ABSTRACT OF THE PROCEEDINGS

COUNCIL OF THE GOVERNOR GENERAL OF INDIA

LAWS AND REGULATIONS.

VOL 10

Book No. 2

March to Dec.

1871

P L

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 1st August 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.
His Highness Sarámade Rájáháe Hindústán Ráj Rájendra Srí Mahárájádhiráj Siváí Rám Sing Bahádur, of Jaypúr, G. C. S. I.
The Hon'ble F. R. Cockerell.
The Hon'ble R. E. Egerton.

CHAUKÍDÁRÍ ACT EXTENSION BILL.

THE Hon'ble MR. STRACHEY moved that the Report of the Select Committee on the Bill to authorise the extension of the Chaukídárí Act to places where there is no Jamadár of Police be taken into consideration. He said that when the Bill was first introduced the only object had been to remove certain restrictions with reference to the places where the Chaukídárí Act might be put in force, which had been found inconvenient in practice. The other Local Governments concurred with that of the North-Western Provinces in the desirability of removing these restrictions. When the Bill was ready to be passed, the Government of the North-Western Provinces had represented that there were other points as to which the Bill was susceptible of improvement, and that these might advantageously be dealt with in the present measure. Some correspondence with the North-Western Provinces Government on the subject had ensued, and the Government of India had expressed the opinion that, so far as the further amendments of the law suggested by the North-Western

Provinces Government involved no question of principle, and even of a kind that no other Government could object to, there would probably be no reluctance on the part of this Council to enact them in the Bill; but that, as regarded matters of more importance, it would be necessary to consult the Governments concerned before legislation could proceed farther, and that to do this would necessarily cause considerable delay. The Government of the North-Western Provinces had replied that the necessity for the measure was urgent, and agreed that it would be desirable to leave the larger topics untouched for the present, in order that the Bill might be passed forthwith. Accordingly, the amendments now introduced were so simple that it was unnecessary to detain the Council by any further remarks with reference to them.

The Motion was put and agreed to.

The Hon'ble MR. COCKERELL moved that after section 4 the following section be added :—

"5. In Appendix A, at the end of the first paragraph, the words 'and the aggregate amount assessed shall not exceed the average rate of two annas per mensem for each house, shop or building in the District,' shall be omitted.

"In Appendix C, the words 'the first payment on the tenth day of the month next succeeding the date of this notification, and every subsequent payment on or before the tenth day of each succeeding month,' shall be omitted."

He said that the appendices contained the forms of process to be issued under the Act (XX of 1856), and the proposed omissions were necessary to bring about a correspondence between the forms and the alterations, to be effected by this Bill, in the provisions of that Act to which they had reference.

The Motion was put and agreed to.

The Hon'ble MR. COCKERELL also moved that the following words be added to section 5 :—

"but shall not take effect within the territories subject to the Lieutenant-Governor of Bengal."

He remarked that as all the changes of the law contemplated by this Bill in effect merely gave greater latitude to the Executive and were simply of a permissive character, they would not, in fact, necessitate any variation of the existing procedure where such alteration was deemed inexpedient, and could hardly therefore, on general grounds, be open to objection on the part of the local authorities in any of the territories in which Act XX of 1856 was in operation. But as the last section of the proposed enactment provided for its incorporation with Act XX, the effect of applying this enactment to Bengal would, he (MR. COCKERELL) believed, be to restrict the power of the local Council to repeal or amend Act XX by its future legislation.

Now he (MR. COCKERELL) believed that, as a matter of fact, through the operation of two local Acts (III of 1864 and VI of 1868, B. C.), Act XX of 1856 had at the present time a very limited application in Bengal, and he thought that it might very possibly be in contemplation in a future re-arrangement or consolidation of the Police law by the local Council, to repeal that Act entirely.

But even if no such consideration stood in the way of the extension of this Bill to Bengal, he would still hold that such extension was undesirable, inasmuch as the Bill related merely to matters of local detail, such as under a proper distribution of the legislative business of the country should be left to be dealt with exclusively by the local Legislature, wherever such a Legislature existed.

And that the present section 5 be read as section 6.

The Motion was put and agreed to.

The Hon'ble MR. COCKERELL then moved that the present section 5 be read as section 6.

The Motion was put and agreed to.

The Hon'ble MR. STRACHEY then moved that the Bill as amended be passed.

