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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.

1881.

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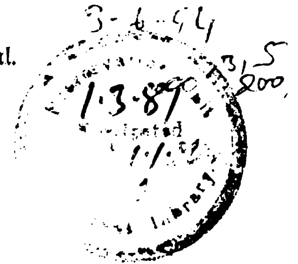

CALCUTTA:
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1882.

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 4th March, 1881.

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 Bengal, K.C.S.I.

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

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

The Hon'ble Rivers Thompson, C.S.I.

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

Lieutenant-General the Hon'ble Sir D. M. Stewart, G.C.B.

Major the Hon'ble E. Baring, R.A., C.S.I.

The Hon'ble C. Grant.

The Hon'ble J. Pitt Kennedy.

The Hon'ble H. J. Reynolds.

The Hon'ble G. F. Mewburn.

The Hon'ble Mahárájá Jotíndra Mohan Tagore, C.S.I.

CRIMINAL PROCEDURE CONSOLIDATION BILL.

The Hon'ble MR. STOKES introduced the Bill to consolidate and amend the law relating to Criminal Procedure, and moved that it be referred to a Select Committee consisting of the Hon'ble Messrs. Thompson, Gibbs, Paul and Reynolds and the Hon'ble Mahárájá Jotíndra Mohan Tagore and the Mover. He said that, when he had obtained leave to introduce the Bill, he had stated that no less than three Codes of Criminal Procedure were now in operation in British India—Act X of 1872, amended by Act XI of 1874, which was in force throughout the Mufassal; the High Courts' Act, X of 1875, which was in force in the Presidency-towns, Allahabad and Lahore; and the Presidency Magistrates' Act, IV of 1877, also in force in the Presidency-towns.

Many of the provisions of these Codes merely repeated one another; many of their rules, though dealing with the same subjects, unnecessarily varied in language; and the result was that the bulk of the Indian Statute-book was far greater than was needed, and that the Courts, when construing one Code, were often deprived of the guidance of prior decisions on another.

The primary object of the Bill, which had been framed at the suggestion of Lord Salisbury when Secretary of State for India, was to recast the Code of 1872, combining with it the substance of the High Courts' Act and the Presidency Magistrates' Act, and incorporating in it the numerous reported decisions on its wording, and thus at last give to India a single and complete Code of Criminal Procedure, and carry out, so far, the policy of providing a simple and uniform system of law for this country. The language and arrangement of Act X of 1872 had, for obvious reasons, been departed from only so far as was necessary for the main purpose of the Bill. Nothing had been altered save what could be clearly shown to be defective or inconsistent with other parts of the plan.

Though many of the outlying Acts and Regulations dealing with criminal procedure were repealed and re-enacted by Act X of 1872, many more were still untouched, and the secondary object of the present Bill was to consolidate these enactments, which were twelve in number :—

Acts.

XXIII of 1840 (*Execution of process*).
XXXIV of 1850 (*State-Prisoners*).
III of 1858 (*State-Prisoners*).
V of 1861, sections 6, 24, 37 to 40 inclusive, part of section 35 (*Police*).
XVIII of 1862 (*Administration of Criminal Justice in the High Courts*).
II of 1869 (*Justices of the Peace*).
XXII of 1870, sections 2 and 4 (*Application to European British subjects of Acts giving summary jurisdiction*).
XXI of 1879, Chapter III (*Inquiries in British India into crimes committed abroad by British subjects*).

Regulations.

Bengal Regulation III, 1818 (*State-Prisoners*).
Bengal Regulation XX, 1825 (*Jurisdiction of Courts Martial*).
Madras Regulation II, 1819 (*State-Prisoners*).
Bombay Regulation XXV, 1827 (*State-Prisoners*).

The result of consolidating the Acts and Regulations above specified would be to substitute a single Act of 568 sections for fifteen enactments containing 1,055 unrepealed sections.

The opportunity had been taken to make no less than one hundred and twelve amendments of the substance of the law. These were carefully described in the Statement of Objects and Reasons, and on the present occasion he would

confine himself to mentioning and explaining a few of the more important. He must, however, observe, on the threshold, that the present Bill was divided into nine Parts—the first containing the usual preliminary matter; the second dealing with the constitution and powers of the criminal Courts and offices; the third containing some general provisions; the fourth treating of the prevention of offences; the fifth, of information to the police and of their powers to investigate; the sixth, of proceedings in prosecutions; the seventh, of appeal, reference and revision; the eighth, of special proceedings; the ninth, of supplementary provisions.

Part I consisted of a single chapter containing the usual preliminary matter. The wording of some of the definitions in Act X of 1872, which defined phrases that did not occur in the Act, had been amended, and definitions of "to sign," "public prosecutor," "pleader," "offence," "chapter," "schedule," "place," and "police-station" had been added. The definition of "investigation" had been extended so as to comprise the proceedings of persons authorized by a Magistrate to make local investigations. The definition of "cognizable offence" had been amended so as to connect it with the third column of the second schedule, which stated "whether the police might arrest without warrant or not." As the law stood in Act X of 1872, the definition of "cognizable offence" and section 92, clause 1, really gave no information on the subject, for that column was nowhere connected with the Code. This defect had in one case, of which MR. STOKES had been informed by Mr. Arthur Macpherson, and probably in others, caused considerable difficulty. A clause had been added to the definition of "High Court" so as to enable the Governor General in Council to appoint in outlying territories, where no such Court was established by law, an officer to perform its functions under the Code.

