ABSTRACT OF PROCEEDINGS

COUNCIL OF THE GOVERNOR GENERAL OF INDIA

LAWS AND REGULATIONS.

VOL 8

1869

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 and 25 Vic., Cap. 67.

The Council met at Simla on Friday, the 4th June 1869.

PRESENT.

His Excellency the VICEROY and GOVERNOR GENERAL of India, K. P., G. C. S. I., *Presiding.*

His Excellency the COMMANDER-IN-CHIEF, K. C. B., G. C. S. I.

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 B. H. ELLIS.

The Hon'ble F. R. COCKERELL.

PRISONERS' TESTIMONY BILL.

The Hon'ble MR. COCKERELL moved that the Report of the Select Committee on the Bill to provide facilities for obtaining the evidence and appearance of prisoners, and for service of process upon them, be taken into consideration.

He said that this Bill was designed to cure a defect in the present state of the law by which the interests of persons concerned in civil suits, or in criminal cases, were liable to be seriously prejudiced.

As the law now stood, except within the limited area of the ordinary original civil jurisdiction of the High Courts at the Presidency Towns, the removal of a person confined in any jail in this country, for the purpose of giving evidence in a Civil or Criminal Court, was not compellable.

The difficulty threatened by this want of power in the courts to enforce the bringing up of persons confined in any jail for the purpose of giving evidence before them, had been in great measure obviated by the voluntary action of the officers in charge of jails, who had generally been found ready to aid the administration of justice by complying with the requisition of the courts for the removal of prisoners whose evidence was required in such courts.

The state of the law was, however, none the less unsatisfactory; for, on the one hand, compliance with the requisition of the court for the removal of a prisoner might at any time be refused. It appeared, indeed, from the communications which had been received on the subject of this Bill that, in the Madras Presidency, under the orders of those responsible for the management of jails, the removal of prisoners for the purpose of giving evidence in any civil court had been absolutely prohibited; and in the Lower Provinces of Bengal, as had been stated to the Council at the time of the introduction of the Bill, the growing disinclination of officers in charge of jails to comply with the requisition of the civil courts for the bringing up of prisoners to give evidence before such courts, had led to the legislative action in this matter taken by the Council of the Lieutenant-Governor of Bengal. Moreover, this unwillingness on the part of officers in charge of jails to permit the removal of persons confined therein on the requisition of the courts which had begun to show itself in some provinces, was likely to become more general, as it was the certain tendency of modern jail management to prevent as much as possible the extramural translation of persons confined therein for any purpose whatever.

On the other hand, there was this further objection to the present state of the law that the want of legal authority for the removal of persons confined in a jail for the purpose of giving evidence, entailed an increased responsibility upon the officer in charge of the Jail who, in compliance with the requisition of the Court, permitted such removal. As regards the mass of persons confined in jails, *i. e.*, those undergoing imprisonment for criminal offences, the officer in charge of the jail being responsible to the Government only for their safe custody, the personal risk incurred by that officer in permitting a removal by which the safe custody of the prisoner is endangered, was perhaps merely nominal; but in the case of a civil prisoner who had been committed to jail at the suit of a private creditor and during whose removal for the purpose of giving evidence in any court the opportunity of escape had been taken, the personal responsibility to the creditor for such escape of the officer to whose custody the debtor had been consigned, would be unquestionable. MR. COCKERELL did not mean to say that the jailor, from whose custody a debtor escaped, was not in any case amenable to a civil suit by the creditor for the injury which the latter might have sustained through such escape; but it was clear that the officer's responsibility for the escape was enhanced by his having, without legal warrant suffered the removal of the debtor from the proper place of incarceration, the facility for effecting an escape having resulted from such removal.

There could therefore be no question as to the fact of there being sufficient grounds for the proposed legislation. All the Local Governments had concurred

as to the necessity of this measure, and had expressed their general approval of the provisions of the Bill.

In dealing with the details of those provisions, the Select Committee had derived great assistance from the Minutes of the learned Chief Justice of the High Court at Calcutta on the subject of the Bill. In fact, most of the alterations of detail in the Bill, as amended by the Committee, had been made in accordance with the suggestions emanating from that high authority.

The Council would observe that, under the provisions of the original Bill, orders for the bringing up of prisoners when made by any subordinate court required the confirmation of the District Judge, or the Court of Sessions, according as such order was made by a civil or criminal court.

It appeared to the Committee that this condition as to countersignature would, from various causes, in the case of orders of removal made by criminal courts, be found to work inconveniently, and that the power of making such orders without reference to other authority for confirmation, might unobjectionably be exercised by all criminal courts not inferior to that of a Sub-Magistrate of the First Class. Generally the subordinate criminal courts were established at no great distance from the district jail, from which in most cases the prisoners required as witnesses would have to be brought: in such cases the removal was easily accomplished, and the discretionary power of ordering it without reference to other authority might well be conceded to courts of that status.

