Friday,
25th March, 1892

ABSTRACT OF THE PROCEEDINGS

OF THE

Council of the Governor General of India,

LAWS AND REGULATIONS

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THE COUNCIL OF THE GOVERNOR GENERAL OF INDIA,

ASSEMBLED FOR THE PURPOSE OF MAKING

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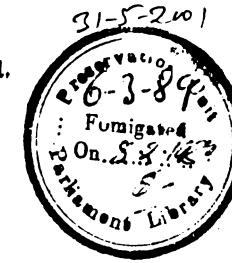

CALCUTTA
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1893

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 Vict., cap. 67.

The Council met at Government House on Friday, the 25th March, 1892.

PRESENT:

His Excellency the Viceroy and Governor General of India, G.C.M.G., G.M.S.I., G.M.I.E., *presiding*.
His Honour the Lieutenant-Governor of Bengal, K.C.S.I.
The Hon'ble Sir P. P. Hutchins, K.C.S.I.
The Hon'ble Sir A. E. Miller, Kt., Q.C.
The Hon'ble G. H. P. Evans.
The Hon'ble J. Woodburn, C.S.I.
The Hon'ble J. L. Mackay, C.I.E.
The Hon'ble Dr. Rashbehary Ghose.
The Hon'ble Sir John Edgar, K.C.I.E., C.S.I.
The Hon'ble Palli Chentsal Rao Pantulu, C.I.E.

MADRAS SMALL CAUSE COURT BILL.

The Hon'ble SIR PHILIP HUTCHINS presented a further Report of the Select Committee on the Bill to extend the jurisdiction of the Court of Small Causes of Madras. He said:—

"The Report in itself is sufficiently explicit on most of the questions which had to be considered by the Committee, but I desire, with Your Excellency's permission, to say a few words in further explanation of our reasons for recommending a republication of the Bill and also for the purpose of reassuring some who consider that the measure is aimed at the suppression or serious mutilation of the original side of all the High Courts, or at all events that it will in the course of time produce that result.

"The Council will remember that one of the reasons which I assigned for postponing our final Report on the Bill was that the Committee had been equally divided upon one point, and that I was unable on behalf of the Government of Madras to accept the decision carried by my learned friend Sir Alexander Miller's casting vote, as I thought its practical effect would be to place the Governor in Council in a difficulty with regard to the selection of the best person

available to preside in the new Court. This difficulty has since been obviated for the time by the recent appointment of a second advocate to the Bench of the Small Cause Court, but I am not sure that it may not recur, nor am I certain that on its true construction section 7 of Act XV of 1882 does apply to the Judges of the new Court as the Bill is now framed. It may, however, be now left to the local authorities to consider whether it will not be better to distinctly prescribe as a qualification for a seat in the City Court some minimum term of professional practice or judicial experience.

"But even apart from that difficulty I cannot regret my decision to abstain from pressing for the immediate passing of the Bill on the present occasion. It is true that the Madras High Court is now so much in its favour that the Hon'ble the Judges have expressed a hope that it may be passed into law in time for the new Court to be inaugurated at the termination of their summer vacation, and it is also true that most of the sections, which were omitted by the draughtsman and have been added by the Select Committee, are more or less of a formal character, and such as must have been all along understood to have been intended. There are, however, one or two of a more novel description, and it is right that an enactment of a purely local character like this should be fully considered by the persons whom it will affect as nearly as possible in the form in which it is to become law.

"The provisions which I have chiefly in mind are those contained in section 8, which relates to a question about which there has always been a certain amount of doubt, *viz.*, whether the High Court's jurisdiction should be excluded. Some years ago it was decided by the then legal advisers of the Government of India that power was clearly vested in this Council to exclude the High Court's jurisdiction altogether, but that opinion has not been fully accepted by all authorities, and I think there can be no doubt that we ought not, if we can help it, to pass an Act based on a proposition which is at all open to question and the decision of which may entail on some unfortunate suitor a ruinous expenditure. After a good deal of discussion, therefore, we have unanimously decided to recommend that the concurrent jurisdiction of the High Court be expressly preserved, and, following the precedent of the Presidency Small Cause Courts Act, we rely on a penal provision as to costs to ensure the resort of suitors to the new Court to be established for them. The provision adopted has, I am assured, proved effective in the case of the Small Cause Courts, and, if that is so, there is no reason why it should not be equally effective as regards this new Court, which after all is only another Court for the determination of what are

really small cases though not within the technical definition of the term 'small causes.'

"Now, my last remark naturally leads me on to the other point on which I proposed to offer some remarks, and that is that the present measure is in no way calculated to impair the authority or independence of the original side even of the Madras High Court. It will simply provide an inferior tribunal for the determination of those petty suits which at present are either excluded by the expensive and dilatory character of the High Court's unsuitable procedure, or block the files and occupy the time of the Judges to the prejudice of more important litigation. Two letters from the European and Anglo-Indian Defence Association on the subject of this Bill have been laid before the Committee, and their main objection seems to be that the measure will practically substitute a District Court for the original side of the High Court, the maintenance of which they consider a matter of supreme importance. In the latter remark I am entirely at one with them, and I am confident that the whole of this Council will be so too. Whether we have regard to the efficiency of the Judges themselves, to the training and maintenance of a good Bar, the impartial administration of justice for the protection of the people at large, or to any other of the objects which a good executive Government must always keep in view, I am very decidedly of opinion that the substantial maintenance of the original side of the High Courts is, as the Association declare, a matter of supreme importance. It is for that very reason that I am and always have been entirely opposed to the establishment of District Courts for the presidency-towns. For all really important work the original side ought to be, and generally is, far more efficient than any District Court, while for the more petty litigation a District Judge is no more required than a High Court Judge. But I am not proposing to establish a District Court, or anything at all likely to lead to a District Court. That indeed is what we might come to if we adopted the suggestion made by the Madras Chamber of Commerce that the new Judge should be paid ₹2,000 to ₹2,500 a month, which is just about the salary of a District Judge. But the effect of this Bill will be merely to relegate small cases, which are not technically small causes, to just such another tribunal as the Court of Small Causes, with Judges of the same calibre and emoluments. If this too is objected to, it can only be on the principle of opposing the insertion of the small end of the wedge, which in itself is the worst of all arguments, paralyzing all efforts at reform, but has no application here because the small end of the wedge has been introduced already. With the full consent of every one concerned the cognizance of small causes has already been

entrusted to an inferior tribunal, and what we now propose is to deal with small cases which are not technically small causes on as nearly as possible the same lines, but preserving the right of appeal to the High Court. The Bill before us is only to apply to Madras, and, as has been well pointed out by the learned Judges of the High Court, the limit proposed for the pecuniary jurisdiction of the new Court is identical with that of the lowest grade of mufassal justiciaries in that presidency. In Madras every District Munsif has jurisdiction up to ₹2,500, and in the Report which I have just presented will be found a strong recommendation that no attempt should be made to go beyond that limit.

"Before I conclude I should like to recapitulate briefly the reasons which make this measure a desirable one for Madras, though it may not be, and so far as my own knowledge goes is not, in any way required for Calcutta.

"(1) The present system under which every case must come before the High Court entails a denial of justice in Madras, though I have no reason to suppose that it does in Calcutta. The existence of this evil has been universally admitted by every one with any special means of knowledge, including the public meeting of the inhabitants of Madras convened last September to oppose my proposals: when an issue has been admitted on the pleadings (so to speak) it does not require to be established by further proof. It has, indeed, been said that this denial of justice had nothing to do with my original proposals, but is an after-thought on my part. My answer is that it will be found referred to in my minutes written in Madras, and that it is prominently mentioned in the High Court's letter of 1885, which I quoted in full in my introductory speech. Now, who are the sufferers from this denial of justice? They are almost without exception natives, and the native community is entirely in favour of the Bill, notwithstanding the application of the scale of fees contained in the Court-fees Act.

