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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 Simla on Saturday, the 12th October 1872.

PRESENT :

His Excellency the Viceroy and Governor General of India, G. M. S. I., *presiding*.
His Honour the Lieutenant-Governor of the Panjáb.

The Hon'ble Sir John Strachey, K.C.S.I.

The Hon'ble Sir Richard Temple, K.C.S.I.

Major-General the Hon'ble H. W. Norman, C.B.

The Hon'ble Arthur Hobhouse, Q.C.

The Hon'ble E. C. Bayley, C.S.I.

The Hon'ble R. E. Egerton.

NORTHERN INDIA IRRIGATION BILL.

The Hon'ble SIR JOHN STRACHEY presented the Report of the Select Committee on the Bill to regulate Irrigation, Navigation and Drainage in Northern India. He thought it convenient to say a few words in explanation of the Report. So far as the Panjáb was concerned, the Committee had not considered it their duty to reopen questions of importance which had been fully considered and carefully decided ; and if the Committee had been dealing with the Panjáb alone, they would have had little or nothing to do but to recommend the passage of a Bill repealing and re-enacting Act XXX of 1871 with the omission of the six sections relating to a water-rate on lands irrigable but not irrigated. But it was necessary to make the Act also apply to the North- eastern Provinces, and this rendered some alterations unavoidable. These were shown in the Report. On some points the views of the Local Governments concerned had not been altogether identical, but all these differences had been either got over or compromised, and the Bill in its present state had been accepted by the Lieutenant-Governor of the Panjáb and his hon'ble friend Mr Egerton, and would, SIR JOHN STRACHEY believed, be found to meet the views of the Lieutenant-Governor of the North-Western Provinces. The Committee thought that the Bill was fit to become law at once ; but as the measure was of so much importance, it was proposed in the first place to republish it as amended in the *Gazette of India*. He hoped it would be proceeded with as soon as the Council re-assembled in Calcutta.

PANJÁB SALT BILL.

The Hon'ble SIR RICHARD TEMPLE moved that the Bill to give the force of law to certain rules relating to salt in the Panjáb be passed. He had already stated the object of the Bill and explained the circumstances under which it had become urgently necessary, in order to prevent the illicit traffic of salt in the Panjáb. The Bill had received the full approval of the Lieutenant-Governor and the Financial Commissioner of that Province.

The Motion was put and agreed to.

OBSOLETE ENACTMENTS REPEALING BILL.

The Hon'ble MR. HOBHOUSE introduced the Bill for the repeal of certain obsolete enactments, and moved that it be referred to a Select Committee with instructions to report in three months. He said—"When I obtained leave to introduce this Bill, I stated the necessity of relieving statute-books of the quantity of dead matter which is thrown off by them as by all other living bodies. The toilers among statutes have indeed reason to be grateful to those who undergo the labour of clearing off extraneous matter. Repealing Acts were passed in 1871 and 1870; but the last great operation of this kind, a much greater one than this, was effected in the year 1868, by an Act drawn by the Secretary and Sir C. Hobhouse, and revised by Mr. Cockerell, a gentleman whom I find constantly putting his shoulder to the wheel when difficult and laborious work is to be done. Let nobody imagine that it is a matter of course or an easy thing for one to take from a statute-book just the right quantity, neither too much nor too little. It is no more easy than it is easy for a surgeon to extract a tumour from the throat. It requires great prior knowledge of the subject, research, patience, judgment and accuracy. I hope also that nobody is thinking that the Bill before the Council is due to any learning or industry of mine. I have only the easy task of introducing it when framed; its construction is due entirely to Mr. Whitley Stokes.

"Now, with respect to this Bill I have the satisfaction of knowing that it furthers the objects certainly of one, I believe of both, my predecessors in this Council. For I hold in my hand a minute written some time since by Mr. Stephen with reference to the work of the Legislative Department. After showing that the Department consisted of himself and Mr. Stokes, he turns to the work of improving the statute-book. He says—

"I will now proceed to consider the steps by which this should be done.

"1.—The first step is to repeal all useless or obsolete enactments. A great deal has already been done in this direction, but much still remains to be effected.

"2.—The second step is to reprint, in the order of their dates, the Acts left unrepealed.

"3.—The third step is to ascertain from the different Local Governments what Orders and Regulations, other than Acts of the Legislature Council passed since 1861, are in force in them,* and to pass an Act declaring that those Orders and Regulations, and no others, shall be in force in those Provinces.

"All this might be done at once, and without delay or expense. When it was done we should know precisely what we have got to deal with. We might, while this is going on, prepare a table of contents for the Statute-book of British India, showing what Acts would require consolidation under each head. This work, which would have been exceedingly laborious, has practically been already done, or nearly done, by Mr. Stokes, whose Index to the Written Law of India would enable us, in a comparatively short time, to complete it."

"The present Bill, which deals with eighty-eight different enactments, will, I hope, form one important step towards the object of a revised statute-book, and, in addition, to the work which has been going on steadily for some years.

