COUNCIL OF THE GOVERNOR GENERAL OF INDIA

VOL. 3

JAN. - DEC.

1864

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 Government House on Friday, the 11th November 1864.

PRESENT:

His Excellency the Viceroy and Governor-General of India, *presiding*.
His Honour the Lieutenant-Governor of Bengal.
The Hon'ble H. B. Harington.
The Hon'ble H. Sumner Maine.
The Hon'ble W. Grey.
The Hon'ble Claud H. Brown.
The Hon'ble J. N. Bullen.
The Hon'ble Maharaja Viziaram Gajapati, Raj Bahadur of Vizianagram.
The Hon'ble Raja Sahib Dyal Bahadur.
The Hon'ble G. Noble Taylor.
The Hon'ble W. Muir.
The Hon'ble R. N. Cust.

The Hon'ble MR. MUIR took the oath of allegiance, and the oath that he would faithfully discharged the duties of his office.

NEW CIVIL PROCEDURE BILL.

The Hon'ble MR. HARINGTON introduced the Bill for consolidating and amending the laws relating to the procedure of the Courts of Civil Judicature in British India, and moved that it be referred to a Select Committee. He said the remarks, with which he would accompany the introduction of this important Bill, must necessarily be, to a great extent, a repetition of what had already appeared in the Statement of Objects and Reasons, which was published with the draft Bill in the official Gazette in the early part of the year, and a copy of which was in the hands of Hon'ble Members.

As the Council were aware, the Code of Civil Procedure, the revision of which was now proposed, was originally prepared in England by a Commission appointed by Her Majesty under the authority of an Act of Parliament. Any opinion which he might express upon the result of the labours of the Commission, so appointed, could carry with it very little weight; but he could not refrain from

observing that he believed it to be impossible for any one, who had ever presided or practised in a Court of Justice, or who possessed any knowledge of Judicial Procedure, to read the Code prepared by Her Majesty's Commissioners without feeling the highest admiration of its merits, or without being struck with the immence improvements which it made in the Codes of Procedure of the three Presidencies, whose places it was intended to take. The reforms proposed by the Royal Commissioners were in their character comprehensive and fundamental. They abolished those interminable written pleadings of the old Code, which, replete generally with irrelevant matter and constant repetitions, wasted the time, and exhausted the strength of the Judges, who were compelled to listen to, and often to translate them ; and, to quote the words of one of the learned Judges of the High Court at Calcutta, who having sat for sometime for the disposal of cases coming before the Court in the exercise of its ordinary original Civil jurisdiction had had ample opportunities of observing the working of the Code, " they swept away effectually the technicalities which so often defeated justice, and had enabled the Courts to try every case brought before them on the merits with advantage to the suitors."

Such being the character of the Code, as prepared by the Royal Commissioners, it might have been expected that it would have been accepted by the legislature of this country in its integrity and at once passed into law, and he had no doubt that this would have been done had the Code been intended to apply only to Courts presided over by Barristers or Judges trained to the law. But the reverse of this came to be the case. The Code, as it was received from England, contained a Chapter for the constitution of High Courts at Calcutta, Madras and Bombay, and it was intended that a certain number of the Judges of those Courts should be Barristers of England or Ireland, or Members of the Faculty of Advocates in Scotland of not less than five years' standing ; but it was considered expedient, for reasons with which it was not necessary for him to trouble the Council, to postpone for a time the establishment of High Courts such as had been proposed by the Royal Commissioners. This led to the Chapter relating to High Courts being struck out of the Code. A section was also introduced into the Code expressly exempting the late Supreme Courts at Calcutta, Madras and Bombay from its operation. The consequence was that the Code, as passed into law in this country, was made applicable only to the Indian Courts as contradistinguished from Courts established by Royal Charter ; in other words, its operation was confined to Courts, the presiding Judges of which, whatever might be their other qualifications for the office had generally not had the advantage of a legal training, and one of the first points which had to be considered by the Select Committee to which the Code was

