Friday,
15th October, 1897

ABSTRACT OF THE PROCEEDINGS

OF THE

Council of the Governor General of India,

LAWS AND REGULATIONS

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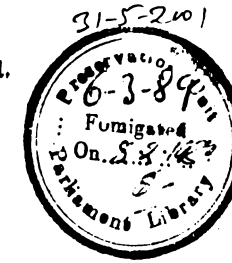

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Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Indian Councils Acts, 1861 and 1892 (24 & 25 Vict., cap. 67, and 55 & 56 Vict., cap. 14).

The Council met at the Viceregal Lodge, Simla, on Friday, the 15th October, 1897.

PRESENT:

His Excellency the Earl of Elgin, Viceroy and Governor General of India, P.C., G.M.S.I., G.M.I.E., LL.D., *presiding*.

His Honour Sir William Mackworth Young, K.C.S.I., Lieutenant-Governor of the Punjab.

His Excellency Sir G. S. White, G.C.I.E., G.C.B., V.C., Commander-in-Chief in India.

The Hon'ble Sir J. Westland, K.C.S.I.

The Hon'ble M. D. Chalmers.

The Hon'ble Major-General Sir E. H. H. Collen, K.C.I.E., C.B.

The Hon'ble A. C. Trevor, C.S.I.

The Hon'ble Sir H. T. Prinsep, KT.

The Hon'ble Sir G. H. P. Evans, K.C.I.E.

STAMP BILL.

The Hon'ble SIR JAMES WESTLAND moved for leave to introduce a Bill to consolidate and amend the law relating to Stamps. He said:—

"During the last forty years there have been three general Stamp Acts; first that of 1862; then that of 1869 which consolidated and amended the Act of 1862; and thereafter the Act of 1879 which consolidated and amended the Act of 1869. The present Act is meant to be a consolidation and amendment of the last of these Acts, that of 1879, which was introduced and passed after elaborate consideration of the subject, and very largely upon the lines of the English Stamp Act. Our hon'ble and temporarily lost colleague, Sir John Woodburn, at the last meeting of the Council, told us that, in the course of time, weaknesses are discovered and brought to light in the case of every Act of every Legislature, and this is the excuse which I make to the Council for bringing now before them for renewed consideration the Act which it is necessary to amend, namely, the existing Stamp Act. It is natural that defects should be found in an Act of the present description, which enters so largely into the business

transactions of every day life. It is not intended to make any alterations in the main lines of the existing law applicable generally to stamps. Most of the alterations which it is proposed to make are alterations of a petty character, and there are only two or three which might possibly be considered to be of any importance.

"The main defects in the Act may be described as follows. First there are cases in which the law, for want of clearness, has failed in its intention. The stamp law differs from most other revenue laws in this respect, that it is left very largely to a sort of automatic operation; that is to say, it is applied by persons themselves to their own transactions, and the burden of its interpretation rests, not merely upon the lawyer, but upon the layman. It is all the more necessary, therefore, that in its working and in its explanation it should be as clear as possible, so that people who desire to pay proper duty upon their documents and who have no intention of evading the duty in any way, may thoroughly and clearly understand the obligations which rest upon them. There are also cases in which we find that the provisions of the law as they stand have been evaded, partly from apparent misunderstanding and partly no doubt because a lawyer, when he is acting for his client, is bound to carry out the transaction entrusted to him in such fashion as to burden his client in the least possible measure with duty. There are some cases in which it is found in practice that the duty imposed by law upon a certain class of transactions has been evaded by carrying out the transaction in a manner in which the same result has been obtained by the payment of less duty. In these cases, it is proposed by some of the provisions which are included in the amending Bill, to levy the amount of duty which the Act of 1879 intended to levy. There are again cases which, it has been found in the experience of the last eighteen years, have not been adequately provided for; and I say this both in the interests of the revenue and in the interests of the persons who are chargeable with duty. There are cases in which greater facilities may be given to the public than are afforded by the present law and there are cases in which petty hardships are inflicted which the present law does not enable the local officers to meet.

"In two or three of these cases the defects have been remedied by previous amendments, there having been, since 1879, two or three amending Acts. But by far the larger number of the defects brought to notice from time to time have been merely examined, noted and recorded with a view of their being brought before the Legislature in a general amending Bill. These cases were all gathered together and submitted for the consideration of Local Governments and the

officers whom they desired to consult, in a circular which was issued in the beginning of 1895. We have received in reply to that circular a large number of suggestions and criticisms of the law as it at present stands. Some of the suggestions which have been made to us we do not see our way to adopt, but such of them as commend themselves to us are embodied in the Bill which it is now intended to lay before the legislature.

