COUNCIL OF THE GOVERNOR GENERAL OF INDIA

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ABSTRACT OF PROCEEDINGS

COUNCIL OF THE GOVERNOR GENERAL OF INDIA

LAWS AND REGULATIONS.

VOL 11

1872

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 Tuesday, the 12th March 1872.

PRESENT:

His Excellency the Viceroy and Governor General of India, K. T., *presiding.*
His Honour the Lieutenant Governor of Bengal.
His Excellency the Commander-in-Chief, G. C. B., G. C. S. I.
The Hon'ble Sir John Strachey.
The Hon'ble Fitzjames Stephen, Q. C.
The Hon'ble B. H. Ellis.
Major General the Hon'ble H. W. Norman, C. B.
The Hon'ble J. F. D. Inglis.
The Hon'ble W. Robinson, C. S. I.
The Hon'ble F. S. Chapman.
The Hon'ble R. Stewart.
The Hon'ble J. R. Bullen Smith.
The Hon'ble F. R. Cockerell.

INDIAN CONTRACT BILL.

The Hon'ble MR. STEPHEN presented the Report of the Select Committee on the Bill to define and amend the Law relating to Contracts, sale of Moveables, Indemnity and Guarantee, Bailment, Agency and Partnership.

CRIMINAL PROCEDURE BILL.

The Hon'ble MR. STEPHEN also presented the Report of the Select Committee on the Bill for regulating the Procedure of the Courts of Criminal Judicature not established by Royal Charter.

INDIAN EVIDENCE BILL.

The Hon'ble MR. STEPHEN also moved that the Report of the Select Committee on the Bill to define and amend the Law of Evidence be taken into consideration. He said: "MY LORD—Just a year ago, in submitting the report of the Committee to the Council, I explained at very considerable length the general design and scope of the Bill which they proposed, and which is now before the Council for its final decision. I need not revert to what I then said upon the general principles of the subject. My best course, I think, will

be to inform the Council of what has taken place in relation to the Bill since I last addressed them on the subject.

"After a very full and careful reconsideration of its various details, the Bill was published in the Gazette and forwarded to the Local Governments for opinion. It was carefully reconsidered in Committee, after the return of the Government to Calcutta. It was published in the Gazette upwards of a month ago, with a report giving an account of the various alterations which had been made in it; and it is now finally submitted for the consideration of the Council. The Committee has fully considered all the papers with which it was favoured; but with one or two exceptions, I cannot say that it has received any very considerable assistance from its critics. The Bengal Government made some important observations, and so did the Madras Government, which favoured us with two peculiarly valuable papers; one by the then Advocate General, Mr. Norton, and the other in the form of a letter by the Government itself, which had obviously been prepared with the advice and assistance of a very able professional lawyer. We have received no public expression of opinion from any one of the High Courts, except the High Court of Bombay, which approved generally of the Bill, but took exception to two of its provisions on minor points. The High Court of Calcutta announced its intention to say nothing at all on the matter. The High Courts of Madras and Allahabad have, as a fact, said nothing; and as the Bill has been before them for many months, I presume that they do not intend to do so. I have, however, the satisfaction of being able to say that most of the Barrister Judges of the High Courts, and three out of the four Chief Justices, have informed me that they approve generally of the Bill, and regard it as an important improvement on the existing state of things. The Local Governments, I think, are unanimous in regarding the measure as one which is much needed, and which is so far suited to its purpose as to be both intelligible to persons not legally trained, and complete in essential respects.

"Upon this point, I would specially refer to the valuable papers already referred to, which have been received from Madras. It is impossible, in reading them, not to see that their authors do not like the Bill. They find every fault they can with it, sometimes coming to very minute criticism. I do not in the least complain of this. I only wish the Bill had been criticised more fully in the same spirit, and I readily admit that the critics in question have pointed out many defects which have been, I think, removed. I am entitled to say that such other defects as may still be latent in it have escaped the detection of at least too highly competent, and by no means favourable critics, who

have given the matter careful consideration. Upon some of these criticisms, I will make a few remarks as I go on. I refer to them now for the sake of showing the importance of the opinions which I am about to read.

"The letter of the Madras Government says—

'It is both advisable and possible so to codify the Law of Evidence as to present within the limits of a single enactment a treatise upon that law practically sufficient for ordinary purposes.'

and it then adds—

'The Draft Bill in its scheme and general arrangement appears to furnish an adequate outline of such a Code;'

but it is observed that the Bill 'in its present state is far from complete.'

"Mr. Norton expresses the same opinion at greater length, and each of these authorities agrees in the statement that the Bill is only a skeleton, which will have to be completed by a great number of judicial decisions.

"Mr. Norton criticises the Bill, section by section, and in order to show how fully he has done so, he observes—

'I have, however, compared it, section by section, with Taylor, Roscoe, Best, and other text-writers; with the Civil and Criminal Procedure Codes so far as they apply to the subject of evidence; with some of the existing Acts which regulate judicial evidence, and such judicial decisions as I have access to, illustrating the principles which at present are generally supposed by the Profession to obtain in the Courts of India.'

"He could hardly, I think, have submitted it to a more searching test. Further on, he observes—

'The process by which this Bill has been, in the main, built up, appears to me to have been by following Mr. Pitt Taylor's work on Evidence, and arbitrarily selecting certain sections or portions of sections.'

"He then criticises the Bill in detail, and concludes by saying—

'Such are the observations that have occurred to me in the most careful study I can give this Bill; and I think that, with some omissions, a little re-arrangement here and there, and considerable extension and enlargement, it promises to prove a great step in advance and improvement in the present uncodified law of evidence, and likely to afford very valuable aid and facilities to the Mofussil Judges, and all concerned in the practice of the law in the Mofussil.'