referred for report, was whether for Courts constituted as the Courts in the Mofussil were constituted, the Code went into sufficient detail, or whether it did not leave too much to judicial discretion, or to the discretion of the Judge. Having had the honour of a seat in the late Legislative Council at the time the Code, as prepared in England, was under its consideration, he was able to say that, however willing the Members of that Council might have been to adopt the Code with little or no alteration for Courts presided over by trained Judges, they were satisfied that they could not safely do so as regarded the Courts presided over by the Native Judges, particularly the Munsif's Courts, which form the great majority, or about four-fifths of the Civil Courts of India. It was known that many of the Munsifs obtained their appointments to the Bench without any previous official training and without their having had any practical acquaintance with judicial proceedings, and the Council felt that to give to young and inexperienced Judges a wide discretion in the way of procedure could be followed by only one result. Endless varieties of practice would be introduced according to the views of individual Judges, and irregularities would be committed, for the prevention and correction of which it would be necessary to allow an appeal from almost every order of any consequence passed during the pendency of a case. But the multiplication of appeals, particularly of what were called interlocutory appeals, was a serious evil. Their effect, he need scarcely say, was not only to entail considerable expense upon the parties, but very materially to delay the final decision of cases, and it was hopeless to expect that any Code of Procedure which allowed such appeals to any extent, could be either economical or expeditious. In order, therefore, to avoid the evils which were certain to flow from allowing too wide a discretion, it seemed to the Indian legislature that there was no alternative but to enlarge or supplement the Code as prepared by the Royal Commissioners, and to go into a little more detail for the guidance and direction of the Mofussil Courts than the Royal Commissioners had thought necessary. He believed that this was a true explanation of the reasons of many of the alterations made in this country in the Code as prepared by the Royal Commissioners, and of the nature of those alterations. If any one would take the trouble of comparing the Code as passed in this country with the Code as prepared by the Royal Commissioners, he thought it would be found that the alterations made by the Indian legislature were for the most part in the direction which he had mentioned, and that they related chiefly to matters of detail. So far as mere procedure was concerned the Indian legislature were most anxious to maintain, and he believed that they had maintained, the fundamental principles and the essential features of the Code as prepared by Her Majesty's Commissioners. They fully recognized the importance of the objects aimed at by the Royal Commissioners in the Code framed by them, *viz.*, to secure

greater expedition, greater certainty and less cost, and in the alterations made by them, they kept those objects steadily in view. And here, as bearing upon this part of his remarks on the introduction of the present Bill, he would quote an observation of the Commissioners on practice and pleadings, by whom the celebrated Code of New York was prepared. They said "in drawing up a Code of Civil Procedure, it must be a question of embarrassment how far it is wise to go into details. There are two opposite difficulties to be avoided; on one hand is the danger by provisions too general of leaving a wide space for judicial discretion on the other, equal danger by going into minute details of making the practice inflexible and intricate, increasing the risks of mischance and leaving unprovided for whatever particulars were unforeseen. What is desired is a middle path between a judicial discretion too wide for safety on the one hand and too narrow for convenience on the other." Looking to the character and constitution of the Courts for whose use alone the Code, as passed, was intended, he ventured to think that the Indian legislature had been so fortunate as to discover the middle path mentioned by the Commissoners who prepared the Code of New York. He had never heard any complaint that the Code of Civil Procedure, as now in operation, entered into too great detail, and he was able to say that when alterations had been asked for, they had generally been in an opposite direction. He thought that the Royal Commissioners, by whom the Code had originally been framed in England and the Indian legislature, which passed the Code into law with certain alterations and additions, might well be satisfied with the measure of success which had attended their labours. The Code had now been in operation for some years in all parts of British India except the territories under the Government of the Punjab and two or three Provinces, to which, owing to their rude and backward state, it had not as yet been thought advisable to extend its provisions, and a universal testimony had been borne in its favour. The reports received from the places in which the Code was in force all agreed that it was working remarkably well and giving very general satisfaction. He willingly admitted that the larger portion of the credit of this success was due to those by whom the Code was originally prepared, that was to say, Her Majesty's Commissioners.

