Friday, May 12, 1871

ABSTRACT OF THE PROCEEDINGS

COUNCIL OF THE GOVERNOR GENERAL OF INDIA

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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 Simla on Saturday, the 6th May 1871.

The Council adjourned to Friday, the 12th May 1871.

H. S. CUNNINGHAM,

SIMLA; *The 6th May* 1871. } *Offg. Secy. to the Council of the Governor General for making Laws and Regulations.*

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 Simla on Friday, the 12th May 1871.

PRESENT:

His Excellency the Viceroy and Governor General of India, K. P., G. M. S. I., *presiding.*
His Honour the Lieutenant-Governor of the Panjáb.
His Excellency the Commander-in-Chief, G. C. B., G. C. S. I.
The Hon'ble John Strachey.
The Hon'ble Sir Richard Temple, K. C. S. I.
The Hon'ble J. Fitzjames Stephen, Q. C.
The Hon'ble B. H. Ellis.
Major-General the Hon'ble H. W. Norman, C. B.
The Hon'ble F. R. Cockerell.

SESSIONS COURTS BILL.

The Hon'ble MR. STEPHEN moved to introduce the Bill to amend the law relating to the Courts of Session. He said—"My Lord, I have the honour to introduce a Bill, of which the title is 'The Bengal Sessions Courts Act, 1871.' As I shall have to request your Lordship to suspend the standing orders so

that the Bill may be passed in a single sitting, I must give a full explanation of that very unusual course.

"The objects of the Bill are to enable the Lieutenant-Governors of Bengal and the North-Western Provinces to appoint Sessions Judges and Additional Sessions Judges for those provinces, and to define and vary the local limits of their jurisdictions, to confirm all past appointments and proceedings, and to indemnify all persons who have acted under them.

"The reason why such an Act is required is, I regret to say, that all the appointments of all the Sessions Judges in Bengal and the North-Western Provinces are illegal; that all the trials had before them have been irregular and might be set aside, and that this state of things has been going on certainly since the year 1868, and probably since the year 1829. I will proceed to state to your Lordship how this extraordinary state of things came into existence. In order to do this it is necessary to go back to the first establishment of Criminal Courts in Bengal. A complete history of them is given in the preamble to Regulation IX of 1793, but I need at present refer only to the last of several measures which preceded the enactment of that Regulation. It is described in the following words:—

"'The Governor General in Council passed certain Regulations on the 3rd December '1790, establishing Courts of Circuit under the superintendence of English Judges, assisted by 'Natives versed in the Mahomedan law for trying, in the first instance, persons charged with 'crimes or misdemeanors, and enabling the Governor General and the Members of the 'Supreme Council to sit in the Nizamut Adawlut and superintend the administration of 'criminal justice throughout the provinces.'

"In the year 1793, four Courts of Circuit were established, which were to try criminal cases of importance, subject to the superintendence of the Nizamat Adálat or Superior Criminal Court.

"The Courts of Circuit continued to exist till the year 1829, when they were abolished by Regulation I of that year. This Regulation divided Bengal into twenty Commissionerships, transferred to the Commissioners all the powers previously exercised by the Courts of Circuit, and required them to hold sessions of gaol delivery when ordered to do so.

"Part of section 5 of this Regulation is in these words—

"'It shall be at all times competent to the Governor General in Council to direct any 'Commissioner, Judge of Appeal, or other Judge, not being the Magistrate by whom the com-'mitments were made, to hold the sessions of gaol delivery for any city or zillah, with the

'powers and authority of a Court of Circuit, without vesting him with the general powers of 'a Commissioner within the division, whenever the arrangement may appear to be necessary 'for the prompt and efficient administration of justice, and circumstances may render it in- 'convenient to appoint such officer to officiate with all the powers of the Commissioner of the 'division.'

"The Commissioners thus became throughout Bengal the Criminal Judges in all cases of importance.

