

Friday, February 5, 1869

ABSTRACT OF PROCEEDINGS

COUNCIL OF THE GOVERNOR GENERAL OF INDIA

LAWS AND REGULATIONS.

VOL 8

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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 5th February 1869.

PRESENT:

His Excellency the Viceroy and Governor General of India, K. P., G. C. S. I.,
presiding.

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

The Hon'ble G. Noble Taylor.

Major General the Hon'ble Sir H. M. Durand, C. B., K. C. S. I.

The Hon'ble H. Sumner Maine.

The Hon'ble John Strachey.

The Hon'ble Sir Richard Temple, K. C. S. I.

The Hon'ble F. R. Cockerell.

The Hon'ble Rájá Shioráj Singh, C. S. I.

The Hon'ble Sir George Couper, Bart., C. B.

The Hon'ble Mahárájá Sir Dig-Bíoy Singh Bahádúr, K. C. S. I., of
Balrámpúr.

The Hon'ble G. S. Forbes.

The Hon'ble D. Cowie.

The Hon'ble M. J. Shaw Stewart.

The Hon'ble J. N. Bullen.

JUSTICES OF THE PEACE BILL.

The Hon'ble MR. MAINE presented the Report of the Select Committee on the Bill for the appointment of Justices of the Peace.

DIVORCE BILL.

The Hon'ble MR. MAINE also presented the Report of the Select Committee on the Bill to amend the Law relating to Divorce and Matrimonial Causes in India.

VILLAGE POLICE (N. W. P.) BILL.

The Hon'ble SIR GEORGE COUPER presented the Report of the Select Committee on the Bill for the maintenance of the Rural Police in the North-Western Provinces.

CIVIL COURTS (BOMBAY) BILL.

The Hon'ble MR. SHAW STEWART introduced the Bill to consolidate and amend the Law relating to the District and Subordinate Civil Courts in the Presidency of Bombay, and moved that it be referred to a Select Committee with instructions to report in a month. He said that the object of the Bill was stated at the time he obtained leave for its introduction. The object was, in substance, very nearly the same as that of Act XVI of 1868, which consolidated and amended the law relating to Principal Sadr Amíns, Sadr Amíns and Munsifs in Bengal. He would now very briefly go through the Bill and explain the principal alterations proposed. The second section proposed the repeal of a number of enactments, which would thus be removed from the Statute Book. In the sixth section an alteration was proposed by which a District Judge would be enabled, under the orders of the High Court, to hold his Court at any town in his District. The necessity of that alteration had been for some time felt, and it would add much to the convenience of suitors. By the twelfth section the Governor of Bombay in Council would, subject to the control of the Governor General of India in Council, be empowered to appoint Joint Judges in any District where it was found necessary in consequence of the state of work : at present each appointment of a Joint Judge must receive the previous sanction of the Government of India ; but it was now proposed, subject to any instructions which the Government of India might issue, to empower the Government of Bombay to appoint Joint Judges from time to time as might be found necessary.

The next alteration would be found in section 22. There were at present in the Bombay Presidency three grades of subordinate Civil Judges, Principal Sadr Amíns, Sadr Amíns and Munsifs ; it was proposed that there should in future be two grades of Subordinate Judges, namely, Subordinate Judges of the first and second classes. The appointment of Principal Sadr Amíns is now vested in the Government, of Sadr Amíns in the High Court, and of Munsifs in the Zila Judges. It was proposed by the Bill that the appointment of all Subordinate Judges should be vested in the Government. On this point the opinion of the Government of Bombay was adverse to that of the High Court. The High Court, as at present constituted, was of opinion that the nomination of all Subordinate Judges should rest with the High Court ; the Government, on the contrary, considered that the duty of appointing Subordinate Judges naturally pertained to the Executive Government of the presidency, and it was fortified in that view by the opinion of the High Court as constituted in 1864, the Judges of which advised the Government of Bombay that the appointment of Subordinate Judges had better be vested in the Executive Government. The views of the High Court and the Government of Bombay would be laid