Part II—as to the constitution and powers of the criminal Courts and offices—consisted of two chapters, of which the first dealt with the classes of criminal Courts, territorial divisions, Courts outside the Presidency-towns, the Courts of the Presidency Magistrates, Justices of the Peace, and the suspension and removal of Judges, Magistrates and Justices of the Peace. The provisions of the Police Act (V of 1861), section 6, had been incorporated in this chapter, section 14. The Local Government had been empowered (section 16) to make rules for the guidance of Magistrates' Benches. This would result in uniformity of practice wherever such uniformity was desirable. Assistant Sessions Judges had been declared (section 17) subordinate to the Sessions Judge in whose Court they would exercise jurisdiction. This would preclude a doubt which had been raised on the subject.

The second chapter treated of the powers of Judges and Magistrates, the description of offences cognizable by each Court, the sentences which might be passed by Courts of various classes, and the mode of conferring powers on the latter. Magistrates of the first class were forbidden (section 29) to try offences under special or local laws which were punishable with imprisonment for more than seven years: such grave cases should be tried by a higher Court. All Magistrates of the first and second classes, and all Magistrates of the third class when specially empowered, were to have the powers of an officer in charge of a police-station (section 38). It was desirable that the police powers which Magistrates could exercise in investigating offences should be clearly defined, which certainly was not the case at present. In section 40 (= Act X of 1872, section 56), as to the continuance of powers of an officer transferred to another local area, words had been introduced to shew that powers conferred by one Local Government did not accompany an officer when he was transferred to a province under another Local Government. A different view had been taken in Assam and, possibly, elsewhere.

Part III contained certain general provisions which it seemed convenient to group together, and which, to avoid forward references, must stand near the beginning of the Code. They related to the following matters:—aid and information to the Magistrates, the police and persons making arrests; arrest, escape and retaking; processes to compel appearance and production of documents, and processes for the discovery of persons wrongfully confined. Here, again, the changes in the law were little more than verbal. But some useful amendments in substance had been made. Thus, to the offences which the public were bound to assist in preventing had been added (section 42) attempts to injure public property, railways and canals; the public (section 42) must assist in cases of fire dangerous to human life or valuable property; the section (45) requiring village-headmen, &c., to report had been extended to escaped convicts and proclaimed offenders, and (to provide for villages in hill-passes through which bands of dacoits habitually proceeded) also to cases where the criminal merely went through the village: the section (46) which authorized, in the case of forcible resistance, the use of necessary means to effect arrests, had been extended to meet the case of attempts to evade them: power had been given (section 49) to break open the doors of a house for the purpose of liberating persons who had lawfully entered for the purpose of making arrests therein: persons making arrests had been expressly empowered (section 53) to take from the person arrested any offensive weapons which he might have about him: the police had been authorized (section 54) to arrest, without warrant, deserters from the Navy; and sections (66, 67) equivalent to

Act XXV of 1861, section 112, had been inserted to provide for the retaking of persons escaping or rescued from lawful custody.

Nothing in the whole course of criminal procedure was so productive of vexatious proceedings and serious consequences as arrests. The utmost care, therefore, had been taken in framing the sections on this subject so as to make them clear and precise. Thus, the wording of section 178 of the present Code, which empowered the police to use "all means necessary to effect the arrest" of a person forcibly resisting or attempting to escape, appeared dangerously wide. It might, conceivably, be held to justify the killing of any runaway criminal. The Bill, therefore, explained that this power did not give the right to cause the death of an arrested person who was not accused of a capital offence. The Bill here followed the law of Scotland, which, in Mr. Mayne's opinion (*Commentaries on the Indian Penal Code*, s. 106) was in India the safer rule.

Sub-divisional Magistrates (as the Bill called "Magistrates of divisions of districts") had been empowered (section 78) to direct warrants to landholders, &c., for the arrest of escaped convicts. This extension was in harmony with the large powers generally possessed by Magistrates in charge of sub-divisions.

The present Code did not provide how attachment of debts and other moveable property of proclaimed persons was to be effected. Provision had, therefore, been made (section 89) for this purpose; and the powers, duties and liabilities of receivers had been declared by reference to the Code of Civil Procedure.

Under the Bill (section 95) a person required merely to produce a document would (as under the Civil Procedure Code, section 164) be deemed to have complied with the requisition if he caused the document to be produced instead of attending personally to produce it. This amendment of the law would obviously tend to save time and expense, and thus diminish the unpopularity of our Courts.

Provision was made (section 104) for making a list (signed by witnesses) of things found in execution of a search-warrant beyond the jurisdiction of the Court issuing it. The necessity of obtaining the signature of the witnesses would be of use as a check upon the irregularities which, it was said, sometimes occurred in the course of searches.

A clause (section 101) had been inserted giving Presidency Magistrates, Magistrates of the first class, and Sub-divisional Magistrates power to issue

warrants to search for persons wrongfully confined. No such power, though needed, was supposed to exist in India, except, of course, in the Presidency-towns, where the High Courts issued, under Act X of 1875, directions of the nature of a *habeas corpus*.