"The general result of these criticisms is, that the Bill is good as far as it goes, but it is very incomplete, and is composed of scraps of *Taylor on Evidence*,

'arbitrarily,' and much too sparingly, selected. I think I owe to the Council and to the public some observations on this matter. I assert that they do the Bill an injustice; that it is very much more complete than its critics allow it to be; and that their own writings prove it. I will not do Mr. Norton the injustice of supposing that he has intentionally kept back anything of importance which has occurred to him on the Bill. I am therefore entitled to assume that his paper, which contains 103 paragraphs and extend over 14 folio pages, refers to all the defects and omissions which his careful study of the subject has brought to his notice. Passing over criticisms of detail, many of which are no doubt just and have been adopted, I find that the only sins of omission with which he charges the Bill are the following:—

"1.—Its provisions as to the effect of judgments are 'meagre.'

"2.—It does not deal fully enough with the subject of presumptions.

"He also suggests slight additions to, or enlargements upon, four sections of very subordinate importance, which I will not trouble the Council by referring to.

"The letter from the Madras Government, which describes the Bill as 'far from complete,' specifies no omission whatever, except in reference to the subject of presumptions, more of which, it affirms, should be included 'in a Code aiming at completeness.'

"The charge of incompleteness, then, comes to this, that the Bill does not deal fully enough with the two subjects of judgments and presumptions. I will refer to those points hereafter; but I will first, with your Lordship's permission, say a few words on the positive grounds on which I assert that the Bill does form a complete Code, and does deal with every subject which has been dealt with by English text-writers on evidence or by English legislation. This leads me, in the first place, to notice the remark that it consists of bits of *Taylor on Evidence* 'arbitrarily' chosen. There is a certain amount of truth in this charge, about as much truth, and truth of the same kind, as there would be in saying that the speech which I am now making is composed of words arbitrarily chosen out of the dictionary. I could hardly mention any English law-book in common use, which is, or even pretends to be, much more than a large index, made up of extracts from cases strung together with little regard to any other than a very superficial perfunctory arrangement of the subject-matter. There is always some one book which is in possession of the field at a given moment, because it is more complete than its

rivals, and has the latest cases and Statutes entered up in it. This position at present is occupied by Mr. Taylor's book, as it was occupied before his time by Gilbert, Phillips, Starkie and others; and as analogous positions are occupied, in relation to other subjects, by *Russell on Crimes*, *Bullen on Pleading* and other works known to all lawyers. To say, however, that the Bill now before the Council consists of bits taken from Taylor, and especially of bits taken 'arbitrarily,' is altogether incorrect. In the first place, the arrangement of the Bill, and the general conception of the subject on which that arrangement is based, are altogether unlike anything in Taylor or in any other text-book on the subject with which I am acquainted. Nowhere in Taylor, nor in Mr. Norton's own book on the subject, will be found any recognition of the distinction between the relevancy of facts and the proof of facts, or any, even the faintest, perception of the extreme ambiguity and uncertainty which, as I showed in the observations which I addressed to the Council a year ago, have been thrown over the whole subject by the absence of anything like an attempt to define with precision the fundamental terms of the subject, and especially the words 'fact' and 'evidence.' As to the notion that bits of Taylor have been 'arbitrarily' put together in the Bill, I will only say that, at a proper time and place, I would undertake to assign the reason why every section stands where it does. Upon the question of completeness, however, I will make this remark: I assert that every principle applicable to the circumstances of British India which is contained in the 1,598 royal octavo pages of *Taylor on Evidence*, is contained in the 167 sections of this Bill; I also assert that the Bill has been carefully compared, section by section, with the last edition of Mr. Norton's work upon evidence, and that it disposes fully of every subject of which Mr. Norton treats.

"As to the specific instances of incompleteness which are alleged against the Bill, two only are of any importance, and upon each of them I will say a few words.

"The first is, that the Chapter on Judgments is meagre. My answer is, that it may appear meagre to those who take their notions of the Law of Evidence from works like Mr. Taylor's; but that it contains everything which properly belongs to the subject. Its utter absence of arrangement and classification on every subject is the great reproach of the law of England, and one of the strongest instances of it is to be found in the way in which provisions of an essentially different character are frequently comprised under the same head. I might give many illustrations of this; but the Law of Evidence, I think, supplies more glaring illustrations than any other department of law.

Many English writers have treated the subject in such a manner as to make it comprise the whole body of the law. Thus, for instance, *Starkie's Law of Evidence* deals with the whole range of the criminal law and of actions for contracts and wrongs. His book contains, not merely rules about hearsay and secondary evidence and the like, but a specification of the sort of facts which it is permissible to prove on a charge of murder, or in an action for libel, in order to show malice, or under the plea of not guilty in such an action. It is obvious that the Law of Evidence thus conceived would include nearly the whole of the substantive law, and it follows, I think, that it is of great importance to draw the line distinctly between what properly belongs to the subject and what does not. It is for this reason that the sections about judgments are drawn in their present form, and that certain topics connected with judgments, which are often dealt with by writers on evidence, are omitted from the Bill. The subject is very technical; but I will endeavour to explain it in a few words:

"The second section of the Code of Civil Procedure enacts that—

'The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties, or between parties under whom they claim.'

