Friday,
24th February, 1888

ABSTRACT OF THE PROCEEDINGS

OF THE

Council of the Governor General of India,

LAWS AND REGULATIONS

Vol. XXVII

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OF

THE COUNCIL OF THE GOVERNOR GENERAL OF INDIA,

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 24th February, 1888.

PRESENT:

His Excellency the Viceroy and Governor General of India, K.P., G.C.B., G.C.M.G., G.M.S.I., G.M.I.E., P.C., *presiding*.
His Honour the Lieutenant-Governor of Bengal, K.C.S.I., C.I.E.
The Hon'ble Lieutenant-General G. T. Chesney, R.E., C.B., C.S.I., C.I.E.
The Hon'ble A. R. Scoble, Q.C.
The Hon'ble Sir C. U. Aitchison, K.C.S.I., C.I.E., LL.D., D.O.L.
The Hon'ble Sir C. A. Elliott, K.C.S.I.
The Hon'ble J. Westland.
The Hon'ble Rana Sir Shankar Bakhsh Singh Bahádur, K.C.I.E.
The Hon'ble Syud Ameer Hossein, C.I.E.
The Hon'ble Rájá Peári Mohan Mukerji, C.S.I.
The Hon'ble W. S. Whiteside.
The Hon'ble J. W. Quinton, C.S.I.
The Hon'ble R. Steel.
The Hon'ble Sir Dinshaw Manockjee Petit, Kt.
The Hon'ble F. M. Halliday.
The Hon'ble Sir Pasupati Ananda Gajapati Razu, K.C.I.E., Mahárájá of Vizianagram.

DEBTORS BILL.

The Hon'ble Mr. SCOBLE presented the Report of the Select Committee on the Bill to amend the law relating to Imprisonment for Debt. He said:—

"As the Bill has been reported in a form substantially differing from that in which it was introduced, I feel it my duty to explain, as briefly as may be, the alterations which have been made and the reasons which prompted them.

"The origin of this measure is thus described in the Statement of Objects and Reasons published by my hon'ble friend Mr. Ilbert on the 9th June, 1886:—

'On the 17th November, 1881, a circular was addressed by the Government of India to all Local Governments and Administrations, stating that the Government of India had under consideration the question of amending the provisions of the Code of Civil Proce-

dure bearing upon the question of the arrest of *pardânashin* women in execution of the decrees of Civil Courts, but that before coming to any final conclusion on the subject the Governor General in Council thought it desirable to deal with the larger question of abolishing imprisonment for debt, and for this purpose to enquire whether sufficient reasons exist for the continued maintenance in India of the present system. Local Governments and Administrations were accordingly requested to favour the Government of India with a full expression of their opinion on the matter.

'The replies to the circular disclosed much difference of opinion as regards the advisability of maintaining in India the present system of imprisonment for debt.

'In favour of the maintenance under existing circumstances of the present system of imprisonment for debt were the Madras Government, the Madras High Court, the Bombay Government, the Bombay High Court, the Calcutta High Court, the Calcutta Chamber of Commerce and the Trades Association, Calcutta (unless a change were accompanied by the enactment of a stringent bankruptcy law), the British Indian Association, Calcutta, the Board of Revenue, North-Western Provinces, the Punjab Chief Court, the Chief Commissioner of the Central Provinces, the Chief Commissioner of Assam (provided the law were so altered as to permit the issue of process against the person only after all means of realising the decree by process against property have been exhausted) and the Chief Commissioner and the Judicial Commissioner of Coorg.'

"On the other side were arrayed the Advocate General of Bengal, the Bengal Government, the Government and High Court of the North-Western Provinces, the Punjab Government, the Chief Commissioner of British Burma, the Judicial Commissioner of the same Province, the Recorder of Rangoon and the Resident at Hyderabad. Thus the preponderance of opinion was on the whole in favour of the maintenance of imprisonment for debt under the present condition of India, but a considerable and influential minority were in favour of its abolition.