Part IV, which related to the prevention of inchoate offences, and arresting the course of such as were in operation, came, it was considered, properly before Part VI, which related to their prosecution when already committed. This was the order followed by Edward Livingston, the eminent jurist, in preparing his system of penal law for the State of Louisiana. The Bill, as now framed, dealt merely with the mode of preventing apprehended offences by the intervention of the officers of justice. Prevention by resistance was, it was thought by many of the authorities to whom the first draft of the Bill had been submitted, sufficiently dealt with by the sections of the Penal Code relating to the right of private defence. This Part comprised six chapters, dealing, respectively, with security for keeping the peace and for good behaviour; the dispersion of unlawful assemblies; suppression of nuisances; disputes as to immoveable property; and, lastly, the preventive action of the police. Under a similar heading, "Preventive jurisdiction of Magistrates," the present Code contained a chapter (XLI) relating to the maintenance of wives and families; but MR. STOKES thought that this subject (if it came at all into a Code of Criminal Procedure) would be more fitly placed in a Part dealing with special proceedings, and the Council would accordingly find it in Part VIII of the Bill.

In the chapter relating to security for keeping the peace and for good behaviour, the section (107) dealing with security for keeping the peace on conviction had been extended to cases in which the accused was convicted of criminal intimidation by threatening injury to person or property This was an offence of the same nature as taking unlawful measures with the intention of committing a breach of the peace, and should, therefore, as regards the taking of security, be placed on the same footing. When the conviction was set aside on appeal or otherwise, the bond would become void. On this the present law was silent.

In section 111 (= sections 505, 506 of the present Code) the words which gave the Magistrate power to demand security from persons of "notoriously bad livelihood" or of "a dangerous character" had been omitted. It had been objected that these words were vague, and that the authority which they placed in the hands of the Police was liable to great abuse.

The Magistrate was empowered (section 133) to make an order as to the character and class of the sureties required. This, it was hoped, would prevent

certain persons making a trade of becoming sureties. The object of the law (as would be seen from section 399 of the present Code) was not merely to provide a money-security, but also to obtain respectable persons as guarantees for the good behaviour of the criminal concerned.

The Bill contained no provision corresponding to section 499 of the present Code, which authorised a Magistrate, with the sanction of the Court of Session, to extend the time for which a person had been bound to keep the peace. If, before the expiration of the term of the original bond, it appeared to the Magistrate unsafe to release the obligor at the end of that term, in justice to the obligor fresh proceedings should be instituted.

Chapter (IX) on dispersion of unlawful assemblies contained the rules for calling out and employing the military, in aid of the civil, power. Here, the only substantial change made by the Bill was that volunteers enrolled under the Indian Volunteers Act, 1869, were placed on the same footing as soldiers of Her Majesty's Army.

As to the Magistrate's powers to abate public nuisances, chapter X, section 134, corresponding with section 521 of the present Code, had been extended to cases of keeping goods or merchandise (for example, damaged rice) injurious to the public health, and of carrying on occupations offensive to the religious feelings of any considerable section of the community. The latter extension was intended to meet such cases as that of a butcher exercising his trade in a Hindú town, so as to cause risk of breach of the peace.

The power to issue injunctions, conferred on Magistrates by section 518 of the present Code, was intended to be exercised only in urgent cases where a speedy remedy was desirable. The Bill (section 145) provided that no such orders should remain in force for more than two months, unless, in case of danger to human life, health or safety, or a riot or affray, the Local Government directed otherwise. Where time allowed, the procedure must be under chapter X.

Part V consisted of a single chapter relating to information to the police and their power to investigate. It corresponded with chapter X of Act X of 1872, and sections 379 and 380 of the same Act. The words "or that immediate arrest is not necessary," which were to be found in section 117 of Act X of 1872, had been omitted from section 158 of the Bill, as it was not apparent why a Police-officer should be debarred from investigating a case of a cognizable offence because he did not at starting feel himself justified in arresting any person.

Section 165 made it clear that confessions to Magistrates should not only be "taken," but signed and certified, like examinations of accused persons. In the form of memorandum relating to confessions, words had been introduced to show that the confession was taken in the Magistrate's presence and hearing, and that it contained a full and true account of the statement.

In the sections (166 and 167) which dealt with searches by the police, and which corresponded with sections 379, 380 of the present Code, amendments had been introduced to meet difficulties which had arisen in practice. Section 168 (= Act X of 1872, section 124, paragraphs 2, 3 and 4), as to the procedure where an investigation could not be completed within twenty-four hours, had also been amended. On the one hand, there was strong objection to allowing an accused person to be detained at a police-station longer than was necessary, and, on the other, to insist on his being forwarded to the Magistrate, when his presence on the spot might be indispensable for tracking out crime or recovering property, might be a serious impediment to justice. Under proper precautions, the retention of the accused for sufficient reasons would, as now, be allowed, but the period of detention had been limited to fifteen days on the whole.

Part VI treated of proceedings in prosecutions up to appeal, and was divided into sixteen chapters, arranged as follows :—

XV. Jurisdiction of Criminal Courts in Inquiries and Trials.
XVI. Complaints to Magistrates.
XVII. Commencement of Proceedings before Magistrates.
XVIII. Inquiry into cases triable by the Court of Session or High Court.
XIX. The Charge.
XX. Trial of Summons-cases by Magistrates.
XXI. Trial of Warrant-cases by Magistrates.
XXII. Summary Trials.
XXIII. Trials before High Courts and Courts of Session.
XXIV. General Provisions as to Inquiries and Trials.
XXV. Evidence.
XXVI. The Judgment.
XXVII. Submission of Sentences for Confirmation.
XXVIII. Execution.
XXIX. Suspensions, Remissions and Commutations of Sentences.
XXX. Previous Acquittals or Convictions.

