

Friday, August 20, 1880

**COUNCIL OF THE GOVERNOR GENERAL
OF INDIA**

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ABSTRACT OF THE PROCEEDINGS

OF THE

Council of the Governor General of

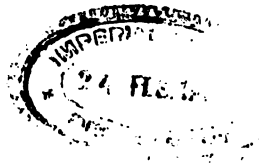
ASSEMBLED FOR THE PURPOSE OF MAKING

LAWS AND REGULATIONS.

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

The Council met at Government House on Friday, the 20th August, 1880.

P R E S E N T :

His Excellency the Viceroy and Governor General of India, K.G., P.C., G.M.S.I.,
presiding.

His Honour the Lieutenant-Governor of the Panjáb, K.C.S.I.

His Excellency the Commander-in-Chief, G.C.B., G.C.S.I., C.I.E.

General the Hon'ble Sir E. B. Johnson, R.A., K.C.B., C.I.E.

The Hon'ble Whitley Stokes, C.S.I., C.I.E.

The Hon'ble J. Gibbs, C.S.I.

The Hon'ble C. U. Aitchison, LL.D., C.S.I.

The Hon'ble B. W. Colvin.

The Hon'ble C. Grant.

PRESIDENCY SMALL CAUSE COURTS BILL.

The Hon'ble MR. STOKES moved for leave to introduce a Bill to consolidate and amend the law relating to the Courts of Small Causes established in the Presidency-towns. He had read somewhere that the present Secretary of State for India had been once observed in the course of one of his own speeches to yawn, and that when asked why he had done so, he replied "because his speech was so stupid." MR. STOKES feared that during the observations which it would be necessary for him to offer to the Council on the present occasion, not only he, but his audience, would yawn not merely once, but several times; but he would endeavour to state what he had to say in as few words as possible.

The Courts now known as the Courts of Small Causes in the Presidency-towns were established by a Charter of George the Second, dated 8th January, 1753 (a little more than four years before the battle of Plassey was fought), and would accordingly appear to be the oldest Courts now existing in British India. They had, from time to time, undergone many changes, their constitution having been re-modelled, their jurisdiction extended and their procedure amended, by various enactments and orders, in particular by Acts IX of 1850 and XXVI of 1864, which placed them on a footing closely resembling that of the English County Courts; but they had been left to a great extent untouched by the important legislation by which, in recent years,

the procedure of the other civil Courts had been reformed. The result of that was that they had become somewhat antiquated and did not fit in with the rest of the Indian judicial system ; that their powers and procedure were, in many particulars, defective, and that, though, owing to the efficient manner in which they had been worked, they had generally given satisfaction, questions had often to be discussed in them which, to use the words of a late Small Cause Court Judge (the Hon'ble Mutusámi Ayyar) now on the bench of the Madras High Court, " are totally foreign to the people who resort to them, and some of which have only an historic interest even in England."

The necessity of completely revising the law relating to those Courts was pointed out many years ago by Mr. Fagan and Mr. Boulnois, two of the ablest Judges who had presided in the Calcutta Small Cause Court ; and in the year 1868, a Bill was drafted for this purpose by our hon'ble and learned colleague, Mr. Pitt Kennedy ; but further action in the matter had been, from time to time, postponed, pending the consideration of certain proposals regarding the jurisdiction and powers of the Courts. Those proposals had now been very fully discussed both in the Home and the Legislative Departments and by the Judges of the different Courts : as near an approach to unanimity regarding them as could well be hoped for had been attained ; and the present Bill had accordingly been prepared to consolidate and amend the entire law.

The most important change introduced by it lay in the extension of the pecuniary limit of the jurisdiction from Rs. 1,000 to Rs. 2,000. This extension had been asked for as far back as 1867 by the Calcutta Trades Association—a body to which we were indebted, not only for some valuable suggestions as to legislation, but also for useful criticisms on many of our Bills. It had since then been much discussed, and had the approval of the Governments of Madras, Bombay and Bengal, of the High Court of Madras, and of the High Court at Calcutta. The only opposition to it came from the High Court at Bombay ; and that opposition appeared to proceed, not so much from any objection to the principle of the extension, as from a fear that it would not be acceptable to the public—a point on which we should be in a better position to form an opinion after the Bill had been published.

