LEGISLATIVE COUNCIL

OF

INDIA

VOL. 4

JAN. - DEC.

1858

P . L .

PROCEEDINGS

OF THE

LEGISLATIVE COUNCIL OF INDIA,

January to December 1858.

Published by the authority of the Council.

A. SAVIELLE, CALCUTTA PRINTING AND PUBLISHING COMPANY (LIMITED),
NO. 1, WESTON'S LANE, COSSITOLLAH.

1858.

mittee of the whole Council be published for general information.

Agreed to.

FRAUDS ON INSURERS.

MR. LEGEYT moved that a communication received by him from the Bombay Government relative to a certain class of frauds practised in Guzerat on Insurers, be laid upon the table and referred to the Select Committee on the Indian Penal Code.

Agreed to.

CONSERVANCY OF MILITARY CANTONMENTS (BENGAL).

MR. PEACOCK moved that the Select Committee on the Bill "for the Conservancy of Military Cantonments in the Presidency of Bengal" be discharged.

Agreed to.

CIVIL PROCEDURE.

MR. RICKETTS gave notice that he would propose an amendment in Section 72 Chapter IV of the Bill "for simplifying the Procedure of the Courts of Civil Judicature not established by Royal Charter" to the effect that no party shall be imprisoned under a decree for less than fifty Rupees for any period exceeding one month, and under a decree for less than five hundred Rupees for any period exceeding six months.

Also an amendment in Section 76 of the same Chapter to the effect that, when a defendant shall have been imprisoned and having delivered up all his property shall have been discharged by the Court, if the amount of the decree under execution shall not exceed five hundred Rupees, it shall be competent to the Court to declare the defendant absolved from all further liability under such decree.

MR. LEGEYT gave notice that he would propose to omit so much of Section 143 Chapter III of the above Bill as requires that depositions of witnesses shall be taken and that the notes by the Judges shall form the record.

The Council adjourned.

Saturday October 2, 1858.

PRESENT:

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

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

THE CLERK presented a Petition of Inhabitants of the 24-Pergunnahs praying, with reference to the Bill "for making better provision for the care of the persons and property of Minors in the Presidency of Fort William in Bengal," that the age of majority be not fixed at twenty-one years.

MR CURRIE said, the Petitioners had misunderstood the Bill altogether. The age of majority was fixed at eighteen, as in the Court of Wards Regulation, and not at the age of twenty-one years. As, however, there was a Petition before the Council from the British Indian Association suggesting the extension of the age of majority to the twenty-first year, he would move that the Petition now presented, be printed.

Agreed to.

CIVIL PROCEDURE.

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

Sections 57, 58, and 59 of Chapter III related to the sale of property in execution of decrees.

MR. HARINGTON said, that the consideration of these Sections had been postponed on his motion at the last meeting of the Committee, on the understanding that, in the course of the week, he would print and circulate the amendments in them which appeared to him to be necessary. This he had done, and he should now move the omission of the Sections as they stood, and the substitution for them of the amended Sections prepared by him. A few remarks would suffice to explain

the alterations which he considered desirable. The first amendment proposed in Section 57, would give a defendant, for the attachment of whose property, *pendente lite*, the plaintiff might apply, and who might in consequence be called upon to furnish security to save his property from attachment, an opportunity of shewing cause why the order should not be enforced. A similar provision had been introduced, at a previous meeting of the Committee, on the motion of the Honorable and learned Judge who usually sat on his left (Sir Arthur Buller), in Section 50, which related to applications for the arrest of the defendant on mesne process, and there seemed no reason why a defendant called upon to furnish security, or, in default, to submit to the attachment of his property, *pendente lite*, should not be accorded the same privilege of being heard against the order. The amended Section also gave the Court power to order the attachment of the whole or any part of the defendant's property specified in the plaintiff's application, at the same time that it called upon the defendant for security. This power was given in Section 59 as it was originally framed, but in the Select Committee words had been introduced which would restrict the exercise of it to moveable property. The application of the plaintiff, however, frequently related to immoveable as well as to moveable property, and as some time would be allowed to the defendant to enable him to furnish the security required of him, the failure to furnish which alone would, as the Section now stood, subject his immoveable property to attachment; and as the only use which a fraudulent debtor would probably make of the interval would be to alienate the property indicated by the plaintiff, which there would be nothing to prevent him from doing, it seemed to him that the power should again be made general, and should be capable of being exercised in respect to both descriptions of property.

With regard to Section 58, he deemed it sufficient to remark that the alterations which he had made in that Section followed necessarily the amendments proposed in Section 57.

