Tuesday, January 13, 1874

ABSTRACT OF THE PROCEEDINGS

COUNCIL OF THE GOVERNOR GENERAL OF INDIA

LAWS AND REGULATIONS.

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ABSTRACT OF THE PROCEEDINGS

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Council of the Governor General of India,

ASSEMBLED FOR THE PURPOSE OF MAKING

LAWS AND REGULATIONS.

1874.

WITH INDEX.

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1875.

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 Tuesday, the 13th January 1874.

PRESENT:

His Excellency the Viceroy and Governor General of India, G. M. S. I., *presiding.*

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

The Hon'ble B. H. Ellis.

Major General the Hon'ble Sir H. W. Norman, K. C. B.

The Hon'ble A. Hobhouse, Q. C.

The Hon'ble E. C. Bayley, C. S. I.

His Highness the Maháráj of Vizianagram, K. C. S. I.

The Hon'ble J. F. D. Inglis, C. S. I.

The Hon'ble R. A. Dalyell.

The Hon'ble H. H. Sutherland.

OBSOLETE ENACTMENTS REPEAL BILL.

The Hon'ble MR. HOBHOUSE introduced the Bill for the repeal of certain obsolete enactments, and moved that it be referred to a Select Committee with instructions to report in a month. He had explained to the Council at the last meeting the object of the Bill and the circumstances which led to its introduction at this time. Of course in a Bill of this kind the enacting part followed the common course, and there was nothing particular in that part of the Bill to explain to the Council. The principle of the Bill was contained in the schedule, and it was in respect to the schedule that he should have some observations to make. He should wish at the same time to remove some of the erroneous impressions which were entertained at our last meeting, respecting the danger which we incurred by sending a Bill of this kind into Committee, and the risk there was of throwing the law into confusion by the enactment of such laws.

The schedule consisted of two main parts. One part related to the Bengal Regulations, and that, as he had explained before, was chiefly the work of Mr. Field: it was an important work; and if we were to pass Bills of this kind at all, we must deal with the Bengal Regulations in the way in which they were dealt with here. The rest of the schedule was not nearly so important.

There were not many items in that part of the schedule which consisted of the total removal of laws from the Statute-book, and not a great many which consisted of the removal of whole sections or parts of Acts. The greatest part of the schedule was concerned with small alterations of the language of the existing Acts, for two purposes. He had taken occasion at a meeting at Simla to explain the two different principles upon which the language of the Acts was altered when the enactments themselves could not be wholly repealed. One principle was as follows: Owing to changes in the law, references to prior Acts and to various extrinsic circumstances became erroneous or senseless. We found repealed enactments spoken of as if in force, or officers named as existing who had ceased to exist. Thus, the reading of Acts was rendered more difficult, and the attention of the reader was apt to be distracted by his meeting with that to which he could not under existing circumstances assign any meaning. So we struck out expressions originally necessary but now incorrect. The other principle was merely the purpose of abbreviation,—of reducing the bulk of the Statute-book to some extent, and making the labours of the reader somewhat lighter.

With regard to the first of these principles, he did not think there was much, if any, difference of opinion in this Council as to the propriety of applying it. With regard to the second, he had read to the Council on a previous occasion some able remarks of the late Mr. Housman who objected to it. Now, there was a difference of opinion about that. It would be for the Council to decide whether this Bill should go to a Select Committee with the approval, expressed or tacit, of that principle, or whether any modifications should be made in it, or any objections raised to it. He had no reason to assign in its favour except what he had assigned before. If he was approaching this subject *de novo*, and if he personally had to revise the Statute-book, he should have doubts which principle to apply; whether to abbreviate the Statute-book or to leave it as it stood. But the reasons for adopting the principle of abbreviation were, first, that it had been already done on previous occasions, and we were only following the line in which the Council had advanced some distance; and, secondly, that the work of the revision of our Statute-book was committed to the Secretary in the Legislative Department, Mr. Stokes, who entertained a strong opinion on the subject, and who considered that, both as regards the bulk and the reading of the Statute-book, it would be in a much better shape if abbreviations were made, than if they were not made. These were the reasons for which MR. HOBHOUSE, for one, accepted the principle of abbreviation, as well as the other principle of eliding all those expressions which, by change of circumstances, had become unmeaning or misleading.

