Saturday, 26th May, 1855

PROCEEDINGS

OF THE

LEGISLATIVE COUNCIL OF INDIA

Vol. I

(1854 - 1855)

MR. GRANT then moved that the words "or shall carry on his business," in the 12th line of the Section, be left out.

Motion carried.

The words "limits of the Court" were next amended, as suggested by Sir James Colvile; and after a further verbal amendment introduced on the motion of Mr. Grant, the Section was passed.

Section IV was read by the Chairman, and after a slight amendment, was passed.

The Committee adjourned, on the motion of Mr. Grant.

The Council then resumed its sitting.

POLICE (MADRAS).

MR. ELIOTT moved that a communication which he had received from the Chief Secretary to the Government of Fort St. George on the subject of the draft Act "for regulating the Police Courts and for the good order and Civil Government of the Town of Madras" be laid upon the table and referred to the Select Committee on the Police and Conservancy projects of Law.

USURY LAWS.

MR. ELIOTT proposed to move that a Petition, which he had received from the Madras Chamber of Commerce, relating to the Bill "for the repeal of the Usury Laws," be laid upon the table, and referred to the Select Committee on the Bill.

THE PRESIDENT said that the Standing Orders required all Petitions to be transmitted to the Clerk of the Council, and that the motion was not regular.

The Council adjourned.

Saturday, May 26, 1855.

PRESENT:

Hon. J. A. Dorin, Senior Member of the Council of India, *Presiding.*

Hon. Major Genl. Low,	D. Eliott, Esq.
Hon. J. P. Grant,	C. Allen, Esq.
Hon. B. Peacock,	P. W. LeGeyt, Esq. and
Hon. Sir James Colvile,	E. Currie, Esq.

USURY LAWS.

THE CLERK brought under the consideration of the Council a Petition from the Madras Chamber of Commerce relating to the Bill "for the repeal of the Usury Laws."

MR. ELIOTT moved that the petition be printed, and referred to the Select Committee on the Bill.

Agreed to.

MEASUREMENT AND REGISTRY OF SHIPPING.

THE CLERK reported that he had received from the Under-Secretary to the Government of India in the Home Department, a communication forwarding, with a view to the consideration of the necessity of any alteration in Acts X of 1841 and XI of 1850, copies of a despatch from the Court of Directors, and its enclosures, regarding the application to India of certain provisions of the English Merchant Shipping Act 17 and 18 Vic. c. 104, which regulate the measurement and registry of shipping.

MR. GRANT moved that these papers be printed, and referred to the Select Committee on Marine matters.

LANDS FOR PUBLIC WORKS (BOMBAY).

MR. LEGEYT moved the first reading of a Bill "to facilitate the acquisition of land needed for public purposes in the Presidency of Bombay." The object of this Bill, he said, was the same as that of the Bill the second reading of which he had moved at the last Meeting of the Council, but which he had, by leave, withdrawn. But the present Bill was founded strictly on Act XX of 1852 and Act XLII of 1850. He had ventured to make only one variation; and this was that, whereas Act XX of 1852 provided, in regard to money paid over to the Collector for lands or buildings as to which there was a dispute, that it should be invested in Company's Paper when it amounted to 500 rupees, this Bill proposed that all sums which came into the Collector's hands should bear interest, while they remained in deposit, at the lowest current rate of interest payable upon Government securities. Instead, also, of only referring, as Act XX of 1852 did, to certain other Acts, he had embodied those Acts into this Bill; which, he thought, would make its provisions more clear.

The Bill was read a first time accordingly.

SMALL CAUSE COURTS.

The Council then resolved itself into a Committee for the further consideration of the Bill "for the more easy recovery of small debts and demands in the territories subject to the Government of the East India Company."

On Section V being read—

Mr. ALLEN said, before the Section was put, he desired to draw the attention of the Council to certain Sections in the original Bill which the Select Committee had

struck out, and which did not appear in the amended draft. These were Sections limiting the right of action to two years after the cause of action shall have accrued. The reasons assigned by the Select Committee for striking them out, was that they were in hopes that a Bill settling the general Law of Limitation would shortly be submitted to the Legislative Council. To this reason for postponing the consideration of those Sections, he had two objections. The first was, if he might quote an old and homely proverb, that a bird in the hand was worth two in the bush. One Member of the Select Committee which drew up the Report in which the Council was told that it might look shortly for a Bill providing a general Law of Limitation, might remember to have read a Bill for the very same purpose published in the *Government Gazette* fourteen years ago. So long since as April 1841, that Bill was read a first time in the Supreme Council of India; it was then referred to the Supreme Courts of Bengal, Madras, and Bombay, and to the different Governments of those Presidencies and of the North-Western Provinces; and it appeared, from the published papers of the Indian Law Commission, that its provisions generally were not disapproved of. More than that, the Bill was reported upon in a very able Minute, which bore the signatures of Mr. Amos, Mr. Millet, Mr. Eliott, and Mr. Borrodaile, who considered that it was based on a good principle, and who, taking into consideration all that had been said in regard to it, recommended the passing of a draft Act prepared and sent up by them. In this draft, it was proposed to limit the right of action for the recovery of legacies to twelve years; for debts upon specialty and debts upon simple contract to six years generally; and for suits for wages and hire, &c., to one year. The Bill was again published in the *Gazette*, and again sent to the different Governments for further consideration; but from that day to this, it had not advanced another step, although no opposition was offered to it. What confidence could this Council have that the Bill now spoken of would be more speedily settled and passed into Law than that Bill of April 1841?

