Friday, February 10, 1871

ABSTRACT OF THE PROCEEDINGS

COUNCIL OF THE GOVERNOR GENERAL OF INDIA

LAWS AND REGULATIONS.

Jan to Mar

1871

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Abstract of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 *&* 25 *Vic., cap.* 67.

The Council met at Government House on Friday, the 10th February 1871.

PRESENT:

His Excellency the Viceroy and Governor General of India, K. P., G. M. S. I., *presiding.*
The Hon'ble John Strachey.
The Hon'ble Sir Richard Temple, K. C. S. I.
The Hon'ble J. Fitzjames Stephen, Q. C.
The Hon'ble B. H. Ellis.
Major General the Hon'ble H. W. Norman, C. B.
Colonel the Hon'ble R. Strachey, C. S. I.
The Hon'ble F. S. Chapman.
The Hon'ble J. R. Bullen Smith.
The Hon'ble F. R. Cockerell.
The Hon'ble J. F. D. Inglis.
The Hon'ble D. Cowie.
The Hon'ble W. Robinson, C. S. I.

CIVIL COURTS' (BENGAL) BILL.

The Hon'ble MR. COCKERELL moved that the report of the Select Committee on the Bill to consolidate and amend the law relating to the District and Subordinate Civil Courts in Bengal be taken into consideration. He said that although several changes in the details of the Bill had been proposed by the Select Committee, yet the measure retained its original character of a purely consolidating enactment aiming at no material alteration of the substance of the existing law. In thus limiting the scope of the proposed enactment, it was not to be supposed that the legislature intended thereby to affirm that the Civil Courts as now established were, in regard either to their constitution or present jurisdiction, as efficient as under existing circumstances they could be, or that no substantial change was expedient or practicable.

Most persons who had experience in the matter and had given to it much careful thought were agreed that our present system of judicial administration was extremely defective; and many valuable suggestions embracing a complete

reconstruction of the system had been made from time to time by those who were most competent to advise the Government on the subject.

But the defects to which he had adverted were not peculiar to any one province or the territories subject to any one Local Government; and their remedy could only be applied through a much wider and more comprehensive measure than a Bill purporting to deal only with the Civil Courts in Bengal.

As a first step in a general scheme for increasing the efficiency of our judicial administration, it was desirable that the entire law by which the present system was regulated should be set forth in a readily accessible and intelligible shape. As regards the Bombay Presidency, the Panjáb, the Central Provinces, Oudh, British Burma and Coorg, this had been already effected by the passing of the several Courts' Acts relating to those territories; but in Bengal and Madras, as the law now stood, it was no easy task to ascertain the precise legal basis of the present constitution and jurisdiction of the Civil Courts in those Presidencies. In illustration of this, he might refer to the great difficulty which he knew that his hon'ble and learned friend (Mr. Stephen)—himself an experienced lawyer—found, when his attention was directed to the question of the improvement of the existing judicial agency, in tracing and welding together the piece-meal legislation from which the Courts derived their present constitution and jurisdiction; and he might further point to the schedule as indicating the fact that the substance of the Bill, consisting of only thirty-eight sections, was at present distributed over no less than thirteen different enactments.

The alterations of the existing law contemplated by the amended Bill were confined for the most part to the supply of those omissions which presumably originated in the disjointed and unconnected form in which the provisions of that law had been from time to time enacted.

There was no corresponding provision in the original, to section ten of the amended, Bill. That section had been introduced for the purpose of applying the general provisions of the Bill to the Civil Courts in certain non-regulation districts of Lower Bengal.

As these Courts practically discharged their judicial functions in subordination to the High Court, in the same manner as the Civil Courts of the Regulation districts, they could not conveniently be excluded from the operation of the proposed Act. At the same time the section had been so framed as not to curtail the latitude accorded to the Local Government by the existing law in regard to the establishment of such Courts.

An omission in the original, in regard to the subject of section 18 of the amended, Bill had been supplied by the transfer thereto of the provisions of Act IX of 1844, for determining the local limits of the respective jurisdiction of Subordinate Judges, where two or more such officers were appointed to the same district. The provision had been extended to meet the case of two or more Munsifs' Courts established within the same division of a district.