"The Code of Criminal Procedure enacts that a man shall not be tried again after he has once been acquitted or convicted. It is a matter of great difficulty and intricacy to describe the precise effect of these provisions, and to show how they apply to a variety of cases which may arise. Mr. Broughton's edition of the Code of Civil Procedure contains ten large pages, in very small print, of notes of the cases which have been decided on the second section of the Code of Civil Procedure, and a certain number of decisions have been given on the corresponding sections of the Code of Criminal Procedure; and it is because this Bill does not codify those decisions that it is described as meagre. My answer to the criticism is, that the authors of the two Codes in question were quite right in considering the matter as essentially a matter of procedure. It no more belongs to the Law of Evidence than a thousand other questions which are sometimes connected with it. There are, for instance, cases in which insanity excuses an act which, but for its existence, would be a crime. If a man defends himself on the ground of insanity, he must give evidence of it, just as he must prove the existence of a judgment barring his antagonist's right to sue if he relies on the right's being so barred: but it appears to me that it would be as reasonable to treat the question of the effect of insanity on responsibility as a part of the Law of Evidence, because, in particular cases, it may be necessary to give evidence of insanity, as to treat the law as to the

effect of a previous judgment on a right to sue as part of the Law of Evidence, because, in certain cases, it may be necessary to give evidence of the existence of a previous judgment.

"The only questions connected with judgments, which do appear to me to form part of the Law of Evidence properly so called, are dealt with in sections 40—44 of the Bill. These sections provide for the cases in which the fact that a Court has decided as to a given matter of fact relevant to the issue may be proved for the purpose of showing that that fact exists. This, no doubt, is a branch of the Law of Evidence, and the provisions referred to dispose of it fully.

"As to the subject of Presumptions, my answer to the critics of the Bill is partly to the same effect, though their criticisms were perhaps better founded. I must admit that the Bill as introduced dealt less fully with this subject than was thought desirable on further consideration, and some additions to it have accordingly been introduced, though the general principle on which the matter was dealt with is maintained. The subject of presumptions is one of some degree of general interest. It was a favourite enterprise on the part of continental lawyers to try to frame systems as to the effect of presumptions which would spare Judges the trouble of judging of facts for themselves by the light of their own experience and common sense. A presumption was an artificial rule as to the value and import of a particular proved fact. These presumptions were almost infinite in number and were arranged in a variety of ways. There were rebuttable presumptions, and presumptions which were irrebuttable. *Præsumptiones juris et de jure*, *Præsumptiones juris*, and *Præsumptiones facti*. There were also an infinite variety of rules for weighing evidence; so much in the way of presumption and so much evidence was full proof, a little less was half-full, and so on. Scraps of this theory have found their way into English law, where they produce a very incongruous and unfortunate effect, and give rise to a good deal of needless intricacy. Another use to which presumptions have been put is that of engrafting upon the Law of Evidence many subjects which in no way belong to it. For instance, there is said to be a conclusive presumption that every one knows the law, and this is regarded as necessary in order to vindicate the further proposition that no one is to be punished for breaking a law of which he was ignorant. To my mind this is simply expressing one truth in the shape of two falsehoods. The plain doctrine, that ignorance of the law is no excuse for breaking it, dispenses with the presumption, and hands the subject over, from the Law of Evidence with which it is accidentally connected, to criminal law to which it properly belongs.

"I will not weary the Council by going into all the details of the subject, though I could with perfect ease, if it would not take too long, answer specifically the remark of the Madras Government on this matter. That Government says—

'Sections 102-4 contain three instances of presumptions, selected from a chapter of the Law of Evidence which in Taylor fills 111 sections. It is difficult to see why any should be inserted when so few are chosen.'

"In general terms the answer is this; large parts of Mr. Taylor's chapter relate to topics which have nothing to do with the Law of Evidence. Those which are of practical importance are all included in the Bill as it stands (a few were no doubt omitted in the first draft), and they fall under these heads:—1*st*.—There are a few cases in which it is expedient to provide that one fact shall be conclusive proof of another, for various obvious reasons—the inference of legitimacy from marriage is a good instance. 2*ndly*.—There are several cases in which Courts would be at a loss as to the course which they ought to take under certain circumstances without a distinct rule of guidance. After what length of absence unaccounted for, for instance, may it be presumed that a man is dead? The rule is that seven years is sufficient for the purpose. Obviously, six or eight would do equally well; but it is also obvious that, to have a distinct rule is a great convenience. All cases of this kind fall properly under the head of the Burden of Proof, and I think it will be found that the provisions contained in chapter VII of the Bill provide for all of them. A new section (114) has been added to this chapter which deserves special notice. Its substance was, I think, implied in the original draft of the Bill; but it has been inserted in order to put the matter beyond all possibility of doubt. It is in the following words:—

'114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations.

The Court may presume—

(*a*.) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(*b*.) That an accomplice is unworthy of credit, unless he is corroborated in material particulars;

(*c*.) That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;

(*d*.) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence;

(*e*.) That judicial and official acts have been regularly performed;

(*f*.) That the common course of business has been followed in particular cases;

(*g*.) That evidence which could be, and is not, produced, would, if produced, be unfavourable to the person who withholds it;

(*h*.) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

(*i*.) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before them:—

As to illustration (*a*)—A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business:

As to illustration (*b*)—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself:

As to illustration (*b*)—A crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable:

As to illustration (*c*)—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence:

As to illustration (*d*)—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course:

As to illustration (*e*)—A judicial act, the regularity of which is in question, was performed under exceptional circumstances:

As to illustration (*f*)—The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances:

As to illustration (*g*)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family:

As to illustration (*h*)—A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked:

As to illustration (*i*)—A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.'