But besides the general principle of not postponing to do a thing in expectation of something that *may* happen at some unknown future time, he thought that the contemplated Small Cause Courts ought not to follow a general Law of Limitation, but should have a special Law provided for their guidance. It was not usual in other countries, and in England, to have a special Law for Courts of summary jurisdiction; but that had been our practice in India. Our general Law of Limitation was Regulation II of 1805. In that Regulation, it was laid down specifically that the right of action in summary suits should be limited to one year only. Subsequently, so advisable was it found that suits of this class should be decided speedily, that it was declared by Regulation VIII of 1831, Section VI, that no decree by a Revenue authority in a summary suit for rent could be contested by a regular suit, unless the regular suit were brought within one year from the date of the decree—so that the period within which a final decree could be obtained in such suits was reduced to two years. In the North-Western Provinces, he had had a good deal to do with summary suits for rent; and, as far as he was aware, no Courts were better liked by the people than the Courts of the Collector of Revenue for summary suits. It was rare for any person to forego the privilege of bringing a summary suit there, and allow three or four years to elapse in order to bring a regular suit instead. He might also mention that the Lieutenant Governor of the North-Western Provinces had said that the great benefit of this Act would depend upon the promptitude of its action; and when it was considered that the jurisdiction to be exercised would extend only to 50 rupees, it did not appear very hard upon a plaintiff to require that he should bring his case before the Court within two years after the cause of action shall have arisen, except where he might be able to show special reasons. He should, therefore, move that the following new Section be introduced after Section IV:—namely,

"No suit shall be brought under this Act unless the same be instituted within two years from the time when the cause of action accrued."

And if that was passed, he was prepared to move the insertion of two or three other clauses regarding absence from India and other causes of disqualification.

Mr. Peacock objected to the insertion of the Section. He stated that it did not comprise all the provisions that were necessary in a well-considered law of limitation. There was no reason why there should be a special law of limitation applicable only to Courts of Small Causes. For these reasons the Select Committee

had struck out the clauses, leaving the subject to be provided for in a general law. The Honorable and learned Member opposite (Sir James Colvile) proposed to bring in such a law. But the Honorable Member for the North-Western Provinces had said that such a law had been in contemplation for the last 14 years ; and he had quoted an old proverb—namely, that a bird in the hand is worth two in the bush. He would, however, remind the Honorable Member, that so long as a bird remained in a bush, it was, like any other animal *feræ naturæ*, the property of any one who chose to appropriate it. The Honorable Member had a perfect right to bring in a Bill for the limitation of suits ; and if the Bill proposed to be brought in by the Honorable and learned Member opposite (Sir J. Colvile) were not introduced so soon as he (Mr. Allen) wished, he had only to take the matter into his own hands, and he (Mr. Peacock) had no doubt that, by the zeal and energy of the Honorable Member, that which was now only a bird in the bush, would soon become a bird in the hand.

MR. ALLEN'S amendment was put, and negatived.

THE CHAIRMAN then read Section V of the Bill, which said—

"A minor may prosecute a suit under this Act without being represented by his guardian or next friend, in the same manner as if he were of full age."

SIR JAMES COLVILE said, he preferred the clause as it stood originally. He did not think it would be safe to give a general power to minors for prosecuting all suits. A minor might represent the whole of his father's estate, which might be all lent out in sums recoverable in Small Cause Courts in suits in which his name might be fraudulently used. As the Section stood originally, a minor could sue only for his own personal earnings. That power we might give, because if he was capable of earning the money, he might reasonably be presumed to be capable of receiving and appropiating it. He (Sir James Colvile) should, therefore, move that the words

"for any sum of money, not exceeding the amount cognizable by the Court, which may be due to him for wages or piece work, or for any other personal service"

be inserted after the word "Act" and before the word "without" in the 2nd line of the Section.

MR. PEACOCK said, his Honorable and learned Friend opposite (Sir James Colvile) had satisfied him that this Section, in its

present form, was too general. He had stated that a minor might be the representative of a large estate left by his father, and that, under the Section as it now stood, he might sue in a Small Cause Court upon contracts entered into by his father, abandoning the excess. It would certainly be unsafe to give a minor that power ; and therefore, he (Mr. Peacock) thought that as a representative, a minor ought not to have a right to sue under this Act. The amendment proposed by the Honorable Member opposite (Sir James Colvile), however, would prevent a minor from availing himself of the provisions of this Section in an action for an assault or other action for a wrong. He (Mr. Peacock) should propose, as an amendment, that the words

"upon any contract entered into with him, or for any wrong for which he might have sued under this Act if of full age"

be inserted after the word "Act" and before the word "without" in the second line of the Section.

SIR JAMES COLVILE said, he thought this amendment better than his own, and, with the leave of the Council, would withdraw what he had proposed.

MR. PEACOCK'S amendment was then put, and carried.

MR. LEGEYT moved that the words

"Provided that no release, compromise, or acquittal by a minor be valid without the consent of the Court"—

be added to the Section. The object of the proviso, he said, was to prevent any undue influence being injuriously exercised over a minor in any case that he should have brought before the Court.

MR. PEACOCK thought it would be very proper to introduce this proviso. When suing, a minor was under the protection of the Court ; and he ought not to be allowed to compromise a suit without the sanction of the Court, or of his guardian.

MR. LEGEYT'S amendment was carried, and the Section, as amended, was passed.

Sections VI and VII were passed as they stood.

Section VIII provided that stamped paper, according to a table of rates given, should be used for plaints, except by Native Officers and Soldiers.

MR. LEGEYT moved that the words

"except in actions by Native Officers and Soldiers which, under the provisions of Act XV of 1845, may be instituted on unstamped paper, shall be engrossed on paper bearing a stamp or stamps proportioned to the amount

sued for, according to the rates in the following table,"

in the Section, be left out, and the following words be substituted for them—

"when the amount sued for shall not exceed 50 rupees, may be engrossed on unstamped paper, and, in lieu of a stamp, a sum according to the rates in the following table, shall be levied as costs on the losing party. Provided that no such fee shall be levied from Native Officers and Soldiers who, under the provisions of Act XV of 1845, are authorized to institute certain suits on unstamped paper."

He thought it would be a great boon to suitors in Small Cause Courts for sums under 50 rupees to be relieved from a charge for stamps; and that the Revenue might not be injured by the measure he proposed, he thought it would be very fair that the losing party should be obliged to pay the same sum which would have been charged as stamp duty under the existing Law, or under this Section as it stood, on the institution of the suit. This idea had found favor on the Western side of India; and the Government of Bombay had expressly mentioned that such a plan would be much more advantageous than the present method of levying stamp duties.

