Thursday,
9th January, 1896

ABSTRACT OF THE PROCEEDINGS

OF THE

Council of the Governor General of India,

LAWS AND REGULATIONS

Vol. XXXV

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OF

THE COUNCIL OF THE GOVERNOR GENERAL OF INDIA,

ASSEMBLED FOR THE PURPOSE OF MAKING

LAWS AND REGULATIONS,

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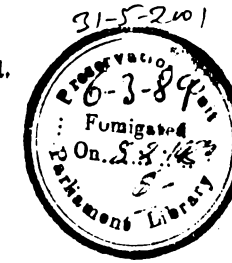

CALCUTTA
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1896

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 9th January, 1896.

PRESENT:

The Hon'ble Sir A. E. Miller, KT., C.S.I., Q.C., *presiding*.
His Honour the Lieutenant-Governor of Bengal, K.C.S.I.
His Excellency the Commander-in-Chief, G.C.I.E., K.C.B., V.C.
The Hon'ble Lieutenant-General Sir H. Brackenbury, K.C.B., K.C.S.I., R.A.
The Hon'ble Sir C. B. Pritchard, K.C.I.E., C.S I.
The Hon'ble Sir J. Westland, K.C.S.I.
The Hon'ble J. Woodburn, C.S.
The Hon'ble Prince Sir Jahan Kadr Meerza Muhammad Wahid Ali Bahádur, K.C.I.E.
The Hon'ble Mohiny Mohun Roy.
The Hon'ble C. C. Stevens, C.S.I.
The Hon'ble A. S. Lethbridge, C.S.I., M.D.
The Hon'ble Sir G. H. P. Evans, K.C.I.E.
The Hon'ble Alan Cadell, C.S.I.
The Hon'ble J. D. Rees, C.I.E.
The Hon'ble G. P. Glendinning.
The Hon'ble Nawab Amir-ud-Din Ahmad Khan, C.I.E., Bahádur, Fakharuddoulah.
The Hon'ble P. Playfair, C.I.E.

NEW MEMBER.

The Hon'ble NAWAB AMIR-UD-DIN AHMAD KHAN, BAHADUR, took his seat as an Additional Member of Council.

INDIAN EMIGRATION ACT, 1883, AMENDMENT BILL.

The Hon'ble MR. WOODBURN moved that the Bill to amend the Indian Emigration Act, 1883, be taken into consideration.

The motion was put and agreed to.

The Hon'ble Mr. WOODBURN also moved that the Bill be passed.

The motion was put and agreed to.

CIVIL PROCEDURE CODE AMENDMENT BILL.

The Hon'ble MOHINY MOHUN ROY moved for leave to introduce a Bill to amend the Code of Civil Procedure. He said:—"The amendments which this Bill proposes to make are not only expedient, but some of them seem to be absolutely necessary.

"I. The first amendment is of section 195 and is an enabling provision. Under that section evidence by affidavit may now be given upon applications. The amendment will enable the Court to receive evidence by affidavit in *ex parte* suits and non-contentious proceedings. In the High Court, evidence by affidavit is received in non-contentious proceedings for the grant of probate or letters of administration. There is no reason why evidence by affidavit may not be given in all *ex parte* suits and non-contentious proceedings, subject always to the discretion of the Court to require the attendance of the declarants for cross-examination. The amendment will greatly simplify procedure and save the recording of a large amount of formal evidence.

"II. The next two amendments may be considered together. At present there is no provision in the Procedure Code for the simultaneous issue of the process of attachment and proclamation as there is in section 163 of the Bengal Tenancy Act. The amendments will enable the decree-holder to apply for the attachment and sale of the debtor's property and for the simultaneous issue of the processes thereof and save the cost and delay of successive service. The reduction of processes in execution, wherever practicable, is certainly desirable.

"The next provision contained in the amendments for the service of proclamation upon the judgment-debtor seems to be absolutely necessary. The framers of the Procedure Code were probably of opinion that proclamation upon the property was a sufficient notice to him. But the service of such proclamation is often a matter of considerable doubt and controversy and, even when *bonâ fide* made, would not apprise the judgment-debtor of the intended sale, if he did not reside in the neighbourhood. It seems to be perfectly clear that the judgment-debtor ought, in all cases, to have notice in order to enable him to save his property from impending sale or to secure a good price for it by seeking out likely purchasers. Valuable property is often situated in out-of-the-way places. In regard to such property, proclamation upon the spot goes for almost nothing. The Civil Procedure Amendment Act, 1894, renders it almost indispensable that the judgment-debtor should have such notice in order that he might take steps for setting aside the sale within thirty days from its date by depositing the amount due under the decree and 5 per cent. compensation for the purchaser.