Under the existing law, the jurisdiction of a Subordinate Judge commenced at the pecuniary limit at which the Munsif's jurisdiction ceased, namely, one thousand rupees.

To enable a Subordinate Judge, therefore, to adjudicate in any case of which the subject-matter in dispute was within that amount, it was necessary to invest him with the powers of a Munsif. The effect of section 19 of the amended Bill was to avoid this necessity by giving to the Subordinate Judge power to try suits of any amount within any division of a district in which for the time being there was no Munsif.

Appeals from the orders of Munsifs must, as the law now stood, be preferred in the District Court, and could only be tried by the Subordinate Judge on reference from the District Judge. In many revenue districts there was no resident District Judge, and the District Court of such district was amalgamated with the District Court of some other revenue district in which the Judge resided.

In such cases, in order to have the appeal tried in the Court of the Subordinate Judge in the revenue district in which the litigation commenced and in which all the parties thereto resided, the appellant must prefer his appeal in the Court of the remotely located District Judge, who thereupon referred the case for trial to the Subordinate Judge of the district in which the original proceedings in the case took place.

To avoid the public inconvenience and delay occasioned by this procedure, the Bill empowered the High Court, with the approval of the Local Government, to direct appeals from the orders of Munsifs to be preferred direct to any Subordinate Judge instead of to the District Judge.

Section 24 contained a verbal alteration designed to convey a clearer expression of the meaning and intention of the corresponding provision of the original Bill. That provision was an exact transcript of section 15, Regulation IV of 1793, which applied to Lower Bengal, and clause 1, section 16, Regulation III of 1803, which extended the former enactment to a portion of the territories under the Government of the North-Western Provinces. By

Regulation VIII of 1795, a special rule was introduced into the Benares Division, to meet cases in which the parties to the suit might be of different religious persuasions; but this rule was abrogated by Regulation VII of 1832, and it was therein enacted—

"Whenever, in any civil suit, the parties to such suit may be of different persuasions, when one party shall be of the Hindú, and the other of the Muhammadan persuasion, or where one or more of the parties to the suit shall not be either of the Muhammadan or Hindú persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled. In all such cases the decision shall be governed by the principles of justice, equity and good conscience" * * * *.

The apparent deduction from the provisions of these different enactments, taken collectively, was—and he might here remark that the decisions of the Courts on this question pointed to the same conclusion—that the Courts were to apply the Muhammadan law only when both the parties to the suit were Muhammadans, and the Hindú law where both the parties were Hindús, and in all other cases were to follow the rule of equity and good conscience.

The section had now been framed so as to give effect to this construction of the law on the subject.

To section 27, a detailed specification of the different classes of proceedings which might be transferred thereunder had been added. A general power of transfer of proceedings pending in the Court of a District Judge was given by the present law; but it had been held that a merely general provision of this sort was practically almost inoperative, as no proceedings held under any special law, which by the express terms of such law were cognizable only by the District Court, could be diverted therefrom under the authority of an indefinite power of transfer.

The section had consequently been amended in accordance with this view.

Lastly, sections 35 and 36 had been so amended as to save the power of intervention by the Local Government in the cases to which those provisions had reference.

The practical effect of these clauses as they now stood was to substitute the general control of the Local Government, over the Judges' action in regard to the appointment and removal of the ministerial officers of the Civil Courts, for the appellate authority heretofore exercised by the High Court.

This provision was viewed with strong disapprobation by a very high authority, whose opinion would necessarily have great weight with the Council, and the Committee had consequently gone very carefully into the grounds of the objection which had been raised.

It was urged that the proposed enactment involved a grave alteration of the existing law and was likely to prove detrimental to the interests of the public service.

In the opinion of the Select Committee the provision which had been objected to was in perfect accord with the present state of the law on this subject. The principle on which this Bill had been framed was adherence to the spirit and intention, if not always the exact substance, of the existing law, and it was believed that there was nothing in these sections which involved any deviation from that principle.

The earlier Regulations in regard to ministerial officers gave full powers in respect to their appointment and removal to the heads of the offices in which they were employed.

