Wednesday,
25th June, 1884

ABSTRACT OF THE PROCEEDINGS

OF THE

Council of the Governor General of India,

LAWS AND REGULATIONS

Vol. XXIII

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Council of the Governor General of India,

ASSEMBLED FOR THE PURPOSE OF MAKING

LAWS AND REGULATIONS

1884

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

The Council met at Government House, Simla, on Wednesday, the 25th June, 1884.

PRESENT:

His Excellency the Viceroy and Governor General of India, K.G., G.M.S.I., G.M.I.E., *presiding*.
His Honour the Lieutenant-Governor of the Panjáb, K.C.S.I., C.I.E.
His Excellency the Commander-in-Chief, G.C.B., C.I.E.
The Hon'ble J. Gibbs, C.S.I., C.I.E.
Lieutenant-General the Hon'ble T. F. Wilson, C.B., C.I.E.
The Hon'ble C. P. Ilbert, C.I.E.
The Hon'ble Sir S. C. Bayley, K.C.S.I., C.I.E.
The Hon'ble T. C. Hope, C.S.I., C.I.E.
The Hon'ble Sir A. Colvin, K.C.M.G., C.I.E.
The Hon'ble D. G. Barkley.

KHOJÁ SUCCESSION BILL, 1884.

The Hon'ble MR. ILBERT moved for leave to introduce a Bill to amend and define the law of Testamentary and Intestate Succession to Khojás. He said:—

"The Khojás are a small sect who were converted from Hinduism to Muhammadanism about 400 years ago, but who notwithstanding their conversion still retain to a great extent their Hindu laws and usages. They are, as a rule, traders by occupation, and they are to be found in almost all the trading communities of Western India, and on the seaboard of the Indian Ocean,—not only in British India but in such places as Cutch, Muscat and Zanzibar. It appeared, from some enquiries made in a lawsuit heard about 18 years ago, that there were then about 2,800 Khojá houses or families in Sindh, about 5,000, in Kathiawar, a considerable number (the precise number is not stated) in Cutch and Guzerat, 450 in Zanzibar, 400 in Muscat, and about 1,400 in Bombay and the immediate neighbourhood. There are Sunni Khojás and Shia Khojás, but the great majority of them are Shias, of the particular variety known as

Shia Imámí Ismailís, who owe spiritual allegiance to the hereditary Imáms of the Ismailís. The representative of these hereditary Imáms was, at the time when the present legislation was first contemplated, and until quite recently, a Persian nobleman, known as His Highness Ágha Khán, a man of romantic history and romantic lineage, claiming descent in direct line from Alí, the Vicar of God, through the seventh and (according to the Ismaili creed) the last of what are called the revealed Imáms—Ismail, the son of Jaffir Sadiq. This nobleman, after a series of adventures in his own country, in the course of which he seems to have seized and held for some time the Province of Kirman, fled to Sindh and there raised a body of light horse which was of some service to General Nott and General England during the first Afghan war (in the years 1841 and 1842), and afterwards to Sir Charles Napier in his conquest of Sindh. In 1845 he went to Bombay, and there spent, with one short exception, the remainder of his days, living in considerable state and enjoying the homage of his spiritual followers. This homage appears to have been of some substantial value, for it is stated that his yearly income, derived from his votaries in various parts of India, and, it is said, in some remote parts of Asia, averaged about £10,000 sterling. The greater part of this income is said to have been spent by his late Highness in horse-racing, a pursuit of which he was for some time one of the most munificent patrons in Bombay. His Highness Ágha Khán died last year, and has been succeeded in the Imámship by his son, who is known as His Highness Ágha Alí Sháh. So much for the spiritual head of the Shia Khojás, whose peculiar relation to his adherents has a very intimate bearing on some of the provisions of the Bill which I am asking leave to introduce.

"Now, the Khojás are, as I have said, subject partly to the Hindu and partly to the Muhammadan law, and they retain the former law to such an extent in matters connected with property and succession that it is presumed to apply to them until the contrary is proved. The extent to which it does apply to them has always been a matter of considerable doubt, and, as they are a wealthy community, the doubts on the subject have given rise to a great deal of litigation, insomuch that the Khojás occupy a space in the reports of the Bombay High Court quite disproportionate to their numbers.

"Among the suits relating to them are three of especial importance—one decided by Sir Erskine Perry in 1847 and reported by him in his volume of Oriental cases; another decided in 1866, after a hearing of 24 days, by Sir

Joseph Arnould, whose elaborate and most interesting judgment is our principal source of information about the Khojás; and a third, decided in 1875, by Sir Michael Westropp, after a hearing which occupied the Lower Court for twenty-four days, and the Appellate Court for four days. In this last case Sir Michael Westropp, the then Chief Justice, after describing the state of the law, went on to remark:—

'It is, however, evident that the Khojás are not as firmly bound in matters of succession and inheritance by the Hindu law as Muhammadans proper are by the Muhammadan law and the Hindus by the Hindu law, and hence it is that it would not be reasonable to require such stringent proof of a custom of inheritance amongst them differing from ordinary Hindu law as from a Hindu.