The Motion was put and agreed to.

LAND-REVENUE PROCEDURE (PANJÁB BILL.

THE Hon'ble MR. STEPHEN moved for leave to introduce a Bill for consolidating and amending the law as to Land-Revenue Procedure in the Panjáb.

He said that the present Bill formed a part of the scheme, which he had recently the honour of laying before the Council, for defining and consolidating the law of the Panjáb. He had had the advantage of consulting His Honour the Lieutenant-Governor and his hon'ble friend Mr. Egerton on the subject, and the opinion arrived at was that it would be more convenient to have two Bills: one to deal with the general law of the Province, and one to deal with land-revenue. The law as to this all-important subject had, from various causes, become extremely obscure and uncertain; and the wonder was, this obscurity and uncertainty had not entailed still more serious inconveniences than had been experienced. MR. STEPHEN might, however, refer to the discussions that took place in the Council some years ago, on the Panjáb Tenancy question, as an instance of the serious evils to which an indistinct, ambiguous and obscure law was calculated to give rise. A large portion of the difficulties in that long and troublesome controversy had arisen from the Settlement officials not clearly understanding the nature of the duties imposed on them by Regulation VII of 1822, and the other enactments which governed land-revenue procedure. There was hardly any subject of graver importance to the State, and there could be no doubt that it was desirable to free it, as far as possible, from all obscurity and confusion, and to give settlement officers the clearest and most unmistakable guide for their proceedings. There was no wish in any way to alter the law; all that was contemplated was to clear away doubts as to what was the law, and to put the existing law into a distinct and convenient form.

The Motion was put and agreed to.

CIVIL COURTS (OUDH) BILL.

THE Hon'ble MR. COCKERELL introduced the Bill to consolidate and amend the law relating to the Civil Courts in Oudh, and moved that it be referred to a Select Committee with instructions to report in six weeks. He said that this Bill was in the main a mere consolidation of the existing law with such alterations, either verbal or of arrangement, as were calculated to express the substance of that law in a more concise and intelligible form.

As regards the constitution of the Civil Courts and their original jurisdiction no change was proposed in the Bill as it now stood, but it might well be the case that, in the opinion of the local authorities, some amendment of the law in these respects, especially as that law was framed with no primary reference to the particular requirements of Oudh, was desirable. If such should be the general opinion, the projected legislation afforded a good opportunity for adopting any approved changes, and any proposals to that effect could be conveniently considered when the Bill was before a Select Committee.

So also in regard to the sections of the Bill relating to the appointment and removal of the presiding officers of the Courts, the oaths to be taken by them, the seals to be used, the places where the Courts were to be held, and the control of the appointment, and matters affecting the discipline, of the ministerial officers of the Courts. These provisions were taken from the Bengal Civil Courts' Act, and were for the most part identical with those of the former Bengal Regulations on the same subjects. As it had been the practice in Oudh to follow those Regulations in matters not expressly provided for by any law directly applied to that Province, the addition of provisions on such subjects, which were not treated of in the Central Provinces and Oudh Courts' Act of 1865, came obviously within the scope of a measure for the consolidation of the existing law.

The adaptation of these provisions to the circumstances of the Oudh Civil Courts in the manner contemplated by the Bill, was to a certain extent speculative, and they might very probably be found to need alteration in detail. They must be understood to be placed in the Bill tentatively, and to be subject to such modifications as might be advised by the local authorities.

The most important part of the Bill was that which dealt with the subject of the appellate jurisdiction of the Civil Courts.

The subject was one of some difficulty, owing to the absence of any settled principle in our previous legislation in reference to it.

In the Non-Regulation territories there were nearly as many differing forms of appellate procedure as there were divisions of such territories subject to a distinct local administration, and this, moreover, notwithstanding that the constitution and status of the Civil Courts up to, and inclusive of, the Court of the Commissioner, were almost precisely the same in each.

In British Burma, on whose Civil Courts the legislature first operated through Act I of 1863, a second appeal on the merits of a case was allowed from a decision on first appeal, when the judgment of the Lower Appellate Court differed from that of the Court of first instance, to the Commissioner, and his decision was absolutely final and not open to revision by any other Court on any question whatever.

In the Panjáb (Act VII of 1868) a second appeal under similar conditions lies to the Commissioner; but, as no finality was accorded to his decision

thereon, a further special appeal against such decision might be brought under the Code of Civil Procedure.