MR. ELIOTT said, a measure such as that proposed by the Honorable Member, had been recommended some time ago by the Indian Law Commission; and he confessed that he was favorable to it on principle; but he thought this was not the time to consider a partial provision of that kind. The subject ought to be taken into consideration in connection with the general question of stamp duties. As he had said before, he approved of the principle of the measure, and should like to see the change introduced as part of a general system of judicature; but standing by itself in this Bill, he could not agree to it. There would be difficulty in working it; especially in small cases. The Government would be involved as a party in recovering the fees. Whenever a decree was passed, it would have to pursue the losing party for the fees; and that, considering the amount to be recovered, would be very inconvenient. In most cases, probably, the Government would have to give up its claim.

MR. LEGEYT said, when the Nazir had a decree to enforce, he would simply have to see that the debtor paid the Government fee as well as the judgment debt. Consequently, there would not be more labour cast on Government servants than they went through now in taking stamps before the institution of a suit.

MR. GRANT said, if the amendment proposed were introduced, two cases of difficulty might arise—one where the defendant was insolvent; and the other where the defendant satisfied the plaintiff. In the former case, was it intended that the plaintiff should make good the amount of the fee to the Court? In the latter case, the plaintiff having been satisfied himself, would not sue out any process of execution; and the Court would have to issue a process on its own account to recover the fee from the defendant.

MR. PEACOCK said, no duty could be more gratifying to a Government than the removal of taxes, and none more disagreeable than to make any opposition when a relief from taxes was proposed. But if the amendment now submitted were carried, it would be better to have no fees at all chargeable in cases under 50 rupees, because it would be quite impossible to recover them. If the plaintiff should be the losing party, and should not pay, who would be the person to point out his goods in order that the fee might be levied upon them? The Judge could not do so; for if he did, it would be impossible for him to perform his other more important duties; and there would be no officer in his Court whose peculiar business it would be to go in quest of property. If the defendant should be the losing party, and should not pay, the same difficulty would arise. The plaintiff would not care about levying more than the amount of his own claim; and the Government would be left to take its own measures for the recovery of its fee. In either case, therefore, the Government would find difficulty in levying the fee; and when the number of cases under 50 rupees that would be brought before the Courts came to be seen,—42,787 in Bengal; 41,077 in Madras; and, he believed, the same number in Bombay—it did appear to him that the difficulty would be so constantly occurring, that it would be better to provide at once that no stamp duty whatever would be charged in such cases. If Courts were to be kept up at the expense of suitors at all, there was no reason why suitors for sums under 50 rupees should not contribute, provided the tax were moderate. He should be glad if all stamp duties on legal proceedings could be abolished; but it was useless to propose such a measure without showing how the loss which the Revenue would sustain, was to be made good. The scale of stamp

duties recommended in this Bill was lower than the scale of fees payable in the County Courts in England, and in the Small Cause Courts in the Presidency Towns. It had been framed upon the principle of making the stamp duty 5 per cent on the highest amount in each step of the scale. Thus, if the action should involve a sum not exceeding 5 rupees, the stamp duty payable would be 4 annas ; if it should involve a sum above 5 rupees and not exceeding 10 rupees, the stamp duty payable would be 8 annas ; and so on. These rates appeared to him to be very moderate, and would be a great boon in Bombay, where, in cases above one rupee, not only was an institution fee payable, but the suitor was obliged to pay an *ad valorem* duty upon every exhibit and every paper filed in connection with his case.

It, therefore, appeared to him that, if it were determined to levy any tax upon suitors for sums above one rupee and under 50 rupees at all, it would be better to leave this Section as it stood, than to alter it in the manner proposed.

MR. LEGEYT'S amendment was put, and negatived.

MR. PEACOCK then moved that the following be added to the Section—

"Provided that nothing in this Act shall render it necessary for any plaint to be written on stamped paper when the amount of debt or damage shall not exceed one rupee, nor shall render a stamp necessary in any place not now subject to a Stamp Law."

The Honorable Member explained that the concluding part of this proviso referred to the Non-Regulation Provinces, where no stamp duty is payable now.

The Proviso was agreed to.

THE CHAIRMAN then read Section IX, which exempted pauper plaintiffs from payment of stamp duty.

MR. LEGEYT moved several amendments, which were carried ; and the Section then stood thus :—

"Clause 1.—The Court, if satisfied of the inability of the plaintiff to pay the value of the stamp prescribed for a plaint, may receive such plaint on plain paper.

"Clause 2.—On the conclusion of the suit, the whole of the costs which would have been incurred by the plaintiff had he not been admitted to sue as a pauper, shall be ascertained and entered in the decree.

"Clause 3.—If the decree is in favor of the plaintiff, the costs, or such part of them as the Court may decree, shall be recovered from the defendant for the benefit of the Government, and other parties entitled thereto.

"Clause 4.—If the decree is against the plaintiff, the defendant, if payment of costs is awarded, may proceed against the plaintiff under the ordinary rules for the enforcement of decrees."

The Section, as amended, was passed.

Section X was passed as it stood.

Section XI provided the mode of instituting a suit under this Act, and directed that, where a plaintiff stated his claim verbally, it should be reduced into writing in the vernacular language of the Judge, by the Judge himself, or by an Officer of the Court under his superintendence.

SIR JAMES COLVILE moved amendments in this Section ; which substituted the words "the language of the Court" for the words "the vernacular language of the Judge." He said he saw no reason why the plaint should be taken down in the vernacular language of the Judge. The plaintiff himself, or his agent, in most cases, would be sure to speak the language of the district ; and it was to be presumed that a Moonsiff was competent to write the language of the district in which he held his Court. The plaint was a proceeding in the suit—a part of the pleadings, and not a record which expressed the Judge's views of the case, or the reasons for his decision ; and it would be more consistent with what was done in other Courts if it was taken down in the language of the Court. Besides, by taking it down in the language of the Court, the necessity would be avoided of having the plaint translated, in order that, under Section XVII of the Bill, it might be annexed to the summons.