'Now, it is manifest that such a state of the law must greatly encourage litigation, and we cannot help thinking that it would be most desirable that the Government should take steps, as was done in the case of the Pársís, to ascertain the views of the majority of the community on the subject of succession, and should then pass an enactment giving effect to those views. Unanimity, of course, could not be expected, but the rules which were found generally to prevail might be made law; and though the religious differences existing among members of the Khojá caste might create some difficulty, it would not, we think, be insuperable.'

"Sir Richard Temple's Government acted on this suggestion and appointed a Commission, of which Mr. Justice Maxwell Melvill, of the Bombay High Court, was President, and of which the other members were His Highness Ágha Alí Sháh and three other gentlemen representing the Shia Khojás, one gentleman representing the Sunni Khojás, and Mr. Spencer, then Acting First Judge of the Small Cause Court at Bombay.

"The Commission took the greatest pains to ascertain the customs and views of the Khojá sect in the Presidency of Bombay and other parts of the country, and after much consideration and discussion agreed on a draft Bill, subject to a dissent on certain specific points which was signed by His Highness Ágha Alí Sháh and by one only of the three other members representing the Shia division. This Bill was approved by the Government of Bombay and sent up to the Government of India, and it constitutes the basis of the Bill which I am now asking leave to introduce. It raised several difficult questions, and it has been the subject of a great deal of correspondence between the Goverment of India and the Government of Bombay—a correspondence which I found in active progress when I came out here, and which continued until the latter end of last year.

"I do not propose to trouble the Council with the details of the Bill, but to confine myself to the more important of the questions of principle which it raises, and to explain the course which it is proposed to take with respect to each of those questions and the reasons for adopting that course.

"The first of these questions is raised by a section of the Bill, which defines the application of the measure—a matter which was not clearly provided for in the Bill prepared by the Commission. The section proposes to enact that the property, whether moveable or immoveable, in British India of a Khojá dying after a specified day shall be regulated by the rules contained in the Act wherever he may have had his domicile at the time of his death. If you compare this provision with the corresponding section of the Indian Succession Act, you will find that, whereas it coincides with it as respects immoveable property, it involves an important deviation from it as respects moveable property; for section 5 of the Indian Succession Act says:—

'Succession to the immoveable property in British India of a person deceased is regulated by the law of British India wherever he may have had his domicile at the time of his death. Succession to the moveable property of a person deceased is regulated by the law of the country in which he had his domicile at the time of his death.'

"Whereas the Bill proposes to disregard domicile in the case of moveable as well as in the case of immoveable property. Now, the rule embodied in the Indian Succession Act is not only the rule of one of the most important of our Codes, but also, as a rule of what is called private international law, has obtained general acceptance among the civilized nations of the West; and we should not be justified in departing from it unless there appeared to be good reason for supposing that it is not suitable to the peculiar circumstances of the Khojás. I think that there are such reasons.

"In determining the question by which rule the succession to moveable property should be regulated, the choice is practically between the law of the domicile of the deceased and the law of the situs of the assets; that is to say, the law of the place where the man had his home and the law of the place where he left his property. Western nations have generally agreed to apply to succession to moveable property the former rule—the rule of domicile—and not the latter. The objections urged against applying the law of the situs to moveable property are chiefly that a man's moveables are apt to be scattered over many jurisdictions each of which has a readily ascertainable law of its own; that accordingly, if the law of the situs is applied to them, his estate will be broken

up into many fragments, all governed by different laws; that a man's moveables may change their place; that the most important of them—goods employed in commerce—are constantly changing their place; that accordingly, if the law of the situs is applied, it will be impossible to foresee the particular law under which they will fall on his death; and, lastly, that the rule of the law of situs does not clearly provide for the portion of the assets which consists of debts or other obligations existing in favour of the deceased. Various theoretical reasons have also been adduced for preferring the law of the domicile, but it is probably practical considerations of the kinds to which I have referred that have turned the scale in its favour.

"Now, do these considerations apply to the case of Khojás dying domiciled out of British India and leaving moveable property in British India? The places out of British India in which Khojás are principally found are, as I have said, such places as Cutch, Zanzibar and Muscat. Now, at a place like Zanzibar there is nothing that can be called a territorial law of succession, and the Courts would probably try to apply the personal law of the deceased, which in the case of the Khojá is *ex hypothesi* unsettled and unascertainable. Thus, there would be, in such a case, no local law of the situs which would conflict with the law applying to the assets in British India, and no law of the domicile to which recourse could be had; so that to give the law of the domicile a preference over British Indian law would be to substitute a congeries of indefinite and half established customs for a law to the application of which no reasonable objection could be made. This being so, the balance of convenience would appear to be, in the case of the Khojás, against allowing the law of the domicile to prevail as to British Indian assets. And a further advantage of adopting the other rule would probably be that, as Consular Courts at Zanzibar and elsewhere would naturally apply British Indian law, the rule would probably come in course of time to be adopted as a personal law applicable to Khojás in all foreign States in this part of the world.

