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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.

1881.

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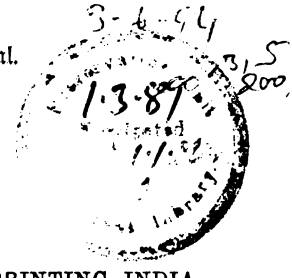

CALCUTTA:
OFFICE OF THE SUPERINTENDENT OF GOVERNMENT PRINTING, INDIA.
1882.

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, Simla, on Wednesday, the 31st August, 1881.

PRESENT:

His Excellency the Viceroy and Governor General of India, K.G., G.M.S.I., G.M.I.E., *presiding*.
His Honour the Lieutenant-Governor of the Panjáb, K.C.S.I., C.I.E.
His Excellency the Commander-in-Chief, Bart., G.C.B., C.I.E.
The Hon'ble Whitley Stokes, C.S.I., C.I.E.
The Hon'ble Rivers Thompson, C.S.I., C.I.E.
The Hon'ble J. Gibbs, C.S.I., C.I.E.
Major the Hon'ble E. Baring, R.A., C.S.I., C.I.E.
Major-General the Hon'ble T. F. Wilson, C.B., C.I.E.
The Hon'ble C. Grant, C.S.I.

COURT-FEES BILL.

The Hon'ble MR. STOKES introduced the Bill to amend the law relating to Court-fees, and moved that it be referred to a Select Committee consisting of the Hon'ble Mr. Gibbs, Major the Hon'ble E. Baring and the Mover. He said that in addition to the alteration of the fees in the case of certain suits for high values, to which he had called the attention of the Council when moving for leave to introduce this Bill, the principal amendments which would be made in the present law by the Bill were the following:—

In clause (*a*), section 36, of the Bill, corresponding to clause (*a*), section 27, of the present Act, power was given to the Local Government to make rules for regulating the supply and sale of court-fee stamps, the persons by whom alone such sale is to be conducted, and the duties and remuneration of such persons. The Local Government had similar powers under the Indian Stamp Act, and such powers would be useful in preventing frauds against the revenue. It was easier to detect the fraudulent removal and re-use of labels when there were means of tracing the persons by whom and to whom the labels were sold. If the stamp-vendors were placed under the control of the Local Government and sales by non-authorized persons prohibited, means could be provided for tracing the vendors and purchasers of stamps with respect to which fraud was suspected.

This amendment had involved other changes in the law. In order to enforce the rules made under clause (*a*), section 36, a penalty was provided by section 41 for breach of the Rules by authorized vendors and for the sale of stamps by a person not authorized. Then, as no one but a duly authorized person could sell stamps, section 48 provided for making an allowance for stamps which a person has purchased but afterwards finds that he has no use for.

In order to prevent the fraudulent removal and re-use of labels, it was necessary to provide for the proper cancellation of stamps. The present law (section 30) directed that cancellation should be effected by punching out the figure-head, so as to leave the amount designated on the stamp untouched, and that the part removed by punching should be burnt or otherwise destroyed. These provisions had not been found to work well in practice. The duty which they impose had not been fully performed, and experience had shown that there was more chance of getting the responsible officers concerned to observe regulations of this kind when they were prescribed by rules which could be adapted to the varying circumstances of the different provinces of the empire. Accordingly, section 39 of the Bill gave each Local Government power, with the previous sanction of the Governor General in Council, to make rules for regulating the mode of cancelling stamps and the persons by whom such cancellation was to be effected.