In the Central Provinces, the Jhansi Division and Coorg, there was no second appeal on the merits of a case, but only the special appeal from an order passed in regular or first appeal on the terms of the Code of Civil Procedure.

In Oudh there was no absolute right of second appeal on the merits of any case, but the Appellate Courts exercise an extraordinary power of revision which practically operated as conferring the privilege of second, and even further appeal, to an almost unlimited extent.

This power originated in one of the provisos subject to which the Civil Procedure Code was extended to Oudh. That its supersession was intended by the enactment of Act XIV of 1865, was evident from certain passages in the speech of Mr. Harington at the time of the passing of that Act. He said—

"With respect to the other suggestion, which proposed to continue a practice forming part of what was generally known as the patriarchal system, the Select Committee had observed as follows:—'We do not concur in the suggestion of the Judicial Commissioner that every Appellate Court should be empowered, within a year after any order shall have been passed by a Subordinate Court, to call up the case and revise the order. Where, as is the case in the present Bill, all proper facilities for appeal are allowed, we do not think it expedient to permit an Appellate Court to interfere except on appeal regularly preferred. In the absence of an appeal, it is only fair to presume that all parties are satisfied with the decision or are willing to submit to it, and it would be opposed to every principle of justice to allow any Court, of its own motion, to re-open the matter after an interval during which the decree has probably been executed and the whole litigation settled.'

"It was right he should mention that the Judicial Commissioner of Oudh, equally with the Judicial Commissioner of the Central Provinces, was anxious that the local Appellate Courts should retain the power which they now possessed of interfering with the decisions and orders of the Courts subordinate to them, although there should be no appeal, and although no objection should be taken by any one affected by the decision or order. The provision to this effect, which now formed part of the Code of Civil Procedure as in force in Oudh, was, he believed, introduced on the recommendation of Mr. Campbell, one of the learned Judges of the High Court at Calcutta, at the time he held the office of Judicial Commissioner of Oudh. Having lately had an opportunity of speaking to Mr. Campbell on the subject, he gathered from what fell from him, that he considered that the time had passed when the power in question could be exercised beneficially or for the interests of suitors, and that he was of opinion that the power should be withdrawn. In this opinion he (Mr. Harington) entirely concurred."

The proviso in question being a part of the then existing law should certainly have been repealed contemporaneously with the enactment of Act XIV of 1865. This was not done, and the result was that the power of revision had been considered to be in force and habitually exercised by the Appellate Courts in Oudh up to the present time.

Thus, in the six different territorial divisions of the Non-Regulation Provinces, there were no less than four distinct systems of appellate procedure based on entirely different principles.

The most commendable principle appeared to be that which gave a second appeal on the merits of a case from the conflicting decisions of the Courts of first instance and first appeal. The Bill consequently adopted the Panjáb procedure, but with this important modification, namely, that the second appeal should, in all cases, lie only to the highest Court of appeal in the Province.

If the right of second appeal on the facts was to be of any practical value, the appeal must lie to such a tribunal as would ensure the attainment of the best decision of the question in litigation as the circumstances of the Province would admit of. Even in the Regulation territories the main defect of our judicial system had always been held to be the weakness of the intermediate Courts of appeal; it being said that there was always a risk of the appeal from the decision of a well-instructed Court of first instance, which had had the advantage of hearing the evidence at first hand and marking the manner in which it was given, coming before a Court of at least no superior judicial capacity, and which had had no such advantage. If there were reasonable grounds for such an apprehension in regard to the intermediate Appellate Courts of the Regulation Provinces, where the Judges had no dual occupation, and, whatever may have been their antecedent deficiency of training for the bench, were set apart for exclusive employment in judicial business, they must exist in a greater degree in regard to the Court of the Commissioner in the Non-Regulation Provinces, whose attention was partially absorbed by his executive functions, and who might have been selected for the post which he filled with reference to his special aptitude for the discharge of such functions rather than for any particular judicial capacity.

For these reasons it was proposed that both the second appeal on the facts as well as the special appeal under the Civil Procedure Code should, in *all cases*, lie to the Judicial Commissioner, and that the latter be substituted for the

abolished Financial Commissioner as the Court of final appeal in suits relating to land in Districts under settlement, the proviso under which the Appellate Courts obtained their extraordinary power of revision being expressly repealed.