"(2) The measure before us will hardly affect the Bar at all, for in Madras, as was also pointed out in the letter of 1885, every vakil of the High Court is entitled to appear, plead and act on the original side. As it is entirely optional with parties to engage counsel, it is probable that the few who do so now in the paltry cases under notice will continue to do so in the new City Court. On the other hand, the other branch of the profession, the attorneys, are likely to get more suits, as in the City Court they will be on equal terms with the vakils and no longer under the necessity of instructing counsel.

"(3) The area of the High Court's original jurisdiction in Madras is excessive in extent, and a great part of it hardly distinguishable from the adjacent

mufassal. Upon this point I am content to read extracts from a standard authority. 'The town of Madras with its suburbs,' says Hunter's Gazetteer, 'extends nine miles along the coast and runs 3½ miles inland, covering an area of 27 square miles.' 'Black Town,' which is the business part of the city, is described as 'an ill-built, densely populated block, about a mile square, with more or less crowded suburbs, stretching three miles north of the Cooum river,' and, after referring to various other areas which go to make up the limits of the original jurisdiction as well as of the Municipality, the writer proceeds as follows:—

'The City of Madras is thus spread over a large area; and it is only after some stay that one realizes the stately semi-suburban life which distinguishes it from the more concentrated social activity of Calcutta. In short, a very large proportion of the tract of country comprised within the municipal limits of the City of Madras—covering as it does an area of 27 square miles, with 14 villages—consists of a poor rural district, more or less under cultivation, which surrounds the fort and the native town and suburban villages. This suburban and semi-rural characteristic explains the recurring difficulties of municipal administration . . . . The moderate resources furnished by a poor and partly rural population have to be scattered over an area many-fold larger than that included under the management of the wealthy corporations of Calcutta and Bombay, with the inevitable result of apparent shortcoming in many details.

"And the same characteristic also explains many of the differences between Madras and Calcutta litigation. Thus I hold in my hand a comparative statement, classing according to value the suits instituted in the several Presidency Small Cause Courts during 1891. The aggregate number is pretty nearly the same for all the Courts, but Madras shows more than 10,000 or 41 per cent. for *sums not exceeding ten rupees* against less than 6,000 or 22 per cent. in Calcutta, and 2,000 or less than 7 per cent. in Bombay. As regards suits between R10 and R500 in value, Madras falls considerably below her sisters. Between R500 and R1,000 the Madras suits are only 40 per cent. of those in Calcutta and 30 per cent. of those in Bombay. Between R1,000 and R2,000 the suits in Calcutta and Bombay are four times as numerous as those in Madras.

"I may, perhaps, take this opportunity—although it has nothing to do with the present subject—to congratulate the people of Calcutta on the improvement which this statement exhibits in the working of their Small Cause Court. On the 31st December last there were only 1,750 suits pending, or something under 7 per cent. of the number instituted during the year, against 2,106 in Madras and 3,186 in Bombay, while the average duration of the cases had been reduced to 62 and 19 days, according as they were contested or uncontested, against 55 and 31 days in Madras and 61 and 40 days in Bombay. Thus, the state of the

files here compares now very favourably with those of the other presidency-towns.

"But to return from this digression. I venture to say that both the physical characteristics and the nature of the litigation at Madras entirely bear out what I said in my introductory speech, *viz.*, that there is no conceivable reason why a petty dispute arising in one of the suburban hamlets should occupy the attention of a High Court Judge on ₹3,750 with all his paraphernalia, when a similar dispute outside the toll-bar would be adequately dealt with by a District Munsif. The Judge of the new Court, I need hardly say, will be very far above the grade of District Munsif.

"(4) Lastly, so far as the measure is one of economy either of money or an expensive agency, the Madras Government is under an obligation not to press for an additional Judge of the High Court unless he is required for other work exclusive of the petty original suits not exceeding ₹2,500 in value. In connection with this point I have heard it stated somewhat inconsiderately that the people pay for the best judicial tribunals and ought to have them; but this is certainly not the case as regards the original side of the Madras High Court. The fees levied are very far below the cost of the Court, and as a matter of fact the mufassal litigants pay not only for the appellate side, which is fair enough, but also for the original side, in which they have little or no concern. The Government of India recognises its obligation to supply as many Judges as are really required, but we do not feel called upon to support a demand for an additional Judge of the highest rank when a very much cheaper Judge is preferred by those immediately concerned and the extra expense falls on others. It has been said that a pecuniary limit is after all an unsatisfactory gauge of the difficulties of a suit; but it is the test which has been everywhere adopted, and no better can be suggested. In cases where this test may fail, owing to the importance of the suit being out of all proportion to its nominal value, the maintenance of the High Court's concurrent jurisdiction, as now recommended, will prevent the test working any practical injustice. It would be impossible to delegate to mere ministerial officers the decision of issues which, though involving trifling sums, may be vitally important to those concerned. Moreover, an efficient ministerial officer of the status contemplated would probably cost more than such a Judge as is required.

"For all these reasons the Government of India consider that the establishment of a new Court of inferior jurisdiction in the Madras Presidency-town cannot be avoided. Even the mercantile and trade associations have twice

admitted the expediency of some such measure. It has now been worked out in full detail, and I trust that, acquiescing in the principle for a third time, all classes will direct their attention to the question how the new Court can be made as efficient as possible."

The Hon'ble P. CHENTSAL RAO said :—

"The hon'ble mover of the Bill has so fully and clearly set forth the reasons which render the establishment of a City Court desirable and necessary, that it is needless for me to take up your Lordship's time with any lengthy remarks. But, knowing as I do the general condition of the natives of Madras and their feelings, I desire to assure the Council that the native public, whose requirements the Bill is chiefly calculated to satisfy, will be anxiously looking forward to the early passing of the Bill, and will heartily welcome it as a real boon conferred on them. Notwithstanding that the institution-fee in the High Court is comparatively smaller in many cases than that in the Mufassal Courts governed by the Court-fees Act, the other expenses of litigation in the High Court in petty suits are so heavy that not only are the doors of justice practically shut against the poor, but those that enter them are seldom able to come out without having to repent that they ever sought such costly justice. The natives of Madras, chiefly those that live in the suburbs, do not in the least differ in their occupations and condition of life from those in the neighbouring district of Chingleput, and I can hardly conceive of any adequate reason for compelling such men to resort to the highest Court in the land for the adjudication of petty suits such as are disposed of in the districts by District Munsifs drawing R200 to R400. I need not, however, discuss the matter further, as all the authorities consulted and the people generally are unanimous in thinking that the establishment of the City Court is urgently called for in the interests of the people.

"As regards the applicability of section 7 of the Presidency Small Cause Courts Act to the Judges appointed to the City Court, I consider it to be a matter of minor importance from the people's point of view, though, on a careful consideration of all the bearings of the subject, I for one am of opinion that the restriction imposed on the discretion of Local Governments by section 7 will not affect the appointments made under the Bill before the Council. Nor do I consider it necessary to fetter the discretion of the Local Government when they have so many qualified and able advocates, High Court vakils and members of the judicial service to choose from."

MADRAS SMALL CAUSE COURT; AMENDMENT OF COURT OF WARDS ACT, 1879 (B. C.).

[*The Lieutenant-Governor; Sir John Edgar.*] [25TH MARCH, 1892.