By Regulation V of 1804 this power, as regards ministerial officers receiving a monthly salary of not less than ten rupees, was resumed. The appointment and removal of the chief ministerial officers was reserved to the Governor General in Council; and in the case of the intermediate class of ministerial officers, those functions were delegated to the Sadr Adálat.

By Section 7, Regulation VIII of 1809, the power of appointment and removal of all except the lowest class of ministerial officers,—*i. e.*, the class whose monthly salary was less than ten rupees—was transferred to the Provincial Court of Appeal; and on the abolition of that Court in 1832, its functions devolved upon the Zila or District Judge.

Thus it appeared that, previously to 1804, and again subsequently to 1832, the absolute power of appointment and removal of the ministerial officers of the Civil Courts was by law vested in the District Judge.

In practice, the High Court at Calcutta had always exercised appellate authority in these cases. A memorandum of the cases in which that Court had received appeals from the orders of the District Judge had been obligingly furnished to MR. COCKERELL by the Registrar. It showed that, from the time of the Court's establishment to the end of 1868, one hundred and forty such appeals were heard, and in thirty-five, or one-fourth of the total number, the orders of the Judge were set aside.

In some of these cases the appellants were officers receiving a monthly salary of less than ten rupees, whose employment was, as had been stated above, by law at all times dependent solely on the will of the head of the office to which they were attached; in others, the appeal was preferred by candidates for public employment whose claims had been rejected in favour of other applicants for some vacant post.

At a time when the expediency of devising some plan for the relief of the High Courts from the excessive appellate business of an unimportant character which, under the present system, devolved upon them, to the detriment of the efficient and economical administration of justice, was so generally acknowledged, it seemed obviously to be contrary to the interests of the public service that a practice, which tended to the occupation of the valuable time of the Judges in dealing with such petty cases as he had just described, should be suffered to continue.

Moreover, MR. COCKERELL thought much was to be said in favour of the provision of the Bill on the ground of the expediency of strengthening the hands of the District Judge in the control of the officers of his own Court and of the subordinate Courts. It was well known that the conduct of these officers largely affected, and necessarily so, the local administration of justice, and he thought that the security for the good conduct of such officers depended in great measure on the strength of the local control.

There could be no doubt but that the maintenance of discipline was greatly prejudiced by the action of a distant controlling authority, which operated so as to create an indiscriminate right of appeal against the orders of the local functionary.

For these reasons he was very strongly of opinion that the provision of the Bill in this matter was correct and should be maintained. The principle on which it rested was the only intelligible one by which the division of the controlling functions of the Local Government and the High Court could be regulated.

There were no other points calling for special remark. He had already explained that the measure was not to be regarded as finite, or in any way pledging the legislature to the approval or permanent maintenance of the present status of the Courts of civil judicature, but for the limited object which it had in view, he had every confidence that the Bill, if passed into law, would be found useful and complete.

The Hon'ble MR. CHAPMAN was glad to find his Hon'ble friend admitted that this Bill was to be considered of a temporary nature. MR. CHAPMAN much wished that Mr. Cockerell had seen his way to deal with the measure in a more general and comprehensive manner.

It was barely two years since the Council legislated for the Civil Courts of Bombay; we were now providing for those of Bengal; and the requirements of Madras in this respect would shortly come under consideration. He believed there would be no great difficulty in enacting a law for the regulation of all the Civil Courts in India under the jurisdiction of the several High Courts. The existing constitution of these Courts was everywhere nearly similar. In all three Presidencies there was the District Judge with two classes of officers of lesser jurisdiction under him; and there were, finally, Her Majesty's High Courts over all.

Such being the condition of affairs, it did seem to him advisable that there should, as far as possible, be no diversity in the relations of the several Governments towards their respective High Courts especially in matters relating to patronage and discipline. If, for example in the case of Bombay, the Legislature had declared it to be expedient that the appointment of all Subordinate Judges should vest in the Executive Government, it surely did not seem consistent to say that in Bengal the Judges were to have the patronage. Then, again, if in Bombay a University degree was held to be a qualification for office, why should this standard be ignored in Bengal? MR. CHAPMAN might go on repeating points of difference even in the matter of nomenclature, but he thought he had said enough to shew that the present Bill could not be looked upon as final and complete.