Mr. Harington

He should therefore move that Section 57 be omitted, in order that the following new Section might be substituted for it :—

"If the Court, after examining the applicant, and making such further investigation as it may consider necessary, shall be satisfied that the defendant is about to dispose of or remove his property with intent to obstruct or delay the execution of the decree, it shall be lawful for the Court to issue a warrant to the proper Officer, commanding him to call upon the defendant, within a time to be fixed by the Court, either to furnish security in such sum as may be specified in the order to produce and place at the disposal of the Court, when required, the said property or the value of the same or such portion thereof as may be sufficient to fulfil the decree, or to appear and show cause why he should not furnish security. The Court may also in the warrant direct the attachment until further order of the whole or any portion of the property specified in the application."

Agreed to.

MR HARINGTON next moved that Section 58 be omitted, and the following new Section be substituted for it; namely :—

"If the defendant fail to show such cause, or to furnish the required security within the time fixed by the Court, the Court may direct that the property specified in the application, if not already attached, or such portion thereof as shall be sufficient to fulfil the decree, shall be attached until further order. If the defendant show such cause or furnish the required security and the property specified in the application or any portion of it shall have been attached, the Court shall order the attachment to be withdrawn."

MR. HARINGTON further moved that Section 59 be left out.

Agreed to.

Sections 70 to 73 were passed as they stood.

Section 74 prescribed the proceeding in case of the death of one of several plaintiffs where the cause of action accrued to the survivor and the representative of the deceased.

THE CHAIRMAN said, he had some little doubt as to the last part of the Section, which said :—

"If no application shall be made to the Court by any person claiming to be the legal representative of the deceased plaintiff, the suit shall proceed at the instance of the surviving plaintiff or plaintiffs; and the legal representative of the deceased plaintiff shall be interested in, and shall be bound by the judgment given in the suit in the same manner as if the suit had proceeded at his instance conjointly with the surviving plaintiff or plaintiffs."

The original scheme or project of law had provided that something like a notice should be given to the legal

representative of the deceased plaintiff to come in and proceed with the suit. The Section as amended in Select Committee made no provision for any such notice whatever, and yet said that, unless the legal representative did come forward and have his name entered in the register of the suit in the place of the deceased plaintiff, the suit should proceed at the instance of the surviving plaintiff, and he should not only be bound by the judgment given if it were in favor of the defendant, but also be interested in the judgment if it were in favor of the plaintiff. It might so happen that the representative might not know that the suit was pending. Such a thing was not very likely, but still, it *might* happen; and he thought it would be better to give the Court a discretion in the matter. To do this, he had prepared the following proviso, which he moved should be added to the Section:—

"Provided that the Court, if it shall see fit, may direct notice of the suit to be served on the legal representative of the deceased plaintiff."

The original project of law had provided that if, even after a proclamation calling on the legal representative to appear, the representative should fail to appear, the judgment should be binding upon him equally with the surviving plaintiff if it was given in favor of the defendant, but that if it was given against the defendant, it should be only to the extent of the share or shares of the surviving plaintiff, and with a reservation of the rights of the legal representative. As the Section stood now, he (the Chairman) was only afraid of possible collusion between the surviving plaintiffs and the defendants in fraud of the representatives of the deceased plaintiff. Perhaps the question had been considered by the Select Committee, but by way of raising it now, he would move that the proviso he had read be added to the Section.

MR. HARINGTON said, the Section as framed by Her Majesty's Commissioners, contained a provision for the issue and publication of a proclamation calling upon the representatives of a deceased plaintiff to appear on a day to be fixed therein, and to proceed with the suit; but looking to the fact that a proclamation stuck up in the Courthouse was not likely to come to the knowledge of the family of the deceased plaintiff, the Select Committee had struck out this provision as useless. The objection to requiring the Court to issue a notice to the representatives of the deceased was that there would be nobody to pay the peon's fees for serving the same. The co-plaintiff, or co-plaintiffs could not be required to pay them; and as no notice could be issued without the previous deposit of the necessary fee for serving it, he did not see how this difficulty could be got over. He thought it would generally happen that the family or representatives of a plaintiff, who might die during the pendency of a suit, would be the first to hear of his death, and it would be their duty to lose no time in taking the necessary steps for carrying on the case in his stead. If they failed to do this, they must abide the consequences of their neglect. As to the other part of the Section, he considered that, as it had been amended by the Select Committee, it was really more favorable to the family of a deceased plaintiff than the original Section, seeing that it gave them an interest in any judgment that might be passed in favor of the surviving plaintiff or plaintiffs.

THE CHAIRMAN asked how the plaintiff would enforce his decree.

MR. HARINGTON said, he supposed in the same manner as any other decree-holder. He presumed that the representative or reprentatives of the deceased plaintiff would be at liberty to unite with the surviving plaintiff or plaintiffs in applying to the Court for execution of the decree passed in their joint favor, and that the Court would be bound to grant execution in the same manner as if such representative or representatives had been originally parties to the suit.

THE CHAIRMAN said, he would not press his motion if there was any difficulty about it. He should have thought, however, that in such cases the plaintiff who had the conduct of the case would pay the fees for the notice in the first instance, and add them to the costs.