MR. LEGEYT said, he had intended to move an amendment to the same effect as that just proposed. The Honorable and learned Member who spoke last had so fully stated the objects and reasons of the amendment which he had proposed, that he (Mr. LeGeyt) thought it unnecessary to make more than one observation on the subject. The Section, as it now stood, would be extremely inconvenient in Western India, in the districts in which there were more languages spoken than in the districts of Bengal. Very often, the Judge might be a Parsee : his vernacular language would be Guzeeratee : but he would, probably, understand English very much better. If he wrote in Guzeeratee, not one of the parties to the suit would understand the plaint if it was in a Court in the Deccan or Southern Mahratta country ; and thus, the necessity would be entailed upon him of explaining to them what he had written.

MR. PEACOCK said, he had felt a doubt when the Bill was in Select Committee,

as to the expediency of requiring that the plaint should be reduced into writing by the Judge in his own vernacular language. His Honorable friend, Mr. Mills, was of opinion that it would be very desirable to compel the Judge to reduce it into writing in his own vernacular language. He (Mr. Peacock) was disposed to think that it should be in the language of the Court. The doubts which he had entertained on the subject had been completely removed by what had been said by the Honorable and learned mover of the amendment, and the Honorable Member who spoke last.

SIR JAMES COLVILE'S amendments were carried, and the Section, as amended, was passed.

Sections XII and XIII were passed as they stood.

Section XIV prescribed the mode of proceeding after plaint received.

MR. PEACOCK moved a verbal amendment in it, which was put and agreed to; and the Section, as altered, was passed.

Sections XV and XVI were passed as they stood.

Section XVII, Clause 1, provided for the service of a copy of the plaint on the defendant, and stated when the summons should require the defendant to attend personally, and when personally or by an agent.

After some verbal amendments,

MR. PEACOCK moved that the words "who" (that is, the agent) "has personal knowledge of the subject, or who shall be accompanied by a witness who has such personal knowledge," be added to the Clause.

The amendment was put and agreed to, and the Clause, as altered, was passed.

Clause 2 of the Section was passed after a slight verbal amendment.

Clauses 3 and 4 were agreed to as they stood, and the Section, as altered, was passed.

Section XVIII was passed as it stood.

Section XIX stated how a summons was to be served.

MR. ELIOTT said, he should move an amendment in this Section, to be followed by others, the object of which was to get rid of the dilatory process of a second summons. The Section, as it now stood, directed that the summons should be served on the defendant personally, when practicable. Section XXI required that, if personal service was not effected, the Nazir should endorse on the summons the reason of not serving it personally. Section XXIII prescribed that if, on or before the day appointed for appearance, it should be proved to the Court that the summons could not be served personally, a second summons, appointing another day for the appearance of the defendant, should be issued, and should be served either personally on the defendant, or, in his absence, by delivery to some adult male member of his family, or servant of his family residing in his dwelling-house or place of business; or by affixing a copy of the summons to some conspicuous part of his usual place of abode or place of business; and also by affixing a copy in the Court room. Now, he (Mr. Eliott) did not see why, when a defendant could not be served personally in the first instance, the steps directed by Section XXIII should not be taken immediately. He could not see that there was any advantage to be gained by the Nazir stating to the Court that the summons had not been served personally before those steps were resorted to, particularly when he looked at Section XLIV, which required proof that the summons had been duly served on the defendant, or that he had come to the knowledge of it, before an *ex parte* decree could be obtained against him,—and also at Section XLVII, which allowed a defendant three months within which to appear and show cause why an *ex parte* decree against him should be rescinded. He (Mr. Eliott), therefore, proposed to move amendments which would make the Section read thus:—

"The summons shall be served by a single peon by delivering a copy thereof, together with a copy of the plaint, to the defendant personally, or to some adult male member or servant of his family residing or being in his dwelling-house or place of business; or by affixing a copy of the summons and a copy of the plaint to some conspicuous part of his usual place of abode or place of business; and also by affixing copies of the same in the Court room—a sufficient time before the day fixed for his appearance, to enable him to appear in Court on that day."

If the amendments which he moved in this Section were carried, he should, when the time arrived, further move that Section XXIII, which directed the issue of a second summons, and Section XXIV, which directed a report of the service of such summons, should be left out of the Bill as unnecessary.

MR. CURRIE said, he had no objection whatever to dispense with the service of a second summons if Section XLVII were retained. But if any material alteration were made in that, he should be very unwilling to remove the safe-guard, such as it was, of a second summons.

MR. GRANT inquired if it was intended that the peon serving a summons should be

allowed either to serve it upon the defendant personally, or to fix it at once on the door of his house, as he pleased. If that were the intention, it would be objectionable ; for the peon ought first to make an attempt to serve the process personally, and if he failed in that, then to post it on the door of the house. Would it not be better to provide that a copy of the summons shall be served by a peon personally on the defendant whenever practicable ; but that, if not practicable, then the alternative process of service might be resorted to ? Without some provision of that kind, the peon, to save himself trouble, would never attempt personal service.

MR. ELIOTT said, he had no objection to introduce an amendment to the effect suggested by the Honorable Member.

MR. CURRIE moved that the consideration of this and the following Sections until Section XLVII be postponed.

Agreed to.

THE CHAIRMAN read Section XLVII, the effect of which was, that, where a decree has been made *ex parte*, it may be altered or rescinded if the party against whom it has been made show cause, personally or by agent, for his previous non-appearance within fifteen days from the date of the decree, if he be the plaintiff ; or within three months after arrest or attachment of property, if he be the defendant.

MR. ALLEN said, the time here allowed to the defendant was too long ; one month, he thought, would be sufficient ; and he proposed an amendment accordingly.

MR. PEACOCK said, a defendant whose property was attached in execution of the decree might be unavoidably in another and distant part of the country, and might know nothing of the attachment, until information from his agent or some member of his family, should reach him. In such a case, he might not be able to appear in Court, either personally or by an agent, within one month, to show cause against the decree.

