[*Mr. Kerr; Mr. M. S. Das; Rai Sheo Shankar Sahay Bahadur; Mr H. McPherson.*]

different from the actual facts. It pre-supposes stringent relations between the landlord and his tenant which do not exist. It takes for granted that the zamindar is always trying to take possession of lands which belong to the raiyat and declaring them to be abandoned, and that therefore the zamindar should be called upon to serve a notice. Now, take the case when there has been a flood or famine, and the raiyats have gone away from their holdings, and the zamindar does not know whether they will return or not. In such a case, it should be quite unnecessary for the zamindar to give notice to the Collector before he takes possession of such lands. I object to this sub-clause, simply on the ground that it supposes a state of things which does not exist at all. Legislation, as we have been told, should be based upon actual experience, and not upon hypotheses."

The Hon'ble MR. KERR said:—

"This amendment of the Hon'ble Member would destroy a safeguard which was considered necessary in the Bengal Tenancy Act,† and has been in force in Bengal for the last 27 years. Anybody who knows anything about the mufassal and the relations of many landlords with their tenants, will recognise at once that it would be extremely dangerous to allow landlords to treat a raiyat's holding as abandoned, without going through the formality of serving a notice through the Collector. It is really a safeguard for the landlord. Good landlords can, by this means, safeguard themselves from the risk of being treated as trespassers. This sub-clause is really in the interest both of the raiyats and landlords, and I would urge the Council to reject this amendment."

The Hon'ble MR. DAS said:—

"I do not see what and whose interests are safeguarded. The matter now stands thus: if the zamindar takes forcible possession of another's land, he will be guilty of trespass under the Indian Penal Code †† But if he serves a notice, then he is not liable to be prosecuted in a Court for tresspass. So really you are not safe-guarding anything. While you say you are helping the raiyat, you are not helping him at all; you are keeping a loophole open. The raiyat might justly say "save me from my friends."

The amendment was then put and lost.

The following motions were, by leave of the President, withdrawn:—

187. The Hon'ble Mr. M. S. Das to move that the words "from the date of publication of notice" in line 5 of clause 90 (*3*) be omitted.

Clause 91.

188. The Hon'ble Rai Sheo Shankar Sahay Bahadur to move that the words "save as provided in sections 13A, 13B, 13C and 25A" in lines 1 and 2 of clause 91 be omitted.

189. The Hon'ble Rai Sheo Shankar Sahay Bahadur to move that the words "save as provided in sub-section (*2*) of section 25A" in lines 3 and 4 of clause 11 be omitted.

Clause 91.

*11A. The Hon'ble Mr. H. McPherson, with the permission of the President, then moved that, for clause 91, the following be substituted, namely:—

"91. A division of a tenure or holding, or distribution of the rent payable in respect thereto, shall not be binding on the landlord, unless it is made with his express consent in writing, or with that of his agent duly authorised in that behalf:

Division of tenancy not binding on landlord without his consent.

† *i.e.* Act VIII of 1885.

†† *i.e.* Act XLV of 1860.

* This amendment was taken from the List of "fresh amendments" which was laid on the table at the meeting of the 20th March (*see* the second foot-note on page 87 of the proceedings of 20th March).

[*Mr. Saiyid Wasi Ahmad; Rai Sheo Shankar Sahay Bahadur.*]

Provided that, if there is proved to have been made in any landlord's rent-roll any entry showing that any tenure or holding has been divided, or that the rent payable in respect thereof has been distributed, such landlord may be presumed to have given his express consent in writing to such division or distribution."

He said:—

"The amendment as printed in the separate paper of "fresh amendments" has a slight mistake in it. In the second line, the word "thereto" should be read as "thereof." This amendment is part of the arrangement come to regarding the redrafted transfer clauses to which I referred yesterday, and is merely a reproduction of section 88 of the Bengal Tenancy Act *."

The motion was put in the altered form and agreed to.

The following motion was, by leave of the President, withdrawn:—

Clause 96.

190. The Hon'ble Mr. Saiyid Wasi Ahmad to move that clause 96 be omitted.

191. The Hon'ble Rai Sheo Shankar Sahay Bahadur moved that the words "the District Judge may on the application, in case (*a*), of the Collector, and, in case (*b*)," be substituted for the words "the Collector may of his own motion or on the application" in line 6 of clause 96.

He said:—

"Sir, a change of considerable magnitude has been proposed to be made in the existing law with regard to the appointments of common managers It is proposed to transfer these cases from the jurisdiction of the District Judge and High Court to that of the Collector and Commissioner. I admit that this alteration is proposed with the best of motives. But I venture to think that a closer examination of the proposed change will convince Your Honour and the Council that it is of a far-reaching effect and should not be made. It affects the very existence of the landlords of joint estates and tenures. The first legislation on this subject was made in 1812, when, by Regulation V of 1812, powers were given to Zilla Courts to appoint competent men to manage the property of joint undivided estates. To deprive a person of the right of the management of his property was a serious matter and could only be taken under very extraordinary circumstances and with proper safeguards. The safeguards in the law of 1812 were that action could only be taken in cases of disputes causing (1) inconvenience to the public, and (2) injury to private rights. The other and most important safe-guard was that the jurisdiction vested in the Court of the Zilla Judge, which could act only on the motion of the Revenue authorities or of any one interested in the estate itself, and not on its own initiative. This provision about the appointment of common managers was considerably enlarged when the Bengal Tenancy Act* was passed, but no change of jurisdiction from the Judicial to the Executive was ever suggested, contemplated or made The result has been that Zilla Judges, under the superintendence of the Sadar Dewani Adalat and High Court, have exercised this jurisdiction for over one hundred years. It is now proposed, in the present Bill, that the jurisdiction should vest in the Collector under the superintendence of the Commissioner, and not in the District Judge and High Court as hitherto. I may say, in passing, that, in this respect, the condition of Orissa is on the same footing as that of other parts of the Provinces of Bengal and Bihar, and I do not see why Orissa, so far as this matter is concerned, should be treated differently from other parts of the province. I look on this proposed change with great alarm, and my fear is that a provision like this will place all the co-owners of estates and tenures in Orissa in a most

* i.e., Act VIII of 1885.

dangerous position. For it will lead to most disastrous consequences to them, and they and their property will incur the risk of being placed in charge of common management more often and more largely than is either good for them or for the country. Hitherto, if any dispute existed between them and their co-owners, causing inconvenience to the public, the Collector, and, in case of injury to private rights, the person interested, had to move the District Judge, who, after going through the matter, might or might not appoint a common manager. In case he did appoint, any party aggrieved could come up to the High Court for redress. Hereafter, in Orissa, the Collector will take the initiative and act as a Judge. If he hears from the Police, or from the Settlement office, or in a private conversation with any person that there exists any dispute between co-owners, not necessarily causing inconvenience to the public but causing injury to private rights (which all disputes do), he can, without waiting for a complaint from the aggrieved party, at once take action and call upon the co-owners to appoint a common manager; and if they do not appoint a common manager, he himself can appoint a common manager, and thereupon the co owners not only lose the management of their estate, but, (if the Bill is passed into law, as it stands), they cannot transfer or mortgage their rights, or even apply for partition. If this clause 96 is passed as it stands, I sincerely pity the positions of all co-owners in Orissa, from big zamindars down to the holders of the smallest tenure. They will be in constant dread of the Executive head of the district. They can, at any time, be deprived of the control of their property. It must not be supposed that I am saying anything against the Collectors, for whom, as a body, I have the greatest respect, regard and admiration. But, Sir, there is something which we lawyers call "judicial interest" or "judicial bias." Human nature is human nature and one of the elementary principles of jurisprudence is that you cannot be both prosecutor and judge. You set at naught the first principle of law by making the Collector both prosecutor and judge. He can take action on his own motion in case of any dispute with which the public peace is not concerned, and he can decide the matter himself. It is placing in his hands a power which should never be placed in the hands of any person, however great confidence you may have in him. It is not only necessary that justice should be done, but it is absolutely necessary that the people should have no misgivings about the tribunal to which they have to go for justice Then let us see what is the reason for the change. It is said that the Collector can keep better supervision over the managers than the District Judge can do. I admit that this is so. I admit that, as a rule, the management of estates cannot be properly supervised by the District Judge in the same way as by the Collector. You do not, however, propose to give to the Collector the supervision of management only, but you propose to give him the jurisdiction to take the initiative and to decide, as a judge, as to whether a common manager should be appointed. This difficulty of management by the District Judge has been felt before. We find it was felt so far back as 1827, for Regulation V of 1827* recognised that management by the District Judge was less satisfactory than management by the Collector. It therefore authorised the District Judge, in cases where he decided to appoint a manager, to issue a precept to the Collector directing him to manage the property. This provision was replaced by a provision in the Bengal Tenancy Act,† section 95, empowering the Local Government to nominate a person as manager for any area; and when the manager is so nominated, the District Judge is bound, under that Act, to appoint him as common manager. If the question of management only is concerned, the difficulty might be obviated by the Local Government exercising the powers under this section. But there is no reason why the power of taking the initiative should vest in the Collector.

My last objection is that the matter has not been properly considered. I am aware that Mr. Adami, the District Judge of Cuttack, supports this provision, but he supports it simply on the ground of the better supervision of management by the Collector. He has not one word to say about the desirability or otherwise of adopting a line of action which would make the Collector both prosecutor and judge. Except, Mr. Adami, no other District

* i.e. the Bengal Attached Estates Management Regulation, 1827.

† i.e., Act VIII of 1885.

[*Babu Janaki Nath Bose.*]

Judge has been, I believe, consulted, and above all, the Hon'ble Judges of the High Court, who have exercised jurisdiction in this matter for over one hundred years, have not been referred to. Is it fair to them? Is it, to say the least, courteous on your part to oust them from a jurisdiction they have exercised for over 100 years without hearing from them as to what they have to say on the subject? When the effect of the Bill is properly understood, it is bound to create alarm. I therefore propose that the present law need not be disturbed."

The Hon'ble BABU JANAKI NATH BOSE said:—

"Sir, this amendment has been very eloquently proposed, and the objections taken are on various grounds, but the change in the law that is here proposed is based upon actual experience. I can inform the Members of this Council that this system of managing certain estates through a common manager has been in vogue in the district of Cuttack for about 20 or 22 years. I must admit that the Judge who first took over the charge of one estate rather liked the work. He took an interest in the particular family whose estate came under his management. But I am in a position to say that no other succeeding Judge ever liked this kind of work, and, generally speaking, there have been several reasons for this. The first is that the Judge is busy with judicial work, and has hardly any time to devote to the management of the estates; the second reason is that he has not the machinery at his command with which to work; and there is another reason, Sir, namely, that these estates are generally embarrassed estates, and, either defaults are made in payment of Government revenue, or the properties have been mortgaged and are brought to sale in Civil Courts, and these occurrences give a considerable amount of trouble to the District Judge. Further, the Judge does not like to have to write to the Collector to postpone a revenue sale, or to call upon his subordinate courts to adjourn execution sales Mr. Adami is, it will be observed, emphatic in his opinion that he has not been able to work this system well, and that it is preferable that the common-manager should be under the Collector. I may also say, Sir, that, at the Conference held in 1909 by Mr. Maddox, most of the gentlemen consulted were in favour of the transfer of jurisdiction to the Collector. But the Hon'ble Member who proposes this amendment says that the Collector would be situated as both prosecutor and judge. I fail to see any difficulty of that kind in this matter. On the other hand, if there is any inconvenience to the public or injury to private rights, the Collector is in a better position to ascertain these facts than the District Judge, who would depend simply upon such second-hand evidence as may be produced before him; and I have noticed, Sir, that though Collectors have seemingly many sins to atone for as regards their relation with the owners of embarrassed estates, they are always very sympathetic with the members of these ancient embarrassed families. Again, not only has the Judge furnished us with this opinion, but local opinion also is certainly the same. There is no harm in my telling the Council that Mr. Levinge, the present Commissioner, is of opinion that the jurisdiction should be transferred to the Collector. There is, further, another reason in favour of the change, and that is that the common manager's accounts ought to be examined periodically at least. But I am sorry to say that, though several estates have been under the management of the District Judge for several years, yet, owing to the want of qualified officers—I do not of course refer to the Judge, for he has no time for these duties—the accounts have never been audited, and no one knows how they stand. For this and other reasons it has been thought fit to change the jurisdiction and to place these estates under the Collector.

"As regards the curtailment of the power of co-sharers, I can also say from personal experience that this too is very necessary; for otherwise, though at first all the co-sharers may think fit to place their estates in the hands of the Collector, some of them may change their minds afterwards, and by their conduct make good management impossible. For this and other reasons, this change in the law is required; and I think that, apart from the vague general remarks to which the Hon'ble Mover attaches much weight, there is nothing in the local conditions, or in the experience actually gained by competent men which shows that this change is unnecessary and ought not to be made.

[*Babu Janaki Nath Bose.*]

At this stage, the Council was adjourned to Saturday, the 23rd March, 1912, at 11 A.M., the President intimating that the debate on amendment No. 191 would then be proceeded with.

A. W. WATSON,

Offg. Secretary to the Bengal Legislative Council.

CALCUTTA,
The 27th March, 1912.

B. S. Press—17-5-1912—4010J—460—G. A. and others.

Proceedings of the Legislative Council, assembled for the purpose of making Laws and Regulations under the provisions of the Indian Councils Acts, 1861 to 1909 (24 & 25 Vict., C. 67, 55 & 56 Vict., C. 14, and 9 Edw. 7, C. 4).

THE Council met in the Durbar Hall at Belvedere on Saturday, the 23rd March, 1912, at 11 A.M.

Present:

The Hon'ble SIR FREDERICK WILLIAM DUKE, K.C.I.E., C.S.I., Lieutenant-Governor of Bengal, sub. *pro tem.*, *presiding*.

The Hon'ble MR. F. A. SLACKE, C.S.I., *Vice-President*.

The Hon'ble RAJA KISORI LAL GOSWAMI.

The Hon'ble MR. R. T. GREER, C.S.I.

The Hon'ble MR. D. J. MACPHERSON, C.I.E.

The Hon'ble MR. E. W. COLLIN.

The Hon'ble MR. C. J. STEVENSON-MOORE, C.V.O.

The Hon'ble MR. E. P. CHAPMAN.

The Hon'ble MR. B. K. FINNIMORE

The Hon'ble MR. J. H. KERR, C.I.E.

The Hon'ble MR. H. L. STEPHENSON.

The Hon'ble MR. T. BUTLER.

The Hon'ble MR. S. L. MADDOX, C.S.I.

The Hon'ble MR. G. W. KÜCHLER, C.I.E.

The Hon'ble MR. L. F. MORSHEAD.

The Hon'ble SIR FREDERICK LOCH HALLIDAY, KT., M.V.O., C.I.E.

The Hon'ble MR. J. G. CUMMING, C.I.E.

The Hon'ble MR. C. H. BOMPAS.

The Hon'ble MR. C. E. A. W. OLDHAM.

The Hon'ble MR. H. MCPHERSON.

The Hon'ble BABU JANAKI NATH BOSE.

The Hon'ble MAHARAJA BAHADUR SIR PRODYOT KUMAR TAGORE, KT.,

The Hon'ble SIR FREDERICK GEORGE DUMAYNE, KT.

The Hon'ble KUMAR SHEO NANDAN PRASAD SINGH.

The Hon'ble BABU BHUPENDRA NATH BASU.

The Hon'ble RAI SITA NATH RAI BAHADUR.

The Hon'ble LT.-COL. G. GRANT-GORDON, C.I.E.

The Hon'ble SIR BIJAY CHAND MAHTAB, K.C.S.I., K.C.I.E., I.O.M., Maharajadhiraja Bahadur of Burdwan.

The Hon'ble BABU KIRTANAND SINHA.

The Hon'ble RAJA RAJENDRA NARAYAN BHANJA DEO

The Hon'ble BABU DEBA PRASAD SARBADHIKARI.

The Hon'ble MR. J. G. APCAR.

The Hon'ble MR. NORMAN MCLEOD.

The Hon'ble MR. F. H. STEWART, C.I.E.

The Hon'ble MR. GOLAM HOSSEIN CASSIM ARIFF.

The Hon'ble DR. ABDULLAH-AL-MAMUN SUHRAWARDY.

The Hon'ble MR. SAIYID WASI AHMAD.

The Hon'ble MAULVI SAIYID MUHAMMAD FAKHR-UD-DIN

The Hon'ble BABU HRISHIKESH LAHA.

The Hon'ble MAULVI SAIYID ZAHIR-UD-DIN.

The Hon'ble RAI SHEO SHANKAR SAHAY BAHADUR.

The Hon'ble MR. MADHU SUDAN DAS, C.I.E.

The Hon'ble RAI BAIKUNTHA NATH SEN BAHADUR.

The Hon'ble BABU MAHENDRA NATH RAY.

The Hon'ble KHAN BAHADUR MAULVI SARFARAZ HUSAIN KHAN.

The Hon'ble MR. DIP NARAYAN SINGH.

The Hon'ble BABU BAL KRISHNA SAHAY.

[*Mr. H. McPherson.*]

THE ORISSA TENANCY BILL, 1912.

Clause 96—contd.

THE Council proceeded with the consideration of Amendment No. 191 relating to clause 96, which had been partially debated at the meeting of the 21st March.

The Hon'ble MR. H. MCPHERSON, in resuming the debate, said :—

"This Amendment (No. 191), and the twenty which succeed it, all relate to the provisions included in the Bill on the subject of common managers, and the main object of attack is the proposed transfer of jurisdiction from the District Judge to the Collector. The first point to note is that all the amendments have been proposed by Hon'ble Members from Bihar. There is not a single amendment suggested by any of the Hon'ble Members who represent Orissa, and it may thus be inferred that the provisions of the Bill have the entire approval of the latter. The proposed innovation in the law is not one which is being thrust upon an unwilling people by Government It is an innovation which was sought by the people themselves, and Government was content to place itself in their hands and accede to their wishes. If Mr. Maddox's report of April 1909 be referred to, it will be seen that the zamindars, whom the Hon'ble Member has solemnly warned of the threatened invasion of their cherished rights of property, were themselves the first to suggest the change. They were dissatisfied with the working of the Bengal Tenancy Act* sections. Mr. Maddox translated their suggestions into proposals which were laid before the Orissa Committee of 1909. The Committee, with the exception of one common manager, who was also a pleader, one mukhtear and one zamindar, were strongly in favour of transferring the jurisdiction of the Judge to the Collector, "not only," I quote from Mr. Maddox's report, "because the Collector is familiar with the agricultural conditions of the district and controls all revenue matters the area for the most part being temporarily settled), but also because he is more likely to appoint competent persons as managers and to supervise their work effectively."