in extenso before the Select Committee to which the Bill would be referred, and the Government of Bombay had acquiesced in the propriety of leaving the matter to the consideration of this Council, and were willing to accept any amendment which the Select Committee might think proper to recommend. It would, however, be noticed that the power of the Government would be very much limited by the second clause of section 22, which provided that no one should be so appointed who had not practised for five years as an Advocate of the High Court in India or as a Vakil in the High Court of Judicature at Bombay, or who had not taken the degree of Bachelor of Laws in the University of Bombay, or who was not qualified for the duties of a Subordinate Judge according to such tests as might for the time being be prescribed by the High Court. It would therefore be within the competency of the High Court to secure the appointment of proper persons by fixing the scale of examination on a proper footing. In this respect the present Bill differed from that enacted last Session for Bengal, which provided that the rules for examination should be prescribed by the Government, under the sanction of the Government of India.

The next alteration was in section 23, which provided that Subordinate Judges might hold their Courts at more places than one within the local limits of their jurisdiction. The object of the alteration was to meet the case of large and sparsely populated Districts, where it was not worth while to create more than one Subordinate Judgeship, and it would enable the Subordinate Judge to hold his Court from time to time in different parts of the District, and thus make his Court easily accessible to the people.

In the matter of jurisdiction the recommendations embodied in the Bill followed very much the existing law. Subordinate Judges of the first class would have jurisdiction in all cases wherein the subject-matter of the suit did not exceed in amount or value 10,000 rupees; and Subordinate Judges of the second class would have jurisdiction up to 5,000 rupees. In Bengal, the jurisdiction of a Subordinate Judge of the first class was unlimited, and the jurisdiction of a Subordinate Judge of the second class was limited to suits not exceeding in amount or value 1,000 rupees. There had always been a great difference of practice in this respect between the Bengal and Bombay Presidencies.

In the twenty-sixth section there was a slight alteration. By the law as it at present stood, Subordinate Judges of the first class might be vested with the power of appeal in suits up to 100 rupees; it was proposed to raise their appellate jurisdiction to suits of the value of 200 rupees.

These were the only points on which the Bill proposed to alter the existing law.

There was one section which had been accidentally omitted from the Bill. In the draft Bill sent up by the Bombay Government, section 20 re-enacted the law contained in section 43, Regulation II of 1827: it was a point on which the procedure of the Bombay Presidency was somewhat peculiar; it provided that no Subordinate Judge should hear any suit in which the Government or any officer on behalf of the Government was the defendant. That had been the law since 1827, and it was never intended either by the Government of Bombay or the High Court that the law should be altered. By inadvertence, however, in re-arranging the draft Bill sent up from Bombay, the section containing that provision of the law had been omitted. MR. SHAW STEWART would bring the subject to the particular attention of the Select Committee with a view to the section being introduced.

The Hon'ble MR. MAINE said he was sure that the Council would at once refer his hon'ble friend's Bill to a Select Committee. The Bill was upon principle within the competence of the Bombay Legislature: it related exclusively to Bombay matters, and in regard to it the experience of gentlemen accustomed to this side of India was more likely to mislead than to guide. The learned Advocate General of Bombay had explained how it came before the Supreme Legislature. The Statute of 1861 establishing the High Courts, and the Letters Patent issued under it, taken in connection with the Indian Councils' Act, reserved exclusively to the Governor General's Council the power of modifying or abridging the jurisdiction of the High Courts. That jurisdiction would be slightly affected by the present Bill, which therefore was necessarily submitted to this Council. Under those circumstances few points need be brought to the attention of the Council. MR. MAINE would observe that in section 12 the words 'general control' were ambiguous. No words had caused greater uncertainty in Act V of 1861, the Police Act. MR. MAINE understood the wish of the Bombay Government and of his hon'ble friend to be that the financial control of the Government of India should be maintained. His hon'ble friend would correct him if, in what he was about to say, he misdescribed the proposal. There was to be a fixed establishment of District Judges corresponding to the number of districts in the Regulation Provinces of the Presidency, and in addition to this there was to be (so to speak) a Judge unattached. This Judge was to be removed from one district to another according as the state of judicial business should require. He was not to be appointed without the consent of the Government of India. But it was desired to avoid a reference to that Govern-

ment every time he was moved from one district to another. If that were what was intended, it would perhaps be better to describe the system more exactly, and to provide that the Joint Judge should in the first instance be appointed to a district with the previous sanction of the Governor General in Council, and then should be moved with the same powers to other districts until the Government of India should otherwise order.