He would pass now to the second subject which he had mentioned, and he thought that, as regards the past, the Council were concerned to know that their business had not been conducted in a way to produce the disasters that had been supposed; and as regards the future, they were entitled to know that they were incurring no great risk by sending this Bill into Select Committee. It was true that in Bills like this, which were composed wholly of details and mostly of small details, it was the Select Committee who really framed the Bill. It would hardly be possible, and certainly was not usual, for the Council at large to exercise any particular control over what the Select Committee did. It was therefore an act of confidence in the Council to refer this Bill to a Select Committee, and it was proper for him to show that that confidence was not ill bestowed.

At our last meeting, the Lieutenant Governor, whom MR. HOBHOUSE was sorry not to see in his place that day, mentioned as a reason for distrusting a Bill of this kind, that there were two occasions on which it was found that the effect of an Obsolete Enactments Bill was to remove very important provisions from the Statute-book. He mentioned two laws which had been removed in that way. One of those was Regulation XXVII of 1793, and the other was the law by which Sessions Judges exercised their powers in Bengal. As to Regulation XXVII of 1793, His Honour said this:—

"Although, there was now a difference of opinion on the subject, that Regulation was repealed without deliberation. The objections of the Bengal Government were not taken into consideration. It was repealed as a mere Obsolete Enactments question at Simla, and no Member of the Council had an opportunity of considering the propriety of its repeal. It was repealed under the disguise of an obsolete Regulation; and several other Regulations also were repealed, by mere inadvertence, to the repeal of which the Bengal Government had a strong objection, but in regard to which it was not heard."

Now that statement had been made before, and it had been answered before, and MR. HOBHOUSE could not help thinking either that, in the hurry of business, the answer had not reached His Honour, or that speaking from memory he was deceived, as most of us were when speaking from memory, and that he remembered the statement of the Bengal Government and did not remember the answer made to it. MR. HOBHOUSE would mention both to the Council. In a letter written by the Bengal Government to the Government of India on the 13th December 1871 appeared the following statement. Speaking of Act XXIX of 1871, which was an Obsolete Enactments Act, the Bengal Government said:—

"The Draft Act first appeared in a very different form from that in which it is now passed, dealing with a far larger number of enactments. It then, in fact, was designed to expurgate

the whole Bengal Code of all provisions deemed to be no longer necessary. At that time, an official reference was made to the government of Sir William Grey. The subject was so large, and Mr. Cockerell so soon pressed for a reply, that it was not possible to give a detailed examination to it. The only officer who did examine it in detail gave a decided adverse opinion, and Sir W. Grey's reply amounted to a protest against passing any such Act in the Governor General's Council, deeming that it could best be dealt with in the Bengal Legislative Council. From that day to this no official communication whatever has been made to this Government. It has never been in any shape intimated that, notwithstanding Sir W. Grey's protest, the Government of India proposed to go on with the measure in an altered form. During the last cold season, when the Council was sitting in Calcutta, and when, if ever, it should naturally have been brought forward, it was never produced but quietly slept."

That letter was answered on the 24th January 1872, and it was answered thus :—

"In paragraph 2 you observe that the draft Act first appeared in a very different form from that in which it is now passed, dealing with a far larger number of enactments; that 'the subject was so large, and Mr. Cockerell so soon pressed for a reply, that it was not possible to give a detailed examination to it; that the only officer who did examine it in detail gave a decidedly adverse opinion, and Sir W. Grey's reply amounted to a protest against passing any such Act in the Governor General's Council, deeming that it could best be dealt with in the Bengal Legislative Council. From that day to this,' you add, 'no official communication has been made to this Government.'

"Upon this I am directed to observe that the Bill was forwarded to the Bengal Government for its opinion in August 1870, and that the opinion of that Government was forwarded to the Government of India in January 1871. The Government of India is of opinion that five months was quite sufficient time for the expression of opinion on the subject. To have given a longer period would have been to postpone the matter indefinitely.

