COUNCIL OF THE GOVERNOR GENERAL OF INDIA

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Abstract of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 & 25 Vic., cap. 67.

The Council met at Government House on Friday, the 17th April 1868.

PRESENT:

His Excellency the Viceroy and Governor General of India, *presiding.*
His Honour the Lieutenant Governor of Bengal.
The Hon'ble G. Noble Taylor.
The Hon'ble Major General Sir H. M. Durand, C. B., K. C. S. I.
The Hon'ble H. Sumner Maine.
The Hon'ble John Strachey.
The Hon'ble J. Skinner.
The Hon'ble F. R. Cockerell.
The Hon'ble Rájá Shioráj Singh, C. S. I.
The Hon'ble H. Crooke.
The Hon'ble Sir R. Temple, K. C. S. I.

CONTAGIOUS DISEASES' BILL.

The Hon'ble MR. MAINE moved that the Report of the Select Committee on the Bill for the better prevention of Contagious Diseases be taken into consideration. He said that, with one exception, the changes proposed by the Select Committee were not important. In addition to the section of the original Bill which had been framed on the analogy of the English statutory provision relating to keepers of houses of ill-fame, the Committee proposed that these persons should register themselves, without, however, relieving them from any other penalty to which their occupation might expose them. The Bill also provided that offices should be opened for the registration of women to whom the Bill applied, and that they should attend there. It was thought that this system would not work well in some places, and therefore power was given to the Local Governments to make rules of registration for themselves. A clause had been introduced to the effect that all registered women sent to hospital should receive lodging, food, clothing and medical treatment gratis. Nothing, MR. MAINE would remark, was said as to the source from which the expenditure necessary for the support and treatment of the women was to be defrayed. That had been designedly left for future arrangement. The Bill, as amended, further provided that prosecutions under the Act should be instituted only by such person as the Local Government should appoint, and the Magistrates exercising jurisdiction under the Act were not to be of a grade inferior to that

of a Subordinate Magistrate of the first class. The utmost care had been taken throughout not to put power into the hands of police or other functionaries of too low a grade.

The really important point in which the Bill had been modified was in the provision which made it applicable, not only to seaports, but to any place in India which the Local Government, with the sanction of the Governor General in Council, should specify. This change had been effected mainly in consequence of the remarks which had been made, when the Bill was first before the Council, by his Hon'ble friend Mr. Strachey. Those most satisfactory results described by his Hon'ble friend had been obtained in the great city of Lucknow, to which the rules of the Cantonment Magistrates' Act had been applied by making it, for the purposes of that law, a part of the cantonment. The expedient resorted to had therefore been a fiction. But the Committee thought that such a mode of attaining a desirable end was to be regretted, and therefore made the Bill applicable to inland towns as well as seaports; although, doubtless, it was in seaports that the experiment would first be tried.

The Hon'ble MR. STRACHEY said that, believing that a more important and beneficial measure could hardly come before the legislature in this country or elsewhere, he was unwilling to give a silent vote in favour of this Bill. If the Council should consent, as he hoped he was not too sanguine in anticipating that it would consent, not only to pass the Bill, but to do so unanimously and without a dissentient voice, he ventured to say that its proceedings would be long remembered to its honour, and that the effect of the Bill would be felt far beyond the Indian towns to which the Act would extend. This was not the first, but it was not the least important occasion on which a measure of Indian legislation might serve as a model, and might prove of great assistance to those who desired to carry out reforms at home. Some years ago opposition to measures of this kind was so great that it seemed almost hopeless to expect that an English legislature would consent to adopt them. The change in public opinion on these matters had been most remarkable, and he ventured to say that the day was not distant when almost all reasonable men would admit that, amongst all the duties of the legislature, there could hardly be one more important than that of alleviating one of the worst causes of human suffering, and protecting posterity against the consequences of the vice of the present generation.

The Motion was put and agreed to.

The Hon'ble MR. MAINE moved that the following sections be inserted after section 17:—

"18. If any registered woman on whom such order as last aforesaid shall have been served conducts herself as a common prostitute before such surgeon or other person empowered as last

aforesaid certifies in writing to the effect that she is then free from a contagious disease (the proof of which certificate shall lie on her), she shall, on conviction before a Magistrate, be punished with imprisonment for a term which may extend to six months, or with fine not exceeding five hundred rupees, or with both.

"19. During the interval between the service of such order upon any registered woman and the granting of such certificate, an allowance for her subsistence shall be provided of such amount and in such manner as the Local Government shall from time to time prescribe."

The provisions of section 17 of the Bill as it stood were intended to be temporary and provisional. It was thought that at first there might be, in some places, not nearly sufficient accommodation in lock-hospitals for the persons whom it would be necessary to treat. Hence, several medical gentlemen had impressed upon MR. MAINE the necessity of making provision for a system of out-door treatment. Other persons whom he had consulted had urged on him strongly that women under such treatment should not be allowed to continue their occupation. It would be observed that, under the circumstances supposed, the condition of the woman was ascertained and known to herself. MR. MAINE recognized the force of the argument, and was willing to make the continuance of the occupation until the time of cure punishable. But he thought that such a provision would be most unjust unless, in the meantime, the means of livelihood were provided to the woman under treatment. Hence, to the penal section he had added a provision that the woman should be entitled to a subsistence allowance up to the time of the surgeon granting a certificate of cure.

The Motion was put and agreed to.

The Hon'ble MR. MAINE also moved that the Bill as amended by the Select Committee, together with the amendments now adopted, be passed.

The Motion was put and agreed to.

PRINCIPAL SADR AMINS, SADR AMINS AND MUNSIFS' BILL.