"The effect of this provision, coupled with the general repealing clause at the beginning of the Bill, is to make it perfectly clear that Courts of justice

are to use their own common sense and experience in judging of the effect of particular facts, and that they are to be subject to no technical rules whatever on the subject. The illustrations given are, for the most part, cases of what in English law are called presumptions of law; artificial rules as to the effect of evidence by which the Court is bound to guide its decision, subject, however, to certain limitations which it is difficult either to understand or to apply, but which will be swept away by the section in question. I am not quite sure whether, in strictness of speech, the rule that an accomplice is unworthy of credit, unless he is confirmed, can be called a presumption of law, though, according to a very elaborate judgment of Sir Barnes Peacock's, it has, at all events, some of the most important characteristics of such a presumption. Be this how it may, the indefinite position in which it stands has been the cause of endless perplexity and frequent failures of justice. On the one hand, it is clear law that a conviction is not illegal because it proceeds on the uncorroborated evidence of an accomplice; on the other hand, it seems to be also law that, in cases tried by a jury, the Judge is bound by law to tell them that they ought not to convict on such evidence, though they can if they choose. How a Sessions Judge (sitting without a jury) is to give himself a direction to that effect, and how a High Court is to deal with a case in which he has convicted, although he told himself that he ought not to convict, I do not quite understand. At all events, it seems to me quite clear that he ought to be at liberty to use his discretion on the subject. Of course, the fact that a man is an accomplice forms a strong objection, in most cases, to his evidence; but every one, I think, must have met with instances in which it is practically impossible to doubt the truth of such evidence, although it may not be corroborated, or although the evidence by which it is corroborated is itself suspicious.

"As I have already observed, I do not wish to trouble the Council with technicalities; but I hope this explanation will show that this part of the Bill, at all events is not incomplete.

"I may observe that many topics closely connected with the subject of evidence are incapable of being satisfactorily dealt with by express law. It would be easy to dilate upon the theory on which the whole subject rests, and the manner in which an Act of this kind should be used in practice. I think, however, that it would not be proper to do so on the present occasion. I have therefore put into writing what I have to say on these subjects, and I propose to publish what I have written, by way of a commentary upon, or introduction to, the Act itself. I hope that this may be of some use to the Civil Servants who are preparing for their Indian career, and to the law students in Indian Universities. The subject is one which reaches far

beyond law; for the law of evidence is nothing unless it is founded upon a rational conception of the manner in which truth as to all matters of fact whatever ought to be investigated.

"I now turn to a criticism made on the Bill by His Honour the Lieutenant-Governor of Bengal, who appears to be somewhat dissatisfied with the manner in which the Bill deals with the question of relevancy, which, as he says, is a question of degree.

'The Lieutenant-Governor has no doubt that the law, clearing up the obscurity now prevailing as to rules of evidence, protecting our Courts from the intrusion of a foreign law of evidence in no way applicable, and rendering the Judges in some degree masters in their own Courts, will be highly beneficial. His principal doubt is, whether it is possible to define by law what evidence is relevant and what is not. He is inclined to think that relevancy is a question of degree; that the relevant shades off into the irrelevant by imperceptible degrees. It may be that it is easier to decide, in each case, what is substantially material to the issue, or so remote in its relevancy that the time of the Court should not be occupied, than to lay down by rule of law what is to be considered relevant and what not. Such rules must necessarily be somewhat refined, and, as it were, metaphysical. If it were allowed to argue the question whether any piece of evidence is, or is not, admissible under such rules, the Lieutenant-Governor would fear that the Court might be lost in disputations. If, however, the rules regarding relevancy be treated as merely an authoritative treatise on evidence for the guidance of Judges, which they are to study and follow as well as they can, but that they are not bound to hear objections and arguments based upon it, the Lieutenant-Governor has no doubt that the rules in the draft are admirably suited to the purpose, and would be extremely useful. It does not seem to him very clear in the draft whether or no Counsel are to be entitled to take objection to evidence at every turn, and to argue the question as to whether it is or is not admissible under the evidence rules. It seems of great importance that this should be made clear; for if Counsel may object and argue, the Lieutenant-Governor certainly has great fear that the argumentations regarding relevancy will be endless.'

"I cannot altogether agree with these remarks. As to the arguments of Counsel, I do not feel that horror of them which His Honour appears to feel. It is, I think, abundantly clear that Counsel will be permitted to argue as to the relevancy of evidence, and as to the propriety of proof, and I do not see how a law can be laid down at all upon which Counsel are never to argue. No one, I think, will seriously assert that lawyers, as a class, are an impediment to the administration of justice, or otherwise than an all-but-indispensable assistance to it; but if they are to exist at all, they must argue as well on evidence as on other subjects. I must, however, observe that every precaution has been taken to prevent useless and trifling argument. In the first place, if the Judge wishes to know about any fact the relevancy of which is under debate, he can cut the matter short by asking about it himself under section 165. In the second place, the mere admission or rejection of improper evidence is not to be a ground for a new trial or the reversal of a decision. The fact that the