"Now, at our last meeting, Sir John Strachey intimated that some people had imbibed the notion that the work recently done, or some, of it, was to be undone; and he took occasion to contradict that notion, and to speak in terms of praise, high, but not too high, of those who had borne the principal share in the work. I need not repeat what I then said. I will only again express my thanks to him for having said so well what we all think. But it would, perhaps, be useful if I were to add something by way of distinguishing between the various lines of work to be pursued, all parts of one great whole, and showing why some should be preferred to others. Of course I am not presuming to speak for the Government, and personally I shall discharge, as well as I can, whatever duties are set me. But, looking at the matter with the lights I have at present, it seems to me most likely that the work of codification proper will advance, at all events for a year or two, at a slower rate than lately.

"When I speak of codification proper, I mean the reduction to writing of unwritten laws. The re-arrangement and combination of written laws is also codification, but it is codification of that which is already, codified, and is usually called consolidation.

"Now, consolidation, dealing with written law, need not involve any change at all; and, though it often brings about some change, yet it is often mere change of detail, and sometimes very little of that. Unwritten law stands in a different position. Of course everybody knows that what we call unwritten law is not unevicenced by writing. But it is contained in many different writings, records of old traditions, and of the utterances of different lawyers, usually imperfect, often conflicting, and never possessing an absolute or final authority which no one is at

* This was done in 1830 by direction of Sir H. S. Maine.

liberty to dispute. It is as it were floating in the air, syllabled by many voices, which it is the privilege of the skilled judge to hear, and his duty to combine into harmony for the purpose of the case before him. It, therefore, possesses a flexibility and a power of adaptation which cannot be possessed by the written law.

“ Now, to reduce this floating element to a single authoritative writing necessarily involves change. No human genius, or collection of human geniuses, can express in language the result of a quantity of traditions and judgments so as to give their precise equivalent: that there should be nothing over and yet no lack. Nor can law be expressed for the first time in language of final and indisputable authority without acquiring a bearing and a rigidity which it had not before. Few probably could attempt the task without finding that the constant imperfection of their instrument and the occasional aberration of their own conceptions from the true mark lead them to expressions which, when they come to be interpreted by others, work unforeseen results.

“ It is obvious, therefore, that from the very nature of the case, the codification of unwritten law must bring about much more change than that of the written law. And this leads me to the following reflections:

“ *First.*—Every change brings some unsettlement. If it is a wise change it settles society on a firmer basis than before: but there must be some disturbance in the process. We are acting for people who, we are told, do not accept change readily. They have no representative institutions, and no organized machinery for making their sentiments known, so that we do not learn immediately what they are thinking. It, therefore, seems more prudent not to make many large changes simultaneously, lest the inevitable disturbance should be too much multiplied; nor in too rapid succession, that we may learn something of the working of one before bringing on another.

“ *Secondly.*—As I have observed before, every great legislative measure must have its imperfections. Some are congenital with it, some spring from the circumstance that it is interpreted by minds other than those which framed it, so that unintended consequences are brought about. These imperfections will be disclosed by the wear and tear of daily work. And it is of greater moment for a time to watch the working of the important laws actually passed, and to assist it when necessary, than to pass others which, of course, would have their defects too, perhaps in much greater number.

“ *Thirdly.*—Supreme legislators may think that I take too professional a view of the matter, but I believe that no laws can work well unless lawyers are well acquainted with them. It may not be always true that ‘whate’er is best administered is best,’ but it certainly is true that without good and accurate administration

no principles and no rules can work well. Such administration cannot be had from men who are not thoroughly familiar with the law they are administering. Now, I hear from judges and others some apprehensions lest they should be found wanting for some time in their knowledge of the new bodies of law. Nor is this surprising, because a lawyer gets his law ground into him by daily practice, and is never thoroughly at ease with it, and cannot apply it with promptitude and accuracy till that process has taken place. If, therefore, we present new laws too rapidly to those who have to apply them, we run much greater risk of miscarriage, and of having to do some of our work twice over, than if they come more gradually.

“ There is yet another reason why the work of codification can hardly go on so rapidly, and that is, that the principle of many recent Acts has brought in their wake the necessity of much legislation, of a local and subsidiary kind, but still legislation. It has been of late years a frequent practice with this Council to pass laws laying down certain principles and limits of action, and then leaving Local Governments to apply the principles by means of detailed rules. The plan seems, if I may say so, to be excellent, and peculiarly suitable to the circumstances of India. But the working of the law, for good or ill, depends very much on the frame of the rules. And we have recently had some instances in which the law and the rules together have brought out some unexpected and not very satisfactory results. It will, therefore, be necessary to bestow more attention upon these codes of rules and, if necessary, to come to the Legislature for amendment of the laws under which they are framed.

“ I hope it will not be considered that by these remarks I intend to disparage the work of codification ; because I do not mean that. It is certainly far the most difficult of all the work a legislator can be called on to do, and makes the greatest demands on legislative genius. It requires the greatest amount of mental labour and of mental power. What I mean is, that at this juncture, just after large measures of codification have been passed, the other objects I have mentioned have greater claims on our attention.