"The provision contained in the second paragraph of the amended section 289 is very important. Proclamation upon the spot is, to say the least, a very unsatisfactory mode of advertisement and often amounts to no advertisement at all. The amendment enables the Local Government to provide and make rules for the advertisement of property in a local Gazette, which should be in the language of the district, and advertise all land-sales by public auction whether by order of Civil Courts or Revenue-authorities. Two copies of the Gazette should be sent to each Court, Civil or Criminal, to each revenue-office, to each police thana, and to each post office, under a rule that one copy should, immediately upon arrival, be fixed up for the information of the public, and the other copy preserved as a record to be bound into a book at the end of each year. The Gazette might be allowed to publish private advertisements and would, in all probability, be fully supported by the fees for advertisements of public sales and receipts from private advertisers, without costing the Government a single rupee. If the Local Governments approve of this scheme, they will frame rules after due consideration and enquiry and deal with the above suggestions as they may think fit. The ancient primitive method of proclamation by beat of drum is wholly inadequate and requires to be supplemented by advertisement in a local Gazette always open and available to the land-buying public.

"III. The supplemental provisions contained in the added sections 654 to 656 are the most important of all. The rule of giving notice prior to the institution of suits, like many others borrowed from the English law of procedure, seems to be wholly unsuited to this country, where its tendency is clearly mischievous and to seriously handicap justice. It raises an artificial preliminary issue between the parties, puts the real issues in the background, and holds out a strong temptation to the Judge to throw out a suit upon the preliminary issue, especially if it be a 'hard case' in any sense, that is, either hard for any of the parties or hard to decide upon the merits. It is a lamentable sight to see suits in large numbers thrown out under this rule, not only by the inferior Courts but by the superior Courts in appeal and second appeal. In the case of *Bhubunmoyi Debya* v. *Ram Kishore Acharjee Choudry* (10 Moore, 279) the judgment of the Privy Council, which was delivered by Lord Kingsdown, says, 'Our system is one of the most artificial character, founded in a great measure on feudal rules, regulated by Acts of Parliament and adjusted by a long course of judicial determinations to the wants of a state of society differing as far as possible from that which prevails amongst Hindus in India.' What we want here is substantial justice with a minimum of procedure and cost, and not strict justice with a highly complex

and costly procedure upon the model of the English law. When human judgment and human testimony are both fallible, it may be doubted whether or how far the attempt at meting out strict justice can be successful in any country. But the attempt involves an amount of procedure and expenditure which we may very well do without in India. The principle of compromise, which is wholly ignored by the English law, seems to be best suited for the adjustment of differences between parties in Indian suits and doing substantial justice between them. One should have thought that, instead of dismissing a suit for want or defect of notice, the Court might very well make it up for the defendant in its decree. The Rent Law Commission, of which I was a member, adopted this view for enhancement suits. The Report of the Commission says, 'Such a large percentage of enhancement cases have failed, because it was not found that the notice had been served or because the notice was defective in form, that it has appeared to us highly expedient to do away with a detail, the practical result of which has been to delay and impede a decision of the real question at issue between the parties. We have accordingly made the institution of the enhancement suit to be notice to the tenant' (Volume I, page 34). The Bengal Tenancy Act, which proceeded upon the lines of this Report, safeguarded the interests of the tenants by providing that a decree for enhancement of rent should take effect on the commencement of the agricultural year next following (section 154).

"Several years prior to the passing of the Bengal Tenancy Act, in the case of *Mohamed Rasid Khan Choudhry* in the Calcutta High Court (20 Weekly Reporter, page 401), the Judges (Sir Richard Couch, C. J., and Glover, J.) held upon the broad principles of justice that 'he (defendant) has no right to hold the property except as a tenant-at-will, and the suit which was instituted more than a year ago would be a demand of possession at that time. If, as is now proposed, the decree is only for ejecting him at the commencement of the next Bengali year, he will have had ample notice that he is to quit the premises, and he will not be prejudiced by our making such a decree.' This ruling was followed in 1875 by Macpherson, Officiating C. J., and Morris, J., in the case of *Hemchander Ghose* (23 Weekly Reporter, page 440). But three years later, these decisions were over-ruled by a Full Bench of the Court chiefly upon the authority of the English case of *Doed Jacobs* v. *Philips* (I. L. R. 2 Cal. 146). Since then the Calcutta High Court and the subordinate Courts have been strict in applying the rule of notice. But a moment's consideration ought to convince any reasonable man that a rule which arms the defendant with a new weapon for resisting a just claim is not