"The proposals which were incorporated in the Bill were circulated to the three associations who may be said to represent the landlord's interests in Orissa. Not only did all three associations approve of the proposals, they suggested that Government should go further in the direction of strengthening the hands of the common manager and curtailing the powers of the co-sharers during the term of management. They wanted Government, in fact, to introduce some of the provisions of the Chota Nagpur Encumbered Estates Act†. Let me now read what the District Judge of Orissa wrote on the subject when the Bill was circulated to him :—

"The changes proposed in clauses 96 to 103 of the Bill are strongly to be advocated. There are at present six estates under common management under the District Judge of Cuttack, one of them being the Bhingapur estate, about the largest estate in Orissa. All, except one, of these six estates may be said to be *in extremis*.

"It is impossible for the District Judge, in the course of his duties, properly to supervise the common managers; he has no regular staff for the purpose and cannot afford the time to go out on tour.

"Furthermore, suits are constantly coming before him on appeal which, properly speaking, he should not hear, being, in a way, an interested party. Parts of the estates are constantly being put up for sale in execution of decrees, and it falls upon the District Judge to petition the subordinate courts to give time; at the same time he has to call for explanations from the lower courts for the delays incurred in completing execution cases.

* i.e., Act VIII of 1885. † i.e., Act VI of 1876.

[*Mr. H. McPherson.*]

"The Collector can far better supervise the management, having experienced Deputy Collectors under him who can give the estates their individual attention.

"All the properties of the co-proprietors should be brought under the common manager. There has been difficulty, for instance, in selling off some house property of the proprietors of the Bhingapur estate in the towns of Puri and Cuttack. Such property is not at present covered by the Bengal Tenancy Act. I would suggest the inclusion, with necessary modifications, of the provision of sections 3, 10, 11, 17 and 18 of the Chota Nagpur Encumbered Estates Act,† 1876."

"The suggestions of the local associations and of the District Judge were considered carefully in Select Committee. The Committee were unable to accept all the suggestions, because it is not the business of a Tenancy Act to provide for the preservation of encumbered estates. The details of clause 101, where they differ from those of section 98 of the Bengal Tenancy Act,*—and these also are the subject of attack by the Hon'ble Members from Bihar—represent the extent to which the Committee considered it safe in a Tenancy Act to admit the suggestions and accede to the wishes of the local associations.

"We have now the very curious situation that when Government has embodied in a Bill provisions which are in compliance with the unanimous and urgent representations of the people of Orissa, the whole scheme is violently assailed by representatives of Bihar. Sir, it does not bode well for the newly-strengthened connection between Bihar and Orissa that what may be called the senior partner in the new concern should adopt this attitude towards the junior member of the firm. I would ask the Hon'ble Members from Bihar to look at the question in this light and to abandon their opposition to this portion of the Bill.

"The Hon'ble mover has laid much stress on the point that the control of the working of common managers has hitherto rested with the Hon'ble High Court, and has endeavoured to excite us by holding up the new provisions to execration as an invasion of their ancient jurisdiction But, Sir, in the management of disorganized estates of all kinds, there has always been close co-operation between the Judicial and the Executive. There has been no jealous rivalry. When we have shown that the existing system has not worked well in Orissa and that there is a universal desire to adopt, instead, management under the control of the Collector, no reasonable objection can be urged to the change. What the Hon'ble Member loses sight of, or does not fully appreciate, is the closeness of the connection which exists between an Orissa Collector and the landed interests of his district. This discussion, indeed, throws an interesting side-light on the difference that has been made to Orissa by the fact that its land settlements are temporary. The Collector is the trusted friend of the proprietary body, and the holy horror with which the Bihar Members affect to regard these proposals is not intelligible to the people of Orissa.

"There is one point, Sir, in the Hon'ble mover's remarks which has arrested my attention. He is afraid of the unlimited discretion that is conferred on the Collector to appoint common managers. It is no more unlimited, of course, than the discretion of the District Judge under the Bengal Act; for, in this matter, the District Judge exercises executive functions, and there is no appeal to the High Court against his orders; but the Hon'ble Member fears that the powers will be more extensively used by the Collector, who may act more frequently on his own initiative. Although the working of the provisions has been subjected to the revisional powers of the Commissioner by clause 102A, which has no counterpart in the Bengal Act, there is, I admit, some possible danger that the provisions of the Bill may be overworked by an indiscreet or over-enthusiastic Collector. Government has no desire to

* i.e., Act VIII of 1885. † i.e., Act VI of 1876.

throw unnecessary work on its mufassal officers. It is true that the successor of an officer who had overworked the sections might disencumber himself of the burden under section 102, but it is not always easy and not always satisfactory to get rid of a responsibility. I therefore propose, Sir, with your permission, to suggest that no appointment of a common manager under clause 98, or release of a property under clause 102, shall be made without the sanction of the Commissioner. The effect of these additions will be to steady the working of the provisions, by affording less play to the idiosyncrasies of individual officers.

"I propose to move the necessary amendments when the clauses in question come up for discussion.

"As to the Hon'ble Mover's remark that only the District Judge of Cuttack was consulted as to the changes contemplated by this clause, I would remind him that there is no other superior judicial officer in Orissa to consult. It would have been useless to refer the Bill to Bengal or Bihar Judges with no knowledge of Orissa conditions. And as for the High Court, well, the Hon'ble Judges do not welcome promiscuous references in regard to proposed legislation; and the Council will remember that when, in the past, a reference has been made to them in connection with a proposed measure, they have not infrequently declined to offer any opinion as to its merits or otherwise. It can hardly be doubted that a similar reply would have been received had the Hon'ble Court been approached in regard to a purely administrative provision such as clause 96."

The Hon'ble Rai Baikuntha Nath Sen Bahadur said:—

I rise, Sir, to support the amendment. Under the Bengal Tenancy Act* the appointment of a common manager, his powers and duties, are provided in sections 93 to 100 of the Act. The District Judge has the right to appoint a common manager, on the representation of the Collector, under certain circumstances, *i.e.*, when there is inconvenience to the public, and on the representation of co-owners when there are injuries to private rights. The District Judge has the power of appointment, and the High Court has the power to make rules for the working of this chapter. Now a departure is sought to be made, and the Collector-Magistrate is to take the initiative, and he can himself appoint a manager. The rules which are provided under the Bengal Tenancy Act,* to be framed by the High Court, are, according to the provisions in this Bill, to be framed by the Local Government, so that practically it comes to a question of the divesting of the jurisdiction of the District Judge and of the High Court, and of vesting the same jurisdiction in the Collector and in the Local Government. This departure, therefore, is a very important one; it affects the principle, it changes the forum, and, unless a good and strong case is made out, the Council, I think, should not make this new departure. It has just now been observed by the Hon'ble Member in charge of the Bill, that the Orissa people do not object to the suggested provision, but that the Bihari Members have taken upon themselves to move the amendment. It does not matter much whether the amendment comes from the Bihari Members or from the Orissa Members; no doubt importance should be attached to the statement made by the Hon'ble Member that this measure will not be forced upon an unwilling people, if, as he says, the people of Orissa are willing to accept it. Suggestions by the local associations have been referred to, and they suggest that the powers should continue in the District Judge. It has further been observed by my hon'ble friend, Babu Janaki Nath Bose, that the District Judge is so much overworked in his judicial duties that he cannot afford to give proper time to considerations of questions which arise in this connection, and he has further observed that he has not at his disposal the machinery which the Collector has. Now if the District Judge has not sufficient time, I think that the Collector-Magistrate, with his multifarious work, has got still less time. That is no ground. As regards the machinery, I may speak from personal

* *i.e.*, Act VIII of 1885.

experience. There is an estate called the Patikabari estate, which is under the management of a common manager appointed by the District Judge of Murshidabad. The sheristadar of the Judge is a most competent person; he supervises the work, and the work is going on very satisfactorily. So that I am not prepared to admit that there is any force in the argument that the Judge has no time or that the Judge has no machinery to supervise work of this nature. Then comes the question as to why especially large powers are intended to be given to the common manager under the new Bill. Why should there be this divesting of authorities and powers from the judiciary and vesting of it in the executive? Sir, I beg to lay stress on the fact, with every deference to the opinion which has just now been expressed by the Hon'ble Member in charge of the Bill, that the people—the public at large—have the greatest confidence in the administration of the law by a judicial officer and ultimately by the High Court. They look upon action taken for administrative purposes by the executive authorities with some degree of misapprehension; rightly or wrongly they do so. Here the co-owners have got vested interests, and I find from the provision made in clause 101 that the co-owners will not have the right, without the sanction of the Collector, even to apply for partition of their estates; that is depriving them of vested rights. When there is a common manager appointed, a dissolution of the common management takes place *ipso facto* by a partition of these estates Now, under the Bengal Tenancy Act,* a co-owner is not under any disabilities in regard to applying for partition, nor is he bound to take the previous sanction of the District Judge or anyone else; he can at once apply for a partition, and then the common manager disappears altogether. Now, a greater power is being sought to be given to the common manager, and, when there is a common manager appointed, a co-owner will not have the right to apply for partition without the sanction of the Collector This places him under an enforced artificial disability; this deprives him of a vested right. Has a good case been made out for this departure? I need not enter into the reasons for the misapprehensions which will arise I do not say that every Collector or every Magistrate will act in a perverse way—far from that; but Magistrate-Collectors in their over-zeal, in consequence of mistakes connected with the appointment of the common manager, may take action which may result in serious injury to co-owners. I will take a simple case for illustration: Sir, suppose there are ten co-sharers, and one of them dies, and a dispute arises between the heirs of that particular co-owner—the nine co-owners being in perfect amity one with another—and suppose the heirs of the tenth co-owner fight among themselves, and thus bring inconvenience on their neighbours, or, in other words, that there is a likelihood of a breach of the peace. The whole property is then brought under a common manager. Such a case is certainly possible—it might take place—if the Collector were trying in his own way to take up the case of the heirs of the tenth of the estate. I will not dilate on this point, because cases are conceivable in which this clause may be worked in an oppressive way. To avoid all these things, I submit that the law as it prevails in Bengal ought to be adopted; and, being a representative of the people, I may say with some degree of confidence, and with due deference of course to the opinion of the Hon'ble Member in charge of the Bill, that this proposed change in the law will be against the wishes of part-owners and against the wishes of the people. This will not be a popular provision. Government should certainly have consulted representative co-owners before taking a step by which vested rights will be interfered with, and by which the jurisdiction of the District Judge and the High Court will be taken away, and such a measure should be adopted only with the greatest caution. I am aware of the fact that a provision has been made in this Bill for the revisional powers of the Commissioner. Under the existing law there is no right of appeal; though a High Court, of course, could exercise its extraordinary jurisdiction of interference in special cases. No provision for appeal is made in any of the relevant clauses of the Bill, but the Commissioner has been given powers of revision, very likely to safeguard the interests of the co-owners. I do not think that power is sufficient, and I therefore support the amendment.

[*Maulvi Saiyid Muhammad Fakhr-ud din.*]

The Hon'ble MAULVI SAIYID MUHAMMAD FAKHR-UD-DIN said :—

Sir, I rise to support the amendment, and I am very glad to find that this amendment is not only supported by the representatives of the people of Bihar, but also by the representatives of the people of Bengal. Of course, I do not know what the reasons are which led the representatives of the Orissa people not to put forward any amendments with regard to this clause, but we have here to look at the principle of law which we are going to enact. We ought not to judge the utility of a clause from the point of view as to who is proposing an amendment to it, but from that of the merits of the clause, and the amendment should be dealt with independently of any such personal consideration. The remarks and observations made by the Hon'ble Member in charge as regards almost every amendment proposed by Bihar members are quite out of place. Hitherto we had given jurisdiction to the District Judge for the appointment of a common manager with revisional jurisdiction vested in the High Court, and now a big change is proposed to be made in the existing law; the Collector is being vested with the power of appointing a common manager of his own motion even without any application on behalf of the co-owners. If he is satisfied that there is some inconvenience, or that there is a likelihood of a breach of the peace, he may appoint a common manager. Now this measure is no doubt very stringent, and it ought to be applied only in extreme cases and under exceptional circumstances; and hitherto, in order to safeguard the misuse of this power, the District Judge was vested with the power of appointing a common manager on the application of a Collector, or even on the application of a private party. Now it is suggested that the District Judge has not sufficient machinery, and that therefore it is difficult for him to look after the management. We know that, under the provisions of the Civil Procedure Code, the Civil Court has power to appoint a Receiver, and a Receiver has to manage his estate under the supervision of the Civil Judge, and has to submit his accounts to the Judge. And even if we assume that the machinery which the District Judge has got is not sufficient to look after the management of such undivided estates, of course we could provide him with sufficient staff and sufficient machinery, by which he could manage the estates efficiently; but there is no reason why these powers should be vested in the Collector who himself has got manifold business to look after. You do not propose to shorten the work of a Collector, but you are asking him to do additional work You seemingly forget that the Collector has got Deputy Collectors under him, and that he can efficiently work through them. You can similarly empower a District Judge to employ subordinates—Munsifs—, and I think, in that case, the District Judge would be able to manage an estate more satisfactorily than the Collector. Then we find in the present clause as to the appointment of common managers that some stringent provisions have been made that the co-owners will not be entitled to sell, mortgage or lease any part of their property, nor will they be entitled to move the Collector or the Civil Courts for a partition of their share. Now when such stringent provisions have been made, it is but fair that the District Judge should exercise that power, which hitherto he has enjoyed, of appointing a common manager; for, practically, the Collector will, for the time being, confiscate this estate, and the co-owner will not be entitled to sell, mortgage, or lease his own share, nor will he be entitled to go before the Collector and ask for a division of his own lands, so that he may be free from all these difficulties. He can do these things only with the sanction of the Collector. I beg to submit, Sir, that, having regard to the stringent provisions which are now introduced in the subsequent clauses of this Bill, the existing law should not be changed, and that this power which has hitherto been given to the District Judge should be retained. Under the Bengal Tenancy Act* we find that it is the High Court which has to frame rules as to common managers; now, under your Bill, the High Court will have nothing to do with these matters. Is it fair that you should take away the power of the

* *i.e.*, Act VIII of 1885.

High Court without consulting that body? The landlords will always be at the mercy of the Collector. If the Collector is displeased with any landlord, the latter's estate will be confiscated under the garb of inconvenience to the public or of private right. The Collector will not be under the control of the Civil Court. I am, therefore, sure that this clause will arouse alarm in the minds of the landlords. With these cursory remarks, Sir, I beg to support this amendment.

The Hon'ble BABU DEBA PRASAD SARBADHIKARI said :—

I wish to add, Sir, to the Bengal support for what it is worth. I was not quite prepared for such a large and persistant promulgation of the opinion that whenever "territorial legislation," if one may so call it, comes up before this legislature or any other legislature, there is to be, at least by implication, also a sort of territorial ear-marking of the support afforded by the different sections composing the legislature. That idea has been, earlier in the debate, properly combated in other connections, and whatever application the idea may be conceded to have to matters of technique and details, it would be undesirable to extend it and emphasize it in connection with the larger questions of principle, such as have involved in this clause and in this amendment. The matter has been discussed on the merits at some length, and it is not necessary for me to travel over the same ground that has been covered by other speakers. Reference has recently been made to the Receiver provisions of the Civil Procedure Code,* and reference may be made to other laws under wich the civil court has, under given conditions, power to interfere whenever there is a dispute of the kind contemplated in this clause. At present there is one, and only one, controlling authority with regard to these disputes, and that is the District Judiciary. Apart from the question of the High Court not having been consulted, apart also from the question of the powers of the civil courts having been taken away, not by implication any longer, but overtly, without much of a case having been made out in support of such transfer of power, we have to consider some practical difficulties that are not only likely, but are sure, to arise when there is dual authority of the kind proposed in this Bill. I do not know, Sir, what will happen to the larger powers with which the common manager, or rather the Collector, is proposed to be vested. But supposing those powers are given to the Collector, and supposing there is a desire to avoid the exercise of those powers whenever there is a likelihood or chance of any of the contingencies contemplated in clause 97 arising, the more enterprising co-owner would straightaway rush to the Civil Court and put his suit on the file and ask for the appointment of a Receiver, before anybody has the opportunity of thinking of a common manager. By this clause no doubt, the Collector is given the power of initiative together with those interested. Of course, as has been pointed out, it would be possible for an infinitesimally small owner to harass and annoy his co-owners by invoking the aid of this section. It would be equally possible, however, for him to go to the Civil Court and ask for the appointment of an official Receiver. Now it is possible that in many cases the appointment of a Receiver would not be a blessing after all, and the administration of an estate through a common manager may have advantages which the Receiver is not able to furnish. The average zamindar, having disputes with his co-owners, has not largely availed himself of the opportunities of having a Receiver appointed, but has preferred the channel of a common manager. That has hitherto been the acceptable practice, and should we, without complete justification or more than justification, do anything that will make people think—having regard to the larger powers that I have alluded to—whether it would not be desirable to anticipate things at an earlier stage, and so make it impossible for a common manager to intervene? A sort of perpetuity has been sought to be created later on in the clause by interfering with the powers of alienation and the rights of partition with which neither the Hindu legislature nor the British legislature had

* i.e., Act V of 1908.

thought of interfering hitherto. Having regard to these proposed extensive powers, there is the greatest likelihood of the powers of a Civil Court being invoked before the proper time, and hence your clauses may prove fruitless. It is indeed difficult to follow the Hon'ble Member in charge of the Bill. If there is any opposition to any clause based on the existing Bengal Tenancy Act,* we are told that the law has done well enough for 27 years, why do you seek to interfere with it? The moment one seeks to adhere to the existing Bengal law, exception is taken that the Bengal law is no longer good enough, and reasons are found—and they can always be found when necessary—for making an advance on the Bengal law. We are not persuaded that anything like a clear case has been made out in support of the drastic and far-reaching innovation proposed in these clauses. Because Orissa representatives have not put any amendment forward, it does not follow that they would not like to adopt one that others have suggested, provided that a fair and reasonable case be made out in favour of the amendment. The Bengal Members have exercised a self-restraint which has been conceded to be praiseworthy, by implication, by the Hon'ble Member in charge, in interfering as little with this Bill as possible. The grievance in some quarters indeed is that the Bengal Members have not taken enough interest in this Bill, and it is complained that those, who support the retention of this Bill in this Council, have not taken enough interest in its progress. I wish to assure those who make a grievance of that kind, on behalf of myself and of the other Bengal Members of this Council, that it is not the interest that is lacking; but we do not wish to needlessly hamper the proceedings and waste the time of the Council by taking up ground which others have so well and very properly covered. But when a question of principle arises, I think it is desirable that Bengal should also make its voice heard and its opinion known, and make due contribution towards securing justice for Orissa, even at the risk of forfeiting the hard-earned praise for good conduct attributed to the Bengal Members in regard to their marked self-effacement in this debate.