The other amendment involved by Mr. Cockerell's proposals was the alteration in the scale of *ad valorem* fees: the cause of this change in the law had been already explained. In suits where the amount or value of the subject-matter in dispute exceeded Rs. 5,000, instead of charging a fee of ten rupees for every Rs. 250 or part thereof in excess of Rs. 5,000 up to Rs. 10,000, the Bill provided a charge of Rs. 25 for every Rs. 500 or part thereof. When such amount or value exceeded Rs. 10,000, instead of a fee of fifteen rupees for every Rs. 500 or part thereof in excess of Rs. 10,000 up to Rs. 20,000, the Bill provided a fee of Rs. 25 for every Rs. 1,000 or part thereof up to Rs. 25,000. So the next class of suits, instead of ranging from Rs. 20,000 to Rs. 30,000 with an additional fee of Rs. 20 for every Rs. 1,000 or part thereof in excess of Rs. 20,000, ranged from Rs. 25,000 to Rs. 50,000 with an additional fee of Rs. 100 for every Rs. 5,000 or part thereof in excess of Rs. 25,000. The next class of suits, instead of ranging from Rs. 30,000 to Rs. 50,000, was to range from Rs. 50,000 to Rs. 4,00,000 with an increased fee of Rs. 100 on every Rs. 25,000 or part thereof. Lastly, instead of a fee of Rs. 25 for every Rs. 5,000 or part thereof in excess of Rs. 50,000, the Bill prescribed a fee of Rs. 100 for every Rs. 50,000 or part thereof in excess of Rs. 4,00,000.

The Bill also provided in section 42 a penalty for the fraudulent possession of used and cancelled stamps which had been removed from the documents to which they have been affixed. The fact of a person having such stamps in his possession was a clear indication of an intent to use them fraudulently.

A penalty had also been provided for failing to file the statement on oath of all property received or realized under a certificate granted under Act No. XL of 1858, Act No. XXVII of 1860, Act No. XX of 1864, or Bombay Regulation VIII of 1827. At present the law requiring such statements to be furnished might be evaded to the detriment of the revenue, for the only penalty was cancellation of the certificate, and default in filing the statement was probably in many cases never brought to the notice of the Court.

The other changes were comparatively unimportant, and were all specified in the Statement of Objects and Reasons.

MR. STOKES continued as follows:—

"In conclusion, I wish to repeat the remark which I made on moving for leave to introduce this Bill, namely, that the Government of India in the Financial Department has originated the present legislation. I say this because it is sometimes asserted that the Legislative Department originates projects of law, and is therefore answerable for what persons, ignorant of the legislative requirements of this vast empire, choose to stigmatize as 'over-legislation.' No assertion could be more groundless. No Government measure is ever introduced into this Council except by order of the Secretary of State or at the instance of one or other of the Executive Departments. Take, for example, the eighteen Acts passed during this year. The first was introduced at the instance of the Foreign Department, the third and seventeenth at the instance of the Financial Department, and all the rest at the instance of the Home Department. So long as such assertions were made merely by Indian newspapers, one could afford to treat them with contemptuous silence. But when a periodical like the *Quarterly Review*,* with the influence which in England is always possessed by a combination of respectability, age and dulness, to give point to an attack on the Department over which I have the honour to preside, quotes a document that does not exist, and never has existed,† and declares (with a base insinuation) that, 'so long as the Legislative Department of the Government of India continues to exist, its existence must be justified by its activity,' it is time to put the public in possession of the facts of the

* No. 303, p. 76, in an article on Sir Richard Temple's *India in* 1880.

† A report of a Select Committee describing the Criminal Procedure Code of 1872 as 'bulky and ill-drawn.'

case. The Legislative Department was established in 1869, and the express condition on which it was established was that it should not be, in respect of Government measures, an originating or initiating department, and that its proper function, in respect to such measures, was to clothe with a technical shape projects of law of which the policy had been affirmed elsewhere. That this condition has been substantially fulfilled, so long at least as Sir Henry Maine, Sir Arthur Hobhouse and myself have held the office of Law Member, I can assert with truth, of my own personal knowledge. With the exception of the Bills to repeal obsolete enactments, our projects of law have always been framed and introduced either by desire of the Secretary of State (as in the case of the new Code of Criminal Procedure), or at the instance of the executive departments of the Government of India. And those departments, I would add, have in most cases been moved to legislate by one or other of the Local Governments.