His Honour THE LIEUTENANT-GOVERNOR said:—

"I have nothing to say with regard to the special subject of the Small Cause Court of Madras, but I desire to express my gratification at the observations which have fallen from my hon'ble friend Sir Philip Hutchins with regard to the improvement which has taken place in the working of the Calcutta Small Cause Court during the past year. The statistics referred to by my hon'ble friend have already come before me, and I also have noticed with great pleasure the better results which have been attained; and I am sure it will be a gratification to the Chief Judge of the Small Cause Court, to whose exertions I believe the improvement is chiefly due, to know that the Home Minister in charge of the Department of Public Justice has also noticed these things in your Excellency's Council and has taken the opportunity of expressing the approval of the Government of India of the improvement which has taken place.

"I may take this opportunity of mentioning that some other suggestions for the reform of these Courts were sent up by the Bengal Government to the Government of India in the course of last year to which no answer has yet been received, and I trust that, if a favourable reply is given, we shall achieve still greater improvement in the successful prosecution of justice in this Court."

COURT OF WARDS ACT, 1879 (B.C.), AMENDMENT BILL.

The Hon'ble SIR JOHN EDGAR moved that the Report of the Select Committee on the Bill to amend the Court of Wards Act, 1879 (B.C.), be taken into consideration. He said:—

"The reasons for the alterations made by the Committee have been stated in our Report, and I do not think it is necessary for me to take up the time of the Council in recapitulating them. There is, however, one point upon which it may be desirable that I should make some remarks. In the original Bill brought into the Bengal Council as amended by the Select Committee of that Council, there was provision that no decree obtained upon a personal obligation of a ward should be executed against his property in the possession of the Court. The High Court, in a letter addressed to the Government of India in April, 1891, took exception to this provision as interfering with the rights of creditors. The Government of India considered that the precise wording of the draft section seemed possibly to lay it open to the High Court's objection, and, in a letter addressed to the Government of Bengal in September last, it was pointed out that the sole object of the proposed legislation was to protect

the family estates, and the Government of Bengal was asked that the draft should be so modified as to make it clear that only contracts made during wardship should be affected. In consequence of this, the Government of Bengal in October last submitted to the Government of India a fresh section following closely the provisions of the Act in force in the Central Provinces. The Government of India considered that this new section was faulty, inasmuch as that under a strict construction of it the ward would be unable during wardship to take a house or to incur any obligation for the purchase of the necessaries of life, and to meet this objection the section contained in the Bill which was published in the Gazette of India of the 20th ultimo was drafted. The Government of Bengal considered that the new section was inadequate and unsuited for the purpose for which it was intended, and this opinion was shared by some members of the Select Committee including myself. Finally, after much discussion and very careful consideration, we adopted the alterations contained in sections 12 and 13 of the Bill as amended. These sections are considered satisfactory by the Government of Bengal as well as by the Government of India, but my hon'ble friend Mr. P. Chentsal Rao has given notice of an amendment which, I think, is in a great measure open to the objection taken by the Government of India to the section drafted by the Government of Bengal in October last. I have ventured to trouble the Council with these details in order to indicate that the sections, as at present drafted, are the outcome of discussions which have been going on for more than a year, and that they have taken their present form in order to meet objections raised in part by the High Court, in part by the Government of India, and in part by the Government of Bengal. I would, therefore, ask my hon'ble friend not to press the amendment which stands in his name.

"Since the Select Committee's Report was laid before the Council by me the Government of India has received from the High Court a letter on the subject of the Bill as amended by the Select Committee. Copies of this letter have been for some days in the hands of the members of the Council, and the principal questions raised in it, especially that immediately connected with the certificate procedure, will be noticed to-day by members able to speak with more authority than I can. It will be enough for me, therefore, to point out to the Council that the Hon'ble Judges have apparently misunderstood the scope of the proposed alteration in section 3 of the Act by which 'estate' is defined as 'including the share of an estate.' This misconception appears clearly in the remarks made in the concluding portion of paragraph 4 of the Hon'ble Judges' letter regarding the future effect of section 37 of the Bengal Court of Wards Act of

1879, from which it would seem that the Hon'ble Judges are not aware that shares of estates are at present managed by the Court of Wards and its officers, who have for years had an absolute right in the accounts and papers relating to the entire estates, and have exercised with regard to the disclosure of titles the power which the Court considers to be of a most formidable and irregular nature. I have now before me a statement received from the Board of Revenue, from which it appears that the majority of 69 proprietors, who are at present under the Court of Wards, hold shares in revenue-paying estates, in revenue-free estates, in patni holdings and in tenures of various kinds; while some of the most important and extensive properties managed by the Court of Wards are almost wholly composed of such shares. In many of these estates the powers under section 37 have been and are being exercised, and the fact that the Hon'ble Judges are unaware of this shows pretty clearly that the evils anticipated in their letter cannot be so serious as they suppose. If the application of section 37 to estates, shares of which are now managed by the Court of Wards had given rise to injustice and hardship, surely the High Court would have heard of it. The fact is, as I have explained to the Council when introducing the Bill, that we are not initiating any new principle or making any new departure. We are simply removing an accidental anomaly of an inconvenient character. In illustration of what I mean I may adduce the property of the Srinagar minors, managed by the Court of Wards, which is made up of 15 entire revenue-paying estates paying revenue to Government of over Rs. 10,000, and shares in 49 estates the revenue payable on account of which shares is upwards of a lakh. Again, the property of the Sankerpur wards in Dinajpur is made up of two entire revenue-paying estates paying Rs. 369 to Government, and of shares in five estates the revenue payable on which shares is Rs. 30,940. In one of these properties it will be seen that the revenue payable on the shares is ten times that payable on the entire estates; in the other, the revenue payable on the shares is 100 times that of the entire estates. As the law at present stands, the bulk of the properties are only managed by the Court of Wards owing to the accident of the minors possessing comparatively insignificant entire estates, and I have heard of cases in which the anomaly is even more grotesque.

"As regards the objection raised by the Hon'ble Judges to the Court of Wards undertaking the management of the property of persons holding undivided shares in joint Mitakshara estates, I can assure the Council that the Government of Bengal never contemplated allowing the Court of Wards to do anything of the kind, and I can scarcely imagine any Court of Wards attempting to do anything so mischievous and preposterous as interfering of their own

motion in the affairs of an undivided Mitakshara family. However, I am quite willing to accept either of the alternative amendments which stand in the name of my hon'ble friend Mr. Evans, and should prefer the first as making perfectly clear that no undivided share held in coparcenary by a member of a joint Hindu Mitakshara family could be taken over by the Court of Wards."

The Hon'ble MR. EVANS said that the object of the Bill was a two-fold one: the first one was to bring in a new class of disqualified proprietors as to whom the Government might be of opinion that in the interests of the public their estates should be managed by the Court of Wards. The other object was to enable them to take over shares of estates without requiring that there should be one undivided estate among them. As regarded the first part of the Bill several objections had been taken, the main objection being that it would lead to an extension of the certificate procedure. He could not help feeling that this was a strong objection. In the present state of things the Court of Wards had to take over an estate of a zamindar, whose papers were untrustworthy, and whose raiyats had been able to hold their own. The raiyats had no very strong reputation for veracity where their rents were concerned, and, on the other hand, the zamindar's papers were frequently untrustworthy, and the raiyat's chance of success depended in nine cases out of ten on his being defendant or the zamindar having to prove his case. In many cases there were disputes of old standing as to the length of the pole to be used in measuring the land, and the rate per bigha, and whether the rent was so much per bigha or a consolidated rent for the holding. Disputes constantly existed as to all these and many other points. When the certificate procedure was employed the whole onus of proof was shifted on to the raiyats. This onus they were unable to discharge, and the result was that in many cases the raiyats were completely crushed for the benefit of the minor or other disqualified zamindar. This was an unjust state of things, which was pointed out at the time of the Bengal Tenancy Act. The question was then raised whether it was possible to do away with this certificate procedure in the case of wards' estates, and it was hoped that at least some change would be made in it. There was a good deal said in favour of a summary procedure for the recovery of rents, where disputed questions had all been settled, the rent fixed, and where no dispute remained, except whether the raiyat had paid his rent or not. But there was no defence possible for the use of such a procedure in disputed cases. So great was the force of this objection that it appeared to him and to many members of the Select Committee that they were bound to put into the Bill a proviso to the effect that the certificate procedure should not apply to the new class of estates unless some other means could be found to attain the same