He would now proceed to state the reasons which had appeared to render a revision of the Code at this time necessary, and which had led to the preparation of the present Bill. He believed that every one who had at any time been engaged in the preparation or revision or in the working of Codes, whether of procedure or substantive law, would readily admit the necessity of their undergoing a periodical revision both to adapt them to altered circumstances and for the rectification of errors. Lord Brougham had justly observed, "As long as men,

"including lawyers, are fallible, so long their legislative labours require correction "and elucidation;" and the Royal Commissioners who framed the first Chapter of the Indian Civil Code, which would shortly be submitted to the Council, said :—

"We agree with the framers of the Penal Code in thinking that the enacted law ought "at intervals of only a few years, to be revised and so amended as to make it contain as com- "pletely as possible, in the form of definitions, of rules, or of illustrations, every thing which "may from time to time be deemed fit to be made a part of it, leaving nothing to rest as law "on the authority of previous judicial decisions. Each successive edition after such a revision "should be enacted as law, and would contain, sanctioned by the legislature, all Judg- "ment law of the preceding interval deemed worthy of being retained. On these occasions, too, "the opportunity should be taken to amend the body of law under revision in every practi- "cable way, and especially to provide such new rules of law as might be required by the rise of "new interests and new circumstances in the progress of the society."

If it were granted (as he believed it must be) that all Codes required revision after certain periods, then he thought it would also be admitted that the first revision of a Code should take place at a shorter interval than any subequent revision, since it must generally be during the earlier years in which a Code was in operation that any defects or omissions in it were most likely to appear or to be brought to notice.

Notwithstanding what he had just said in favour of the periodical revision of Codes of Procedure and of substantive law, he should not have taken upon himself to propose, at this particular time, a revision of the Code which now regulated the proceeding of the Civil Courts throughout the British territories in India, with exception to the few places which he had mentioned, had the sole object of the Bill prepared by him, been to supply omissions or to cure defects brought to light in the working of the Code during the period that had intervened since its introduction, or to remove doubts which had arisen as to the intent and meaning of some of the sections. Were this the only purpose for which legislation was now required, he might have been content to allow the Code to remain in operation for some further time before any general revision was attempted. But during the period that had elapsed since the Code became law, great and important changes had taken place in the Judicial agency of the country as well as in the substantive Criminal law in its relation to the administration of Civil Justice. As noticed in the Statement of Objects and Reasons published with the Bill, acts committed in the Civil Courts, or in connection with the processes of those Courts, which before the passing of the Indian Penal Code were not offences, had by that Code been made offences, and were now punishable by the Criminal Courts. It had been found necessary to enact rules showing by what Courts these acts were to be taken cogni-

zance of and how they were to be brought before the Courts who were to try them. The Supreme and Sadr Courts at the three Presidencies had been abolished, and their places had been taken by High Courts, the proceedings of which on the Civil side, except in the exercise of their testamentary, intestate and matrimonial jurisdiction, were required to be regulated by the Code of Civil Procedure. The Office of Master, in which a large and very troublesome portion of the business which came before the late Supreme Courts was performed, had been done away with. Courts of Small Causes had been established in many parts of the country beyond the limits of the Presidency Towns, the proceedings of which were also required to be regulated generally by the Code of Civil Procedure. The Code had been extended to many places not subject to the general Regulations, such as the Central Provinces, Oude and British Burmah, the circumstances of which were peculiar, but not being known to the framers of the Code, they had made no provsion to meet them, and under the operation of an Act recently passed the offices of Hindu and Mahomedan Law Officers had been abolished, and the Courts would no longer have those officers to apply to for an exposition of the law when questions of inheritance and succession, and other questions requiring to be determined according to Hindu or Mahomedan law arose in suits coming before, them.

These and other changes had already led to the passing of several Acts to amend the Code of Civil Procedure, and legislation was called for on many points connected with the procedure of the Courts, particularly the High Courts. One of the Acts passed to amend the Code was to some extent a consolidating Act, but still the laws constituting the Code of Civl Procedure were much scattered, and further legislation, as already noticed, being necessary, it seemed desirable, instead of adding to the number of Acts by which the Civil Courts were to regulate their proceedings, that the opportunity should be taken to pass a single or consolidating Act, which should be complete in itself, and which should amend whatever experience might have shown to be defective in the existing Code.