MR. ALLEN, with the leave of the Council, withdrew his amendment.

After a verbal amendment, the Section was passed.

The consideration of the postponed Sections was then resumed.

Section XIX being read by the Chairman—

MR. ELIOTT moved the amendments which he had proposed to introduce, modifying them according to the suggestion made by Mr. Grant. They were severally put and agreed to.

Mr. Grant

A verbal alteration was then made, on the motion of Mr. Peacock ; and the Section, as amended, was passed.

Section XX was passed as it stood.

Section XXI was passed, after a verbal amendment.

Section XXII was passed as it stood.

Sections XXIII, XXIV, and XXV, which related to a second summons, were severally put, and negatived.

Section XXVI, Clauses 1 and 2, were passed, after some verbal amendments in Clause 2.

Section XXVII provided that the Court might, in certain cases, order the arrest of a defendant before judgment.

SIR JAMES COLVILE said, he wished to raise a question of principle upon this Section. He confessed that he felt considerable difficultyi n assenting to trust these Courts with the power of arresting upon *mesne* process. As Courts under this Act, they would be less under control than as Courts exercising an ordinary jurisdiction. According to this and the following Section, if the Moonsiff was satisfied that there was ground for believing that the defendant was concealing himself, or about to withdraw his person or effects from the jurisdiction of the Court, he would issue process for his arrest at once ; and there would be no means of staying that writ, because the Bill gave no appeal against the Judge's orders, except, upon special grounds, after judgment upon a trial, or on the rejection of a plaint.

Then, it was to be observed that where the defendant was residing out of the jurisdiction of the Moonsiff's Court, the process might be very oppressively executed. If, having been arrested, he, being a poor man, should be unable to give security, he might be dragged from the place where he was arrested to the Court in which the case was pending, and out of which the order to arrest had originally proceeded.

Considering, therefore, how speedy and summary the proceeding of the Moonsiffs would be under the Act, and how very small the amount of their jurisdiction, he did think that they might well do without arrests upon *mesne* process ; and he should, therefore, move that this and the following Section (which prescribed the mode of proceeding after arrest on *mesne* process) be struck out of the Bill.

Sections XXVII and XXVIII were then put separately, and negatived.

Section XXIX empowered the Court to grant compensation for false arrest on *mesne*

process; but, being no longer necessary, it was likewise negatived.

Section XXX prescribed the mode of procedure on appearance of the parties. It was passed after some amendments, which made it stand thus:—

"Upon the appearance of the parties on the day named in the summons, or upon any subsequent day to which the hearing of the case may be adjourned, for sufficient reason, to be recorded by the Judge, the Court shall call upon the defendant or his pleader or agent, to make his defence. The defence shall be made, either in writing in the language of the Court, or verbally; and, if made verbally, shall be reduced into writing in the language of the Court, either by the Judge himself, or by an Officer of the Court in the presence and under the personal superintendence of the Judge; after which the Judge shall proceed to examine such of the parties as may be present, and either party or his agent may cross-examine the other.

"If either of the parties be not bound to attend personally, any agent by whom he shall appear, or any witness who shall accompany such agent, shall be examined and cross examined in like manner as the party himself would have been, if he had attended personally."

Section XXXI was passed as it stood.

THE CHAIRMAN then read Section XXXII, which was as follows:—

"The examination of the parties or their witnesses shall be upon oath or upon affirmation, and the substance of the examination shall be reduced into writing in the vernacular language of the Judge."

MR. ELIOTT said, he thought it would be advisable to postpone the consideration of this Section until the appeal Clauses should be disposed of. The necessity for recording the substance of the examination arose out of those Clauses. It was his intention to move, as an amendment in Section CX, that there should be no appeal in cases involving sums under 20 rupees; and if that was carried, he should move an amendment to modify this Section.

MR. GRANT said, he should object to the Section being modified, or to its being struck out, even if there was to be no appeal at all. He could not see how a Judge could perform his duties with satisfaction either to the parties in a case, or to the public, or to himself, if he kept no note of the substance of the evidence upon which he passed his decision. There was no appeal from Police convictions: yet Police Magistrates, he believed, invariably take a note of the evidence upon which they convict. Whatever, therefore, the effect of any amendment in the appeal Clauses might be, he considered that this Section ought to be left as it stood. If a Moonsiff should be accused of having given an unjust decision, to what could he appeal in his own vindication if he had taken nothing in the shape of a note of the facts upon which he had come to his decision? He (Mr. Grant), for his own part, if he were a Judge, should think it a duty to himself, as well as to the public, to take a note of the evidence upon which he decided, whether there was an appeal from him or not.

Taking as he did this view of the question, he saw no necessity for postponing the consideration of this Section until the appeal Clauses should be settled.

MR. PEACOCK said, he agreed in the objections taken by the Honorable Member who had spoken last against the proposed modification of this Section. It would not occupy much time for the Judge to record the substance of the examination of the parties to a suit and of their witnesses. For instance, if an issue were—whether the defendant had paid a debt or not, and witnesses were called and proved that, on a certain day, at a certain place, they were present and saw the defendant pay the plaintiff a certain amount—it would not take much time to record the names of the witnesses and the substance of their evidence. It would be the only means by which the Zillah Judge could properly exercise that degree of supervision over his Moonsiffs for which this Bill provided.

GENERAL LOW said, he should move, as an amendment of the Section, that the words "the language of the Court" be substituted for the words "the vernacular language of the Judge," in order that the wording of this Section might be consistent with that of the 11th and 30th Sections.

MR. GRANT said, the practice of all the Civil Courts at present was to take down in writing the whole of the evidence word for word, of course in the language of the witness who gives it; but the object was to get rid of this elaborate process. The Judge's note of the evidence would differ from the statement of the plaintiff or defendant upon which to receive a plaint, or direct issues for trial, inasmuch as such a note would not be a proceeding in the case. There was, therefore, no necessity for such a note being in the language of the Court, or in that of the parties, or witnesses. But it should be in the language in which the Judge would be best able to write down the substance of the evidence, which, doubtless, would be his own.