object. He was informed that it was the intention of the Government of Bengal to take immediate steps to issue an executive order to put a stop to the use of the procedure in disputed cases pending legislation. Of course, an order could only be a stopgap, but His Honour the Lieutenant-Governor is said not to be in the habit of allowing his orders to be disobeyed, and this would be some substantial guarantee that the mischief would not be allowed to continue. On this understanding, without which he could not consent to the Bill being passed previous to legislation in this direction, he was content that the new estates should be subject to the certificate procedure in the same way as old estates. It was a choice between exempting the new class of estates from this hardship while allowing the old class of estates to suffer from it until the law was changed, or securing to both an *interim* protection pending legislation. It might be said he had exaggerated the evils of the certificate procedure; but it was not so. He knew there were supposed safeguards under the certificate procedure. The managers under the Court of Wards had to send in a notice duly verified that rents were due from certain raiyats. On this the Collector, if he thought fit, issued a certificate. Then the raiyat had a right to make an objection before the Collector. If he could establish the objection, the certificate was set aside. If he failed, he might institute a regular suit in a Civil Court to set aside the certificate. But the fact remained that from first to last the onus lay on the unfortunate raiyat of proving his case, and in ninety-nine cases out of a hundred the burden was too great for him, even when he had a good defence on the merits. MR. EVANS had no wish to say anything against the Court of Wards' officers. He did not think they acted with intentional harshness or injustice. But the instincts of the Court of Wards were proprietary, and their duty was to manage the estate for the ward. The Collector did not like to see heavy arrears—the manager had to show good results if he could. The result, however, arrived at was injustice to the raiyat, and he thought it was clear the injustice must be put a stop to.

There was another special objection raised by the High Court as to the shares of estates belonging to members of Hindu joint families. This was a valid objection, and he had sought to meet it by the amendment standing in his name which he understood would be accepted by Government. His hon'ble friend Sir John Edgar had said it was never intended that the Court of Wards should do anything so preposterous as to take over such shares. It was therefore clearly not advisable to pass a law which would give them the power of doing so. Another objection was to the further intrusion of executive powers into private affairs. They lived in a very peculiar country—in a

country in which a great many Western ideas and Western principles had been brought into operation where they did not work harmoniously. There was a rapid process of disintegration going on, and the land had a tendency to pass into the hands of other classes than its old proprietors. It was considered by the Government that it was a desirable thing to preserve a certain number of large estates and old families, and that it was a matter of policy to do so. In a country like this the influence of large proprietors and large estates was very great. They were generally on the side of law and order, and there was no doubt that they had almost invariably been a help to the Government. This was not a large measure, as he did not think many estates would come under it, because very few proprietors would be willing to be disqualified, and lose all power over their estates and become stipendiaries of the Court of Wards for an indefinite time. Even when a proprietor had made up his mind to take this step, he had to go to the Local Government, who had to consider whether in the public interest the estate should be taken up. It had been said that the words "public interest" was a vague thing; but that could not be helped, and the Government would have to judge of it. On the whole he thought that this power should exist in special cases, having regard to the present state of things among the landholders of Bengal.

One more matter he desired to mention, and that was that in the Bill as it originally stood there was a provision enabling the Court of Wards to act as executors to an estate. This was a feature which, he thought, was exceedingly objectionable. This would have the effect of extending the operations of the Court of Wards Act in directions where it was not desirable to extend it. There would be a strong desire on the part of dying zamindars to place the property in the hands of the executive power instead of appointing private persons executors. There was no sufficient reason for this, and he did not think it desirable so to extend the operations of the Court of Wards.

The Hon'ble SIR PHILIP HUTCHINS said:—

"As to the question whether the Report on this Bill should now be taken into consideration, I see no reason for opposing Sir John Edgar's motion. The Government of India have given the High Court's letter the most careful attention, as they do invariably whenever the Hon'ble Judges favour them with any representation; but the Bill is not really being proceeded with in a hurry; it is, as Their Lordships themselves admit, 'substantially the same measure as that introduced into the Bengal Council last year,' and the main points suggested were fully considered last summer.

"The Hon'ble Court's objections seem to fall under three heads. The first relates to the expansion of the definition of an estate so as to include a share in an estate. By 'estate' we mean simply a revenue-unit. We had no intention of treating a Hindu coparcener's undivided share as a separate revenue-unit, and I think this objection will be fully met by the amendment proposed by the Hon'ble Mr. Evans.

"The next objection has reference to the certificate system. From the first the Government of India have shared and supported the view of the High Court that certificates ought not to be issued in respect of any demand which is doubtful or the subject of a *bonâ fide* dispute. Their Lordships have quoted a portion of the third paragraph of our letter as leading them to believe that the amendment of the law relating to certificates would be undertaken before this Bill was proceeded with; but, if the whole paragraph is taken together, I submit that it hardly conveys any such assurance. The whole paragraph stands as follows:—

'There is considerable force in the objections taken to the extension of the certificate procedure. It may, however, be observed that, if the general law as to the power of the Collector to make certificates regarding arrears of rent in wards' estates is amended, the amendment will of course extend to the estates now in question; and the Governor General in Council hopes that the question will be settled before this Bill becomes law.'

"Here the High Court's quotation stops, but we went on to say that 'meanwhile'—that is to say, until the law can be amended—

'Meanwhile, His Honour the Lieutenant-Governor will be asked to consider whether it may not be possible to restrict by executive order the making of certificates, or, if that is not possible, whether a clause should not be added to the Bill providing that that procedure shall not extend to the estates contemplated by the Bill.'

"I believe His Honour is now prepared to give an undertaking which will satisfy the Council that the certificate system will not be abused and that every effort will be made to put it on a better legal basis as soon as possible.

"The third and last objection is one of which the Government of India cannot admit the force, and which indeed is contrary to their recognized policy. It is asserted that the State has no concern with the affairs of any of its private subjects, and that its interference for the purpose of saving private estates is 'a retrogade step, substituting, as it does, for the ordinary law applied in Courts of Justice what is really a special intervention of the executive at its own discretion.' Their Lordships have not explained how the ordinary law as applied by

the Courts can operate to protect an encumbered estate from ruin, and, if their view is to be accepted and State intervention excluded, all our enquiries into the intricate subject of agricultural indebtedness are merely causing vain trouble and expense. But the Government of India take a much wider view of their duties. Whether we have regard to the raiyats of the Dekkhan, the peasant-proprietors of the Punjab, or the great zamindars of the Lower Provinces, it appears to us that the manner in which their estates are passing into the hands of money-lenders and other non-agriculturists involves a grave political danger; and that we are not only justified in taking, but under an obligation to take, such reasonable measures as may appear necessary to secure ancient proprietary families from being ruined by the folly or misfortunes of a single representative. The law of most Provinces already empowers the Local Government, with the proprietor's consent, to place an embarrassed estate under the Court of Wards with a view to rescue it from the clutches of speculative money-lenders. As long ago as 1873 a law to this effect was enacted for the North-Western Provinces, and the Government of India are assured that it has worked admirably. It is time now that it should be extended to Bengal, as it will be if this Bill becomes law; but in this Bill we have introduced a safeguard against unnecessary interference, which does not exist in other Provinces, by providing that no proprietor shall be declared disqualified, even on his own application, unless the Lieutenant-Governor is satisfied that the public interests require him to intervene. No doubt that is a somewhat vague expression, but the very nature of the subject makes it imperative to give the Head of the Local Government a large discretion."