The Hon'ble MR. MADDOX said:—

I only wish briefly to refer to what the Hon'ble Member in charge of the Bill has mentioned this morning, and that is about my report of April 1909. In that report I showed that it was clearly the wish of the people of Orissa to have these particular provisions, and the benefits to be secured by its provisions were also set forth. I need hardly remind the Members of this Council,—those who come from Bihar and Bengal and have spoken to-day—that the people whom they represent are not in such close touch with the Collector and the Deputy Collector as the people of Orissa are, and therefore it is both reasonable and desirable that these provisions should be administered in Orissa by the Collector and Deputy Collector. Besides this, the District Judge of Cuttack whose jurisdiction extends over all British Orissa, has strongly recommended the adoption of these proposals.

The Hon'ble MR. SAIYID WASI AHMAD said:—

I have an amendment, No. 190, to this clause (96) which is to the effect that the whole clause should be omitted. That amendment was withdrawn by me at the last meeting when I saw another amendment in the name of my friend, the Hon'ble Rai Sheo Shankar Sahay Bahadur, on the ground that I thought that his amendment being milder in form and also in support of the present law,—which, according to the view of the Hon'ble Member in charge of the Bill, has worked so satisfactorily for the last 27 years,—would be accepted. I find to-day, however, that that amendment has also been opposed, and opposed rather strongly on a different ground altogether. The first ground put forward by the Hon'ble Member in charge of the Bill is that the Orissa Members, whom this clause particularly affects, have not said a word against

* i.e., Act VIII of 1885.

these clauses, but, on the other hand, have supported a change from th present law. I submit, Sir, this is absolutely no ground. As I said on the very first day of the discussion of this Bill, it is not a matter as to who speaks or who takes part in the discussion of a Bill in this Council. The whole thing is whether or not the Bill, as placed before us, is good law. That is the principle that ought to guide every Member in this House, whether official or non-official. Now the changes that are proposed to be made by the introduction of this clause are of such a nature as to affect the very principles of the Bengal Tenancy Act* inasmuch as this clause deliberately changes the jurisdiction of a District Judge, to hand it over to the District Collector. It is needless for me to remind Hon'ble Members of this Council that there is already a cry against any power being vested in executive officers. Under this Bill you have already given enough power to the Collector. You have practically made him—if you pass this Bill into law—the zamindar of his district. He may do what he likes; all the civil suits, all the rent-suits, will be tried and decided by him. He will be directly in touch with the tenants, and will be directly in touch with the villagers, and naturally will also be in touch with the zamindars. I ask you to consider seriously whether the powers that are proposed to be given to him in this Bill as a whole will or will not make him an interested party whenever a question of this nature comes up before him.

Much has been said by the Hon'ble Member in charge of the Bill as to difficulties that have arisen in the case of District Judges when they have to apply as managers of the estates under their charge for postponements in cases pending before Subordinate Judges. Difficulties also have arisen because District Judges have to try civil suits in connection with the management of these very villages, but will these difficulties not arise in the case of District Magistrates, who will be, as I have said, the real zamindars of the whole district? Now, when you propose to make a change in the law, you have first of all to give a clear and solid reason as to why that law should be changed. Two grounds have been given for the proposed change: the first is that a District Judge is already an overworked officer and has no time; the second is that as the Judge will be an interested party, it is not desirable that he should have the management of the estates. Not a word has been said or suggested either by the Hon'ble Member in charge of the Bill, or in the opinions that have been taken on this clause, as to a District Judge being unable efficiently to manage the estate, or as to his being incapable of doing so. All that has been suggested is that he has no time, and I ask you whether it is reasonable to take away his powers, not because he is incapable of exercising them, but because he has not sufficient staff to work under him. If he has not a sufficient number of men under him, give him more men. What will be the result of this clause being passed into law? The estates will be managed by Deputy Collectors, and not by District Magistrates. You are giving power, in effect, to the Deputy Collectors who are already managers under the Court of Wards. I do not wish to suggest that these Deputy Collectors do not manage the Court of Wards well and satisfactorily, but it is for consideration whether you are not going unduly to overburden them and their Collectors, for cases are not wanting in which we know that various District Collectors and their Deputies have complained of overwork.

Thus I submit that there is absolutely no ground why the law should be changed. As to the District Judge being interested in the matter of common management, I submit that in nearly every case that comes under the Civil Procedure Code† he is similarly interested, though he has to sit as a Court of Appeal and decide these cases. The principal thing is that you cannot change a law without giving solid reasons why the law should be changed, especially when you know that not only the people of Orissa, as I presume, but the entire Council—I am talking of course of the non-official Members and the entire body

* *i.e.*, Act VIII of 1885.
† *i.e.*, Act V of 1908.

of people whom they represent—certainly view this change with a great deal of alarm.

Then the next point has not been answered at all, and that is that we are also taking away the powers of the High Court. Why? What is the ground there? Has it been suggested that the High Court is also overworked in spite of our having 19 or 20 Judges? Absolutely no ground has been given as to why you are going to take away their power. You console us by saying that revisional power is given to the Commissioner. What is a Commissioner after all? He is the immediate superior of the Collector. They are both on the executive side of the administration, and we oppose this clause merely on that ground, and we say, "do anything you like, but don't give too much power to the executive authorities in their districts when we have got District Judges and Civil Courts." As my hon'ble friend from Bengal told us just now—and correctly too—we Indians place a good deal of reliance in Civil Courts, and everybody cries and shouts for a High Court. Even we, in the new Province of Bihar, are shouting for one. Why? Simply because we believe—we may be wrong—but we believe that we shall have better justice done in our High Court than at the hands of a District Collector.

Then again, there is one thing to be considered which the Hon'ble Member in charge of the Bill has very frankly admitted. There is also the chance of this power being abused by over-zealous Collectors. Cases are not wanting—I need not give you instances, but those who have been reading the papers for the last two or three years will tell you that there have been cases—where the District Magistrates have gone beyond their powers at times by oppressing the zamindar, if I may be allowed to say so. What will be the result of this new clause? If the District Collector gets annoyed with even a very petty zamindar, he will say "Oh, all right, on my own motion I will take away all the powers you have got. I will not let you enjoy your own property, and what is more, I will place it in my own hands." What is the remedy for that? Nothing save and except certain powers of revision given to a Commissioner. He is in many cases guided by the notes and remarks of his subordinate officers. We don't expect any justice from him, and therefore I assert that this proposed new law is rightly very strongly opposed by everyone concerned.

There is one more point to which I wish to draw the attention of the Council, and that is this: The District Magistrate is to be vested with this power, and he is vested to such an extent that he can initiate proceedings of his own motion. Now what is the meaning of these words "of his own motion?" They require interpretation; but we know their meaning in the Criminal Procedure Code*; under that Act, the Magistrate may also act on the reports of the police. Now, that is a very serious thing to consider. The District Collector, sitting in his district, receives various reports in his capacity as District Magistrate—both confidential and public reports from the police. If the District Magistrate takes the initiative on such reports and calls upon the co-sharer and says, "You had better appoint a common manager, otherwise I will take charge of your entire property," I submit that that would be very hard on the zamindars,—in some cases at any rate. If there is any chance of the section not working satisfactorily in the case of zamindars, I submit that that fact in itself is a very strong ground why the amendment should be accepted by this Council. I, therefore, beg to support the amendment that has been moved by my friend, the Hon'ble Rai Sheo Shankar Sahay Bahadur.

The Hon'ble Mr. Das said:—

I did not intend to speak on this matter, but there has been something of incrimination and recrimination as to what Orissa Members have charged other

* i.e., Act V of 1898.

Members with, and as to what should be the duty of Orissa Members. I must confess I did not give any particular attention to the study of this subject of common managers. When the matter was before the Select Committee, a proposal was made to incorporate in this Bill something like the encumbered estates provisions. I remember I objected to that. Then I have heard here that those people who have their estates now under a common manager wish for a change, and I have also heard people say that they would like to have the common management in the hands of the Collector. So far that statement is correct. But I don't think anybody was consulted with regard to the provisions of the Bill as they stand. The discussion now before the Council has brought out certain features,—features which I noticed particularly in the speech of the Hon'ble Mr. McPherson and in the speech of the Hon'ble Member who has just resumed his seat. The Hon'ble Mr. McPherson said that he could imagine an over-energetic—or some such word—Collector, and the last speaker pointed out what might be done by the Collector if the words "of his own motion" were left in the clause. These are matters in which I don't think the zamindars or persons who wish for the change were consulted. At any rate the discussion of this provision in the Bill has brought to light certain dangers. Hon'ble Members of the Council who have experience, more experience than I have, in connection with the working of this provision, have pointed out these dangers. Though I am not in a position to speak from personal experience, I may say this much, that we, Orissa Members, are not prepared to oppose any reasonable amendment. All that we say is that any opinion formed by us is not to be adhered to as persistently as is often done by an Hon'ble Member in charge of a Bill. Of course, Sir, we have been yoked with the senior partner to whom the Hon'ble Member, Mr. McPherson, has referred; in taking a partner for life, one has to consult the wishes of such partner very often before one begins to live in the same house with him or her. Secondly, of course, the experience of the Bengali and Bihari Members is not to be thrown away or slighted by the Orissa Members.

I really regret that I cannot offer any observation based on my personal experience, nor can I claim to have given any particular attention to this subject. I cannot, therefore, express an opinion on the amendment either way.

The Hon'ble MR. KERR said:—

I wish to say one thing with reference to the remarks that have fallen from the Hon'ble Member for the University regarding the Bengal Tenancy Act.* The position of Government with regard to this matter is that we resist attacks on the principles of the Bengal Tenancy Act,* and we say that, in cases where that Act has worked well for many years, a very strong case has to be made out in favour of any change. But this question which we are now considering is not a question of principle. It is simply a question of machinery as to whether these common manager provisions should be worked by the District Judge or by the Collector. There is, moreover, a strong case in favour of a change The people of Orissa say that the existing machinery is not working well, and I may say here that the Hon'ble Mr. Das is wrong in thinking that this common manager provisions of the Bill were not circulated for opinion. The suggestion for change was first put forward by the Orissa people themselves in 1909, and the detailed provisions of the Bill were circulated to them some time in July or August last and have been under consideration ever since. They were unanimously approved by the Orissa Association and the Orissa public. They have not, of course, seen the comparatively small amendments which were made in Select Committee, but we may certainly take it that the Orissa public have approved the main principles which transfer this function of control from the District Judge to the Collector. The District Judge himself, who works this machinery at present, says that it is not suitable and wants a change. I submit, therefore, that in this comparatively small question of machinery we ought to be guided by the wishes of the local officers

* i.e., Act VIII of 1885.

and the local people and carry the provisions of the Bill as they now are. I do not propose to reply to the disparaging remarks of the Hon'ble Mr. Wasi Ahmad, which appeared to be characterised by singularly poor taste. It is perhaps enough to remind him that, among gentlemen of his profession, there is an adage to the effect that, when you have a particularly bad case, your only chance is to throw mud at your opponents. Such practices may conceivably be useful in a Court of Law, but are hardly worthy of this Council. As to the Hon'ble Mr. Das' consultations with his "future partners for life," I observe from the daily press that they have already begun, and I trust that they may be attended with much happiness to the people whom Mr. Das represents.

The Hon'ble BABU BHUPENDRA NATH BASU said :—

I will deal with the question that has been raised by the Hon'ble Member, Mr. Kerr, first. But before I do so I confess that if this clause was not a clause involving very important principles of administration, I should have taken no part in the discussion, in view of the statement made by the Hon'ble Member in charge of the Bill that "the Orissa people want it." It is because I feel that there is a very serious question of principle involved in the clause that I venture to detain the Council for a few minutes. The Hon'ble Mr. Kerr says that it is a question of machinery. It is, in one sense, but behind that question of machinery is the question of the hand that applies the machinery, that sets the machinery in motion, and here we have the Collector himself setting the machinery in motion and then deciding for himself at a later stage as to whether the machinery should or should not be set in motion. To those Members of this Council who have spent their lives in district work I am afraid to appeal, because naturally they grow up under a belief that whatever they do is always right, but to others who have not had the benefit of that experience I can make a more strenuous appeal. Is it right or is it proper that the person who is ultimately to decide as to whether a common manager should or should not be appointed should be the person who, in the first place, has to set the machinery in motion? That is a simple question to which I ask for a straightforward reply. I see arrayed against me gentlemen who have held high judicial office, and one* whom we may congratulate upon having been recently selected to fill one of the highest judicial posts in this province. I appeal to them, not as a matter of experience with which I shall deal later on, but as a matter of principle, to say whether they would give their high approval to a procedure of this kind. Then, going away from the question of principle and coming to the applicability of the section, is it not quite clear that the experience we have had cannot absolve us from all fear of interference on the part of an over-zealous district officer, though it may be that in Orissa a state of Arcadia exists, and that the happy relations existing there between executive officers and the people have not their counterpart elsewhere in the province, except probably on those carved images on Buddhist temples, where you see the lion and the lamb drinking water from the same vessel in peace and contentment? But apart from that, it may very frequently happen that obnoxious zamindars may be sought to be put down by methods which will not stand the test of judicial procedure. Many of my friends, who have been district officials—I appeal to them—would say that oftentimes they have found, or have felt, that an obnoxious zamindar, (from their point of view in any event), should have been dealt with, if possible, under the Court of Wards Act.† In my own experience, a case did occur, where the zamindar was forced to seek the protection of Government, after a series of prosecutions, by transferring his estates to the Court of Wards.

Under the law as you are going to frame it, wherever any dispute exists between co-owners, which is likely to cause inconvenience to the public or injury to private rights, the Collector can always interfere. I ask, Sir, the

* The Hon'ble Mr. CHAPMAN. † *i.e.*, Bengal Act IX of 1879

Bengal men, and in that I include the members of the Civil Service as well as my non-official friends,—that is men who have lived in the mufassal and who have experience of the management of zamindaris owned by several proprietors—to say, can they point out to any single zamindari in the whole area of Bengal, Bihar and Orissa, as they now are, where, owing to some disputes between the co-proprietors, some injury to private rights does not often happen, and thus open the door for the appointment of a common manager; and is it intended that the entire province of Orissa should be practically under the zamindari management of the Collector? Would he be able to look after such a huge estate in addition to his other duties? But, it may be said, that it is a state of things which is not contemplated. What is contemplated is the potential power to interfere, and not the actual interference. But this potential power to interfere is a source of great danger. My friend, the Hon'ble Mr. Maddox, calls attention to his report where he says:—"Others ask for an amendment of sections 93 to 100 of the present Bengal Tenancy Act,* so as to bring the procedure both for appointment and control of common managers entirely under the control of the Collector." That is one thing, but the provisions which you are seeking to introduce are quite different.

The Hon'ble MR. MADDOX said:—

May I explain, Sir, that they are detailed in a later paragraph of the same report, paragraph 80, sub-clause 14?

The Hon'ble BABU BHUPENDRA NATH BASU said:—

I have got that part also, and I will deal with it. This is what my friend says on page 57 of his report—

> "The people of Orissa, except the common manager who is also a pleader," (and thereby hangs a tale,) "are in favour of transferring the jurisdiction from the Judge to the Collector. Not only because the Collector is familiar with the agricultural conditions and controls all revenue matters, but also because he is more likely to appoint competent persons as managers and supervise the work effectively."

That I concede. But I shall presently tell the Council that it is possible to secure this without the large departure that you are seeking to make from the existing law.

My friend, the Hon'ble Mr. Hugh McPherson, said, with some degree of appropriateness, that this is a matter in which the people of Orissa alone are concerned, and if they have no objection, why should others, the people from Bihar especially, interfere? Well, this recalls to my mind a recent piece of legislation in this Council, the Improvement Bill of Calcutta, and I should have been very pleased if the fight had been left to us three† on this side and the Hon'ble Mr. Bompas on the other, the rest of the Council abstaining from any discussion or voting; then I think we should not have come off in the sorry plight in which we did on that memorable occasion. But territorial aloofness is a state of things which is not possible in a corporate Council like the one that we have now got, and therefore I think it is right for Bihar Members as well as for ourselves to intervene in this discussion.

My friends are aware that there are provisions in the Code of Civil Procedure‡ under which a property may be brought to sale by the District Judge through the agency of the Collector, and it is quite possible if there is a complaint that Judges have not got sufficient experience in the management of estates or the proper machinery under them, and that these things, *i.e.*, the

* *i.e.*, Act VIII of 1885.

