Thursday,
16th March, 1882

ABSTRACT OF THE PROCEEDINGS

OF THE

Council of the Governor General of India,

LAWS AND REGULATIONS

Vol. XXI

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ASSEMBLED FOR THE PURPOSE OF MAKING

LAWS AND REGULATIONS.

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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 Thursday, the 16th March, 1882.

PRESENT:

His Excellency the Viceroy and Governor General of India, K.C., G.M.S.I., G.M.I.E., *presiding*.
His Honour the Lieutenant-Governor of Bengal, K.C.S.I.
His Excellency the Commander-in-Chief, 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 Mahárájá Jotíndra Mohan Tagore, C.S.I.
The Hon'ble L. Forbes.
The Hon'ble G. H. P. Evans.
The Hon'ble C. H. T. Crosthwaite.
The Hon'ble A. B. Inglis.
The Hon'ble Rájá Siva Prasád, C.S.I.
The Hon'ble W. W. Hunter, C.I.E., LL.D.
The Hon'ble Sayyad Ahmad Khán Bahádur, C.S.I.
The Hon'ble Durgá Charan Láhá.
The Hon'ble H. J. Reynolds.

PAPER CURRENCY ACT AMENDMENT BILL.

The Hon'ble MR. STOKES moved that the Bill to amend the Indian Paper Currency, Act, 1871, as amended, be passed. He said that he made this Motion as a mere matter of form, not with the expectation of the Bill being passed, but in order to give his hon'ble friend Major Baring an opportunity of making a statement with regard to the conversion of bullion into rupees.

Major the Hon'ble E. BARING said that on the last occasion when this Bill was under the consideration of the Council, his hon'ble friend Mr. Inglis raised certain objections to the measure, and the result of the objections was that the further consideration of the Bill was postponed for a fortnight. In the interval which had elapsed since the Bill came under consideration, he had been in communication with his hon'ble friend, and his friend, on his part, had been in

communication with the Banks and importers of bullion, who were mainly interested in the proposed change of the law. He was now, therefore, in a position to state the course which the Government proposed to adopt on the subject,—a course which the Government could readily accept, and which, he hoped, would be acceptable to his hon'ble friend and those whom he represented. The special objection which was raised by his hon'ble friend was this, that, whereas under the existing practice importers of bullion were able to obtain coined rupees for their specie immediately after delivery of the Assay Master's certificate, under the Bill, if it was passed into law, they would have to wait for their rupees until such time as their bullion had been converted into rupees at the Mint. He would not on the present occasion enter into all the arguments for or against this amendment of the law, because he was about to propose that the further consideration of the Bill be postponed. He might, however, say that some of the arguments which he had heard raised against the amendment of the law were of a nature which he did not think it would be possible to uphold. On the other hand, he admitted that the matter required further consideration. The Government would always hesitate very much to ask the Council to pass any measure into law unless those who were interested in the change which it was proposed to make had had a very full opportunity to express their views, and thus of having them fully considered by the Executive Government. And this observation held specially good in respect to currency matters, for currency questions were very difficult and very complicated, and it might be possible that many members of this Council had not had their attention specially directed to them. He should, therefore, hesitate very much to ask the Council to pass any amendment which affected the currency law, until those who were mainly interested in the change had had every opportunity of stating their views on the subject. He might mention that his hon'ble friend Mr. Inglis had himself stated that he had not given any special attention to the subject, but he thought that the ability with which his hon'ble friend represented the views of the mercantile community clearly showed that their case did not lose anything by being placed in his hands. He was, therefore, on behalf of the Government, quite prepared to postpone the further consideration of the measure for the present. His hon'ble friend had given him to understand that the Banks and importers of bullion, who were mainly interested in the question, would like to have time to consult their friends in England. That, MAJOR BARING thought, was a reasonable request, and he was prepared, on behalf of the Government, to say that they would not consider the question executively until the 15th of June, by which time he hoped they would have the advantage of having placed before them the views of those whom his hon'ble friend represented. By that date the Government hoped to reconsider the matter, and possi-