"As to over-legislation, the erroneous ideas prevalent on this subject were exposed, twelve years ago, by Sir Henry Maine in a paper published in the Supplement to the *Gazette of India* for 19th June, 1869. There he points out and proves, first, that next to no legislation originates with the Government of India, secondly, that the great bulk of the legislation of this Council is attributable to its being the local legislature of many Indian Provinces, thirdly, that we seldom meddle with private rights: we only, or almost only, create official duties. Lastly, with unerring tact, he puts his hand on the most important source of legislation—the growing influence of Courts of Justice and of legal practitioners. 'Our Courts,' he writes, 'are becoming more careful of precise rule both at the top and at the bottom. The more careful legal education of the young civilians and of the younger Native judges diffuses the habit of precision from below; the High Courts in the exercise of their powers of supervision are more and more insisting on exactness from above.'

"He goes on to say, in words which I will not attempt to abridge; for notwithstanding all that has been done during the past twelve years, they apply to present circumstances almost as closely as to those that existed when he wrote:—

"'Now the law of India is at present, and probably will long continue to be, in a state which furnishes opportunity for the suggestion of doubts almost without limit. The older written law of India (the Regulations and earlier Acts) is declared in language which, judged by modern requirements, must be called popular. The authoritative Native treatises on law are so vague that, from many of the dicta embodied in them, almost any conclusion can be drawn. More than that, there are, as the Indian Law Commissioners have pointed out, vast gaps and interspaces in the substantive law of India outside the Presidency-towns; there are subjects on which no rules exist, and the rules actually applied by the Courts are taken a

good deal at haphazard, from popular text-books of English law. Such a condition of things is a mine of legal difficulty. The Courts are getting ever more rigid in their demand of legal warrant for the actions of all men, officials included. The lawyers who practise before them are getting more and more astute, and render the difficulty of pointing to such legal warrant day by day greater. And unquestionably the Natives of India, living in the constant presence of Courts and lawyers, are growing every day less disposed to regard an Act or order which they dislike as an unkindly dispensation of Providence, which must be submitted to with all the patience at their command. If British rule is doing nothing else, it is steadily communicating to the Native the consciousness of positive rights, not dependent on opinion or usage, but capable of being actively enforced.

" 'It is not, I think, difficult to see how this state of the law and this condition of the Courts and Bar renders it necessary for the Local Governments, as being responsible for the efficiency of their administration, to press for legislation. The nature of the necessity can best be judged by considering what would be the consequences if there were no legislation, or not enough. A vast variety of points would be unsettled until the highest tribunals had the opportunity of deciding them, and the government of the country would be to a great extent handed over to the High Courts, or to other Courts of Appeal. No Court of Justice, however, can pay other than incidental regard to considerations of expediency, and the result would be that the country would be governed on principles which have no necessary relation to policy or statesmanship. It is the justification of legislation that it settles difficulties as soon as they arise, and settles them upon considerations which a Court of Justice is obliged to leave out of sight.

" 'The consequences of leaving India to be governed by the Courts would, in my judgment, be most disastrous. The bolder sort of official would, I think, go on without regard to legal rules, until something like the deadlock would be reached with which we are about to deal in the Panjáb. But the great majority of administrative officials, whether weaker or less reckless, would observe a caution and hesitation for which the doubtful state of the law could always be pleaded. There would, in fact, be a paralysis of administration throughout the country.'

" The most important of the territories for which we are exclusively the legislature, the territory from which the cry against 'over-legislation' comes with the greatest persistence, is the North-Western Provinces. How many Acts affecting those Provinces and their thirty-two millions were passed last year? Only seven: the Act to confer certain powers on religious societies, which does not apply to Hindús or Muhammadans; the Cantonment Act, which does not affect the bulk of the community; the Act to amend the License Act, a mere taxing measure; the Act (of six lines) to correct a clerical error in the Limitation Act; the Kázís Act, which is merely extendible at the option of the Local Government, and will, when extended, only affect Muhammadans; the Vaccination Act, which applies only to the municipalities to which it may be extended by the Local Government in compliance with the wish of a majority of the Municipal Commissioners, and to the Cantonments to which it may be extended by the

Local Government; and lastly, the Census Act, which has merely a temporary operation. Can this be honestly called 'over-legislation'? When we consider the 'vast gaps and interspaces' in our substantive law which still exist, notwithstanding Sir Henry Maine and the Law Commissioners, should we not rather be accused of under-legislating?