Immediately after the establishment of the High Court of Judicature at Calcutta, it was found necessary to introduce a temporary Bill to provide for the levy of fees and stamp-duties in proceedings before the Court, and to suspend the operation of some of the sections of the Code of Civil Procedure in their application to the Court.

It was pointed out at the time of the introduction of the Bill, that when the Indian legislature passed the Code of Civil Procedure (from the operation of which,

as he had already mentioned, the late Supreme Courts had been expressly exempted) it contemplated that a separate Code of Civil Procedure would be prepared for the High Courts, whenever they should be established; and further legislation was promised as soon as the High Courts had been established a sufficient time to admit of an opinion being formed as to whether any, and what other, alterations of the existing Code were necessary. The present seemed to be a fitting time for fulfilling the promise thus given.

On the establishment of the High Courts, and the extension to them, without any modifications, of the Code of Civil Procedure, which was ordered by the Letters Patent, it was apprehended by many persons that the Code would be found unsuited to the constitution of the Courts and to the suits coming before them. He had shared those apprehensions, but he was happy to think that they had proved altogether unfounded, and, for himself, he was quite prepared to admit that the extension of the Code to the High Courts was a wise and politic measure. He held in his hand a paper written by a member of the legal profession at Calcutta in large practice, who had watched the working of the Code in the High Court with much interest, and who had lately favoured them with some valuable suggestions for its improvement. The writer said—"The Code of Civil Procedure" (Act VIII of 1859 and the amending Acts) "has undoubtedly worked infinitely better in the original jurisdiction of the High Court than could have been anticipated. In some "respects, as for instance, where discovery is required, it is defective, and the pro-"cedure in heavy cases is sometimes too summary; this, however, depends a great "deal upon the Judges; and upon the whole, I think substantial justice is done to "both plaintiffs and defendants. Suits are certainly tried more speedily than "heretofore, and when the Court-fees, which are now unduly high, are reduced, "I think the Court will be cheap as well as expeditious." He would here repeat a remark made by him in the Statement of Objects and Reasons, *viz.*, that it was no doubt owing in a great measure to the skill and ability with which the learned Judges of the High Courts, aided by an intelligent Bar, had worked the Code, and had adapted its provisions to the suits that had come before them, that these favourable results had been obtained. He felt that it must be a source of satisfaction to them to think that the revised Code, should it become law, would enjoy the same advantages in this respect as the Code whose place it was intended to take.

Before noticing the principal alterations proposed by the Bill, he wished to point out that, although the Bill, if it became law, would repeal the present Code, the repeal would, to a great extent, be merely nominal. The consolidation of a number of laws in a single Act necessarily involved the repeal of all the laws to be consolidated. There could be no consolidation without going through the form

of repeal, but it would be satisfactory to the Royal Commissioners, by whom the present Code was framed, to the Members of the late Legislative Council, who took part in passing the Code into law, and to all others who felt an interest in the Code, to be assured that the greater part of the sections of the present Code were re-enacted in the Bill prepared by him, and that the fundamental principles of the present Code were most carefully preserved.

MR. HARINGTON, after noticing the principal alterations which the Bill would make in the present law as detailed in the Statement of Objects and Reasons, went on to remark that the only other addition to the existing Code proposed by the Bill which it seemed necessary for him particularly to notice, had reference to suits brought to enforce the performance of any one or more acts under a contract without waiting for the time when the whole of the acts required to be performed under the contract ought to have been performed. The part of the Bill referred to had been taken with some modifications from the Bill prepared by his hon'ble and learned colleague Mr. Maine, for the improvement of the administration of Civil Justice in respect of suits of small value, and published some time ago in the official Gazette. The Code of Civil Procedure seemed to him the fitter place for the provisions to which he was referring, if they were to become law, and they had been introduced into the present Bill in the form in which they now appeared with his hon'ble colleague's entire concurrence. It was due to his hon'ble colleague that he should leave him to state to the Council the objects and reasons of the sections. This, he need scarcely say, his hon'ble colleague would do with much greater ability and much more to the satisfaction of the Council than he (MR. HARINGTON) could. As connected with the sections in question, he might mention that he intended in Committee to move that the mesne process provided by some of the sections should be allowed in suits for the specific performance of contracts only on registered contracts.