"This was the first question of principle which we had to settle. The next related to the difficult subject of mixed marriages. The Khojás are a very exclusive community, and look with great disfavour on marriages with any person outside their body. None of them deny—at least so we are informed by the president of the Commission—that the marriage of a male Khojá to a female who is not a Khojá is perfectly valid if within the limits allowed by Muhammadan law. But at the same time they are anxious to go as far as they can in the direction of discouraging marriages of this kind. Accordingly, all the Khojá members

of the Commission agreed that only a Khojá widow should be entitled to inherit from her husband; but the Sunni Khojás, who in this matter appear to hold views of a slightly more liberal shade than their brethren of the Shia division, were willing that the sons of a non-Khojá's wife should take some share in the inheritance. Eventually the Commission agreed upon what they called a compromise. They confined to a Khojá widow the rights of a widow in her husband's inheritance, but they invented a term—'alien son'—which they defined as meaning 'the male offspring of a male Khojá and of a female, not being a Khoja, legally married according to the rules of Muhammadan law in force in the sect to which the Khojá in question belongs.' But when you came to see what the rights of the alien son were to be in the inheritance, it turned out that he had no rights at all, and that he was in all respects, except the mere name, treated as if he were illegitimate. I do not refer to daughters, because daughters were placed on an entirely different footing with respect to inheritance. This so-called compromise approved itself not only to the Commission but to the Bombay Government; but with all deference to those high authorities it appears to me that, so far from being a compromise, it was a complete surrender of the principle at stake. The practical effect of the proposals of the Commission would be to place the non-Khojá widow for all the purposes of the Bill on the same footing as a concubine, and the children of a non-Khojá wife on the same footing as bastards; and there is not much difference between doing this and declaring the marriage invalid.

"Now, there are to my mind serious objections on principle to the acceptance of this proposal. Although in legislation of this kind, which is avowedly an attempt to define and make more precise certain usages and customs, we are bound to follow as closely as we can the usages and feelings of those for whom we are legislating, yet there are limits to the distance which we are justified in going in this direction, and the legislature cannot, in my opinion, go as far as the Courts of law. There are, as we all know, certain customs and usages which a Court of law declines, and very properly declines, to enforce on the ground that they are immoral and contrary to public policy. But there are also customs which a Court of law might feel itself bound to recognise or even to enforce, but which nevertheless the legislature would hesitate to impress with the seal of its authority. It is one thing to recognise a rule as existing, but quite another to give it the *imprimatur* of the legislature as a rule which ought to exist. Under what circumstances and to what extent the legislature would be justified in interfering to set aside restrictions on marriage based on religious or caste differences is a question

on which I need not enter, and about which there would probably be some difference of opinion. But on one point I think we should be all agreed, and that is that we should not interfere by legislation to enforce such restrictions. At least I for one would never be a party to any legislation which should throw a doubt on the validity of mixed marriages.

"But the argument against adopting the proposals of the Commission goes further than this; for although the majority of Khojás look with disapproval on marriages of this kind, and possibly regard them as sinful,—opinions with which we have not the slightest wish to interfere,—yet, as I have said, it does not appear to have been even asserted that such marriages are by existing Khojá law or custom invalid. We are not now proposing to pass a law defining or amending the law of marriage among Khojás; and in a Bill which is not dealing specifically with the subject of marriage it would be manifestly improper to throw doubt by a side wind on the validity of certain marriages which, according to existing law and usage, are perfectly valid.

"Accordingly, in the Bill which I am asking leave to introduce you will find no distinction made between Khojá widows and non-Khojá widows, and no definition of an 'alien son.' The Bill defines 'son' to be a legitimate son, and leaves 'widow' undefined, and then proceeds to declare the rights of sons and widows, trusting to the Courts to decide as they will on principles lying outside the law of succession who are legally entitled to the status of sons and widows.

"Whilst I am on the subject of definitions, I may mention that I have omitted the definition of 'undivided family,' which was to be found in the Commission's Bill. The institution of the undivided family appears to prevail among the Khojás, and to resemble, but to be by no means identical with, the undivided family of Hindu law. Now, he would be a bold man who would attempt to define precisely and exhaustively the characteristics of the Hindu undivided family, but it would require still greater boldness to attempt to define the undivided family with a difference which is to be found among the Khojás. It is true that the Commission had attempted such a definition, but when the matter came to be examined it was found that the definition would not hold water. Under these circumstances, we thought it the more prudent course to leave the term undefined.