likely to diminish litigation or to advance the cause of justice. Where he has no defence upon the merits, it furnishes him with an extraneous defence which is often successful and with which he can always harass his adversary through three Courts. Upon the issue thus raised, and raised almost in every case coming under the rule, both sides produce witnesses, one to prove and the other to disprove service. There is necessarily a large amount of hard swearing on one side or the other, and sometimes on both. It is clear, therefore, that a large amount of needless and avoidable perjury is among the evils which directly result from the rule. I may add that technical pleas founded upon it and other similar rules imported from the English law of procedure, by which a claim may be thrown out without trial, were, until lately, wholly unknown to the people of this country and are quite repugnant to their notions of administration of justice. But the rule has now taken root in the statute and case law of British India and cannot well be repealed. The supplemental provisions which it is proposed to add will, however, take off its sting, and will, while giving the defendant every advantage which he has under the rule, save suits from dismissal without trial upon the merits. The Court will now say to him :—'You say you are entitled to six months' notice and such notice has not been given. Well, we will stay the suit for you for six months. All this time the property will remain in your possession, and all this time you will have for considering and maturing your defence, if you think fit to make any. If you have no good defence, you can confess judgment and place the property in the hands of the Court for delivery to the plaintiff, and then there will be no costs against you. In fact, you will have everything that you may fairly claim, short of getting a dismissal of the suit without trial and a field day with witnesses over the question of notice.'

"There is nothing novel in staying proceedings in a suit. The Procedure Code provides for adjournments for longer and less definite periods (section 367 and last paragraph of section 244)."

The Hon'ble SIR GRIFFITH EVANS said :—"This Bill, so far as I have had time to consider it—it has not been circulated and therefore I have not had time to examine it carefully—seems to me reasonable. The first point as regards allowing any person to give evidence on affidavit in *ex parte* suits and non-contentious proceedings seems to be a useful provision. There is a power that the Court may call witnesses for cross-examination, and they may also, if the case turns out to be contentious, think it desirable to have a trial in the ordinary way ; but these are matters of detail for the Select Committee.

"As regards the attachment and sale proclamation issuing together, there is not so much objection to that now as there would have been, since the rule has been introduced of allowing a person whose property is to be sold to set aside the sale within thirty days from its date by payment of the amount due under the decree; and there is not much objection to have the attachment and sale proclamation together, while it lessens expense and delay and removes a source of contention.

"As regards the question of publishing in the local Gazette, that is a matter for Government to consider how far it will be convenient or inconvenient.

"As regards notice prior to institution of a suit, that also seems a good provision. The object of a notice is to give the defendant time to decide whether he should contest the suit or not. The proposed amendment will produce the same result as the present rule that the defendant will have time to consider what he will do, and it will no doubt, as the Hon'ble Member has said, put an end to a large amount of hard swearing as to whether the notice was served or not. It seems to me, therefore, that this Bill might properly be introduced and circulated. As I have said, I have not had an opportunity of examining it carefully, but I think that it deserves the favourable attention of the Council."

The Hon'ble MOHINY MOHUN ROY introduced the Bill.

INDIAN REGISTRATION ACT, 1877, AND INDIAN EVIDENCE ACT, 1872, AMENDMENT BILL.

The Hon'ble MOHINY MOHUN ROY moved for leave to introduce a Bill to amend the Indian Registration Act, 1877, and the Indian Evidence Act, 1872. He said:—"Section 33 (*a*) of the Indian Registration Act, as it now stands and as it is ordinarily construed, is productive of great inconvenience and hardship.

"It frequently happens that the principal has to execute a power-of-attorney for the registration of a document when he is away from his residence or home and is for a time in another sub-district on business or for other cause. There is no good reason why he may not execute it before the sub-registrar of such sub-district and get it authenticated by him. It is obvious that he would be put to great inconvenience and hardship if he had to go for this purpose to the

registering office of the sub-district of his residence. Some registering officers construe this section so strictly as to hold that a person who, residing in the suburbs, has to attend office every day in Calcutta, is not entitled to execute a power-of-attorney before the Registrar of Calcutta and obtain his authentication.

"The law makes it incumbent upon the executant to execute his power-of-attorney before a registering officer. He cannot well do this without appearing before him and residing, though it may be for a short time, within his district or sub-district. It seems, therefore, that the provision for executing the power-of-attorney before a registering officer, who will never authenticate without being satisfied of the executant's identity, acts as a sufficient safeguard, and that the further provision which it is proposed to omit is an unnecessary restriction.