Section 22, and the observations just made upon it by his hon'ble friend, raised the important question of patronage. The Government of Bombay, in one of the papers which had been circulated, had remarked that the subject had been much discussed by the Governor General's Council at its last sittings in Calcutta, and that the discussion had ended in a compromise which in effect continued the existing law. MR. MAINE quite concurred with the Government of Bombay in thinking that, for the reasons which it had assigned, that solution of the question was not possible in the case of Bombay. Hence, we had the Executive Government of Bombay claiming the whole of the judicial patronage on one side, and the High Court, on the other, alleging that it should belong to the Court. MR. MAINE was far from denying that opportunities of strengthening the Executive Government in India should be taken when they fairly presented themselves; and though he might not have used the precise words of the Government of Bombay when it said that judicial patronage naturally pertained to the Executive, he allowed that the theory which prevailed in Western Europe was much to that effect. He apprehended, however, that the foundation of the theory was an assumption that the Executive Government was provided with something like a department of justice, which furnished it with the means of gauging the claims of candidates for promotion. That was not untrue even of England, for the Judges were practically appointed by the Lord Chancellor. He, indeed, might not in the strict sense of the word have a department under him; but then English Judges were taken from the Bar, and the rise and fall of professional reputation supplied the proper criterion of selection. In France, which bore a much closer resemblance to India, not only was there a Minister at the head of a department of justice, but he had in every Court in the country a Deputy, an Attorney of the Empire or an Advocate General, who regularly reported to him. The question then arose, was there any department of justice in India except the High Court? The truth was that the High Courts had inherited through the Sadr Court a good many administrative and executive functions from the time when the lines between executive, legislative and judicial powers were not as strongly drawn in India as they are now. It was in virtue of this administrative character that they enjoyed their patronage. MR. MAINE perceived the Government of

Bombay was quite aware of the difficulty. For, if he understood its letter rightly, it proposed to appoint provisionally on the nomination of the High Court, until such time as a Judicial Commissioner was attached to it. There were, however, great difficulties about the appointment of such a functionary. Not the least of them was that a proposal to create the office in Bengal was made by the Lieutenant Governor in 1863, and supported by the Government of India. But the Secretary of State vetoed it, assigning as a reason that he did not see why the existing relations of the High Court and the Executive Government should not continue. There were other not inconsiderable difficulties inherent in the plan. Might not the consequences be serious if the judicial capacity and knowledge of the Commissioner were not on a par with the highest judicial knowledge and capacity of the High Court? The Judicial Commissioner, as MR. MAINE understood, was to take off from the High Court its administrative and non-judicial functions, and among these would be that power of issuing circulars to the Subordinate Courts for the correction of errors in principle or practice, which was now usefully exercised, and also, it might be supposed, the duty of going on circuit and rebuking errors of system found to exist in the Mofussil. But it was vain to deny that to affect to correct the errors of Judges, or to rebuke their faults, was to lay down law. Might there not be danger of scandal if the highest Court of Appeal ultimately questioned that law or set it aside, and if decisions, which in effect would be rendered upon the instructions of Government, were reversed at the expense of the litigants? The subject was undoubtedly one of much difficulty, and for some time to come the Government would probably have to depend on the advice and assistance of the High Court. But MR. MAINE observed that his hon'ble friend's Bill did not throw upon the Court the duty of tendering such advice. MR. MAINE did not of course mean to say that the learned judges would really decline to give it. But, on the other hand, it was certain that the more of these administrative functions which you took away from the High Court, the greater you made the tendency of the Court to confine itself to its purely judicial duties. It appeared that the Bombay Government did not wish to be bound by the nomination of the High Court, because it might occasionally wish to place a person who had served in the non-regulation provinces, in a judicial office in the Regulation Districts. MR. MAINE would suggest for the consideration of his hon'ble friend whether, after the judicial patronage had been in the first instance assigned to the Executive Government, there might not be a provision that, if the Government did not appoint within a certain number of days or weeks, the High Court should appoint. That would enable the Government to put in any person of whose claims it had a clear opinion, but if it considered that the Court had better materials

for a judgment than itself, to throw on the Court the legal obligation of appointment. Such, that is to say, would be the effect on paper; but the practical effect would be that there would be a complete understanding between the Government and the Court as to the mode of selection, and as to the persons best fitted to be selected.