"The main question which will interest the public in connection with the amendment of the Act is the question what alterations are proposed in the duties. For the most part—I should say in all but very exceptional cases—we leave the duties as they at present stand. It is not our intention to ask the legislature to pass a law in aid of the revenue; but in going through the duties as they stand and in collating the opinions regarding them, there are one or two points in which the duties require amendment. I shall, first of all, mention cases in which it is proposed to increase duties. The first of these is the large class of instruments upon which one anna duty is at present levied. The Act as it at present stands necessarily quotes documents by their English names—quotes, for example, a bill of exchange. A bill of exchange is a document which is established in a very well known form by English Mercantile Law. In this country, very naturally, the English forms of these documents are not the same as those adopted by Native Merchants in their transactions; and questions have consequently arisen with reference to mercantile documents which have the same purpose in Indian commerce that bills of exchange have in English commerce, whether they are liable to duty as bills of exchange. Now, I may mention that in the English Stamp Act bills of exchange have got a specially wide definition. A bill of exchange for the purposes of the Negotiable Instruments Act is defined in the English law relating to negotiable instruments. But in the English Stamp Act it is prescribed that for the purposes of that Act a bill of exchange shall mean a very much larger class of documents than is included within the wider definition of the Negotiable Instruments Act. We have now taken that English definition and we have brought it into our Indian Stamp Act. The result will be that we shall include, mostly under the one-anna rate of duty, a number of instruments which at present escape duty because they are drawn in the native character and are not called hundis, the native hundi being the only name that is expressly included in the term bill of exchange.

"The same course we follow with regard to the definition applying to promissory notes. We have introduced into our present Act a definition of promissory note taken from the English Stamp Act.

"We do not, except in one small particular, propose to alter the duty which is levied upon bills of exchange and cheques, cheques being only one of the varieties of bills of exchange. The intended alteration is that we do not propose to carry on the existing exemption in favor of bills of exchange and other such documents for an amount of less than twenty rupees. Receipts for less than twenty rupees are at present exempted from duty; and as it is an obligation by law to give a receipt in certain cases, we do not propose in any way to alter the taxation of receipts or to impose upon receipts not exceeding twenty rupees a tax which they do not at present bear. But in the case of bills of exchange and cheques, we remove the twenty-rupee exemption, and in this respect we copy the English Act. I may mention that there is a history affecting bills of exchange for less than twenty rupees, and that their exemption from duty appears to have arisen by mistake. I quote from a very learned book written by the Hon'ble Mr. Chalmers in a former state of existence in which, dealing with bills of exchange, he says:—

'By Statute George III. Cap. 88, negotiable bills for less than twenty shillings were made void in England and any person who issued or negotiated them was made liable to a penalty not exceeding twenty pounds.'

"This law has since then been set aside, but it appears to have been the origin of the practice of exempting bills of exchange and cheques under a certain amount, the fact being that in England these were not exempted from taxation, but they were *ipso facto* illegal and there was a penalty attached to the drawing of them.

"In the case of promissory notes there is another alteration which has been made and in which we have also copied the English Law. As the law at present stands a promissory note bears the same duty as a bill of exchange payable on demand. Demand means a very different thing in the case of a bill of exchange from what it means in the case of a promissory note. When a bill of exchange is payable on demand, it is intended, unless it is of the variety known as kites, to start at once upon its journey; it passes through various hands and towards discharge. Now, when a person makes a promissory note payable on demand nothing would surprise him more than the presentation of the note being immediately made to him. It is not really meant to be payable on demand although it is expressed to be so. A promissory note is therefore treated as a continuing security in England, and it is provided that promissory notes shall bear the duty which is payable on a bill of exchange drawn otherwise than on demand. In this respect, therefore, we have copied the English Act and made a change which increases the duty payable upon these documents.

"Another change in the direction of increase is in the case of what are called in England equitable mortgages, and which in the Indian Stamp law, as it at present stands, are called by a rather lengthy name—instruments evidencing an agreement to secure the repayment of a loan made upon the deposit of title deeds or other valuable security. These equitable mortgages, according to English law, pay two-fifths of the duty payable upon a bond. In India the duty is extremely small; it only comes to one-eighth of the amount payable on bonds. An equitable mortgage is a transaction which frequently covers considerable amounts of money, and it is a cheap way of carrying out ordinary borrowings from banks and the like. We propose to raise the duty payable in these cases to about one-fifth of the amount required in the case of formal borrowing by bond. This rate is, in proportion to the duty upon bonds, half of what is leviable by the English law, and seems to us a moderate demand in respect of the transactions involved.

"There are only two other cases in which we have increased the duty, or levy a duty which is not at present provided for. The first is the case of a deed of adoption. A deed of adoption is defined in the Indian Act as one conferring authority to adopt, and is chargeable with a duty of ten rupees. There is no duty payable upon instruments recording adoptions. We propose to include these in the definition of deed of adoption, and thus to extend the ten-rupee duty to cases of adoption. An adoption very frequently conveys to the person adopted very valuable rights indeed, and it is a document which mostly passes between persons possessing ample estate. There seems to us no reason why these deeds should be exempted from stamp duty.

"The other case to which I wish to refer is that of a perpetual lease. It is provided in the existing law that a perpetual lease is chargeable only as a conveyance for a consideration equal to the amount of one year's rent. One year's rent is a very small standard of duty of what may be really a conveyance by sale of a very valuable property. Under these circumstances we propose to regulate the duty, not upon a consideration equal to one year's rent, but upon a consideration which is equal to ten years' rent.

"It will be observed also under the head of power-of-attorney, that we have provided for one class of evasion which is not unfrequently practised under the law as it stands, namely, the facility given for effecting mortgages and the like by what is in form only a power-of-attorney. A power-of-attorney, when it is drawn for a purpose like this, will pay a duty equal to the duty payable in respect of the conveyance of the property for the assignment for which the power-of-attorney is drawn up.

"There are also one or two cases, such as petty partnerships, and petty sales by order of court, in which we have reduced the duty at present assessed.

