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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 30th January 1872.

PRESENT:

The Hon'ble John Strachey, Senior Member of the Council of the Governor General of India, *presiding.*
His Honour the Lieutenant Governor of Bengal.
The Hon'ble Sir Richard Temple, K. C. S. I.
The Hon'ble J. Fitzjames Stephen, Q. C.
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.

OATHS AND DECLARATIONS ACT AMENDMENT BILL.

The Hon'ble MR. STEPHEN, on the resumption of the debate on the Bill to amend Act No. V of 1840 (concerning the Oaths and Declarations of Hindoos and Mahometans), moved that the Bill be re-committed. He said the Council would recollect that the debate in relation to this Bill was adjourned for a given time which expired to-day. During the interval, the matter had been considered by the Select Committee which had recommended that the Bill should be passed, and after considerable discussion they came to the conclusion that the Bill should be made more explicit, and, therefore, that it would be better that it should be re-committed. He accordingly moved that the Bill be re-committed, in order that a new and better version of it might be brought out.

HIS HONOUR THE LIEUTENANT-GOVERNOR said, he had a few words upon this subject to say. He was very glad to know that the Hon'ble Member in charge of the Bill had taken the course which he had announced, and HIS HONOUR believed that, substantially, there was not likely to be much difference of opinion in regard to the provisions of the Bill so far as it now went. Probably all

were agreed that the ordinary use of the present form of solemn affirmation should be struck out of our procedure. But before the motion was passed, he wished to say one or two words in regard to the very difficult question upon which he confessed he had himself not made up his mind, namely, whether, in extraordinary circumstances and in special cases, solemn oaths should be used. The question which the Council would have to decide was, whether the religious sanction should be altogether eliminated from the administration of justice as an engine for getting at the truth. Now, in considering the matter, he thought that perhaps we were apt to look at this question too much from our own point of view. We belonged to a very civilized country and a very advanced society, in which truth was regarded as a virtue quite independently of oaths and was supported by very strong social sanctions. On the other hand, it was his impression that, in most countries of the world, both in the East and the West, but more especially in the East, truth was in no respect looked upon as a public duty, and was not supported by social sanctions. His impression was that, although it might not be the ordinary human view that language was given to us to conceal one's thoughts, still the fact was that, in most countries, in by far the greater number of countries in various stages of civilisation, the opinion generally was, that a man was not bound to tell the truth, and that speech was a weapon which might be fairly used either to communicate the truth or to conceal it. His belief was that, whether we looked to the manners or practices of savage tribes, or to the standards by which the civilised ancients regulated their affairs, they did not think themselves bound to tell the truth to their disadvantage. If we looked to the commandments which we found in the earliest writings of our own faith, we did not find that truth was among the cardinal virtues of the first degree, and that it was prescribed as obligatory upon men. We did not find any commandment which said "Thou shalt not lie;" we only found the commandment which said "Thou shalt not bear false witness *against* thy neighbour;" there was nothing said about bearing false witness in favour of thy neighbour. If we looked to other parts of those writings, the principle inculcated by the most ancient was this, that you were not to foreswear yourselves; not that you should speak the truth upon all occasions, but that on solemn occasions you should not say that which was false. Now, you had here a country, India, which was somewhat in that stage in which, amongst people of all classes and all grades, there was no social sanction for truth. On the other hand, you had in India, as you had in all nations, a special sanctity attaching to what were called oaths; that was to say, when a man did not simply say "I speak the truth," but when he solemnly called God to witness, in one form or other, that he would speak the truth, then, by the con-