"In 1831, it was found that the work was too heavy for the Commissioners, and a Regulation (Regulation VII) was passed, the second section of which was in the following words:—

" 'Whenever, from the pressure of business devolving on a Commissioner of Revenue and 'Circuit, or other cause, the measure shall be deemed advisable, it shall be competent to the 'Governor General in Council, by an order in Council, to invest the Judges of the zillahs or 'cities within such divisions with full powers to conduct the duties of the Sessions.'

"In the five following sections the officers thus to be appointed are described by the title of 'Session Judges,' and I believe that this is the origin of that title.

"Act VII of 1835 empowered the 'Governors of the Presidencies of Fort 'William in Bengal and of Agra, respectively, by an order under the signature 'of the Secretary to Government in the Judicial Department, to transfer any 'part, or the whole, of the duties connected with criminal justice from any 'Commissioner of Circuit to any Session Judge, and to define the powers which 'shall be exercised by each respectively.'

"The law stood thus down to the year 1868, and before I go further I may shortly state its effect.

"The Commissioners of Divisions, or, to use their proper title, the 'Commissioners of Revenue and Circuit' were, as indeed they still are, the representatives of the old Courts of Circuit, and the ordinary Criminal Judges of First Instance in all important cases; but the Governor General in Council had power to do one of two things, namely,—

"1. He might, under clause 2, section 5, Regulation I of 1829, appoint any Judge to hold the sessions of gaol delivery for any city or zila whenever the arrangement appeared to him to be necessary for 'the prompt and efficient administration of justice.'

"2. The Governor General in Council might 'invest the Judges of the zillahs or cities of divisions in which such a measure was deemed desirable with full powers to conduct the duties of the Sessions.'

"It seems clear to me, and the opinion is shared by the authorised legal advisers of the Government, that the first of these provisions, the one contained in the Regulation of 1829, contemplated the special appointment of a particular person to meet a temporary necessity. It will be observed that the appointment was to be made by the Governor General in Council, and this gives rise to a further remark which I shall make immediately.

"As to the provisions of Regulation VII of 1831, it is hard to say, as the language is exceedingly vague, whether it means that any Judge might be authorised to hold any particular Sessions in any specified zila, or that the Governor General in Council might invest all the Zila Judges in one or more specified divisions with power to conduct the duties of the Sessions.

"Be this how it may, neither course, I believe, has been taken for many years. The practice has been to appoint particular persons to be 'District and Sessions Judges,' and their appointments have been made by the Lieutenant-Governors of Bengal and of the North-Western Provinces, respectively, and not by the Governor General in Council. Whether the Lieutenant-Governors, as distinguished from the Governor General in Council, had the power to make these appointments, is a question not altogether free from difficulty; but I do not propose to examine it. It is, I think, perfectly clear, apart from this consideration, that the course of appointment pursued was irregular and warranted by no law or regulation. The Lieutenant-Governors did not appoint the Zila Judges under the Regulation of 1831, to 'conduct the duties of the Sessions,' nor did they invest them with the powers of the Commissioners for that purpose.

"As to Act VII of 1835, it is by no means easy to see how it could be acted upon, for it assumes the existence of a 'Session Judge,' and the only authority for the appointment of Session Judges was Regulation VII of 1831, to which I have already referred.

"The mode in which the Judges were appointed, and the singular and informal use of the expression 'Session Judge' in the Regulation to which I have referred, gradually gave the name to the office, and when the Code of Criminal Procedure was passed in 1861, the analogous name of 'Court of Session' was introduced into the Code. Section 22 of the Code of Criminal Procedure defines

the jurisdiction of Courts of Session; but I greatly doubt whether, in the whole of India, there is such a thing as a 'Court of Session,' except in the Panjáb. In Bengal and the North-West the powers (if any) of the Sessions Judges are derived from the old Courts of Circuit; neither in Madras or Bombay are the Sessions Judges directly connected by any law that I know of with the 'Court of Session' referred to in the Code of Criminal Procedure. In the Non-Regulation Provinces, other than the Panjáb, the jurisdiction of the Criminal Courts stands, I suppose, upon the general powers of Government exerted by executive orders which were confirmed by section 25 of the Indian Councils' Act, but these executive orders form the most obscure part of our whole legal system. In the Panjáb, the Courts established by the Panjáb Courts' Act have such powers as Criminal Courts as the Local Government may confer upon them, and I suppose that the Local Government has conferred upon them the powers which they habitually exercise.