"So far as regards increases of duty which we propose to introduce into the present law; it will be seen that they are not very many. We have further taken the opportunity of making special provision in the Act with reference to debentures. There is at present no special provision with reference to debentures. They are dealt with under the general conditions of bonds. But since the law of 1879 was passed, debentures have come very largely into use, and the practice of limited companies issuing debentures has been extended very widely. We have therefore made special provision relating to debentures. We do not alter the tax upon them; they pay the same duty as is payable on bonds under the existing law; but we have incorporated in the existing law one kind of exemption which has been given by notification, namely, we have provided that in cases of debentures issued in pursuance of a mortgage deed, they shall be exempted from further duty; that is, the duty shall be payable once upon the mortgage-deed, and not again upon separate debentures issued in conformity with it. This provision is intended for the benefit of limited companies, and does not apply to private persons or proprietors of estates issuing debentures as is now sometimes done. Such debenture-issuers will be responsible, not only for the payment of the duty on the mortgage, but also for the payment of the additional duty which is required under the existing law for debentures issued under the mortgage.

"We have also for the facility of business connected with debentures provided in the Act itself for the renewal of debentures without the payment of any extra duty. At present, when a company wants to renew debentures, it has to pay the same duty upon them as upon the originally issued debentures. We have provided that when debentures are renewed, they shall not be chargeable with any new duty, and we allow also for certain alterations in the terms of the debentures being effected without new payment of duty.

"I do not propose in any way to go over all the petty alterations in the provisions of the Bill; they will be dealt with in due course by the Select Committee. There are only one or two matters to which I wish to call attention.

"The first is with reference to a new section which was passed as Act VI of 1894 to give facilities to local authorities for issuing debentures upon payment of composition duty. We have by the addition of a word in that section included the exemption of transfers as well the exemption of issues of debentures; but we have also made provision, by adding a sub-section, for levying a penalty upon a local authority which issues debentures without first of all paying duty. This penalty is taken word for word from the similar provision in the English Act.

"The next alteration is the provision of a method of cancellation of adhesive stamps. People are bound to cancel stamps, but no direction is given as to the method of cancellation. We provided in the law one method of cancellation; that method is not made absolutely obligatory, but it is desirable to give people one clear method of complying with the prescription of the law as to effecting cancellation. In section 20 we have provided a rate of exchange for the conversion of amounts expressed in foreign currencies for the purposes of valuation under the Act. The existing law lays down a rate for the conversion of sterling and one or two other currencies into rupees. That provision, I need not say, has become altogether obsolete; and now, instead of fixing a particular rate for the conversion, we have given power to the Governor General in Council by the issue of a notification to prescribe a rate of exchange for the conversion of British or any foreign currency into the currency of British India.

"Another section which is very far from clear is that which is now section 24 and relates to the sale of property which is transferred to any person subject to incumbrance. It is necessary to provide that the consideration for such sale should be reckoned not only upon the money paid but also upon the money due for discharge of the encumbrance. We have explained this by an explanation and illustrations attached to the section.

"Then in section 26 we have made special provision for the case of leases of mines. This section provides for the case of levy of duty *ad valorem* when the amount on which to reckon the duty is unascertainable. The provision of the present law is that a person may select his own rate of duty, but may not upon the document recover more than that duty covers. In the case of mines of which the rent is a share of the produce it is utterly impossible to tell beforehand what the amount of rent may be. We have therefore provided that any person who chooses to assess the share of the produce at 20,000 rupees a year may recover any amount in excess of that estimate without regarding the limit covered by the duty paid.

"In section 29 we have provided that if a person besides giving an original receipt is called upon to give a copy of it, he will not be responsible for the payment of the duty on that copy, but the person who demands it.

"Chapter IV of the Bill deals with the admissibility of improperly stamped documents in evidence. We have received from some Judicial officers objections to the whole principle of this chapter. They have given us many valuable suggestions and criticisms upon the working of the Stamp law, but we are unable to

accept their views in respect to the authority of Civil Courts to admit documents in evidence which are not properly stamped. The whole of this subject was carefully gone into and explained at the time that the Act of 1879 was before the Council; and I refer hon'ble members and the officers in question to those discussions as giving ample reasons why we should maintain the law on the subject, which obliges Civil Courts to refer these matters to the revenue officers and not to dispose of them themselves. In this chapter we have made some provision for the benefit of the public, namely, in giving revenue officers the power to interpose of their own motion in favor of a person subjected to a penalty.

"We have added a section 48 which gives the necessary power to the Collector to recover all sums required to be paid under the Act, there being at present no provision of this kind.

"In the case of Chapter V, which deals with spoiled stamps, we have made the whole subject much more clear than it stands in the present law. There is one change which has been made in this Chapter to which it is necessary to draw attention because I think that the present provisions of the Act are based upon a misunderstanding. The provisions of the English Act, from which the Indian law is taken, are that if a document is found to be void in law from the beginning, the parties who executed it can claim refund of the duty which they have paid upon it, provided no legal proceeding has been commenced in which the document would have been given in evidence. As adopted in the Act of 1879, this section was worded so as to apply to documents which have been found by a Court of law to be void. This the reference to the English Act will show to be a mistake. If a document is found by a Court to be void, it must have been produced in evidence before that Court and must have been made use of by the party producing it. There is no reason why duty should in such a case be refunded. We have therefore amended the existing Indian law in this respect so as to bring it into conformity with the English law.