The Hon'ble MR. COCKERELL moved that the Report of the Select Committee on the Bill to consolidate and amend the law relating to Principal Sadr Amíns, Sadr Amíns and Munsifs, and for other purposes, be taken into consideration. He said that some alterations of a substantial character had been made in the Bill since its introduction into this Council, and, in stating the considerations which had led to the first of these changes—he referred to the proposed abolition of the Court of the Sadr Amín—it might be well that he should remind the Council of the facts of the case as regarded the existing jurisdiction of the Sadr Amín and Munsif.

Every district was divided into a certain number of Munsifís, in each of which a Munsif's Court was established, for the trial of all suits the amount or

value of the subject-matter of which did not exceed rupees three hundred. The Munsifí in which the principal Civil Court of the district was located was called the Sadr Munsifí.

The pecuniary limits of the Sadr Amín's jurisdiction commenced from the amount at which the Munsif's jurisdiction ceased, and extended to rupees one thousand; whilst, in regard to local limits, his jurisdiction extended over the whole district.

In the Lower Provinces of Bengal almost universally, and in the North-Western Provinces generally, the Sadr Amín was vested with the jurisdiction of a Munsif within the limits of the Sadr Munsifí in which his Court was situated. The result of the increased jurisdiction assigned by the Bill to all Munsifs was, under the operation of the provisions of the Code of Civil Procedure in regard to the institution of suits, the reduction of the status of Sadr Amíns, both in regard to pecuniary and local jurisdiction, to that of a Munsif within the Sadr Munsifí.

It became necessary, therefore, either to confer upon Sadr Amíns an entirely new and increased jurisdiction, commencing from the limit of their former jurisdiction, or to abolish their Courts as Courts of distinct jurisdiction. In the Bill as originally drawn, it was proposed to adopt the former course; and, accordingly, Sadr Amíns were thereby vested with power of cognizance of suits whose amount or value exceeded rupees one thousand, but was not more than rupees three thousand, retaining the local limits of their former jurisdiction. The Committee, on a careful consideration of this proposal, were decidedly of opinion that the number of suits ranging between these amounts instituted in any district would in all probability be insufficient to fully employ those Courts; whilst the effect of such a measure would necessarily be the *pro tanto* encroachment upon the existing jurisdiction of the Principal Sadr Amíns, which, so far as the information in possession of the Committee enabled them to judge, stood in no need of such curtailment. On these grounds, it was now proposed to abolish the separate Court of Sadr Amín. The proposal necessarily involved a change of designation of the Courts of Principal Sadr Amíns, and, on other considerations, it was held that such change was desirable.

The Courts of Munsifs grew out of the office of Amín, or Native Commissioner, whose original quasi-judicial functions were performed in the character of arbitrators, or referees; hence the Court or office immediately above that of the Amín, or Munsif, derived the name of Sadr Amín, or Native Head Commissioner, and later, when the Court of Principal Sadr Amín was

established by Regulation V of 1831, the old nomenclature was adhered to. Up to that time, eligibility for these offices was restricted to Natives of this country, and the nomenclature adopted was not, therefore, inappropriate to the circumstances of the case. By Act VIII of 1836, that restriction was removed, and all persons were declared eligible for the offices of Principal Sadr Amín, Sadr Amín and Munsíf; the original designation of those offices seemed, since the passing of that enactment, to have lost its peculiar claim to retention, and in the case of the superior class of judicial officers to whom this Bill had reference, might well be abandoned in favour of the new term proposed.

In the Bill as introduced to the Council, the power of selection and appointment of Munsif, which by the existing usage was vested in the High Court, was transferred to the Local Government. In deference to the strongly expressed opinion of the High Court on this subject, it was now proposed to abandon, to a certain extent, the contemplated change of practice, and reserve to the High Court the selection, and, consequently, virtual appointment, of Munsifs. The question had been so settled after very careful consideration and discussion of the subject by the Select Committee. The late Hon'ble Member of this Council by whom the Bill was introduced argued that the Government had better means and opportunities than the High Court of making a fit selection of persons for appointment as Munsifs. He did not wish to lay much stress upon that argument, or institute any comparison of the field for selection presented to each of these high authorities. He thought that a stronger argument might be adduced in favour of the change, from the recognized rule in England and elsewhere that political expediency required that the appointment of persons to the judicial Bench should be exclusively vested in the Executive Government. To determine the value of the argument on the other side, derived from the long-established contrary usage of this country in regard to such appointments, it was necessary to examine the course of previous legislation on this subject. The office of Amín or Munsif was established under Regulation XL of 1793, and the selection and appointment of such officers was placed under the control of the Sadr Diwáni Adálat. By Regulation XLIX of 1803, the office of Sadr Amín, or Native Head Commissioner, was constituted, and similar provision was made regarding the appointment of those officers. By Regulation XXIII of 1814, that control over the selection and appointment of both these classes of officers was transferred to the Provincial Courts, and those Courts continued to direct the appointments of Sadr Amíns and Munsifs up to 1831. By Regulation V of that year it was enacted, in supersession of the former law regarding the appointment of Sadr Amíns and Munsifs, that the Governor General in Council should have power