In the case of orders of removal by subordinate civil courts, the control contemplated by the original Bill should, the Committee thought, be retained: regard being had to the number of such courts and the distance of the places at which they were established from the jails from which prisoners would have to be removed, such control could not properly be dispensed with. Sections three and four had therefore been so amended as to draw the distinction which it was thought desirable to maintain between the orders of subordinate criminal and civil courts in this respect.

At the same time, the Committee were of opinion that it should be clearly understood that the procedure for the validation of an order of removal made by a subordinate civil court, should be so guarded as not to admit of any argument as to the propriety of the order being raised before the court by which it must be countersigned. It had been provided therefore that the proposed order of removal should be accompanied by a brief report of the circumstances which were held to justify the issue of the order, and that the Judge whose counter-

signature is required should dispose of the reference summarily on the perusal of such report. When the order was for the removal of a person confined in a jail situated in a district other than that within which the court issuing such order was established, it had been provided that such order should be sent to the Magistrate of the district in which such jail was situate. This alteration of the original Bill had been made in view of the fact that the Magistrate was ordinarily more directly connected with the officer in charge of the jail, and therefore the more fitting medium of communication in such cases than the district court.

Provision had been made for the detention of persons removed to give evidence in any court at or near such court until their attendance was formally dispensed with by the presiding officer of the court. The Bill, as originally drawn, provided only for the conveyance of such persons to the court in which their evidence was required, but left the responsibility for their subsequent disposal undetermined.

The power of excluding certain classes of prisoners from the operation of the provisions of the Bill relating to removal, which was in the original Bill vested solely in the Local Governments, had been extended to the Governor General in Council. In the case of State prisoners, or persons who had been transported and are confined at the Andamans or elsewhere, it might be desirable that this power should be exercised by the Governor General.

The Code of Civil Procedure contemplated the taking of evidence by commission in cases only where the person whose evidence was required resided at a place more than one hundred miles distant from the place where his evidence was needed, and the Bill provided for the removal of a person confined in a jail situate not more than one hundred miles from the place where his attendance as a witness is called for. Cases, however, were readily conceivable in which, though the evidence of the person confined in a jail could not be absolutely dispensed with, his attendance to give evidence in court was unnecessary. To meet such cases, provision had been made for taking the evidence of a person confined in a jail by commission, when such jail was more than ten miles distant from the place where the evidence was required.

The obligation of the officer in charge of a jail to transmit the process delivered to him, for the purpose of being served on any person confined in such jail, to any other person at the instance of the person so confined, had been made conditional on the cost of transmitting such process being furnished by the latter person.

So far MR. COCKERELL had confined his remarks to a brief description and explanation of the principal changes introduced into the Bill by the Select Committee up to the date of their first report. Subsequent to the presentation of that report, he had received certain important suggestions from high authorities which seemed to call for the reconsideration of some of the provisions of the Bill. He thereupon moved for and obtained the recommittal of the Bill, and the remaining points to which he had now to call the attention of the Council formed the subject of the Committe's second report.

The first of these related to the area of the operation of the Bill. At the time of its introduction he had explained that the High Courts had already the power of causing the removal under a writ of *habeas corpus ad testificandum* of persons confined in a jail situate within the local limits of their ordinary original civil jurisdiction. It was deemed therefore inexpedient to interfere in any way with this existing jurisdiction, and the area over which it extended was expressly excluded from the operation of the Bill as it stood at the time of the Committee's first report. It was pointed out that the effect of this restriction was to give the High Courts no power of ordering the bringing up before *themselves* of persons confined in any jail situate beyond the local limits above referred to, and it was certain that they had no such power under the existing law, although the Bill did empower them in certain cases to cause the removal of persons so confined for the purpose of giving evidence in courts subordinate to such High Courts. Further, it was doubted whether the writs which the courts could issue for the removal of persons confined within the abovementioned local limits, constituted a sufficient legal warrant for removing such persons to any place beyond those limits.

To remove all doubts as to the insufficiency of the existing law in this respect, and to give full power to the High Courts to cause alike the removal of persons confined in a jail situate beyond the local limits of their ordinary original civil jurisdiction for the purpose of giving evidence before themselves, and of persons confined within those limits to places situate beyond the same, section two of the Bill, as formerly amended, had been omitted, and the present section two (to which MR. COCKERELL proposed to make some further addition) substituted therefor.

