

Tuesday, July 4, 1871

ABSTRACT OF THE PROCEEDINGS

COUNCIL OF THE GOVERNOR GENERAL OF INDIA
LAWS AND REGULATIONS.

VOL 10

Book No. 2

March to Dec.

1871

PL

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 Tuesday, the 4th July 1871.

P R E S E N T :

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.

OUDH REGULATIONS BILL.

The Hon'ble MR. COCKERELL moved for leave to introduce a Bill for declaring what laws are in force in Oudh. He said, this measure was a part of the general scheme described at the last meeting of this Council, for removing all ambiguity as to the legal effect of section twenty-five of the Indian Councils' Act of 1861, in the determination of the law in force in the non-regulation territories.

After the exhaustive remarks of his hon'ble and learned friend (Mr. Stephen) on that occasion, it was hardly necessary for him to enter into any explanation of the need for legislation of this kind.

Although, in the case of Oudh, the subject was not so complicated as it had been shown to be in that of the Panjáb, by reason of the comparatively short period intervening between the annexation, or rather the re-occupation, of Oudh and the date of the Indian Councils' Act, and the consequently small number of orders to be dealt with, yet there also the advantage of a

simple declaration of what must be deemed to constitute the law of the province would, he thought, be generally acknowledged.

The task of sifting the various orders of Government during that period and distinguishing between those properly having the force of law, and those of a purely executive character, was entrusted to a committee of officers of local experience of which the present Judicial Commissioner was the President. The Committee's selection of orders having the force of law was described in their report to have been guided by an opinion of the Advocate General of Bengal expressed in a letter to the Government of India, dated the 13th September 1864, to the following effect :—

“I am clearly of opinion that the rules, laws and regulations referred to in section twenty-five are such as if passed for the regulation provinces since the 22nd April 1834, must have been passed by the Council of the Governor General in its legislative capacity. * * *

“I think it is clear that the section must be read as applicable to such rules and regulations as were in the nature of laws affecting rights or imposing punishments, and that any rules or orders which in their nature were only rules for the guidance of a department or for the action of the executive, and which could be, and always have been, issued by the Government in its executive capacity merely, do not come within the section.”

The result of the Committee's action on this principle was condensed in a volume of extremely moderate dimensions, as compared with that exhibited to the Council in connection with the similar Bill for the Panjáb. The collection of orders and rules which that volume contained commenced with the Government letter of the 4th February 1856, which laid down in the most comprehensive manner the rules which were to govern every department of the administration of the province at the time of its annexation to British India. Much of those rules had since been superseded by the introduction of the Codes ; but some of considerable importance survived.

For example, the reference in somewhat loose and general terms to the Panjab Civil Code contained in these orders had been held by the Privy Council to render obligatory the adoption of the principles of the Code as the basis of the administration of justice in Oudh. The extent to which these principles were to be applied, as also the degree of permanence intended to be given to their operation, must, he thought, be considered extremely doubtful ; for in the letter of Government, to which he had referred, occurred the following passages :—

“But it will not escape your observation that, in the preparation of the rules under notice, much attention has been given to the *lex loci*, and that, specially in matters relating to

inheritance, marriage, divorce and adultery, adoption, wills, legacies and partitions, as well as in all commercial transactions, a due regard to local usage has been enjoined. It cannot of course be supposed that the *lex loci* or local custom in provinces differing so widely as the Panjáb and Oudh is in all or even in many respects identical, and it follows that those provisions of the rules, which rest on the *lex loci* in the Panjáb, cannot with any propriety, or without risk of injurious failure, be extended to the province of Oudh.

“ While then the Governor General in Council directs your attention to this collection of principles of law as calculated to afford material assistance in the absence of any better or more appropriate treatise, he refrains from requiring the strict observance of them, until it can be ascertained how far they are applicable to the peculiarities of the province and the customs of its people. With this end in view, His Lordship in Council desires me to suggest that all the Commissioners and District Officers and the most experienced of the Assistants, should be required to study the principles of law in their daily application to the business brought before the Civil Courts, and after the lapse of a twelve-month or more, as may be hereafter determined, to report to the Judicial Commissioner the opinions which they may have formed to the applicability of the ‘rules of law to the people of Oudh,’ and to offer at the same time any remarks and suggestions which may have occurred to them.”

