Thursday,
4th January, 1894

ABSTRACT OF THE PROCEEDINGS

OF THE

Council of the Governor General of India,

LAWS AND REGULATIONS

Vol. XXXIII

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OF

THE COUNCIL OF THE GOVERNOR GENERAL OF INDIA,

ASSEMBLED FOR THE PURPOSE OF MAKING

LAWS AND REGULATIONS,

1894

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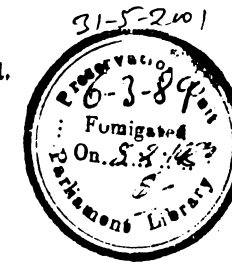

CALCUTTA
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1895

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 Indian Councils Acts, 1861 and 1892 (24 & 25 Vict., cap. 67, and 55 & 56 Vict., cap. 14).

The Council met at Government House on Thursday, the 4th January, 1894.

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.
His Excellency the Commander-in-Chief, K.C.B., G.C.I.E., V.C.
The Hon'ble Sir A. E. Miller, KT., Q.C.
The Hon'ble Lieutenant-General H. Brackenbury, C.B., R.A.
The Hon'ble Sir C. B. Pritchard, K.C.I.E., C.S.I.
The Hon'ble J. Westland, C.S.I.
The Hon'ble Sir A. P. MacDonnell, K.C.S.I.
The Hon'ble Dr. Rashbehary Ghose.
The Hon'ble Sir G. H. P. Evans, K.C.I.E.
The Hon'ble C. C. Stevens.
The Hon'ble J. Buckingham, C.I.E.
The Hon'ble A. S. Lethbridge, M.D., C.S.I.
The Hon'ble Gangadhar Rao Madhav Chitnavis.
The Hon'ble H. F. Clogstoun, C.S.I.
The Hon'ble W. Lee-Warner, C.S.I.
The Hon'ble P. Playfair.

NEW MEMBERS.

The Hon'ble GANGADHAR RAO MADHAV CHITNAVIS, the Hon'ble MR. CLOGSTOUN, the Hon'ble MR. LEE-WARNER and the Hon'ble MR. PLAYFAIR took their seats as Additional Members of Council.

PRESIDENCY SMALL CAUSE COURTS ACT, 1882, AMENDMENT BILL.

The Hon'ble SIR ALEXANDER MILLER moved that the Bill to amend the Presidency Small Cause Courts Act, 1882, be referred to a Select Committee consisting of the Hon'ble Sir Antony MacDonnell, the Hon'ble Sir Griffith

Evans, the Hon'ble Dr. Rashbehary Ghose, the Hon'ble Mr. Mehta, the Hon'ble Mr. Playfair and the Mover. He said:—

"It will be in the recollection of some at least of the Members of Council that last session I had proposed to send this Bill to a Select Committee which was practically the same as the Committee now named, except that new names have been substituted for those who have ceased to be Members of the Council and therefore of the Committee. The Bill, however, stood over to await certain replies. Those replies have since been received from various quarters and they run to some length. I do not mean to trouble the Council with the whole of them, but I must refer to some of them in the course of what I have to say. I do not know that I ever have seen a more remarkable case of difference of opinion than that which I find in the papers below me. I think the well-known quotation "quot homines, tot sententiæ," thoroughly applies to them. There is but one thing in which they are all agreed. They all agree that something ought to be done to alter the existing law, but I can hardly find any two of them that agree as to what that something ought to be. Under the circumstances all that I can do will be to place all these opinions in the hands of the Members of the Select Committee, if nominated, and to hope that the labours of the Committee may evolve out of this mass of varying opinions something which will be substantially acceptable to the whole of the community.