"For these reasons it appears to me that the Sessions Judges, as they are called, never were properly appointed in Bengal and the North-West, since the practice of appointing them individually to be 'District and Sessions Judges' was first introduced, whenever that may have been; but I am sorry to say I have not got quite to the end of the history.

"In 1868, a repealing Act (VIII of 1868) was passed, which repealed a vast number of obsolete enactments. Amongst others, it repealed Regulation VII of 1831, under which Zila Judges could be appointed Session Judges; and Act VII of 1835, by which the 'duties connected with criminal justice' might be transferred from the Commissioners of Circuit to the Session Judges. Act VII of 1835 has never, I believe, been acted upon in recent times. And though the same persons have been appointed to be District and Sessions Judges they have not, as I have already shown, been appointed with express reference to Regulation VII of 1831. The repealing Act of 1868 accordingly cannot, I think, be said to have made any other difference in the validity of the appointments, than that it did away with one argument (I think it was a bad one) by which they might have been defended. After that Act came into force, the only law under which a Sessions Judge could be appointed was Regulation I of 1829, and that, as I have already pointed out, authorised only an appointment by the Governor General in Council for one particular occasion.

"This state of things was discovered sometime ago in the course of the investigations which have recently been made in the Legislative Department with a view to the consolidation and simplification of the law. We proposed

at first to deal with it in connection with the re-enactment of the Code of Criminal Procedure,—a measure which the newspapers tell us has been abandoned or at least indefinitely postponed, but with which I most certainly intend to proceed as soon as the Government returns to Calcutta. This course would have avoided patchwork legislation, but it was impossible to take it. The matter was brought before the notice of Government by an application from the Government of the North-Western Provinces with respect to the re-arrangement of the local jurisdiction of the Judge of Jounpúr, and it became apparent, upon examining into the matter, that it was impossible to effect this without legislation.

"Such is the history of the measure now submitted to your Lordship and the Council. It is in itself extremely simple, and merely converts into express law what has always hitherto been supposed to be the law. It enables the Lieutenant-Governors to appoint Sessions Judges, and to define and vary the local limits of their jurisdiction, confirms existing appointments, and invests the Judges appointed with the character of Courts of Session within the meaning of the Code of Criminal Procedure. Finally, it confirms all past proceedings, and indemnifies all officers by whom they were taken. I think that these provisions speak for themselves, and that I need not insist upon their importance or expediency.

"I have a few observations to make in conclusion. I have seen in the newspapers references to this matter, and charges founded upon it against the Legislative Department and its 'recklessness.' One of the accusations in question was that the Bengal Civil Courts Act had repealed a Regulation under which Sessions Judges were appointed. This is altogether incorrect. The Bengal Civil Courts Act did not repeal any such Regulation for two excellent reasons: First, there was no such Regulation to repeal; and next, if there had been, the Act dealt only with Civil and not with the Criminal Courts. I may incidentally observe that the Bengal Civil Courts Act did quietly cure a flaw in the constitution of the Civil Courts of Bengal, hardly less serious than the one in the constitution of the Criminal Courts which will be cured by the present Bill. What that flaw was it is not necessary for me to state, and as it is effectually cured it would not repay the ingenuity of the critics of the Legislative Department to try to find it out.