With the leave of the Council, the amendment was withdrawn, and the Section was passed as it stood.

Sections 75 and 76 were severally passed as they stood.

Section 77 prescribed the proceeding to be adopted in case of the death of one of several defendants, or of a sole or sole surviving defendant.

THE CHAIRMAN said, the Select Committee had in this Section put two Sections of the original project of law together. He presumed it was intended, not that the suit should begin *de novo* when the legal representative of a deceased defendant was made a party to the suit, but that he should be bound by all the former proceedings in the suit. To make this clear he (the Chairman) should move that the words "and had been a party to the former proceedings in the suit" be added to the Section.

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

Sections 78 to 82 were severally passed as they stood.

Section 83 provided as follows:—

"If, on the day fixed for the defendant to appear and answer or any other day subsequent thereto, to which the hearing of the suit may be adjourned, neither party shall appear, either in person or by a pleader, when duly called upon by the Court, the suit shall be dismissed, with liberty to the plaintiff to bring a fresh suit, unless precluded by the rules for the limitation of actions."

MR. PEACOCK (for Sir Arthur Buller) moved that all the words after the word "dismissed" in the 9th line of the Section be left out, and that the following words be substituted for them:—

"Whenever a suit is dismissed under the provisions of this Section, the plaintiff shall be at liberty to bring a fresh suit, unless precluded by the rules for the limitation of actions; or if he shall, within the period of thirty days, satisfy the Court that there was a sufficient excuse for his non-appearance, the Court may issue a fresh summons upon the plaint already filed."

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

Section 84 provided as follows:—

"If the plaintiff shall appear in person or by a pleader, and the defendant shall not appear in person or by a pleader, and it shall be proved to the satisfaction of the Court that the summons was duly served, the Court shall proceed to hear the suit *ex parte*. If the defendant appear on any subsequent day to which the hearing of the suit is adjourned, and shall assign good and sufficient cause for his previous non-appearance, he may be heard in answer to the suit in like manner as if he had appeared on the day fixed for his appearance.

MR. LEGEYT moved that after the word "may," and before the words "be heard" in the 15th line of the Section, the words "on his undertaking to pay all expenses occasioned by his so appearing and being heard" might be inserted. He said he should further move that all the words after the words "*ex parte*" in the 19th line of the Section should be omitted. With respect to the first motion, it appeared to him that such a provision was only reasonable. The second was of more importance. He thought that a defendant might be inclined to hold off until the end of the suit before he thought it worth his while to come in and make his defence, and then, when once admitted, he would be at liberty to call back any witness who had been examined in chief for the purpose of cross-examination. This would be a great hardship upon witnesses, some of whom might be living at a distance of twenty or thirty miles from the Court. Three-fourths of the cases now decided, were decided *ex parte*, in consequence of the defendants not appearing The defaulters had no intention of resisting the claims preferred; but they would not pay unless there were decrees against them.

MR. HARINGTON said, the addition proposed by the Honorable Member for Bombay would not in his opinion be any improvement. The Honorable Member appeared to have overlooked the fact that a defendant could not be allowed to be heard after the time fixed for his first appearance, unless he shewed good and sufficient cause for his previous non-appearance. Now it might and frequently would happen that a defendant, in a case ordered to be tried *ex parte* by reason of his non-appearance within the time allowed, taking advantage of the opportunity which would be afforded to him under the Section as at present worded, of shewing cause against the order previously to the decision of the suit, might satisfy the Court that the summons had not been duly served upon him in any of the prescribed modes, or when the summons had

been returned as served, he might be able to show that the return was a false one, and that the plaintiff had himself been a party to and had actually contrived the fraud practised on the Court. In such a case he did not think that the Honorable Member for Bombay would contend that the defendant was not entitled to be placed on the same footing as if he had appeared and answered on the day fixed for the first hearing of the suit, or that, if willing to bear the expense, he would deny him the right of re-summoning any of the plaintiff's witnesses who had been examined in his absence, if he thought that by cross-examining them he should be able to elicit any thing in his favor, or to shake their previous testimony. The Section did not require that the plaintiff should reproduce his witnesses, or that they should be recalled at his expense, but that the defendant, having excused his previous non-attendance, should be heard in answer to the suit in the same manner as if he had appeared on the day fixed for his appearance. This seemed to him (Mr. Harington) only fair and proper, even though it should involve the re-appearance of the plaintiff's witnesses on the application of the defendant for the purposes of cross-examination, the defendant, as already noticed, bearing the costs of the fresh summonses, which in that case would require to issue. By Section 90 a defendant against whom an *ex parte* decision might be passed, might apply, at any time not exceeding thirty days after any process for enforcing the judgment had been executed, for an order to set aside the decision, and if he should satisfy the Court that his previous default had not been wilful, it would be the duty of the Court to restore the case to the file and to grant a new trial. Now, when a new trial might be allowed under the Section just referred to, the defendant's right to demand that the witnesses for the prosecution, who had been examined in the original trial, should again be required to attend at his expense, in order that he might be confronted with, and have an opportunity of cross-examining them, appeared to him quite clear, and, considering that the defendant should have the same power in cases falling under the concluding clause of the Section under discussion, he should vote against the Honorable Member's amendment.