to direct the manner in which the selection of these officers should be regulated. Up to the present time, no later enactment on this subject had been passed, and the existing practice in regard to the appointment of both Sadr Amíns and Munsifs had arisen out of the provisions of that law. Since so much stress had been laid by the High Court on the fact of the originally proposed selection and appointment of Munsifs by the Government being in reversal of the existing *law* and practice, it was worthy of note that the directly contrary system of selection and appointment of Sadr Amíns had resulted from the same provision of the law which governed the existing practice in the appointment of Munsifs, and from this fact he argued that the existing law, Regulation V of 1831, in supersession of the principle affirmed by previous legislation on the subject, vested in the Government the power of initiating action in the matter of the selection and appointment of subordinate judicial officers, and that, consequently, the proposal contained in the Bill as originally drawn, to vest the power of appointment of Munsifs in the Local Government, involved no innovation on the course of legislation that had taken place on this subject. Nevertheless, the proposal did involve a change of a very long established practice, and as no necessity for the change of system could be urged from the test of past experience of the working of the existing one, the Committee, as he before remarked, in deference to the strong remonstrance of the Judges of the High Court, had adopted the form of appointment set forth in the amended Bill. For the sake of uniformity, that form of appointment had been made applicable also to the case of Subordinate Judges: the change of system introduced by this extension was more apparent than real; it would practically involve no material alteration of the present mode of dealing with such appointments, whilst, if the change was not adopted, the principle on which the High Court claimed the power of selection of Munsifs and that power was conceded to them was lost sight of, and the object which that Court had in view was liable to be frustrated. For, it would be observed that, neither in the existing law, nor in the Bill as first drawn, was there any provision restricting the choice of the Government, in its appointment of the higher classes of Subordinate Judges, to the ranks of the Munsifs selected by the Court, and, consequently, the Court would have no guarantee that the Benches of the more important subordinate judicial Courts would be filled by the persons originally selected by itself. He did not say that it was likely that the Government would take other fields of selection than that of the specially trained judicial class—the Munsifs—for the higher posts of the subordinate judicial service, but he said that it would have legal immunity in so doing, and that, in legislating on the subject, they were bound to take note of such a possible contingency and provide against it.

The next change of substance to which he wished to advert was the restoration, or rather confirmation, of the existing limits of the appellate jurisdiction of the District Judge and the High Court.

In the Bill as originally drawn, it was proposed to raise the appellate jurisdiction of the District Judges to include suits whose subject-matter in value or amount was equal to, but did not exceed, rupees ten thousand. The main idea which suggested this important change in the existing law was that, under the operation of the new mode of valuation of suits relating to land introduced by the Stamp Act of last year, the appellate jurisdiction of the District Judges would be virtually curtailed to a considerable extent, whilst the High Court would be swamped by the proportionate increase of appeals that would thus be transferred to that Court from the several districts. The Committee found that the result of the change of the Stamp Law had not hitherto been in the least degree in accordance with this anticipation.

He held a return of regular appeals preferred to the High Court during the months of June, July and August for the last four years, *i. e.*, for the three years immediately preceding the change of the Stamp Law, and for the year in which that change took effect; the average aggregate number of appeals during those months in the three years previous to the passing of the new Stamp Act was 125; whilst the aggregate of the three months subsequent to that change was 102. Allowing for the effects of the increased duty in causing a temporary decrease in the institution of appeals, and assuming that such general decrease would not be of permanent duration, it was nevertheless clear that the anticipation upon which the proposed change of the law mainly rested would never be realized. On other grounds, the Committee held that it was inexpedient to amend the existing law on this subject by the adoption of the proposed increased appellate jurisdiction of the District Judges. They considered that it was very desirable that, in suits of such importance as those covered by the originally proposed alteration of the law, there should be an appeal to the High Court upon the facts. They observed that one result of that proposed change, if adopted, would have been that, in suits whose subject-matter in amount or value was rupees ten thousand, there would have been an appeal from the decision of the District Judge as to the facts of the case direct to the Privy Council, without any intervention of the High Court. Such a possible contingency, in the opinion of the Committee, was undesirable. It was argued, amongst other grounds for the change proposed on the introduction of the Bill, that the measure would have the advantage of providing for the record of the judgment of the District Judge on regular appeal, and

that of the High Court in special appeal, in cases involving subject-matters of the value of rupees ten thousand ultimately appealable to the Privy Council.

He could not recognize the force of this argument. The regular appeal which lay to the High Court in such cases in the present state of the law necessarily covered any question that could arise in special appeal, and the record of the High Court's judgment upon the facts in such cases must be surely of greater value than that of the District Judge's decision, and was likely to be so appreciated by those whose interests were most affected by the question. The Committee proposed, therefore, to re-enact, in substance, the existing law on this subject.

He now came to what might be held to be the most important provision of this Bill, the investment of the ordinary subordinate Civil Courts with the jurisdiction of Small Cause Courts within certain pecuniary and local limits.

In the Bill as amended by the Select Committee, this power of investment was enlarged so as to bring Munsifs within its application, and having regard to the various exigencies of different localities, as well as to the qualifications of the judicial officers available for the exercise of final jurisdiction, the principle of varying pecuniary limits had been introduced. On this point he should make no comment, as he believed that his Hon'ble friend Mr. Maine would, when the Committee's Report was taken into consideration, move, in the form of an amendment, the substitution of fixed limits for the present provision of the Bill, and to this deviation from the Committee's proposals he had acceded, as it was perhaps on the whole better calculated to promote the successful working of this new jurisdiction.

The investment of Munsifs with any final jurisdiction in the trial of suits, however limited as to value, was doubtless a most important experiment; but whilst, on the one hand, the very superior qualifications of the Munsifs of the present day seemed to justify some step in this direction, on the other, the excess to which the right of appeal was carried and promoted a litigious spirit amongst the people called for some check in the interests of the people themselves. The statistics of original suits and appeals instituted went to show that, in suits of the smallest amount or value, the right of appeal was by far the most largely availed of, and that its assertion to a certain extent decreased in proportion to the rise in value of the subject-matter of litigation. He found, from a return which was prepared in connection with the enquiry into the working of the Stamp Act, that the number of appeals in suits up to ten rupees' value, instituted in the Civil Courts of the North-Western Provinces during the third quarter of 1866, was

202, and the number of original suits was 534; whilst the number of appeals in suits ranging between ten rupees and one thousand rupees in value, instituted during the same period, was 766, and the number of original suits was 7660.