MR. HARINGTON concluded by expressing his obligations to the gentlemen who, while the Bill was under preparation, had assisted him with advice and suggestions. He named the hon'ble and learned Chief Justice of the High Court at Madras, Sir Adam Bittleston, one of the Puisne Judges of that Court, Mr. Levinge, one of the Puisne Judges of the High Court at Calcutta, Mr. Couch, one of the Puisne Judges of the High Court at Bombay, the Judges of the Sadr Court at Agra, Mr. J. Strachey, the President of the Sanitary Commission at Calcutta, and lately Judicial Commissioner for the Central Provinces, and Sayud Ahmad Khán, late Principal Sadr Amín at Gházípur. These gentlemen, amidst the arduous duties of their Courts, had found time to revise the Bill before it was published, and he gladly availed himself of the present opportunity of thanking them for the valuable

notes and suggestions which they had been good enough to send him. He added that suggestions were reaching the Council daily from all quarters in consequence of the publication of the Bill, and the requisition made for the opinions of the local officers upon it, and assisted by these, he trusted that should the Council assent to his motion, the Select Committee would be able to present to the Council a Bill which they would have no difficulty in accepting and in passing into law, and that no further revision of the Code would be necessary for many years.

The Hon'ble MR. MAINE said,—" Perhaps it will be convenient to the Council that I should follow Mr. Harington, and state the course that I propose to take with reference to those sections for which I am almost solely responsible. As regards the bulk of the Bill, I do not suppose the Council will refuse to refer it to a Committee. The only objection I can conceive is that the revision of the Code is possibly premature. I think that my hon'ble friend has met that objection, and, indeed, if the revision be premature, it would still be desirable to refer the Code to a Committee for the great majority of the questions which arise on it are of a kind which can be only settled in Committee, and in settling them, we ought to have as much as possible the benefit of my hon'ble friend's unrivalled knowledge of Indian procedure.

" I pass to those sections on specific performance which are taken from the Bill for the improvement of the administration of Civil Justice in respect of suits of small value. I will say at once that I do not intend to ask the Council to discuss their detail. They have been already modified in passing into the Code, and when we get into Committee, I hope to be able to consent to such further modifications as may suit them to the capacities of the Mofussil Courts, and prevent them causing one atom of practical injustice. And I may say at once that I am ready to accept Mr. Harington's suggestion, and to confine the exercise of those summary powers which I think that Civil Courts should sometimes exert to prevent their procedure from defeating itself, to the case of contracts registered under the Registration Act—an Act of which I said at the time it was passed and I say now, that it is destined to revolutionize the administration of Civil Justice in India. All, then, I ask the Council to affirm by referring the sections to a Committee is their principle. So much, however, has been said and written, and (I am obliged to add) ignorantly and perversely said and written, about these sections and their intention, that I am under the necessity of stating to the Council how they originally found their way into my Bill, and how they assumed their original form. And it seems that I must defend one of the most valuable principles known to jurisprudence, the princi-

ple of specific performance, which has been placed in jeopardy by this discussion. It may be recollected by the Council, or by part of it, that on my arrival in this country, the first duty which devolved upon me was the withdrawal of the Penal Contract Bill, which Her Majesty's Government had announced its intention of disallowing. I have nothing to recant or recall of what I said upon that occasion. My opinion still is, that those who demanded it did not understand it, and that they did not realise how deadly a weapon they were placing in the hands of any creditor who was actuated by private enmity, and with what perils, under the wide definitions of fraud which the Bill contained, they were surrounding the whole class of debtors, Native and European. But when I asked the Council to allow me to withdraw the Bill, I read all the objections of the Home Government and all the arguments of the opponents of the Bill, as implying an opinion and a pledge that, while a Penal Contract Law was inadmissible, the Civil Procedure of India, applicable to contracts, had been or ought to be improved up to the highest point to which it was capable of improvement consistently with principle. And, indeed, without that admission, I confess for myself that I am utterly unable even to frame an argument against a Penal Contract Law, unless I were to adopt a doctrine, which I hold to be anarchical and anti-social, that deliberate contracts need not be performed. In that spirit, at the close of the debate, the late Viceroy, Lord Elgin, remarked as follows :—