opposite is the rule in England is the great cause of the enormous intricacy and technicality of English law on this point. If, in the Tichbourne case, one single question had been permitted after being objected to, and if the Court had afterwards been of opinion that it had been wrongly permitted, then, however trifling the matter might have been, the party whose objection had been wrongly over-ruled would have been by law entitled to a new trial, and the whole enormous expense of the first trial would have been thrown away. This never was the law in India, nor will it be so now. The result is that the provisions about relevancy will be useful principally as guides to the Judges and the parties, and, in particular, as rules which will enable the Judge to shut out masses of irrelevant matter which the parties are very likely to wish to introduce. As to the more general question, I think that it is possible to give the true theory of the relevancy of facts, and if I thought it desirable to enter upon a very abstract matter in this place, I think I could show what this theory is, and how this Bill is founded upon it. Be this however as it may, and taking a view, not indeed less practical, but more immediately and obviously practical, I would make the following observations:—I am quite aware that relevancy is, as His Honour observes, a matter of degree, and for that reason the Bill gives definitions of it so wide and various that I think they will be found to include every sort of fact which has any distinct assignable connection with any matter in issue. The sections which define relevancy are, indeed, enabling sections. Any fact which fulfils any one of the many conditions which they declare to constitute relevancy will be relevant, and most facts which have any real connection with the matter to be proved would fulfil several of them. Take, for instance, this fact—A man is charged with theft, and it is proved that he was seen running away immediately after the theft with the stolen goods in his hand. This is (1) a fact so connected with a fact in issue as to form part of the same transaction, and is therefore relevant under section 6; (2) it is the effect of a fact in issue, and is therefore relevant under section 7; (3) it is the conduct of a party to the proceeding subsequent to a fact in issue, and is so relevant under section 8; (4) it is a fact which in itself renders a fact in issue highly probable, and is therefore relevant under section 11. This fact, therefore, is relevant under no less than four sections, each of which would admit a great number of facts which would not be admitted by the other sections. Indeed, the latitude of the definition of relevancy will be best appreciated by negativing the conditions which the Act imposes. Suppose that you are able to assert of a fact that it is neither itself in issue nor forms part of the same transaction, nor is its occasion, cause or effect, immediate or otherwise; that it shows no motive or preparation for it; that it is no part of the previous or subsequent conduct of any person connected with the matter in question; that it does not explain or introduce any fact

which is so connected with the matter in question, or rebut or support any inference suggested thereby, or establish the identity of any person or thing connected with it, or fix the time of any event the time of which is important; that it is not inconsistent with any relevant fact or facts in issue; and that neither by itself, nor in connection with other facts, does it make any such fact highly probable—if all these negatives can be affirmed, I think we may say, without much risk of error, that the one fact has nothing to do with the other, and may be regarded as irrelevant.

"I now come to a matter which has excited a good deal of discussion, though it relates to a subordinate and not very important part of the Bill—that which concerns the examination of witnesses by Counsel. The Bill as originally drawn provided, in substance, that no person should be asked a question which reflected on his character, as to matters irrelevant to the case before the Court, without written instructions; that if the wourt considered the question improper, it might require the production of the instructions; and that the giving of such instructions should be an act of defamation, subject, of course, to the various rules about defamation laid down in the Penal Code. To ask such questions without instructions was to be a contempt of Court in the person asking them, but was not to be defamation.

"This proposal caused a great deal of criticism, and in particular produced memorials from the Bars of the three Presidencies. It was also objected to by most of the Local Governments to whom the Bill was referred for opinion. Some of the objections made to the proposal were, I thought, well founded. It was pointed out, in the first place, that the difficulty of obtaining the written instructions would be practically insuperable; in the next place, that the Native Bar throughout the country were already subject to forms of discipline which were practically sufficient; and, in the third place—and perhaps this was the most important argument of all—that, in this country, the administration of justice is carried on under so many difficulties, and is so frequently abused to purposes of the worst kind, that it is of the greatest importance that the characters of witnesses should be open to full inquiry. These reasons satisfied the Committee, and myself amongst the rest, that the sections proposed would be inexpedient, and others have accordingly been substituted for them which I think will in practice be found sufficient. The substituted sections are as follows:—

'146. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend

(1) to test his veracity;

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injurying his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose, or tend directly or indirectly to expose, him to a penalty or forfeiture.

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of section 132 shall apply thereto.

148. If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injurying his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:—

(1.) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(2.) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(3.) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence.

(4.) The Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer, if given, would be unfavourable.

149. No such question as is referred to in section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

Illustrations.

(*a*.) A barrister is instructed by an attorney or vakíl that an important witness is a dacoit. This is a reasonable ground for asking the witness whether he is a dacoit.

(*b*.) A pleader is informed by a person in Court that an important witness is a dacoit. The informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dacoit.

(*c*.) A witness, of whom nothing whatever is known, is asked at random whether he is a dacoit. There are here no reasonable grounds for the question.

(*d*.) A witness, of whom nothing whatever is known being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dacoit.

150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakíl, or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakíl, or attorney is subject in the exercise of his profession.

151. The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.'

"The object of these sections is to lay down, in the most distinct manner, the duty of Counsel of all grades in examining witnesses with a view to shaking their credit by damaging their character. I trust that this explicit statement of the principles according to which such questions ought or ought not to be asked, will be found sufficient to prevent the growth, in this country, of that which in England has on many occasions been a grave scandal. I think that the sections, as far as their substance is concerned, speak for themselves, and that they will be admitted to be sound by all honourable advocates and by the public. I cannot leave the subject without a few remarks on the memorials which the sections originally proposed have called forth from the Bar in various parts of the country. As none of the bodies in question have made any further remarks on the Bill, since it appeared in the Gazette in its amended form about a month ago, I suppose that the alterations made in the Bill have removed the main objections which they felt to it. I need not therefore notice those parts of their memorials which were directed against the consequences which they apprehended from the sections which have been given up. They contain, however, other matter which I feel compelled to notice. I need not refer to all the memorials. The one sent in by the Calcutta Bar was for the most part proper, though it contained passages which I think might as well have been omitted. The memorial of the Bombay Barristers contains similar passages, expressed more fully and less temperately, and I shall accordingly confine myself to noticing such of their remarks as appear to me to deserve notice.