The returns for the third quarter of 1867 exhibited nearly similar results, so that, whilst in the litigation involving the far greater amount or value the proportion of appeals to original suits was 1:10, in suits of the most trivial description that proportion rose to about $1\frac{1}{7}$:1.

When it was considered that the mass of litigation throughout the provinces to which this Bill was intended to apply was of the class cognizable by Small Cause Courts—for he saw from the returns of litigation in the Lower Provinces of Bengal that, in addition to some 40,000 suits instituted in the regularly constituted Small Cause Courts, there were no less than 80,000 of this class of suits instituted in the ordinary Civil Courts, whilst the aggregate of all other classes of suits did not exceed 60,000—it might reasonably be said that the measure which the amended Bill contemplated was recommended on no insufficient grounds. The Committee very much regretted that their proposal in regard to the absolute investment of these subordinate Courts with this extent of final jurisdiction did not meet with the approval of the Judges of the High Court. The High Court desired to encumber the exercise, by these Courts, of the powers of Small Cause Courts, with a form of procedure foreign to the principle on which the business of those Courts was conducted, and further to vest a power of control in the District Judge which might, and probably would, in effect, render nugatory the advantage to be derived from the finality of jurisdiction which the provisions of the amended Bill contemplated. The Committee, with all deference for the High Court's opinion on this question, were unwilling to adopt the proposed restriction on the exercise, of final jurisdiction by the Subordinate Judges and Munsifs who might be selected for investment with Small Cause Court powers.

The other alterations of the Bill proposed by the Select Committee were of less importance. He would proceed to notice such of them as seemed to call for remark. Provision had been made for the transfer of the existing Principal Sadr Amíns, Sadr Amíns and Munsifs to the new offices constituted by the Bill, without re-appointment, the object of which was to prevent the sudden and general interruption of business throughout the provinces to which the Bill would apply, were it necessary for the Government to make fresh appointments, and for the judicial officers to subscribe fresh declarations, ere they could enter on the

duties of their offices under this Bill. With a similar view, it was proposed to give jurisdiction to the Subordinate Judges and Munsifs over all proceedings pending at the time of the passing of this Bill in the Courts of the several officers for whom they were substituted. This had been so arranged to suit public convenience to the utmost possible extent, it being provided, even, that cases pending in the Courts of Sadr Amíns, which it was proposed to abolish, should be adjudicated by the Munsif in charge of the Sadr Munsifí, in order to save suitors the expense and trouble of making fresh arrangements for the conduct of such cases in different places and before different Courts. It had been suggested to him that this provision need not extend to suits only just instituted, and in which no evidence or issues had been recorded. He thought, however, that, where vakíls had been engaged and steps taken for the conduct of the suit, even though no evidence or issues had been recorded, the change of Court would still be open, in some degree, to similar objection. He would even have wished to make like provision, as far as practicable, for cases tried by Sadr Amíns, and remanded on appeal subsequently to the passing of this Bill, but there would be difficulty in the way of such provision, and it would be better to relinquish it. The Bill as originally drawn contained detailed provisions for cases of misfeazance by subordinate judicial officers: they were in fact certain clauses of Act XXXVII of 1850, transferred to this Bill with certain alterations and emendations adapted to the change of criminal procedure since the passing of that enactment. The Committee deemed it advisable to exclude those sections, leaving subordinate judicial officers to be dealt with, in the matter of charges of misfeazance, under the general law applicable to all public servants in such cases.

The original Bill contained no provision for the appointment of the ministerial officers of the Courts of the Subordinate Judges and Munsifs, although it contemplated the repeal of the law by which such provision was made in regard to the ministerial establishments of the Courts of Principal Sadr Amíns, Sadr Amíns and Munsifs. In the amended Bill, it was proposed to re-enact the substance of those provisions of the existing law, with the addition of certain powers of removal and other punishment of ministerial officers in cases of misconduct, subject to the usual course of appeal prescribed by the Code of Criminal Procedure.

There was also a suggestion from the High Court of the North-Western Provinces for a provision to empower the Local Government to invest Principal Sadr Amíns, *i. e.*, Subordinate Judges, with the powers of Munsifs. He thought that, in Lower Bengal, there had not been a case in which a Principal Sadr Amín had been vested with the powers of a Munsif, and that, there, the

provision would hardly be needed ; but he believed that there were such cases in the North-Western Provinces, and at all events, as the High Court had suggested it, the Select Committee had no doubt that a provision to that effect should be enacted.

The next and last alteration made by the Committee which he would notice was the power of reference as to civil proceedings. The old law restricted that power to the reference of what were called "miscellaneous" and "summary" proceedings, terms which were no doubt somewhat undefined. The section in the Bill had been so modified as to include Munsifs as having power, on reference from the District Judge, to take cognizance of referred civil proceedings. The object was to provide for certain cases in which local investigations by subordinate judicial officers would be of very great advantage to the proper adjudication of the cases. He was aware that, in cases under Act XXVII of 1860 (the Certificate Act), and Act XIX of 1841, by which curators of the property of deceased persons were appointed in cases of wrongful possession of such property being acquired or threatened, there were frequently conflicting claims in regard to property of trifling value, which might be very well disposed of by the Munsif, who could himself conduct the local investigation, but which the Judge had no power to refer for that purpose under the existing law.