The determination of the High Court's jurisdiction in these matters led to the consideration of a point of much importance which had been overlooked in the previous amendments of the Bill, *i. e.*, the territorial limits within which this power of removing prisoners, whether by the High Courts, or by the courts

subordinate thereto, should be exercised. Under the Bill as first amended it was within the competency of a High Court to cause the removal of a person confined in a jail in any part of India for the purpose of giving evidence in a court subordinate to such High Court, and similarly any principal civil court, or a criminal court not inferior to the court of a Sub-Magistrate of the 1st Class subordinate to a High Court, could, without regard to territorial limits, *i. e.*, the limits over which the administration of the Local Government to which such court was subordinate extended, order the removal of a person confined in a jail for the purpose of giving evidence in such court, provided the jail was not more than one hundred miles distant from the place where the person's evidence was required. The Committee held such unrestricted power of removal as regards territorial limits undesirable, and the present provisions of the Bill had been adapted to the principle that it is inexpedient to allow the removal of a person confined in a jail situate within the territorial limits of one Local Government to give evidence in any civil matter pending in a court subordinate to another Local Government.

In criminal matters, the Committee held that the interests of justice might require occasionally the removal of a person confined in any jail, however distant from the place where his evidence was required, and the Bill, as now amended, contained a suitable provision for such exigencies. It was a principle of the Bill that wherever a prisoner's personal attendance as a witness could not be provided for, his evidence should be obtainable by commission: still the Committee thought there should be some check upon the too indiscriminate and general issue of commissions: it was therefore provided that where a commission had to be executed in any jail beyond the local limits of the appellate jurisdiction of the High Court to which the court issuing such commission was subordinate, to validate the commission the previous sanction of such High Court to its issue would be necessary.

The position of the Recorders of Maulmain and Rangoon had necessitated some special provision to give them the needful jurisdiction for the purposes of this Bill. The local limits of their appellate and original jurisdiction were conterminous, and they were not in a judicial capacity subordinate to the Chief Commissioner of British Burma who, as regards so much of that province as lay beyond the local limits of the Recorder's jurisdiction, exercised the powers of a High Court, nor were they subordinate in the sense contemplated in the general provisions of the Bill to the High Court at Fort William. It followed that they would have acquired no power under the Bill, as previously amended, to cause the removal of any person confined in a jail situate beyond the local

limits of their jurisdiction. On the other hand, the Chief Commissioner of British Burma, whose powers of a High Court do not extend to the local limits of the jurisdiction of these Recorders, could not have caused the removal of any prisoner confined within those limits.

To obviate the difficulties which might have arisen out of these circumstances, the provisions contained in the last clauses of Sections 7 and 8 of the Bill, as last amended, had been framed.

Lastly, exemption from liability to removal had been extended to the case of persons under confinement pending trial, and persons whose term of imprisonment would be likely to expire before they could be removed to the place where their evidence was required, and hereafter returned to the jail in which they were confined.

In the one case the removal might be attended with great public inconvenience, or be injurious to the interests of the persons under trial. It is true that the Bill as it now stood went somewhat beyond the object in view, enforcing, as it did, the disability for removal even where that removal might be allowed without detriment to public or private interests; but he (MR. COCKERELL) would presently move a slight amendment which would remove this objection. In the other case, *i. e.*, the case of persons whose unexpired term of imprisonment would appear at the time of the receipt, by the officer in charge of the jail in which they are confined, of the order for their removal, not to admit of such removal and return to the jail previous to the expiration of their sentence, such removal, if effected, would in fact operate as an extension of the term of their confinement and an encroachment on their right of liberty.

The Hon'ble MR. MAINE said that the measure would no doubt be useful. It introduced no new principle, but legalised an existing practice, and in effect extended to the whole of India the power of issuing a *habeas corpus ad testificandum* which was now confined to the Presidency Towns. There was only one point on which it was necessary to remark. It was of some interest to His Excellency the Commander-in-Chief and to his hon'ble and gallant friend, Sir Henry Durand. A doubt had occurred to his mind whether the new law would apply to military prisons. Until 1868, it was impossible for the Government of India to make any rules which would affect these prisons, for this would have been to affect the Mutiny Act. But now the new Mutiny Act, 31 Vic., cap. 14, sec. 20, had declared that it should be lawful for the Secretary of State for the War Department, "and in India for the Governor General in Council," to make regulations for such prisons. That did not, MR. MAINE thought, mean

the Governor General in Legislative Council, otherwise there would be the anomaly of coupling an executive officer like the Secretary of State for the War Department, with a non-executive body like the Council of the Governor General for making Laws and Regulations. The expression meant, in his opinion, the Governor General in his executive capacity, and in that capacity the Government of India would have to issue an order making the provisions of the Bill expressly applicable to military prisons.