"The first question arises on section 2 of the Bill. Section 2 of the Bill proposes to deal with the constitution of the Court. As the law at present stands, one-third at least of the Judges of the Court must be barristers or advocates—and one-third means two in the present case; but for the remaining Judges there is absolutely no qualification whatever prescribed. The Bill proposes to alter that by prescribing a qualification for all the Judges, and in deference to an opinion expressed, I think, in the Home Department, though I am not positive as to this, that when there was a qualification for all the Judges it was no longer necessary to keep up a separate qualification for some of them, it has been proposed to limit the necessity for being a barrister or an advocate to the Chief Judge. To that proposal objection has been taken, of a somewhat remarkable nature, namely; first of all, it was said that the advocates mentioned in the present rule might be roughly described as practising barristers. That of course is right. Then it is said, as an objection, that the Chief Judge must indeed under the Bill be a barrister or an

advocate, but that that he need not be a professional man, or have ever actually practised as a barrister. Now, with all deference to those who take this point, I must say that "this is the very false gallop of" criticism. There is not one word in the Bill to alter the qualification of the Chief Judge as it stands at present. Under the existing law he must be a barrister or an advocate; that qualification would be treated as a practising barrister, not as a mere ornamental barrister. Under the new law he would be just as much and just as little required to be a practising barrister, and I cannot for one moment think that it would ever enter the head of any Local Government to appoint as Chief Judge a man who had had no practice at the Bar. So that, so far as the objection goes that the Chief Judge need not be a professional man, the law is not proposed to be altered, and the objection does not really exist. On the other point, I am bound to say that there is a large consensus of opinion, though not by any means universal, that the rule by which at least one-third of the Court should consist of men who had practised at the Bar should be maintained, and all I can say is, that, if the Select Committee desire to retain that rule, I have no objection; on the contrary, if I were forming a Court for the first time, I would require every Judge to be a man who had some forensic training, by which I mean not merely the technical position of having been "called to the Bar," but practical experience gained by actual practice. But though that might be a very reasonable rule to lay down when creating a new Court, it is a very different thing to say that it would be desirable to apply that rule to an existing Court very differently constituted. Then it is argued that the other Judges require no qualification at all. That seems to me to be perfectly contradictory of the previous argument as regards the necessity of retaining one-third of the Court as barristers. I agree with the view expressed by the High Court of Calcutta, that it is desirable that whenever a professional man, in which I include, of course, a practising vakil, who may be just as competent as any man called to the Bar,—that whenever a professional man can be obtained, it is desirable that he should be obtained and that we should not go outside the ranks of the forensic profession for a Judge. The Bill, however, does not go so far as this, but recognizes service as a Subordinate Judge even without any forensic experience as a sufficient qualification. But at present all I am concerned to say is, that it seems to me absolutely essential that there should be some sort of professional qualification for every man who is appointed a Judge. Whether the qualifications in the Bill are the best or not is a matter which I would be

willing to leave, with one exception, to the views of the Select Committee; but I am bound to say that I would rather the Bill were abandoned altogether than allowed to pass, leaving, as things stand at present, Judges who might be appointed having no professional qualification whatever.

"The only other point as regards this section upon which I wish to say anything is as regards the proposal that the Judges to be appointed shall be of five years' standing in their qualifications. It has been objected to that that the standing is not enough, and it has also been objected that the standing is too much. I think myself that five years is a very low qualification, but I am unable to propose a higher one, because by a law of the British Parliament which we cannot alter, that is the qualification imposed for Judges of the High Court, and it would be absurd in us, I think, to propose to create a Small Cause Court in India, the qualifications of the Judges of which should be higher than those imposed by the Parliament of the United Kingdom for the qualifications of the Judges of the High Court. I am, therefore, unable—though I am personally in agreement with the Government of Bombay and others who have suggested seven instead of five years—to propose that the qualification should be more than five years, because it would lead to the inconsistency which I have mentioned. It is quite true that I do not suppose that there ever was, or could be, an appointment of a gentleman of anything like so little as five years' standing to the position of a Judge of the High Court. I am sure if such a thing were done it would produce a storm, both here and in England. I rather think there is no Judge of any High Court who was appointed on less than fifteen years' standing, and I should say that the average was nearer twenty years. But I regret that, the qualification for the High Court being five years, I cannot propose to increase that qualification with regard to the Judges of this Court.