"In the result, my learned friend, adopting the opinion that imprisonment for debt ought to be abolished, proposed that, 'having regard to the authority and experience of some of those who are opposed to a change in the law, and bearing in mind the immense diversity of circumstances and conditions which prevails throughout this vast peninsula,' the most prudent course would be to confine its application in the first instance to one province, the North-Western Provinces and Oudh, where the balance of authority, administrative and judicial, was in its favour, leaving it to the Local Governments, with the previous sanction of the Governor General in Council, to apply it to other provinces as they might see fit.

"The Select Committee have not been able to accept this view. They are of opinion that there should be uniformity of practice in regard to execution of decrees wherever the Code of Civil Procedure applies, and that it is the part of the Legislature, and not of Local Governments, to determine whether any, and what, changes should be made in that procedure. Bearing in mind Lord Macaulay's celebrated aphorism—'Uniformity when you can have it; diversity when you must have it; but in all cases certainty,' they have carefully examined the voluminous papers submitted to them with a view to ascertain whether any alteration of the law was called for, and whether men's minds were generally agreed as to the particular alteration necessary.

"Let me here quote Mr. Ilbert's summary of the present state of the law:—

'The present state of the law is this. Under the Civil Procedure Code a decree or order for the payment of money may be enforced by the imprisonment of the judgment-debtor. The Court has a discretionary power to refuse execution at the same time against both person and property, but has no discretionary power to refuse execution either against person or against property at the option of the creditor. When an application for execution of a decree is presented, it must, if it is not barred by efflux of time and is otherwise in order, be admitted, and then the Court must order execution of the decree *according to the nature of the application*. The Court cannot refuse to issue its warrant for the execution of the decree unless it sees cause to the contrary, and "cause to the contrary," as interpreted by the Courts, means some cause which deprives the decree-holder of the right to execute, or to execute against the party against whom execution is sought, or to execute in the mode prayed for.

'Thus, therefore, it may be clear that the debtor has property available for attachment, and that a warrant of arrest has been applied for from vindictive or other improper motives, and yet, if the creditor asks for a warrant of arrest, a warrant must issue. The debtor may be a woman, she may even belong to the class of women who by the law of this country are exempted from public appearance in Court, and yet, if the creditor says that he wishes to send her to prison, to prison she must go.'

"It appeared to the Committee that a state of the law under which the discretion as to whether a debtor shall be arrested and imprisoned or not rests not with the Court but with the creditor was wrong and ought not to be maintained. It has been well said that—'to arrest without enquiry is to punish the larger number of debtors because the smaller require to be coerced;' and it is easy to see how such a power is likely to be misused. The Committee accordingly examined the opinions before them with a view to ascertain whether such a modification of the law as would vest the discretion in the Court was generally desired.

"It would be wearisome to go through all the opinions received, but I will venture to quote a few of them. The Bengal Government wrote:—

'Honest debtors would have a sufficient protection if the Code of Civil Procedure were amended so as to give the Court the discretion of refusing applications to execute process against the person.'

"The Bengal Chamber of Commerce 'would like to see imprisonment, in default of satisfying a decree of the Civil Courts for money, fenced round so as to exclude its being used for malicious motives out of spite, or to satisfy feelings of hatred or revenge.' How this might best be done they say is a problem for those to solve who have proposed the new change in the law. But they suggest that the Judge, after hearing the statements on both sides, might decide whether it is or is not a case where imprisonment for debt might properly be resorted to.

"In the opinion of the Bombay Government,—

'The Courts should have the power to distinguish between the two classes of debtors, and to send to jail those who will not pay, or who, not having the means of paying immediately, refuse to enter into such terms as the Court considers fair and reasonable.

'His Excellency in Council would prefer a provision that upon an application for the arrest of any debtor the Court should cause the defendant to be brought before it, and should satisfy itself that he has not the means of discharging the debt either immediately, or in such manner and within such time as the Court may consider reasonable. If the defendant fails to satisfy the Court, the warrant for arrest should issue.

'The Court would generally be able to satisfy itself by examining the parties and any witnesses whom they might produce, both as to the present means of the defendant and his prospect of future earnings; and, in the event of immediate payment being impossible, it might in most cases substitute for the extortionate bond required by the creditor an order for payment by instalments (including reasonable interest) under section 210 of the Civil Procedure Code. The whole amount of the debt should be made payable immediately, on default of payment of any instalment, and in that event a warrant of arrest should be granted without further inquiry.'