"The Government of India in this Department is unable to accept the account given in your letter under notice of the reply of the Lieutenant-Governor of Bengal to its inquiries, or of the Bill itself as originally framed. The Bill originally consisted of two parts. It repealed altogether a large number of obsolete Regulations. It also repealed the obsolete parts of the remaining Regulations. What Sir W. Grey objected to was, not the repeal by the Government of India of the obsolete Regulations, but the partial repeal of the Regulations which were obsolete in part only. His words are—'The Lieutenant-Governor would have thought that the most convenient mode of proceeding might have been to stop short of the separate repeal of those portions selected for repeal,' *i. e.*, to confine the repeal to those Regulations which it was possible to repeal at once as a whole. The rest of his Secretary's letter points out that the re-enactment, in a more convenient shape, of the Regulations which it was proposed to repeal partially might be conveniently left to the Bengal Legislative Council, and that, accordingly, if the second schedule was still to be kept in the Bill, its operation should be confined to the North-Western Provinces. There is not a word in the letter to indicate that the Lieutenant Governor objected in any way to the repeal of the Regulations which it was proposed to repeal altogether. It would obviously have been a very inconvenient course to have them

repealed by two separate Acts,—one passed by the Governor General in Council for the North-Western Provinces, the other by the Bengal Legislative Council for the Lower Provinces.

"The Government of India accepted Sir W. Grey's views, omitted the schedule containing the partial repeals from the Bill, and confined its operation to the matter to which Sir W. Grey did not object. The Government of India in this Department is thus of opinion that so far from acting, 'notwithstanding Sir W. Grey's protest,' it adopted and carried out the very course which he suggested."

Then towards the end of the same letter, it was written :—

"In conclusion, I am to observe that Mr. C. D. Field, in his observations on the Bill which has now become Act XXIX of 1871, suggested that so much of Regulation XXVII of 1793 as declared the illegality of the collections, or showed the title of the former owners to compensation, or imposed a penalty for such collections, should be maintained, and that the Committee arrived at the conclusion embodied in the Bill for the reasons given above."

MR. HOBHOUSE thought the Council would see that it was a mistake and an error of memory now to say that the Bengal Government had strong objections to this repeal; that their objections were not taken into consideration; that no member of the Council had had an opportunity of considering the propriety of its repeal.

That brought him to the substance of the Regulation, whether it was obsolete or not. The Regulation was one relating to the collection of sayer duties. If the Council had followed him, they would see that Mr. Field proposed to retain parts of the Regulation, but that the Committee arrived at the conclusion that they ought to repeal the whole "for the reasons given above." Some parts proposed to be retained were those which declared the illegality of the collection of sayer duties by zamíndárs, and those which made compensation to them for the abolition of those duties. And the reason for not retaining these parts was that their repeal did not affect the principle of law which made the collection of sayer duties illegal, nor did it affect the right of any owner of these duties to receive compensation, especially as the time for claiming compensation had expired a great number of years before. The other part of the Regulation which it was proposed to retain was that part which imposed a penalty for the collection of sayer duties, but that penalty was imposed in a way which, owing to changes in procedure, was absolutely unworkable. It was to be imposed by means of a civil suit brought by somebody from whom the collection was illegally levied, in which suit he was first to recover damages from the person who levied the collection, and then the Judge was ordered to impose a fine according to the circumstances of the offender. That was obviously a mixing up of civil and criminal jurisdiction, which might have

been quite feasible in 1793, but which, owing to the complete severance of those jurisdictions in the machinery in existence in 1871, was impracticable. Therefore, it appeared on examining the Regulation that, whatever work it had to do, it had done. It declared the illegality of a number of collections which nevertheless had been levied, MR. HOBHOUSE believed, ever since the passing of the Regulation up to the present time; at all events, for the last thirty or forty years they had been collected in increasing quantities year by year, and they had been levied, not only by private zamíndárs, but by Government itself as proprietor of estates. As he had said on the last occasion, it was exactly one of those cases in which the world had outgrown the law. The facts had slipped away; and if you attempted to apply the Regulation to the existing state of facts, you would find that it would not help you out of difficulties, but rather get you into them. Therefore, it was thought better to repeal the Regulation *in toto*.

Now, looking back and trying to see what the repeal had effected, he could not find that it had effected any change in the law, except possibly—and he said only possibly—this; that, indirectly and in the process of a long time, some prescriptive rights might grow up which, if the Regulation was in the Statute-book, would not prevail. Whether that was a good thing or a bad thing might be disputed. But it was only in that possible, it was only in that indirect, it was only in that future, way that the repeal of the Regulation as obsolete could produce any effect. Obsolete it was, most clearly, as regards any direct, immediate, visible effect: it was only straining our vision into the future, that we could see, or might conjecture, that its repeal might possibly produce some effect.