"In section 51 we have inserted a provision which will give certain facilities to companies which in the course of their business keep a considerable number of stamped forms for use. Cases have occasionally arisen in which these forms have ceased to be useful for the purposes for which they were prepared. There are no provisions in the existing law by which a refund of the duty paid on such forms can be claimed; although claims made in such cases have been considered by Government, and refunds made by executive order. We have thought it better to provide greater facilities in this respect and have empowered the chief Revenue authority to give refunds in these cases.

"In section 64, the general penalty section, an alteration has been made by including as an offence under the Act the doing of an act with intent to defraud. If the English Act be referred to, it will be found that the general penalty clause is much wider than the section proposed.

"In the chapter relating to supplemental provisions (Chapter VIII), there is one new clause, which we have taken from the English Act, and which subjects every public officer, and therefore every Judge of a Court, who is in charge of records of any description, to give access to the revenue authorities for the purpose of making any enquiry to determine whether any document is insufficiently stamped. In transferring that section from the English to the Indian Act we have omitted the penalty clause, because we consider that the Judges and other public officers in this country are likely to conform to their legal obligations without being threatened with a penalty of ten pounds in case of default.

"There is one alteration we have made in a small matter. We have provided that one anna adhesive stamps may be sold without any license being necessary.

"In the schedule to the Act we have made several changes in form which we believe will conduce very largely to public convenience.

"First, we have improved the alphabetical order. For instance, in the case of a divorce or a gift, people would naturally look under the letter D or the letter G, as the case may be. If reference be made to the existing schedule, they will not be found under these letters, but under the letter I, namely, under the head of Instruments. There are other similar cases.

"We have also removed exemptions from their position in a separate schedule of exemptions and placed them in the schedule of duties under the articles to which they refer.

"Another change is that we have made the ascertainment of duty more direct and more easy. For example, the three tables of duty under the heads of bills of exchange, bond and conveyance are at present drawn up in a very curtailed form. It is impossible, when considerable amounts are involved, without the aid of paper and pencil, to make out from the different tables the duty payable on a particular instrument. By extending the table we have made it easy for a person by a reference to the schedule to ascertain directly what the particular duty is. We have altered the schedule in another respect by improving the references; for example, if you want to find the duty on an administration

bond, you are referred to security bond; and if you turn to security bond, you are sent to find the proper duty under the head of bond. There are several cases of double reference of this kind, and we have in these cases made the reference direct.

"Besides the exemptions which are mentioned in the Act itself there are a large number which have been effected by notification. These refer chiefly to documents which arise in the course of the business of public departments. If we bring these into the new Act, we will crowd the schedule largely with matters of no general public interest. We therefore propose to continue the present practice and to provide for all these exemptions by notifications and not by bringing them into the Act itself. There are a few documents of this character which are exempted under the provisions of the Act as it stands, but we have cut out these exemptions with the intention of including them in the list of similar instruments which have been from time to time exempted by notifications. This list it is intended to print and make public as soon as possible, so that any person who has any interest in these documents will see that the removal of them from the schedule of exemptions is not to be interpreted as an intention to levy any duty upon them.

"I have thought it necessary to make these remarks, for the length of which I hope to be excused; but the Bill is one which contains a very large number of amendments and affects a very large number of common transactions, so that, it is necessary to enter into explanations in some detail. I have now explained all but the most unimportant matters in which it is proposed to amend the Act of 1879, and I make the motion which stands in my name."

The motion was put and agreed to.

The Hon'ble SIR JAMES WESTLAND introduced the Bill.

The Hon'ble SIR JAMES WESTLAND 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 may think fit. He said that he might mention that in the publications of the Bill it was intended to reprint it in the form in which it was compiled for working purposes in the Legislative Department; namely, that new and altered matter would be shown in italics, and in addition to that would be shown on the margin of each clause the authority, in the Indian or English Acts, from which the clause was taken.

The motion was put and agreed to.

1897.] [*Mr. Chalmers.*]

INDIAN PENAL CODE AMENDMENT BILL.

The Hon'ble MR. CHALMERS moved for leave to introduce a Bill to amend the Indian Penal Code in relation to Extra-territorial offences. He said :—"The objects of this Bill are stated in the Statement of Objects and Reasons, and I think that I need say a very few words about it. The purport of the Bill is to define on the face of the Code itself the extent of its extra-territorial operation; that is to say, the extent to which the Code applies to offences committed outside British India. As the Council are aware, the powers of the Indian Legislature are wholly derived from Acts of Parliament. At the time the Indian Penal Code was passed, that is to say, in 1860, Parliament had only conferred on the Indian Legislature the power of dealing with extra-territorial offences in one particular case, namely, where the offence was committed by a servant of Government; consequently, the only provision in the Indian Penal Code which deals with extra-territorial offences is a provision contained in section 4, which punishes offences committed outside British India by servants of Government. But since 1860 Parliament has conferred various extra-territorial powers on the Indian Legislature. Those powers have to a large, but not to the full, extent been exercised by the Foreign Jurisdiction Act of 1879. We think it is right and convenient, in the case of a Code like the Indian Penal Code, that the extent of its extra-territorial operation should appear on the face of the Code itself. This Bill is accordingly proposed to be introduced for the purpose. Section 4 of the Indian Penal Code will be repealed and a new section will be substituted which will exercise the powers conferred by the English Statutes on the Indian Legislature, and will provide that the provisions of the Code shall extend first to any native Indian subject of Her Majesty in any place without and beyond British India; secondly, to any other British subject within the territories of any Native Prince or Chief in India; and thirdly, to any servant of the Queen, whether a British subject or not, within the territories of any Native Prince or Chief in India; that is to say, we shall exercise to its full extent our Parliamentary authority to deal with offences committed outside India.