"Mr. Justice West writes:—

'Looking to all the circumstances, a discretionary power should, I think, be given to the Civil Courts as to the issue of a warrant of arrest before the failure of other means of enforcing a decree, and there the legislature should, for the present, be content to stop.'

"The Advocate General of Bombay says:—

'No doubt there are cases in which the power of imprisonment for debt is abused by the creditor, as may be said of all legal process; but I think that these cases would be fully provided for by an amendment of the Civil Procedure Code giving the Court power to refuse an order for arrest of a judgment-debtor or to make an order for his release after arrest in such cases as are provided by section 30 of the Presidency Small Cause Courts Act, 1882; and I think that such an amendment ought to be made.'

"Mr. Justice Brandt, of the Madras High Court, says, and Mr. Justice Parker concurs with him:—

'I should be in favour of an amendment of the provisions of the Code of Civil Procedure in this respect to the extent of vesting the Court executing the decree with full discretion as to whether it would allow process to issue for the arrest of the person of the judgment-debtor, before and until process against property has been issued and proved infructuous.'

"Acting upon the opinions thus expressed, the Select Committee have, in sections 2 and 4 of the Bill, provided that, when an application is made for the execution of a decree for money by arrest and imprisonment, the Court may issue, instead of a warrant, a notice calling on the debtor to show cause why he should not be committed to jail. If the debtor appears upon this notice and satisfies the Court that he is unable, from poverty or other sufficient cause, to satisfy the decree, the Court may release him; if he fails to appear or to satisfy the Court of his inability to pay, the Court may arrest and imprison him. As a guide to the discretion of the Court we have adopted the main provisions of the original Bill as to the circumstances a consideration of which may influence the Court in determining whether or not to exercise the power of imprisonment against a debtor. This is a point on which great differences of opinion may and do prevail, but, having regard to the fact that a man may be guilty of many of the malpractices mentioned without bringing himself within the clutches of the criminal law, the Committee has decided to maintain these provisions.

"It may be thought that this is but a slight alteration of the existing law, that under section 336 of the Code as it stands a debtor has only to inform the Court that he intends to apply to be declared an insolvent, and that upon declaring his intention so to apply within a month, and giving security that he will appear when called upon, the Court shall release him. But the alteration is important. Under the existing law the debtor comes before the Court in custody; under the proposed Act he may

come as a free man. It is obvious that he will be in a far better position to prepare a statement of his affairs and to ask his friends to become security for him if he is at liberty than if he is exposed to the indignity and inconvenience of arrest and consequent imprisonment. This consideration applies of course to the honest debtor, whom alone we are concerned to protect: and it is surely fair that his poverty should not be made the occasion of aggravating his misfortune. On the other hand, it is only fair to give the creditor every reasonable facility for obtaining the property of his debtor; and experience seems to establish that in India at all events the remedy is not complete without the power of imprisonment in proper cases.

"One class of judgment-debtors, however, the Committee propose absolutely to exempt from liability to arrest and imprisonment for debt, and that is—women. This is in accordance with the views of the British Indian Association as to *pardánashin* ladies expressed in a letter to the Government of Bengal under date the 28th of June, 1882. 'The law,' they say, 'ought to be adapted to the peculiar circumstances of the country. The Committee submit that the Indian feeling regarding the sanctity of the zanána is not a mere sentiment: it is bound up with the deeply cherished religious feelings and social usages of the people.' The proposal in the Bill is to render a woman's property alone answerable for debts incurred by her: we thus assimilate the position of all women to that enjoyed by some married women under Act III of 1874. That there is abundant ground for making this exemption general is clear from the papers which have been before the Committee. Although it may not be true, as stated by one officer, that 'it is almost invariably the female who is selected for imprisonment,' there is no doubt that a system under which, from want of better accommodation, respectable though poor women may be lodged in a criminal jail with thieves and prostitutes for their companions, is self-condemned. The only difficulty in the way of total exemption of women arises from the fact that a woman may, of her own motion or at the instigation of designing persons, institute a false and vexatious suit against an innocent defendant and go harmless if the suit is dismissed and costs are decreed against her. To guard against this we have provided in section 5 that, when a woman is sole plaintiff, the Court may, on proper grounds shown, require her to give security for costs.