"The next point on which the Bill departs from the recommendation of the Commission relates to the succession of remote relations to the inheritance of a

person who dies intestate. The Commission's Bill admitted to the succession only those of the 'more distant relatives' of the intestate who were on the father's side, and confined it to such of them as are within the seventh degree of kindred. On failure of this limited class of distant kindred, section 42 gave the property 'to the *jamát* of that sect of the Khojás to which the intestate belonged at the time of his death, to be held and applied according to to the customs of the said *jamát*.' Even this did not satisfy the two dissenting members of the Commission and some of the other adherents of His Highness Ághá Khán, who, as Imám, was the person chiefly interested in the succession of the *jamát*. They contended that the *jamát* should come in after the nearer relations. This point was very carefully considered by the Government of India in consultation with the Bombay Government, and the conclusion they came to was that it was impossible to exclude the heirs of deceased persons in favour of any such institution as a '*jamát*' or any person or authority representing such an institution. Of course, it is quite open to any Khojá who desires that his property should be devoted to any charitable or religious purpose, or should be enjoyed by any spiritual person for whom he entertains a special veneration, to dispose of his property by will, or otherwise in accordance with law; but if he dies intestate, it would be contrary to all established principles to enact that his property should devolve otherwise than upon his relatives.

"Apart from this objection on the ground of principle, there appear to be practical objections to the proposal as formulated by the Commission. You ask what a *jamát* is. It appears from Sir Joseph Arnould's judgment in one of the cases to which I have referred that it is an assembly in council of all the adult male members of the Khojá community of the place. Now, of course, it is obvious that doubts might arise as to the constitution of a *jamát* with respect to the religious belief, the residence of the deceased, his attendance at the *jamát*, and on other similar matters. Then there might be doubts as to who were the other persons actually belonging to the *jamát* to which the deceased belonged so as to be entitled to the property; and further there might be doubts as to how the property of a deceased intestate Khojá was to be held and the objects to which it was to be applied. It is quite true that the Bill prepared by the Commission proposed to say that the property was to be held and applied according to the customs of the *jamát*; but if you refer to Sir Joseph Arnould's judgment, you will find that, as a matter of fact, there are no customs at all to look to." (The Hon'ble MR. GIBBS.—"Excepting as to dinners, I think.)" "There may

possibly be customs as to dinners, but the fact appears to be that, though a *jamát* collects large sums of money through its officers, it only does so on behalf of the Imám; the money collected is passed on to him, and if the *jamát* wants any portion of it for its own purposes, such as the dinners to which Mr. Gibbs has referred, or the keeping up of the *jamát-kháná* (the council-room or guildhall of the community), it can procure it only as a grant from the Imám. Practically, therefore, to give the money to the *jamát* is to give it to the Imám, and it appears to be absolutely in the discretion of the Imám to spend the money as he pleases; and it appears from the judgment of Sir Joseph Arnould that the late Imám used to devote the money derived from this source to such purposes as horse-racing. Practically, therefore, if you give the succession to the *jamát*, it is the same thing as giving succession to the Imám, and the property may be devoted by him to such purposes as he thinks fit, whether religious or secular. It has been said that there is practically no difficulty in ascertaining how the money ought to be spent, but it is quite clear that we cannot legislate on a basis such as this. We should have to define the constitution of the *jamát*, and we should have to define carefully how money belonging to the *jamat* should be applied, and it would be impossible to place the property at the absolute disposal of any individual, in whatever degree of veneration he might be held. That being so, we have excluded the *jamat* from the succession, and the Bill extends the succession to relatives of the intestate, both on the father's and on the mother's side, without limit of degree, and then goes on to apply the ordinary rule which makes the Crown the ultimate heir in the very rare occasions in which the owner of property dies and leaves no person entitled to succeed under the ordinary provisions of law.

"One of the most difficult parts of the Bill—to pass to another subject—was that which relates to the rights and interests of a widow or mother taking by succession in cases where there are in existence certain male relations entitled to the inheritance subject to her rights. The interest of a Khojá female succeeding under these circumstances resembles the well-known estate of the Hindu widow, but with very important differences, some of which are not easy to understand or explain. The provisions of the Bill on this subject have been worked out with very great care by Mr. Fitzpatrick, who has devoted an immense deal of trouble to the Bill, and are merely a development, with the requisite amplifications and the additions of the necessary machinery, of the proposals formulated by the Commission. On one point we have depart-