With those remarks he would move that the Report of the Select Committee be considered by the Council. He wished only to add that, if the motion was carried, he would afterwards move a slight amendment in one of the sections of the Bill. He referred to section 13. It was intended to extend the power of reference of appeals to Subordinate Judges or Principal Sadr Amíns which was at present vested in the District Judge, subject of course to the orders of the High Court, so as to admit of its application to appeals from the orders of the Revenue Courts. Whatever considerations might have dictated the reservation of such appeals to the cognizance of the Judge at the time of the passing of Act X of 1859, could hardly apply at present; and there seemed no reason (he knew that the North-Western Provinces' High Court held that opinion) why appeals from the orders of the Revenue Courts should not be disposed of by the Subordinate Judges. Such a provision would have the effect of relieving the District Judge of work of a not important character, but which took up a great deal of time which would then be at his disposal for the trial of original suits, a matter which the High Court considered very desirable. Anything that would relieve District Judges in this respect, without a sacrifice of the security of the interests of the people who came before the Courts, seemed very desirable, and consequently it was proposed in the Bill, originally, by leaving the term

"any appeals" to include revenue appeals. It was afterwards found necessary, on further consideration, to introduce the words "passed by Munsifs," and the introduction of those words made the provision no longer applicable to revenue appeals. This consequence was at the time overlooked, and he now proposed to repair the oversight by the introduction of a few words in the section above referred to, which would include appeals from Revenue Courts.

The Hon'ble SIR RICHARD TEMPLE said there was one point in the statement which had just been made to which he would solicit the attention of the Council, and it was this. In the Committee's Report, paragraph 3, it was said that—

"In deference to the opinion of the Judges of the High Court at Fort William, the virtual appointment of Munsifs, which, in supersession of the existing practice, the Bill, as originally drawn, proposed to confer on the Local Government, has, in the Bill as amended by us, been vested in the High Courts."

Then the 4th paragraph went on to say—

"For the sake of uniformity of practice, this provision has been extended to the appointment of Subordinate Judges."

This was a point on which he spoke with the greatest hesitation and deference in the presence of His Honour the Lieutenant Governor of Bengal; but SIR R. TEMPLE submitted that this proposal did involve a serious sacrifice of the power of the Lieutenant Governor. He understood, subject to correction, that the appointment of Munsifs had virtually and practically rested with the High Court, but that the appointment of officers above that grade had rested in the Lieutenant Governor, on the recommendation of the High Court. That was to say, formerly the Sadr Court, and latterly the High Court, had submitted a list of persons eligible for appointment to the higher grade, and that their recommendations had hitherto received the sanction of the Lieutenant Governor. Now, granting that, perhaps, as the appointment of Munsifs had rested with the High Court, this Bill should leave that power as it stood, he could not admit the policy of the concession of the additional power proposed to be given to the High Court, of appointing Subordinate Judges. He admitted that the opinion of the High Court would have great influence in those appointments; nevertheless, to make over that power absolutely by law to the High Court involved an administrative principle resulting in a considerable sacrifice of the powers of the Lieutenant Governor. He did not propose any amendment, but if any other Hon'ble Member concurred in his opinion, he would be quite willing to assume the responsibility of moving an amendment to this effect, that the power of the

appointment of Munsifs vested in the High Court did not extend to the appointment of Subordinate Judges.

His Honour the Lieutenant Governor said that, as a member of the Select Committee, he had signed the Report made by them; but if the Council had referred to the letter written by the Government of Bengal, it might have appeared to them that he had no very strong opinion in favour of the provision on which Sir Richard Temple had been commenting. In fact, in one of the points adverted to, he should himself, on principle, be disposed to go further than Sir R. Temple went. His Honour thought that the essential point in this case was the original appointment of gentlemen to the judicial service of the Government. There seemed to him to be greater fitness, as regarded the selection of those who were already members of the judicial service for advancement to higher posts, that such selection should be made by the chief judicial authority in the country, than that that authority should have the original selection of gentlemen for the judicial service. There were many reasons that might be given why the power of selecting gentlemen from the community at large, or from certain classes of that community, to enter into the judicial service, should rest with the Executive Government, rather than with the judicial authority. But His Honour was influenced to agree to the opposite conclusion from the consideration that the appointment of Munsifs had, in point of fact, for many years past, always rested with the Sadr Court, and afterwards with the High Court, and because he did not see his way to asserting positively that there would be such clear gain in making the change as would justify him in opposing his judgment to the strongly expressed opinion of the High Court. On that ground he had consented to the alteration made by the Select Committee, namely, to leave the appointment of Munsifs, as it always had been, in the hands of the High Court. If, however, the question was raised as a question of principle, His Honour would feel bound to state his opinion that those appointments ought rather to rest with the Executive Government. With respect to promotion to the office of Sadr Amín and Principal Sadr Amín, he had not thought it worth while to object to this change made by the Bill, because it was hardly other than a nominal change. He thought the Hon'ble Mr. Cockerell had hardly stated that point strongly enough. He believed that, as a fact, every such promotion had always been virtually made by the Sadr and the High Courts.

The Hon'ble Mr. Maine agreed with His Honour the Lieutenant Governor that much less was to be said for giving the Local Government the appointment of Subordinate Judges, than for giving it the appointment of Munsifs. The

High Court alone could in most cases judge whether the judicial performances of a Munsif entitled him to promotion to a Subordinate Judgeship, for Subordinate Judges would be almost exclusively promoted Munsifs. In point of fact the Local Government was understood now to apply to the High Court for the means of judging the worthiness of candidates for the higher judicial appointments, and the Committee had in this respect only maintained the existing practice. If the section were kept as it stood, it would pretty much represent the system which obtained in England. The High Court would nominate, and the Executive Government would appoint, just as the Lord Chancellor nominated at home, and the Crown appointed.