The amendment was, by leave, withdrawn. The Section was then passed as it stood.

Section XXXIII provided that, after examination of the parties or their witnesses on the first appearance of the defendant, the Court might make its decree, if no further evidence was required.

Mr. PEACOCK moved amendments in this Section which were agreed to, and which made the Section run thus :—

"If, after the examination required by Section XXX, and also the examination of any witness who may attend to give evidence on behalf of either of the parties, a decree can be properly made without further evidence, the Court shall make its decree accordingly."

The Section as altered, was passed.

Section XXXIV, Clauses 1 and 2, was passed as it stood.

Section XXXV was passed after a verbal amendment.

Sections XXXVI and XXXVII were passed as they stood.

Section XXXVIII was passed, after a slight amendment.

The subsequent Sections until Section LIII, (omitting Section XLVII, which had been settled before) were passed as they stood.

Section LIII, Clause 1, provided that a plaintiff having a joint demand against several persons, might sue one or more of them without the others ; but that the dismissal of such suit, or a decree therein, shall bar his claim against the persons not joined.

Sir JAMES COLVILE said, the privilege given by this Section, of not joining all the defendants, was invaluable. But he had some doubts whether it was not desirable to give the plaintiff the power of suing the contractor not joined for such balances as he might fail to recover from the man whom he did sue.

Mr. PEACOCK said, it would be inconvenient to allow a plaintiff to sue one of several defendants after he had proceeded against another for the same cause of action. If he elected to sue one defendant alone, he might do so ; but after he had failed in his action or recovered a judgment against one defendant, he should be barred from suing another defendant for the same cause. Where a question could be decided in one suit, a person ought not to be permitted to make it the subject of two several suits. Otherwise, he might be guilty of great vexation, and might compel each defendant to attend several times about the same matter—once as a defendant in the suit against himself, and again as a witness in each of the actions against his co-contractors. Besides, if a plaintiff had a cause of action against several persons in consequence of a personal injury, or in any case in which the damages were unliquidated, if he were allowed to bring separate actions, he might recover one amount of damages against one defendant, and different amounts against the others for the same cause. In such a case, inasmuch as a plaintiff ought not to be entitled to double or treble damages for a single joint act committed by several persons, he ought not to be allowed to enforce more than one of the judgments, and there would be a difficulty in knowing whether he ought to be allowed to levy the highest or the lowest amount of damages. If he levied the highest, in a case in which a defendant was entitled to contribution, against the defendant in the action in which the lowest amount was awarded, such defendant would say—

"I was never summoned to defend the action in the Court which gave the plaintiff a verdict for so high an amount. In the action against me, I showed that the plaintiff was not entitled to so large an amount, and I could have done the same again had I been made a party."

It, therefore, appeared to him (Mr. Peacock) that there would be very great inconvenience and difficulty in allowing a plaintiff to bring separate actions for one cause of action where he had the option of proceeding against all at once, or of making his election between them.

The Clause was put, and agreed to as it stood.

Clause 2 was agreed to after an amendment, by which a provision regarding a second summons was expunged.

The Section, as amended, was then passed.

The CHAIRMAN then read Section LIV, the effect of which was that any person against whom judgment shall have been obtained, and who shall have satisfied the same, shall be entitled to sue for and recover contribution from any person jointly liable with him, in the same way as if the judgment had been obtained against them jointly.

Mr. ALLEN inquired, if a plaintiff obtained a collusive judgment against one defendant, and that defendant afterwards proceeded for contribution against a person jointly liable, would it not be open to such person to show that the judgment had been fraudulently obtained ? The Honorable Member for Bengal suggested that there should be an express provision for that purpose.

MR. PEACOCK said that this was not necessary. Where two persons were jointly liable, and one of them was compelled to pay the whole debt, his right to contribution from the other would not depend solely upon the judgment against him, but upon the circumstances under which the joint liability arose. By merely allowing judgment to go by default in an action brought against him, a party could not acquire a right to contribution. He must show, not merely that the judgment had been recovered, but that he had satisfied it, and that the person sued for contribution was jointly liable, and that such joint liability arose under circumstances which rendered him liable to contribute. The Section said, if one of several persons *jointly* liable *satisfied* a judgment recovered against him alone, he should be entitled to recover contribution from the others in the same manner as if the judgment had been obtained against them jointly. In neither case would the judgment alone give a right to contribution.

Suppose that an action were brought against two persons upon a bill of exchange accepted by both, but by one of them only as an accommodation acceptor or as a surety for the other. If the plaintiff recovered a verdict against both, he might levy the amount against both or either, because they were both liable to him. If he levied it against the accommodation acceptor, that defendant would be entitled to recover, not a contribution merely, but full indemnity from the other. If the plaintiff levied against the defendant for whose benefit the other had accepted the bill, that defendant would not be entitled to recover a contribution, because he would be bound by an implied contract of indemnity to the accommodation acceptor. To enable one defendant to recover contribution from another, there must be a joint liability, and that joint liability must have arisen under circumstances that entitled him to contribution. A judgment recovered against him fraudulently or by collusion would not assist him in this respect. If the holder of a bill of exchange upon which two persons were liable, brought an action against one of them, and he allowed judgment to go by default, and the amount of the bill were levied against him; in order to recover contribution from the other, he must prove that they became parties to the bill under circumstances which rendered it binding on the other to contribute. The judgment of the Court against the defendant seeking contribution, would be no proof of that fact.

MR. ALLEN asked, if a plaintiff sued one of three defendants upon a joint bond, and either through collusion, or mismanagement of the defence, the bond was held good, and judgment was given for the plaintiff—would the defendant against whom the decree passed, be entitled to recover one-third of the amount of the judgment against each of the other defendants?

MR. PEACOCK replied, certainly not, unless the bond were entered into under such circumstances as made it binding upon the co-defendant to contribute. In an action for contribution, it was not enough for the plaintiff to prove that a judgment had been recovered for the debt in respect of which the contribution was sought, and that he had satisfied the judgment. He must go further. He must prove that the cause of action had arisen under such circumstances that his co-contractors were bound to contribute. This would be the same whether the judgment were recovered against all the contractors jointly or against one of them separately, and whether the judgment were recovered by default or after trial. The Section went no further than to allow one of two or more defendants, where the whole amount of the joint debt was levied against him, to sue the others for contribution. It would not relieve him from the burthen of proving that the contract had been made under circumstances which made it binding upon them to contribute.