"The true inference from the statement which I have made appears to me to be that it is in the highest degree necessary that the laws of this country should be put into a definite, concise, and explicit form, instead of being allowed to

remain, as many of them have remained, for nearly a century, scattered over volumes of loosely-worded Regulations. Till within the last three months, it was necessary to refer to thirteen different Acts and Regulations, scattered over seventy-seven years, to ascertain the law as to the Civil Courts of Bengal, now contained in one Act of thirty-eight sections. I think it is altogether discreditable that, in two of the most important provinces of the empire, people should have gone on being hung, transported and imprisoned illegally for a period of probably nearly forty years. I can understand those who wish to have no laws at all, I can understand those who wish to have good laws; but people who, because they would prefer personal government to government by law, prefer confused laws to simple ones, and complain of reckless over-legislation when one simple Act is substituted for thirteen bits of Acts enacted at different times and couched in phraseology of very different styles, seem to me to labour under a lamentable confusion of thought. A pettifogging pleader is the only person who can really and logically object to the work of consolidation and re-enactment in which much progress has been made, and which I hope will soon be completed.

"I do not look with any great satisfaction on the Act which I now submit to your Lordship and the Council. It is a piece of patchwork, and as such, though necessary, is not to be commended. I hope that it may soon be superseded by something more comprehensive. It would be no very difficult matter, and it would be most important, to have a general Criminal Courts Act for the whole of India. I hope that it may be found practicable to pass such an Act in connection with the re-enactment of the Code of Criminal Procedure, which deals with the subject of Criminal Courts in a manner of which I will only say at present that it appears to me fragmentary, strange, and by no means well adjusted to other parts of the law.

"I may observe that the Madras Government has expressed a hope that a Bill upon the Madras Civil Courts will not be proceeded with until the question of the separation of the judicial and executive departments is finally settled. Such a suggestion appears to me equivalent to a proposal that the Bill may be postponed till the Greek calends. The question about the judicial and executive departments has been under discussion for years, and will probably continue to be discussed for years more. Whatever decision may be reached upon it in the course of time, it is obviously desirable that the law relating to the Madras Civil Courts should be put together in a convenient shape. To do so will be no sort of impediment to any future reform; but, on the contrary, it will be a step towards any reform which may be determined on as it will much diminish the labour of settling its details."

The Hon'ble MR. COCKERELL said that the statement of his hon'ble and learned friend indirectly raised the question of the propriety of the repeal of Regulation VII of 1831, and Act VII of 1835. As he was not only a member of this Council at the time of the passing of Act VIII of 1868, by which those enactments were repealed, but had charge of that measure, for a time at least, during its passage through the Council, and he was consequently, to a certain extent, more directly responsible for its details, he felt called upon to say a few words in regard to the considerations which led to those repeals.

The only clause in Regulation VII of 1831 which in any way connected the office of Sessions Judge with the successors of the Courts of Circuit had been already cited at length in the speech of the hon'ble Mover, and it would have been noticed probably that that clause contained no provision for the appointment of a "Sessions Judge," but simply empowered "the Governor General by an order in Council" to invest a Zila or District Judge with power to hold the sessions of gaol delivery—apparently within the local circuits of his jurisdiction as a Civil Judge, though this was not clearly expressed in the enactment.

The only legal effect of this Regulation was to empower the Government, whenever the measure might, from any local circumstances, appear desirable, to confer upon the Civil Judge of any district a concurrent jurisdiction for the purpose of holding the sessions with the Commissioner of Circuit.

The words "Sessions Judges so appointed," as had been already remarked, did occur in some of the subsequent sections of this Regulation, but their occurrence could be interpreted only as an indication of the prevalence at that period of a rather loose method of drafting; such an expression used in reference to what had gone before being wholly inaccurate.

From the whole context of the Regulation, as well as from the retention of the provisions of Regulation I of 1829 which established the Commissioner of Circuit as a Court of Session in succession to the abolished Court of Circuit, it was clear that the enactment gave nothing more than a discretionary power to be applied by the Executive under particular circumstances, and that it could not contemplate the absolute substitution of the District Judge for the Commissioner of Circuit in the conduct of the sessions duties. The Commissioners of Circuit retained their legal power of holding sessions up to the present time, and, indeed, in one division of Lower Bengal (he did not, of course, refer to Non-Regulation Provinces, in which the Commissioner was generally the *de facto* Sessions Judge) that power was still, he believed, habitually exercised.