"In truth, my Lord, even if the Legislative Department were, under the Rules for the Conduct of Business, competent to originate projects of law, and even if we were anxious to 'over-legislate,' we have not the time to do so. Our non-legislative functions are growing more and more engrossing. The title of the Legislative Department is now, and has long been, to a large extent a misnomer. It should be 'Judicial and Legislative Department'; for since 1872 not only have all the rules which the Governor General in Council is authorised by many Acts to make or to sanction been sent to us for consideration, but the executive departments of the Government of India have been empowered, by the Rules for the Conduct of Business, to consult us on—

'(*a*) the construction of Statutes, Acts and Regulations;
(*b*) cases involving general legal principles;
(*c*) proposed amendments of the law; and
(*d*) notifications to be issued under any enactment.'

"Of this power the executive departments have largely availed themselves; for during the five years ending with 1880 the average annual number of references (many of them involving questions of much difficulty) made to and answered by the Legislative Department has been 420; and this year the number will be higher, 363 having been made up to yesterday."

The Motion was put and agreed to.

The Hon'ble MR. STOKES also moved that the Bill be published in the local official Gazettes in English and in such other languages as the Local Governments might think fit.

The Motion was put and agreed to.

PANJAB LAWS ACT AMENDMENT BILL.

His Honour the LIEUTENANT-GOVERNOR of the Panjáb introduced the Bill to amend the Panjáb Laws Act, 1872, and moved that it be referred to a Select Committee consisting of the Hon'ble Messrs. Stokes and Thompson and the Mover. He said that in asking for leave to introduce the Bill he had explained the object of it, and he had no wish to add to the remarks then made.

The Motion was put and agreed to.

His Honour the LIEUTENANT-GOVERNOR of the Panjáb also moved that the Bill be published in the *Panjáb Government Gazette* in English and in such other languages as the Local Government might think fit.

The Motion was put and agreed to.

BURMA FORESTS BILL.

The Hon'ble Mr. RIVERS THOMPSON presented the Report of the Select Committee on the Bill to amend the law relating to forests, forest-produce and the duty leviable on timber in British Burma, and moved that the Report be taken into consideration.

The Motion was put and agreed to.

The Hon'ble MR. RIVERS THOMPSON then moved that the Bill as amended be passed. Before this motion was put to the Council he wished to make a few observations upon some of the more prominent points in the Bill which had come under the consideration of the Select Committee. After its introduction the Bill had been referred to the Local Government, and we had received from the Chief Commissioner of British Burma a report which embodied the views of a great many local officers and of the two Conservators of Forests in that province. The whole of the details of the Bill had been very carefully considered and an excellent report submitted. Generally, the Bill, as he had stated before, proceeded on the lines of the Indian Forest Act of 1878, but there were certain particulars in which modifications were necessary to make that law applicable to the particular circumstances of British Burma. In submitting the report of the Select Committee, it would be seen that in a great majority of the points on which local opinion had been expressed, they had adopted the views which the Chief Commissioner, advised by his forest-officers, had submitted for our consideration. But there were one or two important points on which the Select Committee had differed from the Local Government, and perhaps it would be as well to draw the attention of the Council to these, without enlarging upon the verbal and other details by which the original Bill had been amended. In the section relating to definitions, two changes of some consequence had been made: one in the definition of "forest-officer," which now included officers appointed by the Government of India, in addition to those appointed by the Local Government, because Conservators and Assistant Conservators were appointed by the Governor General in Council; and a second alteration, which defined "land at the disposal of Government" to mean—

"(*a*) land in respect of which no person has acquired the status of a landholder under section seven of the Burma Land and Revenue Act, 1876;

"(*b*) land in respect of which no person has acquired any right created by grant or lease made by, or on behalf of, the British Government."