“ This Bill is for one of those objects, namely, the simplification of the written law with an ultimate view to a revised edition of the statute-book ; and, as such, I introduce it.”

The Motion was put and agreed to.

MADRAS CIVIL COURTS' BILL.

The Hon'ble Mr. HOBHOUSE moved that the Report of the Select Committee on the Bill to consolidate and amend the law relating to the District Munsifs in the Presidency of Fort St. George, be taken into consideration. He said that, as

stated in the Report, the Government of Madras had deprecated the passage of the amended Bill (which consolidated the law relating to all the local Subordinate Courts) until the question regarding the separation of the Civil Service into Revenue and Judicial Branches had been settled. It was pointed out to that Government by the Legislative Department that the amended Bill, consolidating the fourteen Acts and Regulations in which the law on the subject was now contained, would facilitate rather than hinder the solution of this question. MR. HOBHOUSE was happy to say that a letter had been received that morning from the Government of Madras, from which he would read the following passage :

"In deprecating any amendment or consolidation of the law relating to the Civil Courts in this Presidency, until the question of the separation of the judicial and revenue branches of the service shall have been definitely settled, the Madras Government were influenced by the following considerations :

"1st.—That as it has been proposed to re-establish the grade of Subordinate Judge, as it existed in this Presidency prior to 1862, with a small cause jurisdiction superadded, and to reserve all appointments to that grade of judicatory as formerly to members of the Covenanted Civil Service, it is not expedient to abolish the designation of Principal Sadr Amin which has been hitherto applied to a grade of judicatory not so reserved.

"2nd.—That the Bill referred to in your letter clearly contemplates the subordinate courts, for which it provides, being exclusively confined to civil work ; whereas, in the opinion of the Governor in Council, it is very desirable that the Courts in which Covenanted Civil Servants are to serve before being appointed to the higher judicial office of Civil and Session Judge, should be invested with a criminal as well as with a civil jurisdiction.

"2. I am directed to state that the Governor in Council does not now desire to press these objections to the proposed legislation. The first can probably be met by dividing the Subordinate Judges into two grades, of which the first would usually be reserved for the Covenanted Civil Service ; and in regard to the second objection, although it is not contemplated in the Bill that the Subordinate Judges should exercise a criminal jurisdiction, there is nothing apparently in its provisions which would preclude the Local Government, should it see fit to do so, from investing any of the Subordinate Judges with the powers of a Magistrate under the Code of Criminal Procedure."

The Motion was put and agreed to.

The Hon'ble MR. HOBHOUSE then moved that to the second clause of section one the following words be added :

"except the Tracts respectively under the jurisdiction of the Agents for Ganjam and Vizagapatam."

Under Act XXIV of 1839 these tracts possessed a judicial system of their own and the effect of the amendment would be to preserve it.

The Motion was put and agreed to.

The Hon'ble MR. HOBHOUSE then moved that to section seven the following clause should be added :

“ The Local Government may for good and sufficient reason annul any appointment made under this section.”

The section referred to District Munsifs, and the amendment, which had been suggested by the Local Government, would confer upon that Government a power which MR. HOBHOUSE thought it was only reasonable the Governor in Council should possess.

The Motion was put and agreed to.

The Hon'ble MR. HOBHOUSE also moved that in section eighteen for the words “ The Judge of a District Court ” the words “ Any Judge of a District Court, Subordinate Judge, or District Munsif ” be substituted.

The effect of this amendment would be to enable the Local Government to suspend or remove for misconduct any judicial officer under the Act.

The Motion was put and agreed to.

His Excellency the PRESIDENT moved that to section twenty-two the following clause be added :

“ Every appointment under this part shall be made subject to such rules as the Local Government from time to time prescribes in this behalf.”

His Excellency thought that this clause, which had been suggested by the Madras Government, would tend to prevent jobbery. He was, however, unwilling to interfere with the discretion conferred by section 22 on District Judges as regards the suspension and removal of ministerial officers.

The Motion was put and agreed to.

The Hon'ble MR. HOBHOUSE then asked leave to withdraw his Motion that the Bill as amended be passed. As the amendments which had just been made were not in all respects precisely in accordance with the wishes of the Madras Government, he thought it desirable to give that Government an opportunity of considering the amended Bill. A question had also been raised as to the proper mode of valuing suits for land for the purposes of jurisdiction under the proposed

Act. He therefore proposed, with His Excellency's permission, to postpone the passing of the Bill until the first meeting of the Council in Calcutta.

Leave was granted.

PANJÁB OPIUM BILL.

The Hon'ble MR. EGERTON moved that the Report of the Select Committee on the Bill to amend the law relating to Opium in the Panjáb be taken into consideration.

The Motion was put and agreed to.

The Hon'ble MR. EGERTON then moved that the Bill as amended be passed.

The Motion was put and agreed to.

The following Select Committee was named :

On the Bill for the repeal of certain obsolete enactments—the Hon'ble
Mr Bayley and the Mover.

The Council then adjourned *sine die*.

WHITLEY STOKES,

Secretary to the Government of India.

SIMLA ;

The 12th October 1872.