The Council would see that the above-mentioned chapters were arranged, as nearly as might be, according to the chronological order of the ordinary events in a prosecution.

Chapter XV (as to the jurisdiction of the Courts in inquiries and trials) dealt, first, with the place of inquiry or trial: and, secondly, with the conditions requisite for the initiation of proceedings, such as the receipt of a complaint, a police-report, the receipt of information from private persons, commitment by Magistrates, and sanction by Courts, public servants or the Government.

Sections 9 and 10 of the Foreign Jurisdiction Act (XXI of 1879), which dealt respectively with the liability of British subjects for offences committed out of British India, and with the reception in evidence of depositions made before Political Agents, had been transferred to this part of the Code (sections 189 and 190), which was obviously their proper place.

To the provisions contained in the existing law regarding the transfer of cases, there had been added a clause providing that, when any Magistrate of the first class, specially empowered in this behalf by the Magistrate of a district, had taken cognizance of any case, he might transfer it for inquiry or trial to any other competent Magistrate in such district. This would enable such Magistrates to distribute the work in their Courts, when it was necessary to do so, with less delay than at present.

In Chapter XVIII, of inquiry into cases triable by the Court of Session or High Court, power was given (section 210) to the Magistrate to discharge the accused at any stage of the case if, for reasons to be recorded, the Magistrate considered the charge to be groundless.

Chapter XIX, of the charge, *i. e.*, the written accusation of an offence, instead of being placed, as in the present Code, after the chapters relating to trials, appeals and execution, would be found where one would naturally look for it, namely, between the rules as to inquiries and the rules as to trials. There could not, obviously, be a prosecution until the person who had suffered by the offence or knew that it had been committed, accused the offender. This chapter extended to the whole of British India the amendments in Act X of 1872, sections 439 to 459, made by Act X of 1875; and, with reference to Mr. Justice West's observation in *Reg.* v. *Chand Hur*, 11 Bom. 241, on the corresponding section (457) of Act X of 1872, section 239 of the Bill had been confined to offences consisting of several particulars, a combination of some only of which constituted a complete minor offence.

From the section (236) relating to joinder of charges, corresponding with section 454 of the present Code, had been omitted all provisions as to the amount of punishment. They obviously belonged to substantive law, not to procedure, and would find their proper place in the Penal Code. The illustra-

tions had also been amended. Some of them, as they stood in the present Code, were inaccurately worded: others did not illustrate the paragraph to which they were made to refer.

Provision had been made in section 239 for the case where a person charged with an offence proved circumstances which reduced it to a minor offence. He might then be convicted of the minor offence, though he was not charged with it.

Chapter XX dealt with the trial of summons-cases. To the section (251) which related to frivolous and vexatious complaints a clause had been added providing that, when awarding compensation in any subsequent civil suit relating to the same matter, the Court should take into account any sum paid or recovered as compensation under this section. A similar provision, when compensation had been given out of a fine, was contained in section 308 of the present Code.

In Chapter XXI, as to trials of warrant-cases, as in Chapter XVIII, had been inserted a clause (section 254) authorizing the Magistrate to discharge the accused at any stage of the case if, for reasons to be recorded, the Magistrate considered the charge to be groundless. As the law stood (Act X of 1872, section 215), no matter how groundless the charge might be, the Magistrate was compelled, before discharging the accused, to take the evidence of the complainant and of all the witnesses whom the prosecution might bring forward. The provision (Act X of 1872, section 218) that the accused should, while making his defence, be allowed to recall and cross-examine the witnesses for the prosecution, had been expressly confined by the Bill (section 257) to cases where the witnesses were present in the Court or its precincts. The unrestricted power conferred by the present Code, to recall witnesses for the prosecution after they had left the Court, was said to be often abused for the purpose of harassment and delay.

In Chapter XXII, as to summary trials, the Local Government had been authorized to confer on Benches invested with second or third class powers jurisdiction to try abetments of, and attempts to commit, the offences which they might now try summarily. The omission in section 225 of the present Code to provide for these abetments and attempts was obviously *per incuriam.* The offences of retaining stolen property not exceeding Rs. 50 in value, and assisting in the concealment or disposal of stolen property not exceeding Rs. 50 in value, had been added to the list of those triable in a summary way; and the offence of receiving stolen property would not be so triable where its value exceeded that amount.

Chapter XXIV contained some general provisions as to inquiries and trials. Here, at the instance of many authorities consulted, the power of tendering conditional pardons to accomplices, which was now exercisable only in cases triable by the Sessions Court, had been extended (section 337) to all warrant-cases. This change was an important one, and further opinions on its propriety were desirable.

The power to examine the accused given by section 250 of the present Code had been modified by the omission of the words "and shall question him generally on the case after the witnesses for the prosecution have been examined."

His Honour the Lieutenant Governor asked which was the corresponding section of the Bill?

The Hon'ble Mr. Stokes replied that His Honour would find it at once by turning to the table at the end of the Bill, showing the corresponding section-numbers. It was 342.