HIS EXCELLENCY THE PRESIDENT said that he agreed with Sir Richard Temple that it would be desirable that the power of appointing the subordinate judicial officers should be vested in the Executive Government. HIS EXCELLENCY thought the High Court should nominate, but there should rest with the Local Government a power of rejection: or the Court might send up two or more names, and the Local Government might select from amongst them. It seemed to HIS EXCELLENCY that it was an advantage to the nominee to receive his appointment wholly from the Lieutenant Governor of the Province, and that a person thus appointed might acquire greater influence and respect. At the same time the Lieutenant Governor might be assisted by the advice and recommendation of the High Court. An enactment that the Court was to nominate, and that the Government must appoint, would, HIS EXCELLENCY thought, never work well.

The Hon'ble MR. COCKERELL said that it seemed to him that the Local Government, in its opportunities of judging of the capacity and merits of the subordinate judicial officers, was not at all in the same position as it was in regard to its executive officers. The Lieutenant Governor had very few opportunities indeed of judging whether Subordinate Judges had discharged their duties with success; their decisions could only come before him in a very casual and indirect way; they did not make any report to the Local Government, by which their ability and intelligence could be ascertained; and, in point of fact, the Government had found such difficulty that it invariably had communicated demi-officially with the High Court, asking them to state what Munsif or Sadr Amín was considered fit for promotion.

[HIS HONOUR THE LIEUTENANT GOVERNOR said that he believed such communications were made officially, merely asking for the usual list.]

The Hon'ble MR. COCKERELL remembered two or three cases of such demi-official communications during the period for which he officiated as Secretary to

the Government of Bengal, and he spoke from his experience of the practice then prevailing. Therefore, the Bill really did no more than confirm the existing practice already noticed in the letter of the High Court; but if the suggestions there made were carried out, and the law remained as it stood, the result would follow that the High Court's object in desiring to retain the power of appointing Munsifs, in order that it might have a thorough practical control over the judicial Bench, would not be attained; because there was nothing in the law to restrict the choice of the Local Government to Munsifs in the appointment of Subordinate Judges. There would be nothing to prevent the Lieutenant Governor from making a selection out of the deserving executive officers, and appointing them to be Subordinate Judges. It was to remedy that defect and inconsistency in the existing law that MR. COCKERELL would strongly urge that, if the High Court was to have the nomination of Munsifs, they should also have the power of selection of Subordinate Judges.

The Motion was put and agreed to.

The Hon'ble SIR RICHARD TEMPLE moved an amendment to the effect that the power of appointing Munsifs and Subordinate Judges be vested in the Local Government as originally proposed in the Bill.

The Hon'ble MR. STRACHEY said that, although as a matter of principle he should have been inclined to admit that what the Hon'ble Sir Richard Temple said was perfectly fair, and that, theoretically, it would be better that such power of appointing Judges should rest with the Local Government rather than with the High Court, it seemed to MR. STRACHEY that the objection was rather theoretical than practical. His Honour the Lieutenant Governor had told them that, as a matter of fact, this Bill really did nothing more than confirm the practice followed for years, and it was hardly too much to say that, practically, the High Court had what it was now proposed to recognize by law. It seemed to MR. STRACHEY, therefore, that there was at any rate no harm in vesting the nominal power where the actual power had always rested, and where apparently it still rested. And, generally, he came to the conclusion that he could not support the amendment.

HIS HONOUR THE LIEUTENANT GOVERNOR said that, if Sir Richard Temple's amendment took the form of saying that appointments to Munsifships should be made by the Local Government, and that appointments to Subordinate Judgeships should be made from the Munsifs on the nomination of the High Court, he should vote for the amendment. The Hon'ble Mr. Cockerell had laid what

appeared to HIS HONOUR great stress on the danger that might arise from giving the Government power to appoint Subordinate Judges without any legal restraint. But he did not understand why there should be more danger in entrusting the power to Government, than there was in the section as it stood in the Bill. Under the Bill as it stood, the High Court might appoint anybody to be a Subordinate Judge; for instance, the High Court might appoint a gentleman from the Bar who did not understand a word of the vernacular language, and why it should be supposed that there was more danger in putting similar power in the hands of the Executive Government, he did not understand.

The Hon'ble MR. TAYLOR expressed concurrence in the views of the Lieutenant Governor. If Sir Richard Temple's proposed amendment were put in the form suggested by His Honour, he (MR. TAYLOR) should be disposed to give it his support.

The Hon'ble MR. MAINE asked the Council, before it accepted an amendment which the High Court would regard as derogating from its authority, to listen to the language of the letter which the Court had addressed to the Government of Bengal. That letter said—

"It has been and still is one of the great objects of the High Court to raise, as far as possible, the character and status and efficiency of the Munsifs. They are glad to find that their efforts have not been fruitless, and that one of the objects of the Bill under consideration is to increase the jurisdiction of that class of officers."

To that argument of the Court the greatest weight was due. The High Court, as a fact, had hitherto had the appointment of Munsifs in their hands, and the very ground of the most important part of the Bill was the complete success of the system. The Court went on to say—

"Without laying claim to any very extensive degree of knowledge, the Judges consider that it may be fairly conceded that the High Court has at least as good an opportunity of judging of the qualifications of the persons to be selected for the offices of Munsifs for the whole country, as the Commissioners, Judges, Collectors, officers of the Education Department, and the numerous executive officers scattered over the country, and to whom allusion was made by the mover of the Bill.

But another ground alleged for the proposed change was that, in the judgment of the mover, it was not advisable to place, in any judicial body, any power which did not belong to judicial functions."