The Hon'ble SIR ALEXANDER MILLER said:—

"I have so little to add to what has been already said, that I do not think I ought to detain the Council long; but, considering the character of the criticisms of the High Court and the assurance which was given to them, and which no doubt has been fully carried out, that every member of this Council would consider and carefully weigh their representations, I do not think I ought to let this Bill pass without a few observations in reference to their letter.

"There are only two or three points in regard to which I think it necessary to say anything. First, as regards the certificate procedure. Now, I confess I personally thoroughly agree with the view of the High Court, and I think this is also the view of the Government of India, that the certificate procedure, although suitable for the recovery of Government revenue, which is a fixed and definite claim, and as to the amount of which there can be no question, the only point arising being as to whether it has been actually paid

or not, is very unfit for being used as a lever for determining cases between landlord and tenant—cases which in every country are frequently of a very complicated nature, and which in this country are, as far as I can understand, not only more complicated but more difficult of determination than in ordinary countries, because the tenants seem to be even more improvident than those with whom I have been accustomed to deal, though I should have thought that their improvidence could not have been exceeded had I not heard the account which my hon'ble friend Mr. Evans has given us of the tenantry of Bengal.

"I should certainly, if the Government of India were not pledged to take up at the earliest possible convenient moment the whole question of the applicability of the certificate procedure to questions between landlord and tenant, have thought it necessary to move for some clauses which would have excluded that procedure from the new cases about to be brought under the Court of Wards; but, as I understand, the Government are not only to look into the question at the earliest possible moment, but to legislate so as to put this matter on a fair and satisfactory footing, and I do not think that the extension for a short time of this procedure to the few extra estates which may be brought under the Court in the interval is of sufficient importance to delay the passing of an Act which, on the whole, I think a very desirable and beneficial one.

"The next point taken up by the High Court is the general objection to taking out of the hands of a man not disqualified by law the conduct of his own property. I can only say that the objection is one which has not, as far as I know, prevailed in any civilized country where the matter has been brought forward. The Scotch law is extremely analogous to that which we are now proposing to introduce. It is a little more against the landowner, because here we propose that the consent of the disqualified man should be required, whereas by the Scotch law of *prodigus* a man, otherwise *sui juris*, may under certain circumstances be deprived against his will of the right of managing his property.

"The laws both in France and Germany have always recognised the right of the State to prevent a man from dissipating his property, and the power of a Conseil de famille was until the introduction of the Code Napoleon very much greater in that respect than anything now proposed, and within the last few years the lunacy law in England has been so far modified as to enable the Master in Lunacy to declare a man unfit to manage his property without declaring him a lunatic or taking charge of his person. Under these circumstances, I cannot see that there can be any objection in principle to our extending the

protection of the Court of Wards to those persons who are practically in the position of the class which I have last named—that is to say, persons who are in the public interest not to be trusted to deal with their own property, although they cannot be said to be lunatics or unable to take care of themselves.

"The last objection taken by the High Court was to the clause which proposed to invalidate the contracts of persons whose property is under the charge of the Court. The clause is only of importance when you come to deal with persons who are in the new class, because, except perhaps a few unmarried women, all the other persons affected are already incapable of entering into valid contracts; but the new class consists of persons who are *sui juris* in the eye of the law, and are not disqualified except under the particular provisions of this Act. The terms of the clause have been the subject of much discussion partly by the High Court, partly by the Government of Bengal, partly by the Government of India, now for several months, and after having assumed various forms they were settled, not exactly unanimously, but nearly unanimously, by the Select Committee in the form which appears in the Bill. They are not exactly in the form which personally I should like, but I am willing to stand by the form which they have assumed. I should object most strongly to any such alteration as that which is proposed by my hon'ble friend Mr. Chentsal Rao which would go to the extent of depriving these persons of any real power of contracting at all. I know what his proposition is—that, so far as the question of necessaries is concerned, they would be in the same position as a minor; but this is a question of contract, whereas the law as to necessaries rests on a totally different footing, quite independent of contract; and I doubt very much whether a man who is not a minor—a man who is *sui juris*, and to whom goods had been delivered at his request—would be subject to an action for necessaries. If he is to be unable to enter into any contract which might involve pecuniary liability, the result would be that no one who supplies him would be able to recover the money unless the man himself chose afterwards voluntarily to pay it. That would have two results: first of all, a number of people who might think it very desirable to put their estates under the Court of Wards would very probably hesitate to do so if they found themselves reduced to absolute incapacity in the eye of the law; and, secondly, if it was once known that a man was a ward of this class, no man in his senses would trust him with a loaf of bread or a bottle of wine unless he paid the money down for it. I do not think it desirable that these persons should be placed in this position. The clause as now framed does two things. It provides, in the first place, that no such ward shall be competent to create any charge—that is to say, to mortgage or pledge his estate

without the consent of the Court; and, secondly, that, if he has entered into any contract involving him in pecuniary liability, the consent of the Court shall be required before execution can be taken out against his estate in fulfilment of that contract.

"That would enable the creditor to recover from the man himself if he had anything to pay with. He would be able to get payment by threatening execution if he was not paid voluntarily, and I see no reason whatever why this course should not be open to the creditors. I think that it is entirely for the interests of the country that old estates should not be dissipated, and that as far as possible the agricultural population should be retained in possession of the land; but it is not for the public interest that men should be encouraged to defraud their creditors, and I therefore hope that this Council will not consent to any alteration of the last two clauses as settled by the Select Committee."

His Honour THE LIEUTENANT-GOVERNOR said:—

"What has been said by my hon'ble friends Mr. Evans and Sir Philip Hutchins on two of the main subjects under discussion,—the applicability of the Court of Wards' action to an undivided share in an estate, and on the general principle of enabling a proprietor to declare himself disqualified to manage his estate and to put himself under the protection of the Court,—has been so complete in itself and so entirely agrees with my views that it is not necessary for me to add anything on that subject. I turn, therefore, at once with pleasure to the third main subject of the day—the applicability of the certificate procedure to wards' estates—and will answer the challenge made by my hon'ble friend Mr. Evans in this respect when he practically asked if the Bengal Government would pledge itself that executive orders should issue preventing the use of the Certificate Act in certain classes of cases, and that the earliest possible opportunity should be taken of amending the Certificate Act in the same direction. I answer that challenge with pleasure, and I undertake that what he and the High Court desire, and what he has so justly stated, shall be done. I fully agree with what has been said by my hon'ble friend Mr. Evans that, when the Court of Wards first takes over the estate of a deceased proprietor, it generally finds that estate in a condition of great confusion; the accounts and the rent-rolls in an extremely inaccurate and untrustworthy state; and it is a hard thing for the raiyat that the manager of an estate under the Court of Wards should have legal power given him to act upon these inaccurate and untrustworthy *jamabandis* and other documents as if they were thoroughly reliable, and should issue a process against the raiyat for the rent which these papers show to be due, and leave the onus of proving that the rent is not due on the raiyat. But,