"That is the main provision of the Bill; but we have also inserted another clause, namely, clause 3, to carry out a suggestion of the Bombay Government. We have made it an offence for a person in British India to abet any act which would be an offence if committed in British India, but, as a fact, is committed outside. In short, to put it in popular language, we have extended the law of abetment to offences committed outside British India. It has been held by the Bombay High Court that if a person in British India abetted or incited a murder

in Goa, he would not be guilty of any offence. We have come to the conclusion that he ought to be deemed guilty of an offence, and that India is not to be made an Alsatia for instigators of crime. I think I need say nothing further in support of this motion."

The motion was put and agreed to.

The Hon'ble MR. CHALMERS introduced the Bill.

The Hon'ble MR. CHALMERS 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 may think fit.

The motion was put and agreed to.

CRIMINAL PROCEDURE BILL.

The Hon'ble MR. CHALMERS moved for leave to introduce a Bill to consolidate and amend the law relating to Criminal Procedure. He said:—

"The object of this measure is to consolidate and amend the various enactments now in force relating to Criminal Procedure.

"The Code of 1882 has been amended by 16 different enactments, so that it no longer contains anything like a complete statement of the law relating to Criminal Procedure, and a consolidation of these enactments has become imperative.

"But mere consolidation is not enough. Fifteen years working of the Code have shown it to be defective in many particulars which have not been touched by the amending Acts. It would be outside the scheme of the Government of India to make any organic changes in the Code. But the task of revising in detail 560 sections and five lengthy schedules has not been a light one. Happily, I have had the assistance of my honourable friend Sir H. T. Prinsep, and on him has fallen the brunt of the work. His qualifications for this work are well known. By his successive editions of the Codes of 1861, 1872 and 1882, he has made the subject peculiarly his own, and I am fortunate to have had his collaboration.

"As the Council are aware there are eleven High Courts in India, or rather Courts which have the powers of High Courts. All these Courts are Courts of

co-ordinate jurisdiction. The decision of any one of these Courts is not binding on any other of them, and, as far as I can judge, there is not the same anxiety in India, as there is in England, to follow, if possible, the ruling of a Court of co-ordinate jurisdiction. As a necessary consequence of this state of things, many provisions of the Code have been differently interpreted in the different provinces. Thus one and the same provision of the Code may have an entirely different operation according to the locality in which it is applied. The inconvenience of such a state of things is obvious, and it emphasizes the necessity pointed out by Sir Fitz James Stephen for the periodical revision of our Codes. My honourable friend Sir Henry Prinsep undertook the labour of going through all the reported decisions of the Courts and collating the results. We have endeavoured, by drafting amendments in the Bill, to remove, as far as practicable, these discordant interpretations, and to restore uniformity to the law.

"But apart from the decisions of the Courts, we have been favoured with large numbers of suggestions for amendment in the Code, which have been furnished by local authorities, judicial authorities and other experts. These suggestions when collected form a pile of papers considerably higher than this table. My honourable friend kindly took upon himself the task of examining these suggestions, and of winnowing the grain from the chaff. We then in consultation settled the amendments to be adopted and inserted them in the draft.

"As I have said organic reform is outside the scope of the Government scheme, and, subject to two exceptions, I do not think I need trouble the Council at this stage with any remarks on the amendments we have introduced. They are essentially matters for a Select Committee. When the Bill reaches that stage, I trust they will be carefully and critically examined.

"The first exception that I refer to owes its initiative to my honourable colleague Sir John Woodburn. In parts of India there appears to be an increasing unwillingness to come forward as sureties for good behaviour. The consequence is that there is an increasing number of persons, who being ordered to find security for good behaviour or to keep the peace, have to go to prison in default of finding sureties. To mitigate this hardship, provision has been made in the draft Code that, when a man, who is ordered to find security, cannot do so, the Magistrate may, if he thinks fit, instead of sending him to prison make an order placing him under police superveillance. Police superveillance is not introduced as a substitute for security, but merely as an optional alternative to actual imprisonment.

"The second amendment, which involves a matter of principle, is the introduction of the English rules as to first offenders. Provision has been made that in

case of a first conviction for theft, criminal misappropriation or any other offence punishable with not more than two years' imprisonment, the Court may, if there be extenuating circumstances, release the offender upon certain conditions instead of sentencing him. The conditions are that he should execute a bond, with or without sureties, to come up for judgment when called upon, and in the meantime to keep the peace and be of good behaviour. This system has worked well in England. It has also worked well in France and in other continental countries where it has been adopted. I see no reason why it should not also prove successful in India, and I sincerely trust that it will do so. In the class of cases to which these provisions apply, I think that too much stress cannot be laid upon the distinction between first offenders and habitual criminals. In the case of a first offender who perhaps has committed some offence under sudden or grave temptation, the anxiety of the trial and the disgrace of conviction are often sufficient punishment. In the case of an habitual offender, it is obvious that previous punishment has not acted as a deterrent, and it is very rarely that any punishment that can be awarded will have the effect of reforming his ways. The object of the law is confined to inflicting such punishment as may act as a deterrent to others, and keep the habitual offender out of mischief for a considerable time. It is sometimes urged against the English system of dealing with first offenders that a nominal punishment would be a more appropriate remedy. But I would point out that the provisions we propose to adopt are much more effective than any slight or nominal punishment. The offender still has the judgment hanging over him in case of misbehaviour. If he misbehaves, he will be called up for judgment, and then a substantial sentence can be awarded on the original conviction.