census of all nations, he was bound to speak the truth at his peril and would suffer for it in the next world if he did not. As HIS HONOUR had said on a late occasion, he believed that when an oath of this kind was administered according to the forms and practice and ideas of the Natives of this country, there was no country in the world in which an oath was more effective than in India. The question was whether we were to discard and eliminate this engine from the administration of justice, which in all Native States had been considered the most powerful engine for eliciting the truth. Well, the view which the Hon'ble Member in charge of the Bill had deemed it desirable to take, he believed, was this, that in our Courts and in the circumstances under which we administered oaths or affirmations, oaths were ineffectual, and we must rely on what he might call the secular sanction for eliciting the truth. We must tell witnesses and parties to suits that we did not administer an oath, but if they told a lie, they would go to jail. If that was an effectual and good protective sanction, it would be all very well. But when he looked to the practical administration of justice, to the terror which was held out to a witness if he told a lie, he feared that you relied upon a terror that had very little practical effect, for this reason, that the number of cases which were successfully prosecuted for perjury was very small indeed. When you came to analyse the small number of cases in which people were convicted of perjury, he believed that it would be the experience of all around him, not only that there was a small number of such cases, but also that in the greater number of these, owing to the procedure of our Courts, the parties were convicted of perjury simply because they had contradicted themselves, saying something different in one Court from what they had before said in another Court. There were a certain number of convictions on that ground; but convictions for perjury pure and simple, where you proved a man's words to be false, were, he might say without fear of contradiction, extremely rare. Consequently, the terror you could hold out in the shape of this secular sanction was very small indeed; he might almost say infinitesimally small. A witness could therefore snap his fingers at you: the chances were ten thousand to one that he would get off; he would say to himself "I shall not go to jail; therefore I shall speak what I like."

HIS HONOUR confessed that this was an extremely difficult subject, and one upon which he had not fully made up his mind. He admitted that there were some forms of oath, such as swearing upon a son's head, to which objection might fairly be taken, and he would not advocate the administration of that class of oaths; but if a Hindú considered the holding of a cow's tail a form of oath which his co-religionists respected, he did not see that there could

be more objection to his doing so, than the requiring a Christian to kiss the Bible. The view, therefore, which he was inclined to suggest as being worthy of consideration would be, while granting that it was not desirable on all occasions to use the name of God Almighty, to consider whether it would be advisable to say that, on certain special occasions, an oath might be administered; whether it might not be possible to say that each Local Government, on the recommendation of the local High Court, should prescribe the particular forms of oath respected in the Provinces, which might be administered to witnesses and parties on certain solemn occasions; and whether the Court might not order or permit such an appeal to the oaths of parties for the settlement of a dispute. This subject was somewhat mixed up with civil procedure, and HIS HONOUR was not prepared to recommend any definite course at this moment, but he would venture to submit, for the consideration of the Committee, that it was a matter which ought not to be decided without very full and careful and anxious consideration. It was a question of overwhelming importance, whether we ought finally and completely to eliminate the religious sanction.

The Hon'ble MR. STEPHEN said it appeared to him that His Honour the Lieutenant-Governor had overlooked the fact that the question at present before the Council was whether the Bill should be re-committed, and not whether any particular recommendation should be made to the Select Committee. It would rest with the Committee to make any recommendation which they thought it necessary and proper to make. MR. STEPHEN would therefore suggest to His Honour that it would be for him, before the report of the Select Committee was made, to make up his mind as to a definite proposal; if he came to that determination, it would be in his power to propose an amendment to that effect, assuming always that the Committee did not think it desirable that such oaths should be taken, and the matter would be taken into consideration when the subject was again brought before the Council.

The Hon'ble MR. ROBINSON thought that this was a matter which showed how important it was that the Native opinion of the country should be properly represented both in Council and in Committee. He had alluded to the absence of Native advice in the legislature on a former occasion, and felt himself bound to do so again on a question of this kind.

The Motion was put and agreed to.

CRIMINAL PROCEDURE BILL.

The Hon'ble MR. STEPHEN also presented the preliminary report of the Select Committee on the Bill for regulating the Procedure of the Courts of

Criminal Judicature not established by Royal Charter. He need not remind the Council of the circumstances connected with the introduction of this Bill, and of the course which was taken when it was introduced. The Committee had received, as MR. STEPHEN had mentioned on a former occasion, a strong recommendation from more Local Governments than one, including that of Bengal, that the existing state of things with regard to the jurisdiction over European British subjects should be altered. These recommendations had been carefully considered, and the Committee had arrived at the conclusion that the time had come when the law on this subject might properly be altered, and they had prepared a preliminary report for the purpose of giving the widest publicity to their views, in order that the matter might receive full consideration by the public before the amended Bill was prepared and brought up before the Council for consideration with the view of its being passed into law. The Committee wished to secure the fullest possible discussion, at the earliest possible period, of the substantive changes which it was proposed to make in the law. In a Bill of so large an extent, there must of course be a large number of administrative changes in which the Committee must act for themselves, and on which it would be idle to consult the public at large. But with regard to general questions of broad principle, he thought it was very desirable that the public should have every opportunity of giving expression to their views. He proposed therefore to state now what the Committee recommended on the subject he had mentioned; and on one or two others of considerable importance. It was not proposed to pass this Bill until the end of March; he hoped that the early opportunity which was taken of giving publicity to the conclusions to which the Committee had come, would be sufficient to afford ample time for the fullest discussion of them by the public.