"The eighth section of the Act as it stands contains a provision which I propose to ask the Select Committee to alter, though it is a point upon which I feel less strongly than upon that regarding the professional qualification. As the Act stands at present, section 8 after providing for the status of the Chief Judge, runs thus—

'The other Judges shall have rank and precedence as the Local Government may, from time to time, direct.'

"Now, there is not, so far as I know or believe, any Court in the civilised world—there certainly is not any British Court—in which the

Judges other than the Chief Justice or the Chief Judge have any difference in rank or precedence other than that which follows from the dates of their appointments, and to place it in the hands of the Executive Government of any country to alter the precedence of the Judges of the Court generally, as distinguished from their right to designate the Chief Judge, would be to do the very thing which the English constitution has been labouring to avoid ever since the Revolution, that is, to keep the Judges dependent on the favour of the Executive. Even in the smaller Courts it is desirable to avoid this as far as possible, and therefore I propose in the Select Committee to alter that clause by saying that the other Judges of the Court shall have rank and precedence according to the dates of their respective appointments; but, as I said, that is a matter upon which I do not feel the same strong opinion which I do with respect to the necessity that every Judge shall have a professional qualification, and, if the Select Committee or this Council differ from me, I shall be perfectly satisfied to acquiesce in their view.

"The third section is objected to only, I think, by the Government of Madras and by Mr. Justice Parker, who writes very strongly on the point. I must read what he says. It is due to him to do so, although I think that I can satisfy the Council that he has misunderstood the operation of the clause. He says:—

'I strongly protest against sections 3 and 6 of the new Bill. The practical effect of them is to repeal the Civil Procedure Code altogether as far as the Presidency Small Cause Court is concerned, and to turn the High Court into a Legislative body with power to enact an entirely new Code of Civil Procedure for the Presidency Small Cause Court. It may be desirable that the High Court should have power to make supplementary rules consistent with the Civil Procedure Code for the regulation of the procedure in the Small Cause Court, but such powers can be given by the extension of section 652, Code of Civil Procedure, to the Small Cause Court. But that the High Court should have power to pass rules in supersession of the law of the land seems to me a complete departure from all sound principles of legislation.'

"Now, the facts are that the provisions of the Code of Civil Procedure are not adapted in all respects to summary proceedings, and that the rules which have been made for the Small Cause Courts are, by common consent, cumbrous and dilatory; and various proposals for alterations of them were made and considered at great length not only in the Home Department of the Government of India, but also by the Local Governments, and there was a general

consensus of opinion that, whilst the Code of Civil Procedure was to continue to be the basis of the procedure in all Courts in the country, the Judges of the High Court were the best persons to judge and determine when the Code of Civil Procedure might, for purposes of these summary proceedings, be set on one side, and what would be the best thing to substitute for the provisions of the Code. It is not intended, it never was intended, and there certainly is not one word in the Bill which could be construed into such an intention, to set aside the Code of Civil Procedure altogether. All that is done is, that it is proposed to leave in the hands of the Judges of the several High Courts a power which at present is exercisable by the Judges of the Small Cause Courts themselves, with the consent of the Local Government; but it has not been found to work as it is, and the opinion has been generally formed, that the Judges of the High Court are likely to be better able to frame satisfactory rules, particularly as it may very well be that the rules which will fit one Small Cause Court may not be exactly the rules desirable in another Small Cause Court. The Judges of the various High Courts are likely to be the best bodies to frame practical rules, not, however, by any means suggesting that it is necessary for them to set the Code of Civil Procedure aside and to start a new Code for themselves.

"Section 4 of the Bill is a section introduced to enable a plaintiff who has a claim against several different persons, some of whom are, and some are not, within the jurisdiction of the Small Cause Court, to prosecute his claim against those whom he can reach without being obliged to prosecute it against those whom he cannot. It seems to me to be a very reasonable proposition, and it is generally approved; but there is one dissentient gentleman, a man whose opinions are entitled to considerable weight, who proposes instead to allow the plaintiff to sue absent defendants, although the Court has no jurisdiction over them. I confess that that is a strong proposition, and I should hesitate very much before I would propose it. But there are certain amendments proposed which will be brought before the Select Committee which will, I think, get rid of some of the objections raised to the clause. I propose to ask the Select Committee to put in an express provision that the plaintiff shall not only be obliged to abandon that suit, but to abandon his rights altogether, against the absent defendants, without prejudice to any right of contribution which any of the defendants sued may have against them. I do not think that a plaintiff ought to be encouraged to split up his claim and bring a case as to part against *A* to-day and as to another part against *B* to-morrow, though at the same time it would

be very unfair if *A* having been compelled to pay the whole claim, should be prevented from claiming his proper share from *B*, because the latter was absent. I think, however, that a very simple amendment will get over that difficulty.