> 'He had such confidence in the good sense of his countrymen that he was persuaded the European community would agree that it was better, if existing laws could possibly achieve the object in view, first to try their operation ; but if beyond those laws, other special legislation was necessary to meet any proved evils, it would be the duty of the Government to endeavour to discover what remedy could be applied. He could not pledge himself that a remedy should be discovered ; but he could assuredly say that the Government would not fail from want of a sincere attempt to discover it.'

"As a step to the fulfilment of this pledge, my hon'ble friend, Mr. Harington, and I obtained an interview with some gentlemen then in Calcutta, who belonged to the class in whose interests the Penal Contract Bill was supposed to be framed. I think I may say, subject to Mr. Harington's correction, that the aim we proposed to ourselves was this—to discover what genuine and *bonâ fide* difficulties they laboured under in civilly enforcing a contract : to point out to them how those difficulties were obviated by the existing civil law : and, if we were ourselves convinced of defects, to consider the best way of removing them. Those sections were the fruit of the interview ; and when it is said that their very form shows that they are drawn in the interest of the Planters it will appear from what I have said that that in a certain sense, and from the necessity of the case, is true. They are a series of short propositions drawn out from the existing law, and intended to

show those who had demanded a Penal Contract Law that the ground for it did not exist, or might be removed without compromising principle. Now, Sir, it would not have been unnatural or surprising if the agitation about the Penal Contract Bill, and the severe scrutiny to which the Civil Procedure Code was consequently subjected, had elicited certain defects in the Code. But in fact I believe at the time as I said in the Statement of Objects and Reasons appended to my Bill that the substantial part of the sections was already law without further enactment. Whether I was right or wrong, it is not now material to enquire, as the sections have passed out of my hands into those of my friend, and will pass probably into those of the Committee. It is enough to say that I thought so, and that Mr. Harington, the first authority on Indian procedure, thought so too. I have only stated this for the purpose of making the admission that if I had been framing for the first time sections containing new law, they would have been expressed with greater fulness, and would have provided for many contingencies which a lawyer is able to anticipate.

"I now pass to the principle involved in the specific performance of a contract—which I need scarcely say to the Council, is its actual or exact performance—the doing of the very thing promised to be done as opposed to the right to recover damages for the non-performance of that promise. From the plaintiff's point of view, nobody, I suppose, would deny that the specific performance of his contract is what abstractedly he is entitled to, and not the recovery of damages, which, probably, neither he nor the defendant contemplated when the contract was made. Hence, it is practically found that in proportion as a system of law aims at doing perfect justice to all parties, it leans towards specific performance, and takes the stress of its remedies off damages. To take some examples: the English Courts of Common Law which, with many practical excellencies, have, it must be owned, but an imperfect theory of justice, had originally no power of enforcing specific performance, and only lately acquired it by Statute. But the English Court of Chancery, which, with many great and grave defects, has a more perfect set of principles than the Courts of Common Law, has always ordered and still orders specific performance in cases where damages would be an insufficient remedy. (MR. MAINE here quoted a statement of the principle from a judgment of Lord Hardwicke's, and continued). I do not wish to invite the attention of the Council to merely technical points. But I may say that the action of the Court of Chancery in matters analogous to that before us cannot be understood without taking into account its system of injunctions, under which, by ordering a man not to do a particular thing, it virtually tells him what to do. I freely admit, however, that both as regards specific performance and as regards injunctions, the Court of Chancery exhibits more timidity than would be inferred from the amplitude of the