"Section 9 of the Bill provides for the cancellation by the Court of an order for arrest or imprisonment in case of the serious illness or confirmed bad health of the debtor, and by the Local Government if he is suffering from any infec-

tious or contagious disease: but a debtor released under these circumstances is liable to be re-arrested.

"The Select Committee has not adopted that portion of the original Bill which cast the burden of maintaining a debtor while in jail upon the State. Imprisonment being used as a means of compelling payment, it seems just that the creditor, who asks the State to assist him in obtaining payment by this means, should pay the expenses of the process. By retaining this obligation of the creditor to support his debtor while in jail, a debtor is not likely to be kept in jail longer than is necessary to convince the creditor that the debtor has no means of satisfying the debt.

"As originally drafted the Bill related to decrees or orders of Revenue Courts. The general consensus of opinion on the part of the officers and Administrations consulted was that the collection of revenue should not be made subject to the provisions of the Bill, and its operation as regards rent and revenue will extend only to decrees passed in rent-suits by Civil Courts or Courts regulated by the Code of Civil Procedure and to the collection of revenue under the rules of the Code, as in Bengal and Burma. With a view to assimilate the maximum time of imprisonment for rent-defaulters to that fixed for other civil debtors throughout India, we have recommended certain subsidiary amendments in Madras Act VIII of 1865 and the North-Western Provinces Rent Act, 1881.

"It only remains for me to thank the Council for the patience with which they have listened to these observations. But the Bill is one of great importance; and having regard to the alterations which have been introduced, I ask the Council to direct its re-publication. The effect of the Bill will now be to prevent the imprisonment of debtors who are paupers but not fraudulent; and to leave creditors the power of imprisoning debtors when a Court has been satisfied that such process may justly be resorted to."

The Hon'ble SIR CHARLES ELLIOTT said—

"I was not a member of the Select Committee appointed to examine this Bill, but, as the subject is one in which I have always taken the greatest interest, I think it right to venture to offer a few remarks on the subject for the consideration of the Council. When the proposal to abolish imprisonment for debt altogether was circulated for the opinion of Local Governments, I was not able, as the Hon'ble the Law Member has just stated, to support the proposal in its entirety, feeling that in the present condition of things the temptation which it

would place in the way of debtors to fraudulently remove the whole of their property, or to transfer it to others, or to cause it to disappear, would be very great. But I pointed out the extremely unsatisfactory position in which the Civil Courts are placed from the fact that no discretion is allowed to the Courts in the case of judgment-creditors applying for the execution of decrees either against the property or the person of a debtor, and I urged that the law should be modified to the extent of allowing that discretion. I venture to think that the line which has been taken by the present Bill has very happily hit the proper medium between the more advanced proposal which was originally circulated and the provisions in the existing law which have been worked in a very objectionable way. But, though on the main point the Bill has been a very great improvement, I think there are certain other objectionable points in the Code of Civil Procedure which, if it had been in my power, I should wish to have seen changed along with this Bill, but which I have not had an opportunity of bringing before the Select Committee from the fact of my not being here at the time when this Bill was being considered. I think on that account I may venture to lay before the Council now the points which should, in my humble opinion, be taken into consideration whenever an opportunity occurs of amending the Code of Civil Procedure.