ed, not indeed from the substance, but from the language, of the Bill prepared by the Commission. They proposed to call the widow's interest a life-estate, and to describe those who came after her as 'reversioners.' But terms like these, borrowed from the highly technical and artificial nomenclature of English law, are always apt to suggest false analogies when applied to Hindu legal conceptions, and we thought it better to discard them. For the purpose of describing the position of the Khojá female taking the limited estate which is given her under this Bill, we have suggested the term 'restricted owner.' The chief advantage of this term is that it has not already any technical meaning, but it is quite possible that some one may be able to suggest some more appropriate phrase, and, if so, we shall be only too glad to adopt it. The rights and liabilities of this restricted owner are carefully defined in the Bill; but I will not dwell on them now, because they are of a very technical character and will be found fully explained in the Statement of Objects and Reasons. As to the power of alienation which should be given to a widow or mother taking by succession, there was not a complete agreement among the members of the Commission. His Highness Aghá Alí Sháh and some of his adherents were anxious to give her somewhat larger powers of alienation for religious purposes; but on this point the Government of India, after hearing the arguments adduced on both sides, came to the conclusion that they ought to support the views of the majority of the Commission. So much as to intestate succession.

"In dealing with the wills of Khojás, the Bill, following generally the lines of the Hindu Wills Act, proposes to apply to them certain sections of the Indian Succession Act with modifications; but there are difficulties, with which some of us are familiar, connected with the construction of the Hindu Wills Act, which made it necessary to depart in some points from the form and language of that measure. The difficulties to which I refer are these. The Succession Act contains provisions which give or assume the existence of a power of disposition by will in favour of unborn persons. The Hindu Wills Act applies these provisions to certain Hindus, but qualifies their application by the proviso that nothing in the Act is to authorize a Hindu to create in property any interest which he could not previously have created, that is to say, could not have created before the passing of the Hindu Wills Act. Now, in the famous *Tagore* case, which was pending when the Hindu Wills Act was passed and was decided shortly afterwards, the Judicial Committee of the Privy Council held that a Hindu could not under his own law, as unaffected by our legislation, make any disposition by will in favour of an unborn person; and the High Court at Calcutta, in a judgment delivered a short time ago, and against

which no appeal has, so far as I know, been lodged, have decided that, under the proviso in the Hindu Wills Act, when read in connection with the decision of the Judicial Committee in the *Tagore* case, a Hindu has no power to make a disposition by will in favour of an unborn person, notwithstanding the incorporation in the Hindu Wills Act of certain sections which imply the existence of such a power; that is to say, they have held that the power of a Hindu to leave property by will to an unborn person is precisely the same as it was before the Hindu Wills Act was passed; in other words, that he has no such power at all. But the Judges made some strong remarks as to the inconsistency between the language of the incorporating Act and the language of the sections which it incorporated. After those remarks it was quite impossible to take the Hindu Wills Act as a precise model for legislation in the present case, and, practically, two courses lay open to us, either to give Khojás the same power of disposition in favour of unborn persons as is given by the Indian Succession Act, or else to place them in the same position as Hindus under the Hindu Wills Act are declared by judicial decision to occupy; that is to say, the position of not having any power to make such a disposition by will. It was clear that the question as to which of these two courses should be adopted stood on grounds altogether independent of those on which the perpetuity question among Hindus had been discussed; for it must be borne in mind that the Khojás are not Hindus, although they have in certain particulars retained some of their customs and usages. Under these circumstances, the Government of India consulted the Bombay Government as to which of the two courses should be adopted, and intimated in their communication that they would be willing to adopt whichever of the two courses might be considered most expedient having regard to existing practices and usages among the Khojás. The reply which we received was to the effect that, as far as appeared, there was no recognized definite rule among the Khojás bearing on the point; that it was unlikely that any attempt had hitherto been made among them to create by will an interest in favour of an unborn person; that there was thus a *tabula rasa*; and that it was quite open to the legislature to legislate on the subject as it thought best, without any fear of violating an existing custom or of running counter to any prejudice or desire of the Khojá community. This being so, the Government of India have come to the conclusion that it is not desirable to confer by law on the Khojás any power of testamentary disposition in favour of persons not in existence at the time of the testator's death; and accordingly all portions of the Indian Succession Act which confer or assume the existence of such a power, have, as far as practi-

cable, been omitted from the sections which we have incorporated, and we intend to insert a proviso to the effect that nothing in the portions of that Act made applicable shall confer such a power. It appears to me that, if the question is to be settled by reference to considerations of general expediency apart from any pre-established usage, the balance of convenience is in favour of not superadding to the complications which arise out of Hindu family law the further complications which we all know are apt to arise out of testamentary settlements.

"I may add that, in order to meet the objections which were urged by the Calcutta Judges against the practice of wholesale incorporation by reference, I propose to put in a schedule to the Bill those sections of the Indian Succession Act which are to be incorporated in it, showing precisely the modifications which are to be made in the sections as incorporated.