while admitting that this is not the right position in which to place the raiyat, I do not believe the law has often or usually been worked so as to cause real injustice. I am very glad that my hon'ble friend Mr. Evans in stating the case protected himself from making, and the officers of this Government from having made, against them a charge which might possibly have been based on what has been written on this subject. My hon'ble friend Mr. Evans has very justly said that, although the legal position of the raiyat is a very unfair one, he had no doubt that the managers of the estates, and the Rent Courts before which the requisitions of the managers would come, would do their best to do justice, but he thought that they would be to a certain extent not honest in their desire to show a clean rent-sheet, and that they would be anxious to prove themselves too good executive officers in the matter of collecting rents. He has, I think, quite accurately stated the fact that the Rent Courts before which these requisitions come would, as a rule, be quite as careful to ensure that a decree was not made against the raiyat on insufficient grounds as a Civil Court would. I think he has to some slight degree exaggerated the idea of how the desire to show a clean rent-sheet might operate in the minds of the managers of estates. If my hon'ble friend had had the duty imposed upon him, as I have had, of studying the Board of Revenue's Annual Report on the Court of Wards' Estates, and he had seen the extremely large amount of arrears and the inefficiency of the managers in the matter of collection, I think he would have been less disposed to come to the conclusion that these officers were actuated merely by the desire to show their executive efficiency. As a matter of fact, the Annual Report shows that in a great many of the wards' estates the arrears are very large and the collections very slow and behindhand, and I shall take note of what fell from my hon'ble friend Mr. Evans, and shall have great pleasure in issuing the next resolution on the next report to bear in mind the suggestion he has made, that possibly one cause of the inefficiency of these managers may be their anxiety not to do injustice in the case of those arrears which exist.

"Passing on from that point, I desire to state in as clear language as possible what I intend to do to carry out the pledge now given. I fully agree that a summary process is not a suitable process in a case where any dispute exists as to whether the amount is due or not, and the order which I propose to issue is that, as soon as an estate comes before the Court, the first duty of the Court will be to comply with the provisions of section 101 and the following sections of the Act, to make a settlement of the estate, to have a field measurement made and a complete record-of-rights. Until that record-of-rights is made, and every dispute between landlord and raiyat is decided and a clear sheet exists

showing exactly what each man holds, what his tenure is, and what rent is due from him, till then I think any form of summary procedure is not justifiable. Under orders which will emanate from this Government no such process will issue from the time when such order is made public, and I will take the earliest possible steps to amend the particular law in this direction.

"I think, therefore, that my hon'ble friend Mr. Evans is well advised in not pushing his objection to the certificate procedure to the extent of trying to bar the passing of this Bill or inserting provisions restricting the application of the Certificate Act. He has rightly said that if he had done that he would only have saved some very few estates from the operation of this clause, and nothing could have been done to interfere with the operation of the Act in regard to all the other estates. After the pledge which I have given has been carried out, the procedure will apply to the whole of the estates under the Court of Wards.

"But a further vista opens out to us in connection with this matter, and it is one of considerable importance, and I am glad to have this opportunity of explaining it. I came to this Council having no doubt about it, but some slight doubt has been occasioned to me by the remarks of my hon'ble friend Sir Alexander Miller, who has expressed an opinion that a summary procedure might be suitable for the recovery of the Government demand of revenue, but would in no case be suitable in the adjustment of disputes between landlord and tenant. I trust that when my hon'ble friend Sir Alexander Miller has had an opportunity of seeing the care and accuracy with which the record-of-rights under the Tenancy Act is made, how clearly every circumstance of the tenure is defined, what care is taken to make a complete and accurate settlement, to define the amount of rent due, and as to every possible incident connected with the tenure, I think, when the hon'ble the Legal Member has satisfied himself on these subjects, he will probably agree that it is quite as just that there should be a summary procedure for the recovery of rent as to have a summary procedure for the recovery of revenue from estates borne on the Government rent-roll. The Council are aware that we are engaged now not merely in a cadastral survey of those estates, as to which I have pledged myself, but in an operation which has given rise to great agitation and anxiety on the part of many of our important landholders and many of the most loyal subjects of the Government, and I think it will be some satisfaction to them and tend to remove their anxiety if they have reason to hope that as soon as this record-of-rights, which will be formed under the Bengal Tenancy Act with a more summary procedure for the recovery of rent than now exists, shall be bestowed upon them, they will practically obtain the same benefits in regard to the recovery of rents from their raiyats as the

Government officers have with regard to the recovery of rents in estates which belong to Government or in estates which are managed by the Court of Wards. There is a provision now in the Tenancy Act under which rent-suits below Rs. 50 may be tried summarily like a Small Cause Court suit, but this provision had not been put into force hitherto because rent-suits generally have turned not merely on the question whether the rent had been paid or not, but on the question how much the rent really is, or whether rent is due at all. When once disputes of this sort have been cleared away, it seems probable that the provision referred to may be utilised, or even that some simpler procedure may be invented. I propose that this subject should be taken in hand by the Bengal Government at the earliest opportunity; and, if I get the sanction of this Council, I trust I may be able to introduce a Bill of this kind which will extend its benefits, which, I think, are perfectly reasonable, to the great and small landholders in the districts in which the cadastral survey is carried out. In that way we shall do a great deal to remove the suspense and anxiety which has arisen between landlords and tenants with regard to the trouble and expenditure which the survey will bring upon them, and also to allay the opposition to the cadastral survey, which will, I believe, be of the greatest benefit to the country."

The Motion was put and agreed to.

The Hon'ble MR. EVANS moved the following amendment, namely:—

That after the words "and includes a share in or of an estate" proposed to be added to section 3 of the Act by section 2 of the Bill as amended, the words "other than an undivided share held in coparcenary as the property of a Hindu joint family governed by the *Mitakshara* or *Mithila* law" be inserted.

The Motion was put and agreed to.

The Hon'ble P. CHENTSAL RAO moved that for section 13 of the Bill, as amended, the following section be substituted, namely:—

Substitution of new section for section 60.

"13. For section 60 the following section shall be substituted, namely:—

Disability of ward to contract, etc.

'60. No ward shall be competent, without the leave of the Court, to transfer or create any charge on, or interest in, his property or any part thereof, or to enter into any contract which may involve him in pecuniary liability.'"

He said:—

"The principle of the Bill in so far as it is designed to preserve ancient families from ruin, and to prevent their estates from being broken up, has my

hearty sympathy ; and I only regret that the Bill is limited in its operation to Bengal. In Madras there are some very ancient zamindaris which are heavily involved in debt, and are on the brink of destruction. They richly deserve the protection and benefit which the Bill is calculated to afford, and I hope it may be in my power to introduce, with Your Lordship's permission, a similar Bill for Madras some time next year after consulting the Madras Government and the chief zamindars of the Province.

"Coming to the details of the Bill under consideration, section 13 seems to me to be inadequate for the purposes for which it is intended. I presume that the object of the section is to prevent creditors from advancing loans to the wards without the leave of the Court, so that the wards may be weaned of their pernicious habits of constantly contracting debts, and that it may be possible for the Courts to restore the estates free from encumbrances, and so give them a fresh start. If so, I do not see how the section can effectually attain the object. The section does not declare contracts entered into by the wards without the permission of the Court void, but simply lays down that the estate shall not be, without the leave of the Court, answerable for debts incurred during the period of management, the personal liability of the debtor remaining unaltered. This provision may deter some prudent and honest creditors from advancing loans without the permission of the Court, but I can speak from experience that there are everywhere a considerable number of speculators who are ever ready to advance loans on mere personal security, provided a high rate of interest is promised. They freely calculate upon the weakness of human nature and reckon upon the debtors voluntarily selling or mortgaging their property, when they are in a position to do so, to liquidate the debts and avoid incarceration in jail. The effect of section 13 will thus be not to prevent the accumulation of debts during the period of management, but to create debts far more serious and insidious in their consequences than ordinary debts contracted in the absence of any prohibition; for loans under ordinary circumstances on the security of the estates bear a moderate rate of interest, whereas loans on mere personal security can only be had at ruinous rates. The only effective way of preventing accumulation of debts during the management and forcing habits of frugality on the proprietors is, not by enacting that the property shall not be answerable for such debts without the leave of the Court of Wards, but by declaring all contracts entered into without the leave of the Court absolutely void, so that creditors may under no circumstances be tempted to advance loans without the leave of the Court. It may be said that such a provision would be a violent intrusion