Within a little more than a year after the promulgation of these directions, the whole province was reduced to a state of anarchy by the mutiny of 1857, and it appeared from the subsequent letter of Government, dated 6th October 1858, that no such report was made up to that date. From the absence of any reference to the matter in the Committee’s report, it was to be inferred that no such investigation of the subject, as was contemplated by the orders of Government, had ever been made up to the present time.

It would clearly be necessary to restrict the operation of the principles contained in the Code to the extent to which they might be found to be consonant to the practice of the Oudh Courts during the last twelve years. This was the only question connected with the framing of the Bill, which he was now asking leave to introduce, which presented any difficulty. The rest was very simple. There were certain rules of procedure in force in the Panjáb which were applied to Oudh by the orders of Government, dated 20th January 1859. There was a circular letter based upon an order of Government in regard to the record of rights of sub-proprietors and middle-men. The rules regarding such rights had been superseded for the most part by the enactment of Act XXVI of 1866. The only object in declaring them to have the force of law, was to give validity to past proceedings. There was also a rule as to the award of a fixed percentage to the finder of hidden treasure, and an order in regard to the employment of juries in the adjudication of civil cases in Lucknow.

Some doubt appeared to exist as to the law of limitation of suits now in force in Oudh, and appended to the Committee's report was a rather long correspondence on the subject ranging over several years and terminating with no satisfactory solution of the question at issue. The importance of that question was, however, very much diminished by the recent enactment of a new limitation law which would come into force in Oudh, as elsewhere, about two years' hence. All that had to be done now, therefore, was to declare what must be considered to have been, and to be, the law on this subject until the new Act came into operation, and to provide for the legal validity of past proceedings so far as they were affected by his question.

It was thought, moreover—but on this subject some doubt was felt—that the system of registration of deeds heretofore in operation in Oudh had not the force of law. Here, again, all future difficulty was avoided by the application of the new Registration Act. It would seem, however, in any case to be immaterial whether the force of law was or was not conceded to the present system of registration in Oudh, for that system not only made no registration obligatory, but apparently did not give any prescribed superiority to the registered over the unregistered document.

One useful result of this scheme for declaring the law in force in our more recently acquired territories would be the effacement of all distinction between the so-called "regulation" and "non-regulation provinces." That distinction was purely nominal, for it would be found that every regulation that was still operative in the older was practically in force in the more recently acquired provinces. Indeed, in one sense the latter would appear to be more overlaid with regulation law than the former, for apart from the fact of the Indian Councils' Act of 1861 having given the force of law to a mass of rules and orders promulgated by the Executive Government, he found from the volumes which described the regulations in force in the Panjáb and Oudh—and he confessed that the discovery was rather mortifying, as he had taken great interest in the work of consolidation and replacement of the regulations by modern enactments—that, for the purposes of these provinces, the 'spirit' of old regulations decently buried and put away in the repealing schedules of the consolidation Acts by which they had been superseded, was held to have survived their corporeal extinction.

The only places to which the term "non-regulation" could now aptly be applied, were those districts and hill tracts along our frontiers which had been expressly placed beyond the pale of the mass of our laws, whose degree of civilization and material progress were better suited to the patriarchal, than the legal, system of administration.

The Hon'ble Mr. STEPHEN merely wished to add one word to what had fallen from his hon'ble friend. He entirely concurred in his observations with which he had closed his speech. He would be sorry that it should be supposed that the process at present going on with regard to the law of this country was calculated to render it more intricate or difficult. On the contrary, it was a process of simplification, and its result would be to render the law less technical and obscure. At present, in provinces like Oudh and the Panjab, there was considerable difficulty in ascertaining what the law was; and in Burma, as had been pointed in a striking pamphlet by Mr. Broughton, the present Administrator General, the condition of things was such that, supposing it to be the interest of a sufficiently skilful lawyer to go into the matter, difficulties might ensue which it would be really extremely difficult to meet except by express legislation. In fact, when rules and orders, such as are called for by the necessities of a newly conquered province, were suddenly invested with the fixity of law, it was certain that, before long, complications and embarrassments would ensue, for which legislation was the only cure. It was on this account that the present measure, and others of a kindred nature, had become a matter of necessity.

The Motion was put and agreed to.

GENERAL REGULATIONS AND ACTS (DEHRÁ DŪN) BILL.

The Hon'ble Mr. COCKERELL also presented the Report of the Select Committee on the Bill to bring the Dehrá Dún within the operation of the General Regulations and Acts.

The Council adjourned to Tuesday, the 11th July 1871.

H. S. CUNNINGHAM,

SIMLA; }
The 4th July 1871. }

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