"These, I think, are the only points in connection with the Bill on which I need touch at the present stage, and I will merely conclude by apologizing for the length to which I have been compelled, by the nature of the subject, to carry my explanations."

His Excellency THE PRESIDENT SAID:— "It is needless that I should say that ample time will be given for the consideration of this Bill by the parties concerned before it is proceeded with in its various stages."

The Motion was put and agreed to.

INDIAN SALT ACT, 1882, AMENDMENT BILL.

The Hon'ble SIR A. COLVIN introduced the Bill to amend the Indian Salt Act, 1882, and moved that it be circulated for the purpose of eliciting opinion thereon.

The Motion was put and agreed to.

The Hon'ble SIR A. COLVIN also moved that the Bill and Statement of Objects and Reasons be published in the local official Gazettes in English and in such other languages as the Local Governments might think fit.

The Motion was put and agreed to.

1884.] [*Mr. Barkley.*]

PANJÁB COURTS BILL, 1884.

The Hon'ble MR. BARKLEY moved for leave to introduce a Bill to amend the law relating to Courts in the Panjáb. He said:—

"The object of this Bill is to make the changes in the law under which the Panjáb Courts are now constituted, which are required for the purpose of giving effect to the arrangements for the improvement of the judicial agency and the reform of the appellate system, which form part of the scheme for the reorganization of the civil administration in the Panjáb recently sanctioned by the Secretary of State for India on the recommendation of Your Lordship's Government. These changes are so numerous that the most convenient mode of carrying them out appears to be to repeal the Panjáb Courts Act of 1877 and include the whole of the law on the subject, except so far as it is to be found in the Criminal Procedure Code, in the Bill which I have now the honour to ask leave to introduce.

"The arrangements proposed involve a further step in the direction of relieving from judicial duties officers employed in the revenue and general administration of the Province. When the Panjáb Administration was organized, thirty-five years ago, all its officers, from the members of the Board of Administration down to the Tahsíldárs, were invested with civil and criminal jurisdiction in addition to their revenue and executive functions, and there can be no doubt that this was the arrangement best suited to the earlier days of the administration of a new province, and that it was attended with many advantages so long as it was possible to maintain it. But it was almost inevitable, that, in the administration of an extensive province like the Panjáb, some division of labour should become necessary. The growth of population, the extension of agriculture, the development of trade, the steady increase of litigation, the introduction of a stricter system of law and procedure, and the increasing demands of the central administration upon local officers, have all added to the amount of work to be done, while the simplicity of system which enabled a single officer to control the administration of a district or division in all departments has disappeared as departments have been multiplied. It has therefore become necessary from time to time to increase the number of officers, and to arrange for the distribution of work between them. When the Board of Administration was dissolved, the Chief Commissioner was relieved of judicial functions by the appointment of a Judicial and a Financial Commissioner, of whom the former became the head of the Judicial Department. The duties

of the Judicial Commissioner, however, were by no means purely judicial. He had the control of important branches of the administration, such as the police and the public works of the province, and it was not until the Chief Court took the place of the Judicial Commissioner, early in 1866, that any Court, except a few Small Cause Courts, could be said to be presided over by officers exclusively engaged in the judicial administration.

"In 1875, the increasing pressure of work made it necessary, in order to give Deputy Commissioners and Tahsíldárs time for their other duties, to relieve them, in a large measure, of civil judicial work. This was done, under Act XIV of 1875, by the appointment of a number of special officers, known as Judicial Assistants and Munsifs, upon whom the powers of a Deputy Commissioner and of a Tahsíldár were respectively conferred, and these officers have been mainly, though not always exclusively, employed in the discharge of judicial functions. The Commissioner of Pesháwar has also been practically relieved of his judicial duties by the appointment of a Civil and Sessions Judge, and some other Commissioners have been partially relieved of judicial work by the appointment of two Additional Commissioners.

"It has now become necessary to make further provision for the judicial duties at present performed by Commissioners and Additional Commissioners and by the Civil and Sessions Judge of Pesháwár, and as the number of appeals to the Chief Court is annually increasing and has for several years been greatly in excess of what three Judges—the permanent strength of the Court—could dispose of, it has been thought advisable to reduce the number by giving greater finality to the decisions of Courts subordinate to the Chief Court. It is, therefore, now proposed to constitute seven Divisional Courts, consisting ordinarily of two Judges each, which will take the place of the Commissioners' Courts and of that of the Civil and Sessions Judge of Pesháwar, and at the same time to make considerable alterations in the law regarding the right of appeal in civil suits. The number of Judges sanctioned for these Divisional Courts being thirteen, it is proposed, in order to complete the seven Courts, to take power to appoint the Commissioner of a Division to be one of the Judges; but, unless where this is done, Commissioners will be relieved of the judicial duties now devolving upon them. It is, however, proposed to transfer certain classes of suits relating to land, which can be better disposed of by Revenue-officers than by purely judicial officers, from the Civil to the Revenue Courts, and in these cases Commissioners will still exercise appellate jurisdiction. There is no doubt that, in consequence of the proposed changes, the work of Commissioners will be greatly reduced, and this

renders possible a reduction in the number of Commissioners east of the Indus, as well as the abolition of the appointments of the Civil and Sessions Judge of Peshâwar and the Additional Commissioners.