"I may observe, in the first place, in general, that I have read in the newspapers and in these memorials much that can only mean that I individually was actuated in drawing this Bill by hostility to the Bar; indeed, the Bombay memorial says, in so many words, that remarks made by one member (meaning, I suppose, me) in Council 'appear to contemplate the extinction of the profession of Barrister-at-law in India.' In support of this surprising statement, they quote, as being 'open to no other construction,' the following words from the report of the Select Committee :—

'The English system, under which the Bench and Bar act together and play their respective parts independently, and the professional organization on which it rests, does not as yet exist in this country, and will not for a very long course of time be introduced.'

"Before I make the remarks which this suggests, let me ask Your Lordship and the Council whether a charge that I, of all people, wish for the extinction of the profession of Barrister-at-law in India, is not upon the face of it absurd? I am myself a Barrister of eighteen years' standing, and a Queen's Counsel of four years' standing. I believe that there is no Barrister in British India of whom I should not be entitled to take precedence, professionally, if I chose to practise here; and so strong is my connection with my profession, that I am at this moment on the point of resigning one of the most responsible offices which a Barrister can hold, for the purpose of returning to the ordinary routine or professional practice. How is it possible to imagine that a man so situated should be hostile to the profession? When this Bill was introduced I was—as I still am—anxious to do whatever lies in my power to preserve the honour and dignity of my profession, and to prevent its good name from being disgraced. For this reason I devised what I regarded as an appropriate remedy for a great and crying evil; one with which I have been much impressed by my own observation in England, and which is likely to extend in India as the habit of cross-examination becomes more general, and when the rights which a cross-examining advocate has are explicitly defined. The remedy, I will admit, was to some extent inappropriate; but for merely proposing it, for merely recognizing the existence of the evil against which it was directed, I am charged with wishing to extinguish my own profession.

"The real meaning of the expressions in the report (for which I am fully responsible) was, I think, so plain that I cannot understand how the memorialists can have ascribed to them a sense which I think they could never suggest to any fair mind. The report said—

'The English system, under which the Bench and the Bar act together and play their respective parts independently, and the professional organization on which it rests, does not as yet exist in this country, and will not for a very long course of time be introduced.'

"'Yes,' say the memorialists, 'it does exist, to wit, in the Presidency towns.' This is much as if the water-works of Calcutta were referred to, to contradict a statement that India is wretchedly supplied with drinking water. I make a statement about an Empire as large as Europe without Russia, and am told that it is incorrect, because there are three English Courts, and three knots of, perhaps, a dozen or so English Barristers, to be found at towns which are in the nature of English settlements. The reason why the statement complained of was not qualified by excepting these towns and Courts was simply that the exception was not important enough to be stated. It would, indeed, have been matter of great

indifference to me, personally, whether the Bill extended to the High Courts sitting on the original side or not. It is a mistake to make exceptions without a necessity for them; but the question, what rules of evidence should apply in the Presidency towns, is one of every little real importance. The great and vital importance of the matter lies in the effect which it will have on the administration of justice throughout the country at large. It is framed in order to meet the wants, and lighten the labours, of district officers, by giving them a short and clear view of a subject which has been converted into a sort of professional mystery, the knowledge of which was confined to a knot of persons specially initiated in it. Now, as regards the Mofussil, I repeat the expressions complained of. I assert that they are absolutely true, and state a fact notorious to every one. I say that, throughout India generally, nothing like the English system, under which the Bench and Bar act together and play their respective parts independently, does now exist, or can for a length of time be expected to exist. Let me just re-call for a moment the nature of that system. In the first place, the Bench and the Bar in England form substantially one body. The Judges have all been Barristers, and the great prize to which the Barristers look forward is to become Judges. That is not the case in India, nor anything like it. The great mass of Indian Judges are not, and never have been, lawyers at all; the great mass of Indian lawyers have no chance or expectation of becoming Judges, and many of them have no wish to do so. Even in the Presidency towns, the whole organization of the profession differs from that of England in ways which I do not think it necessary to refer to, but which are of great importance. I may, however, observe that the position of an English Barrister who practises in the Mofussil, whether he is habitually resident in a presidency town or not, is altogether different from that of an English Barrister in his ordinary practice in England. An English Barrister on Circuit, and even at the Quarter Sessions, is subject to a whole series of professional restraints and professional rules, which do not, and cannot, apply to practice in the Mofussil in this country. He acts under the eyes of a public which takes great interest in his proceedings, and puts a powerful check upon them. He practises in important cases before Judges whom he feels and knows to be his professional superiors, and to whom he is accustomed to defer. No one of these remarks applies to a Barrister from a Presidency practising in the Mofussil. The result of this state of things must be matter of opinion. It is impossible to discuss the subject in detail. The Bombay and Calcutta memorialists consider it eminently satisfactory: let us hope they are right. My opinion, of course, is formed upon grounds which it is not very easy to assign, and, as it can be of little importance, I shall not express it. In any case this Bill can do no harm.

"Passing, however, from the case of English Barristers to the case of pleaders and vakíls, and the Courts before which they practise, I would appeal to every one who has experience of the subject, whether the observations referred to are not strictly true, and whether the main provision founded upon them—the provision which empowers the Court to ask what questions it pleases—is not essential to the administration of justice here. In saying that the Bench and the Bar in England play their respective parts independently, what I mean is that, in England, cases are fully prepared for trial before they come into Court, so that the Judge has nothing to do but to sit still and weigh the evidence produced before him. In India, in an enormous mass of cases, this neither is nor can be so. It is absolutely necessary that the Judge should not only hear what is put before him by others, but that he should ascertain by his own inquiries how the facts actually stand. In order to do this, it will frequently be necessary for him to go into matters which are not themselves relevant to the matter in issue, but may lead to something that is, and it is in order to arm Judges with express authority to do this that section 165, which has been so much objected to, has been framed.