"If there are any other amendments to which attention ought to be called at this stage, I have no doubt my honourable friend will deal with them. I will only add this much. Looking at the Code of 1882 as an English lawyer, I cannot say I am much enamoured of it. Many of its provisions appear to me to be cumbersome, complicated and over-minute. But then I am aware that India is not England. There may be good reasons for regulating minutiæ of procedure here which in England are dealt with as matters of discretion or court practice. The Code of 1882 has been in force for 15 years, and Courts, practitioners and the public have become familiar with it. Any attempt to alter it organically would for some time create great confusion, and would probably do much more harm than good. This consideration we have steadily kept in view. We have even, at some sacrifice of form, preserved almost entirely the original numbering of the sections. When a section has been repealed we have split up some

neighbouring section so as to fill up the gap. When new matter has had to be inserted, we have, as far as possible, inserted it as sub-sections to the original sections or reserved it to the end. As the result, I think the numbering of only five or six sections has been altered. This no doubt involves some awkwardness of form, but does not, I think, outweigh the practical convenience of retaining the original numbering of the sections."

The Hon'ble SIR HENRY PRINSEP said:—"My Hon'ble friend, the Legal Member of the Viceroy's Council, who has moved for leave to introduce this Bill, has invited me to follow him in explanation of its details which are in amendment, and, we hope, in improvement, of the present law.

"I do not propose to refer to each of these in turn. To do so would unnecessarily waste the time of this Council. I shall address myself only to those amendments which affect the law on any important point, for the Statement of Objects and Reasons attached to this Bill refers to all of them, and many are of so simple a character as to call for no other special notice. My object is to draw the attention of this Council, and of those who are likely to offer any further suggestions for our consideration before any alteration of the law takes place, to matters of practice which most materially concern the procedure of the Criminal Courts, and by this means also probably to lighten the labours of the Select Committee to which in due course this Bill will be submitted for examination and report.

"There has been no attempt to introduce any new law, except on the points already mentioned. The objects of the Bill under consideration are in the first place to consolidate the present law now contained in the Code of 1882, and sixteen amending Acts since passed; in the next place to express the law clearly on points on which the Superior Courts have given contradictory interpretations, or have interpreted it in a sense which seems to be opposed to the intention of the Legislature; and lastly to expand it so as to meet difficulties which have arisen in practice. There have been also a few amendments in the drafting. The arrangement in the Code of 1882 has been scrupulously maintained, and it will also be found, as stated by my Hon'ble friend, that the amendments have been introduced so as practically not to alter even the numbering of the sections. The definitions of various expressions have also been arranged alphabetically. The convenience of all this will be readily acknowledged by all whose duties, official or professional, bring them in connection with matters relating to this branch of the law.

"It has been under consideration whether this Code, with certain necessary special provisions, should not be extended to the Police of the Presidency Towns of Calcutta and Bombay. It already applies to the Police of the Town of Madras. The Local Governments of Bengal and Bombay have, however, expressed a wish to deal with this subject by special legislation; but, while deferring to their wishes, it is proposed to give the Local Governments, with the sanction of the Governor General in Council, power to extend such portions of the Code to Presidency Towns as may be found to be necessary. As an instance of this, I would venture to draw attention to section 164 of the Code which enables a Magistrate to record a confession or statement made to him before the commencement of an inquiry or trial. It has been held that the power conferred by this section cannot be exercised in these Presidency Towns. The amendment of section 1 will enable the Government, if it so desires, to extend this and other sections to proceedings in those Towns.

"Chapter XXXIII, relating to criminal proceedings against Europeans and Americans, remains untouched. Some parts of it may be open to improvement; but it has been considered preferable to await the result of further experience of its working, for, although as amended in 1884, it has been in operation for several years, the cases under it have been few, and no serious inconvenience has been felt to call for its further amendment.

"Amongst the definitions, a definition of 'trial' has been introduced, thus re-enacting the definition which appeared in former Codes, and was repealed by the Code of 1882. The definition marks the distinction between an inquiry and a trial before a Magistrate; it has been found in practice that confusion has arisen from the present Code which has omitted it.

"Section 10 will enable a Local Government to appoint temporarily an additional District Magistrate whenever some special work of an urgent character, as, for instance, plague, famine or settlement-work, may prevent the District Magistrate from performing the duties of his office. The duration of such a special appointment has been limited.

"The object of the amendment of section 21 is to give the Chief Presidency Magistrate generally the same control over other Presidency Magistrates as is now exercised by a District Magistrate over other Magistrates in the District.

"The amendments in sections 31—34 will enable an Additional Sessions Judge to deal with a case tried by an Assistant Sessions Judge or a Magistrate

exercising special powers under section 30 in certain Provinces which require confirmation of the sentence passed, if it should be beyond the ordinary powers of such officer. An Additional Sessions Judge exercises the same powers as a Sessions Judge in his ordinary jurisdiction, and there is no reason why he should not also have jurisdiction to deal with such cases, which, under the present law, can be tried only by a Sessions Judge.

