to the Straits Settlement Act XXIII of 1840 (for executing within the local limits of the jurisdiction of Her Majesty's Courts legal process issued by authorities in the Mofussil)."

Committee of the whole Council on the Bill "to amend Act III of 1857 (relating to trespasses by Cattle)."

The Council adjourned.

Saturday, June 22, 1861.

PRESENT:

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

The Hon'ble Sir H. B. E. Frere,
H. B. Harington, Esq.,
H. Forbes, Esq.,
C. J. Erskine, Esq.,
The Hon'ble Sir C. R. M. Jackson.
and
W. S. Seton-Karr, Esq.

BREACH OF CONTRACTS.

THE CLERK reported to the Council that he had received a Petition from certain inhabitants of Bhownugger in Zillah Ahmedabad in the Presidency of Bombay against the passing of a law relating to Breaches of Contract, and had certified that the Petition was not framed in accordance with the Standing Orders, forasmuch as it did not conclude with a distinct prayer.

CATTLE TRESPASS.

THE CLERK presented a Petition of the British Indian Association con-