language in which the Judges declare the principle; and doubtless the smallness of the transaction would be a reason for the Court's not interfering. The reason of that I take to be this:—The Court of Chancery, much as it has been reformed, is still a great and complex machine, difficult to be put into motion, and not always certain of operation when it does move. Many of its rules still savour of the doctrine, which does credit to its modesty, that a Chancery suit is a great evil, not to be encouraged, if not to be discouraged. But, when we come to systems of codified law, with a procedure much cheapened and simplified, we find no such hesitation in decreeing specific performance. Accordingly, the French law, which is now the law of the greater part of Europe, will always order specific performance when the defendant is able to perform. And so little difficulty do the Civil Courts make about decreeing it that I myself remember a French Court ordering an eminent author to write a novel, in six volumes. And as there are some persons who appear to think that there is something unpractical about a highly simplified law or procedure, I may as well go on to say that M. Dumas did write the novel. But, unquestionably, the most advanced law on the subject is contained in the Code of Civil Procedure. For as I read the sections 192 and 200 of the Code, the right of an Indian Mofussil Court to decree specific performance is exactly co-extensive with its right to decree damages. So that, as the law stands at present, damages for a breach of contract to marry being unquestionably recoverable in India, a Court of Justice may order a man to marry a particular woman, and may imprison him if he declines. And it illustrates the value of the censures which have been directed against these sections of mine as innovations designed in the interest of the Planters, that when we get into Committee, I shall have to ask my hon'ble friend to allow the law to be narrowed, and certain classes of contracts to be excluded from the rule.

"I know it will be said that the question in India is not whether an order for specific performance is just to plaintiffs, but whether it is just to defendants. I say that it is just to defendants, and eminently just and eminently kind to poor defendants. See how specific performance operates. In the first place, under the existing Indian Law, the defendant has the same ground of defence in opposing a decree for specific performance as he has in opposing a decree for damages. Next, the Court cannot order specific performance of a contract unless it is satisfied that the defendant in fact is able to perform it. Here is the great safeguard and protection of poor defendants. A decree for damages has this characteristic of a criminal penalty, that it issues unconditionally, and without regard to the circumstances of a poor defendant, who must pay or go to prison. But an order of specific performance is moulded to the circumstances of the person against whom it

issues. I am not afraid to face the question, which is no doubt in the minds of the Council, and to ask what is the effect of a system of specific performance as compared with a system of damages, as between planter and ryot. It is this. The planter obtains a decree for damages and executes it. He seizes the Ryot's bullocks, his plough, and his brass pans. They are worthless to the Planter; but to the ryot, if what is said of him be true if he be a mere *adscriptus glebae*, living from hand to mouth—they must be invaluable; they must be the very means of living. Now what worse could one say of a remedial system than that it inflicts the maximum of injury on the defendant, and confers the minimum of benefit on the plaintiff? Suppose, however, the decree is not executed: it is then hoarded up and kept hanging *in terrorem* over the ryot. I have no hesitation in saying that a system of perpetually unexecuted decrees is sufficient to keep an open sore externally running in society. Can such a system be compared with one of redress by specific performance? Is it not infinitely better that the Court should step in, and, when the defendant has shown the first symptoms of intending to commit a breach, order the contract to be performed, at the same time taking away none of his rights of defence?

" Just see what the case is. It is not that of a man who, when he made the contract, did not intend to perform it. That is a punishable offence under the Penal Code. Nor is it the case of a defendant who, from unforeseen circumstances, becomes unable to perform his contract. For it would never be possible for the plaintiff to show the power of such a defendant to perform the contract, and, consequently, no order for specific performance would issue. The case is that of a person who, when he made the contract, did intend to perform it, but, subsequently, changes his mind. Surely, the sooner the Court steps in after the original intention has been formed, and obviates the change of intention, the better it is for the defendant, and certainly the better for the interests of morality. But I should be sorry that the Council should suppose that all I have said is mere theory and speculation. The advantageousness of a system of specific performance to poor defendants I know from personal observation. Look to the English County Courts. They were established, not to supply the defects of the Court of Chancery, which at that time were regarded as incurable, but to supply those of the Courts of Common Law. Consequently, they possess by law no power of awarding specific performance of contracts. But still, insensibly, progressively, against the law, and without fixed intention on the part of the Judges, by the mere force of commiseration for the poor, they have become Courts awarding specific performance. The Judges, seeing much of poor men, and, like all who see much of them, contracting a sympathy with their troubles, become unwilling to make unconditional decrees