"Section 35 of the Code enables a Magistrate to pass separate sentences in excess of his ordinary powers on a person convicted at the same trial of two or more distinct offences. The explanation and illustrations which have been introduced are intended to show the difference for purposes of this section between distinct and separable offences as provided by section 71, Indian Penal Code. The reported cases show some confusion in applying the correct rule.

"Section 41 (2) will enable a District Magistrate to withdraw any power conferred by him on a subordinate Magistrate in the same way as the present law enables a Local Government to act in respect of powers conferred by it.

"The addition of sub-section (2) to section 44 has been introduced, so as to apply the law in respect to the giving of information regarding the commission of, or intention to, commit certain specified offences in British India, to offences in Native States. It has been found that preparations to commit such offences in Native States have been made in British India, while the law imposes no obligation to give timely information which, in many instances, might have prevented the commission of those offences. The obligation is also extended to the giving of information of such offences when committed so as to give greater facilities to the detection and arrest of the offenders.

"The object of the amendment of section 54 is to enable a village Policeman or Chowkidar to arrest without warrant as an ordinary Police officer, because it has been held that such powers can be exercised only by an officer of the regular Police force. There is no sufficient reason why such a distinction should exist, while it is obvious that the immediate arrest of persons falling within the section is most necessary to promote the ends of justice.

"Section 57, as amended, is intended to provide for the case of a resident in a Native State, who may have committed a non-cognizable offence in British India and in the presence of a Police officer, but who, under the present law, after his name and residence have been ascertained, must be released from custody on giving a bond for his appearance. If he thereupon returns to

his residence in a Native State, no further proceedings can be taken against him, either to enforce the terms of the bond, or to obtain his attendance before a Magistrate. It is proposed therefore, in such cases, to require a bond with surety or sureties resident in British India.

"The object of section 61 is to prevent unnecessary detention by the Police of a person arrested, and the term of such detention, unless extended by a special order of a Magistrate, is limited. The section will apply to an arrest by a village Policeman or Chowkidar under section 61 as amended by this Bill, or to the case of one arrested by a private person under section 59, and any unavoidable delay in taking him to be placed in the custody of a Police officer, who is competent to hold an investigation, may result in the expiry of the limit of detention in police custody before he can be so made over, or before an investigation could have commenced. It is therefore proposed to limit the operation of section 61 to detentions by Police officers of the regular force.

"Section 106 (3) is intended to settle the law in consequence of contradictory judgments of the High Courts of Calcutta and Allahabad. There is no sufficient reason for limiting to a Court of first instance the power to add to a sentence an order for security to keep the peace, where the recorded evidence satisfies a Court of Appeal or Revision that such an order is proper. Section 423 (*d*) will give an Appellate Court power to make such an order, and this power will also be conferred on a Court of Revision by section 439.

"Section 110 has been re-cast, and it has been extended so as to enable security for good behaviour to be taken from the protectors and harbourers of thieves and disposers of stolen property; (*f*) is a re-enactment of a part of the Code of 1872, the repeal of which by the Code of 1882 has been found to be inconvenient in practice.

"Section 144 has been extended to Presidency Towns, as there is apparently no reason why a Presidency Magistrate should not have the same summary powers as other Magistrates to pass an order, with temporary effect only, when the interests of the public require him to take immediate action to prevent serious consequences to human life, health or public tranquillity.

"The amendments of sections 145—147 are generally the restoration of the law which was for very many years in force before the Code of 1882. The modifications then made have resulted in some confusion in regard to the matters which can be dealt with by a Magistrate within the terms 'disputes relating to

any tangible immoveable property or the boundaries thereof,' and it has also been found that these terms, which are less wide than those in the previous law, have unduly restricted the action of a Magistrate in many kindred matters likely to cause a breach of the peace. The time of the possession which the Magistrate has to find has also been expressly declared to be that of the date of the order passed by him taking cognizance of the matter in dispute.

"The amendments of sections 156—159 will enable certain specially empowered Magistrates to order an investigation into certain cases in which the police may have abstained from holding an investigation.

"Conflicting judgments of the High Court in regard to the right of an accused to see statements made by persons examined by a police officer in the course of an investigation have made it necessary to settle the law in this respect. It is proposed by an amendment of section 161 to make such statements privileged in the same manner as police diaries are protected by section 172. This view of the law and the reasons for it have been exhaustively discussed and explained in a recent case by Edge, C. J., and it is proposed to accept his judgment.

"Under section 191 the accused is entitled to claim the transfer of a case to another Magistrate, or its commitment to the Court of Session, if proceedings have been taken by him otherwise than on a complaint, or on a police report of the facts constituting an offence. The amendment requires that such right shall be claimed only before any evidence has been taken, and not at any stage of the trial as, for instance, after the evidence taken has gone against the accused. An application for a transfer of a case at such a stage of the trial could not be regarded as *bonâ fide*.

"The present Code, section 7, declares that a Sessions Division shall be a District or consist of Districts; but it does not contemplate, as sometimes happens, that a District may fall within two Sessions Divisions, and it has been found impossible to make them conterminous in regard to other departments of the administration. It is therefore proposed to remedy this difficulty by enabling a Local Government to appoint the Sessions Judge of the adjoining jurisdiction an Additional Sessions Judge, so as to make him competent to try cases relating to such localities, which otherwise would have to be tried at a greater distance and with much inconvenience to the parties and witnesses.