† *i.e.*, the Hon'ble BABU D. P. SARBADHIKARI, the Hon'ble MR. APCAR, and the speaker

‡ *i.e.*, Act V of 1908

management of estates and supervision, would be better done by Collectors;—it is quite easy, I say to provide a machinery by which the Judge, after having given an order for the appointment of a common manager, will be able to seek the help of the Collector in carrying out the part that is purely administrative, and which will not interfere with the judicial discretion of the Judge, or take away their powers of interference from the High Court. My friend says that he is going to give us the additional protection of the Commissioner. Far be it from me to say that that is not a protection. I differ from the Hon'ble Mr. Wasi Ahmad in this respect. But I would appeal to Mr McPherson himself to say, what is the extent of that protection? In how many instances and cases like these would the Commissioner be inclined to interfere, because remember, your grounds are so vague, viz, "inconvenience to the public or injury to private rights?" If these two things are established, it is merely a matter of discretion and not of judicial exercise of power, and in how many cases would the Commissioner interfere? Then, Sir, it has been said that some of the Orissa zamindars wanted, if it was possible, to incorporate in the law some of the provisions of the Encumbered Estates Act* for the protection of their estates. That is a feeling with which I can sympathise, but at the same time, as my friend knows, the provisions of the Encumbered Estates Act* cannot be called into existence until the estate has become heavily encumbered. What happens—will my friend say—to an estate in which, for instance, one proprietor is the owner of 15-annas? He is a thoroughly capable proprietor. Another is the owner of a one-anna share. In Bengal and Bihar there are owners of shares which are much more fractional than one anna, and because one of these is incompetent or unruly, the Collector is to have power to interfere and appoint a common manager. This appointment of a common manager by executive order takes away entirely the right of the 15-anna shareholder to the management of his own estate, but that is not all. If that were all, I could understand that it was probably the policy of Government to reduce the zamindars, upon whose co-operation it has often relied, and whose absenteeism has always been criticised, to the position of mere annuitants. But more than that, besides reducing them,—capable men who may have fractional shares in a zamindari,—into the position of mere annuitants, you take away their power of sale, mortgage, gift or lease so that they can in no way deal with any portion of their property for any purpose whatever without the sanction of the Collector. My friend says, why should you fear that the Collector will unjustly withhold his sanction? I have not that fear. I take it that I need not fear. But why, because some fractional part of my estate has got into a state which may necessitate the appointment of a manager, should I be deprived of the ordinary rights of a proprietor over my property, and why should I be compelled to seek the assistance of the Collector, and to be entirely dependent on his favour for the exercise of the commonest rights of property over my own estate? And more than that; not only do you, by an executive order, impose upon me, who may be a proprietor qualified to manage my own estates, this liability, and deprive me of the rights of sale, gift or assignment, but you further impose upon me this state of tutelage for all time until the Collector chooses otherwise. You take away from me the right to have my own share partitioned and given to me separately so that I may exercise the rights of management and of proprietorship over my own property. Is that fair? I do not know what the Orissa zamindars may think of it; but I am quite sure that in no other part of India, except the Sonthal Parganas, would any zamindars or proprietors of estates relinquish their rights to property under conditions like these, even if the Collector were a man who would be always infallible. This is a serious innovation and a serious encroachment upon the rights of private property, and I earnestly ask the Council carefully to consider what they are going to do before they vote upon this amendment.

* † Act VI of 1876.

The Hon'ble RAI SHEO SHANKAR SAHAY BAHADUR said :—

"Sir, we have heard in reply to several of our amendments that the people of Orissa have accepted this, and that there is no ground for the people of Bihar to intervene Sir, the people of Orissa seem to be very gentle. But I do not know whether all the zamindars of Orissa, either of the permanently or temporarily-settled estates, have in a body, for themselves, their heirs and their assigns, submitted an application to Your Honour that they want this change in the law for the appointment of a common manager. I do not think so. But assuming for the sake of argument that they have done so, shall we be deprived of the right of considering this question? Sir, I have heard of decrees by consent, but I have never heard until now of legislation by consent. In this case, a vital question of principle is involved, and the law, as proposed to be introduced, must stand or fall on its own merits. In considering the question of the appointment of common managers, there are three stages. The first is the stage of giving cognizance to the court in cases of dispute between the co-owners and the hearing of the dispute by that court. The second stage is that, when it is found that there is a dispute and that a common manager should be appointed, the Court issues a notice to the joint holders of the estate, calling on them to show cause whether a common manager should be appointed or not; and, if the joint owners do not agree among themselves with regard to the appointment of a certain manager, the Court can itself appoint a common manager. The third stage is that, when a common manager is appointed, the Court has the control and supervision of the management of the common manager. The amendment before the Council, which I had the honour to move, refers to the first stage, viz., where the Court has to take cognizance of the fact as to whether or not there is any dispute, and whether the dispute is of such a nature that it is absolutely necessary that a person should be deprived of the right of management and a common manager appointed Some of my friends have rather complicated the issue by the introduction of the procedure of the second and third stages. They do not say that the Civil Court, under the superintendence of the High Court, should not have the jurisdiction of taking cognizance of a case and deciding whether there is any dispute or not, or whether it is a fit case for the appointment of a common manager. What they say is this: that a District Judge cannot keep proper control over the common manager, and therefore an amendment in the law is necessary. As I said before, when moving this amendment, so far as I am personally concerned, although I know many are opposed to the views I entertain, I would have welcomed a motion to this effect that the power of taking cognizance and deciding whether a common manager should or should not be appointed should vest in the Civil Court, but that the power of keeping control over the common manager might be given to the Collector. I should have personally no objection to that; but what I seriously object to is this—and this question is a serious one, for it is a question of depriving a man of his right of management—I object that this power of deciding whether there is a dispute and whether a person should be deprived of his right of management should be placed in the hands of the Collector, and that the Civil Court and High Court should be divested of that right. I submit that this change in the law can only be defended if it has been proved that the Civil Court and the High Court have failed to exercise this power properly or have misused this power. Have we got any such proof before us? Can you condemn the High Court without giving it an opportunity for explaining whether it has misused this power? Is that fair? These are my grievances, Sir, and they have not been answered by the Hon'ble Member in charge. I may say that, so far as this amendment is concerned, there cannot be any dispute that the power of taking cognizance and deciding whether a common manager should or should not be appointed should vest as heretofore in the Civil Court under the superintendence of the High Court. Has a case been made out that the Civil Court should be divested of this power, and that this power should now vest in the Collector? I say no."

[*Rai Sheo Shankar Sahay Bahadur; Mr. Saiyid Wasi Ahmad.*]

A division was then taken with the following result :—

Ayes 17.

The Hon'ble Kumar Sheo Nandan Prasad Singh.
" Babu Bhupendra Nath Basu.
" " Kirtanand Sinha.
" Raja Rajendra Narayan Bhanja Deo.
" Babu Deba Prasad Sarbadhikari.
" Mr. Apcar.
" " Golam Hossain Cassim Ariff.
" Dr. Abdullah-al-Mamun Suhrawardy.
" Mr. Saiyid Wasi Ahmad.
" Maulvi Saiyid Muhammad Fakhr-ud-din.
" Babu Hrishikesh Laha
" Rai Sheo Shankar Sahay Bahadur.
" Mr. Das.
" Rai Baikuntha Nath Sen Bahadur.
" Babu Mahendra Nath Ray.
" Khan Bahadur Maulvi Sarfaraz Husain Khan.
" Mr. Dip Narayan Singh.

Noes 25.

The Hon'ble Mr. Slacke.
" Raja Kisori Lal Goswami.
" Mr. Greer.
" " Macpherson.
" " Collin
" " Stevenson-Moore
" " Chapman.
" " Finnimore.
" " Kerr.
" " Stephenson.
" " Butler.
" " Maddox.
" " Küchler.
" " Morshead
" Sir Frederick Loch Halliday, KT
" Mr Cumming.
" " Bompas.
" " Oldham.
" " H. McPherson.
" Babu Janaki Nath Bose.
" Sir Frederick George Dumayne, KT.
" Lt.-Col. G. Grant-Gordon.
" Mr. Norman McLeod.
" " Stewart.
" Maulvi Saiyid Zahir-ud-din.

The following members were absent:—

The Hon'ble Mr. Mitra.
" " Rai Sita Nath Ray Bahadur.
" " Maharaja Manindra Chandra Nandi.
" " Maharaj-Kumar Gopal Saran Narayan Singh.
" " Mr. Dutt.
" " " Reid.
" " Babu Braj Kishor Prasad.
" " " Bal Krishna Sahay

The Hon'ble Maharaja Bahadur Sir Prodyot Kumar Tagore and the Hon'ble Sir Bijay Chand Mahtab, Maharajadhiraja Bahadur of Burdwan, abstained from voting.

The result of the division was *ayes* 17, *noes* 25, and the motion was therefore lost.

The following motions were, by leave of the President, withdrawn:—

192. The Hon'ble Rai Sheo Shankar Sahay Bahadur to move that the words "or clause (*c*)" in the penultimate line of the provision to clause 96 be omitted.

Clause 97.

193. If motion No. 190 be carried, the Hon'ble Mr. Saiyid Wasi Ahmad to move that clause 97 be omitted.

194. If motion No. 191 be carried, the Hon'ble Rai Sheo Shankar Sahay Bahadur to move that the words "District Judge" be substituted for the word "Collector" in line 3 of clause 97.

Clause 98.

195. If motion No. 196 be carried, the Hon'ble Mr. Saiyid Wasi Ahmad to move that clause 98 of the Bill be omitted.

[Rai Sheo Shankar Sahay Bahadur; Mr. H. McPherson; the President; Babu Bhupendra Nath Basu.]

196. The Hon'ble Rai Sheo Shankar Sahay Bahadur moved that the words "has jurisdiction under the Court of Wards Act* in force for the time being and" be inserted after the word "Wards" in line 3 of clause 98 *(a)*.

He said:—

Sir, my ground for this amendment is that the Court, under the Court of Wards Act,* has jurisdiction only if the property consists of an estate or part of an estate paying revenue to Government, and the Act does not confer jurisdiction on the Court to take charge of property consisting of tenures only. These clauses in the Bill deal both with estates and tenures. In order to remove the anomaly, I propose the above words to be added, but I will not press for it if it is not accepted by the Hon'ble Member in charge of the Bill.

The Hon'ble MR. H. MCPHERSON said:—

I do not accept the amendment, Sir. There seems to be a similar provision in the Bengal Tenancy Act.† The word "tenure" appears in section 97 of the Bengal Tenancy Act † in much the same way as it appears here. Section 97 says:—

"In any case in which the Court of Wards undertakes under section 95 the management of an estate or tenure, so much of the provisions of the Court of Wards Act, 1879,* as relates to the management of immoveable property shall apply to the management. The same reference to tenures occurs in section 95."

The Hon'ble RAI SHEO SHANKAR SAHAY BAHADUR said:—

Sir, I do not wish to press this amendment.

The motion was then, by leave of the President, withdrawn.

The following motion was, by leave of the President, withdrawn:—

197. If motions Nos. 191 and 194 be carried, the Hon'ble Rai Sheo Shankar Sahay Bahadur to move that the words "District Judge" be substituted for the word "Collector" in clause 98 wherever it occurs.

The Hon'ble MR. H. MCPHERSON said:—

Sir, may I have your permission to ask for the suspension of the Rules of Business in order to move an additional amendment?

The PRESIDENT said:—

Yes.

The Hon'ble MR. H. MCPHERSON said:—

I beg to move, Sir, that after the words "in any case" in sub-clause *(b)* of clause 98 the words "with the previous sanction of the Commissioner"‡ be inserted.

The Hon'ble BABU BHUPENDRA NATH BASU said:—

I would like to know whether this provision would give the party a right of appeal to the Commissioner, or whether there would only be a private communication between the Collector and the Commissioner.

---

* i.e., Ben. Act IX of 1879.
† i.e., Act VIII of 1885.
‡ *See* also p. 230, *post*.

[*Mr. H. McPherson; Babu Bhupendra Nath Basu; Mr. Saiyid Wasi Ahmad; Rai Sheo Shankar Sahay Bahadur.*]

The Hon'ble MR. H. MCPHERSON said:—

Sir, the facts of the case will have to be reported beforehand by the Collector to the Commissioner and, no doubt, the Commissioner will be only too glad to hear what the parties have to say before he passes orders. We may trust the Collector and the Commissioner to do justice in this matter, and not to take action without giving a full hearing to those concerned.

The Hon'ble BABU BHUPENDRA NATH BASU said:—

Would it not be simpler if the power of appeal were given to the parties to the Commissioner in the case of the appointment of a common manager, and as regards the matter of sales, gifts, etc.?

The Hon'ble MR. H. MCPHERSON said:—

There is provided, Sir, the revisional power of the Commissioner, and this, together with the additional words, secures our object. Knowing that the previous sanction of the Commissioner is necessary and that he has revisional powers under clause 102 A, the parties will, no doubt, go to the Commissioner and state their objections, if any.

The motion was put and agreed to.

The following motions were, by leave of the President, withdrawn:—

Clause 99.

198. If motion No. 190 be carried, the Hon'ble Mr. Saiyid Wasi Ahmad to move that clause 99 of the Bill be omitted.

199. If motions Nos. 191 and 194 be carried, the Hon'ble Rai Sheo Shankar Sahay Bahadur to move that the words "District Judge" be substituted for the word "Collector" in clause 99 wherever it occurs.

Clause 100.

200. If motion No. 199 be carried, the Hon'ble Mr. Saiyid Wasi Ahmad to move that clause 100 of the Bill be omitted.

Clause 101.

201. If motion No. 193 be carried, the Hon'ble Mr. Saiyid Wasi Ahmad to move that clause 101 be omitted.

202. The Hon'ble Rai Sheo Shankar Sahay Bahadur moved that the words "in respect of all their joint immoveable property" in line 7 of clause 101 (*3*) be omitted.

He said—

These words were added by the Select Committee, and it is not clear what they mean. Do they mean that the common manager shall take charge of all the joint property? If so, it is exceedingly objectionable and inconsistent with section 96, where the existence of a dispute is a condition precedent for exercising this extraordinary jurisdiction of depriving a joint landlord of the control of his property. I submit that the Orissa people should not be treated in this respect in a way different from other provinces, and we should not go beyond the Bengal Tenancy Act* in this respect.

* *i.e.*, Act VIII of 1885.

[*Mr. H. McPherson; Babu Janaki Nath Bose; Rai Sheo Shankar Sahay Bahadur.*]

The Hon'ble Mr. H. McPherson said :—

This is one of the matters in which we placed ourselves in the hands of the local associations and representatives of Orissa. The clause, as originally drafted, was on the lines of the Bengal Tenancy Act.* Several suggestions were made by the local associations and by the Members from Orissa to strengthen the hands of the common manager in dealing with the joint properties of the people who came under management. This was one of the points in which we were asked to make an addition to the provisions of the Bengal Tenancy Act.* As the addition has been made at the request of the Orissa people, I think it ought to stand.

The Hon'ble Babu Janaki Nath Basu said :—

Sir, this change has been made in the law chiefly for this reason, that although the common manager takes charge of the estates and other tenures belonging to the co-owners, they may have some house property in a town which properly does not come under the category of an estate or a tenure; hence the fact that the family possess such properties gives rise to various disputes amongst the co-sharers, and such disputes cannot be settled unless the common manager takes over the management of such property also. And there is another reason for this: If it is proposed to sell the houses in the town to liquidate the debts of the family, the common manager is not competent under the existing law to deal with such properties, and the owners themselves will not agree and will not execute a conveyance of these properties so that money may be raised and debts liquidated. These are the chief reasons for the clause, and this is a provision of the law which has been approved of by local opinion.

The motion was then put and lost.

The following motion was, by leave of the President, withdrawn:—

203. If motions Nos. 191 and 194 be carried, the Hon'ble Rai Sheo Shankar Sahay Bahadur to move that the words "District Judge" be substituted for the word "Collector" in clause 101 wherever it occurs.

204. The Hon'ble Rai Sheo Shankar Sahay Bahadur moved that the words "nor shall they, without the sanction of the Collector—

(*a*) by sale, mortgage, gift or lease, assign their share of the property, or

(*b*) apply for a partition of the estate or other property in the Civil Court or under the Estates Partition Act, 1877,"

in lines 9 to 14 of clause 101 (*3*) be omitted.

He said :—

This is another instance of departure from existing law. In the Statement of Objects and Reasons it is stated that opportunity is being taken to revise the law as to managers in other respects also. Reference is made to a decision of the High Court in the case of Amar Chandra Kundu, I. L. R., 31 Calc., page 305, and in consequence of that decision it is suggested that the powers of co-owners should be curtailed. I do not see how the power in a co-sharer to alienate his share can effect injuriously his co-sharer landlords, the management by the common manager, or the tenants of the estate, when the transferee simply steps into the shoes of the co-sharer who transferred his share and all he does is subject to do what the common manager might have done in the due discharge of his duty. It is a serious matter to deprive a landlord not only of his right to manage his property, but also of the right to exercise his

* *i.e.*, Act VIII of 1885.

proprietary right. He is not an idiot, minor, insane or an otherwise disqualified proprietor of the type specified in the Court of Wards Act.* You step in, not because he is unfit, but because he has had the misfortune to have some dispute with his co-sharer. In such a case to treat him as a disqualified proprietor is most outrageous. Then the provision preventing him from applying for partition means that when he comes within the jurisdiction of the common manager, you do not wish that he should extricate himself from his jurisdiction. You wish that he should be deprived of his management and control for ever. Ordinarily where a co-owner loses control over his property in consequence of a dispute between him and his co-owner, the first and foremost honest thought that would suggest itself to him would be to get his estate partitioned so that he may no longer be a co-owner and subject to the jurisdiction of the Court. You bar that remedy. You say, "you shall not get your estate partitioned, as that will lead to the courts losing jurisdiction over you." Surely, in the guise of enacting an agrarian law to govern the relationship between landlord and tenant, you do not wish to pass a law of confiscation of property for these p or people. These provisions were introduced into the Bengal Tenancy Act† on the recommendation of the Rent Commission, an extract of whose report was given by Sir Steuart Bayley at page 379 of the debate on the Bengal Tenancy Bill when opposing the motion of the Hon'ble Raja Peary Mohan Mukerjee for omitting these clauses from the Bill, because to some extent they concerned the relationship between landlord and tenant; for the tenant is hampered and harassed if there is a dispute between the co-owners, and he is interested in the appointment of a common manager. But so soon as a common manager is appointed, the object for which you include these provisions in a Tenancy Act is attained, and you must stay your hands and can go no further. This is the principle recognised in the Bengal Tenancy Act.† You are hardly justified in introducing the provisions of the Chota Nagpur Encumbered Estates Act,‡ or in applying the provisions applicable to a disqualified proprietor under the Court of Wards Act* with respect to a person who may be as competent as any of us here, and who has full power to deal with his property, subject to the rights of his tenants or of his co-owner. I submit we are treading on dangerous ground, and that it is safer to follow the Bengal Tenancy Act† in this respect. My hon'ble friend is very anxious to give a right of transfer to tenants who never exercised it before, but by this provision he takes away the rights of the landlord to transfer his property, a right which he has always exercised.