Now he would pass on to the next question, which was that of the Sessions Judges. Upon that point, the Report of the Council's last Proceedings ran thus:—

> "His Honour the Lieutenant-Governor explained that there was one case in which there could be no doubt whatever that there had been an erroneous repeal. It was discovered that the consequence of one of these repealing enactments had been that, for a series of years, men had been hung throughout the country without any law whatever. Sessions Judges had been abolished by a repealing Act."

No doubt it was a very serious matter that a repealing Act should cause people to be hung without any law whatever. But that statement also had been made before, and had been answered, and he would again read to the Council what was said on the subject. In the same letter, that of the 13th

December 1871, from which he quoted previously, the Government of Bengal said this:

"The Lieutenant-Governor believes that most especial care is necessary in regard to the repealing of the old Regulations of that wonderful early Code, which is, in fact, the foundation of our whole system. He has already met with several instances in which great inconvenience is caused by inadvertent repeals, and a more marked instance could hardly be found than was exhibited in the necessity for passing the only other Act specially affecting Bengal, which was this season dealt with at Simla—the Sessions Judges Act already alluded to. That necessity was caused by a former repealing Act, by which the Sessions Judges were inadvertently repealed, and all capital and other sentences were rendered illegal for several years."

The Sessions Judges' Act was XIX of 1871; and the answer given to the letter was also in the previously quoted letter of the 24th January 1872. It was there stated that—

"The necessity for the Sessions Judges Act was caused, not by any inadvertency in any repealing Act, but by the loose and irregular manner in which the Regulations were drawn, and by the singular intricacy which was produced by the system which their authors adopted, of continually amending and modifying Regulations drawn at different times, and with a view to circumstances subsequently altered, instead of repealing the old enactments in a body and re-enacting them in a convenient and systematic shape. No more marked instance of this could be mentioned than the series of enactments which made 'all capital and other sentences illegal' for nearly forty years. The details will be found in the speeches made, when the Sessions Judges Act was passed, by Mr. Stephen and Mr. Cockerell. If the flaw in question had not been discovered in the course of the investigations required for the consolidation of the Regulations, it might have been suddenly brought to light by any person accused of crime, and might have caused the most serious failure of justice and public scandal. As to the other instances of inconvenience referred to, I am directed to say that none have come under the notice of the Government of India."

Now, the whole story of the change in the law and in the practice, by which it came about that Sessions Judges had not the power that they had assumed to exercise, was rather a complicated one. It would be all found very fully and clearly explained in Mr. Stephen's speech when he introduced the Sessions Judges' Act, on the 12th of May 1871, but, for the present purpose, MR. HOBHOUSE could explain it in a very few words to the Council. There were three enactments, Regulation I of 1829, Regulation VII of 1831, and Act VII of 1835. By the combined force of these enactments the Government of India and the Local Government between them, and by observing certain forms, might perhaps appoint Sessions Judges to administer criminal law distinct from the Commissioners of Divisions who represented the original Criminal Courts. He said "perhaps," because the enactments were so drawn that controversies might be raised on their legal effect. But in point of

fact the prescribed forms were never observed, or at all events had not been observed for a period of nearly forty years. The Supreme Government had not acted at all in the appointments, for which its intervention was necessary by law. The Local Governments had not followed the forms prescribed, but had assumed the power to appoint Sessions Judges of their own direct authority and to invest them with full criminal jurisdiction. The enactments therefore that he had mentioned were really inoperative and obsolete: when they were repealed they had not been used for years. There was not a single Judge in the whole country who derived title through them, or whom any body thought to derive title through them. They were therefore most properly struck out from the Statute-book as obsolete; and so little were they connected with the existing title of Sessions Judges, that no body had thought from that day to this (excepting the erroneous observation of the Government of Bengal) that the repeal made any difference. Indeed the flaw in the title of Sessions Judges was discovered in a totally different proceeding. It was on a comprehensive review of the Regulations being taken in the Legislative Department for the purpose of further consolidation, that this flaw was discovered. And then it was put right, not by any revival of the enactments, which were then completely off the Statute-book, and if put on again would be as useless as they were before, but by passing an entirely new law adapted to modern circumstances and calculated to give the powers required. Therefore, it would be found that this story about the Sessions Judges was a mistake; and he felt sure that if the Lieutenant-Governor was here, he would be glad to find that his memory had misled him, that there was not that carelessness which he supposed, and that there was not a tendency in these Acts to so much danger as he apprehended.