bly some communication with the Secretary of State might be necessary; for, as he had explained before, the amendment of the law was introduced at the instance of the late Secretary of State, Lord Cranbrook. In agreeing, however, to a postponement of the measure, he wished to make two qualifications. It had to be borne in mind that the original scope of the measure first introduced was merely to provide for a circle of issue in British Burma. In respect to that portion of the Bill, no objection whatever had been raised, and there were also one or two very minor amendments in the currency law to which no objections had been taken. There would be no practical objection to postponing the measure so far as the establishment of a circle of issue in Burma was concerned, because the Bank of England had not yet furnished the notes for Burma, and, even if the Bill were passed into law to-day, the Government would not be able to constitute a circle of issue at Rangoon for some months to come. He thought that the interests of the mercantile community of Burma would be met if they had these notes by the cold season. Although it would be objectionable to pass the Bill as it stood with the proposal to which his hon'ble friend objected at Simla, and although he was prepared, on behalf of the Government, to say that that would not be done, and that the passing of the Bill would be postponed till the Council re-united in Calcutta, he did not think there would be any objection, if necessity should arise, to passing at Simla the Bill without the provision relating to the conversion of bullion into currency; that was to say, the clauses relating to the establishment of a circle of issue in Burma and the other minor amendments to which he had alluded. He would be glad if his hon'ble friend would take the opportunity of stating his opinion upon this branch of the subject in the course of the discussion. There was one other qualification which he had to make in agreeing to a postponement, and in regard to which he would make a few observations. Under the existing Act of 1871, the Government had the power, by a notification in the Gazette, to interpose a period of time between the delivery of the Assay Master's certificate and the handing over of coined rupees to the person who held that certificate. That provision of the law had never yet been acted upon, because no occasion had hitherto arisen which necessitated its being put into practice, and he had no reason for supposing that any such occasion would arise in the course of the year. At the same time, he wished to say that, in agreeing to the postponement of the Bill, it must be clearly understood that, should occasion arise, and should it be found that the currency reserve consisted, to an undesirable extent, of bullion and to a less extent than was quite safe of coined rupees, then the Government would not hesitate to act on the power, which at present existed, and interpose a period of time between the delivery of the certificate and the handing over of coined rupees for imported bullion.

With these observations he proposed that the further consideration of this Bill be postponed.

The Hon'ble MR. INGLIS said that, on the part of the Banks and other importers of bullion, he had to thank the Government for consenting to postpone the consideration, until the Council next met in Calcutta, of that portion of the Indian Paper Currency Act which proposed to effect a change in the issue of Mint certificates. This would give the parties affected by the change ample time to present their views, and he trusted they would be able to adduce good reasons why it should not be made. There could be no possible objection to passing the other portions of the Bill at Simla if it was found to be necessary to deal, during the summer, with the question of extending the paper-currency to Burma and those other minor points to which no one objected.

Since this subject was last before the Council, he had ascertained somewhat more fully the views of the importers of bullion, and they were anxious it should be known that they had no wish to base their objections to the Government proposal on merely selfish grounds. If it could be fairly said that, by the present method, they gained at the public expense, they would have nothing to urge against the change. They urged, however, that in ordinary times it could make no difference to the Currency Department whether an importer of bullion who had obtained a Mint certificate was paid the value of that certificate immediately, or after a longer or shorter interval. The Currency Department derived no interest from the supplies of notes and coin lying idle in their hands. These were so much dead-stock, as it were; and, if importers of bullion could be accommodated by receiving its value from the Currency Department before it was coined, without any loss to the public revenues, it could not be said that any special favour was being shown them. In times of pressure, when the supplies of coin at the disposal of the Currency Department did not permit of this accommodation being given, importers of bullion could not object to Government making use of the power they now had, under section 14 of the present Act, to name an interval sufficient to admit of their bullion being coined, after which their Mint certificates would be cashed.

Another point was this, that in India importers of bullion paid a Mint charge of Rs. 2-15 per cent. for conversion of their bullion into coin. In England, no such charge was made. Any one who tendered £10,000 or upwards in gold bullion to the Mint, might have it converted into coin absolutely free of expense. MR. INGLIS was not able to say how the cost of the English Mint was met, but he believed it was from profits derived from the coinage of the silver and copper currency. At all events, the fact, he believed, was not disputed that, while here

the charge for coinage paid by importers of bullion was relied upon to pay for the cost of keeping up the Mints, in England the Mint was kept up virtually at the public cost. This was a strong reason why no additional charge should in this country be thrown upon importers of bullion.