MR. MAINE had only further to observe that one of the Judges of the Bombay High Court, Mr. Justice Tucker, had, if MR. MAINE rightly understood him, appealed to the Council to consider a plan of his own before it continued the existing organization of the Mofussil Courts. That plan bore a considerable resemblance to some proposals which had been published under the name of a gentleman who had formerly been Chief Justice of Bombay and was now a Member of the Council of India, Sir Erskine Perry. It was thus described by Mr. Tucker:—

“It should be considered whether an improvement might not be made in the constitution of these Courts by the amalgamation of the existing Courts of District and Assistant District Judges with the Courts of Small Causes and of Principal Sadr Amins at each Head Quarter Station, and the establishment of a single central Court in each District composed of three or more associate Judges, European and Native, with co-ordinate powers and exercising original and appellate jurisdiction.

A tribunal thus constituted could discharge by means of divisional benches all the diversified functions of the Courts which it would supersede, and the creation of a principal Court so composed, in each of the Districts of this presidency, would remove many of the admitted evils and anomalies of the present system. Amongst other advantages it would afford an opportunity for the employment of the Junior Judges, who belonged to the covenanted Civil Service, in the trial of original suits—a great desideratum at present; and it would elevate the position of the Judges, European and Native, who might be selected outside the covenanted Civil Service, and thus open an honourable career for Native talent. A reform of this character might be introduced without any very considerable increase of expenditure, and it could scarcely fail to be productive of public benefit. It will enable Government to secure for judicial offices in the mofussil the services of successful pleaders in the High Court and also of the new class of Advocates who will have taken the degree of Bachelor of Laws in the Bombay University—men who will not, except in rare instances, accept a Subordinate Judgeship, whatever may be the rate of pay which may be ultimately fixed for these appointments.”

These two projects of Sir Erskine Perry and Mr. Tucker would no doubt require to be considerably modified in application, but MR. MAINE had long thought that the reform of the lower Appellate Courts, which no doubt was much needed, would ultimately take something like this shape. Mr. Justice Tucker had, however, not observed or not stated that the change could only be carried out by Act of Parliament. Statute 24 & 25 Vic., cap. 54 reserved the offices

mentioned in the first two classes of the second head of the schedule to members of the covenanted Civil Service, except on conditions that, practically, could not be fulfilled. The better opinion would seem to be that this enactment prohibited the Indian Legislature from abolishing the present District Civil Courts. But at all events it would prevent the Government from placing in any Court substituted for District Courts the class of persons contemplated by Mr. Tucker. That being the state of the law, MR. MAINE did not think that these proposals could at present be discussed in this country with profit.

The Hon'ble MR. SHAW STEWART said that, with reference to the question put to him by the Hon'ble Mr. Maine, he would give the best explanation in his power. As regards the twelfth section it was the intention of the Bill that the financial control of the Government of India should be strictly maintained. In paragraph six of the letter from the Government of Bombay the circumstances under which this provision was proposed were stated at length. The present law, Act XXIX of 1845, required the consent of the Government of India to the appointment of a Joint Judge. Those words were construed by the High Court to mean that the consent should be given before each and every such appointment was made; it had therefore been found impossible to transfer a Joint Judge, even when the sanction to his appointment had been received, from one jurisdiction to another. MR. SHAW STEWART thought that the proposal of the Hon'ble Mr. Maine would have the effect of giving to the Government of Bombay all that was required to enable the Government to move a Joint Judge from one district to another.