The Committee recommended with regard to jurisdiction over European British subjects:—

"(1.) That a full-power Magistrate, being a Justice of the Peace, and being, in the case of Mofussil Magistrates, a European British subject, should be empowered to try European British subjects for such offences as would be adequately punished by three months' imprisonment and a fine of rupees 1,000.

"(2.) That a Sessions Judge, being a European British subject, should be empowered to pass a sentence on European British subjects of one year, or fine; and that, if the European British subject pleads guilty or accepts the Sessions Judge's jurisdiction, the Court may pass any sentence which is provided by law for the offence in question.

"(3.) That a European British subject convicted by a Justice of the Peace or Magistrate, should have a right of appeal, either to the Court of Session, or High Court, at his option.

"(4.) That in every case in which a European is in custody, he may apply to a High Court for a writ of *habeas corpus*, and the High Court shall thereupon examine the legality of his confinement and pass such order as it thinks fit."

MR. STEPHEN did not wish to enter at length into the reasons which had led the Committee to these conclusions. He might, however, say that an early amendment of the law in the way of a reasonable extension of the criminal jurisdiction over Europeans seemed to him absolutely necessary. As the law stood, a British subject could not be criminally punished by any tribunal other than the High Courts—a procedure which involved an immense deal of trouble and expense—except in a limited class of cases, such as petty assaults and the like, by fine extending to rupees 200, and, on non-payment of the fine, by imprisonment extending to two months. He could well understand how such a state of things came to exist. In former times, almost all the Europeans in the country held official positions, and would be liable to be punished by removal from their offices for any misconduct on their part, which was a considerable guarantee for their good conduct. The only other European residents were military men, who, of course, were subject to military tribunals and military discipline. But the number of Europeans now to be found in India had very largely increased, and their position in life was very different from what it was before. The degree in which they were subject to Government control, either as military men or persons in official employ, was weakened; and there was a much larger number of men over whom the Government had no hold whatever. It appeared to him, therefore, that every one would agree that the old state of the law was unsuitable to the state of things now existing, and that the only question as to which there could be any difference of opinion was the degree to which the criminal jurisdiction over British subjects should be extended: it was a matter in which no absolute line could be drawn; but a sort of rough analogy might be found in the jurisdiction of Magistrates and Courts of Quarter Session in England. The extent to which jurisdiction was proposed to be given over Europeans in the Mofussil was, in the case of conviction by a Justice of the Peace, imprisonment for three months, which, taking the imprisonment of a European in India as being twice as severe a punishment as his imprisonment in England, would be equal to imprisonment for six months in England. A Court of Session was empowered to pass a sentence of imprisonment for one year, which would correspond to two years' imprisonment in England. Since the passing of the Consolidation Acts of 1861, two years'

imprisonment was in almost every case the greatest extent to which a person could be imprisoned in England. Therefore, what the Committee proposed might be said broadly and roughly to consist in subjecting Europeans in India to such punishments at the hands of the ordinary Courts as could be inflicted on them at home by Magistrates in petty or quarter Sessions.

With regard to that portion of the resolution of the Committee which related to writs of *habeas corpus*, what the Committee proposed was to render a matter certain which was now attended with considerable doubt and uncertainty.

There was another important subject upon which the Committee had come to the following resolution:—

"RESOLUTION 2.—We think that the provisions of the Code ought to be extended to proceedings in the Presidency towns, but not so as to vary the procedure now in force in trials by jury in the Presidency towns. We are not, however, as yet in a position to say whether this can be more conveniently done in the present Bill or in a separate measure."