This led him to make just one other remark. Was it desirable on the part of Government to do anything which would have the effect of discouraging imports of bullion? The issue of deferred Mint certificates as the rule, and not the exception, would undoubtedly have this effect. It would probably, in the first instance, raise the price of the Secretary of State's bills relatively to silver; but, as in the long run the price of Council bills was determined by the price of silver, anything that would tend to depress that price would re-act on Council bills.

The Hon'ble MR. STOKES then asked leave to withdraw the Motion.

Leave was granted.

CIVIL PROCEDURE CODE AMENDMENT BILL.

The Hon'ble MR. STOKES also moved that the Report of the Select Committee on the Bill to amend the Code of Civil Procedure be taken into consideration. He said that the Committee approved of all the amendments which the Bill, as introduced, proposed to effect, and had made some ten further amendments, which he would shortly describe to the Council.

First, they had, at the suggestion of the High Court, North-Western Provinces, amended sections 80 and 81 of the Code so as to provide for annexing, as well as endorsing, returns of service. Such returns were, in the North-Western Provinces and, possibly, elsewhere, prepared on printed forms and annexed to the original summons, and by this expedient much clerical labour was saved, as it was only necessary to fill up the blanks left in the forms.

Secondly, at the suggestion of the same High Court, and also of the Bombay Government, they had added to section 95 of the Code a proviso enabling the Local Government, with the previous sanction of the Government of India, to remit postage and registering fees chargeable under the Code, or to prescribe a scale of court-fees to be levied in lieu thereof.

In section 266, clause (*g*), they had, at the suggestion of the Chief Commissioner of Assam, expressly exempted from attachment gratuities to pensioners of Government, and they had altered clause (*h*) of the same section so as to exempt the salary of a public officer or railway-servant when it did not exceed Rs. 20. Whatever sums over Rs. 20 might become liable to attachment of half, at least Rs. 10 would thus be left in the hands of such officers and servants. Two at least of the Local Governments were in favour of this change.

In section 289, they had made a small verbal amendment, so as to make it clear that the copy of the proclamation of an execution-sale should not be fixed up in the court-house until after the proclamation had been made where the property to be sold was attached. Mr. Justice Prinsep had represented that this change was needed to prevent the practice of first fixing up the copy in the court-house, the consequence of which was, as the date of sale depended on the date of so fixing up the copy, that full time was not given to persons living near to the property to be sold.

To section 337 they had added some words to show how, in the case of a surety, the security furnished under that section might be realised.

In the chapter on insolvency, they had made two slight amendments: in section 347 they had, at the suggestion of the Local Government and High Court of the North-Western Provinces, enabled the Court, where the applicant was a pauper judgment-debtor, to exempt him from any payments under that section; and to section 351 they had added a clause requiring the Court, if not satisfied as to the propriety of the judgment-debtor's conduct, to make an order rejecting his application: the effect of this would be to render such orders appealable—a matter as to which there had been contradictory decisions (Indian Law Reports, 5 Calc. 719; 6 Calc. 168).

Section 368 empowered the plaintiff, in certain cases where the defendant, or one of several defendants, died, to apply to the Court and get the representative of the deceased made defendant in his stead, and declared that "when the plaintiff fails to make such application within the period prescribed therefor, the suit shall abate." This had been found to cause hardship, and the Committee had therefore added the words "unless he satisfies the Court that he had sufficient cause for not making the application within such period."

Doubts having been raised by the learned Advocate General of Bengal and the Judges of the Calcutta Court of Small Causes as to the precise position of a Commissioner under section 309, the Committee had declared that, for the purposes of that section, he should be deemed to be a Civil Court.

At the suggestion of Mr. Sayyad Mahmud, they had modified section 582 so as to render Chapter XXI completely applicable to proceedings arising out of the death, marriage or insolvency of parties to an appeal. This would preclude a doubt which had recently arisen in the High Court at Fort William, as to whether, when an appellant died, and his representative failed to apply to be substituted, and the appeal abated, the Court could award costs to the respondent as against the appellant's representatives.

In section 642, they had made a verbal change to show that judicial officers, &c., were, under the circumstances there mentioned, exempt from arrest under process issued by Revenue Courts, and they had modified section 651 so as to provide, in accordance with a decision of Mr. Justice Straight, for resisting apprehension under the warrants of such Courts.