upon the natural rights of owners of private property, but the objection will vanish when it is remembered that the prohibition applies only to persons already legally incompetent to enter into contracts, or to persons who have with their eyes open consented to the properties being managed by the Court of Wards in consequence of their own inaptitude, and with the full knowledge that their rights will be abridged for their own benefit during the management. I may also remark that any declaration that the wards shall not be competent to enter into contracts cannot in the least affect ordinary engagements made by them for necessaries of life, for all such engagements fall within section 68 of the Contract Act, IX of 1872, which clearly says that, if a person incapable of entering into a contract under any law for the time being to which he is subject (*vide* section 11) is supplied by another person with necessaries suited to his condition in life, the latter person is entitled to be reimbursed from the property of such incapable person. This seems to me to be quite sufficient for all ordinary requirements, and in extraordinary cases there is nothing to prevent the wards obtaining the previous consent of the Court.

"For the foregoing reasons I beg to propose to substitute the following section for section 13 in the Bill :—

Substitution of new section for section 60.

"13. For section 60 the following section shall be substituted, namely :—

'60. No ward shall be competent, without the leave of the Court, to transfer or create any charge on, or interest in, his property or any part thereof, or to enter into any contract which may involve him in pecuniary liability.'"

Disability of ward to contract, etc.

"I observe that a similar section was suggested by the Bengal Government, and it is not clear from the papers circulated why the suggestion was not adopted. I applied for the correspondence that passed on the subject and referred to by the Hon'ble Mover in his first speech, but I was informed that the correspondence did not take place in the Legislative Department and that there was no likelihood of its being printed and circulated among the Members.

"It is my humble opinion that a clear prohibition against contracting debts is much more beneficial even to the general public than an indirect and indefinite prohibition such as that conveyed by section 13. It would at once save the creditors from throwing away their money and entering into litigation, whereas, if section 13 stands as it is, there is every chance of their being tempted to advance money in the hope of obtaining the consent of the Court of Wards for the execution of the decrees they may obtain, which hope may after all prove fruitless. Moreover, the principle of making the property answerable for debts, not upon the nature of the debt or purposes

for which it was made, but upon the unrestricted discretion of a Revenue-authority to be exercised even after the latter has ceased to have anything to do with its management, appears to me to be novel and unprecedented, and is in my opinion a greater violation of the rights of owners of property than that implied in the declaration that all contracts entered into during the period of management without the consent of the Court shall be void. If I have correctly gauged native character, I may say that all legislation of an indefinite character, though honestly meant for the protection and safety of the people, is always viewed by the public with a vague sense of distrust and suspicion, the possibility of which it should be our aim to prevent.

"My Lord, I need hardly assure your Lordship that I have ventured this amendment and these remarks not in a spirit of hostility to the Bill but because I sympathise with the main object of the Bill, and wish to make it as effective as possible for the attainment of its avowed object.

The Hon'ble SIR PHILIP HUTCHINS said:—

"It has already been stated that the precise form which this particular provision should take was very fully discussed by the Select Committee, and it was also considered by Your Excellency personally and your Council when the Bill was before the Bengal Council. We all thought that it would not be right entirely to disable the ward from contracting, and the section as framed seems to give creditors ample notice that they have practically nothing but the ward's current allowance or goods to look to. I am not at all sure that section 68 of the Contract Act would have any effect in the case of a ward with a sufficient allowance, and, even if it does apply, I do not see why the ward should be prevented from obtaining something beyond bare necessaries. It may be noticed that the Hon'ble Judges of the High Court have taken no objection to this part of the Bill."

His Honour THE LIEUTENANT-GOVERNOR said:—

"I think it right to say, with regard to this section, that as far as my private judgment is concerned my views agree with those expressed by Mr. Chentsal Rao. Personally I should have preferred the section extracted from the Central Provinces Act and adopted by the Bengal Government, but it was discussed by Your Excellency's Council very fully; the arguments which Sir Philip Hutchins has repeated in this Council were brought forward and were considered to preponderate; and I felt bound to bow to the authority of that decision. I feel satisfied that the clause as now drafted will meet all the practical ends which I have aimed at. It is possible that there may be here and there a case in

which it does not meet them, but the hardship which might thus be caused would be very unlikely to occur, and it would hardly be necessary therefore for us to provide for it.

"Under these circumstances I am prepared to waive my objection and to accept the section as drafted by the Select Committee."

The Motion was put and negatived.

The Hon'ble SIR JOHN EDGAR moved that the Bill, as amended, be passed.

The Motion was put and agreed to.

BENGAL MILITARY POLICE BILL.

The Hon'ble SIR JOHN EDGAR also moved that the Report of the Select Committee on the Bill for the Regulation of the Bengal Military Police be taken into consideration. He said:—

"The Select Committee have made scarcely any changes in the Bill as introduced, and the changes made were mainly with the intention of improving the wording of the Bill as drafted. One section was shortened and another was made more clear; some parts of other two sections were omitted. There is practically nothing to be said about these alterations, and the reasons for which the Bill has been introduced have been already explained."

The Motion was put and agreed to.

The Hon'ble SIR JOHN EDGAR also moved that the Bill, as amended, be passed.

The Motion was put and agreed to.

INDIAN LIMITATION ACT, 1877, AND CODE OF CIVIL PROCEDURE AMENDMENT BILL.

The Hon'ble SIR ALEXANDER MILLER asked leave to postpone the motion which stood in his name that the Bill to amend the Indian Limitation Act, 1877, and the Code of Civil Procedure be taken into consideration. He said that since he had put this notice on the paper he had received a telegram from his friend the Chief Justice of the High Court at Allahabad in which he said that

there were cases pending there now which he did not think that the Bill as drawn would cover. He proposed therefore not to make this motion at present, and he would move that it might be postponed until the next session at Simla, when the matter could be considered.

Leave was granted.

PARTITION BILL.

The Hon'ble DR. RASHBEHARY GHOSE moved for leave to introduce a Bill to amend the Law relating to Partition. He said:—

"I propose to state briefly the present condition of the law on the subject, the alterations it is proposed to introduce, and the grounds on which such alterations would seem to be desirable. In this country, where coparcenary is one of the commonest modes of holding property, the proper method of effecting a partition must always be a question of considerable importance. But, if we except the different local laws concerned with the division of revenue-paying estates, the only statutory enactment on the subject is to be found in section 396 of the Civil Procedure Code. Under this section, which embodies the practice of the English Court of Chancery prior to the Partition Act of 1868, a commission is issued by the Court to certain persons,—the canonical number is three,—who are directed, in the first instance, to ascertain and inspect the property and to divide it into the requisite number of shares, with authority in some cases to make payments in money by way of equality of partition. The next duty of the Commissioners is to prepare a report, or, if they cannot agree, separate reports, which are however liable to be quashed by the Court, when a new commission is issued in the same terms and with possibly the same result. In England this cumbrous, dilatory and expensive procedure has been replaced, in most cases, by Statute, by the much simpler method of a sale of the property and a division of the proceeds. Under the old Chancery practice, which has been reproduced in our Code, no amount of inconvenience or practical difficulty, however great, could prevail against a claim for partition. I will here give only one illustration. In the well-known case of *Turner* v. *Morgan*, reported not in the pages of Dickens but in Vesey, where a house had to be divided between two persons, and one of the parties insisted upon a partition by metes and bounds, the Lord Chancellor said that out of mercy to the parties he would let the case stand over, as the worst thing for the parties would be a decree for partition, and His Lordship suggested a reference as to the value and to which party the option of buying or selling should be given. The