MR. HOBHOUSE thought it right that the Council should know what he had stated; he had not spoken in a controversial spirit; because he quite agreed with the Lieutenant-Governor that the greatest caution should be exercised in removing from the Statute-book as dead matter that which might still be living matter.

In truth it was not easy to effect any very large and sweeping repeal without some danger of removing that which was not only alive but useful. That danger, however, was greater when we were passing an Act which professed to make a substantive alteration of the law, than when we were passing one which did not profess to make such alteration. In the former case we were enacting a new body of law, and were supposing that we covered all necessary ground. We then swept away all that we believed we had made unnecessary.

In that process there was considerable risk of leaving some of the necessary ground uncovered. And he might say frankly, not only that some disasters might occur, but that, having regard to our human fallibility, they must occasionally occur, in effecting these processes. But when we were passing an Obsolete Enactments Bill we were careful to see that the matter removed was really dead matter. We were not professing to substitute any thing for that which was to be removed; and what we had to ascertain was only that nobody having a knowledge of the subject considered that there was any use in any of the enactments proposed to be removed. On the whole, he thought the Council might fairly send this Bill into the hands of the Select Committee without any great anxiety that the law would be thrown into confusion. Errors there might be: he hoped they would be small ones. And he hoped that the Select Committee would err on the side of caution rather than on the side of incaution.

His Excellency THE PRESIDENT said that His Honour the Lieutenant-Governor was so constant and regular an attendant at the meetings of the Legislative Council, that he was sure his absence that day was only occasioned by the very onerous nature of the duties which were thrown upon him at this time to meet the wants of those parts of the province which were suffering from scarcity. As a considerable portion of the remarks of his hon'ble friend, Mr. Hobhouse, had been directed to some criticisms which the Lieutenant-Governor had made upon this Bill at a former meeting, HIS EXCELLENCY thought that the Lieutenant-Governor should have an opportunity of making any further remarks which he might wish to make upon the subject. That, he thought, could be well arranged if on this occasion we referred the Bill to a Select Committee with instructions to report in a month, and postponed the nomination of the members of the Committee to the next meeting.

The Motion was put and agreed to.

KULLU SUB-DIVISION (PANJÁB) BILL.

The Hon'ble MR. HOBHOUSE also moved for leave to introduce a Bill to invest the Assistant Commissioner in charge of the Kullu Sub-division of the Kángra District with certain appellate powers. He said that the circumstances which made this Bill desirable were very simple. By Act IV of 1870, the Assistant Commissioner of the Kullu Sub-division of the Kángra District was invested with appellate powers in civil cases. That was different from the ordinary mode of procedure in the Panjáb. Under the Panjáb Courts' Act, appeals would be carried to the Deputy Commissioner of the Kángra District.

Act IV of 1870 was one of those measures which were passed to try an experiment, and see whether it worked conveniently or not, and it was passed for only a short term of years. It expired on the 13th April 1873, and since that time appeals had followed the ordinary course of procedure, as settled by the Panjáb Courts' Act. Now it was found that the practice under Act IV of 1870 was more convenient than the ordinary practice under the Panjáb Courts' Act, and the Judges of the Chief Court had proposed that the system established under Act IV of 1870 should be re-established. Kullu was a remote district; the cases which were tried there were very simple; and it was a hardship on the inhabitants to have to attend the Courts at the station of Kángra for the purpose of prosecuting appeals. These were the reasons which induced the Chief Court to propose this Bill. The Local Government approved of the measure. On those grounds MR. HOBHOUSE asked for leave to introduce the Bill.

The Motion was put and agreed to.

The Council then adjourned to Tuesday, the 27th January 1874.

CALCUTTA;
The 13th January 1874.

WHITLEY STOKES,
Secretary to the Government of India,
Legislative Department.

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