"There is no such restriction in the cognate clauses, section 33 (*b*) and section 33 (*c*), nor in section 29.

"Section 47A, which it is proposed to add, is a very important and necessary provision. The present law, section 47, leaves a wide door open for the commission of fraud. *A* executes a transfer of his property to *B*, and does not immediately register the deed. The law allows four months, which may be extended under certain circumstances to eight months, for its registration, and, if executed out of British India, the registration may be deferred for years at the option of the parties. There is nothing to prevent *A* from again transferring the property to *C* within the time allowed for registering the first deed. If *C* made any enquiry in the registry office, he would obtain no information of the execution of the prior deed, and would be easily taken in. Under the present law, if the transfer in favour of *B* be afterwards registered, it will take effect against the deed in favour of *C*. In such cases there is generally some kind of understanding between the vendor and the first transferee. But it is very difficult to prove collusion between them, and the result of litigation between the rival purchasers generally is that the vendor sells his property twice over, and the second purchaser is completely sold. This should not be. The section proposed to be added will, by giving priority to prior registration, prevent the commission of such fraud. There is a similar provision in the English statute law, 7 Anne, c. 20, and 38 & 39 Vict., c. 87, s. 28.

"The proposed rule is not likely to operate with hardship upon anybody. Purchasers or mortgagees seldom pay money before registration, well knowing that the deed is waste paper unless registered. There may be exceptional

cases where there has been *bonâ fide* payment of money by the first transferee before registration. If it could be shown that the subsequent transferee had notice of the prior transfer, it would probably be held that the subsequent transfer was not *bonâ fide* and would not take effect although registered previously. It has been so held with reference to a cognate section—I. L. R. 8 Cal. 597 F. B.; see also *Le Neve* v. *Le Neve*, White and Tudor's Leading Cases in Equity, Volume II, page 32 (edition of 1877). But, if both the transfers are *bonâ fide* the transferee who has been tardy in registering his transfer, and whose tardiness has enabled the transferor to perpetrate fraud, ought certainly to suffer.

"With regard to registered documents of a certain age, say twelve years, when they are past the age of being questioned by suit, it is desirable that the Civil Court should have the power to use them as evidence without formal proof of execution. Prudent men of business generally rely and act upon registered documents without such formal proof. Why should not the Civil Court be at liberty to dispense with it, when it thinks fit to do so? If, however, a registered document be seriously impugned or be the subject of an issue in the cause, the Court will doubtless go into evidence upon it. This is exactly what the amendment provides. Under it, the Court 'may presume' that a registered document which is more than twelve years old and is produced from a proper custody is genuine. The expression 'may presume' is thus defined in the Indian Evidence Act:—

'Whenever it is provided by this Act that the Court "may presume" a fact, it may either regard such fact as proved, unless or until it is disproved, or may call for proof of it.'

"This presumption applies at present to all documents more than thirty years old, although they may have never seen the light until produced in Court. It is proposed to extend this presumption to registered documents of a less age but having a greater guarantee of authenticity by reason of registration. The proposed amendment, while it will simplify the procedure of the Court and save the recording of a lot of formal evidence, seems to be necessary in the interests of justice for the protection of purchasers at auction sales, who have to depend chiefly upon certified copies of deeds from the registry office and find it extremely difficult to obtain evidence of their execution."

The Hon'ble SIR GRIFFITH EVANS said:—"The second amendment as regards giving priority to prior registration appears to be a very important one and it will require serious consideration.

"It will particularly require consideration as regards documents executed in England.

"As regards the other matters they are comparatively small and one of them seems, at any rate, to be very desirable; and as regards the other proposal for allowing a registered document of twelve years to be taken as *primâ facie* proving itself, there is much to be said for it and I incline to think it will work well."

The Hon'ble SIR ALEXANDER MILLER SAID:—"I do not intend at this stage to express any opinion on any of these amendments except the one last mentioned by the Hon'ble Sir Griffith Evans. It seems to me that in a country where we have the limitation of twelve years it is a most reasonable provision that a document so old that possession in accordance with the document would give a good title under the Statute of Limitations, whether the deed itself were valid or not, ought to be at least looked upon as *primâ facie* proving itself: and I do not understand that the Bill proposes to go any further; if it does, it may be necessary to amend it."

The Hon'ble SIR GRIFFITH EVANS said:—"No, it does not go any further."

The motion was put and agreed to.

The Hon'ble MOHINY MOHUN ROY introduced the Bill.

The Council adjourned to Thursday, the 16th January, 1896.

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

CALCUTTA;
The 10th January, 1896.

S. G. P. I.—72 L. D.—7 12-50.