"I have now referred to the main points in the Bill which have been attacked, and as I fully explained the principles on which it was founded more than a year ago, I have only to move that it may be taken into consideration."

The Motion was put and agreed to.

The Hon'ble MR. STEPHEN then moved the following amendments:—

That, in section 8, instead of the second paragraph, the following be substituted:—

"The conduct of any party, or of any agent to and party, to any suit or proceeding in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto."

That, in section 9, line 3, after the word "which," insert the words "support or."

That, in the explanation to section 57, instead of the words "the Parliaments of the United Kingdom of Great Britain, of England, of Scotland, and of Ireland," the following be substituted:—

"1. The Parliament of the United Kingdom of Great Britain and Ireland;

2. The Parliament of Great Britain

3. The Parliament of England;

4. The Parliament of Scotland, and

5. The Parliament of Ireland."

That the words " or in any other case in which the Court thinks fit to dispense with it " be added to the proviso in section 66.

That the following new section be inserted after section 157 :—

158. Whenever any statement, relevant under sections 32 or 33, is proved, all matters may be proved, either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested."

And that the numbers of the subsequent sections be altered accordingly.

The Motion was put and agreed to.

His Honour THE LIEUTENANT-GOVERNOR would ask the permission of His Excellency the President to move an amendment of which he had not given notice. He would observe that the Council had had very short notice of this Bill being brought forward and passed to-day. The amendment which HIS HONOUR intended to propose was not of much importance; it was simply to lop off a dead branch of the Bill, namely, section 150.

The Hon'ble MR. STEPHEN said that the section to which His Honour the Lieutenant-Governor referred was one of considerable importance, to which great weight was attached. He might say that the Council ought to have had notice of such an amendment. It was moreover a matter which would give rise to a great deal of discussion.

His Honour THE LIEUTENANT-GOVERNOR believed he was correct in saying that the Council had not had notice, until yesterday or the day before, that the Bill was to be brought forward. He would not have asked, at this stage, for leave to move a substantive amendment; his amendment was merely to lop off a dead branch.

His Excellency THE PRESIDENT thought that this was a question of great importance, and that notice should have been given of the intention to move the amendment.

His Honour THE LIEUTENANT-GOVERNOR said that, as His Excellency the President was of opinion that notice of the amendment should have been given, HIS HONOUR did not think that his amendment was of sufficient importance to delay the passing of the Bill.

The Hon'ble MR. COCKERELL felt very much inclined to support His Honour the Lieutenant-Governor in his attempt to have an amendment in the sense which His Honour had indicated brought forward, and thought that there were probably other members who were of the same opinion. The section which it was proposed to omit was a dead branch, which it would be very well to get rid of. MR. COCKERELL had proposed a similar amendment in Committee, but had been overruled.

His Excellency THE PRESIDENT observed that there seemed to be a strong feeling in favour of the amendment; and although he was sorry that any further delay should occur to the inconvenience of business, he thought that an adjournment of this Bill might, under the circumstances, be advisable.

The Hon'ble MR. STEPHEN said that, looking to the great pressure of business before the Council, he would much rather consent to the amendment being brought on at once, than that there should be an adjournment.

His Honour THE LIEUTENANT-GOVERNOR would express a strong opinion that his amendment was not of sufficient importance to call for an adjournment.

His Excellency THE PRESIDENT had not had an opportunity of considering the nature of the amendment which His Honour the Lieutenant-Governor wished to propose; but he would be happy to act according to the prevailing opinion of the Council. The Hon'ble Member in charge of the Bill had himself expressed a desire that the amendment should be brought on and settled to-day.

His Honour THE LIEUTENANT-GOVERNOR then moved the omission of section 150. He had already stated, in regard to the amendment, nearly all that he had to say, namely, that the section was really a dead branch, without any effect or practical meaning whatever. It would not be necessary for him, therefore, to detain the Council with many words upon the subject. It seemed to him that this section was the shadow of a real provision which had been struck out of the Bill, and which was past and gone. The Hon'ble Member in charge of the Bill had explained at considerable length, and in an extremely lucid manner, the circumstances under which a group of sections found place in the Bill, namely, sections 146 to 150. HIS HONOUR might say, broadly, that the effect of these sections, down to section 149, was to prescribe that certain questions affecting the character of witnesses might, under certain circumstances, be admitted, and that, under certain other circumstances, such questions ought not to be admitted. Well, as the Bill was originally drawn, it not only laid down

what questions should be admitted and what questions should not be admitted, but another section prescribed penalties for the improper putting of such questions by advocates or other persons engaged in a case. After a great deal of discussion, he believed, these penal provisions were struck out of the Bill. The consequence was that advocates engaged in a case were subject, with regard to the putting or not putting of such questions, to no special penalties, but only to those rules which guided and governed an advocate's professional conduct in regard to these as to all other matters. Well, then, if it be, as he said, that this section provided no penalties at all, and provided no course of proceeding which the Court was not competent to take without it, it was in fact a fiction and a sham; a weak and defective compromise of a matter which had been disposed of. His Lordship and the Council were aware that, in this country, Courts of all descriptions, from the higher to the lower, were subject to the control of the highest Court: each was subject to the direct control of the Court under which it acted and by which it was supervised. No law was necessary to enable an inferior Court to report to the superior Court any matter affecting any advocate who held his license from that Court. It seemed to HIS HONOUR that this provision was much more in the nature of a section to enable a teacher to report a boy to his parents or to one who held a moral or legal control over him. The section was of no practical effect, but to some extent disfigured the Bill, as being a fictitious shadow of a reality which had passed away, and HIS HONOUR therefore proposed to omit it.