They had also made some slight amendments in a few of the forms contained in schedule IV.

As the Code had already been amended, they thought that the convenience of the Courts, the Bar and the public required that Act X of 1877 and its amending Act (XII of 1879) should be repealed and re-enacted with the amendments made by the Bill and those described in their report. The present order and numbering of sections and chapters would be preserved, so that no one, except perhaps the proprietors of unsold editions of the Code, would complain of the proposed re-enactment.

The Motion was put and agreed to.

The Hon'ble MR. EVANS moved that, in section thirteen, for paragraph one of the same Bill, the following be substituted, namely:—

> "No Court shall try any suit or issue in which the matter directly and substantially in issue
>
> has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and
>
> has been heard and finally decided by such Court."

He said that he had to move an amendment in section 13. This section was generally known under the name of the *res judicata* section. The necessity for the amendment which he proposed arose in this way. The broad principle of *res judicata*, he believed, no one disputed; it was a most useful and necessary principle and rested upon abundant foundation. It rested upon the broad principle that, when a man had once obtained the decision of the tribunal to which the State had committed the adjudication of such questions, the other party to the suit should have no power to harass him further by a fresh suit upon the same subject-matter. It also rested upon another broad principle, that it was desirable to have finality in litigation. Otherwise there would be perpetual uncertainty of title and uncertainty of property. The want of such finality would depreciate the value of property. There

was therefore no desire on MR. EVANS' part, or on the part of anybody, to diminish in any way the operation of this just principle. This principle was one of substantive law and of universal application, and did not derive its force from any Procedure Code. But it had always been thought desirable that the Procedure Code should contain a section positively barring the institution of a second suit on the same subject-matter. It had also been thought wise to have a further provision to the effect that, if in any suit any issue or point be properly raised, it should not be raised again in any other suit between the same parties, although such suit might be in regard to a different subject-matter. This broad principle was subject to the limitation that the decision sought to be used in bar of a subsequent suit or trial should be that of a competent Court. But the question was, what was the meaning in section 13 of the term "competent Court?" Did it mean a Court of jurisdiction competent to try the subsequent suit or of jurisdiction competent to try the former suit? That was to say, must the Court whose decision was used in bar be of concurrent jurisdiction with the Court which was to be barred by the decision, or might it be an inferior Court?

The case of Courts of exclusive jurisdiction was sufficiently provided for by the substantive law and the Evidence Act, and need not be mentioned in the Procedure Code.

This question had assumed a very great practical importance on this account. Rent-suits in Bengal had been transferred from the Revenue Courts, which had no power to determine questions of title, to the Munsifs' Courts,—Courts which were Courts of general jurisdiction, but limited in extent. What happened frequently in a rent-suit was this: Every zamíndár was obliged to give general authority to his local agents to bring suits for rent without special reference to him, and these men had to exercise their own discretion in the institution and conduct of such suits. There was, however, a provision of the rent law under which a claimant might dispute the right of the plaintiff to demand rent from the tenant, on the ground that he, the claimant, was the proprietor of the land and not the plaintiff. Then the Munsif had to decide, for the purposes of that suit, which might be a suit for Rs. 5 on account of rent, who was the party who was entitled to get that rent; and, on the scanty materials before him in the petty case, this badly-paid, and possibly unlearned, Munsif, with the aid of such argument as might be addressed to him by the class of vakíls practising in such Courts, gave the best decision he could.

But the question on which the right to that paltry sum depended might involve the title to vast zamíndárís with thousands of tenants.

If on a subsequent occasion the claimant, who had been successful in the Rs. 5 case, instituted a suit to eject the zamíndár from the possession of these vast zamíndárís—a suit possibly valued at 20 lakhs of rupees—was the existence of the Munsif's decree in the rent-suit to be a bar to the trial of the important question of title by the superior Courts?

Was the superior Court to refuse to hear the zamíndár and to eject him on production of the Munsif's decision, although that decision might be clearly wrong?

Was the zamíndár to lose his zamíndárí without power to bring his case before the High Court and the Privy Council? This grave question depended on the meaning of the words "competent Court" in the Act. It had been decided that the true construction of these words was one which made the Munsif's decision conclusive. This was not a satisfactory state of things.

How was a man to advance money upon the security of land under such a state of things?