As regards the twenty-second section of the Bill, MR. SHAW STEWART thought that the Hon'ble Mr. Maine had somewhat misunderstood the views of the Government of Bombay. As MR. SHAW STEWART understood it, the Bombay Government preferred to have it distinctly stated that the Government was to have the appointment of Subordinate Judges. The words referred to by the Hon'ble Mr. Maine were as follows :—

“ Although, however, His Excellency in Council thinks that it is necessary for the Government to retain the power of appointing to the higher class, he is yet willing, in the absence of a responsible adviser such as a Judicial Commissioner, to accept the nominations of the High Court to the higher grade appointments within the second class.”

MR. SHAW STEWART understood that to mean that, if this Council considered that the High Court ought to have a share of the patronage, the Government of Bombay was willing to accept an alteration so as to allow the High Court to nominate, and the Government to appoint, Subordinate Judges of the lower grade, the Government having absolute power of appointment in the

case of Subordinate Judges of the higher class, which was now the law in Bengal under Act XVI of 1868. The Government of Bombay, as he understood it, would prefer the Act to stand as in the Bill; but if it was considered that the High Court ought to have the power of appointment, the Government was willing to have the alteration made: if made, it would then clearly be stated to be the duty of the High Court to nominate, and no such difficulty, as that anticipated of the High Court refusing to nominate, could occur.

He regretted that he was not able to speak as to the appointment of a Judicial Commissioner; he was not aware how that matter stood, or if the Government of Bombay had any prospect or intention of making such an appointment. If, however, the alteration referred to above were made, it would probably be necessary to alter the law as soon as a Judicial Commissioner was appointed, and to let the nomination come from the Judicial Commissioner instead of from the High Court.

The Hon'ble SIR RICHARD TEMPLE said that he noted with satisfaction the assurance given by the Hon'ble Mr. Shaw Stewart that there was no intention in the Bill of at all weakening the financial control of the Government of India. He hoped that attention would continue to be given to this in Select Committee. It was also satisfactory to see that the Bill clearly affirmed the authority of the Local Government in respect to the patronage of appointments. For with all deference to what had fallen from the Hon'ble and learned Member, Mr. Maine, and with all respect to the several High Courts, SIR RICHARD TEMPLE believed it to be essential that the hands of the Executive Government should be kept strong as much in regard to judicial as all other patronage; and he hoped that nothing would be enacted to materially impair the power of the Local Government in this important particular.

The Hon'ble SIR HENRY DURAND said that the Hon'ble Mr. Shaw Stewart had, by an explanation which he had given him on the subject, removed a doubt which existed in SIR HENRY DURAND's mind with reference to certain sections of the Bill which empowered the High Court to suspend Judicial Officers without the authority of Government. He had learnt from the Hon'ble Mr. Shaw Stewart that Political Officers exercising judicial functions under the Bombay Government, and those of Justices of the Peace, would not be affected by the provisions of the Bill. To SIR HENRY DURAND this assurance that the sections to which he had referred did not bring those officers under the direct action of the High Court of Bombay was very satisfactory, for he could conceive circumstances under which it would be extremely inconvenient that Political Officers who exercised high judicial functions should, at the will of the High Court, and

without the sanction of the Government of Bombay, be subject to the provisions of the sections to which he had alluded ; but with the assurance of the Hon'ble Mr. Shaw Stewart that the sections did not touch such officers, SIR HENRY DURAND had nothing to observe but that the information removed the objection which he might otherwise have had to the sections.

The Motion was put and agreed to.

EMIGRATION OF COOLIES BILL.

The Hon'ble MR. STRACHEY moved that the Hon'ble Mr. Gordon Forbes be added to the Select Committee on the Bill to amend the Law relating to the emigration of Native labourers.

The Motion was put and agreed to.

The following Select Committee was named :—

On the Bill to consolidate and amend the law relating to the District and Subordinate Civil Courts in the Presidency of Bombay—the Hon'ble Mr. Maine, the Hon'ble Sir Richard Temple, the Hon'ble Messrs. Cockerell, Gordon Forbes and the Mover.

The Council adjourned till the 12th February 1869.

WHITLEY STOKES,

Asst. Secy. to the Govt. of India,

Home Department (Legislative).

CALCUTTA,

The 5th February 1869. }