The Hon'ble BABU JANAKI NATH BOSE said:—

Sir, these provisions have been proposed entirely for the benefit of co-owners of estates in Orissa. In fact, Sir, I may submit that the Hon'ble Member in charge of this Bill accepted these proposals only when he was convinced that they would be beneficial to the co-owners themselves, and that they were wanted by the people who would particularly have recourse to this law. The present law, Sir, as we find it in the Bengal Tenancy Act,† has been found defective in actual working. The Privy Council has held that all the co-owners together cannot deal with their property as long as the common management lasts, but that each one of them can deal with his share, or alleged share, of the estate separately. The Council ought to remember that these families in Orissa are governed by the law of *Mitakshara*, and when the estate or estates are taken charge of by the common manager, these shares of individual co-owners are not known or ascertained. If each individual co-owner goes on mortgaging his share or portion of his share, and if suits are brought into court to which the other co-owners and the common manager are parties, the situation gives rise to a lot of litigation which is disadvantageous to the management of the estate. Then we come to the next stage; properties are actually sold, and outsiders become purchasers of fractional shares of such estates. If originally,

* *i.e.*, Ben. Act IX of 1879.
† *i.e.*, Act VIII of 1885.
‡ *i.e.*, Act VI of 1876.

[*Md. Saiyid Wasi Ahmad.*]

Sir, there were three owners of the estate taken charge of by the common manager, in three years' time there may be three hundred such purchasers who would come under the common manager as co-owners of the estate. You can easily imagine, Sir, the disadvantages of such a position, and, in order to obviate such difficulties, the first clause was proposed and accepted by the Select Committee, viz., "nor shall they, without the sanction of the Collector by sale, mortgage, gift, or lease, assign their share of the property."

Then supposing, Sir, a co-owner is possessed of one pie in an estate which is under a common manager, he can, if he is viciously inclined, try to put an end to the common management by suing in the Civil Court for a partition of the estate, or by applying to the Collector for partition of the estate under the Estates Partition Act,* although the other co-owners are quite willing to keep the common management intact. To make such conduct impossible, so that one person owning a very small share in an estate will not be at liberty to do an injury to the other co-owners who are benefiting by the common management, clause (*b*) of sub-clause (3) of clause 101 was proposed to the Select Committee and was accepted. Now, these changes in the law were very carefully considered, and it was thought that if common management was to be at all feasible, some such safeguards must be laid down. My friend from Bihar has not had the experience of the actual difficulties of common management, and nor does he appreciate the reasons why these changes in the law are proposed; and therefore it is on theoretical grounds, Sir, that he is opposing this measure.

The Hon'ble Mr. Saiyid Wasi Ahmad said:—

Sir, as a similar amendment stands against my name (No. 205), I beg to support the motion that has been put forward by my friend, the Hon'ble Rai Sheo Shankar Sahay Bahadur. I have carefully heard my hon'ble friend from Orissa, the Hon'ble Babu Janaki Nath Bose, and the only ground on which he recommends this clause being passed by this Council is, that it is in the interests of the zamindars and for the good of the people of Orissa. I was waiting to hear from him whether the principle to take away the right of a person is good in itself or not. Sir, the day before yesterday† we heard my friend opposite, the Hon'ble Mr. Das, appeal to this Council that it would be outrageous to deprive a tenant of his right to sell his land in case he may be in need of selling it to support his poor children. I make a similar appeal to the Members of this Council on behalf of petty zamindars who are at times really and honestly forced to sell their properties in order to save themselves, their people and their families. What is the provision that you are making for them? As my friend the Hon'ble Rai Sheo Shankar Sahay Bahadur has said, it is not because a zamindar is unfit to manage his property that you slip in, but because he has the misfortune not to get on well with one or two of his co-sharers. But suppose he is, after the appointment of a common manager, forced, on account of certain circumstances that may befall any person, to sell not the whole, but any portion of his property, why should you oppose that? What is the theory, therefore, whereby a man, after having this right—proprietary right—over his own property, is to be deprived of the power to deal with it in any manner he pleases, especially when he is in no way at fault? Well, Sir, I do not know with what object a change of this nature has been introduced into this Bill, but it appears to me that the introduction of the clause itself is out of order in such a Bill as this, if I may be permitted to say so, because it does not relate to a provision of law governing the relationship between landlords and tenants. This particular clause prescribes for certain action to be taken in connection with two fighting zamindars. Well, surely a Tenancy Bill should not provide a law that governs only zamindars, and does not in any manner interest or affect a tenant. Have you made out a case that tenants are either directly or indirectly affected by means of this clause? If the tenants are not to suffer, then I do not see

* i.e., Ben. Act V of 1897. † i.e., 21st March 1912.

[*Mauivi Saiyid Muhammad Fakhr-ud-din.*]

why a clause like this should be incorporated in this Bill. Then, again, look at the hardships which fall upon poor zamindars, when a dispute arises between one or two members of the same family holding joint-property,—whether governed by *Mitakshara* law or Muhammadan law, it does not matter. What is the best way of avoiding that dispute? What is the zamindar to do? The best way of avoiding that dispute is for him to apply for partition and to be finished with it; but you are going to take away even the right of partition of his estate from that zamindar. I submit that absolutely no ground has been put forward, even by my hon'ble friend Babu Janaki Nath Bose, in support of such an enactment. I do not see why this right should be taken away from the zamindar if a common manager has to be appointed. Then again, if you do not permit the partition, practically it will be like this, that the zamindar will have absolutely no hand in the management of his zamindari; he cannot really derive any benefit or any advantage of any sort from his own property; and it will be simply disastrous for the petty zamindars to have any such enactment. The argument has been advanced that the Orissa people are content with this proposed legislation; but my friend forgets that now Orissa is to be a part of Bihar; and we Biharis have therefore as much interest in the welfare of Orissa as the people of Orissa themselves. What will be our fate, then, should we seek to become landlords in Orissa? Supposing rich Biharis go to Orissa because it is part and parcel of Bihar and commence purchasing properties there, the operations of this clause will affect them seriously and very materially. I submit there is absolutely no argument in support of this clause. I therefore support the amendment of my hon'ble friend, Rai Sheo Shankar Sahay Bahadur.

The Hon'ble MAULVI SAIYID MUHAMMAD FAKHR-UD-DIN said:—

"Sir, hitherto my impression has been that the provision for the appointment of a common manager, whether in the Bengal Tenancy Act* or any other Tenancy Bill, was for the protection of the interests of the tenants, and to safeguard the interests of the landlord and the tenants in matters arising between landlords and tenants themselves. But it appears that the provisions of clause 101 have been chiefly incorporated in this Bill for the protection of the interests of the landlords, and of the landlords alone. Now my friend, the Hon'ble Babu Janaki Nath Bose, tells us that these provisions were accepted by the Hon'ble Member in charge of the Bill on the application of the local zamindars. It appears that the zamindars of Orissa are very convenient people. They have got inherent rights, they can sell, mortgage or lease away their properties; they can make an application for the partition of their shares. If they want that these natural and inherent rights which they possess should be taken away from them and should be made dependent upon the mercy of the Collector, I can only say that these landlords of Orissa are fortunate in their desires. My friend, the Hon'ble Babu Janaki Nath Bose, has put forward the case of a *Mitakshara* family; but I put it in a different way. Supposing that in one estate there are two Muhammadan zamindars and two Hindu zamindars of different families, and one of the Hindu zamindars dies, and there is a dispute amongst his heirs. Now, why should the other three persons be deprived of their natural and inherent rights of mortgaging, selling, assigning their share or asking the Collector to partition their share? There is a dispute as regards a fraction of the sixteen-anna property. Now, so far as that fraction is concerned, the estate may be confiscated or kept under management; but why should the other co-sharers be deprived of their inherent rights? That is where I fail to see any justification for this legislation, and there is no such provision under the Bengal Tenancy Act.* I do not therefore think, Sir, that it would be fair in principle to incorporate these provisions in clause 101, because it would be very hard on the zamindars of Orissa. Of course I have got no personal experience of Orissa. My friend, the Hon'ble Babu

* i.e., Act VIII of 1885.

Janaki Nath Bose, is perfectly right in saying that the Bihar Members have got no personal experience of the conditions of Orissa. I am prepared to accept that, but I fail to see the reasonableness of these zamindars of Orissa in making an application to cut away their rights or in putting restrictions and limitations upon their own natural and inherent privileges. Assuming that some landlords of Orissa might have indiscreetly made such applications, yet I am anxious to ascertain the soundness of the principle; we are fighting for a principle Instead of enacting law to define the relationship between landlord and tenant, you are enacting the provisions of Chota Nagpur Encumbered Estates Act* in this Bill. If the Orissa landlords are anxious, for reasons known to them, to have a curtailment of their powers and rights then enact some special law for them. With these words I beg to support the motion" .

The Hon'ble BABU MAHENDRA NATH RAY said :—

"Sir, I beg to support this amendment, which attempts to do away with a most revolutionary clause of the Bill, and a clause which I submit is most dangerous; and I hope that, before this matter is finally considered and this amendment either accepted or rejected, the Council will consider the very serious question which this clause, and the amendment there anent has raised. To a lawyer such a provision as would have the effect of depriving a co-sharer of all rights of property, simply because the property has been placed under the charge of a common manager, seems to be opposed to all principles of jurisprudence, and to all known principles of law. It is impossible to find out any connection between the incidents of common management and this taking away from a co-owner of a property under common management the rudimentary elements of rights of property. I find, Sir, from the fact that part of the clause is underlined,† that in it are some of the amendments, rather, the improvements or additions made to the Bill during the course of its passage through Select Committee; and when I look to the report of the Select Committee with a view to see whether any explanation of this most extraordinary provision is suggested, I find it stated at page 5 of the report that, "we have modified the provisions of clause 101, so as to strengthen the hands of the common manager and prevent mischievous interference by co-sharers with the objects of management" I was startled to find, Sir, that this reason was given seriously by the Select Committee for this most revolutionary change. It is impossible to see how the taking away of the elementary rights of property from the co-sharer of a property placed under common management will make it impossible for co-sharers mischievously to interfere with the common management, or how it will strengthen the hands of the common manager. I am afraid, Sir, that when that part of the report of the Select Committee was drafted, the very drastic change made was evidently lost sight of, for the explanation given at page 5 cannot possibly refer to this most revolutionary change. I find that the three hon'ble gentlemen who represented Orissa in the Select Committee have nothing to say about this most extraordinary clause in the notes of dissent submitted by them. If this means, as has been suggested by the Hon'ble Babu Janaki Nath Bose, that the zamindars of Orissa are perfectly content to keep in suspense all their proprietary rights during the indefinite period of the tenure of a joint manager,—because I must point out that there is absolutely no limit to the length of time during which the common manager may hold his appointment;—if the zamindars of Orissa really desire that during this indefinite period all their rights of property should be kept in suspense, we may be surprised at the idea, but a sane legislature ought certainly not to support that idea and, in pursuance thereof, give effect to a clause like this

"It does not require any serious argument to point out the fallacy of this position. This Bill nowhere says that it is to apply to *Mitakshara* families

* i.e., Act VI of 1876

† All amendments made in Select Committee were underlined in the copy of the Bill that was laid on the table prior to the debate in Council.

[*Raja Rajendra Narayan Bhanja Deo; Rai Baikuntha Nath Sen Bahadur.*]

only; it will apply to all families and to all co-owners who may have property within the limits of the Orissa Division; and, within the limits of the Orissa Division, there may be some—there are some families—which are not wholly governed by the *Mitakshara* law. I shall ask the Council for a moment to imagine what would be the possible effect of this clause being made law? A joint manager is appointed with a view that such an appointment shall avoid any inconvenience to the public or injury to private interests. The joint manager takes charge of the common estate, relieves the co-owners of the management with a view to avoid inconvenience to the public or injury to private interests, and this state of things is continued until the Collector is of opinion that this managership can be abolished without any inconvenience to the public or injury to private interests. This state of things may go on for a long time—it may go on for 20 years or 40 years,—and during all this time the person who has a substantial share in the joint estate is not to deal with it as owner of that estate, but has, I suppose, to be relegated to the class of pensioners, and he will get an annual allowance or a monthly allowance, or some other allowance from the common manager. During all these years his rights of ownership are suspended. He cannot sell, and, if he is about to die, he cannot make a bequest in favour of any person. He cannot, even if he has a desire to put an end to all disputes by partitioning the property and getting his share separated from the rest, be allowed to do that. Why? We have been told that this is for the benefit of the Orissa zamindars. But how? If the Orissa zamindars think that, for an indefinite period of time, it would be a benefit to them to extinguish their rights and to be placed on a pension under the direction of the Collector and to be supplied with this pension periodically, they may be welcome to that supposition, but it is an idea which we cannot endorse.

"I submit that this provision is of a revolutionary character, and one for which there is absolutely no justification; and I hope, Sir, that the Council will adopt this amendment and reject this dangerous innovation in the Bill."

The Hon'ble RAJA RAJENDRA NARAYAN BHANJA DEO said:—

"Sir, with regard to the Orissa zamindars, it has been discussed whether the estate ought to go under the management of the Collector or a Judge. There might be some difference of opinion as to that, but I do not think, Sir, that there can be any difference of opinion about omitting these two sub-clauses (*a*) and (*b*) of sub-clause (*3*) of clause 101. I do not know which zamindars of Orissa have actually approached Government to put in these clauses, and I shall be obliged if I am enlightened on the subject. But certainly, Sir, these two are very mischievous clauses in the Bill, and I support the amendment. I believe there is a proposal for the partition of Bhingapur, a large estate in Orissa. The question is pending before the Judge If the amendment is not accepted, I fear the present provision will interfere with the proposal for partition."

The Hon'ble RAI BAIKUNTHA NATH SEN BAHADUR said:—

"I need add only a few words in support of this amendment. That vested interests cannot be divested is an axiomatic principle, but a breach of that principle would be the effect of this Council adopting this measure. There is no doubt that normally all the owners have power to sell, mortgage, give away, or lease away their property, but restriction on that is sought to be put by this sub-clause (*3*) (*a*).

"Now, it is well known to every one that most of the zamindar class live from hand to mouth, and they have, on occasions of extraordinary expense, to incur debts and then, by economy, to pay off those debts gradually. For instance, a death of a parent in the family necessitates the *sradh* ceremony which the son is in duty bound to perform; in the same way, Hindu families,

on the occasions of marriages of daughters, have to incur extraordinary expenses, and for these ceremonies they have to borrow money or sometimes to sell away a portion of their property. Under this innovation they would be precluded from doing that and they would be put to very great inconvenience. On the other hand, the management is not in the least interfered with if a man borrows money by mortgaging his share of the property. The management goes on as before, and the co-owner gradually pays up his debt, or, if he sells his property, the purchaser will be in the same position, because he stands in his shoes. The management is not interfered with, for the only change is that the vendee gets the profits which the vendor was getting. As regards gift, this clause has a far-reaching effect. It interferes, I beg to assert confidently, with the general testamentary powers of co-owners. A gift may be a gift *inter vivos* or a prospective one after one's death. If a co-owner wishes to make a disposition by diverting a course of inheritance, he will be prevented from doing it. That is a right which will be affected by this provision. It has been observed by my Hon'ble friend, Mr. Janaki Nath Bose, that the co-owners concerned are governed by the *Mitakshara* law. I am not in a position to contradict him. Assuming that there must be some cases in which zamindars have acquired properties, the devolution of which they have the right to control by testamentary disposition, what will be the effect of this new legislation? It will have a far-reaching effect of a dangerous and revolutionary character which no Council ought to countenance.

"Then, with regard to the second sub clause (*b*), dealing with partition. According to the original clause, 96, inconvenience to the public is a ground for the appointment of a common manager. In the case of a partition there will not exist such inconvenience. If there is a partition effected, each party enjoys the property separately and there will be no inconvenience to the public. It has been said by my friend that the majority of co-owners like the common manager to continue, but that if one of them is a wicked and mischievous man he may apply for partition for his own purposes. In that case the majority can, if they like, keep the common management by consenting to the partition to the extent of the share of the party applying for partition: the other portion of the estate may remain intact. My friend to the right* has drawn the attention of the Council to the reasons given in the report of the Select Committee as regards these provisions. The fallacy of the reasoning is apparent. The common management will not be interfered with, and this improvement, which is sought to be made by the Select Committee, goes to make a provision of a dangerous character.

"I submit, therefore, that this Council, before it gives its sanction to the placing of this provision on the Statute book, should consider whether it should deliberately ignore the first principles of law and bring about a revolution; and whether it should go so far as to interfere even with testamentary powers."

The Hon'ble BABU DEBA PRASAD SARBADHIKARI said:—

"Sir, I claim that this is more than a mere 'matter of machinery,' and I hope after what has been said that it will be conceded that it is a very serious matter of principle which is involved in this amendment.

"We are not here, though the Hon'ble Mr. Wasi Ahmed seems to think so, to legislate for the benefit of enterprising Bihar investors who threaten that they will buy property in Orissa. I suppose Orissa will be able to take care of itself, and I hope that when the Bihar investor goes into the Orissa market he will find that advantages and disadvantages counterbalance one another. But the anxiety of the Uriya who, according to my friend, Mr. Madhusudan Das, is not always able to take care of himself, is that step-motherly solicitude for its welfare is being carried further than any legislature or Law Court ever thought of. We are aware that in recent times, in the Punjab for example, and in other parts of the country, discount has been sought to be put on land alienation.

* The Hon'ble BABU MAHENDRA NATH RAY.