The remedy of contribution, however, was one which existed now. The defendant who paid a joint debt in full, would, under the law as it stood, have a right to seek contribution from his co-contractors if he paid it voluntarily, in the same manner as if payment were enforced against him by judgment. He (Mr. Peacock), therefore, thought that the Section might be struck out altogether.

MR. CURRIE said, he thought it would be advisable to omit the Section, because Native Judges might misapprehend it, and suppose that they were not bound to go into any question of collusion.

The Section was then negatived.

THE CHAIRMAN then read Section LV, which provided that the Court should either non-suit the plaintiff, or dismiss the suit with costs, if, after the appearance of the defendant, he neglected to prosecute his suit; and that a dismissal of the suit should bar any new suit on the same cause of action.

SIR JAMES COLVILE said, this Section gave to the Judge the option of non-

suiting the plaintiff, or dismissing the suit. No Court with which he was conversant allowed the dismissal of a suit for want of prosecution to be a bar to a future action. He should wish to know whether the practice in the Mofussil Courts was different?

MR. PEACOCK said, there was a distinction in the Mofussil between a non-suit and the dismissal of a suit. In the former case, a new action might be brought; but the dismissal of a suit was a bar to any further litigation. He confessed, however, that he never had been able fully to understand why the Section was necessary. Mr. Mills said, it would be necessary in order to secure the deposit of fees by plaintiffs for the service of subpœnas in time for the trial; but if a plaintiff did not lodge the fees for the service of subpœnas in time for the trial, the subpœnas would not be served, his witnesses would not attend, and he would fail in his case as a matter of course. He (Mr. Peacock) thought the Section had better be omitted.

The Section was put, and negatived.

Sections LVI, LVII, and LVIII were passed as they stood.

Section LIX provided how judgment was to be pronounced, and when and how it was to be written and translated.

MR. LEGEYT said, the Section provided a form of judgment peculiar to this Act, which he thought was unnecessary. Act XII of 1843 prescribed a form of judgment which was very well understood all over the country; and, fortified as it had been by Act XXXIII of 1854, he thought it ought not to be lost sight of. The form of judgment which the former prescribed, modified by the amendments of the latter, which made it more practically useful, was the best that could be provided for any Courts; and he thought it would be a mistake to depart from it in the Courts contemplated by this Bill. He should, therefore, propose that all the words in the Section which prescribed a form of judgment, should be struck out, and that the words "and all the provisions of Act XII of 1843 and of Act XXXIII of 1854 shall be applicable thereto" be substituted for them.

After some conversation upon the question, the amendment was put, and agreed to; and the Section, as altered, was passed.

Section LX was passed, after some verbal amendments.

MR. ALLEN moved that the following Section be inserted after Section LX: namely,

"If the decree be against the plaintiff, it shall be lawful for the Court to include in the amount of costs a sum not exceeding 50 rupees, to be paid to the defendant in satisfaction for his trouble and attendance."

MR. PEACOCK said, he was opposed to the introduction of this Section. It was certainly not necessary to give compensation to the defendant when the decree was against the plaintiff in an Act like this, if it was not necessary to give it to him in the general course of procedure. By this Act, a defendant would have much greater protection against being made to attend unnecessarily. The plaintiff must show the Judge that he had a *primâ facie* cause of action before he could obtain a summons. If, in doing that, he made untrue averments, he would be liable to punishment for perjury; but if the Judge was satisfied that he had a sufficient *primâ facie* case, and issued a summons, there was no reason why the defendant should be entitled to recover compensation from the plaintiff when the decree went against that party. Nor was there any reason why a defendant who obtained a verdict should be allowed compensation in preference either to a witness, who, being no party to the litigation, might be brought into Court when his evidence was not material, or to the plaintiff, if he should recover a verdict after a frivolous defence. The provision suggested would be one-sided entirely. It would give compensation to a defendant and not to a plaintiff or to a witness, and he thought that it ought not to be inserted.

MR. ALLEN'S amendment was then put, and negatived.

Section LXI was passed, after a slight amendment.

Sections LXII and LXIII were passed as they stood.

Section LXIV was passed, with a slight verbal alteration.

Section LXV was passed as it stood.

Section LXVI provided that a Judge under the Act might punish for contempt within hearing or view, by imprisonment for a term not exceeding seven days, or by a fine not exceeding 20 rupees, commutable to such imprisonment.

MR. LEGEYT said, it had been suggested to him that this Section gave an undue power of absolute imprisonment to these Courts, and that it would be better to leave contempts to be dealt with by the existing Law—namely, Act XXX of 1841, which, he believed, applied all over India. It might be very possible that the Moonsiff's

Court might be so far from the zillah Judge's statiou, that seven days would be spent in custody before the person condemned could get access to the zillah Judge to remonstrate, or appeal against the Moonsiff's order.

Under this Section, it was doubtful whether an appeal would lie or not; but under the Bombay Code, the order would come under the head of miscellaneous orders, and would be governed by the general law applicable to them. But still, there might be inconvenience felt, or wrong done. A suitor, during the progress of his case, might get angry with the Moonsiff, or the Moonsiff might get angry with him, and the Moonsiff, having lost temper, might charge him with contempt, and order him to jail for seven days. To jail the suitor must go—a jail which, in some districts, might be a cage. He might be a very respectable man, and ought not to be so treated.

The question, therefore, was whether it would not be better to leave contempts to be dealt with by the general Law, as heretofore. That provided for a fine of 200 rupees; but at the same time it gave the right of appeal. It had been in force for the last fourteen years; it applied in all Moonsiff's Courts; and he had never heard that it had been very much misused.

The Section was put, and negatived.

Section LXVII provided penalties for resistance of process.