"Section 5 is a section which was proposed by the late Mr. Hart, the Chief Judge of the Small Cause Court in Bombay, and it seems to me to have a very useful operation. The only objection that I have seen made to it is one which I think misapprehends the scope and operation of the section. The objection is taken by so important a body as the Judges of the High Court at Calcutta. They say that—

'With regard to section 5 of the draft under consideration, the Judges are of opinion that the provision contained in the proposed new section 19 A is calculated to lead to results of a highly inconvenient character and ought not, therefore, to form part of the Bill. It permits the refusal by the Small Cause Court to certain suits in which questions relating to the title to immoveable property may be raised as incidental to the main issues. Such questions arise collaterally in many cases which may quite properly be decided by a Small Cause Court, and the introduction of the section referred to might, in the view of the Judges, do harm in two ways. In the first place, it would tend to the rejection of a very large number of suits in which no objection, in respect of either the summary nature of the procedure or the competency of the tribunal, could be reasonably taken to the decision for collateral purposes only, of questions connected with title to immoveable property; and, secondly, it would be likely to create much dissatisfaction if parties interested in such cases, a large proportion of which are concerned with claims of small amount, were thereby compelled to have recourse to the higher tribunal which must, of course, retain exclusive jurisdiction in title suits.'

"Now, with great deference to the learned Judges, that seems to me to misapprehend altogether the scope of the section. The section provides that—

'When the right of a plaintiff and the relief claimed by him in the Small Cause Court depend upon the proof or disproof of any right to, or interest in, immoveable property or any other title which the Court cannot finally determine, the Court may at any stage of the proceedings return the plaint to be presented to a Court having jurisdiction to determine the title.'

"It does not interfere with the jurisdiction of the Court in any case in which it now has jurisdiction and in which it would be able if the law remained unaltered to decide the case; but what it does provide is this, that when a case arises such as this, and the Court cannot decide it, because a question

of title has arisen which the Court is not competent to decide, instead of being obliged, as it now is, to dismiss the suit, leaving the plaintiff to begin again in a competent Civil Court, having thrown away all the costs already incurred, it enables the Small Cause Court to transfer the suit into a Court which has jurisdiction to try it, and thereby to save the throwing away of everything that has previously been done. It is exactly analogous to the provision in the English Judicature Acts, whereby when a cause is now brought in the Chancery Division which ought to be heard in the Queen's Bench Division, instead of the suit being dismissed, an order is made transferring the cause from one Division to the other. And it seems to me that, so far from its being a provision which will limit the jurisdiction of the Small Cause Court, the clause merely prevents certain costs which would otherwise have been entirely thrown away from being wasted, in cases where the question of title is one which the Court cannot determine, and the Court cannot determine the suit without having this question of title previously settled. But however the Select Committee may view the question as to whether relief ought, or ought not, to be given to the plaintiff who makes a mistake of this nature, I can only say that I am willing to acquiesce in their decision.

"Section 6 is a section with regard to which I need not trouble you. It is a simple corollary to section 3. And, if section 3, which enables the Judges to make rules, is passed, the repeal of the existing clauses is a matter of course.