That would cover a great deal of the repetition which occurred in the previous Bill, and was therefore not without its value in the understanding and working of a large measure. Again, one of the principal points to which the Chief Commissioner took exception was with reference to section four of the Bill. That section was as follows:—

"Nothing in the Burma Land and Revenue Act, 1876, shall be deemed to affect or ever to have affected any right by which one person is entitled to remove and appropriate, for his own profit, any part of the soil belonging to another person or to the Government, or anything growing in, or attached to, or subsisting upon, the land of another person or of the Government; and nothing in this Act shall be *deemed* to affect the provisions of sections twenty and twenty-one of the Burma Land and Revenue Act, 1876."

And with reference to this section, the Chief Commissioner said—

"Section four was not in previous drafts of the Bill, nor was it proposed by the Local Administration. Its purport apparently is to declare that the Burma Land and Revenue Act did not override or extinguish easements as defined in the Indian Limitation Act, 1877. So far as is known in Burma, no Court of Justice and no person whatever has ever raised any question that would require to be set at rest in this particular way. If it is intended to safeguard the claims of Karens and others who practise *toungya* cultivation, then the only person against whom such safeguarding is needed is the Government. Now the provisions of the present Bill and the past history of the Government relations with *toungya*-cutters for the last 25 years show that Government has treated the interests of these people with the utmost tenderness and consideration."

Practically that was the effect of the new section. The Chief Commissioner went on to say—

"On the general principles that it is a great pity ever to make a law that is not shown to be needed, and that it is inexpedient to create by legislation vague undefined rights or claims, the scope of which cannot be foreseen, the Chief Commissioner and his officers strongly advise that this section be omitted."

However, in considering the subject, the Select Committee came to the conclusion that it was necessary to retain the section; because, though the Land Revenue Act of British Burma referred to easements as acquired under the Limitation Act of 1871, it did not cover the more extended definition of easements as defined in the later law of 1877, and as it was indisputable that such rights did exist in Burma, and that they were in fact the particular claims to which the attention of Forest-Settlement-officers had to be directed, it was absolutely necessary by this addition to secure that those easements should be saved and the section was simply therefore a declaration of the law as it at present existed.

In section eleven a material addition was made in the Bill, in connection with the claims relating to the practice of *toungya* cultivation, and how they were to be dealt with. The Council were aware that the system of *toungya* cultivation was one which extended to different parts of India. We found it under different names in Bombay, Assam, Bengal and elsewhere, and it was generally acknowledged that it was a very wasteful and destructive system of cultivation. He would best describe it as it was worked in Burma in the words of the Chief Commissioner. He said—

"It may be well to explain here what an ordinary *toungya*-cutter's proceedings are. He cuts down the forest on three to five acres this year, burns the timber and brushwood when dry, sows his rice in the ashes, and reaps it in the cold season. Next spring he will go on to another plot of forest and treat that in the same way. Meanwhile bamboos and underwood grow up on the plot he has abandoned. For a period of seven to fourteen years he takes up new plots of forests, and at the end of that period he may return to his or some of his neighbour's old clearings and begin the process over again; or he may, if the spirit moves him, go off to another valley and cut *toungyas* there, returning after twenty or twenty-five years to his old ground. It has been argued, and it is even now held by some, that the *toungya*-cutter has rights of property in the areas of forest he has cut down in past years and in the land he cultivates each year, just as an ordinary raiyat has in his fallow land and his rice land. The Government of India has repeatedly repudiated this view; and, indeed, the view cannot be accepted if we are to preserve the forest at all in the interests of the general population, present and future. The provisions of the present Bill and the whole history of our dealings with *toungya*-cutters in reserves show that the Government and its officers are scrupulously careful to treat these people tenderly. Paragraphs 118 and 119 of Mr. Brandis' valuable report of 1881 on the Burma Forests enter fully into this matter and give illustrations. But at the same time, while the *toungya*-cutters are treated well, it is most undesirable that doubts should exist whether or not these people have not rights of landholders, or rights of property in the forests they cut down. And, therefore, it is proposed to set these doubts at rest by the additional section now submitted."