How were counsel to advise on the soundness of a title when all the care might be defeated by the production of a rent-decree for Rs. 5 from some obscure local Court of the lowest grade?

This evil was felt in 1879; the question was then agitated; it was agreed by the Select Committee on Act XII of 1879, of which MR. EVANS and his learned friend the Advocate-General were members, that some amendment of this sort was necessary. The amending Bill was, however, passed at Simla, and for some reason the amendment was not introduced into the Act. His learned friend the Law Member could perhaps explain how it had happened. This was an amendment which was called for, it being necessary to define what was a Court of competent jurisdiction.

On the question of the necessity of defining the terms "competent Court," MR. EVANS referred to a case in which Mr. Justice White said that he would have interpreted the words in the sense given to them by the amendment if he had not been obliged to follow decided cases, in which the other interpretation had been given to the words.

That was followed by a more recent decision in a case involving over a lákh of rupees, which confirmed the interpretation already put by the Courts, and in which the Judges held themselves bound by a Munsif's decision in a rent-suit, though they were of opinion it was a wrong decision.

He had said enough to show the necessity for the amendment, and he believed it to be an amendment which would be approved of alike by the Bench, the Bar and the suitors. But it had been suggested to him that the section, as amended, did not cover the whole ground covered by the principle of *res judicata*. It had been pointed out that the section, as amended, did not compel a Court, which had no jurisdiction finally to decide certain questions, to follow the decision of Courts which had exclusive jurisdiction to decide such matters. But he thought it did not require any section in a Procedure Code to secure the result. The rules laid down in *Duchess of Kingston's case*, and declared by the Privy Council to be applicable to India, covered the whole ground.

The section, as amended, would be useful and salutary, if not exhaustive. He thought it better to have an useful section which was not exhaustive, than to work inconvenience and practical evil in straining to include every thing.

The Hon'ble MR. STOKES said that he cordially supported the amendment of his hon'ble and learned friend, one of the few members of their profession who had aided him in the arduous task of codification. It would render the intention of the Legislature clearer as to the issues meant in section 13 of the Code, though he was not so sanguine as to believe that it would render it impossible for the Courts in future to misconstrue the clause in question. In England, the rule was that absurdity and inconvenience were to be avoided when the language of a Statute admitted of another meaning, and in India this rule had been followed by Mr. Justice White in construing section 13, although that learned judge had been compelled to submit to former decisions. Here, however, it was hardly too much to say that some Judges (he was happy to say, they were but few) were inclined to decide as if the rule was exactly the reverse—as if, in other words, the presumption was that the Legislature intended an absurd and mischievous, rather than a reasonable and wholesome, enactment. This unfortunate tendency was, probably, like most other juristic phenomena, capable of an historical explanation; but however that might be, it rendered the task of the draftsman of Indian Acts so difficult as to be almost impracticable, and it furnished a complete justification for the code of rules of construction which the late Indian Law Commission had recommended, and which it was to be hoped that MR. STOKES' able and accomplished successor would frame and pass during his term of office.

The Motion was put and agreed to.

The Hon'ble MR. STOKES moved that the Bill, as amended, be passed.

The Motion was put and agreed to.

PRESIDENCY SMALL CAUSE COURTS BILL.

The Hon'ble MR. STOKES also moved that the final Report of the Select Committee on the Bill to consolidate and amend the law relating to the Courts of Small Causes established in the Presidency-towns be taken into consideration. He said that the Select Committee had amended section 23 (extending portions of the Code of Civil Procedure) of the Bill as referred back to them, and thus made the same procedure applicable to all cases before the Small Cause Courts.

In section 31 of the Bill (prescribing the cases in which the Court might suspend execution of decree), the Committee had by a slight alteration made it clear that the Small Cause Court had power to discharge from imprisonment a judgment-debtor who was unable from poverty to pay the amount of the decree against him.

In deference to the opinion of the mercantile community and what MR. STOKES for one considered the just claims of the pleaders, the Committee had omitted section 90, which declared what persons were entitled to appear, plead or act in a suit or proceeding in the Small Cause Court, and had thus left that matter to be provided for by rules to be made under section six of the Legal Practitioners Act, 1879.