"It is proposed to empower the Chief Court to make rules for the exercise of the powers of the Divisional Court by one of the Judges of that Court, subject to the proviso that no order other than an interlocutory order, and no decree, sentence or decision of any Court, should be reversed by any Judge sitting alone. The Chief Court at present possesses an analogous power to make rules for the exercise of its own powers by one or more of its Judges.

"The reason for proposing that these Courts should consist of two Judges was that it was considered that this would strengthen them for appellate purposes and allow of finality being given to their decisions passed in appeal. There is of course the drawback that more Judges will be required to do the same work, and this may make it more difficult to fill up the appointments properly at first. But the greater number of appointments of this class may induce more officers to prepare themselves to fill them; and, where two Judges concur in reversing or modifying the decision of a subordinate Court, there will be less reason for allowing a further appeal than where a single Judge of appeal has come to a different decision from that of the first Court on the same evidence.

"For the Court of the Deputy Commissioner, again, it is proposed to substitute the Court of the Assistant Judge, and to relieve Deputy Commissioners of their civil judicial functions, except in a few of the lightest districts, where the Deputy Commissioner may be empowered to act as Assistant Judge in addition to his other duties.

"It is provided that the new Divisional Court should be the District Court or principal Court of original civil jurisdiction within its division, power being reserved to Government to confer all or any of the powers of a District Court upon an Assistant Judge, in order to provide for the disposal of certain classes of cases which are only cognizable by a District Court.

"The jurisdiction of the Divisional Court and of the Assistant Judge in original civil suits will, like that of the Deputy Commissioner at present, be unlimited as respects the value or amount in litigation, and power is taken to give certain Subordinate Judges jurisdiction extending to Rs. 5,000, to take the place of the officers now exercising the full powers of an Assistant Commissioner, whose jurisdiction extends to Rs. 10,000. All other officers empowered to decide civil

suits, including the Munsifs, will be invested with the powers of a Subordinate Judge of the second, third or fourth class, that is, with powers to decide suits the amount or value of which extends to Rs. 1,000, Rs. 500 or Rs. 100, respectively.

"Power is also taken to invest Assistant Judges and Subordinate Judges with certain Small Cause Court jurisdiction, as may now be done in Bengal, the North-Western Provinces and Oudh, under the corresponding Acts applicable to those provinces.

"The changes made by the Bill in the appellate system are mainly directed to reducing the number of appeals at present allowed. The second appeal on a question of law or custom now allowed by the Civil Procedure Code in suits other than those which would be cognizable in a Small Cause Court, and the further appeal on the whole case, when an Appellate Court has reversed or modified the decree of a Court of original jurisdiction, which is permitted by sections 38 and 39 of the Panjáb Courts' Act of 1877, are both taken away, and the decisions of Appellate Courts are made final, except that the Judges of a Divisional Court are enabled, when they differ as to the judgment which should be passed on an appeal, or when some question of law or custom or general interest is involved, to grant a certificate permitting a further appeal to the Chief Court, if they think the case of sufficient importance to justify a further appeal. The abolition of second appeals takes away a great part of the appellate work for disposal by the Chief Court, while the abolition of further appeals, with the above exception, will greatly relieve the Divisional Courts.

"To admit of finality being given, as far as possible, to appellate decisions, appeals to Assistant Judges are confined to suits not above Rs. 500 in value, either of the Small Cause Court class, or of any other class which the Chief Court, with the sanction of the Local Government, may determine to put on the same footing for purposes of appeal; and appeals in suits above Rs. 5,000 in value, as well as appeals in any other suits decided by the Divisional Court, are declared to lie to the Chief Court, while all other appeals allowed by law will lie to the Divisional Court. A few first appeals now cognizable by Commissioners and all further appeals hereafter to be allowed will thus lie to the Chief Court, while appeals in some cases now cognizable by Deputy Commissioners will lie to the Divisional Court, which will be relieved of all further appeals and a few first appeals.