Assuming, then, that the pecuniary limit of the jurisdiction was to be raised as proposed, the question arose whether any appeal should be allowed in suits above Rs. 1,000, or whether the present system of allowing a new trial by the Court itself and a reference to the High Court on a point of law was sufficient. On that point the difference of opinion had been greater. The Governments of Bombay and Bengal, the Calcutta High Court, and the Judges of the Small Cause Court at Bombay, were against admitting an appeal. The Government of Madras, the High Court there, and the Judges of

the Small Cause Courts at Calcutta and Madras, were in favour of it; as was also Mr. Kennedy at the time he drew the Bill already referred to. On the one hand, it was urged that allowing an appeal was, especially as it involved the taking of notes of evidence and the writing of judgments, inconsistent with the summary procedure of the Small Cause Court, that the hearing of cases subject to appeal could not conveniently be carried on simultaneously with the ordinary Small Cause Court work, and that the existence of a power to appeal would render litigation needlessly protracted and expensive. On the other hand, the importance of providing a check on the trial of questions of fact in suits of the higher value was insisted on, and it was pointed out that, in two at least of the Presidency-towns (Bombay and Madras), the practice of taking notes of evidence in all contested cases already prevailed. The Bill as at present drawn did not provide an appeal; but the Select Committee, to which he hoped it would be referred, would consider whether in suits above Rs. 1,000 an appeal should not be allowed.

The next question which presented itself in connection with the jurisdiction of the Small Cause Courts was that as to the classes of suits which those Courts should be empowered to hear. It had been thought best, both with a view to relieve the High Courts as far as possible of the petty litigation which now forms a considerable portion of their work on their original side, and in order to avoid, as far as might be, the doubts and difficulties which attended the construction of provisions of this sort, to draw the Bill so as to give the Small Cause Courts jurisdiction in suits of all descriptions with certain specified exceptions.

The most important of those exceptions was that of suits for the recovery of immoveable property. It appeared from the records of the Legislative Department that the framers of Act IX of 1850 intended that its 25th section should confer jurisdiction on the Presidency Small Cause Courts in such suits; but there had been a considerable difference of opinion as to the actual effect of that Act and of its amending Act (XXVI of 1864) in this particular.

The High Courts of Calcutta and Bombay had held that the Small Cause Courts were given jurisdiction in the suits in question by the 25th section of Act No. IX of 1850. The Bombay High Court had held further that a like jurisdiction was conferred in suits up to Rs. 1,000 by the Act of 1864, while the Judges of the Calcutta Small Cause Court held that their jurisdiction in such suits was not extended by that Act. The Madras High Court had held that neither Act conferred any such jurisdiction. It would seem that the learned judges, like a certain united family in Ireland, had "all agreed to disagree." To this it should be added that in Calcutta the jurisdiction, though

held to exist up to Rs. 500, was, for some reason which had not been fully explained, but little resorted to.

The Madras and Bombay authorities and the majority of the Calcutta High Court were in favour of giving the jurisdiction. The Bengal Government, the officers consulted by it (including the Judges of the Calcutta Small Cause Court) and four of the Judges of the Calcutta High Court were against it. The Bill, as he had already intimated, would not give it, and it was manifest that, if it were to be given, special provisions relating to it would have to be introduced. An appeal should certainly be given, proper provision would have to be made for execution, and probably some rules would, as suggested both by the Calcutta and the Madras High Courts, be required to limit the operation of the decisions of the Small Cause Court as *res judicata*. Considering the fact that questions of rights in respect of immovable property in the Presidency-towns were, to use the words of the Bombay Government, "peculiarly intricate and difficult," he was himself against giving the jurisdiction.

Other suits in which it was proposed to withhold jurisdiction from the Small Cause Courts were the suits mentioned in section 25 of Act IX of 1850, and in addition thereto suits against the Secretary of State for India in Council, suits for partition, for foreclosure, for redemption, suits for the specific performance or the rescission of contracts relating to immovable property, administration-suits, suits to obtain an injunction or to enforce a trust. The machinery of the Presidency Small Cause Courts was not such that it could deal usefully with most of these matters: the difficult and complicated questions which constantly arose in the suits just mentioned could not possibly be disposed of in the summary manner which the public had a right to expect from a Small Cause Court, and (speaking with all respect for the present able and learned Judges) the constitution of those Courts was not such that those questions could always be safely left to their decision.