That was an attempt, however, of a far narrower kind than is boldly attempted in this remarkable clause. We, in this legislature, thought that we were legislating for the ordinary interests which govern the relations between tenant and landlord in the ordinary spheres of life; but to attempt to divert the course of law in a way that this clause seeks to do is an unheard-of thing, and if this legislature were to lend itself to it, it would be opening up the way to enormous difficulties. Sir, the anxiety of the majority of co-owners to keep property together at the expense of inconveniencing a one-pice owner is not at all the exclusive monopoly of Orissa. In other parts of the country also, amiable heads of families are anxious that recalcitrant co owners, owning half-pice or a pice share of the estate, should not embarrass a family by going and seeking for a partition. But where such an owner has gone to the Law Court, the Law Court has never said, 'You shall not get your partition because you are such an infinitesimal owner. To minimise the evils of such situations the legislature, in its wisdom, has enacted various relieving measures; for example, if the majority of owners desire that their property should not be partitioned by metes and bounds, under certain circumstances it can be put up for sale. Reliefs of that kind the legislature has tolerated, and I have no doubt, under proper conditions, will tolerate, to a yet larger degree; but to lay down that when, because of unfortunate incidents, a common manager has been appointed, a man's property should be tied up by a method of perpetuity foreign to the spirit of our law and legislation is a suggestion which the Law Courts and legislatures have always discountenanced, and, to put it in the kindest way, such a thing is unheard of. We, here, by a short clause, are to introduce measures that are entirely alien to the spirit of the law governing perpetuities. The Bengal school was in advance of the *Mitakshara* school in matters of partition, and now that the Bengal and Mitakshara-governed countries are to be separated, there seems to be in the air a subtle and far-reaching sort of reasoning by which the old school is to return to power just when its authority was on the wane.

"When the representatives of Orissa tell us that we have no experience about their internal conditions and that we have no business to speak of these matters, we feel ourselves situated somewhat like those placed between the deep sea and a well-known but (in polite society) rarely-mentioned personage. For, at the same time, complaint is not lacking if there be want of seasonable interference by Bengal Members. Sir, the Hon'ble Mr Madhusudan Das has complained with regard to one of the members of the Select Committee, that he had never been near Orissa and knows nothing of the country. That complaint does not apply to many of us, and certainly not to me. Many witnesses here will bear testimony that I have not only been to Orissa but know the country. My ancestors came from there and I take a lively interest in all matters appertaining to that province and hope to do so for all time in spite of being separated from it, for Orissa has special and unique attractions for me. We Bengalis seek to interfere when it is our duty to do so and because we all take great interest in that classic land. The Hon'ble the Raja of Kanika has said nothing to show that these fundamental changes in the law of the country with regard to ordinary landholders is required, and we shall await the pronouncement of the other Orissa representative as to whether such a change is necessary, for I find some difficulty in accepting in its entirety the *ipse dixit* of the Hon'ble Babu Janaki Nath Bose in regard to this matter.

"The Hon'ble Babu Janaki Nath Bose has referred to mischief making owners. If the sanction of the Collector is to be obtained, how is that to be a remedy against these mischievous evils if they have a real foundation in fact? If these transfers are allowed, the transferee will have no higher rights or status than the owners themselves, and so, by reason of the mere transfer, the transferee cannot harass the common management. If the owners do not think it worth while to keep together their property, are they to be compelled to do so against their will or interest for nearly all time to come? Not only for marriage expenses and *sradh* expenses is it that money may be

required, but there may be other *bonâ fide* demands for money which can be raised only by mortgage or by sale. Transfers at critical moments ought not to be discountenanced, and we have no right to say:—'You are not to protect your interests by raising money because the common manager has the property.' Take another case,—the case of that obnoxious person in Hindu society,—a widow who cannot get enough out of her infinitesimal property to maintain herself. But for this clause she would, under the legal necessity provisions of the Hindu law, be able to raise money for her maintenance or for the spiritual benefit of her husband. All this will be denied to her, because, by this piece of legislation, she will not be able to raise money while there is a common manager. Is it possible that such a state of things is to be tolerated ?

"Having regard to all these reasons, I think the Council ought to set its face against a clause like this and ought not to accept it."

The Hon'ble MR. DAS said:—

"I find that, in this case, the Orissa zamindar has been made to take the position of our old friend, the raiyat. He is not here himself, and therefore people evidently imagine that everybody has a right to represent him and to say what the Orissa zamindar wants and what the Orissa zamindar does not want. There is, on my left, the hon'ble gentleman* who represents the landlords of Orissa and Chota Nagpur, and we have just heard what he had to say on this amendment.

"Orissa is backward no doubt, but that does not mean certainly that the people of Orissa are anxious to be divested of what are their lawful rights. I daresay they have been divested and robbed of their rights under the colour of legislation and sometimes under the colour of settlement procedures. I am glad to hear that, in this Council, persons other than Orissa Members have used the word 'revolutionary,' and that the work done in connection with this Bill has necessitated the use of that word. I have tried my best to impress on some responsible people the difference between taking away vested rights and preventing the acquisition of fresh rights by legislation, but I do not see that my attempts have been successful. I find in one of the papers—paper No. 6, which relates to this Bill—a letter, on page 9, addressed from the Hon'ble Babu Janaki Nath Bose, described as Vice-President of the Landholders' Association. I know that the Hon'ble Member is not the Vice-President of the Landholders' Association, and he does not represent any landholders' association here."

The Hon'ble BABU JANAKI NATH BOSE said:—

"The Hon'ble Member is wholly in error if he refers to my humble self. May I explain ? The Vice-President of the Landholders' Association is one Mr. J. N. Bose, and as his initials and mine are the same, the Hon'ble Member has seen fit to put me down as Vice-President of the Landholders' Association."

The Hon'ble MR. DAS, continuing, said:—

"I apologise to the Hon'ble Member. I was, as he surmises, led away by the similarity of the two names.

"The present clause 103 seems to take away from the zamindars the power of transfer and mortgage which they exercised under the control of the District Judge. The withdrawal of this right will be prejudicial to the co-owner. I should like to know who has taken the trouble to take the views of the Orissa

* The Hon'ble RAJA RAJENDRA NARAYAN BHANJA DEO.

landlords on this subject? To me it seems to be a preposterous idea. One man has been living an extravagant life, and another man, his co-owner, may be living a thrifty life; but, because the extravagant man feels the necessity of having a common manager and his estate managed by a Collector, must the thrifty man, who can manage his estate well, be saddled with the pay of a common manager for the only reason that his neighbour is an extravagant man? Is he to undergo all that inconvenience because his neighbour is extravagant? This is really visiting the sin of one's neighbour on one's self. Neither moral nor legislative philosophy will sanction this

The Hon'ble MR. MCPHERSON said:—

"This debate has sprung two surprises upon me:—In the first place I think we are indebted to the Hon'ble Mr. Saiyid Wasi Ahmad for letting the cat out of the bag when he explained to us why the Bihar Members object to these new provisions which are proposed to be introduced. They are, it seems, not so much concerned about the cherished rights of the Orissa proprietors, as about their own prospective rights in Orissa properties. This fact may, perhaps, account for the recently-reported meteoric appearance in Orissa of two Hon'ble Bihari Members of the Imperial Council. Mr. Das might possibly enlighten us as to the progress of his consultations with these hon'ble 'future partners for life.'†

"A still greater surprise to me, however, has been the language addressed to the Council by the Hon'ble Raja of Kanika and also by the Hon'ble Mr. Das.

"The position is this, Sir—When the Bill was first prepared, it contained no provision of the nature which is now objected to. The Bill was circulated to the local associations; and the local associations made various suggestions praying for the insertion of this particular clause. We considered them in Select Committee and at first the Government Members were, on the whole, reluctant to accept them. We did, however, accept them eventually in a modified form, adding the words 'without the sanction of the Collector' to the restraints proposed to be placed on co-sharers. We said we did not want to impose on the co sharer that unlimited restraint upon the exercise of his proprietary rights which the local associations wished to impose upon him, but we were willing to give the Collector a power of adjudication in the matter. That is, if the Collector thought that the exercise of his ordinary proprietary rights was proposed for mischievous ends and for the purpose of wrecking the whole of the common management, he would refuse sanction; but if, on the other hand, the exercise of the rights was proposed for a reasonable purpose, it would naturally be sanctioned. All the objections that have been taken to this clause are based on the false supposition that the Collector is an unreasonable and despotic individual who is not swayed by common sense or by common feelings of humanity, but I do not think that the Council will permit themselves to be led by the nose by the Hon'ble Mr. Wasi Ahmad in this connection.

"Not only, Sir, do we claim that the Collector is a reasonable individual, but we give you the safeguard that he is supervised in this work by the Commissioner. If the Collector refuses sanction in any case where he ought not to have done so, then in the ordinary course the aggrieved parties will go to the Commissioner, who will consider their objections and overrule the Collector if he has done wrong. From the beginning we have recognised that the right of partition should not ordinarily be refused to the co-sharers, because partition

* In the actual debate, the Hon'ble Mr. Das read, during this speech, a portion of the opinion on the bill submitted to Government by the Orissa Landholders' Association, but no reference thereto is to be found in the original proof of his speech. (See the speech of the Hon'ble Mr. McPherson above and on the next page.)

† See page 208, *ante*.

may obviate the dispute which causes the necessity for common management. The only reason why this provision was introduced into the section was to prevent some petty co-sharer, who had no desire to consult the good of the joint family but merely wished to cause mischief, from putting in an application for partition, just at a time when the joint estate is beginning to weather the gale of adversity and recover stability. An application for partition in respect of a one pice share, put in at an inconvenient moment, might involve the whole estate in a great deal of expense and trouble, and the object of the common management might be entirely wrecked. We have no desire by this sub-clause to prevent for all time the partition of estates which are subject to common management. But it may be reasonable to delay the partition till the estate has recovered from the effects of previous mismanagement, or till it can be released under section 102. The Collector will be the best judge of that. He may refuse an application for the time being, but admit it on renewal, and it should be remembered that the parties can refer to the Commissioner if they think that the Collector has acted unreasonably in refusing. The point I wish to emphasise is that all these precautions to secure the success of common management were put into the Bill at the urgent and repeated request of the Orissa zamindars and their local associations.

"Such being the intention of the sub-clause and the history of the case, you will be able to judge of my surprise when both the Hon'ble the Raja of Kanika and the Hon'ble Mr. Das got up in this Council and took exception to these provisions on the ground that they had been put into the Bill without the Orissa zamindars being previously consulted. Unfortunately, neither the Hon'ble Mr. Das nor the Hon'ble Raja of Kanika have got up their case thoroughly. They have, I fear, forgotten the facts. They have not looked at the opinions on the Bill forwarded by the Orissa Landholders' Association, of which I believe the Hon'ble Raja of Kanika has the honour to be President. I do not know, Sir, whether the Hon'ble Mr. Das is a member of the Orissa Landholders' Association; he is more probably a member of some Orissa Raiyati Association, and he is perhaps a member of the Orissa Association However that may be, we have got here the opinions both of the Orissa Landholders' Association and the Orissa Association and, when I read them you will see that I am correct in saying that these provisions in the Bill have been put into the Bill on the suggestion of the two Orissa Associations. The Hon'ble Mr Das began to read* us a portion of the opinion of the Orissa Landholders' Association, but he did not go very far; perhaps it would have been wise of him to glance down the page and see what the Association really did say.

"I will read you their remarks:—

'The present clause 101 (*3*) seems to take away the power of transfer or mortgage which the common manager, under section 98, clause (*3*) of the Bengal Tenancy Act,† used to exercise under the control of the District Judge The withdrawal of this right would be prejudicial to the interest of the co-owners. It often happens that, to protect the estate, it becomes necessary to sell a portion or to raise money by mortgage, and co-owners often do not agree among themselves in the matter. This right must of course be exercised under certain restrictions, and the Association suggests that the common manager may be vested with powers conferred on managers under sections 17 and 18 of the Chota Nagpur Encumbered Estates Act,‡ with such modifications as may be deemed necessary.

'The words "otherwise assign" in this sub-clause are not exhaustive and would not include the raising of money by other means, such as by notes of hand, without in any way charging the property. The liberty of co-owners of contracting any amount of debts during the continuance of the management, often embarrasses the common manager and the District Judge, and they find it difficult to meet the demands of previous and subsequent creditors, specially when properties are attached and brought to sale, or a warrant of arrest is issued against one of the co-owners. The Association would therefore suggest that section 3 of the Chota Nagpur Encumbered Estates Act,‡ specially section 3 (*3*), may, with such modifications as may be deemed necessary, be introduced with advantage.'

---

* *See* foot-note on preceding page.
† i.e., Act VIII of 1885.
‡ i.e., Act VI of 1876.

[*Mr. H. McPherson.*]

"Now, Sir, I have before me a copy of the Chota Nagpur Encumbered Estates Act* and I will read from it to the Council. Section 3 of the said Act lays down that :—

'So long as such management continues,

(*a*) the holder of the said immovable property and his heirs shall be incompetent to mortgage, charge, lease or alienate their immovable property or any part thereof, or to grant valid receipts for the rents and profits arising or accruing therefrom,

(*b*) such property shall be exempt from attachment or sale under such process as aforesaid, except for, or in respect of the debts due, or liabilities incurred to Government, and

(*c*) the holder of the same property and his heirs shall be incapable of entering into any contract which may involve them or either of them in pecuniary liability."

"The Chota Nagpur Encumbered Estates Act,* you will see, goes very much further than our Bill. In our Bill we deal with immovable property only, but the Landholders' Association wanted to restrict the power of the co-sharers to enter into any pecuniary debt whatever.

"Their opinion continues as follows:—

'The Association would further beg to suggest that the common manager should also be vested with the power of preparing schemes for the settlement of debts with the approval and sanction of the Collector, as provided for in section 11 of the Chota Nagpur Encumbered Estates Act,* and that, in all important matters, such as mortgage, sale, or settlement of debts, the orders of the Collector should be made appealable to the Commissioner as provided for in section 10 of that Act.'

"As I have said before, it has come as a great surprise to me that, in spite of these opinions having been authoritatively promulgated by the Association, they have now been repudiated by the President of the Association, if I am right, as I believe I am, in stating that the Hon'ble Raja of Kanika is the President of the Association. I do not know whether the Hon'ble Mr. Das belongs to this Association or to the Orissa Association. But I do know that the Orissa Association, as well as the Orissa Landholders' Association, was in favour of restricting the powers of the co-sharers further than we have done in this clause.

"This is what they say:

"Therefore the Association propose to add the words "nor shall any portion of the estate or tenure be attached or sold in execution of a money-decree against one or more of the co-sharers" after the words "assign their share of the property".'

In other words, the Association hold that a co-sharer should not be allowed to incur any private debts.

"I think, Sir, we have good reason to feel aggrieved that, when we have acted upon the suggestions of the Orissa Associations, the Orissa members should now turn round and complain that we have put into the Act provisions which will interfere with the exercise of their rights,—'provisions about which they have not been consulted"! I pause to wonder what the members of the Orissa Landholders' Association will think of their Hon'ble President's consistency!

"Sir, one or two Hon'ble Members have referred to the question of testamentary rights. The Bill, I may explain, contains no prohibition against the testamentary disposition of property."

* *i.e.*, Act VI of 1876.

[*Babu Deba Prasad Sarbadhikari; Mr. H. McPherson; Mr. M. S. Das; the President, Rai Sheo Shankar Sahay Bahadur.*]

The Hon'ble BABU DEBA PRASAD SARBADHIKARI said:—

"What about gifts?"

The Hon'ble MR. H. MCPHERSON said:—

"A gift is not a bequest. There is nothing in the Bill to bar bequests.

"I do not think, Sir, that I have anything further to say on the subject of this sub-clause. I have explained it sufficiently to the Council, and I think the Council will agree with me that the amendment which has now been proposed and has so unexpectedly been supported by two of the Orissa Members should be rejected."

The Hon'ble MR. DAS said:—

"Sir, I wish to say a few words in respect of the personal remark against me."

The PRESIDENT said:—

"What was the personal remark made against you?"

The Hon'ble MR. DAS said:—

"I was in the Select Committee when this clause—"

The Hon'ble MR. MCPHERSON said:—

"I do not remember, Sir, having said anything in my speech about what was done by the Hon'ble Mr. Das in Select Committee. I merely asked if he belonged to the Orissa Landholders' Association or to the Orissa Association."

The PRESIDENT said:—

"You are not in order, Mr. Das, in rising again to speak on this amendment."

The Hon'ble RAI SHEO SHANKAR SAHAY BAHADUR said:—

"I do not wish to make any long reply to the points advanced by the Hon'ble Member in charge of the Bill, but I beg to urge before the Council that this is a Bill, as will appear from the preamble, to amend and consolidate certain enactments relating to the law of landlord and tenant in the districts of Cuttack, Puri and Balasore in the Orissa Division. How can these powers which are proposed to be given to the Collector and how can these provisions depriving the landlords of their rights—which are said to be in the interest of the landlords alone—find a place in such an enactment? Can you, Sir, in an enactment like this introduce all the provisions of the Court of Wards Act* and the Chota Nagpur Encumbered Estates Act?† It is absurd. So long as a provision in some way governs the relations of the landlord and the tenant, you have a right to include it in this Bill. I will not say whether the Hon'ble Member in charge has made out a case that these powers should be taken away from the co-owners and landlords—I think he has not; but I do urge that these provisions should not in any case find a place in the Bill which is now before the Council. If you think, Sir, that the powers of co-sharers should be curtailed, or that some law should be passed depriving them of their right to their property or compelling them not to mortgage, sell, or apply for partition, you ought to have a separate Bill with which the tenant will have nothing to do."

---

* i.e., Bengal Act IX of 1879.
† i.e., Act VI of 1876.

[*Rai Sheo Shankar Sahay Bahadur.*]

A division was then taken, with the following results:—

Ayes 18.

The Hon'ble Babu Bhupendra Nath Basu.
„ Babu Kirtanand Sinha.
„ Raja Rajendra Narayan Bhanja Deo.
„ Babu Deba Prasad Sarbadhikari.
„ Mr. Apcar.
„ Mr. Saiyid Wasi Ahmad.
„ Maulvi Saiyid Muhammad Fakhr-ud-din.
„ Babu Hrishikesh Laha
„ Rai Sheo Shankar Sahay Bahadur
„ Mr. M Das.
„ Rai Baikuntha Nath Sen, Bahadur.
„ Babu Mahendra Nath Ray.