Mr. Stokes would like to have gone further and expressly provided, in accordance with two decisions of the Calcutta High Court, that by exercising the power in question the Sessions Court was not to establish a Court of inquisition, and to force a prisoner to convict himself by making some criminating admissions, after a series of searching questions the exact effect of which he might not readily comprehend. The real object was to enable a Judge to ascertain from time to time from a prisoner, particularly if he was undefended, what explanation he might desire to offer regarding any fact stated by a witness; or after the close of the case, how he could meet what the Judge might consider damnatory evidence against him (I. L. R. 6 Cal. 102). In deference to the contrary opinions of the two gentlemen, Mr. Cockerell and Mr. Colvin, who had so loyally helped him in the revision of the Code, he had abstained from making any provision on the subject; but he would certainly bring the matter to the notice of the Select Committee to which he trusted the Bill would be referred. He would take the present opportunity of quoting what Mr. Livingston had written on this subject:—

> "An unrestrained right of interrogating is also very apt to produce insidious and catching questions. Instead of a cool and impartial attempt to extract the truth, the examination becomes a contest, in which the pride and ingenuity of the Magistrate are arrayed against the caution or evasions of the accused, and every construction will be given to his answers that may fix upon him the imputation of guilt."

Mr. Stokes would leave this part of the Bill with the remark that the power to interrogate accused persons, given by the section in Act X of 1875, corresponding with section 250 of the present Code, had, according to his hon'ble and learned friend the Advocate General of Bengal, never been used by the High Court at Fort William in the exercise of its original criminal jurisdiction.

Much doubt existed as to the offences which might lawfully be compounded. The Exception to section 214 of the Penal Code (in which the law on the subject was contained) was excessively obscure, for it could seldom be said of any act that it was an offence "irrespective of the intention of the offender," and this obscurity was increased, rather than diminished, by the illustrations annexed to that section, two of which gave the case of an assault, though the definition of that term in section 351 made the offence depend on the intention. The Bill repealed these illustrations; and section 345 declared in unmistakeable language that certain specified offences, and no others, might be compounded. These were—

Causing hurt (Penal Code, sections 323, 334, 337, 338).
Wrongfully restraining or confining (Penal Code, sections 341, 342).
Assault or use of criminal force (Penal Code, sections 352, 358).
Unlawful compulsory labour (Penal Code, section 374).
Mischief, when the loss or damage was caused to a private person (Penal Code, sections 426, 427).
Criminal trespass and house-trespass (Penal Code, sections 447, 448).
Criminal breach of contract of service (Penal Code, sections 490, 491, 492).
Adultery, and enticing, &c., a married woman (Penal Code, sections 497, 498).
Defamation (Penal Code, section 500).
Printing or engraving defamatory matter (Penal Code, section 501).
Sale of printed or engraved substance containing defamatory matter (Penal Code, section 502).
Insult intended to provoke a breach of the peace (Penal Code, section 504).
Criminal intimidation, except when the offence was punishable with imprisonment for seven years (Penal Code, section 506).

The offences of voluntarily causing hurt, voluntarily causing grievous hurt, and cheating, punishable under the Indian Penal Code, sections 324, 335 and 417, would be compoundable with the permission of the Court, and by the person to whom the hurt had been caused, or by the person cheated, as the case might be.

The power of the Government to commute punishment (section 402) had been so worded as to authorize a sentence of rigorous, to be commuted to one of simple, imprisonment. This was not, apparently, possible under section 322 of the present Code, where the law on the subject was now to be found.

Part VII dealt with appeals, references and the revisional jurisdiction of the High Court.

The power to appeal in criminal cases was liberally bestowed by the present law, and only two new cases had been provided for by the Bill. An appeal had been given (section 405) from orders rejecting applications for delivery of attached property. An appeal had also been given from convictions in contempt-cases by Courts of Small Causes in the Presidency-towns.

Section 408 provided that the appeal from a District Magistrate exercising the enhanced powers conferred under section 34 (= section 36 of the present Code) should lie to the Court of Session in cases in which the sentence had not been submitted to that Court for confirmation, and, when it had been so submitted, to the High Court. This put the appeals in question on the same footing as appeals from an Assistant Sessions Judge. There seemed to be no reason for making any distinction between the two.

Section 423, in accordance with a decision of the Madras High Court (I. L. R. 1 Mad. 54), declared that, when an Appellate Court enhanced any punishment inflicted by the sentence appealed against, it might inflict punishment of a different kind. Personally, MR. STOKES, in common, he believed, with most Indian lawyers, was averse to the power of enhancing punishments which the present Code (section 280) gave to the Appellate Courts. Its existence tended to deter convicted, but, possibly, innocent, persons from presenting appeals, and thus to deprive the lower Courts of the control which could only be effectively exercised over them by means of an unhampered system of appeal. This matter, as well as the power to examine accused persons, he hoped to bring to the special notice of the Select Committee.

In the case of an appeal from an acquittal, section 427 expressly authorized the High Court to order the accused to be arrested and brought before it, and to commit him to prison pending the disposal of the appeal, or admit him to bail. In the absence of this power cases had occurred in which criminals, afraid of the result of the appeal, escaped, and made the appeal on behalf of the Government of no avail.

A section (431) suggested by a decision of the Bombay High Court (I. L. R. 2 Bom. 564) provided that appeals by persons required to give security for good behaviour, or by convicted persons, should abate on their death, and

that appeals against acquittals should abate on the death of the accused. The power of revision conferred by section 439 would enable the High Court, where justice to the family of the convicted person might so require, to alter his sentence even after the appeal had abated.

Sub-divisional Magistrates empowered by the Local Government in this behalf were authorized (section 435) to call for records of inferior Courts. This was in accordance with the powers of control in other respects which they exercised.