A rather important consideration arose upon this proposition, namely, whether the Bill would not have the effect of throwing upon the Judicial Commissioner a greater amount of appellate business than he could reasonably be expected to dispose of compatibly with the due discharge of his other duties. The special appeals in suits relating to land being, under the policy of Government, exempted at present from liability to any Court fees, were already very numerous [indeed, he was informed that the present annual institution of appeals in Oudh averaged about two thousand, whilst the total number of such appeals which came yearly before the High Court of Calcutta, which had a working daily average of about three or four benches of Judges for their disposal, was scarcely above three thousand], and it was probable that the new procedure of the Bill would largely increase the present number.

This exemption from the payment of Court fees, and the excess in the number of appeals which it promoted, were doubtless but of temporary operation, and the period of such operation would soon expire as the settlements of land-revenue in Oudh were drawing to a close.

But, even if the excessive increase of business likely to devolve upon the highest Court of appeal through the operation of this Bill should not be of permanent duration, yet, on general grounds, it would seem expedient to devise some means of strengthening that Court partly by associating some other officer with the Judicial Commissioner for the trial of appeals, and partly by some provision for the reference of cases presenting questions of unusual difficulty to the High Court of the North-Western Provinces. In short, what appeared to be wanted was the restoration, in some form or other, of the substance of the procedure prescribed by the recently repealed Act XXXVII of 1867.

If this suggestion should commend itself to the local authorities, and he (MR. COCKERELL) had reason to believe that it accorded with the views of the present Chief Commissioner, there would be no difficulty in shaping the Bill so as to effect that object when it came before a Select Committee.

Mr. Cockerell had only to add that, in naming six weeks as the period within which this Bill, if committed, should be returnable to the Council, he had regard to the limited area within which the Bill was intended to operate, and the inconsiderable number of persons consequently to be consulted as to its provisions. But it should be clearly understood that there was no desire to hurry through the Council a measure involving such important considerations, and that the fullest opportunity would be afforded for eliciting the opinion of all persons most competent to advise on the subject of the proposed alterations of the law.

The Hon'ble Mr. Stephen observed that the Council was at present in a particularly favorable position for legislating for Oudh, as it numbered among its Members two Ex-Commissioners of that Province. With reference to his hon'ble friend's remarks on the appellate system of India, the principle of such a system in his (Mr. Stephen's) opinion was, that the existence of a right of appeal exercised a constant influence in keeping judicial officers up to the mark. This check was weakened rather than strengthened by multiplying appeals. An officer, disposed to be negligent, would, no doubt, be quickened in the performance of his duties by the consciousness that his judgment would be reviewed by his immediate superior; but the effect of this was lessened by the reflection that this reviewing authority would, in its turn, be reviewed by a Superior Court, and that the case might ultimately find its way to the Privy Council, and not be disposed of for years. So, again, as to special appeals: they were, no doubt, a natural arrangement at the time when the law had to be administered by officers comparatively uninstructed in its details; but as matters now stood, they were a premium to lawyers to pick every possible hole in a judgment, and there was great doubt whether, on the whole, they conduced to substantial justice; on the other hand, there was no doubt that they conduced largely to delay, chicanery and waste of time. It would, in Mr. Stephen's opinion, be far better to let the Courts state points of law, wherever a reasonable doubt existed, than to put it in the power of the parties to raise any question they pleased, and so indefinitely prolong litigation.

Mr. Stephen made these remarks not with the least intention of throwing doubt on the propriety of his hon'ble friend's proposals, but merely for the purpose of reminding the Council that the present system of appeals in the Courts of this country was open to serious objection, and would some day or other require to be reformed. He did not, however, think that this was

any reason for opposing the present measure or for putting Oudh on a different footing from other parts of the Empire.

The Motion was put and agreed to.

The following Select Committee was named :—

On the Bill to consolidate and amend the law relating to the Civil Courts in Oudh :—His Honour the Lieutenant-Governor of Panjáb, the Hon'ble Messrs. Strachey, Stephen and Egerton and the Mover.

The Council adjourned to Tuesday, the 8th August 1871.

H. S. CUNNINGHAM,
Offg. Secy. to the Council of the Governor General for making Laws and Regulations.

SIMLA;
The 1st August 1871.