Saturday,
10th March, 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 Saturday, the 10th March, 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*.
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 Bahadur, 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 G. H. P. Evans.
The Hon'ble J. W. Quinton, C.S.I.
The Hon'ble R. Steel.
The Hon'ble F. M. Halliday.
The Hon'ble Sir Pasupati Ananda Gajapati Razu, K.C.I.E., Mahárájá of Vizianagram.

CIVIL PROCEDURE CODE, &c., AMENDMENT BILL.

The Hon'ble MR. SCOBLE presented the Report of the Select Committee on the Bill to amend the Code of Civil Procedure and the Indian Limitation Act, 1877. He said:—

"Although this Bill is somewhat formidable in appearance, I do not think it will be found upon examination to contain much controversial matter. I am free to confess that I approached its consideration rather more than twelve months ago by no means with a light heart. The revision of the Code of Civil Procedure is not a matter to be readily undertaken by any one familiar with the working of the Courts and who knows from practical experience how easy it is to pick holes and how difficult it is to mend them. No one could be more averse than I am to what is called 'tinkering' enactments of this kind. But

being confronted with an amending Bill on my arrival in this country, and overwhelmed with suggestions for still further amendments, I have had to deal with the matter, however reluctantly; and, with the assistance of the Select Committee, I hope to have produced a practically useful measure.

"As the Council are aware, the last edition of the Code was published in 1882. The six years which have since elapsed have brought to light some defects in its method, and some difficulties in its construction, which it is the object of the present Bill to remedy. The defects have been pointed out by the Courts which have had to administer the Code; the difficulties have resulted from imperfections of expression which have led different High Courts to construe the same sections in different ways. In dealing with this Bill the Select Committee has attempted no startling innovations, but has limited itself to the more modest, and, I think, more useful, task of making plain that which was before obscure, and supplying that which experience has shown to have been accidentally omitted or imperfectly expressed.

"At the risk of being somewhat tedious—for details of this kind, though important, are not interesting to a lay audience—I must ask the Council to bear with me while I point out the principal alterations effected in the Code by this Bill. Taking the sections in their order, the first to which I desire to call attention is section 3, which has been introduced on the suggestion of the Government of the North-Western Provinces and Oudh. The object is to preserve the summary character of rent-litigation under local laws; and it is justified on the ground that holding the provisions of the Civil Procedure Code to be applicable to the proceedings of the Rent and Revenue Courts, in all points which are not provided for in the special Acts governing those classes of Courts, may be the source of considerable embarrassment to the Administration, both by throwing impediments in the way of the easy realization of the rents from which the land-revenue is paid, and imposing increased labour on the Rent Courts whose time is already fully occupied.

"Section 5 relates to suits on foreign judgments. Upon this point there is a conflict of decisions between the High Courts of Madras and Bombay, which we have settled by declaring that Courts in British India shall not be precluded from enquiring into the merits of the case in which the judgment was passed by any Court in Asia or Africa, excepting only Courts established by the authority of the British Government in our colonies and dependencies. This will avoid the anomaly of placing the Courts of Siam or Cabul on the same footing as the Queen's Courts in Ceylon or Hongkong.

"Section 6 is intended to avoid a difficulty as to jurisdiction which frequently arises where the boundaries of estates or holdings are destroyed or altered by fluvial action.

"Section 7 is based upon a suggestion of Mr. Justice Straight, and makes it clear that, in order to found jurisdiction it is enough that a material part of the cause of action arises within the local limitsof the jurisdiction of the Court in which the suit is instituted.

"The object of section 9 is to give to the Courts greater power of amendment of plaints than they at present possess. The tendency of the Courts in England is to allow the greatest latitude in this direction. In a recent case before the Court of Appeal (*Weldon* v. *Neal,* 19 Q. B. D. 395) Lord Justice Lopes says: 'However negligent or careless the first omission, and however late the proposed amendment, the amendment should be allowed if it can be allowed without injustice to the other side.' In this country, where, as the Advocate General of Bengal observes, 'there is every likelihood of a poor suitor acting in ignorance or under the advice of ignorant advisers, and launching an honest case in a clumsy and irrational manner,' it appeared to the Select Committee there was abundant reason for adopting the English rule. The only necessary limitation is to prevent a suit of one character from being turned by amendment into a suit of a different character; and it is therefore provided that amendments which would have this effect are not to be allowed.

"Sections 10, 11, 12, 15 and 16 are intended to facilitate the service of summonses by an agency other than that of the Courts which issued them.

"Section 14 substitutes for sections 141 and 142 of the Code a simpler method of dealing with the documentary evidence produced in suits.