Where, in the opinion of the Court of Session or District Magistrate, an accused person had been improperly discharged by an inferior Court, the accused should not be committed without having had an opportunity of shewing cause why the committal should not be made (1 O'K. 98). Provision to this effect had been made by section 436.

When the Court of Session or District Magistrate reported, for the orders of the High Court, the results of examining any proceeding, and recommended that a sentence be reversed, the Court of Session or District Magistrate might order (section 438) its execution to be suspended, and the accused, if in confinement, to be released on bail or on his own bond.

Section 439 (corresponding with Act X of 1872, section 297) had been framed so as to allow the High Court, when exercising its revisional jurisdiction, to interfere with improper acquittals. There was reason to believe that this change was in accordance with the intention of the framers of Act X of 1872.

Where the High Court exercised its powers of revision, no order (section 440) would be made to the prejudice of the accused, unless he had had an opportunity of being heard.

Part VIII, as to special proceedings, dealt with the procedure relating to the following matters :—criminal proceedings against Europeans and Americans; lunatics; contempts of Court and other offences affecting the administration of justice; maintenance of wives and children; State-prisoners; proceedings in the nature of *habeas corpus*.

Section 451 removed some unnecessary differences which existed in the present law between the procedure of the High Courts and Courts of Session in cases in which European British subjects were concerned. In particular, it was provided that, in the Court of Session as well as in the High Court, the requisite moiety of the jury or assessors might be made up by Americans as well as Europeans. Under the present Code (section 78), the trial of a European

British subject before the Court of Session need not be by jury. But, under section 234, an European or American, not being a British subject, had an absolute right to be so tried. The Bill omitted the latter provision.

The power given by sections 433 and 434 of Act X of 1872, to discharge from custody or make over to his relative a person acquitted on the ground of insanity, had been extended, in sections 474 and 475, to the case of persons who, being found to be insane at the time of trial, were committed to custody.

The rules as to the proceedings in case of contempts and other offences affecting the administration of justice applied in the present Code to "civil" Courts, and doubts had been raised as to their applicability to the revenue Courts, which existed in most Indian Provinces. The corresponding provisions of the Bill (sections 476, 478, 479, 480, 482) had been expressly made applicable to revenue Courts, and, where the Local Government so directed, Sub-Registrars would (section 483) be "civil Courts" within the meaning of section 480. The position and qualifications of Sub-Registrars varied in different provinces; but, in some parts of the country, they were believed to be fitted for the exercise of these powers.

Section 477 had been framed so as to allow a Court of Session to charge a person for giving false evidence before itself,—a power of which such Courts were unintentionally deprived by section 472 of the present Code.

Section 487 had been redrawn so as to avoid the difficulty which was felt in determining the meaning of the words "offence committed in contempt of its own authority," which occurred in the corresponding section (473) of Act X of 1872.

Part IX contained certain provisions supplementary to the general rules of procedure contained in the Code. It dealt, first, with the public prosecutor, bail, commissions for the examination of witnesses and special rules of evidence. It then contained certain provisions relating to bonds to keep the peace, for good behaviour, for appearance, &c.; the disposal of property regarding which an offence had been committed; the transfer of criminal cases; irregular proceedings; and, lastly, certain miscellaneous matters.

Power had been given to appoint as public prosecutor, in any case committed to the Sessions Court, a Police-officer not below the rank of Assistant District Superintendent. The entire exclusion of the Police from such a function was, in the opinion of many authorities, inexpedient. With the limitation above described, there would be no fear of intimidation of witnesses or undue influence.

The provisions of the present law as to commissions for the examination of witnesses had been amended in four respects. Where the witness resided in a Native State, power had been given (section 513) to issue the commission to the Political Agent or other local officer representing the British Government. Section 515 required that the interrogatories should be thought relevant by the Magistrate or Court directing the commission. Where a Subordinate Magistrate wished for a commission, he would (section 516) apply to the District Magistrate, and not (as at present) to the Sessions Judge: this would relieve the Court of Session of a duty which could be more conveniently performed by the District Magistrate. And power was expressly given (section 518) to stay the inquiry or trial for a specified time reasonably sufficient for the execution and return of the commission.

Chapter XLIV related to the disposal of property regarding which an offence had been committed. In accordance with a recent rule of the High Court at Bombay, section 528 declared that, when a High Court or Court of Session made an order for the disposal of property, and could not through its own officers conveniently deliver the property to the person entitled thereto, the Court might direct its order to be carried into effect by the committing Magistrate. Orders under this section made in appealable cases would not be carried out until the time allowed for appealing had expired, or, if an appeal was presented in due time, until the appeal was dismissed.

Where an innocent purchaser bought stolen property and restored it to the lawful possessor, provision had been made (section 530) for payment of the price out of money found on the convicted thief. This was in accordance with 30 & 31 Vic., cap. 35, section 10, and it was thought likely to be useful in India.

Section 532 provided, in case of a conviction under the Penal Code, sections 292, 293, 501 or 502, for the destruction of the obscene books and defamatory matter in respect of which the conviction was had. It also provided for the destruction of adulterated or noxious food, drink or drugs in respect of which a conviction was had under sections 272—275 of the same Code.

This chapter also contained a section (533) equivalent to section 534 of the present Code, providing that, whenever a person was convicted of an offence attended with criminal force, and it appeared that by such force any other person had been dispossessed of any immoveable property, the Court might order such person to be restored to possession. In the present Code this provision was misplaced in a chapter (XL) dealing with the preventive juristion of Magistrates in case of disputes as to immoveable property.