The Hon'ble MR. STEPHEN wished to make a few remarks with reference to the observations of the Hon'ble Mr. Chapman, and also to add a few words to the very complete explanation given by the Hon'ble Mr. Cockerell of the several provisions of the proposed Act. He did not think that his two Hon'ble friends were speaking of the same thing when one admitted, and the other accepted with satisfaction, the admission, that this Bill was not complete. The Hon'ble Mr. Cockerell meant to say (and MR. STEPHEN certainly agreed with him) that he was desirous that the public should understand that it was not the intention of those who introduced this measure that it should be taken as ratifying and approving the existing system of Civil Procedure and the existing system of our Civil Courts, which, of course, was intimately connected with that procedure. No one could

have studied the subject without seeing that, although it was difficult to provide a remedy, it was easy to observe the defects of the present state of things. He had no right to dogmatize on the question how those defects might be set to rights; but he could state with some confidence, his conviction that they never would be set to rights until they were fully understood, and that a great step towards their full comprehension was made by stating the law in a plain and unmistakeable form. So much for what had fallen from the Hon'ble Mr. Cockerell.

He apprehended that this was not what the Hon'ble Mr. Chapman meant when he said that the Bill was not to be taken as complete, but that he intended by that remark to express his regret that a general Civil Courts Bill for the whole of British India, or at least for the whole of the Regulation Provinces, was not introduced. MR. STEPHEN'S answer to that was that the project was too ambitious. The difficulty of producing any measure of the kind which would give satisfaction in its arrangement to all the Local Governments was one which would be very well estimated from the observations which fell from the Hon'ble Mr. Chapman himself, because he had pointed out in his observations several differences which existed between the system of Bengal and the system of Bombay. The fact was that in every one of the presidencies a system prevailed slightly different from the systems of the other presidencies. The differences were not perhaps very important in themselves, but they related to topics on which there would be most prolonged and animated discussion if any question were raised about them. The arrangements now in existence in Bombay were arrived at some time since, and were enacted into law in 1869. The arrangements which at present existed in Bengal had also been arrived at after great discussion very recently. And the reason why he for one would not advocate having one general Act on the subject was that he did not wish to revive those discussions, which would entail a great waste of time. There was another reason besides this. He hoped that ultimately the Indian Statute Book might be divided into Parts corresponding to the Local Extent of the Acts, many of which had to be local in their extent because under the Indian Councils' Act the local legislatures had not power to pass them. There would be the Acts relating to Bengal, the Acts relating to Bombay, the Acts relating to Madras, the Acts relating to the North-Western Provinces, and the Acts relating to the Non-Regulation Provinces in separate collections of very small volumes, and there would be the general Acts relating to the country at large. That was the scheme on which the greater part of our consolidation measures had gone,

and he thought the Council would agree with him that it was a scheme which had considerable recommendations. These Courts Bills were in his opinion emphatically local, and each ought to go into the collection of Acts referring to the province to which it related. Besides this no one said that the administration of civil justice was on any thing like the footing on which we would wish to see it. If it was not on that footing, it was far more easy to have a Civil Courts Bill for each province by itself, because, then, alterations could be made with much greater ease, and with less disturbance of the whole system. It might be said if the law is in such an unsatisfactory condition, why consolidate it at all? His answer to that was—in order that we might know what we were about. In this way you did know what you were about: you had a distinct plan on which to work. If you had no such plan, your alterations would either be sweeping and made in the dark, or else they would be slight and technical, making that which was already technical and difficult to understand, much more technical and difficult to understand. Moreover, when you undertook so large a subject as the alteration and reform of the judicial system of an empire like this, it was necessary to go by steps and proceed with great caution. There were many consents to be obtained, there were many separate Governments to be consulted to whose opinions the greatest deference was due, and sanction must be received from home. All that implied a necessity for great delay. It was much better, while we were about it, to secure what was an undoubted advantage so far as it went.