They had postponed the commencement of the Bill to the 1st of July next, and, so as to give full time for settling the new rules of procedure, they had made some minor amendments in the Bill, most of which had been suggested by Mr. MacEwen, one of the Judges of the Calcutta Court of Small Causes, to whom he (MR. STOKES) desired to express his obligations. They recommended that the Bill be passed as now amended.

The Motion was put and agreed to.

The Hon'ble MR. STOKES also moved that section twenty-four of the same Bill be omitted and the section-numbers and cross-references in the Bill be altered accordingly. The section in effect provided that certain decisions of the Small Cause Court should not operate as *res judicatæ* in the High Court. The Council having adopted the amendment of section 13 of the Code of Civil Procedure, brought forward by his hon'ble and learned friend Mr. Evans, section 24 of the Bill became unnecessary.

The Hon'ble MR. HUNTER said that he desired to allude for a moment to one section of this Bill. The pleaders of the Small Cause Court believed that section 90 of the Bill, as it was originally printed, would interfere with their practice and damage their professional prospects. He wished to acknowledge

the ready courtesy with which his hon'ble friend the Law Member received the representations which he made on their behalf. The clause objected to had been removed by the Select Committee on its further consideration of the Bill; and he had much pleasure in voting for the Bill as it now stood.

The Hon'ble MR. INGLIS said that he wished to express his acknowledgments to the Select Committee for the improvements they had effected in the Bill since it was last before the Council. He was glad Government had conceded the points asked for in the memorial from merchants and others. As regarded the point raised by Mr. Evans in the Select Committee's report, he desired to express his agreement with Mr. Evans' view that it would be decidedly preferable to give defendants a carefully guarded power to apply for a transfer of their cases before trial to the High Court, rather than allow them to apply for a rehearing by the High Court after trial in the Small Cause Court. The provisions as to rehearing, embodied in sections 39 to 41 of the Bill, took away the character of finality, so much prized, which at present attached to all Small Cause Court decisions. This was, MR. INGLIS thought, very unfortunate, and he doubted very much if they would work well in practice. At the request of the hon'ble member in charge of the Bill, he consulted the Committees of the Chamber of Commerce and the Trades Association regarding these sections, and was sorry to find that the two bodies differed regarding them. The Committee of the Chamber of Commerce were of opinion that they should be omitted from the Bill. The Trades Association, on the other hand, were in favour of retaining them. In these circumstances, as the hon'ble the Law Member had decided to retain the sections in the Bill, he was not prepared to move their omission, as he would have done had the parties chiefly concerned been unanimous. His own opinion was they were a mistake, and that they would, by and by, have to be repealed.

The Hon'ble MR. EVANS said he wished to explain shortly why it was that his dissent appeared in the report of the Select Committee as regarded the rehearing sections. The question arose in this way. When it was proposed that the jurisdiction of the Small Cause Courts should be extended to Rs. 2,000, it was ascertained that the public, whose voice was the only voice of importance in a measure of this kind, desired to have a short, cheap and speedy means of recovering trade and mercantile debts up to Rs. 2,000; and it was agreed, after enquiry, that this might be granted. But the question arose whether, as regards suits between Rs. 1,000 and Rs. 2,000, there should not be some safeguard, some means by which questions of complexity and difficulty, which very often arose in cases of that amount, and which could not be very satisfactorily decided in the Small Cause Courts, should in some way be

brought before the High Court for determination. There were cases in which the full machinery of the High Court, for forcing one party to discover to the other what documents he had relating to the case by allowing an inspection of books, &c., was of great advantage. This was a power which the Small Cause Courts did not possess. Two courses were proposed. One was what MR. EVANS had proposed, and what he had persistently advocated. It was allowed by section 22 that the plaintiff might elect the Court in which he wished to proceed, and might sue his defendant either in the Small Cause Court or in the High Court as he pleased, subject to this condition, that, if he brought his suit in the High Court, and if he succeeded in his suit, he should lose his costs, unless a Judge of the High Court certified that the case was a fit case to be tried in the High Court.