"Section 17 empowers the Local Governments to authorize selected Judges to take down the evidence in appealable cases in the English language. This section is regarded by the Bengal Government as 'perhaps the most important in the Bill,' and the Lieutenant-Governor believes that 'a cautious use of the power therein conferred will effect an enormous saving of time both in original as well as in appellate Courts.' District Judges are of the same opinion. Mr. Stevens, of Gya, writes—'It is scarcely possible to exaggerate the trouble, annoyance and waste of time which are frequently caused by the present mode of recording evidence;' and Mr. Towers, of Midnapore, says—'I believe the change would

be a very salutary one in all District Courts, and probably in those of most Subordinate Judges, which are always situated at head-quarters, and the pleaders practising in which are good English scholars.' For myself I believe I could do twice the amount of appellate work if I had a record of the evidence in English. In original cases also it will save District Judges much time and trouble to have but one record. The expense of translations in the High Court will also be much reduced, and there will be a very appreciable gain to litigants.' From Madras, Mr. Justice Parker writes—'These provisions have long been most desirable in the Madras Presidency. The present practice is as much disliked by the Bar as by the Judge, and causes great loss of time.' The Bombay Government, on the other hand, consider the alteration undesirable; and there would be much force in their observation that "Judges are of necessity frequently sent to districts with the language of which they are unacquainted, and in such cases it is not desirable that there should be no vernacular record of the evidence" if the proposal were absolute; but, as Local Governments may limit and revoke the exercise of the power as they please, it may surely be expected of them not to misuse the discretion with which they are invested.

"Sections 18 and 19 make it clear that the law does not require the rehearing of a suit by the successor of a Judge who, having part heard the suit, has been prevented by death, transfer or other cause from concluding the trial; but that the hearing may be taken up at the stage at which it was left by the previous Judge, with liberty to recall and re-examine any witnesses from whom further evidence may be desired.

"In section 20 we carry out a suggestion of the Chief Court of the Punjab with regard to the award of interest on decrees for money.

"Section 21 is designed to bring equitable set-offs, which the Courts are in the habit of allowing, within the operation of section 216 of the Code.

"In section 26 we have empowered the Court executing a decree to determine questions as to stay of execution: and, as considerable difficulties have been felt with regard to the meaning of the word 'representatives' in section 244 of the Code, we have provided a procedure by which, in case of dispute, the representative of a party for the purposes of the section may be ascertained.

"There have been so many conflicting rulings of the High Courts upon the effect to be given to payments or adjustments of decrees which have not been certified to the Court charged with the execution of those decrees, that we have

provided in section 27 that, unless such payment or adjustment has been certified as required by the Code, it shall not be recognized as a satisfaction of the decree by any Court executing the decree. This provision will, it is hoped, have the effect of inducing parties who settle out of Court to report to the Court that such settlement has been made.

"Section 28 brings the provisions of the Code in regard to the attachment of property in execution of a decree into accordance with recent legislation, and removes a doubt as to the extent to which the salaries of certain classes of public servants are liable to be attached.

"Under section 320 of the Code, Local Governments were empowered to direct that the execution of decrees affecting immoveable property might be transferred, in certain cases, from the Court to the Collector; and subsequent sections provided that the Collector might sell, let or mortgage the property as might seem most desirable under the circumstances. The Local Governments were authorized to make rules for the guidance of the Collector and his subordinates in executing the decree; but no provision was made as to the authority to which an appeal would lie from orders passed by the Collector in exercise of the powers conferred on him. The High Courts of Calcutta and Bombay have expressed the opinion that the proceedings of the Collector should be subject to appeal to the District Judge and the High Court; but there is a Full Bench decision of the Allahabad High Court, with which the Select Committee concurs, to the contrary effect. We think it was the intention of the Legislature that any appeal from the orders of the Collector in matters of this kind should go to the superior Revenue-authorities. There are obvious reasons of convenience in favour of this course, and we have so provided in section 30 of the Bill.

"The most important clause in section 31 is that which provides that Chapter XX of the Code, which relates to proceedings in insolvency, shall not apply within the towns of Calcutta, Madras and Bombay. This provision has been introduced at the suggestion of the High Court of Calcutta, the Judges of which point out the inconveniences of the present dual system, and say that 'it seems to be quite unnecessary to have two different systems of insolvency law at work in the same place. The provisions of the Insolvent Act, though in many respects imperfect, are now understood by practitioners, and great confusion and uncertainty has in some cases arisen from the introduction of a new and more imperfect procedure.' As the question of amending and consoli-

dating the law of bankruptcy and insolvency in British India is now before the Council, it seems desirable that the presidency-towns should, at all events for the present, retain the system to which they have for long years been accustomed. In regard to small insolvencies, moreover, I am in great hopes that they will be to a great extent got rid of when the Debtors Bill passes into law.

"The remaining sections of the Bill relate mainly to minor alterations. Sections 32, 53 and 66 extend the period during which the representatives of deceased suitors may apply to be entered on the record as plaintiffs or defendants. Section 33, restoring a provision of the Code of 1859, relaxes the stringency of the existing law respecting the dismissal of suits for default in giving security for costs. Section 34 enlarges the class of persons to whom commissions to examine witnesses may be issued, subject to such rules as the High Court may make in the matter. Sections 37, 38, 40 and 41 are to remove difficulties which at present beset ruling chiefs when they sue in our Courts.