And the additional section which he (the Chief Commissioner) proposed declared that the *toungya* practice did not convey any right over the land.

The necessity for such a declaration in the present Bill was not apparent, for it could not be overlooked that in the Land Revenue Act of British Burma there was a provision especially which saved every practice of that kind from giving rights such as it was now wished to protect by a special section in the Bill. Under the twenty-second section of the Land Revenue Act it was expressly provided that no person could acquire, by length of possession or otherwise, any right over lands which had been allotted by the rules framed under section 21 to tribes or families practising *toungya* cultivation.

It would therefore be mere surplusage to add to the present Bill any section merely expressive of such a declaration, and the Select Committee had decided

not to include it. However they recognized, as the Chief Commissioner and any one acquainted with British Burma would recognize, the valuable assistance which those *toungya*-cutters afforded to Forest-officers in a great many matters; and, therefore, section eleven provided for the complete investigation of all claims relating to this method of cultivation in land which was to constitute a reserved forest, and enabled the Forest-Settlement-officers to prescribe the limits within which the practice might be carried on and continued.

MR. RIVERS THOMPSON would also draw attention to Chapter III of the Bill, which was a new one, and related to the constitution of village-forests. There were at present no village-forests in Burma, but it was thought desirable that Government should take the power of assigning certain areas of its own in the neighbourhood of villages for the use of their inhabitants, under the condition that teak or other specially reserved trees should remain the property of Government. The establishment of such forests would be a great boon to the people; and it had been found by experience that it was quite possible in Burma to combine the protection and good management of a teak-producing forest with a free user of bamboos or other woods required by the people for all domestic purposes.

The chapter to which he now alluded would give the Chief Commissioner the power of constituting such village-forests and regulating the use of them.

Referring to Chapter IV of the Bill, the Chief Commissioner proposed to maintain the ancient and universally recognized right of the State to all teak trees, wherever situate, for a period of five years, that is, for such time as would enable the Government to utilize the valuable trees, after which he considered the right might be conveniently abandoned. At the same time he thought that all teak trees situated in land at the disposal of Government within the meaning of the definition should always be reserved. As the Government rights in the teak tree as a royal tree are recognized in Burma, even when the tree stands on land the property of a private person, the Select Committee had agreed that these rights should be provided for in the Bill, and we have therefore, in section 35, declared all such trees to be the property of Government. It was thought, however, that, instead of declaring, as proposed, that teak trees standing on land not at the disposal of Government should be abandoned at the close of a fixed period of five years, it would be advisable to give the Chief Commissioner power to declare that such trees shall cease to be the property of Government and to be reserved trees. If it were enacted that the teak trees should cease to be the property of Government at the end of five years, the Conservator would probably be compelled to sell

a great number of them at one time, and, perhaps, at a time when the price of teak timber was low. It seemed unnecessary to incur the risk of a loss of Government property. The Bill as drawn under clause (*c*), section 35, confers upon the Chief Commissioner ample power to deal with the matter as the circumstances in each case might require.

He did not think he had any other observations to make with reference to the Bill. The subject had been under consideration by the Local Government for several years, and since its return to us here had been carefully reviewed both by Mr. Brandis and Mr. Baden-Powell, and in all its details had been thoroughly scrutinized by the Legislative Department.

The Motion was put and agreed to.

SINDH INCUMBERED ESTATES BILL.

The Hon'ble MR. GIBBS presented the Report of the Select Committee on the Bill to amend the Sindh Incumbered Estates Act, 1876.

BROACH AND KAIRA INCUMBERED ESTATES BILL.

The Hon'ble MR. GIBBS presented the Report of the Select Committee on the Bill to amend the Broach and Kaira Incumbered Estates Act, 1877.

The Council adjourned to Wednesday, the 7th September, 1881.

R. J. CROSTHWAITE,

SIMLA;
The 31st August, 1881.

Officiating Secretary to the Government of India,
Legislative Department.

Govt. Central Branch Press, Simla.—No. 329 L. D.—8-9-81.—270.