The Hon'ble Khan Bahadur Maulvi Sarfaraz Husain Khan.

Noes. 27.

The Hon'ble Mr. Slacke.
„ Raja Kishori Lal Goswami.
„ Mr Greer.
„ Mr. Macpherson.
„ Mr. Collin.
„ Mr Stevenson-Moore.
„ Mr. Chapman.
„ Mr Finnimore
„ Mr. Kerr.
„ Mr. Stephenson.
„ Mr. Butler
„ Mr. Maddox.
„ Mr. Küchler.
„ Mr. Morshead.
„ Sir Frederick Loch Halliday, Kt
The Hon'ble Mr. Cumming.
„ Mr. Bompas.
„ Mr. Oldham
„ Mr. H. McPherson
„ Babu Janaki Nath Bose.
„ Maharaja Bahadur Sir Prodyot Kumar Tagore, Kt.
„ Sir Frederick George Dumayne, Kt.
„ Kumar Sheo Nandan Prasad Singh.
„ Lt.-Col. G. Grant-Gordon.
„ Mr. Norman McLeod.
„ Mr. Stewart.
„ Maulvi Saiyid Zahir-ud-din.

The following Members were absent:—

The Hon'ble Mr. Mitra.
„ Rai Sita Nath Ray Bahadur.
„ Maharaja Manindra Chandra Nandi.
„ Maharaja Kumar Gopal Saran Narayan Singh
„ Mr. Golam Hossain Cassim Ariff.
„ Dr. Abdullah-al-Mamun Suhrawardy.
„ Mr. Dutt.
„ Mr. Reid.
„ Babu Braj Kishor Prasad.
„ Mr. Dip Narayan Singh.
„ Babu Bal Krishna Sahay.

The Hon'ble Sir Bijay Chand Mahtab, Maharajadhiraja Bahadur of Burdwan, abstained from voting.

[*Mr. Saiyid Wasi Ahmad; Rai Sheo Shankar Sahay Bahadur; Mr. H. McPherson.*]

The result of the division was *ayes* 13, *noes* 27, and the motion was therefore lost.

The following motions were, by leave of the President, withdrawn:—

205. If motion No. 201 be not carried, the Hon'ble Mr. Saiyid Wasi Ahmad to move that the words—

"nor shall they, without the sanction of the Collector—

(*a*) by sale, mortgage, gift or lease, assign their share of the property, or

(*b*) apply for a partition of the estate or other property in the Civil Court or under the Estates Partition Act, 1897,"

in lines 9 to 14 of clause 101 (*3*) be omitted.

206. If motion No. 201 be not carried, the Hon'ble Mr. Saiyid Wasi Ahmad to move that the words "or on a joint application of the co-sharers" be substituted for the words "and not otherwise" in lines 1 and 2 of clause 101 (*3*).

Clause 102.

207. If motion No. 190 be carried, the Hon'ble Mr. Saiyid Wasi Ahmad to move that clause 102 be omitted.

208. If motions Nos. 191 and 194 be carried, the Hon'ble Rai Sheo Shankar Sahay Bahadur to move that the words "District Judge" be substituted for the word "Collector" in line 4 of clause 102.

The Hon'ble Mr. H. McPherson, with the permission of the President, moved that after the words "at any time", in the fifth line of clause 102, the following words be substituted, namely:—

"with the previous sanction of the Commissioner."

The Hon'ble MR. H. MCPHERSON said:—

"This amendment, Sir, is consequential to that already accepted by the Council in connection with sub-clause (*b*) of clause 98,* and which I moved after amendment No. 197 was withdrawn."

The motion was put and agreed to.

The following motions were, by leave of the President, withdrawn:—

209. The Hon'ble Rai Sheo Shankar Sahay Bahadur to move that clause 10A be omitted.

210. If motion No. 190 be carried, the Hon'ble Mr. Saiyid Wasi Ahmad to move that clause 102A be omitted.

Clause 103.

211. If motion No. 190 be carried, the Hon'ble Mr. Saiyid Wasi Ahmad to move that clause 103 be omitted.

212. The Hon'ble Rai Sheo Shankar Sahay Bahadur to move that for the words "Local Government" in line 1 of clause 103 the words "High Court" be substituted.

* See page 214 *ante*.

[*Raja Rajendra Narayan Bhanja Deo; Mr. H. McPherson; Babu Hrishikesh Laha; Mr. M. S. Das.*]

Postponed amendment No. 179.

The Hon'ble Raja Rajendra Narayan Bhanja Deo, with the permission of the President, moved that, in the place of amendment No. 179,* (as set out in the List of Amendments, Annexure A), the consideration of which was postponed from the meeting of the 21st March, the following be substituted, namely:—

That the words "tank for drinking water" be inserted after the words "village road" in line 7 of clause 87 (*1*).

The motion was put and agreed to.

Consequential amendment to amendment No. 148†, as modified in Council.

The Hon'ble Mr. H. McPherson, with the permission of the President, moved that, in consequence of the acceptance in Council, at the meeting of the 21st March, of a modified form of amendment No. 143,† by which the new sub-clause, sub-clause (*3c*), was inserted in clause 60, the following amendment be made in line 5 of sub clause (*3b*):—

That for the words "as next hereinafter provided" the words "as provided in sub-section (*4*)" be substituted.

The motion was put and agreed to

The following motion was, by leave of the President, withdrawn:—

Chapter XA.

213. The Hon'ble Babu Hrishikesh Laha to move that Chapter XA be omitted.

214. The Hon'ble Mr. M. S. Das moved that Chapter XA be omitted.

He said:—

"Sir, when the Revenue Settlement of Orissa was made between the years 1890 and 1900 the records prepared during that period showed that some portions of land were set apart for certain communal purposes, and in the *kabuliyat* executed by the zamindar it was stipulated that he should be considered responsible for reserving those lands for communal purposes It is not necessary for me to go into the details of the different purposes for which these lands had been set apart. but they were generally of this nature—grazing ground, cremation ground and reserve tanks—the importance and necessity of which are felt and admitted by all In moving this amendment I should mention here, first of all, Sir, that it is not my intention to say that those lands which have been entered in the *kabuliyat* should be excluded, or that any portion of them should be excluded. Of course there was a contract between Government and the zamindars in respect of those lands, and that contract was put down in writing in the *kabuliyat*. The zamindar was responsible, and under certain circumstances the Collector could take action to prevent any infraction of the terms of the *kabuliyat*. After the revenue settlement, Sir, came the revision settlement, the object of which I do not understand, I must confess. Whether the settlement officers were made to correct the records having reference to the changes which property had undergone between the date of the last record and the date when this revenue settlement record was prepared, or whether they were to correct certain entries which were erroneous, or whether they were to do both I don't know, but I suppose that, for the purposes of my argument, I should say that the records deal with both these objects. Now, during this revision settlement, Sir, some of the lands over and above what had been entered in the *kabuliyat* as 'public grounds,' if I may be pardoned for using such an expression, were entered in the records. The question is whether such an entry should really come within the

* *See* page 189 of the proceedings of 21st March

† *See* page 176 of the proceedings of 21st March

[*Mr. M. S. Das.*]

province of the revision settlement work. Revision settlement work, to me, ought to mean a revision which is necessary on account of changes which have come about in rights in property between the last record (made during the revenue settlement) and the date of the subsequent record made on the spot. Consequently, if the revision settlement officer undertook to make an entry about communal lands in the revision settlement records, *primâ facie* it would show this, that at the time of the revenue settlement they were not 'public grounds,' *i.e.*, communal lands; *i.e.*, they were not used at the time of the revenue settlement for those purposes, but must have come into such use during the interval between the revenue and the revision settlement. Now the difference between 1900 and 1906 was six years. Thus, supposing that during these six years there was some change, some lands which were not actually communal lands at the time of the revenue settlement might have been found to be used for the purposes of the community at the time of the revision settlement. The question would naturally suggest itself, was the use of such a character as to be recognized as an easement, understanding by that term all that every lawyer understands? There was an interval of six years, and even if we suppose that from the day that the revenue settlement officer left the village to the day when the revision settlement officer visited the village again this land was used for public purposes, will that make it an easement? It may be that it had been used for communal purposes only for three weeks, or only for three months before the time when it was recorded by the revision settlement officer.' Who were the persons who recorded all this? Amins. I particularly refer to the Hon'ble Member* who will be on the Bench of the High Court a few days hence, and ask him whether the determination of questions of easement can be left to amins on Rs. 10 or Rs. 12, and whether the Hon'ble Member will carry such an idea to the High Court Bench. But these are the people who are entrusted with this work, and what is the result? I have actually a specific case where a chaukidar on his nightly visits used to sit down under a tree occasionally, and the amin went and said, 'This is *sarbasadharan* land in public possession,'—because the chaukidar used to sit there every night! Where he finds one morning some cattle going into a tank for the purpose of drinking water—the cattle might have got there by trespassing—the amin goes and says, 'well, the cattle get water here, so it is *sarbasadharan*, used for cattle drinking.' What has been the result, Sir? The result is this: I got a telegram yesterday saying that in one case the Secretary of the Orissa Association had to go into Court, and the Court set aside this record; but look at the expense! And I may tell you, Sir, that before I left for this place—that was only on the 18th March, I saw actually notices issued on behalf of three thousand men in the district of Puri—printed notices—in the hands of a pleader, to be sent to the Collector for civil suits in respect of *sarbasadharan* entries. That is in one district. Really this is revolution; for pardon me, Sir, you are making over the right of inquiry into rights of a most complicated nature to amins on Rs. 10 and Rs. 15. I beg to inquire whether an amin understands what an easement is. He understands very well what it is to lie down at ease and to make an easy life of it, but whether he understands what easement means is a very different matter. An easement is only the right to use a property, which might belong to another person, in a certain way. Unless the property be in another person, there cannot be an easement. I am willing to pay one thousand rupees if anyone will produce an amin before me who will tell me that easement means that the property must be in another person, so that you may have an easement over it. Well, Sir, what will be the social result of this change? The social result will be that the zamindar will not allow any land to be used by the community. He will keep a tight hand and say, 'Here my rights are to be invaded in a most arbitrary manner, and I shall not allow you to use anything.' And that certainly would not tend to a happy state of things. And then, Sir, are we to legislate here on speculative lines, leaving the people to determine the right law in the civil courts? Legislation which depends upon remedial

* Hon'ble Mr. CHAPMAN.

effects to be produced hereafter by Civil Court decisions does not deserve the name of legislation. The people have a right to say that we want the legislature to think over the matter and to pass the law so that we might be saved the ruinous costs of litigation; but here, seemingly the legislature says, 'We need not stop to enquire what the result of this will be upon the people, or to what length this will prolong litigation; we will pass the Bill—we have no time to look into these things. There is the 1st of April coming, and we must pass this' Therefore, I say, what is the result? I have told you that there are three thousand men going to the Civil Court in one district; another telegram I received yesterday said (this was from Cuttack), 'My clients have given notice to the Secretary of State that they will bring such suits.' Now what is all this? Are we going to be ruined by litigation? It is said, Sir, very often, that it is this pernicious class of pleaders who multiply litigation. Well, amins do not make any bargains with pleaders.

"Then, Sir, I find this was one of the clauses with reference to which I said that the Hon'ble Mr. McPherson has been ransacking all parts of India and putting on the back of the poor Uriya whatever he finds,—anything likely to give a bend to his back, as though he were to say, 'you are a very turbulent people, you must have the worst laws; it is difficult to manage you. Bengal can be managed; Bihar can be managed; but you people cannot be managed, and so you must have laws from all parts of the world.' It is certainly unlucky that he has not imported anything from the Andamans; he brings things only from Madras! What does the Madras Act say? The Hon'ble Member does not look into the circumstances in which an Act of this nature was justifiable in Madras; he reminds me of some of my countrymen who imitate certain things because they are English, without knowing that they are not at all suited to the conditions of this country. You often find some of my countrymen cutting the tails of their horses because Englishmen in England do it; they forgot that there are no flies or mosquitoes in England. The poor animal wants his tail here to drive away mosquitoes.

"In Madras, Sir, when the settlement was made, Government put aside some land as common land, and therefore, when the Act was passed, Government had every right to say, 'Well, no assessment was made on these lands, they were exempted from the assessment of revenue, they were our lands, and you, zamindars, have no right to these lands, and consequently they must be set apart now for communal purposes.' But here, what is the state of things in Orissa? You have assessed every bit of land and you have included it in your *kabuliyat*, only exempting such portion as is particularly mentioned in the *kabuliyat*, and now you say you have a right to decide as to what is communal land. I do strongly object to Government saying what is communal and what is not communal. Government would be perfectly justified in making a contract with the zamindar and asking the zamindar for such land, and if the zamindars were asked, I am sure, in 95 per cent. of cases, they would say, 'Very good, take this piece of land which has been used for communal purposes.' But that is one way of doing things, and there is the other way of assuming that Government have a right to it. If you want to help the community, the best thing would be for somebody, not an amin, to go and inquire which land should be set aside and for what purpose. What do the villagers say? The villagers have been using the land. Your right is based on the present use of the land. There has been no quarrel, no dispute about the land, and the people are living in a happy state of contentment. Is it not desirable, Sir, that a particular inquiry should be made on the spot and something recorded which would cause no disturbance of the peace hereafter?

The Madras Act says this:—I am reading from section 20 of the Madras Estates Land Act*:—

* 'Threshing floors, cattle stands, village sites and other lands situated in any estate, which are set apart for the common use of the villagers, shall not be assigned or used for any

* Mad. Act I of 1908.

other purpose without the written order of the District Collector, subject to such rules as the Local Government may make in this behalf.'

"'It may be desirable'—I am reading from a speech by the Hon'ble Mr. Forbes when this Act was introduced—"that I should explain in a few words what is the position of Government with reference to this matter. The position that the Government take in this matter is that the village communal lands, which were in existence at the time of the permanent settlement, were not included in the permanent settlement as being lands exempt from land revenue at the time.'

"Well, there lies the difference, and it is an essential difference that makes all the difference between the two cases.

"Again, clause 103A reads :—

'When, in the *sarbasadharan* portion of a record-of-rights, prepared and finally published under Chapter XI, or under any other law for the time being in force, an entry has been made that any land has been set apart for the common use of the community, or for the exercise of certain rights by the community, such land shall not, without the written order of the Collector of the district, be assigned or used for any purpose which interferes with the purpose for which it was set apart.'

"A common man must turn out within six months. The common man is generally a *bajiaftidar*, and the Hon'ble Mr. McPherson has told us what his position is Perhaps his annual income is Rs. 22-8, but he still enjoys the respectability of a zamindar, though he might come to Calcutta and work as a coolie here. This man has got some land, and this land is taken away by the Collector for public purposes. The Legislature is very kind when it allows as much as 30 years to the Collector in which to take such action, and only six months to this poor man. I should be the last person to say that the reservation of communal rights should not be made, for their reservation is recommended by all classes of people. But about these communal rights—we must inquire what rights have been enjoyed. Suppose there is a piece of land which has never been used for communal purposes. A man has his own house on it and has lived there for 30 years, but at the end of that period the Collector says you must give up the land. But how can he remove from there within six months? Suppose a piece of land is set apart for certain purposes. Afterwards it is found that there was a tank there which was filled up. The zamindar says, 'Let us dig another tank here which we will use afterwards for public purposes.' All are agreed to that. Nobody makes any complaint. But even here the Collector has got the power to interfere. I do not say that in no instances Government interference should not be introduced. But I do say that, in a matter like this, an attempt should first of all be made to inquire into the true state of things.

"We must remember, Sir, that this Council is on the eve of its dissolution. The Hon'ble Mr. McPherson has told us that this Bill is the parting gift of Bengal to Orissa. But what is he going to make a parting gift of? A number of law suits? Will this Government undertake to pay all the costs of litigation in the new province? You legislate here without inquiring into the state of things which you have brought about during the revenue settlement operations. You say a system must be introduced in Orissa, because it exists in Bengal or in Madras. I am in a position to say that three thousand men are going to sue—I saw the notices, printed notices,—and I am sure that by this time they are in the hands of the Collector of Puri. Think of the idea of thousands of men going in for litigation. The Hon'ble Mr. Maddox has seen enough of Uriya life. I may not be a friend of the Uriyas, but he claims to be. Now, is it right, is it at all desirable, is it in the interests of society, is it in the interests of the good name of this Council that this measure should be passed at once? Why not leave it to the other Council? Are we on the eve of a revolution that legislation of this kind should be passed at once?"

[*Mr. Norman McLeod; the President; Mr. M. S. Das; Babu Hrishikesh Laha; Mr. Cumming.*]

The Hon'ble MR. NORMAN MCLEOD said:—

"May I rise to a point of order, Sir? The Hon'ble Member is bringing in irrelevant matters into his discussion."

The PRESIDENT said:—

"No; it appears to me that the Hon'ble Member is quite in order and may proceed."

The Hon'ble MR. DAS said:—

"For these reasons, Sir, I submit that this chapter should be omitted from the Bill."

The Hon'ble BABU HRISHIKESH LAHA said:—

"I rise to support the amendment moved by my hon'ble friend, Mr. Das.

"The whole of this chapter proceeds on the assumption of the authenticity of the *sarbasadharan* portion of the record-of-rights, where the communal lands have been entered. But the fallacy of this assumption has been exposed by the Orissa Association (*see* page 283 of the Collection of Opinions), and referred to by Babu Raj Kissore Dass, Manager, Jagganath Temple, Puri, in his letter dated the 13th January, 1912. But, if this chapter is to be retained at all, its provisions should be made in consonance with the landlord's *kabuliyat*, with a view to ascertaining the communal lands which the landlords, by their agreements with Government, have bound themselves to maintain as such in the village, instead of with the *sarbasadharan* portion of record-of rights where frequently entries about communal lands have been made by mistake or neglect of officers of the Settlement Department. To compel a landlord to set apart a certain plot of land as communal land on the basis of an erroneous entry in the record-of-rights, and then to prosecute him under clause 249 of the Bill for disobedience, would really be unfair and unjust It is not denied that provisions should be made for the conservation of communal lands. They are necessary for the preservation of health and cattle, but those provisions should not be based upon an erroneous record, and care should be taken that, in the solicitude for the conservation of these lands, people's private lands are not taken on the pretext of them being communal. No doubt, by clause 103D, the Collector is empowered to set aside a wrong entry in the *sarbasadharan* portion of the record-of-rights, but at the outset the landlord is at a disadvantage and, as experience has shown, it is difficult for him to set aside an entry once wrongly made. The provisions of the Penal Code* and of the Code of Criminal Procedure† are comprehensive enough to cover any encroachment on communal rights. Hence Chapter XA is not at all necessary, and its effect on the clauses comprised therein would be to put landlords and tenants at loggerheads, and thus there would be an incitement to the tenants to take as much land as they can from the landlord on a slight pretext. And their combination would be effective so far as evidence in a Court of Justice is concerned, as against the landlord's own lands. This chapter in the long run would be injurious to the interests of the landlord."