The grounds of this recommendation were sufficiently obvious. There was an obvious importance in having one system in force throughout the whole country, and though the English system was no doubt originally better than the Indian system, he thought that the Indian system was now the better of the two. They did not propose, as at present advised, to interfere with the procedure in trials by jury in the Presidency towns. The conditions which rendered trials by jury desirable did exist to a considerable extent in such towns: they had in fact been in existence in Calcutta for he did not exactly know how long, but he believed for a hundred years and more, and in Madras and Bombay for a very considerable time. But setting aside the procedure as to trials by jury, if the other parts of the Code of Criminal Procedure were examined, there would be found very little reason why a similar procedure should not be observed in all Courts. When a crime was committed, the offender would be arrested with or without a warrant according to the nature of the offence. He must be taken before a Magistrate who must commit him for trial before the Court of Session or the High Court; he would be tried, and if convicted, sentence would be passed. These were the steps to be observed under the Criminal Procedure Code, and it appeared to MR. STEPHEN that there was no good reason why there should be one system in one part of the country and another system in another part of the country. The matter would require to be very carefully considered in order that no mistakes should be made, and it might be found advisable to deal with the subject in a separate measure.

The third resolution had reference to a question which was referred to the Local Governments when this Bill was introduced; it was a question connected with the jury system in the Mofussil. The jury system, as the Council were aware, was introduced by the Criminal Procedure Code passed in 1861. It was then felt to be an experiment, because the whole system of trial by jury implied the existence of a state of things which was peculiar to a community of Englishmen, or a people with English ideas; and if it did succeed, it would succeed in spite of difficulties peculiar to India. The Committee had considerable doubts as to the course which ought to be taken in regard to the jury system in the Mofussil, and whether it ought to be maintained at all. There was, however, one point upon which they felt clear. They thought that the Judge, in cases in which he differed from the jury, should have power to refer the case to the High Court, and that the High Court should be empowered to pass final orders. In trials by jury a decree of finality attached to the verdict which attached to the decisions of no other tribunal in the country, and which was entirely opposed to the general spirit of the administration of justice in India. If a man was convicted before a Session Judge, he had an appeal to the High Court, where they discussed the whole matter, and if they thought justice had not been done, they would revise the decision. In England this could not be done, and the effect was that an irregular appeal to the Home Secretary was in practice allowed, by which the ends of justice were often defeated. Here, if a jury convicted, their verdict was absolutely final; and the only remedy available when a man was unjustly convicted in that way was a petition to the Local Government or to the Governor General in Council, as the case might be, for the exercise of the prerogative of mercy. That was a power to which MR. STEPHEN thought there was the very strongest possible objection. The administration of the law was one thing, and the exceptional setting aside of the law was quite a different thing. He admitted that there might be exceptional cases where, owing to peculiar circumstances, it would be proper for the Government to interfere to mitigate sentences which the Judge was bound to pass. But it appeared to MR. STEPHEN altogether improper that a man should be permitted to say "the Judge thinks I am guilty, but I tell you that I am innocent." Substantially that was an appeal; but it was an appeal to a person who ought not to accept the appeal; such questions ought to be left to the judicial authorities. The information before the Committee upon this subject, and the experience of the members of the Committee led strongly to the conclusion that failures of justice resulted from this circumstance.

Such were the resolutions of the Committee as to the three points of change in substantive procedure which they recommended, and they were brought forward in this way in order to give them the very widest publicity that they could have.

INDIAN EVIDENCE BILL.

The Hon'ble MR. STEPHEN then presented the second report of the Select Committee on the Bill to define and amend the Law of Evidence. He hoped that the Report of the Committee would be published in the Gazette next Saturday. This Bill had been very fully discussed in connection with the papers received on the subject from all parts of the country. He might observe that there were various points which had been the subject of criticism, and amendments had been made in the Bill to meet those criticisms. He, however, was able to say that, as far as he knew, there was a considerable concurrence of opinion that a law on this subject was wanted, and that this Bill should be passed substantially in its present form. Experience would show what further amendments would be required. He had the authority of many of the Judges of the High Courts to the fact that they considered it desirable that a Bill on this subject should be passed, although there were a great variety of suggestions as to particular amendments of the law. The amendments which had attracted most attention were certain sections of the Bill relating to the cross-examination of witnesses by barristers and advocates. The provisions in the Bill on this subject had been considerably altered, but he would not at present enter into any of the questions which were dealt with in the Report of the Committee. The alterations which the Committee recommended would be seen when the report was published. He proposed that the Bill should lie before the Committee for a reasonable time, and that it should be finally submitted to the Council four or five weeks after the publication of the Report.

The Council adjourned to Tuesday, the 13th February 1872.

CALCUTTA;
The 30th January 1872.

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

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