MR. LEGEYT asked what the difference was between the re-hearing provided for by Section 84, and that provided for by Section 90.

MR. HARINGTON replied that in the one case the defendant appeared and showed cause before judgment, in the other, he appeared and showed cause after judgment.

MR. LEGEYT said, in that case he thought the best course would be to omit Section 90 altogether. It would be generally found that defendants would prefer to come in under Section 84. If a defendant did not choose to appear during any stage of the trial, he (Mr. LeGeyt) did not see why, with the ample grace allowed to him by Section 84, he should have unrestricted liberty to come in and lengthen out the proceedings after judgment given. After the observations made by the Honorable Member for the North-Western Provinces, he should be very glad, with the leave of the Council, to withdraw the amendment which he had moved; but he should move that all the words after the word "*ex parte*" in the 9th line of the Section be omitted.

The original Motion was accordingly withdrawn.

The second Motion being proposed—

MR. HARINGTON said, the Bill as originally drawn having allowed a defendant against whom an *ex parte* judgment had been given, to obtain a new trial if he applied within a certain time, and satisfied the Court that his failure to appear on the day fixed for the first hearing of the suit was not wilful—it became the duty of the Select Committee to consider whether, if a defendant, in a case ordered to be tried *ex parte* owing to his omission to attend within the time allowed, appeared before judgment was pronounced and showed cause for his previous default, the Court should be compelled to wait until after judgment had been given against him, and process for enforcing the same taken out, and then, in the event of the defendant applying for a new trial and excusing

his non-attendance when the suit was called on for hearing, set aside the judgment, and replace the case on the file; or whether the Court, having the defendant before it, should not at once go into his reasons for not having appeared within the time fixed in the summons, and if satisfied of their sufficiency, permit him to be heard in answer to the suit in like manner as if he had appeared on the day fixed for his appearance. The question was fully discussed, and the conclusion arrived at was that the latter was not only the proper course, but that it would be scarcely less beneficial to the plaintiff than to the defendant, inasmuch as it would materially expedite the final settlement of the matters in dispute between the parties, and might save them both much expense. The Committee accordingly introduced the words objected to by the Honorable Member for Bombay, and which he proposed to omit. The present practice was in accordance with the Section as amended by the Select Committee, and he (Mr. Harington) had tried numerous cases in which the great convenience and advantage of that practice had been apparent. He could not therefore support the Honorable Member's motion.

The motion was then put, and negatived.

MR. PEACOCK moved that the words "upon such terms as the Court may direct as to the payment of costs or otherwise" be inserted after the word "may" in the 15th line of the Section.

The motion was carried, and the Section then passed.

Sections 85 to 89 were severally passed as they stood.

Section 89*a* provided that if either the plaintiff or the defendant in a suit, who was summoned or ordered to appear personally, should fail to do so without lawful excuse or showing sufficient cause, the Court might either pass judgment against him, or make such other order in relation to the suit as he might deem proper in the circumstances of the case.

MR. CURRIE moved that all the words of this Section be left out,

Mr. Harington

and that the following new Section be substituted for them, namely:—

"If any plaintiff or defendant, who shall have been ordered or summoned to appear personally under the provisions of Section 17 of this Chapter, shall not appear in person or show sufficient cause to the satisfaction of the Court for failing so to appear, such plaintiff or defendant shall be subject to all the provisions of the foregoing Sections applicable to plaintiffs and defendants, respectively, who do not appear either in person or by pleader."

Agreed to.

Section 89 being read by the Chairman, it was moved by Mr. Currie that all the words of this Section be left out, and that the following new Section be substituted for them, namely:—

"In support of the cause shown by a plaintiff or defendant for failure to appear in person, the Court shall receive any declaration in writing on unstamped paper, if signed by such plaintiff or defendant and verified in the manner hereinbefore provided for the verification of plaints."

Agreed to.

Sections 90 and 91 were severally passed as they stood.

Section 92 provided as follows:—

"If the defendant desire to set-off against the claim of the plaintiff any demand for which he might have sued the plaintiff in the same Court, he shall tender a written statement containing the particulars of such demand, and the Court shall investigate the claim of the defendant in the suit before it, along with the claim of the plaintiff, if it shall consider it reasonable so to do. If the demand proposed to be set-off exceed the sum to which the jurisdiction of the Court extends, the defendant shall not be allowed to set-off the same unless he abandon the excess."