"Section 7 is the section which has given rise to perhaps the largest amount of difference of opinion. As the law now stands, there is theoretically no appeal from the decision of the Small Cause Court, but any one who feels himself aggrieved may move the High Court to call for the record, and thereupon, if the High Court thinks fit, the decision may be set aside, and the plaintiff is then permitted to commence a completely new action on the Original Side of the High Court, to have the case determined: that is to say, the form which an appeal is obliged to take is one which is both cumbrous and expensive, and it involves all the delay of a new action and new pleadings, everything which the Small Cause Court is designed to get rid of, but it does not prevent the case from being re-tried. I do not find anywhere in the papers any opinion in favour of the retention of this proceeding, which has been characterised by very high authority as "a hateful clause." Now, the Bill proposes to get rid altogether of that cumbrous proceeding, and to provide instead thereof that any decree in which the subject-matter is of less value than R1,000 shall be concluded

in the Small Cause Court without going to the High Court at all, and that any decree in which the subject-matter exceeds ₹1,000, shall be subject to an ordinary appeal. I find that there are no less than three different views on this. I think the view of the majority is that the best course would be to restrict the jurisdiction of the Small Cause Court to suits, the subject-matter of which does not exceed ₹1,000, and thereupon to get out of all difficulty. If that view is taken, although I do not think it is the best, I would not quarrel with it. Another view is to retain the present procedure, only enabling the defendant in any case in which a suit is brought for more than ₹1,000, to remove it into the High Court. That is a somewhat cumbrous proceeding, and, though I myself have no objection whatever to concurrent jurisdiction in different Courts, it is contrary to the scheme and to the spirit of Indian legislation on these matters; and I doubt whether it would be as desirable as limiting the jurisdiction of the Court altogether. Still, it might possibly be found a workable *modus vivendi*, having regard to the fact that there is so much difference of opinion in different localities on the question of limit.

"The third proposal is that which is contained in the Bill. As between the first and the third again, I do not feel any great preference either way. I cannot myself understand how a cause which is worth a thousand rupees can be called a 'small cause,' but it seems to be generally accepted as such. One thing, however, I cannot accept. I cannot, unless I am driven to do so, consent to any man being obliged to leave at issue a question which may cost £150 for decision at a single hearing and before a single Judge. I should like to refer for one moment to what has been said on that subject by the Bombay Chamber of Commerce. The Chamber writes :—

'What my Committee consider is really wanted is an opportunity for the plaintiff to obtain a re-hearing in cases where a fraudulent defence has been set up at the first hearing in the Small Cause Court, which defence could not have succeeded had the procedure at the Small Cause Court enabled the plaintiff to show that the defendant's documents produced in the Small Cause Court were fraudulent, and which he would on a re-hearing be able to do in the High Court, where the whole procedure as regards inspection of documents contained in the Civil Procedure Code obtains. A mere right of appeal will not cover this point, because an appeal can only proceed on the facts and evidence before the Court of First Instance, whereas a right of re-hearing enables the suitor to meet deficiencies in the evidence caused by surprise or otherwise in the First Court. Practically, the position now is that the plaintiff does not know what case he has to meet in the Small Cause Court, and he can be, and no doubt frequently is, met with fraudulent

documents and a fraudulent defence, which the Committee of the Chamber submit should not be possible in suits for so large a sum as ₹2,000.'

"Of course, if that is done in the first instance, and if the plaintiff has an appeal, he knows by the time he goes to the Court of Appeal what case he has to meet, but it becomes to my mind even more important, in these summarily tried cases, that there should be an appeal than it would be in a case in which there were regular pleadings. In any case of importance the nature of the case to be made by the other side can be more or less gathered from the pleadings, but in a case of summary proceedings is it not possible for a man to know beforehand what the case is that he may have to meet. You do not know what your opponent's case is till you hear it argued, and it is impossible to anticipate what points may arise in such a case until it has been argued before the Court of First Instance.

"I should like, while dealing with that point, to mention what Mr. Justice Starling has said upon the subject. He says:—

'I have always thought that the present practice of applying for a re-hearing, and then having the suit re-heard on the Original Side, rather clumsy, and at the same time involving much waste of time and needless expense, and I have been, and still am, of opinion that it is only fair to suitors to allow an appeal from decrees of the Small Cause Courts when the amount at stake exceeds ₹1,000.'