Chapter XLVII comprised some miscellaneous matters, of which he would mention the following as new. Power had been given (section 552) to the Local Government to fix places of imprisonment or custody. Moneys (other than fines) payable by virtue of any order made under the Code would be recoverable as if they were fines (section 558). The power to compel restoration of abducted females, which now existed only in the Presidency-towns, had been extended (section 562) to District Magistrates. Power had been given to the High Courts (section 564) to make rules for the inspection of the records of subordinate Courts. And as to miscellaneous criminal proceedings, if any doubt arose as to the procedure to be followed, the Court would be guided by such rules (consistent with the Code) as the High Court might make in this behalf (section 568). The Bill contained no clause equivalent to Act I of 1868, section 5, although similar provisions were contained in each of the Codes now consolidated (X of 1872, section 309, X of 1875, section 107, IV of 1877, section 12). The matter would be provided for by the Bill, which he had mentioned, to amend the Penal Code.

Schedules II and V, which corresponded respectively with Schedules IV and II of Act X of 1872, had been altered so as to adapt them, not only to the Mufassal Courts, but to those of the Presidency Magistrates. The latter schedule now contained no less than 56 forms for most of the proceedings directed or authorised by the body of the Bill. These forms had stood the test of practice in the Presidency of Madras and the Panjáb. He did not know who had framed them; but they seemed to unite brevity with precision. The present Code contained only a set of forms of charges, and nine forms of summonses, warrants, bonds and the instruments incorrectly termed recognizances.

As to Schedule II, the offence of voluntarily causing hurt had been made one for which the police might not arrest without a warrant. A like change had been made as to voluntarily causing hurt on grave and sudden provocation, not intending to hurt any other than the person who gave it. The numerous investigations by the police into charges of "hurt," which the present law rendered necessary, were said to distract their attention from more important duties, and to result in little good to the public.

The offence of adultery, which was now triable only by the Court of Session, had been made triable also by a Presidency Magistrate and a Magistrate of the first class. Enticing married women, which was done only for the purpose of adultery, was now punishable by the Magistrate, and it would seem that adultery should also be punishable by him.

The paragraph relating to mischief by fire with intent to cause damage had been altered in accordance with a proposed amendment of section 435 of the

Penal Code. This alteration had been made in order to check the offence, which was very common in some parts of the country, of setting fire to garnered crops. A cultivator might have the whole of his crop destroyed in this way, and yet, if its value was less than Rs. 100 (as was often the case), he could not obtain the aid of the police to arrest the offender without a warrant from a Magistrate..

And now, having mentioned some of the most important amendments in substance which the new Code proposed to make—of these there were altogether 112—MR. STOKES wished to refer to a recent letter from five of the Judges of the Calcutta High Court, the recommendations of which His Honour the Lieutenant-Governor had unreservedly accepted. Those learned Judges thought that the defects of the present Code could be cured by an amending Act. But the Code, which contained 541 sections, had already been amended by an Act (XI of 1874) of 47 sections. The new amending Act proposed by the Judges would contain at least 200 sections, providing for the 112 amendments in substance to which he had referred, and about ninety necessary amendments of the wording of the present Code. Now, since Act X of 1872, with the amending Act of 1874, contained 588 sections, the result would be for the Mufassal a Code of nearly 800 sections, inconveniently contained in three separate enactments, side by side with a number of outlying Acts and Regulations dealing directly or indirectly with criminal Courts and criminal procedure. For this shapeless mass MR. STOKES proposed to give the whole country one compact Code containing only 568 sections, not "nearly seven hundred," as the High Court Judges had alleged with more zeal than accuracy. The learned Judges also alleged that the new Code was "encumbered with matter connected with the Courts having jurisdiction in the Presidency-towns which related to a very small section of those concerned in the administration of justice." Here, again, was an exaggeration, for of the 568 sections of the new Code, those relating exclusively to the Presidency High Courts and Presidency Magistrates were only twelve in number—namely, 18, 19, 20, 21, 362, 370, 411, 432, 433, 434, 441, 501. There were also a few words in section 486, which gave an appeal to the High Court from a conviction in a contempt case by a Court of Small Causes in a Presidency-town. That was all.

MR. STOKES would have liked to enlarge upon the advantages of having a clear, compact and methodical Code of Criminal Procedure, first, as diminishing expense, delay and uncertainty in applying their admirable substantive law—the Indian Penal Code—for the punishment of offences; secondly, as furnishing a potent instrument of education; and, thirdly, as tending to maintain our intellectual prestige among the quick-witted races over whom we rule in India. But he had trespassed too long on the time and patient attention

of the Council; and he would only say in conclusion, that, excluding the special provisions of the Acts relating, respectively, to Coroners in the Presidency-towns, European British vagrants and criminal tribes, the Bill was now, so far as Mr. Cockerell, Mr. Colvin, Mr. Fitzpatrick and himself had been able to make it, a complete body of criminal procedure. No pains had been spared to render its provisions plain and practical; and, in return, he earnestly asked all competent persons to point out the mistakes and omissions which, notwithstanding the careful and repeated revision it had undergone, they would doubtless discover in so large and complicated a work.

The Motion was put and agreed to.

The Hon'ble MR. STOKES also moved that the Bill 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.