The Hon'ble MR. CUMMING said:—

"Sir, the Hon'ble Mover of the amendment was supposed to be speaking on amendment No. 214, viz., that Chapter XA, regarding communal rights, should be omitted; but the first portion of his speech was directed to amendment No. 116 which referred to the agreement made by landlords at the time of the Revenue Settlement. He, however, agreed that communal rights in Orissa should be preserved, and I am glad to see that the Hon'ble Member who spoke next also was of the same opinion. These views they have also given in their Minutes of Dissent. The Hon'ble Mr. Das was quite correct in stating what was

* *i.e.*, Act XLV of 1860
† *i.e.*, Act V of 1898

intended by the expression 'communal rights.' It is intended to refer to grazing grounds, tanks for drinking purposes, cemeteries, burning grounds and other waste lands on which the community can and does exercise some common right. In explaining this to the Council, I think the Hon'ble Member did not sufficiently explain the arrangements under which these entries have been made. At the time of the original Revenue Settlement they were made by the consent of the landlord, and the entries that were subsequently made at the time of the Revisional Settlement were made under the authority of an amending section of the Bengal Tenancy Act.* Mr. Taylor, whose settlement work is so well known in Orissa, has stated that there were very many lands which were omitted at the time of the original Revenue Settlement, and regarding which there was no doubt as to the propriety of their entry.

"Now, Sir, some reason should be adduced why Government should interfere in this matter at all. It was found in one case in Orissa that a grazing ground had been consecrated by a holy man, and that a curse had been announced against all encroachers. This apparently was effective, because it was found that the present reserved area was practically the same as the original ground. But an arrangement of this kind cannot be made as the general arrangement for the whole of Orissa. What is everybody's business is nobody's business. It may be urged that the private parties interested should take action in a matter of this kind. But to this there is an objection. If the zamindar is receiving rent for the land upon which an encroachment has been made, it is not his interest to interfere. Or, again, in the case of raiyats, it is perhaps too much to expect such a general exercise of public spirit on their part in matters in which they are not individually concerned. The present Commissioner of Orissa has advised Government that it is generally agreed that measures should be taken to preserve communal lands and that Government should take the initiative. It has been shown that, in a great many cases, action has been taken with no result at all. There is no procedure. Notices are issued, and after months of notices and counter-notices the Collector finds himself in the same position in which he started. For all these reasons, Sir, this chapter has been inserted in the Bill as it at present stands.

"If the Hon'ble Members who have spoken would admit the propriety of preserving these rights, they are quite correct in saying that sufficient safeguards should be provided against abuse. I submit, Sir, that safeguards have been and are being provided. I have already mentioned that, at the time of the original settlement, the entries were made with the consent of the landlords. I remember making such entries myself, and I can assure the Hon'ble Members that there was no case of interference or encroachment on any zamindar's rights. The orders of Mr. Maddox, the then Settlement Officer, were quite clear on the point. As regards the later proceedings, namely, those of the Revisional Settlement, as I have also explained, the entries were justified because it was legal to make in the record-of-rights an entry concerning any right of way or other easement attaching to the land. There is, therefore, no doubt as to the legality of these entries. As a matter of fact, it was found at the time of the Revision Settlement that new entries had ordinarily been made in consultation with, and with the approval of, landlords. Many of them had given their signatures, and those who were not willing to give their signatures had given their tacit approval. Indeed, a good deal of trouble has been taken to insure accuracy in this respect. No one of course will claim that absolute accuracy can be obtained when one is dealing with a vast number of entries. As for the assertion that entries regarding communal lands are the work of the amins, the procedure actually is that these entries have to be inserted by responsible gazetted officers. Besides, it must be remembered that objections can be taken and suits instituted against such entries. And now, in addition to that, under a new clause 103D, which was inserted in Select Committee, opportunity is given to the Collector of the district to correct

*i.e., Act VIII of 1885.

any incorrect entries which may be brought to his notice or to strike out any entry regarding lands which may no longer be used for the common good of the community.

"It is also not the case in section 103A that the lands are being transferred to the Collector. The proprietary right still remains with the zamindars. What section 103A really means is this : That when such entries have been made, such lands shall not, without the written order of the Collector, be assigned or used for any purpose which interferes with the purpose for which it was set apart. The chapter then goes on to say that, if the lands have been occupied by any trespasser and that if the matter is brought to the notice of the Collector, he may issue a notice, and that, after the issue of this notice, the Collector may take action and may have the trespasser evicted. Ample provision has been made for appeal both against the action of the subordinates of the Collector and against the orders of the Collector himself. Such, then, are the provisions, and I do not think that it can be said that these err on the side of harshness. It was stated by the Hon'ble Member who spoke first that strong penal provisions have been brought in from other provinces. I would remind the Hon'ble Member that the present Manager of the Jagannath Temple at Puri has stated that any measure to preserve communal land cannot be too drastic. I consider, Sir, that the provisions in this chapter, which have received the full approval of the Government of India, are quite salutary, and that they are not excessively harsh, and I would therefore call upon the Council to reject the amendment."

The Hon'ble MR. MADDOX said :—

"The Hon'ble Mr. Das has, in his speech, appealed to me. I only wish I could follow his arguments more clearly. They are more difficult to follow than any that I have heard in this Council. I did not gather whether he wanted us to allow the somnolent Uriya zamindar to continue in somnolence, or whether he was anxious that the pernicious pleader should be sent to the Andamans. However that may be, the Hon'ble Member has doubts about the correctness of entries made by the amin on Rs. 10. I would point out that these entries are all attested by responsible gazetted officers. He also objects to new easements being entered. I would point out to him that section 102 of the Bengal Tenancy Act,* under which the previous records were made, is quite different from section 102 as revised by the Amending Act† of 1907 under which the revision record was made. There is a great difference between them, as an examination of clause 105 of the present Bill will show. The Council is asked to give effect to the present record which is to the benefit of Brahmins, Karans, and Pans, as well as of zamindars also."

The Hon'ble MR. DAS said :—

"Sir, the Hon'ble Mr. Maddox says that I did not speak intelligently enough, or rather I was not intelligible enough to him. This is the misfortune we Indian Members suffer from talking in a foreign tongue. All that I can say is that I have done my best always to make myself understood. The question is not who supervises these entries. Am I to understand that a responsible officer actually goes to the spot and sees, day after day, for which purpose a particular land is used and, on firsthand information thus gathered, defines the kind of easement which the public have acquired in it; or am I to understand that the amin reports a piece of land to be *sarbasadharan* and it is then recorded as such? The fact is that *sarbasadharan* record is made without defining the kind of easement. *Sarbasadharan* means that the property belongs to the public, and that very fact will create great confusion; for, as the Hon'ble Mr. Cumming has said, what is everybody's property is nobody's property. Therefore, I say, what everybody claims to be his right is really nobody's right at all. One

* i.e., Act VIII of 1885.

† i.e., Bengal Tenancy (Amendment) Act, 1907.

man says that he will graze his cattle here; another says that he will use it as a park, because it is *sarbasadharan* We must really define the word, or it will lead to confusion. Everything will depend on the interpretation of the word given by the responsible officer in charge of the work. Something is considered as *sarbasadharan*, say, in a portion of a zamindari. Surely one zamindar's consent is not enough. Suppose there are four co-sharers in the zamindari. One of them, to spite the others, declares that a portion belonging to another co-sharer is *sarbasadharan*. Will that be recorded as such? I mention this as something that might happen, and this will lead to confusion and disputes. I have seen, I said, notices to a Collector ready to be delivered and printed, with envelopes addressed, on behalf of three thousand men. Am I to understand that these three thousand men are rushing to the ruinous expense of litigation without any grievance at all, and is not a change of this nature entitled to the consideration of the Council? Yesterday, I received a telegram from a man in which he says, 'I have got an entry removed and altered by the Civil Court, and I have given notice with regard to other entries.' I have, Sir, given a typical instance: A chaukidar sits under the tree at night, sometimes in his nightly rounds, and the amin comes and says, 'this is *sarbasadharan*.' These people have no idea of the facts. The point is that you entrust this duty to these unsuitable classes of people. I should only repeat that, when you are recording what is communal land, care should be taken not to have this work done by the amins. I have not the slightest objection to a man being put in jail for six months for trespass on communal land, and I should be the last man to sympathise with him; but it would not be fair nor wise to record as such lands which are not really communal. On these grounds, I think that this amendment should be accepted."

The motion was then put and lost.

Clause 103A.

215. The Hon'ble Mr. M. S. Das moved that the following be substituted for clause 103A, namely:—

"103A. When in the *sarbasadharan* portion of a record-of-rights of a village, prepared and finally published under Chapter XI, or under any other law for the time being in force any entry has been made setting apart land with the consent of the proprietor for the common use of the community or for the exercise of certain defined rights by the community or land which the proprietor has in the course of a settlement of land revenue engaged by the terms of the *kabuliyat* executed by him to preserve as grazing grounds, cremation grounds and reserved tanks, such land shall be placed under the control of a panchayat appointed by the Collector for the purposes of this chapter, and it shall be the duty of such panchayat to see that the said land is not used for any purpose which interferes with the purpose for which it was set apart."

Encroachment of communal lands

He said:—

"I do not intend to go over the same grounds again. All that I wish to say is what the Royal Commission on Decentralization stated in their report. I find that the Royal Commission on Decentralization recommended that the panchayat system should be introduced. Of course, it may be found true that we have no such men of public spirit here, as the Hon'ble Mr. Maddox and the Hon'ble Mr. McPherson say. That may be true. In the absence of such spirit or interest, I think it should be the duty of Government to encourage and stimulate the development of the spirit by giving our people a chance. There is very little to be done in connection with this proposal. Panchayats have got great powers, and it is in the contemplation of Government to give them more powers and a much more responsible position. In every village, I suppose, that

the Hon'ble Mr. McPherson and the Hon'ble Mr. Maddox have come across, there is a hut called *bhagabatghar*. It belongs to everybody. Everybody meets there in the evening, and it is a sort of village club. But what does the amin generally do when he comes? He wants to record it as *sarbasadharan*. But it is really a small hut built by the zamindar or some respectable person of the village, and all enjoy the privilege of meeting there in the evening. You cannot call that communal. As regards the infringement of the right, who can be the best judges? I suppose the panchayat or the people who live in the village. The appointment of the panchayat should be left in the hands of the Collector. *At any rate, even if they are at all likely to neglect their duty, I am* sure they will not sleep for 30 years during which at least ten Collectors will have come and gone. In a much shorter time they would find out that there has been an infringement of the rights of the people. The difficulty is that competent people cannot be found to undertake this duty, but the fact also is that the people do not understand what rights they have. But directly the panchayat is appointed, the matter would be discussed in the village and people would begin to understand such rights. Everybody will understand, 'I have got a right to these lands. I have a right to take water from that place,' and so on, and this will develop the right idea of the easement of the community over lands and other places. At present they say: '*I have been grazing cattle on this land simply because the zamindar permits it.*' *But if this panchayat system were* introduced the raiyat would understand that he has got a right to do so Now it has been admitted, I gather, from the reports and letters which the settlement officers have placed before the Council that with the revisional settlement the raiyat has understood his rights. So, let not the initiative be left to the Collector, because the Collector will not be at the place for 30 years but the panchayats will. For this reason the initiative should be left in the hands of the panchayat, and nobody would be better able to judge of these matters than the panchayat. I may read another extract (paragraph 20, page 669 of the Decentralization Commission's report): 'It is most desirable to constitute and develop village panchayats for the administration of certain local affairs within the villages. *This system must, however, be gradually and carefully worked. The head*man of the village, where one is recognised, should be *ex-officio* chairman of the panchayat, and other members should be obtained by a system of informal election by the villagers.' So it is really the idea of Government, I suppose, to develop a spirit of local self-government; and not only that, but to develop a sense of responsibility in the people, and this is certainly a thing which any civilized Government should be proud of. I think, for these reasons, that the rights of the people should be entrusted to some people in the village who would be the best persons in whose hands these rights may be safely left."

The Hon'ble Mr. Cumming said:—

"Sir, I oppose this amendment. I have already explained the general position, and the reason why certain powers are entrusted to the Collector. It is not a fact that the proprietary right is taken away from the zamindars. With regard to these communal lands, the proprietary rights of the zamindars still remain. The lands are simply regarded as subject to certain rights of user on the part of the community. I do not think that the zamindars of Orissa would be grateful to the Hon'ble Member if this amendment were carried, whereby the control of such lands, the proprietary right of which belongs to individual zamindars, would be placed in the hands of the panchayat. Undoubtedly the panchayat, as representing the local interests and rights of the community, can and should take proper care regarding the conservation of such lands; and I am sure that a Collector would welcome any report made by a panchayat on which satisfactory action could be taken. *But on behalf of* the zamindars, I think the Government should oppose this amendment."

The Hon'ble Mr. Das said:—

"Sir, I am sorry I could not follow the Hon'ble Mr. Cumming, but, so far as I understand, he thinks this would be taking away the rights of the zamindars.

I do not know if there is anything like that in my proposal. I will not, however, make any further remark than this, that the right which belongs to the public, whatever be the nature of that easement, should be left and entrusted to the panchayat; and what is entrusted to the panchayat would be nothing more or nothing less than what the Collector would be entrusted with under this clause. I do not mean to say that the zamindars should be deprived of the proprietary rights. However, if there is any defect in the wording of my amendment, I am quite willing to leave it in the hands of the Hon'ble Member in charge or of our Secretary to be corrected. I think the amendment ought to be accepted."

The motion was then put and lost.

The following motions were, by leave of the President, withdrawn:—

216. If motion No. 213 be not carried, the Hon'ble Babu Hrishikesh Laha to move that the following proviso be added at the end of clause 103A, namely:—

"Provided that the land mentioned as *sarbasadharan* land in an entry of the record-of-rights tally with those mentioned in the landlord's *kabuliyat* executed in favour of Government in regard to the preservation of communal rights, and that in no case shall any entry in the record-of-rights override any condition mentioned in the *kabuliyat*."

Clause 103B.

217. If motion No. 214 be not carried, the Hon'ble Mr. M. S. Das to move that the following be substituted for the first paragraph of clause 103B, namely:—

"If, on the complaint of any member, made with the consent of the majority of the members of such panchayat, it is proved to the satisfaction of the Collector that any person occupies any land referred to in section 103A, for any purpose which interferes with the purpose for which such land was set apart,....."

218. The Hon'ble Mr. M. S. Das moved that the following be added as an explanation to clause 103B, namely:—

"*Explanation*.—The planting of trees and the growth of fodder on land reserved for grazing shall not be deemed to be interference with the purpose for which such land was set apart."

He said:—

"Sir, my humble labours during the last two days' discussion have convinced me that I have been trying to strike blood out of a piece of genuine granite from the rocks of Scotland. I would simply ask the Hon'ble Member in charge whether he is prepared to accept my amendment."

The Hon'ble MR CUMMING said:—

"Sir, I may say on behalf of the Hon'ble Member in charge that the Government is prepared to accept this amendment, but with the omission of the following words: 'and the growth of fodder.' The amendment would then read as follows:—

'*Explanation*.—The planting of trees on land reserved for grazing shall not be deemed to be interference with the purpose for which such land was set apart.'

[*Mr. M. S. Das; Rai Sheo Shankar Sahay Bahadur; Mr. Cumming.*]

"If the Hon'ble Member is prepared to accept the amendment in this form, the Government is equally prepared to do so, but I should add that he is unfair to the Hon'ble Member in charge in suggesting that he has made no concessions in regard to this Bill. He has made many and ample concessions

The Hon'ble MR. DAS said :—

"I thank the Hon'ble Member, and accept the concession now made with pleasure."

The motion was put in the altered form and agreed to.

The following motion was, by leave of the President, withdrawn :

Clause 103 F.

219. The Hon'ble Rai Sheo Shankar Sahay Bahadur to move that the words "three years" be substituted for the words "six months" in line 3 of clause 103 F.

220. The Hon'ble Mr. M. S. Das moved that the words "one year" be substituted for the words "six months" in line 3 of clause 103 F.

He said :—

"Sir, I would ask the Hon'ble Member whether, having regard to the circumstances of the case, it would not be reasonable to give one year's time to a man instead of six months, and I hope the Hon'ble Member will accept my amendment."

The Hon'ble MR. CUMMING said :—

"Sir, I oppose this amendment. I see no reason at all to extend the term from six months to one year."

The Hon'ble MR. DAS said :—

"I will then withdraw this amendment."

The motion was then, by leave of the President, withdrawn.

The following motions were, by leave of the President, withdrawn :—

Clause 104.

221. If motions Nos. 191 and 194 be carried, the Hon'ble Rai Sheo Shankar Sahay Bahadur to move that the words "District Judge" be substituted for the word "Collector" in line 4 of clause 104 (*2*) (*c*).

Clause 105.

222. The Hon'ble Mr. M. S. Das to move that the words "*bajiaftidar* tenure-holder, *bajiaftidar* raiyat," be substituted for the word "*bajiaftidar*" in line 2 of clause 105 (*b*).

Clause 109.

223. The Hon'ble Mr. M. S. Das moved that the words "but the previous entry shall be admissible as evidence of the facts existing at the time such entry was made" in lines 4 to 6 of the proviso to clause 109 (*3*) be omitted.

He said :—

"Sir, I think the previous entry would be evidence of the facts existing at the time. The idea was, I imagined, that each entry should be evidence till it was replaced by another."