MR. HARINGTON said it had been suggested to him that it might be hard upon a defendant who had a counter-claim against a plaintiff exceeding the amount of the plaintiff's claim, to compel him, as was required by the last part of this Section, to abandon the excess before he could be allowed to plead a set-off to the claim of the plaintiff, and considering that there was some force in the objection, he proposed to meet it by striking out all the words after the word "extends" in the 10th line, and substituting the following words:—

"The Court shall forward the case to the principal Civil Court of original jurisdiction in the district, and it shall be competent to such Court either to decide the case itself or to refer it for trial and decision to any Court subordinate to its authority, and competent in respect of the value of the suit."

At the same time he thought that, if these words were introduced, the counter-claim of the defendant should be chargeable with the same stamp duty as a petition of plaint, and he would therefore move, in the first instance, that the words "which shall be engrossed on a stamp paper of the value prescribed for plaints" be inserted after the word "demand" in the 6th line of the Section.

MR. CURRIE said he had some doubts as to the insertion of the words proposed. The Section had been very fully considered by the Select Committee, and they thought that, where a defendant did not go into Court of his own free will, it was fair that he should be allowed to have his set-off without paying the Stamp fee which he would have had to pay if he had sued the plaintiff of his own free will.

MR. HARINGTON, with the leave of the Council, withdrew his motion, and the further consideration of the Section was postponed.

Sections 93 to 95 were severally passed as they stood.

Section 96 provided as follows:—

"At the first hearing of the suit, and if necessary at any subsequent hearing, any party who appears in person, or the pleader of any party who appears by a pleader, may be examined orally by the Court. Previously to the examination of a party to the suit, he shall be admonished in the manner hereinafter provided for the admonition of witnesses."

MR. FORBES moved that the consideration of this Section be postponed until after the consideration of Section 145, which provided that witnesses should be examined without oath or affirmation, and in which he proposed to move an amendment.

Agreed to.

Section 97 provided as follows:—

"If any party who appears in person shall refuse to answer any material question relating to the suit which the Court may think proper to put to such party, the Court may pass judgment against him, or make such other order in relation to the suit as it may deem proper in the circumstances of the case."

THE CHAIRMAN said, he had some doubts about this Section. It seemed to him rather unsafe to give a Court the power of "passing judgment against" a party who might refuse to answer any question which it might happen to think material. The duty of the Court would be to decide the case under investigation upon the evidence before it. In doing so, it would couple the other evidence in the case with the refusal of the recusant party, and come to such a conclusion as that might appear to it to justify. But this Section said, in effect, that the Court might punish a suitor who, foolishly perhaps, refused to answer any particular question, by "passing judgment against him," whatever the evidence in the case might be. It was, as he had said before, an unsafe power to give to a Court, and he saw no necessity for the Section at all.

MR. HARINGTON said, the Section was almost word for word the same as Section 141, which provided as follows:—

"If any person, being a party to the suit, who shall be ordered to attend to give evidence or produce a document, shall, without lawful excuse, fail to comply with such order, or attending or being present in Court, shall, without lawful excuse, refuse to give evidence, or to produce any document in his custody or possession named in such summons as aforesaid, upon being required by the Court so to do, the Court may either pass judgment against the party so failing or refusing, or make such other order in relation to the suit as the Court may deem proper in the circumstances of the case."

That Section had been taken from the present Law of Evidence, which had been found to work well, and as he could see no reason why, when the parties to a suit attended in person, and were examined at the first hearing, they should not be subject to the same penalty in the event of their refusing to answer any material questions put to them, as they would be, under the Section just quoted, for a similar refusal in cases falling under that Section, or why the powers of the Court should not be the same in the one case as in the other, he hoped that the Committee would allow the Section to stand. The object in view was to elicit the truth, and by compelling the parties to tell all that they knew, to enable the Court to dispose of the case, if possible, at the first hearing.

MR. PEACOCK said, this Section would meet the case of a party to a suit, who, though not summoned to appear, was present at the hearing of the case, but refused to answer any question put to him under Section 141, which provided that if any person, being

a party to the suit, who should be ordered to attend to give evidence, or produce a document, should, without lawful excuse, fail to comply with such order, or, attending or being present in Court, should, without lawful excuse, refuse to give evidence, or to produce any document in his custody or possession, upon being required by the Court so to do, the Court might either pass judgment against him, or make such other order in relation to the suit as it might deem proper in the circumstances of the case. But if the party was in Court without having been summoned, and should refuse to give his evidence, though the whole case might hinge upon it, he would not come under Section 141. Section 97 would place him in the same position as that of a party who had been summoned, but failed to appear, or, appearing, refused to answer any question put to him.

MR. CURRIE said, he was inclined to agree with the Chief Justice's opinion. The examination contemplated by this Section was a mere conversational examination. It was hardly in the nature of a formal examination such as that contemplated in Section 141. When the Code was in preparation, he had doubted whether the provision respecting previous admonition in Section 96 should be inserted. The principle of the Code in this respect was that the Court should endeavor to elicit the facts of the case by the questioning of the parties. Then, the question was, whether, not having been formally summoned, the case should be decided against a party for refusing to answer.