But it was clear that the Executive had not relied upon this Regulation as validating the existing mode of appointment of Sessions Judges; for by no straining of terms could the Regulation be held to authorise more than the delegation to the Zila or District Judge of the duty of holding sessions, whereas since 1831 numerous appointments of officers, who were not District Judges, had been made from time to time to hold sessions, such officers being designated Additional Sessions Judges.

Moreover, in the absence of any precise definition by enactment of the local limits within which Civil Judges were to exercise criminal jurisdiction—the utmost that could be assumed was that their criminal was to be conterminous with their civil jurisdiction. Now, if the present practice was to adhere *generally* to any rule of this kind, such adherence was certainly not universal.

In illustration of this, he would take the case of Bíjnúr, in the North-Western Provinces. That district had no Resident Judge, and the present practice, as he was credibly informed—the Hon'ble Mr. Strachey, who was well acquainted with all matters connected with the local administration in Rohilkhund, would, perhaps, be so good as to correct him if he was wrong—was to delegate to the Judges of Bareilly and Sháhjehánpúr the duty of holding the sessions in the Bíjnúr District alternately. As this district could not be within the local limits of the civil jurisdiction of both those Judges, it was evident that no authority could, under any circumstances, have been derived from Regulation VII of 1831 for the assignment of this duty to both.

As regards Act VII of 1835, the partial character of the intended transfer of duties from the Commissioner of Circuit to the District Judge, and the reference to special circumstances by which it was to be regulated in each particular case, seemed to be even more marked, for the Act provides that—

"It shall be competent to the Governors of the Presidencies of Fort William in Bengal and of Agra, respectively, by an order under the signature of the Secretary to Government *in the Judicial Department*, to transfer any part, or the whole, of the duties connected with criminal justice *from any Commissioner of Circuit to any Session Judge, and to define the powers which shall be exercised by each respectively.*"

The justification of the repeal of those enactments, therefore, was that the practice which they authorised and enjoined had become obsolete, and was superseded by the existing mode of appointment of Sessions Judges, and the allotment of duties to those officers long before the passing of Act VIII of 1868, and that, as such appointments derived no validity from the enactments above referred to, their retention on the Statute-book was unnecessary and inexpedient.

He made these remarks for the purpose of exonerating the Council from the reproach, to which it was sometimes subjected, of rash or hasty legislation in the direction of indiscriminate and uncalled for repeals of previous enactments. He asserted that the repeals just referred to were certainly not made inadvertently, but after due deliberation; he submitted that, for the reasons which he had already given, they were perfectly justifiable, and he was strongly fortified in this view by the concurrent opinion expressed in the speech of his hon'ble and learned friend, who was not responsible for what was done in 1868.

In reference to the Bill now before them, he had only to add that if any further argument on the side of the advantages accruing, or likely to accrue, from the consolidation scheme, which had for sometime past occupied the attention of the Legislative Department, and was being gradually carried out, were needed, it could be supplied in a very forcible way by the circumstances which necessitated the introduction of this measure; for the preliminary work connected with the development of that scheme had led to the discovery of this grave flaw in the constitution of the Sessions Courts—a discovery which but for this work would probably have been left to the Courts themselves, and would in that case, whenever it occurred, have occasioned a more or less serious miscarriage of justice, which it would have been beyond the power of the legislature to rectify.

The Motion was put and agreed to.

The Hon'ble MR. STEPHEN having applied to His Excellency the President to suspend the Rules for the Conduct of Business,

The President declared the Rules suspended.

The Hon'ble MR. STEPHEN then moved that the Bill be taken into consideration.

The Motion was put and agreed to.

The Hon'ble MR. STEPHEN then moved that the Bill be passed.

The Motion was put and agreed to.

The Council adjourned to Friday, the 19th May 1871.

H. S. CUNNINGHAM,

Offg. Secy. to the Council of the Governor General for making Laws and Regulations.

SIMLA;
The 12th May 1871.