MR. STEPHEN might, however, make some remarks on the topic alluded to by the Hon'ble Mr. Cockerell, in order to show how very necessary the present measure was for the purpose described. The Bill as it stood had at all events the merit of giving in thirty-eight sections a perfectly clear account of the Civil Courts of Bengal, and any one who became a Civil Servant of the Bengal Presidency after the passing of this Act, would have nothing more to do, if he wanted to know what the Civil Courts were, than to read this Act. Now, he would just point out, by reference to the schedule of Acts and parts of Acts to be repealed, the kind of process which a person would have to go through at present if he wanted to get authentic information regarding the Civil Courts of Bengal. First, he would have to go to the year 1793, and to two Regulations, large parts of which had been repealed and amended and re-amended, when he would find that two bits of Regulation III of 1793 and one bit of Regulation IV of 1793 still remained in force, and that these bits, which would not strike anybody as being of any great importance, were the real foundation of the present judicial system of Bengal. A part of Regulation III of 1793 defined the jurisdiction of the Zila Courts, and was law to this

day. A part of Regulation IV of 1793 was also the foundation of the Civil Procedure of those Courts. When the student had found out how much of these two Regulations had not been repealed, he would have made the first step towards a general theory upon the subject. These Regulations, however, applied only to the zilas of Lower Bengal, and to the cities of Patna, Dacca, and Murshidábád. The student would next come to the year 1795, and find two more Regulations of which certain portions were unrepealed, and when he discovered what they were, he would find that a similar system applied to the cities of Benares, Mirzapúr, Gházípúr, and Jaunpúr. From 1795 he would go to the year 1803, and would find a similar couple of Regulations relating to the Provinces ceded by the Nawáb Názim of Bengal to the East India Company, and then he would have to consult some historical work to find who the Nawáb Názim was and what Provinces were ceded by him. Then he would have to go to the year 1805, which extended the Regulations to the Conquered Provinces situated within the Doáb and on the right bank of the Jamna and to the territory ceded by the Peishwa. In short, he would have to go through a prolonged course of reading, before he could discover what Civil Courts existed in Bengal. In practice of course no one or hardly any one would take all that trouble. Practically people learned the system by practice and conversation, but he believed the consequence of that to be that the minds of many persons continued throughout their career to be in a confused and uncertain condition on the whole subject. That was a considerable evil in a country like this, where it was absolutely necessary to put young men with little professional experience and training, to the discharge of very important and arduous duties; and therefore it would be a great convenience, if they were enabled to get the necessary information without much trouble.

These were the considerations which had led to the framing of this Bill in its present form. As to the details, they had been so fully stated by the Hon'ble Mr. Cockerell that it was not necessary for him to trouble the Council with any further remarks on the subject.

The Motion was put and agreed to.

The Hon'ble Mr. Cockerell also moved that the Bill as amended be passed.

The Motion was put and agreed to.

BROACH TALUQDÁRS' RELIEF BILL.

The Hon'ble MR. CHAPMAN moved for leave to introduce a Bill to relieve from incumbrances the estates of Taluqdárs in Broach. He said that the

provisions of the Bill he proposed to introduce were identical with those contained in the Oudh Act passed as recently as September last.

The persons for whose benefit this measure of relief was intended were five in number. They were descendants of the ancient Rájpút family, who were the former proprietors of Gujarát, and some of whom were forcibly converted to Muhammadanism at the time of the conquest.

It was not necessary for MR. CHAPMAN, on this occasion, to enter on the question as to whether it was just and politic on the part of Government to shield from utter ruin the ancient landed aristocracy of this country, and to prevent their estates being swept away by the action of our Courts. In the present instance the Government must be distinctly understood as not committing themselves to any general policy on the subject. The idea of protective interference of this kind originated in Bombay, and a local Act was passed for the benefit of the Ahmedábád Taluqdárs. It had been deemed expedient to extend the same kind of relief to the Broach Taluqdárs, whose circumstances were precisely similar and whose estates were situated in the adjoining Collectorate. The Government had already promised to advance the sum requisite to clear these estates from incumbrances in the same manner as had been so successfully done in the case of the Ahmedábád Taluqdárs. The Council were now asked, as a special case, to give the Government the necessary legal authority.