MR. PEACOCK said, if Section 97 were omitted, and a party to a suit who was present in Court without having been summoned should refuse to give his evidence, the Court would only postpone the examination, and then summon him to attend. If he failed to appear, or, appearing, persisted in his refusal to give evidence, the Court would then have the power, under Section 141, either to decide the case against him if he was the defendant, or to dismiss the suit if he was the plaintiff. What was the use of this double proceeding? Why should not the Court have the power of decreeing or dismissing in the first instance?

Mr. Peacock

THE CHAIRMAN said it seemed unwise to refuse the only support tendered to him, but he felt bound to say that he did not object to place a party examined under this Section on the same footing with a party examined at some other stage of the case. The best part of the Code framed by Her Majesty's Commissioners was that which was intended to put a stop to vexatious litigation at the outset, and therefore, it appeared to him that whatever examination was held in the first stage of a case, ought to be subject to the penalties of perjury, and to any other consequences which would fairly affect the witness if he were under examination at the trial of the case. His (the Chairman's) doubt with respect to the Section was whether it did not go too far in giving the Court the power of deciding against a party to the suit, merely because he refused to answer a particular question.

The question might touch his notions of honor, and yet, if he refused to answer it, the Court, under this Section, would have the power of passing judgment against him simply because of the refusal. For instance, a Hindoo would never tell the name of his wife. The Judge should come to his decision by looking at the whole evidence in the case.

The Section was then passed, after verbal amendments.

Section 98 was passed after similar amendments.

Section 99 was passed after an amendment.

Section 100 provided as follows:—

"all exhibits produced by the parties shall be received and inspected by the Court; but it shall be competent to the Court, after inspection, to reject any exhibit which it may consider irrelevant or otherwise inadmissible."

MR. HARINGTON moved that the words "recording the grounds of such rejection" be added to the Section.

The motion was carried, and the Section then passed.

Sections 101 and 102 were severally passed as they stood.

Section 103 enacted that admitted exhibits should be marked and filed, "provided that, if the exhibit be an entry in any shop-book or other book, a

copy of the entry endorsed as aforesaid shall be filed as part of the record, and the book shall be returned to the party producing it."

MR. LEGEYT moved that the words "by the party producing it" be inserted after the word "filed" in the 11th line of the Section.

After some discussion, the Motion was by leave withdrawn.

MR. LEGEYT moved that the words "a copy of the entry endorsed as aforesaid" after the word "book" in the 9th line of the Section be left out, and that the words "the party on whose behalf such book is produced, shall furnish a copy of the entry, which copy shall be endorsed as aforesaid and" be substituted for them.

The Motion was carried, and the Section then passed.

Sections 104 to 107 were severally passed as they stood.

The consideration of Section 108 was postponed.

Sections 109 to 111 were severally passed as they stood.

Section 112 was passed after an amendment.

MR. LEGEYT moved that the following new Section be introduced after Section 112; namely:—

"But if, after such amendments, either party should be still dissatisfied with the issues as framed, the Court may, on the dissatisfied party paying all expenses and furnishing such securities as are hereinafter provided for appellants in regular appeals, certify to the next higher Court a special appeal to try whether the issues directed are the proper issues; and pending such enquiry, the proceedings in the lower Court shall be stayed.

THE CHAIRMAN remarked he could not help saying that it was very inexpedient to admit these interlocutory appeals, since they would occasion very great delay.

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

Sections 113 to 116 were severally passed as they stood.

Section 117 empowered the Court to grant time to either of the parties, and to adjourn the hearing of the suit.

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

"Provided that in all such cases, the party applying for time shall pay the costs occasioned by such adjournment, unless the Court shall otherwise direct."

The Motion was carried, and the Section then passed.

Sections 118 to 129 were severally passed as they stood.

Section 130 was passed after a verbal amendment.

Sections 131 to 142 were severally passed as they stood.

Section 143 provided as follows:—

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

MR. LEGEYT said, he had to move an amendment of this Section. The question which it involved had been very much discussed in Select Committee. He had been unable to concur in the decision to which they had come, and he had not yet given up all hope of what he considered ought to be the mode of recording

evidence in the Criminal Courts at least, if not also in the Civil. What he proposed to have done was that the witness should be brought into Court and examined, that he should orally depose what he knew of the case, and that the Judge should immediately write with his own hand, or, if he should be unable, from sickness or any other cause, to do so, cause to be written, a careful note of what the witness did say. That note should be carefully explained to the witness in his vernacular language and signed by him; and it would then, as he (Mr. LeGeyt) contended, form a much better record than the kind of deposition that was now taken. It had been for many years the practice, he would not say of every Court, but certainly of several Courts in Bombay at least, to take down the evidence of witnesses in a most slovenly manner. When Commissioners went round on their tours of inspection, the subordinate Courts were careful to do everything according to proper form and order; but there was too much reason to believe that, not only in the subordinate but also in the higher Courts, when a witness had a long statement to make, a very imperfect and hasty outline of it was taken down by some sheristadar. He was then asked whether he had stated what appeared on the paper, and in almost every case, his answer was —"Yes," his chief wish being to get away from the irksome state in which he had been during the whole time that his statement was being extracted from him. On such a record, it was impossible that any confidence could be placed by any Court of Justice. He (Mr. LeGeyt) contended that, if the appellate Courts had the Judge's own notes before them, they would be a more trust-worthy record of what had been said by the witnesses than any which they now had. They would also have the advantage of getting a record written in their own language, and would be able to determine what each witness really had meant to say. The principle of the amendment he proposed, was admitted in that part of the present Section which said—