Then followed a passage, part of which, in the letter which had reached the Council, had been marked illegible; but the meaning was clear and was as follows:—If this doctrine was correct, it would

"strike at the root of the power of superintendence and supervision over the subordinate Courts which has been entrusted to the High Court by Parliament, and it is in direct opposition to section 7 of the Bill, which vests in the Judge of the District the power of making temporary appointments which, according to the views expressed by the mover, seem to be treated as nominations for the permanent appointments. He says 'the Judge would then be called upon to state the qualifications of the person he had nominated, and it would rest with the Local Government to make the permanent appointment.' The High Court has no desire whatever to retain the power of appointing Munsifs or any other powers for which they are not considered by Government to be competent. Nor do they object to the transfer of the patronage to the Local Government, or wish to interfere in any way as to the selections to be made, if His Excellency the Governor General, in his Legislative Council, from experience of the past, considers that the Local Government has better means of ascertaining the qualifications of candidates than the High Court. The Court has made the above remarks solely with the desire of correcting an erroneous impression, upon which the Governor General in Legislative Council seems to have acted, in proposing by the Bill under consideration to remove the appointment of Munsifs from the High Court, and vesting it in the Local Government. They are also desirous of protecting themselves, lest, by silence, they should be supposed to have assented to the reasons which have been publicly put forward in the Gazette as the grounds for the transfer proposed by sections 4 and 7 of the Bill."

Perhaps it was hardly correct to say that anything which had hitherto been done amounted to a proposal of the Governor General in Legislative Council to remove the appointment of Munsifs from the High Court. But MR. MAINE entirely concurred in the position that the practical question was, whether the High Court had hitherto performed its duty of selection well, and, as for the theoretical difficulty, it was got rid of by the consideration that Parliament had expressly already conferred on the High Court semi-executive functions.

The Hon'ble MR. COCKERELL said that, with reference to the remarks of His Honour the Lieutenant Governor, he wished to observe that he had perhaps not rendered his meaning sufficiently clear in regard to the objection which he entertained to letting the appointment of the higher class of subordinate judicial officers rest with the Local Government, while that of the lower class remained in the hands of the High Court. He believed that the whole principle on which the High Court contended for the retention of the power of appointment in its hand was, that the Court, as constituting the chief supervising authority, was mainly responsible for the proper administration of the law; and that its controlling authority, and consequently the means of ensuring success in such administration, would be weakened, if the selection of persons for employment in the judicial service was not reserved to it. This contention necessarily

rested on the assumption that the choice of persons for appointment to the higher grade of subordinate judicial officers must be made from the lower grade, *i. e.*, the then existing staff of Munsifs originally selected and appointed by the High Court. But if the field of selection of persons for appointment to the higher grade was not confined to that class of judicial officers—and under the existing law it was not so restricted—then, the very principle for which the High Court contended fell to the ground.

The Hon'ble SIR RICHARD TEMPLE said he entirely accepted the terms of the amendment as suggested by His Honour the Lieutenant Governor. What he intended to move was, that the appointment of Munsifs and of Subordinate Judges should rest with the Local Government.

[The Hon'ble MR. MAINE remarked that the Hon'ble Sir Richard Temple had originally confined his amendment to Subordinate Judges only.]

The Hon'ble SIR R. TEMPLE continued—But after hearing the arguments that His Honour the Lieutenant Governor had advanced, he accepted the terms of the amendment as suggested by His Honour, namely, that Munsifs should, in the first instance, be entirely appointed by the Lieutenant Governor, and that the subsequent appointment to the office of Subordinate Judge on promotion should be made by the Government on the recommendation of the High Court. If that amendment were carried, it would not in any way derogate from the authority of the High Court. Practically, the selection would chiefly, if not entirely, lie with the High Court; but there was an extreme difference between the High Court *nominating* and practically exercising influence over these appointments, and the Court being vested absolutely by law with the power of appointing those important judicial officers. SIR R. TEMPLE submitted that the High Court would still retain that influence, but in preserving the authority of the Local Government over the judicial service, it would greatly add to the vigour of the administration, and would maintain what in India was of so much importance, namely, the authority of the Lieutenant Governor. If that principle was applicable to Bengal, it would, SIR R. TEMPLE believed, be applicable to all other Provinces, and therefore it was an administrative question on which he ventured to maintain his opinion.

There were one or two points in the letter of the High Court which had been referred to, on which, with deference, he would make one or two observations. He understood that letter ran to the effect that the appointment to these offices was a judicial power. If he was correct in that view of the letter, he would submit that "judicial" meant the trial and decision of cases, but the administrative function of appointing officers to the judicial service was

indeed of an executive character. If he understood rightly, there was something said to the effect that such an amendment as this would derogate from the executive power given by Parliament to the High Courts. If that were so, he would reply that it was to be presumed that whatever power Parliament thought fit to be vested in the High Courts, was so vested by Act of Parliament, and the fact of Parliament not having hitherto vested the High Courts with this power of making these appointments was an excellent reason for this legislature not going further in vesting the Court with powers with which the imperial legislature did not vest them. It had been said that the power of selection must be reserved to the High Courts. To that he had to answer that, practically speaking, such selection would be resorted to in practice, but nevertheless the final sanction and confirmation of the Local Government ought to be retained.

With these observations he would commend the subject-matter of the amendment to the Council.

The Hon'ble MR. MAINE said that he must really beg the Council to pause before it accepted his Hon'ble friend's amendment. Sir R. Temple had now pretty nearly reversed the proposal which he at first made to the Council. The circumstance that the second amendment differed so greatly from the first afforded some ground for saying that his Hon'ble friend had not bestowed sufficient attention on this very serious question. On what ground could the Council take away from the High Court all power over appointments of Munsifs? Only on the ground that the powers it had hitherto exercised had been mismanaged or abused. This was the direct contrary of the assumption made by the Bill. MR. MAINE could not accept his Hon'ble friend's observations on the argument of the High Court based on the authority conferred on it by Parliament. From the very construction his Hon'ble friend had put on that argument, he might have inferred that it was never used in the sense he supposed. What the High Court plainly urged was, that the only ground on which these appointments could be taken away from it consisted in the theoretical objection to appointment by any authority not of an executive character; and the Court argued that this theoretical difficulty was disposed of by the action of Parliament in conferring on the Court powers of superintendence and supervision which were in their nature not judicial but executive. The Bill as amended carried on its face the assumption that the practical working of the existing system had been excellent. But it saved the theoretical principle by providing that the Local Government should appoint on the nomination of the High Court. He earnestly requested the Council to remember that the burthen of show-

ing that a better system could be substituted rested on those who proposed the change.