"The only objection of any substance that I have seen is this. It is said you will destroy the summary nature of the Court, because it will be necessary for the Judge to take down the evidence, and you must have a judgment. As far as taking down the evidence goes, I do not know that that is necessary, though I think any Judge, in dealing with a case of the value of ₹1,000 or more, would consider it his duty to take a tolerably good note of the evidence, and I cannot understand any Judge making up his mind and delivering his judgment without having given himself the advantage of having before him a note of the evidence which had been tendered. But it is certainly the duty of every Judge to deliver a judgment, that is to say, to give the public an opportunity of knowing the reasons for which he has come to his decision. It is also the duty—as I pointed out on a former occasion—it is the duty of the appellant, or the person who expects to be an appellant, to provide himself with a sufficient note of the evidence and judgment if he has any reason to suppose that the Judge will not have taken a sufficient

note of the evidence: or that he will not have written his judgment. I have seen appeals over and over again in which, although no doubt a good deal of the evidence was more or less recorded, not one word of the judgment was to be found except that which was noted on the back of counsel's brief; but the Court of Appeal never hesitated to accept what counsel wrote upon the back of his brief as a fair statement of what the Judge had said. It is the duty of every appellant to make out his case, because if he does not do this, the presumption is that the Court below is right. However, as between all these conflicting views, I have stated my own view, and I am willing to a certain extent to leave the matter in the hands of the Select Committee. All I would venture to say in that respect is that, unless a professional qualification of some kind is imposed upon every Judge of the Court, and unless either the jurisdiction of the Court is limited to ₹1,000, or an efficient appeal of some sort is given in all cases above ₹1,000, I personally consider that the Bill will have been "destroyed," and if it comes back from the Select Committee in such a condition, I shall ask leave to withdraw it."

His Excellency THE PRESIDENT said:—"The Hon'ble Legal Member in making this Motion has supported it by a number of arguments of a very technical and, if I may say so without giving him offence, controversial character. I think it due to my hon'ble colleagues, and to myself, to say that the statement of the Hon'ble Legal Member must be taken as representing his own views upon the points with which he has dealt, and not as in any way committing the Government of India. The Select Committee will obviously be entirely unfettered in dealing with this important measure. I have made these observations in order to avoid possible misconception."

The Hon'ble SIR GRIFFITH EVANS said:—"After what has fallen from the Hon'ble Member in charge of the Bill, and from His Excellency the President, I do not propose to trouble the Council with observations of any length. The matter can come before the Select Committee, who will be unfettered. I only now wish to say that, had I found that it was an essential portion of this measure that a system of regular appeals should be introduced into the Calcutta Small Cause Court, I should have felt it my duty to oppose the Bill and to divide the Council on the question that it be referred to a Select Committee; but, as the matter now stands, I do not think it necessary to take this course."

The Motion was put and agreed to.

LAND ACQUISITION ACT, 1870, AMENDMENT BILL.

The Hon'ble SIR ALEXANDER MILLER also moved that the Bill to amend the Land Acquisition Act, 1870, be recommitted to a Select Committee consisting of the Hon'ble Sir Antony MacDonnell, the Hon'ble Dr. Rashbehary Ghose, the Hon'ble Mr. Stevens, the Hon'ble Mr. Lee-Warner and the Mover. He said:—

"I am substituting Mr. Lee-Warner's name for that of Sir Charles Pritchard, at Sir Charles Pritchard's request. This Bill passed through Committee last session, and it was merely postponed, because Sir James Mackay was anxious to have time to consider it at the end of the session. Since then a somewhat important paper has come in, in the shape of an opinion by Mr. Ogilvie, who is largely connected with land acquisition in the Punjab, and I have thought it desirable that that paper should be before the Select Committee in order that, with regard to some of the more or less weighty suggestions made in it, the Committee should have an opportunity of determining whether any, and which of them, should be adopted; and therefore I think it advisable that it should be recommitted. This would only perhaps involve one single sitting."

The Motion was put and agreed to.

The Council adjourned to Thursday, the 11th January, 1894.

J. M. MACPHERSON,
Deputy Secretary to the Government of India,
Legislative Department.

CALCUTTA;
The 11th January, 1894.

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