"The first point is with regard to section 342 of the Code of Civil Procedure. Under that section, if the decree is for a sum less than Rs. 50, a person can be imprisoned for six weeks; and, if it is for Rs. 50 or over, he can be imprisoned for six months. But I do not find it distinctly laid down what the exact sum is which is referred to as making up the Rs. 50; whether it is the decree for the original debt, or whether it is the decree plus the interest on the debt up to date and the costs which have been incurred since. Under section 235 the creditor when applying for execution has to state the amount of debt due on the decree, and the interest, and the costs; and it is not clear whether section 342 intends that the whole of these three items should be considered to make up the Rs. 50 or not. The North-Western Provinces Rent Act, as mentioned in the concluding section of this Bill, expressly excludes costs and makes the term of imprisonment depend on whether the amount decreed, exclusive of costs, does or does not exceed Rs. 50. But I am given to understand that in most cases the Courts interpret this phrase to mean the original debt or the part of it remaining unpaid plus the interest and costs. Now, clearly the case may often happen—and I have practically found that it does happen—in which a decree may have been obtained for Rs. 45 and the addition of interest and costs in the case brings it to something over Rs. 50.

So that the question whether the imprisonment should be for six weeks or six months depends entirely upon whether in such cases the costs are included in the decree or not. I venture to think it would be well if the Code were so amended as to lay down a uniform procedure on this point.

"The second point I wish to bring forward is with regard to the interpretation of the wording of the same section. The section runs as follows:—

'No person shall be imprisoned in execution of a decree for a longer period than six months, or for a longer period than six weeks if the decree be for the payment of a sum not exceeding fifty rupees.'

"But some doubt exists as to whether the term should be the whole of six weeks or of six months, as the case may be, or whether in either case it may be a somewhat shorter period—whether the section is meant to be rigid or elastic. I believe the majority of the Courts interpret this section in the sense that it must be rigid, that is to say, when the law says that no person shall be imprisoned for a longer period than six months when the decree is for a sum exceeding Rs. 50, they hold that it means that every such person shall be imprisoned for a period of six months. That seems to me to be a perversion of the meaning of the words. During the course of my inspection of the Civil Courts in Assam I have found that in some cases Munsifs have taken one view, and in other cases they have taken the other. And it seems to me to be exceedingly desirable that the Courts should have power to say, 'Here is a debt of a little over Rs. 50 (say, Rs. 100); I will give the debtor two or three months' imprisonment for it, and not the full term of six months which the law provides.' If there is any opportunity, I think it will be well for the Code to be amended either to carry out the meaning I attribute to the section, or at any rate to make its meaning perfectly clear.

"The third point is with regard to the subsistence-allowance. The hon'ble mover has just informed us that a proposal has been made to the Committee that the cost of the maintenance of civil prisoners should be borne by the State. I am extremely glad to hear that the proposal has been rejected; for it seems to me to be a perfectly axiomatic principle that, if our jails and our jail-establishments are to be used as bailiffs by moneylenders for the purpose of collecting debts due to them, they should be compelled to pay the costs of such procedure. But the law does not say clearly that they should pay the whole costs of this procedure. There is no interpretation in the Act of the term 'subsistence', but I believe that, as

a matter of fact, it is generally taken to mean simply food. An inspection of the schedules prescribed by the different Local Governments, in which they provide a scale of payment for debtors of different classes, will show that in almost every case for the poorest classes of debtors two annas a day is prescribed, which may be roughly taken as the minimum amount upon which a man can be fed. The Prisons Act (Act XXVI of 1870), which is in force in Assam, provides by section 36 that the clothing and bedding which are required for a civil prisoner may be charged against the creditor. No one who has inspected a jail in bitter cold weather, as I have in Assam, and has seen the state in which the extremely poor classes of debtors are left, can fail to doubt that this is a reasonable and merciful provision. But I go further and say that the creditor should be made to pay not only the cost of food, clothing and bedding, but also a share of the expense which the State has to bear in the watch and ward of the prisoners and also of the building and maintenance of the places in which they are kept. I think it would be well on a future occasion if the law were so amended as to show that all this expenditure ought to be laid upon creditors and not upon the State.