HIS HONOUR THE LIEUTENANT GOVERNOR wished to observe, in explanation of one remark which the Hon'ble Mr. Maine had made, that he did not think that the way Mr. Maine put the case to the Council was entirely fair. He had pressed on the Council that the *only* ground on which the power of appointing Munsifs could be taken away from the High Court was, that the Court had misused the power. Now, in saying this, Mr. Maine said in fact that he (THE LIEUTENANT GOVERNOR) had asserted that the High Court had misused its power. HIS HONOUR need hardly say that nothing could be further from his intention than to suggest such an idea. Nobody knew better than he did that the power of the High Court in making these appointments had, as the Hon'ble Mr. Maine had said, been exercised in the most excellent manner. HIS HONOUR could not at all admit that the only ground on which the power could be taken away was the assumption that it had been abused, and he was at a loss to understand how Mr Maine could have made such a statement, for Mr. Maine himself must virtually have been an assenting party to the Bill as originally drawn, and, on the first occasion of his addressing the Council to-day, he had himself admitted that there were reasons which might be urged in favour of giving the power to the executive authority. HIS HONOUR could only say for himself that, in expressing an opinion in favour of a power of this kind resting with the executive, rather than with the judicial, authority, he had not the very remotest intention of reflecting in any way upon the High Court.

The Hon'ble SIR RICHARD TEMPLE said he understood the Hon'ble Mr. Maine to say that his amendment would deprive the High Courts of the power which they now legally possessed. With extreme deference, SIR R. TEMPLE would submit that the Courts possessed that power by courtesy and practice, and not exactly by law; and that, because the present Bill proposed to vest the Courts, by law, with what they now possessed by executive rule only, he objected to it. And, as to his having reversed his amendment as supposed by the Hon'ble Mr. Maine, he would explain that he did not exactly reverse it, but only modified and enlarged it, in deference to the Lieutenant Governor's views.

The Hon'ble MAJOR GENERAL SIR H. M. DURAND said that a good deal of discussion had arisen on a point which appeared to him hardly to have required it. Practically, the discussion had been based on the words "and the Local Government shall appoint such person accordingly." Now the word "appoint,"

in its ordinary acceptation, when applied to the Governor General or to a Lieutenant Governor, was not understood to exclude, but to involve without specification, the powers of approval or disapproval. He thought this view was supported by the second clause of section 5, where the Local Government nominated and appointed if the High Court failed to nominate. He considered this view also borne out by the penultimate clause, which ruled that every Subordinate Judge and Munsif so appointed should hold office during the pleasure of the Local Government. The legal position seemed to him an incorrect one, which made the privilege to nominate circumscribe the inherent powers ordinarily conveyed by the word 'appoint.'

The Hon'ble MR. MAINE said that the undoubted intention of the Select Committee was, that the Local Government should appoint the person nominated by the High Court, and no other. If that intention was not carried out, stricter language must be employed. But with deference to his Hon'ble and gallant friend, MR. MAINE must really say that the words of the section were not open to doubt:—

"Whenever the office of a Subordinate Judge or Munsif under this Act is vacant, the High Court may nominate such person as it thinks proper to fill such office, and the Local Government shall appoint such person accordingly. Provided that, if no such nomination is made within a reasonable time after the occurrence of the vacancy, the Local Government shall nominate and appoint to the office such person as it thinks proper."

HIS EXCELLENCY THE PRESIDENT said that he would adjourn the consideration of the Bill. He did that reluctantly, because we were coming towards the end of the session. But he thought an important matter of this kind ought not to be determined without due consideration. There was, moreover, another amendment which the Hon'ble Mr. Cockerell intended to move, but of which HIS EXCELLENCY had had no notice, and which seemed to him to involve matter worthy of serious consideration, namely, the power of giving subordinate judicial officers jurisdiction to hear appeals from the decisions of Collectors and Deputy Collectors. On the whole, therefore, HIS EXCELLENCY thought it desirable to adjourn the debate to the next meeting of the Council.

The further consideration of the Bill was then postponed.

HIGH COURT FEES' BILL.

The Hon'ble MR. COCKERELL also moved that the Report of the Select Committee on the Bill to provide for the collection, by means of stamps, of fees payable in the High Court of Judicature at Fort William, be taken into consideration. The alterations made by the Select Committee were confined, he

might say entirely, to the re-arrangement of some of the sections and a few verbal emendations. In this, the Committee had been guided by suggestions kindly furnished by the Chief Justice of the local High Court and the First Judge of the Calcutta Court of Small Causes. The Bill as now amended would, he thought, be found to present no difficulty in operation. The other High Courts had been consulted, but as yet no replies had come in. Seeing, however, that the provision in section 3 contemplated the gradual extension of the Act to those Courts, and not its immediate operation on passing into law, there was no necessity for waiting until those replies were received.

The Motion was put and agreed to.

The Hon'ble MR. COCKERELL also moved that the Bill as amended be passed.

The Motion was put and agreed to.

The Council then adjourned till the 24th April 1868.

WHITLEY STOKES,

CALCUTTA,
The 17th April 1868.

Asst. Secy. to the Govt. of India,
Home Department (Legislative).