"It being proposed, as already mentioned, to transfer the jurisdiction in certain classes of suits relating to land to the Revenue Courts, a chapter has been

added to the Bill making these cases cognizable by the Revenue instead of by the Civil Courts, and containing other provisions rendered necessary by the transfer. Most of these classes are similar to those made cognizable by Revenue Courts by section 93 of the North-Western Provinces Rent Act, 1881; and, while appellate jurisdiction is not given, as in that Act, to the Civil Courts of appeal, but to the superior Revenue-authorities, thus entirely relieving the Civil Courts of a class of cases which Revenue-officers are likely to be in a better position to dispose of satisfactorily, the provisions of the Bill as to the powers of Revenue Courts and as to the cases in which first and further appeals should lie are in part based on the model furnished by that Act. This part of the Bill has undergone less discussion than the chapters relating to the Civil Courts, but it would be difficult to adapt the provisions of the Bill as to appeal in civil suits to the Revenue Courts, which will be differently constituted from the Civil Courts; and it is at the same time not desirable to continue the system of second appeals allowed by the Civil Procedure Code, or to allow further appeals to the same extent to which these are now permitted by the Panjáb Courts' Act. The provisions now proposed will restrict further appeals to a few of the more important classes of cases, the first appeal in which will lie to Commissioners and the further appeal to the Financial Commissioner.

"Power is taken for the Local Government, with the previous sanction of the Governor General in Council, to make rules regulating the procedure of the Revenue Courts in the cases thus transferred to their jurisdiction, it being at the same time provided that, until such rules are made, these Courts should be guided by certain parts of the Civil Procedure Code, and that the Financial Commissioner should be deemed to be the High Court within the meaning of that Code.

"As sanction has been given to the appointment of a second Financial Commissioner, provision is also made for the distribution of business between Financial Commissioners, and power is given to one Financial Commissioner to refer any question arising in an appeal pending before him to the other for his opinion thereupon.

"Owing to the greater finality given to appellate decisions by the provisions of this Bill, the revisional jurisdiction of the Chief Court under the Civil Procedure Code, sections 617 and 622, is certain to be more largely resorted to than hitherto, and some supplementary sections have, therefore, been

added to the Bill, interpreting certain expressions to be found in those sections, and increasing the fee leviable on an application to the Chief Court under section 622 for the exercise of its revisional jurisdiction, but empowering the Court to direct the refund of this fee when the application has been successful, if it thinks proper to do so.

"Other minor modifications of the law will be found to be sufficiently explained in the Statement of Objects and Reasons. The only one of these which need be mentioned now is that, in section 21, interlocutory orders are excepted from the proviso declaring that a single Judge of the Chief Court, in the exercise of his appellate jurisdiction, may not reverse the order of any Court; and the Chief Court is also enabled to provide by rule for the constitution of a full bench of the Court, and to delegate to one of its Judges the power of determining what Judges shall sit alone or as a bench of the Court. This is necessary, as, although the present Panjáb Courts' Act provides for the disposal of certain cases by a full bench, it contains no explanation of this expression, and a doubt has therefore arisen whether a full bench can be constituted when, from any cause, it is not possible for all the Judges for the time being appointed to the Court to be present. Thus, if a Judge is absent on leave and no successor has been appointed, as happened on two occasions last year, or if a Judge is from illness unable to attend Court, it is doubtful whether, under the present law, a full bench sitting can be held. To remove this difficulty, it is proposed that, when the Chief Court consists of more than three Judges, it may by rule declare what number of Judges, not being less than three, shall constitute a full bench and prescribe the mode of determining what Judges should sit together for the purpose.

"In the High Courts established by Royal Charter, the Chief Justice, under the Act of Parliament providing for the establishment of those Courts (24 & 25 Vic., c. 104, section 14) regulates the sittings of the Judges either alone or as division benches. In the Chief Court, there being no Chief Justice, and no such power being given to one of the Judges by the existing law, the power to regulate the sittings of the Judges resides in the Court as a whole; and, unless this power is conferred by law upon the senior Judge (who is declared to be the Chief Justice within the meaning of the Criminal Procedure Code), the Court should be authorized to delegate the power subject to any rules it may make for its exercise.

"I need only, in conclusion, refer to two other questions which have been discussed in connection with the subject of the present Bill, but with which it

does not deal. These are the amendment of the description of the cases cognizable by Small Cause Courts contained in section 6 of Act XI of 1865, and the mode of determining the value of a suit for purposes of jurisdiction, which is, in many cases, very different from its value for the purpose of levying a court-fee on its institution. These questions are as important in other parts of India as in the Panjáb, and can be more appropriately dealt with in connection with the amendment of the general law than in a local Bill; and the former of them, at least, will, it is understood, be taken up separately."

The Motion was put and agreed to.

The Hon'ble MR. BARKLEY also introduced the Bill.

The Hon'ble MR. BARKLEY then moved that the Bill and Statement of Objects and Reasons be published in the *Panjáb Government Gazette* in English and in such other languages as the Local Government might think fit.

The Motion was put and agreed to.

The Council adjourned to Wednesday, the 9th July, 1884.

SIMLA;
The 1st July, 1884.

D. FITZPATRICK,
Secretary to the Government of India,
Legislative Department.

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