"My fourth point arises when, having taken the prisoner through his term of imprisonment, we come to the conditions upon which he is to be released. The Code of Civil Procedure provides no form of warrant under which he is to be imprisoned. In the case of a criminal prisoner a specific form of warrant is laid down by law. And beyond that the Prisons Act provides that in the case of criminal prisoners jailors should keep a register of warrants, and a book shewing the names of prisoners and the date upon which each prisoner is to be released. In Bengal the Local Government provides for the same thing by its own circulars. So that in the case of criminal prisoners there is no possibility, except by direct fraud, by which a man can be kept in prison one single day beyond the term of his imprisonment. And it is our custom on inspecting jails to look specially at this register of the dates of release. It provides a page for each day of the year for many years ahead, and we there see the names of the prisoners who are to be released on each day, far ahead of the date of inspection; then we turn up the warrants and verify the register by the warrants. And in this way every inspecting officer who visits a jail sees that there is no possibility of the liberty of a prisoner being infringed for a day longer than his warrant provides. But it is strange that the law has taken no such tender care of civil prisoners. There is no provision which secures that a man shall be released at the time he ought to be let out. The form of warrant under which he is committed to prison is not

fixed by the law but is laid down by the High Courts. The North-Western Provinces High Court has provided a form of warrant in these terms:—

'You are hereby required to receive the said prisoner and to keep him in custody for the term of , subject to the provisions of section 341 of the Code of Civil Procedure.'

"But the form of warrant issued by the Bengal High Court (unless it has been recently altered) does not contain any provision of this kind. It runs—

'You are required to receive and to keep him in prison until the said decree shall be fully satisfied, or until the prisoner shall be otherwise entitled to be released according to the terms of section 341 of the Civil Procedure Code.'

"That is to say, it leaves the date of the release of the prisoner to be decided by the jailor, according to his knowledge of law and his interpretation of the Act; and that, I submit, is a power which should not be left to a man who is in the somewhat inferior position in which the jailors of minor jails usually are. I think it is necessary when the law is revised that the form of warrant should be prescribed in the Code, and that a similar provision should be made for civil as for criminal prisoners with regard to keeping up a release-book and a registry of warrants.

"Then, the last point I wish to bring forward is with regard to cases of insolvency. It is quite true that, under the wise amendments of the Bill now before the Council, these provisions will become of very much less importance than they have hitherto been. Hitherto they have been the sole protection of the pauper debtor against the malice or the rage of his creditor; whereas now the discretion of the Court is interposed and the creditor will not be allowed by the Court to use the Government jails as a means of wreaking his anger upon the debtor who is honest but who is entirely unable to pay. Still the provision for insolvency, as far as it remains, should, I think, be modified in one respect, namely, that at present a prisoner who applies for insolvency has to furnish sufficient security that he will appear when called upon. Now, the pauper debtor can never furnish security. Over and over again, when I have visited jails, I have found extremely poor prisoners lying in them for extremely small sums (say, for Rs. 10 or Rs. 20). I have asked them why they did not apply to the Court for an order of insolvency, and the answer was generally that they knew nothing whatever about it, that provisions of the law had never been brought to their notice: and afterwards, when measures have been

taken to remedy this, the answer has been that the law requires them to find security for their appearance, and that they were quite unable to provide any security; therefore that very small provision has completely frustrated the intention of the law with regard to the very class of debtors for whom it was intended. I think their cases should be taken into consideration and some remedy devised to prevent the procedure from being so ineffectual.

"These are the points which my personal experience of the administration of a province has brought to my notice. It is unfortunate that I was unable to bring them before the Select Committee, owing to the fact of my not having been in India, but last week I took the first opportunity I had to speak to the hon'ble member in charge of the Bill, and he informed me that, if I brought forward these points as amendments, they would necessitate so considerable a change in the Bill that it would be necessary to refer it back to the Local Governments, and therefore a whole session would expire before the Bill could be passed. Admitting, as I do, that the Bill is an extremely valuable one, I completely accepted the force of his objection, and the only thing I can do now is to give what publicity I can to the points which I desire to see amended in the Code of Civil Procedure, because, as I understand, in a very short time the amendment of the Code will be taken in hand, and I trust that, having brought forward the points in this way, they will be considered by the Select Committee and the Council."

The Hon'ble LIEUTENANT-GENERAL CHESNEY gave notice that at the next Meeting he would move that the Army Reserve Bill be taken into consideration.

The Council adjourned to Friday, the 2nd March, 1888.

S. HARVEY JAMES,
Secy. to the Govt. of India,
Legislative Department.

FORT WILLIAM;
The 29th February, 1888.

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