MR. LEGEYT said, Moonsiffs could also punish for resistance of process now; and again referred to Act XXX of 1841.

MR. PEACOCK remarked that that Act provided for acts in obstruction of justice committed in the presence of the Court.

MR. LEGEYT said, he should like to leave the case contemplated by the Section to the local Magistrates, if the Moonsiffs could not deal with them under Act XXX of 1841.

The Section was put, and negatived.

Section LXVIII, which authorized the issue of a warrant if the person accused failed to attend upon a summons for resisting process, was put and negatived.

Sections LXIX to LXXIII were passed as they stood.

Section LXXIII was passed after a slight verbal amendment.

Sections LXXIV and LXXV were passed as they stood.

Section LXXVI enabled the Court to pass a decree contingent upon the opinion of the Sudder Court, pending which execution was not to issue.

MR. LEGEYT suggested that this Section should be left out. If there was so grave a doubt on a point of law as to require a reference to the Sudder Court, it appeared to him that it would be better that a decree should not pass pending that reference. If decrees were to be passed before the decision of the upper Court upon the points referred, he looked forward to a great deal of doubt and distrust on the part of those who held decrees as to whether the Court which passed them was a good one or not.

SIR JAMES COLVILE said, he was not disposed to agree with the Honorable Member. To his mind, there could be no reason why the Small Cause Court should not proceed to try matters of fact, and give a decree upon them subject to the opinion of the Sudder Court upon the question referred, which would only be a question of law. To wait until the opinion of the Sudder Court was received, would be to keep the parties and their witnesses hanging about the Court, expecting a trial; whereas if the Small Cause Judge proceeded to try and decide upon the facts, making his decision depend upon the opinion of the Sudder Court on any point of law which he might refer, this inconvenience would be obviated, and no injustice would be done to either party. The Small Cause Court in Calcutta followed this course when it stated a case for the opinion of the Supreme Court.

MR. PEACOCK said, he quite agreed with the Honorable and learned Member who had spoken last. It might be that, when a doubtful question of law arose, the witnesses of both the parties might be present to speak to the facts. This Section would not compel the Judge to examine them then; but if he thought it would be better to proceed with the evidence, and pass a decree, reserving the point of law, it would enable him to do so, making the decree contingent upon the opinion of the Sudder Court, instead of sending away the witnesses, and putting them to the inconvenience of attending again another day.

SIR JAMES COLVILE remarked that, if the Judge proceeded to determine the case upon the evidence, reserving the point of law, the case might break down upon the facts, and so the Sudder Court would be relieved from the necessity of deciding the question of law.

The Section was then put as it stood and passed.

Sections LXXVII to XCII were severally passed as they stood.

Section XCII provided that diet money should be deposited at the time of the issue of the warrant.

It was amended by the omission of a provision regarding warrants for arrest upon *mesne* process, and by an alteration fixing the maximum rate of diet money ;—and then passed.

Sections XCIII and XCIV were passed as they stood.

The Committee then adjourned, on the motion of General Low.

The Council resumed its sitting.

POLICE AND CONSERVANCY (BOMBAY).

MR. LEGEYT moved that certain papers which he had received from the Secretary to the Government of Bombay be laid upon the table, and referred to the Select Committee on the projects of Law relating to the Police and Conservancy of Calcutta, Madras, and the Straits Settlements.

Agreed to.

NOTICE OF MOTION.

MR. LEGEYT gave notice that he would, on Saturday next, move the second reading of the Bill "to amend Act XXVIII of 1839."

The Council adjourned.

Saturday, June 2, 1855.

PRESENT :

The Honorable J. A Dorin, Senior Member of the Council of India, *Presiding*.

Hon. J. P. Grant, Hon. B. Peacock, Hon. Sir James Colvile, D. Eliott, Esq., C. Allen, Esq., P. W. LeGeyt, Esq., and E. Currie. Esq.,

MINORS (FORT ST. GEORGE).

MR. ELIOTT presented the Report of the Select Committee on the Bill "for making better provision for the education of male minors, and the marriage of male and female minors subject to the superintendence of the Court of Wards in the Presidency of Fort St. George."

BUILDINGS (BOMBAY).

MR. LEGEYT moved that the Bill "to amend Act XXVIII of 1839" be now read a second time.

Question put and agreed to.

The Bill was read a second time accordingly.

MR. LEGEYT gave notice that he would, on Saturday the 9th instant, move that the necessary Standing Orders be suspended, to enable him to move that the above Bill be passed through its subsequent stages.

SMALL CAUSE COURTS.

The Council then resolved itself into a Committee for the further consideration of the "Bill for the more easy recovery of small debts and demands in the territories subject to the Government of the East India Company."

Section XCV was passed as it stood.

Section XCVI provided that the Court may suspend execution temporarily where it shall appear that the defendant is unable at the time to pay the debt or damages awarded against him.

MR. LEGEYT moved that this Section be expunged. If it were retained, he thought that, in almost every case in which an execution was applied for on a decree, the defendant would plead inability to pay ; and this would entail on the Court a more troublesome inquiry than that which had been required in trying the case. There were several Sections in the Bill which would increase the present amount of labour of the Judge ; but this one would do so to so great a degree that he thought it would be much better to expunge it. Means for the relief of insolvents were in force in all the Presidencies ; and if a defendant was really unable to satisfy a judgment, he might obtain very speedy relief by those means.

He also thought that the exercise of the power given by the Section, would constantly be liable to misconstruction. Plaintiffs would always be thinking that the Judge suspended execution from favor, affection, or some cause advantageous to his own interests.

For these reasons, he thought that the Bill would be much improved if the Section were expunged.

MR. PEACOCK said, the Section was similar to Section LXXI of the Act constituting the Small Cause Court in Calcutta ; but he should be very sorry to see much difficulty thrown in the way of the Courts by constant applications such as those which the Honorable Member for Bombay apprehended ; and if the Section was likely to give rise to any difficulty, he thought it had better be left out, especially as he believed that the necessity for the corresponding Section in the Calcutta Small Cause Court was not very much felt.