The Hon'ble MR. ELLIS said that as he had not been present at the previous discussions, he was not sure whether he was in order in now suggesting any alterations in the details of the Bill, but he desired to make a few remarks in reference to section 3. The hon'ble mover had said that the procedure adopted in that section for the Subordinate Magisterial Courts differed from that laid down for Subordinate Civil Courts, because the latter were generally at a greater distance than the former from the jails, whence the prisoners would have to be brought. Now this might be true of some parts of India, but it certainly was not the case in other parts of India, for there were districts in which many outlying Subordinate Magistrates' Courts were at a far greater distance than any of the Subordinate Civil Courts from the District Jails. He (MR. ELLIS) thought, therefore, that it was to be regretted that a procedure analogous to that adopted for the Subordinate Civil Courts had not been approved for Subordinate Magisterial Courts also. He would greatly prefer that the power of summoning convicts from jails should be given to all Subordinate Magisterial Courts, but subject to the approval of the District Magistrate, just as the summons of the Subordinate Civil Courts was subjected by the Bill to the approval of the District Judge. This check might often prevent the inconsiderate exercise of authority by a Subordinate Court, and save expense to the State, much trouble to the Police, and some inconvenience to the public. He (MR. ELLIS) thought that an alteration, such as he suggested, might be made with advantage; but if its propriety were not concurred in by the hon'ble mover and the Members generally, he did not wish at that stage of the proceedings to press it further.

The Hon'ble MR. MAINE said that notice of the proposed amendment would have to be given and circulated in the usual way, and if this were done, the Bill of course could not now be passed.

The Hon'ble MR. COCKERELL said that in regard to what had fallen from the Hon'ble Mr. Ellis, he would explain that there were good grounds for not adopting the provision which that Hon'ble Member would desire to see

introduced. He (MR. COCKERELL) had perhaps not stated the case sufficiently in regard to the inexpediency of requiring the confirmation by a superior court of orders for the removal of prisoners when made by a Subordinate Criminal Court. This confirmation, which was provided for in the Bill as originally drawn, was strongly objected to by the Chief Commissioner of British Burmah; it was shown that in that Province, where the means of communication between the subordinate and superior Criminal Courts was slow and uncertain, such a restriction on the validity of an order of removal when made by the Subordinate Criminal Court, was likely to create serious difficulties. It was perhaps mainly owing to this remonstrance that the original provision of the Bill in this respect had been departed from. He (MR. COCKERELL) thought the conclusion at which the Committee after a careful consideration of this subject had arrived, was a correct one, and he would be opposed to its reversal.

The Hon'ble MR. ELLIS then withdrew his proposed amendment.

The Hon'ble MR. COCKERELL then moved that for section 2 the following be substituted:—

"2. For the purposes of this Act, the Courts of Small Causes established within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Fort William, Madras, and Bombay, and the courts of persons exercising the powers of a Magistrate of Police within the same limits, shall be deemed to be respectively subordinate to the said High Courts."

Presidency Small Cause Courts.

Police Magistrates.

He said that the High Courts as in the case of the Small Cause Courts, so in that of the Police Magistrates, exercised no general control over the proceedings of those functionaries; and it was doubtful whether the latter could be held to be 'subordinate' to the High Courts in the sense of that term as used in the Bill: they clearly had no connection with the High Courts as regards the local limits of the appellate jurisdiction of those courts. For the purposes of the Bill therefore, it was necessary to make special provision for the subordination of the courts of the Police Magistrates, as well as of the Small Cause Courts to the High Courts, otherwise the Police Magistrates would have no power of compelling the removal of persons confined in any jail beyond the local limits of their ordinary jurisdiction for the purpose of giving evidence before them.

The Motion was put and agreed to.

The Hon'ble MR. COCKERELL also moved the following amendments:—

"That in section 3, line 11, the word 'criminal' be inserted before 'court.'

That in section 4, line 10, the word 'civil' be inserted before 'court.'".

That in section 7, line 28, the words 'and sections three and four' be inserted after 'section.'

That to section 11 the following proviso be added:—

'Provided that the said officer shall not so abstain when the order has been made under section three,

and the person named in the order is confined under commital for trial, or under a remand pending trial or pending a preliminary investigation, and does not appear to be from sickness or other infirmity unfit to be removed,

and the place where his evidence is required is not more than five miles distant from the jail in which he is confined.'

"That in section 16, line 15, for 'it,' the words 'the said copy' be substituted."

The first, second and last of these amendments were intended to remove ambiguities which might be supposed to exist in the sections to which they respectively referred. The third was needed, as the subject of the clause referred to applied to Sections 3 and 4 as well as to Section 7. He had already, in his remarks on the details of the Bill, explained the necessity for the fourth amendment.

The Motion was put and agreed to.

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

The Motion was put and agreed to.

The Council then adjourned to Friday, the 18th June 1869.

WHITLEY STOKES,
Secy. to the Council of the Govr. Genl. for making Laws and Regulations.

SIMLA,
The 4th June 1869.