"In cases where an appeal does not lie to a higher tribunal, it shall not be necessary to take down the depositions of the witnesses in writing at length; but the judge shall make a short memorandum of the substance of what each witness may have deposed, and such memorandum shall be written and signed with his own hand, and shall form part of the record."

The record in appealable cases would be much shortened by this being done with the addition which he proposed of a full note being taken of each deposition as it was given. He believed he was right in saying that in the Supreme Court at Madras, only the notes of the English Judges went up to the appellate Courts.

MR. FORBES said, a translation of the whole proceedings went up.

MR. LEGEYT, in continuation, said, he knew that in the Bombay Courts, in both Criminal and Civil proceedings, the Judges kept very full notes of the depositions, and the record was much fuller, and a most decided improvement on the mode of taking depositions which obtained elsewhere. In all Civil cases, the Judge's notes formed the only record. He should conclude by moving the following amendment:—

[The Honorable Member read an amendment to the effect he had stated.]

MR. HARINGTON said it appeared to him that this Section, which corresponded almost word for word with the Section as prepared by Her Majesty's Commissioners, very properly made a wide distinction between cases which were open to appeal, and cases which were not open to appeal. In cases of the latter class, if the Judge was intelligent, honest, and industrious, and went carefully into all the proofs which were exhibited before him, it was a matter of comparatively little importance how much or how little of those proofs he placed upon record; but it was different when an appeal was allowed to a higher tribunal. In such cases, the Judges of the appellate Court were not only deprived of the advantage enjoyed by the lower Court of questioning the witnesses and of observing their demeanor, but the amendment of the Honorable Member for Bombay, if carried, would place them under the further disadvantage of not even hearing what the witnesses had said, substituting for their evidence in detail a brief memorandum

[Mr. LeGeyt said—Careful.]

MR. HARINGTON continued, it came pretty much to the same thing whether the memorandum was to be a brief or careful one; it was left to the Judge in the Court below to confine it to what he considered sufficient or necessary. Now, it certainly appeared to him that the appellate Court was entitled to have before it the whole of the evidence of each witness in the very words in which the evidence was given, in order that it might compare the statements of the several witnesses one with another, and judge how far the evidence of each witness was deserving of credit. The Honorable Member for Bombay had said that in that Presidency the practice was to record evidence in a most careless and slovenly manner. Of that, of course, the Honorable Member for Bombay had had better opportunities of judging than he (Mr Harington) had had; but if such was the practice among the Judges of Bombay, he certainly had no reason to think that it was so amongst the Judges on this side of India.

MR. LEGEYT said, he did not mean to limit his remarks on this point to the Presidency of Bombay. He believed it to be applicable to the Company's Courts all over India.

MR. HARINGTON said, his own experience did not confirm what had been stated by the Honorable Member for Bombay, but if the case was as had been represented, all he could say was that the Judges who were in the habit of taking evidence in the loose and slovenly manner described by the Honorable Member, were guilty of a gross dereliction of duty. But, supposing the practice to be general, how would the course proposed by the Honorable Member remedy it? What reason had they for expecting that Judges who deliberately violated the present law, which in its terms was as clear and express as any law could be, would be more scrupulous or at all more conscientious under the rule proposed by the Honorable Member for Bombay? He could not believe that such would be the case, and he should therefore oppose the amendment.

MR. PEACOCK said, where a case was appealable, there ought to be some record of the depositions of the witnesses; whether the record should be taken down by the Judge or by an Officer, was another matter. Formerly, a Judge was allowed to make over the task to an Officer, and certainly great abuses were committed under that system; but this Section provided that "in cases in which an appeal may lie to a higher tribunal, the evidence of each witness shall be taken down in writing by, or in the presence, and under the personal direction and superintendence of the Judge, and, when completed, shall be read over in the presence of the Judge and of the witness, and also in the presence of the parties to the suit or their pleaders, or such of them as are in attendance, and shall be signed by the Judge."