NORTH-WESTERN PROVINCES RENT ACT, 1873, AMENDMENT BILL.

The Hon'ble MR. THOMPSON, in the absence of the Hon'ble Mr. Colvin, asked for leave to postpone the Motion that the Bill to amend the North-Western Provinces Rent Act, 1873, as amended be passed.

Leave was granted.

INDIAN PENAL CODE AMENDMENT BILL.

The Hon'ble MR. STOKES introduced the Bill to amend the Indian Penal Code, and moved that it be referred to a Select Committee consisting of the Hon'ble Messrs. Thompson, Gibbs, Paul and Reynolds and the Mover.

The Motion was put and agreed to.

The Hon'ble MR. STOKES also moved that the Bill 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.

JHÁNSÍ ENCUMBERED ESTATES RELIEF BILL.

The Hon'ble MR. RIVERS THOMPSON, in the absence of the Hon'ble Mr. Colvin, presented the Report of the Select Committee on the Bill to provide for the relief of Encumbered Estates in the Jhánsí Division of the North-Western Provinces. He wished to state that the modifications and changes

which the Select Committee had thought it necessary to introduce into the Bill rendered it necessary to refer the Bill back, with the Report of the Select Committee, to His Honour the Lieutenant-Governor of the North-Western Provinces. It was not intended to take any further measures for passing the Bill into law until the opinion of His Honour had been ascertained regarding the several amendments which had been made in the Bill, and which diverged a good deal from the proposals which had been originally submitted by the Government of the North-Western Provinces. He had also to add that the action of the Council regarding the further progress of this Bill was stayed by the necessity of referring their proceedings up to date to Her Majesty's Secretary of State for India.

MERCHANT SHIPPING BILL.

The Hon'ble Mr. Stokes introduced the Bill for the further amendment of the law relating to Merchant Shipping, and moved that it be referred to a Select Committee consisting of the Hon'ble Messrs. Thompson, Gibbs, Paul, Reynolds and Mewburn and the Mover. The Bill, as he had said when obtaining leave to introduce it, consolidated Act IV of 1875 and part of Act XIII of 1878, with certain substantial amendments which he had described. But it did more than this.

Those Acts of 1875 and 1878 related in part to the suspension and cancellation of Board of Trade certificates to which the provisions of the Imperial Merchant Shipping Acts applied. An examination of the provisions of our Acts in connection with those of the Imperial Acts shewed that our Acts dealt with several matters already provided for by Parliament. This was not desirable. Apart from the question which might be raised as to the validity of our law, where that law was not transcribed *verbatim*, it was inconvenient from a practical point of view that double provisions relating to the same subject-matter should exist side by side. In re-enacting, therefore, the provisions of the Acts repealed by the Bill, an endeavour had been made to restrict its provisions to matters for which the Imperial Acts did not provide and on which it was clear we could legislate. This had necessitated the omission of some and the amendment of other provisions of the present law.

The Bill was, he must confess, a mere piece of patchwork. But this was unavoidable in the present state of the English Statute law on the subject of merchant shipping. He thought, however, that the Bill might be made somewhat more complete by incorporating the unrepealed provisions of Act I of 1859, and if the present Motion were carried, he would ask the Select Committee to incorporate those provisions.

The Motion was put and agreed to.

The Hon'ble MR. STOKES also moved that the Bill be published in the local official Gazettes in English and in such other languages as the Local Governments might think fit.

BENGAL PILOTS BILL.

The Hon'ble MR. STOKES moved for leave to introduce a Bill to give power to arrest persons whose evidence is needed under Act No. XII of 1859 *(to make better provision for the trial of Pilots at the Presidency of Fort William in Bengal for breach of duty).* He said that the last section of Act No. IV of 1875, which conferred on Courts established for the trial of pilots in Bengal under Act No. XII of 1859 certain powers for compelling the attendance of witnesses, would be repealed if the Merchant Shipping Bill, which he had just introduced, became law. As such a provision was somewhat out of place in a Merchant Shipping Act, it seemed better to re-enact it as a section in Act No. XII of 1859, and the present Bill had accordingly been prepared for this purpose.

The Motion was put and agreed to.

The Hon'ble MR. STOKES also applied to His Excellency the President to suspend the Rules for the Conduct of Business. It was desirable that the Bill should proceed through the Council *pari passu* with the Merchant Shipping Bill, and be referred to a Select Committee identical with that to which the Merchant Shipping Bill had just been referred.

The President declared the Rules suspended.

The Hon'ble MR. STOKES then introduced the Bill and moved that it be referred to a Select Committee consisting of the Hon'ble Messrs. Thompson, Gibbs, Paul, Reynolds and Mewburn and the Mover.

The Motion was put and agreed to.

The Hon'ble MR. STOKES also moved that the Bill be published in the *Calcutta Gazette* in English and in such other languages as the Local Government might think fit.

The Motion was put and agreed to.

FORT WILLIAM MAGISTRATES BILL.

The Hon'ble MR. REYNOLDS presented the Report of the Select Committee on the Bill to provide for the better government of Fort William.

PRESIDENCY SMALL CAUSE COURTS BILL.

The Hon'ble MR. STOKES presented the Report of the Select Committee on the Bill to consolidate and amend the law relating to the Courts of Small Causes established in the Presidency-towns.

The Council adjourned to Friday, the 11th March, 1881.

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

CALCUTTA;
The 4th March, 1881.

C. H. L.

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