The Hon'ble MR. COCKERELL entirely agreed with what had fallen from His Honour the Lieutenant-Governor, and, in his opinion, if any provision of this kind could properly find a place in a legal enactment, it should rather be in a Bill relating to pleaders, such as the Bill on that subject which was already before the Council. It seemed to him (MR. COCKERELL) entirely out of place in a Bill of this kind. He had always entertained this opinion, and pressed it in Committee, and he thought His Honour had correctly described the clause referred to as a dead branch. But as it was one which could do no harm, MR. COCKERELL had not thought it necessary to repeat his opinion on the subject and press his views upon the Council. As, however, the matter had been taken up, he was exceedingly glad to have this opportunity of expressing his full concurrence in the Lieutenant-Governor's suggestion.

The Hon'ble MR. CHAPMAN could not help thinking that the provision which His Honour the Lieutenant-Governor proposed to omit was not a dead branch, but a branch which had some vitality in it. If advocates practising in the Mofussil knew that their conduct would be liable to be reported to the High

Court, and thus brought to the notice of the profession, he thought this knowledge might act as a salutary check against those who were likely to abuse the liberty of the Bar.

The Hon'ble MR. ROBINSON joined entirely in the view taken by his hon'ble friend Mr. Chapman. He thought that the provision of section 150 would act as a very wholesome check upon vakíls who practised in up-country Courts. They aspired to rise to the judicial service, and it was desirable that the High Court should know something of the character of the men practising in the Lower Courts, and more especially have their shortcomings brought before them. MR. ROBINSON thought that the provision which it was proposed to omit was a very good one, and he would therefore vote against the amendment.

Major General the Hon'ble H. W. NORMAN thought, on the whole, that the section should be retained; it might be the means of doing some good and he thought it could not do any harm.

The amendment was then put and negatived.

The Hon'ble ME. STEPHEN then moved that the Bill as amended be passed. He would not trouble the Council with any further remarks.

His Honour the LIEUTENANT-GOVERNOR said he would not like to let this motion pass without saying a few words; he had passed so long a portion of his life in dealing with evidence, that he hardly liked to say he was at the last moment compelled to take this Bill upon trust; but he might say that he had placed his trust in a quarter in which it could be very well placed. It was a Bill that, he believed, had received thorough consideration and thorough sifting in a most thorough and systematic manner. It was in the hands of a man who was so extremely free from antiquated prejudices and antiquated notions, that he hoped the Bill had been made as good as a Bill of this kind could be expected to be made in the hands of any man. HIS HONOUR had on a former occasion expressed his opinion against any law of evidence for this country. He had doubts whether any legal law of evidence, as distinguished from moral and metaphysical laws, was really a good thing. But at the same time he felt that things had taken that course, and the circumstances were now such that it was hopeless to avoid some law of evidence; and he hoped and believed that a law of evidence, freed from intricacies and technicalities, had this very great advantage to the Courts of the country, that it at least put them, in respect of the law, on an equal footing with the advocates practising before them. It enabled the

Judge to say to the Advocate, "I am as good a man as you: if you raise a question of evidence, there is the law by which your question can be decided." It would put a stop to the practice, hitherto prevalent, of an Advocate shaking in the face of the Court a mysterious law of evidence, which was not to be found codified anywhere as substantive law, or otherwise, in any shape admitting of its being easily referred to by our Judges and judicial officers of all grades. HIS HONOUR could have wished that the Hon'ble Member in charge of the Bill had not found it necessary to tell the Council that the Bill was, to a considerable extent, based on *Taylor on Evidence*; because HIS HONOUR'S view was that it was not desirable to take any dictionary of English law as the basis of a law of evidence in this country. If he could find any ground for objecting to any part of the Bill, it was that, in some parts, it somewhat smelt of the English law of evidence; but he hoped that most of the sting of Taylor had been taken out of him by the Hon'ble Member in charge of the Bill, and by the Committee, in the course of their manipulations of the Bill. HIS HONOUR was also in one respect glad to observe that the Bill had been reconsidered, and that the result of that consideration was that it had come out of the hands of the Select Committee very much reduced in point of the metaphysics which were somewhat conspicuous in the first draft. That being so, and the Act being, as the Hon'ble Member had explained, made large and wide, and constructed in such a manner as, by many meshes, to bring into its scope almost every possible fact, he might say that he looked upon the passing of this Bill as hopefully as he would look upon the passing of any law of evidence; that he hoped for the best, and should look to the great wideness of its provisions as a means of enabling the Courts to make the best of the law. For himself, in that view, he accepted it and thanked the Hon'ble Member for it.

The Hon'ble MR. STRACHEY expressed, in a few words, his feeling, in which he was sure the Council would agree, that India owed to his hon'ble and learned friend a great debt of gratitude for this Bill, which was now about to be passed. MR. STRACHEY was confident that his hon'ble and learned friend had by this Bill conferred upon the country an important benefit, of which they would see the result hereafter in a really great improvement in the administration of justice in India. The Council had to thank Mr. Stephen for a very great deal of admirable work; and MR. STRACHEY was sure that his name would long be remembered in India, through this work in particular, which was now about to be completed.

The Motion was put and agreed to.

PANJÁB MUNICIPALITIES ACT AMENDMENT BILL.

The Hon'ble MR. COCKERELL presented the Report of the Select Committee on the Bill to prolong the operation of Act XV of 1867 (Panjáb Municipalities).

The Council adjourned to Tuesday, the 19th March 1872.

CALCUTTA;
The 12th March 1872.

H. S. CUNNINGHAM,
Offg. Secy. to the Council of the Govr. Genl. for making Laws and Regulations.

Government of India Central Printing Office.—No. 848 L. D.—3-6-72.—50.