If, in the face of this provision, any Judge should allow several witnesses to be examined at once in different parts of the Court, or to be examined in his absence, he would be guilty of a great dereliction of duty, and would be liable to be brought to account by the Government under whom he was placed. He (Mr Peacock) should object to the motion to omit all the words from line 9 to line 45 of the Section; but he thought it would be right to say that, if the evidence was not written down by the Judge at the time it was given, he should make a memorandum in his own vernacular language of the substance of it during the examination, and make that memorandum a part of the record. In appealable cases, however, it was preferable that everything should be taken down.

THE CHAIRMAN said, he was quite clear that, in appealable cases, the depositions of the witnesses should be taken down in full by some body or other. He believed that the experiment had been tried in the Sonthal districts—of the Judge taking down the evidence (as we understood the phrase) in his own language, and that the system had been found to be in many respects an improvement upon the course of the regular Courts; all the Judges, however, in those districts were European Officers, and the whole system of administering justice to that barbarous people was made as simple

as possible. This was to be a Code for the whole of India, it might be unreasonable to pass a Section by which a Mahommedan Judge, for example, would be bound to take down the evidence as given in Bengali; for many Mahommedans would be unable to write Bengali rapidly: and on the other hand it might be unsafe to let him send up only his own version of it in Oordoo. In the Supreme Court, generally speaking, the evidence was delivered by the witness in the vernacular, and taken down by the Judges in all cases, and by an Officer also in appealable cases, in English; but it was so taken down from the interpretation of skilled Interpreters, who were sworn to interpret truly, and whose sole occupation it was to interpret. Considering the various classes and races from which Judges were taken in this country, he thought the Council could hardly call on them to take down the evidence in the vernacular language of the witnesses, but the memorandum which the Honorable Member for Bombay proposed the Judge should record, would be a very great improvement on the existing practice, because it would give the appellate Court an opportunity of testing the value of the depositions sent up, and, at all events, it would be extremely valuable as showing how the evidence had struck the Judge's mind, at the same time that it would be a check on the omlah who was writing down the depositions. He (the Chairman) was not prepared to vote for the motion of the Honorable Member for Bombay. He did not think that the Honorable Member would get by the machinery he proposed, those materials which the appellate Court ought to have; but at the same time, he was disposed to vote for the motion of the Honorable and learned Member on his right (Mr. Peacock) as it provided for that which would be useful in addition to the system proposed by the Section as it stood.

MR. LEGEYT said, after what had passed, he saw that there was no chance of his amendment being carried. The object of it was to secure a more trustworthy record than now existed, and as that would be met if the course suggested by the Honorable and learned Member opposite (Mr. Peacock) were adopted, he would not press his amendment to a division, if the Honorable and learned Member would frame an amendment and bring it forward at the next meeting of the Council.

THE CHAIRMAN said, he would suggest the insertion of a clause in the amendment to be framed for the purpose of correcting what seemed to him to be a most ridiculous state of things. Suppose that the Judge who tried a case was an English Judge, and that an English witness went before him. The witness would be allowed to give his evidence in English. Ought not that evidence to be taken down in the language in which it was given? Nothing could be more absurd than to translate that witness's good English into bad Bengalee, in order that it might go up to the appellate Court, which also consisted of English Judges, to be read out with the nasal twang of the Native Omlah. It appeared to him that a clause should be inserted in the intended amendment, which would prevent such an absurdity.

MR. CURRIE said, he had some doubt as to the utility of the memorandum. The reason of the Honorable Member for Bombay for urging that it should be written with the Judge's own hand, was that it was the only way to ensure his attending to the examination. But if a Judge was disposed to do what was contrary to the law, he might just as well make the memorandum while the deposition was being read to him, or he might take the deposition home, and write out the memorandum from it there.

Then he did not think that the memorandum would be of any advantage to the appellate Court, and it would considerably enlarge the record. If an English Judge was trying the case, and the case went up in appeal, the memorandum would doubtless be useful; but even then, there would be the risk of the appellate Court deciding on the memorandum and not looking into the evidence. In Bengalee cases, which formed nine-tenths of the cases tried, the memorandum would be of no advantage in addition to the detailed

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

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

Section 144 was passed after an amendment.

Sections 145 and 146 were postponed.

Sections 147 to 149 were severally passed as they stood.

Sections 150 and 151 were severally passed after amendments.

Sections 152 to 166 were severally passed as they stood.

Section 167 was postponed.

Sections 168 to 170 were severally passed as they stood.

The consideration of Chapter IV was postponed.

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

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

NOTICE OF MOTION.

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

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

EXCLUSIVE PRIVILEGES TO INVENTORS.

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

Agreed to.

AHMEDABAD MAGISTRACY.

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

The Council adjourned.

Saturday, October 9, 1858.

PRESENT:

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

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

STAMP DUTIES (BENGAL.)

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

MR. PEACOCK moved that the above Petition be printed.

Agreed to.

ENDOWMENT OF MOSQUES, HINDOO TEMPLES, AND COLLEGES.

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

MR. CURRIE moved that the above Petition be printed.

Agreed to.

CHURRUCK POOJAH.

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