From this it appeared that the Act itself recognized the fact that there were some classes of cases which were fit to be brought in the High Court, and that meant that the procedure of the Small Cause Court was unfit for the adjudication of such cases. In such cases the plaintiff, notwithstanding that he sued in the High Court instead of in the Small Cause Court, would get his costs. It appeared to MR. EVANS that the complement to that section was to enact a somewhat similar provision with regard to defendants. As, however, a defendant, when sued for money, was generally anxious to obtain as much delay as he possibly could, MR. EVANS proposed to tie him down more strictly, and to enact that a defendant should be at liberty to make an application to have the case transferred from the Small Cause Court to the High Court, upon a full affidavit of the facts and particulars of his defence, which would enable the High Court to judge whether it was a fit case for removal. The other party would have the opportunity of putting in a counter-affidavit, and of being heard in opposition; and, if the Judge to whom the application was made thought that it was a fit case, he should have the power of directing the transfer of the case from the Small Cause Court to the High Court. Further, such transfer being ordered, the Judge would be empowered to impose such terms on the defendant, as regarded the deposit of security and the like, as he thought fit. Provisions of a somewhat similar kind would be found in the distress-sections of this Act. That, MR. EVANS thought, would be sufficient to bring before the High Court all cases of real complexity, leaving the same finality to attach to the decisions of the Small Cause Court, in suits between Rs. 1,000 and Rs. 2,000, as at present existed in the case of suits under Rs. 1,000.

The other course was one which was to be found in sections 39—41, and it was a procedure of a singular character. As the law at present stood, it was possible to get the Judge of the Small Cause Court to refer a point of law

to the High Court. That was a simple thing. Then, where there had been a mis-trial, or the decision was unsatisfactory to either party, there was a provision enabling either party to apply for an order for the rehearing of the case by the Small Cause Court. On such application, the Judge who originally tried the case sat with another Judge to decide whether or not there had been a miscarriage of justice; and the necessity for the presence of the Judge who tried the case arose from the fact that the evidence of witnesses was not reduced to writing in the Small Cause Courts. It was, therefore, essential that the Judge who heard the case should be sitting there, in order to correct any mistaken view of the evidence which the pleaders, through their zeal for their clients, might seek to impress upon the Court. Each pleader would most naturally think that the evidence of his witnesses ought to be believed, and he tried to impress upon the Court the nature of that evidence. But, if the Judge before whom the case was first heard was present on the application for a re-trial, he would be in a position to correct the pleaders as to the facts which were really established in evidence. The new remedy was that an application might be made *ex parte* before a Judge of the High Court, by affidavits, in which the applicant might swear to a state of facts of which the High Court Judge was perfectly ignorant, and the Judge would have nothing before him but the *ex parte* statements of the applicant; and, with the exception of allowing a margin for the overstatement of evidence, which every prudent Judge would probably do, the Judge would have no possible means of saying whether the facts stated in the affidavits were correct or not. If, on hearing these affidavits, the High Court was of opinion that there had been a miscarriage of justice, or that for any other reason it was a case fit to be re-heard, then the case would be brought before the High Court, and then tried afresh.

MR. EVANS held the same views on this subject as had been expressed by his hon'ble friend Mr. Inglis; and those views were shared by the Judges of the Small Cause Court and, he believed, by the Local Government.

But the rehearing clauses of the Bill had been drawn by his learned friend Mr. Pitt-Kennedy, and approved of by the Select Committee and the Executive Government. Under these circumstances, MR. EVANS had asked his hon'ble friend Mr. Inglis to consult his friends amongst the mercantile and trading communities, in order to ascertain their wishes in the matter, and he found that the members of those communities were split up into two sections. The Chamber of Commerce agreed with the view held by MR. EVANS, but the members of the Trades Association preferred the sections which had been introduced into the Bill.

Having regard to the present stage of the proceedings, if any motion which MR. EVANS brought forward was successful, it would, he found, have the effect of stopping the immediate passing of the Bill, and he was not disposed to take any course which might have that effect; because he understood that the members of the mercantile and trading communities considered it very desirable that the Bill should be passed without further delay. Bearing also in mind that, if experience showed that these sections in the Bill worked badly, the Act could easily be amended by their omission, or the substitution of such provisions as he had suggested, he thought it would not be his duty at this late stage of the proceedings to move any amendment.