Colonel the Hon'ble R. STRACHEY said, although he had no intention of moving a negative, he desired to take the first opportunity of objecting entirely to legislation of this character. The Hon'ble Mr. Chapman had told the Council that he was not on the present occasion about to discuss the policy of the measure. But COLONEL STRACHEY thought that the only ground on which such a measure should be brought forward was that its policy was such as the Government approved; and if the Government approved of its policy, it would be in a position at some future time to explain it.

The Hon'ble MR. ROBINSON said he viewed with very great regret the extension of the policy of the Oudh Taluqdárs' Act. There was a case in the Madras Presidency where the proprietors of some very badly managed zamíndáris had asked the Government to advance twenty lákhs of rupees for the purpose of bolstering up their badly managed zamíndárís. He thought there was no doubt that the Oudh legislation was leading zamíndárs to look forward to Government help to relieve them from difficulties which were not caused by

the action of our Courts, but by their own dissolute and irregular conduct. The Courts were not to blame for such results, and he therefore viewed with very great regret any attempt to extend the legislation that had taken place in regard to the Oudh Taluqdárs. He had not seen this Bill until a few hours before the meeting of the Council, and he understood that it was not allowable to raise objections to a Bill at this stage; he was not prepared, therefore, to enter fully into the question, but had only made the few observations that occurred to him at the time.

The Motion was put and agreed to.

CONSOLIDATED CUSTOMS ACT AMENDMENT BILL.

The Hon'ble SIR RICHARD TEMPLE moved for leave to introduce a Bill for the further amendment of the Consolidated Customs Act. He said that, as the Council would remember, that Act was passed in 1863, and from time to time various amendments in the details had become necessary. On the present occasion three amendments were proposed, which he would explain in the briefest possible form. As the Council were aware, the Government of India was empowered by section 23 to prohibit the importation or exportation of any particular class of goods. Doubts had arisen as to whether that authorised the prohibition of the importation or exportation of goods by land. It was very necessary that those doubts should be removed, and he therefore proposed to insert the words "by land or by sea, or both by land and by sea."

Again, in the Calcutta Bonded Warehouse there was a very important rule, that when any person lodged goods in the Warehouse he received a certificate which was transferable by endorsement. We proposed to extend that rule to the Presidencies of Madras and Bombay.

The third amendment proposed was this. Certain parts of India, especially Bombay, had become what were called entrepôts of commerce, that was to say, goods were imported into these places and then again re-exported. Of course such goods had paid import-duty; but when they were re-exported, a drawback was allowed. That was to say, the import-duty was refunded to the importer, a certain portion being reserved as a security to the State. Well, it became, as experience showed, of great importance that goods once imported in order to be re-exported should be easy of identification, and also that the Government should have the power of specifying what those goods should be. We, therefore, now proposed to enumerate the classes of goods which could be so re-exported. Also we proposed that the proportion of duty retained by the State in cases of drawback should be somewhat enlarged. This appeared necessary for securing

the just dues of the State. Three-fourths (instead of seven-eighths) would be the amount of drawback, and one-fourth (instead of one-eighth) would be retained as reserved duty.

It was possible that, when the Bill went into Committee, one or two further points would arise in which an amendment of the law might appear desirable.

The Hon'ble MR. STEPHEN was sorry that the present measure should be introduced as a mere amending Bill, because it was much better to consolidate the Acts on a given subject than to amend them piecemeal from time to time. And as the Consolidated Customs Act had already been more than once amended, it would have been better to have a comprehensive measure than to pass another amending Act. But our hands were tied in this matter, and that was the justification of this Bill. The Consolidated Customs Act contained several sections relating to the coasting trade of India. Now, there was an English Statute (32 & 33 Vic., cap. XI) the fourth section of which forbad the legislature of any British possession to bring into force any law relating to the coasting trade until Her Majesty's pleasure thereon had been publicly signified. The effect of this would be that if we were to consolidate the various Customs Acts into one, we should have to get the Secretary of State's previous consent to the measure, and before that could be obtained, there might be considerable changes in the system which we should have to administer. For the present, therefore, the consolidation measure must stand over.

The Motion was put and agreed to.

The Council adjourned to Friday, the 17th February 1871.

CALCUTTA,
The 10th February 1871.

WHITLEY STOKES,
Secy. to the Govt. of India.

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