for payment of damages, and, consequently, for imprisonment. This is what constantly occurs in certain parts of England. An artisan has contracted to execute a piece of work. If it was in Coventry, it would be some lengths of ribbon; if in Nottingham, a pair of shoes. He has broken his contract and is brought into Court. Legally the Judge can only condemn him to pay damages and consequently to go to prison. But practically, if he finds that the defendant can still execute the contract, he adjourns the case and gives him time to perform it. In other words, without law, he decrees specific performance. Knowing this, I was not surprised when I learned in Spring what was the plan which the first practical jurist of England, Lord Westbury, had devised for the relief of the poor from the coarse machinery of the County Courts. The Lord Chancellor's Bill was avowedly designed in the interests of poor defendants; and I have seen it asserted that it was thought too favourable for defendants, too unfavourable for plaintiffs, and that it consequently was postponed. Here is the English Bill, and its principle is to lessen the power of these Courts to award damages and, consequently, imprisonment, and to give them all the powers of the Court of Chancery, and amongst them that of awarding specific performance. Indeed, making allowance for the difference of procedure in the two countries, and the consequent difference of form in the Bills, it may almost be said that these very sections, which have been condemned in India as devised in the interest of the rich, have been transferred to the English Bill in the interest of the poor. Both Bills are, at all events, founded on a principle which I at least have always contended for as applicable to jurisdiction over the poor, that of taking the stress of judicial remedies from damages, and of freely employing those equitable remedies which can be moulded to the situation of persons and to facts.

"I know, however, what may still be said to me, that this is all very plausible, but that there is a part of India in which unjust contracts are made. Let us assume those contracts to be as unjust as they are alleged to be. Are you going to keep the whole procedure of India in a backward condition, because unjust contracts are made in a corner of Bengal? Even there the probability is that the majority of contracts are perfectly fair. But I maintain that, even as regards unfair contracts, a system of specific performance is better than a system of damages, and that the more scientific instrument will inflict the less deadly wound. I have, however, for myself, no objection to state what further expedient I would employ to solve this ever-recurring contract-difficulty. I would provide Courts and Judges of such capacity that, while on the one hand you arm them with the utmost resources of Civil procedure, on the other they shall be able to recognize and take cognizance of equitable defences in suits for breach of contract, as distinguished from legal

and formal defences. Our Mofussil Courts are Courts both of law and equity; and, under a proper administration of justice, every contract to which there is a real moral objection should be worthless to the holder. It may be said there is not sufficient judicial material for this in India. But surely if society in a part of Bengal is so exceptionally constituted as to arrest the improvement of your general Civil procedure, the logical inference is that that part of the country should be exceptionally dealt with; that your judicial strength should be concentrated there; and that more than usual facilities should there be provided for scientifically administering the law. Many other nostrums are about, but I have a profound disbelief in all of them. The only remedy which I hold to be sovereign is the application by competent Courts of those tried and tested principles of jurisprudence which alone are capable in matters of contract of mediating between man and man."

The Motion was put and agreed to.

The following Select Committee was named :—

On the Bill for consolidating and amending the laws relating to the Procedure of the Courts of Civil Judicature in British India—the Hon'ble Messrs. Harington, Maine, Anderson and Bullen, the Hon'ble Raja Sahib Dyal Bahadur and the Hon'ble Messrs. Taylor, Muir and Cust.

The Council then adjourned.

WHITLEY STOKES,

Offg. Asst. Secy. to the Govt. of India,

Home Dept. (Legislative).

CALCUTTA,

The 11th November 1864.

C. I. P.—77 L. D.—20-6-11—