The want of any power to execute the decree of a Small Cause Court against immovable property, except by the circuitous process of instituting a suit upon such decree in the High Court, had for many years past been complained of as involving an undue hardship to plaintiffs, and in some places, particularly in Madras, driving them to institute their suits in the High Court instead of in the Small Cause Court. The objections that existed to giving the Small Cause Courts jurisdiction in suits to recover immovable property applied also to giving them power to execute their decrees against immovable property. In execution-cases complicated questions as to the relative priority of incumbrances, or as to the rights of persons claiming maintenance out of the attached property, constantly presented themselves in the Presidency-towns; and to dispose of such questions satisfactorily not only required an astute and

learned lawyer, but a hearing so long and laborious that to grant it would seriously impede the Small Cause Court in the disposal of cases for the speedy decision of which it primarily existed. The Bill would accordingly empower the Court to send its decrees for execution to the High Court or to a mufassal Court in the same way as the mufassal Small Cause Courts do under section 20 of Act No. XI of 1865. The only serious opposition to this proposal came from the High Court at Bombay, and it rested mainly on the political or economical objections which of late years had been so frequently urged against the sale of immoveable property in execution of decrees. Objections which, however weighty they might be in the mufassal, where the land was the only means of livelihood of the mass of the people, and was in fact the basis of society, had little or no force in the cases that occurred in the Presidency-towns.

It had been held that the procedure in the Presidency Small Cause Courts was that of the Courts of common law in England, except in so far as it had been modified by Act IX of 1850. The result was that technical questions as to forms of action and the effect of particular pleas often engaged the attention of the judges, though they arose nowhere else in India. The Bill and one of its schedules would make the simple and uniform Code of Civil Procedure the foundation of the procedure of the Small Cause Courts in the Presidency-towns, as it was of those in the Mufassal; but the special provisions of the existing Acts regarding Court-fees, fees to Counsel and attorneys, and suspension of execution in cases of sickness, had been retained; and it might be a question whether further modifications of the general law, for example, as regards the payment of expenses of witnesses, should not be introduced.

The Bill would confer in the Presidency Small Cause Courts a limited insolvency-jurisdiction. This was completely new. The introduction of provisions for this purpose had been advocated by the Government of Bengal, the Calcutta High Court and the present Chief Justice of Madras, with a view to relieving the High Courts of a mass of petty work with which they were at present burthened, to the great detriment of more important business. In Calcutta, for instance, the business in insolvency occupied a Barrister Judge for nearly thirty days in the year, and all the Judges who had sat in the Insolvent Court were unanimous in the opinion that this amount of Judge's time so lost to the High Court was not accompanied by commensurate advantages to the public in the application and working of the insolvent law. In their report for 1875 the High Court said that "during the last three years the instances might be counted on the fingers in which resort has been had to the Insolvent Court for the purpose of an equitable distribution among creditors of any appreciable estate belonging to the insolvent. In the great majority of cases the applications are made by the debtors themselves only when arrest is imminent or has actually been effected, and when they really have no property left, or have taken

means to conceal it." That was five years ago. But things had become no better in the meantime. In fact, it might be said *ingravescit in dies malum*. There had been some difference of opinion as to the way in which the insolvency-jurisdiction should be divided between the High Court and the Small Cause Court. The Bill would assign to the Small Cause Court all cases of non-traders, leaving to the High Court only the cases of traders. This was the principle of division proposed by the Calcutta High Court; and it seemed to be the most convenient, for it was, as a rule, in the latter class of cases only that questions of difficulty and importance arose in this country. The great mass of non-trading insolvents consisted of Government clerks who had lived beyond their means, and the settlement of their affairs was, generally speaking, only too simple a matter, there being in most cases little or no assets to recover or distribute.

The Bill would also contain a chapter on testamentary and intestate jurisdiction. The object of this was to relieve the High Court, and at the same time to provide in the case of small estates, when the assets of the deceased were less than Rs. 1,000, a cheap and expeditious mode of obtaining probate or letters of administration.

These were the chief points of the proposed legislation. He had only to thank the Council for listening so patiently to what was indeed a *labor operosus ac molestus*, and to add that the Bill would be published as soon as possible, but that it would not be proceeded with till the Council had re-assembled at Calcutta: in order to give the public and the profession ample time to familiarise themselves with its provisions, it would not come into force before the 1st July, 1881.

The Motion was put and agreed to.

The Council adjourned to Friday, the 3rd September, 1880.

SIMLA;
The 20th August, 1880. }

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