The Hon'ble MR. STOKES said that he agreed in much that had been said by his hon'ble and learned friend Mr. Evans with regard to the provisions as to re-hearing in the High Court. Those provisions were no children of his. They were framed by his learned friend Mr. Pitt-Kennedy, on the model of certain rules enacted by the 14 & 15 Vic., c. 57, for the Irish Civil Bill Courts, and they were intended to provide, in cases of suits for more than Rs. 1,000, where there had been a failure of justice, a substitute for an appeal, without entailing the necessity of any elaborate record of evidence being kept by the Court below. They had received the approval of the Advocate General of Bengal, who was, in 1881, a member of the Select Committee. Still there was no doubt that they did away, in an important class of cases, with the finality which should characterise the decisions of a Small Cause Court, and they were probably open to other objections. If, then, his hon'ble friend Mr. Evans had moved to omit them, MR. STOKES should certainly have supported the motion. But the amendment which his hon'ble friend suggested practically amounted to giving to the High Courts a concurrent jurisdiction in suits in which the value of the subject-matter was Rs. 1,000 to Rs. 2,000; and the principal object of this Bill was to withdraw cases of this sort from the ordinary original civil jurisdiction of the High Court, and thus to relieve it from a mass of work which could (it was thought) be efficiently performed by a less expensive tribunal. Moreover, there was much force in the remark of the Calcutta Trades Association that his hon'ble friend's proposal, if adopted, "would be placing a weapon in the hands of defendants to protract proceedings merely for purposes of vexation and needless expense to plaintiffs." For these reasons, if his hon'ble friend's proposal had been put as an amendment, he should have felt bound to oppose it. He ventured to think that, under the circumstances, considering that the provisions in question were approved not only by the Calcutta Trades Association, but also—if one might argue from the absence of objection—by the mercantile community in Madras and Bombay, the Council would do well

to let these provisions become law. After a year's experience, if they were found to work ill, they could be repealed without affecting in the least the rest of the measure.

His Excellency THE PRESIDENT said:—"I think that the course which it is proposed to take with regard to this Bill is the best.

"The mercantile community, being really the persons chiefly interested in the measure, appear to be divided on the subject, and, as I understand it, the majority are in favour of trying these sections. Let them, therefore, be tried. As far as my own opinion goes, I am inclined to agree with my hon'ble friend Mr. Inglis; but it would perhaps, on the whole, be wiser to let this system be tried; and, if it be found not to work well, there will be no difficulty in repealing it, as suggested by my hon'ble friend Mr. Evans."

The Motion was put and agreed to.

The Hon'ble MR. STOKES then moved that in Schedule II, opposite "Chapter X," the entry should stand as follows:—

> "Sending for records, and production, &c., of documents, sections 137 (except paragraph 2), 138, 140 (except the proviso and the last six words), 141 (except the third sentence), 142, 143 and 145."

The object was merely to correct an error in this schedule, due to an oversight of the Committee, for which he, as Chairman, was chiefly responsible.

The Motion was put and agreed to.

The Hon'ble MR. STOKES then moved that the Bill, as amended, be passed. It would replace no less than five Acts and four other less important enactments, and it was the last, but not the least important, of the series of measures of consolidation (as distinguished from codification) which he had had the honour of bringing before this Council.

The Motion was put and agreed to.

JHÁNSÍ INCUMBERED ESTATES BILL.

The Hon'ble MR. CROSTHWAITE presented the further Report of the Select Committee on the Bill to provide for the relief of Encumbered Estates in the Jhánsí Division of the North-Western Provinces.

CENTRAL PROVINCES TENANCY BILL.

The Hon'ble MR. CROSTHWAITE also presented the Report of the Select Committee on the Bill to consolidate and amend the law relating to Agricultural Tenancies in the Central Provinces.

BRITISH BURMA PILOTS BILL.

The Hon'ble MR. STOKES introduced the Bill to provide for the grant of licenses to Pilots in British Burma, and for investigating certain charges against them, and moved that it be referred to a Select Committee consisting of the Hon'ble Messrs. Thompson and Crosthwaite and the Mover. He had already sufficiently explained the object and nature of the Bill.

The Motion was put and agreed to.

The Hon'ble MR. STOKES then moved that the Bill and Statement of Objects and Reasons be published in the *British Burma Gazette* in English and in such other languages as the Local Government might think fit.

The Motion was put and agreed to.

The Council then adjourned *sine die*.

CALCUTTA;
The 16th March, 1882.

R. J. CROSTHWAITE,
Offg. Secy. to the Govt. of India,
Legislative Department.

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