"Section 44 is in accordance with the views of the Muhammadan Educational Endowment Committee, recently appointed by the Government of Bengal, and is intended to facilitate proceedings in suits relating to public charities. The Committee represent that it has been decided by a Divisional Bench of the Calcutta High Court (I. L. R. 8 Cal. 32) that the interest possessed in a mosque by those who live in the village in which it is situated, and are in the habit of worshipping in it, is not a direct interest within the meaning of section 539 of the Code. 'It would seem to follow that the real beneficiaries of a public trust, that is to say, those members of the general community who derive advantage from it in its ordinary operation, can seldom proceed under the section; while those whose interest in the foundation is more direct, as being entitled to share in its management, and who therefore can institute suits, are the very men who are likely to be guilty of malversation or other breach of the conditions of the trust. The Committee consider it most impolitic to deny the remedy to all except those who inflict the wrong, and would strike the word "direct" out of the section.' We have adopted this suggestion.

"Section 47 is intended to get rid of an anomaly which arises under the present state of the law in regard to the dismissal of appeals by default, and is proposed by Mr. R. J. Crosthwaite, the Judicial Commissioner of the Central Provinces, who writes as follows:—

'This amendment is necessary, because, as section 551 stands now, an appellant can, if his appeal is fixed for hearing under that section, refrain from appearing, and then

appeal from the decree of the first Appellate Court dismissing his appeal. The Court of second appeal will then have to consider the appeal and decide it, because the provisions of section 556 do not apply in the case of an appeal dealt with under section 551. When a first appeal is dismissed under section 556 for default, there is practically no second appeal, because the second Appellate Court must hold that, as the appellant did not appear in the Court of first appeal, that Court's decree dismissing the appeal was under section 556 correct; but when an appeal is fixed for hearing under section 551, and, the appellant not appearing, his appeal is dismissed, section 556 does not apply; and an appellant can thus ignore the Court of first appeal and take his appeal to the High Court. Section 556 does not, I think, apply, because there can be no doubt that the words 'on the day so fixed' mean 'the day fixed under section 552 for hearing the appeal.' This state of the law is anomalous, and, considering that a Court of second appeal is supposed to go by the findings of fact of the Court of first appeal, inconvenient. If an appellant does not appear on the day fixed for hearing, whether it be fixed under section 551 or section 552, his appeal should be dismissed; but he should have a right to apply for re-admission under section 558.'

"Upon the sections which follow from 48 to 59 I need not trouble the Council with any observations. But section 60 is of more importance. It embodies a suggestion made by the Judges of the High Court of Calcutta, who thus describe the difficulty which it is intended to cure:—

'In this province it is often difficult to tell whether a suit should be instituted in the Small Cause Court or a Court possessing ordinary civil jurisdiction. Numerous cases have been brought to the cognizance of this Court in which great inconvenience, hardship and injustice have been caused in this way. A suit is brought in the first instance in the Small Cause Court, and that Court declares that it has no jurisdiction and dismisses the suit. The plaintiff then institutes the same suit in the Munsif's Court, which, upon trial, gives him a decree. The defendant thereupon appeals to the higher Courts, and it is held that the Munsif had no jurisdiction, and accordingly the suit is dismissed. The result is that the unfortunate suitor gets no relief anywhere. And this same result also follows when the Court of first instance holds that it has no jurisdiction, and also when the suit is in the first instance instituted in the Civil Court and the suitor subsequently goes to the Small Cause Court. The Judges think questions of jurisdiction and errors as to jurisdiction should be susceptible of being dealt with and cured by the High Court by transfer, affirmation of decree or otherwise; and they think that the order of the High Court as to jurisdiction should be final.'

"I will not detain the Council by a detailed reference to the remaining sections of the Bill; but there is one important omission to which I desire briefly to advert. A recent decision of the Privy Council (*Rájá Amir Hasan Khan* v. *Sheo Buksh Sing*, L. R. I. A. 237) has given a more limited construction to section 622 of the Code than had been put upon it by the Courts in India;

and many suggestions have been made with a view to the extension of the revisional powers of the High Courts to all cases in which there had been a material irregularity in procedure or the decision was based on an erroneous view of the law. The Committee have not been able to adopt these suggestions, the more especially as they have been favoured with one by the Chief Justice of Bengal which would have the effect of doing away with second appeals altogether and substituting for them a right of application to the High Court as a Court of review in all cases in which it could be shown that a failure of justice had occurred. This suggestion, coming from so high an authority, deserves, and will receive, the most respectful consideration; but the proposal is of too sweeping a character to be hastily adopted, and the Committee did not think it desirable to delay their Report on this Bill for the purpose of consulting other authorities upon it.

"I have only to add that the draft has been twice circulated, in its original and in an amended form, to Local Governments and High Courts, and that the Bill as reported is the outcome of a most careful consideration on the part of the Committee of the criticisms which have been received from judicial officers and others engaged in the daily working of the Code, and therefore best able to indicate the points in which it is susceptible of improvement. To these gentlemen I desire to tender my best thanks for the valuable assistance which they have rendered and which has, I hope, enabled the Select Committee to work out a series of amendments of the Code which will simplify and facilitate in many important respects the administration of justice."

The Council adjourned to Friday, the 16th March, 1888.

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

FORT WILLIAM;
The 10th March, 1888.