

Thursday, July 26, 1877

ABSTRACT OF THE PROCEEDINGS

COUNCIL OF THE GOVERNOR GENERAL OF INDIA

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 21 & 25 Vic., Cap. 67.

The Council met at Simla on Thursday, the 26th July 1877.

PRESENT :

His Excellency the Viceroy and Governor General of India, G. M. S. I.,
presiding.

His Honour the Lieutenant-Governor of the Panjáb, C. S. I.

His Excellency the Commander-in-Chief, K. C. B.

The Hon'ble Sir E. C. Bayley, K. C. S. I.

The Hon'ble Sir A. J. Arbutnot, K. C. S. I.

Colonel the Hon'ble Sir Andrew Clarke, R. E., K. C. M. G., C. B.

Major-General the Hon'ble Sir E. B. Johnson, K. C. B.

The Hon'ble Whitley Stokes, C. S. I.

The Hon'ble T. C. Hope, C. S. I.

The Hon'ble F. R. Cockrell.

The Hon'ble B. W. Colvin.

BOMBAY REVENUE JURISDICTION ACT AMENDMENT BILL.

The Hon'ble SIR ALEXANDER ARBUTHNOT asked leave to postpone the motion which stood in his name, namely, that the Bill to amend the Bombay Revenue Jurisdiction Act, 1876, be taken into consideration. He explained that a letter had lately been received from the Bombay Government stating that the Bill in question had not yet been translated into the Native languages. The translation was, however, being proceeded with, and the Government of India would be informed as soon as it was done. Under these circumstances he thought that the further consideration of the Bill should be postponed until the translation had been published.

Leave was granted.

PANJÁB COURTS BILL.

The Hon'ble MR. STOKES introduced the Bill to consolidate and amend the law relating to Courts in the Panjáb, and moved that it be referred to a Select Committee. He said that the justification of this Bill was to be found in the schedule, where the Council would find enumerated the seven Acts through which

the rules relating to the Civil Courts of the Panjáb were now scattered—*dispersa in omnes partes multitudo*. But though the primary object of the Bill was to consolidate and arrange these rules, the opportunity had not been neglected of making a few amendments which twelve years' experience of the working of those Courts had shown to be desirable. These were all set forth in the Statement of Objects and Reasons, and it was needless to take up the time of the Council by recapitulating them.

One change, however, might be held to require explanation. The Council was aware that the Panjáb was pre-eminently what the old French lawyers called a *pays de coutumes* as distinguished from the *pays de droit écrit*, by which they meant those parts of France in which the Roman law prevailed. The Panjáb Laws Act (IV of 1872, section 5) accordingly laid down with startling generality that, in questions regarding inheritance, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partition, or any religious usage or institution, the rule of decision should be "any custom of any body or class of persons"—the meaning probably was "any custom applicable to the parties concerned"—"which is not contrary to justice, equity and good conscience, and has not been declared to be void by any competent authority," and (section 7) that all local customs should be regarded as valid unless they were contrary to justice, equity or good conscience, or had, before the passing of that Act, been declared void by any competent authority.

Now it appeared that the prevalent opinion of the Panjáb lawyers was, that a question as to the existence of an usage which had to be established by evidence was not matter for special appeal under section 372 of Act VIII of 1859, and that it would not be matter for second appeal under the corresponding section (584) of the new Code of Civil Procedure; and hereon Mr. Fitzpatrick, now one of the Judges of the Panjáb Chief Court, had made some remarks which were so clear and pertinent that MR. STOKES would do wrong if he did not read them to the Council:

"In this Province, where the great bulk of the law is customary law, I think it is desirable that this Court should have power in special appeal or on reference under section 19 (if the system of reference is to be adopted) to look into the evidence on which the question of the existence of a custom has been decided by the Courts below. I have no wish to alter in the least the enactment which gives custom so great a preponderance in the Panjáb; but I must say I view with some alarm the prospect there is before us if this Court has not the fullest power of control over the decision of questions of customary law. In the first place, though the question as to the existence or non-existence of a custom is one to be settled by evidence, it is one of far greater delicacy and difficulty than any ordinary question of fact. Moreover, a wrong decision on an ordinary question of fact has no effect beyond the sphere of the particular matter before the Court, while a wrong decision on a question of custom

affects the law applicable in all subsequent cases of a similar nature. Further, the great variety of customs recognized by the Courts as having the force of law is already beginning to give rise to difficulties; and though I have no wish, as I say, to retrace our steps and give custom less preponderance than it has at present, I think we should be most careful to guard against the possibility of existing customs branching out into greater diversities than they now present. If we leave the matter altogether in the hands of the lower Courts, I apprehend existing customs will branch out into greater diversities. The differences in the evidence adduced in individual cases, and the differences of disposition in individual officers, must often lead to this, that what is in reality one and the same custom will develop different varieties in different jurisdictions. The only check on this is to give the fullest powers to the central authority to review all decisions on questions of custom."

With Mr. Fitzpatrick the Panjáb Government concurred, and the Bill accordingly contained a clause which would add (of course only in the Panjáb) to the grounds on which a second appeal might be brought the existence or non-existence, validity or invalidity, of a custom alleged to have the force of law.

His Honour THE LIEUTENANT-GOVERNOR said that he had little to add to what his hon'ble friend Mr. Stokes had already said. The Bill was one for consolidating the various enactments regarding the Courts of Civil Justice in the Panjáb. It contained little that was new, and nothing which involved the change of any important principle. It had been carefully considered by the learned Judges of the Chief Court of the Province and by other officers of experience; and it embodied the provisions which had been found necessary in practice for the regulation of the Courts of Civil Justice, and for the distribution of appellate work in those Courts. It would, when passed, make the law affecting the Panjáb Courts of Civil Justice much more clear and easy than it was at present.

The Motion was put and agreed to.

The Hon'ble MR. STOKES then moved that the Bill be published in the *Gazette of India* in English, and in the *Panjáb Government Gazette* in English and such other languages as the Local Government may think fit.

The Motion was put and agreed to.

The following Select Committee was named:—

On the Bill to consolidate and amend the law relating to Courts in the Panjáb,—His Honour the Lieutenant-Governor, the Hon'ble Sir Edward Bayley, and the Hon'ble Messrs. Cockerell and Colvin and the Mover.

The Council adjourned to Thursday, the 2nd August 1877.

SIMLA; }
The 26th July 1877. }

A. PHILLIPS,
Secretary to the Government of India,
Legislative Department.