suggestion was not accepted, and when the Commissioners allotted to one of the parties the whole stack of chimneys, all the fire-places, the only staircase and all the conveniences in the yard, the Lord Chancellor declined to interfere because he did not know how to make a better partition. The well-known Greek saying that the half is better than the whole points a moral which I am afraid is too often lost on suitors. In India cases like *Turner* v. *Morgan* are, as might be expected, of frequent occurrence, and, as observed by Babu Amrito Lal Chatterjee, a Subordinate Judge of mature experience, one perverse member of a family may by his obstinacy practically ruin the whole property. The learned Judge mentions what he calls a typical case of its kind, and adds, 'such cases, though not very common, are not very rare in the country.' Mr. Neill, the Judicial Commissioner of the Central Provinces, also speaks of the extreme difficulty of partitioning some kinds of property under the present law, and points out that partition is not unfrequently made the occasion of annoyance by ill-conditioned coparceners. 'Cases,' adds Mr. Neill, 'have remained pending for years simply on account of the difficulty of making a partition under the present state of the law.' Other learned Judges have also expressed similar opinions, and, if some Judges have been more fortunate, it is due probably to mere accident if not to the occasional display of a vigour beyond the reach of law. I trust I have said enough to show that it cannot be affirmed that no amendment of the law is called for, as a state of things in which a judicial deadlock, so to speak, is possible can never be viewed with indifference by the Legislature. I may add that the question of amending the present law has been mooted from time to time, and a mass of valuable opinion—not the less valuable on account of the divergence of views which the communications disclose—have been collected by Government, and through the courtesy of the Hon'ble Member in charge of the Home Department placed at my disposal. In England, as I have already pointed out, the old procedure has been in a very large measure rendered obsolete by legislation. In this country, owing to the division and subdivision of landed property which is constantly taking place under the Hindu and Muhammadan laws of inheritance, the evil from one point of view is undoubtedly much greater; but the strong attachment of my countrymen to landed property, especially when it is ancestral, should make us extremely cautious in replacing in any particular case the usual remedy of an equal partition by a sale of the property and a division of the proceeds. Whether the sentiment which animates my countrymen is economically wise or not I need not pause here to discuss. I will only say that man does not live by political economy alone. The Hudibrastic rule is not the measure of all things, and there are currents

of thought and feeling deeper than any ever sounded by the economist's plummet. Speaking for myself, and as a Hindu, I am bound to say that I fully sympathise with the sentiment which attaches us to our landed possessions and should be sorry to see it disappear. It is a healthy sentiment and furnishes one of the best securities for the maintenance of law and order. Moreover, as we all know, laws must be adapted to the habits of society when not manifestly injurious to others and should not aim at remoulding such usages or habits even when they are the result of blind prejudice. We cannot therefore proceed too warily, and accordingly the power with which it is proposed to invest the Court is only given subject to very stringent conditions, and only to the extent necessary to meet an acknowledged evil. These conditions are (1) that the property cannot conveniently be divided; (2) that it would be more beneficial for the parties that it should be sold; (3) that at least one-half of the shareholders must concur in the sale. But, in order to prevent the possibility of a request for sale being made on inadequate grounds or from improper motives, provision is made for the compulsory transfer of their shares by the parties who desire a sale to the other shareholders at a valuation to be made by the Court. But, even when all these conditions exist, a large measure of discretion is left to the Court, which, I trust, will never be crystallized into a cluster of rigid rules.

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"The result, therefore, is that, although the Court would be wholly unable to sell the property in the absence of any of the conditions imposed on the power, it may refuse to do so notwithstanding the existence of all these conditions if in the exercise of a sound discretion it is of opinion that no sale should take place in any particular case. I venture to think that with these safeguards the measure, while meeting an acknowledged evil, cannot fairly be charged with introducing any serious innovation, or with trenching in any degree on the rights of persons holding property in common. The question is one really of procedure, and the present Bill will merely affect the mode of relief and nothing else. Indeed, even under the present practice, when the Court gives compensation in money by way of equality of partition, it really makes a transfer of a part of the property, although the transaction is disguised under a slightly different name. The present Bill is only an extension of this practice to some very exceptional cases in which, in the absence of such a law, the common property might be destroyed or rendered comparatively valueless. I ought to add that it is a great satisfaction to me to find that the fathers of Hindu law who shaped out and elaborated our jurisprudence anticipated by several centuries the improvements only recently grafted on the old Chancery practice in England.

Speaking of indivisible property—a class in which Shankha and Likhita place dwelling-houses—Vriashpati declares :—

'They (the sages) by whom it is ordained that clothes and the like are not liable to partition have not decided (as to what should be done with respect to such things). The estate of opulent men, consisting of vehicles and ornaments, if held in common (by his heirs) would be unemployed, for it cannot be allotted to any one (of the co-heirs). Therefore it must be divided in an equitable manner; else it would be useless. An equitable partition is made, by (distribution of the price after) the SALE of clothes and ornaments, by distribution of a written debt after recovery, by exchanging the dressed food with an equal allotment of undressed grain, by drawing water of a single well or pond for use according to need, * * *.' *Digest V, 366; Vivada-Ratnákara, Asiatic Society's Sanskrit edition, 505.*

"The practice of giving money compensation in certain cases is also, I am glad to find, recognized in the Muhammadan law (Hedaya, Bk. 39, Ch. 3).

"I should add that, when the Court finds it necessary to direct a sale of the property, the co-sharers will not only be at liberty to bid but a right in the nature of pre-emption has been conceded to them. The only other section of the Bill to which it is necessary to call attention is section 4, which compels a stranger who has bought a share of a dwelling-house belonging to an undivided family to transfer it to the members of the family if they undertake to buy it upon a valuation to be made by the Court. To those who are familiar with the habits, usages and feelings of my countrymen, I need hardly say that the intrusion of a stranger into the family dwelling-house is regarded as nothing short of a calamity. The mischief has been remedied to a certain extent by section 44, paragraph 2, of the Transfer of Property Act, an enactment which recognises—and, if I may say so, very properly recognises—the truth of the poet's saying, not always perhaps borne in mind, that 'right too rigid hardens into wrong.' In conclusion, I will only say that, although it is somewhat rash to make any general assertions, I trust I may safely affirm that whatever hostile criticism may be levelled against the other parts of the Bill, a provision which protects the family dwelling-house from the intrusion of a stranger into any portion of it will be welcomed as a boon and a blessing by my countrymen of every creed and of every shade of opinion."

The Hon'ble SIR PHILIP HUTCHINS said :—

"My hon'ble friend the mover has favoured me with a copy of his Bill, and I think the Government of India may welcome it as a fair and moderate measure, calculated to remove a difficulty which, although personally I have

some doubt as to its existence to the full extent alleged, many able and experienced Judges have felt in executing decrees for partition. The details will of course be subjected to scrutiny and careful consideration by a Select Committee after public opinion has been elicited."

The Motion was put and agreed to.

The Hon'ble DR. RASHBEHARY GHOSE also introduced the Bill.

The Hon'ble DR. RASHBEHARY GHOSE also moved that the Bill and Statement of Objects and Reasons be published in the Gazette of India in English, and in the local official Gazettes in English and in such other languages as the Local Governments think fit.

The Motion was put and agreed to.

The Council adjourned *sine die*.

S. HARVEY JAMES,
Secretary to the Government of India,
Legislative Department.

CALCUTTA;
The 29th March, 1892.

Government of India Central Printing Office.—No. 556 L. D.—30-3-92.—303.—A. E. deS.