"Section 194, as amended, embodies Act X of 1875, section 144. The only other unrepealed section of that Act is sufficiently enacted in section 333, so that the entire Act may now be repealed.

"The object of section 195 (2), which defines a Court for purposes of that section, is to exclude proceedings under the Registration Act. In respect to the application of the section of the present Code to such proceedings, the judgments of the High Courts have been contradictory. Such matters are sufficiently provided for by the Registration Act. The addition to sub-section 6 will enable the High Court to extend the term of a sanction to prosecute given under this section, which, in many cases, may be desirable in the ends of justice. It has been held by the Calcutta High Court, under the present Code, that the term for which sanction to prosecute is in force cannot be extended.

"It has been found that some Magistrates refuse to allow the cross-examination of witnesses for the prosecution before commitment. It is now proposed to give an accused option to cross-examine so as to enable him, if he is so advised, to show that the evidence for the prosecution does not warrant his commitment to the Sessions Court.

"Section 213, as amended, will enable a Magistrate after commitment made, and after further proceedings taken under that section, to cancel a commitment, if, on the evidence so taken, he finds that the charge is unsustainable.

"Section 225 (2) requires that any objection to the form of a charge shall be made at the earliest opportunity; and that if not so made, it shall not be sustainable, so as to prevent miscarriage of justice on such technical matters. Several reported cases show the necessity for such a rule.

"The amendments of sections 227—231 will settle the law in regard to the powers of a Court to add to the charges before it. Some reported cases show that the law has been differently interpreted in this respect, and it is proposed now to make it clear.

"The illustration to section 236 will serve to show that statements made by a witness, which are both contradictory and irreconcilable, constitute the offence of intentionally giving false evidence, and may form the subject of a charge in the alternative, the judgments of the High Court having differed in this respect.

"Several attempts have already been made to prevent abuse from the exercise of the right of re-calling the witnesses for the prosecution for purposes of cross-examination, but the intention of the Legislature is still evaded. It has been found that, even after a full cross-examination of the witnesses for the prosecution, the right is successfully claimed for the purpose of going over the same ground as that followed in the previous cross-examination; and that witnesses are

re-summoned for that purpose. A second cross-examination, under such circumstances, is unnecessary for the purposes of a fair trial. It causes only a mischievous waste of time, and is certainly harassing to persons obliged to appear as witnesses a second time before a Magistrate. The amendment of this section is intended to prevent such a practice, and the amendment of section 257 has the same object in view.

"The present law does not declare at what place a Court of Session shall sit. Section 269 (2), while declaring that such Courts shall sit as at present, will enable a Local Government, by general or special order, to fix another place, either for the ordinary sitting of such a Court, or for any particular trial.

"Section 388 enables a Court to suspend execution of a sentence of imprisonment passed in default of payment of a fine while a warrant for distress for levy of the fine is being executed, and it provides that a bond, with or without sureties, may be taken. But it does not provide for a case in which a sentence of imprisonment can only be passed if the fine cannot be realised. It is proposed to include such a case within this section.

"The modification of section 391 has been suggested to prevent a short sentence of imprisonment being passed with an additional sentence of whipping. Such a sentence is inappropriate for one who has been previously convicted; and the practice has, moreover, sometimes caused a serious embarassment when a short sentence of imprisonment may have been served before the term of appeal has expired, or an appeal has been heard, for then the sentence of whipping which has been suspended to allow an appeal cannot be executed, and the person so sentenced is entitled to release, and cannot be re-arrested, should his appeal be dismissed, so that the whipping may be inflicted. The sentence of whipping, therefore, becomes inoperative. The proposed amendment will, it is expected, prevent the occurrence of such cases, and will also require a Court to pass an appropriate sentence of imprisonment if an additional sentence of whipping is considered to be necessary.

"Concurrent jurisdiction is conferred by section 435 on Sessions Judges and certain Magistrates in regard to revision. Sub-section 4 will prevent an application for the exercise of such powers to be made to a second of such officers if it has been unsuccessful in the first instance. It should be made only direct to the High Court.

"Section 439 (5) will prevent a person who has the right of appeal from applying to a Court of Revision without having recourse to the Appellate Court; and if he does not appeal, he will not be able to apply for an order in revision.

" Section 465 (3) will enable a Court to record the evidence of witnesses relating to the trial of a person which cannot be held because he is found to be incapable of making his defence by reason of unsoundness of mind in the same way as section 522 provides in the case of an accused person who may have absconded. Unless this can be done, it may happen that, when the trial is held, such evidence may be lost.

" After proceedings have been taken by a Court for certain offences such as voluntarily giving false evidence or forgery specified in section 195, and the case has been referred to a Magistrate to proceed as on a complaint made by such Court, it has been considered undesirable that a Court of Revision should interfere with the powers of a Magistrate to act, any more than it can do so in proceedings on a complaint in other cases. Hence the proposed amendment to section 476 to prevent the intervention of a Court of Revision.

" The amendment of section 514 will enable proceedings to be taken against the estate of a deceased surety, but only if the bond has been forfeited during his life-time.

" Section 517, as amended, will enable a Court to pass orders in respect of any document or other property before it. The present law seems unduly to limit the exercise of such a power, and it seems necessary to give a Court discretion to act generally in such matters.

" The interpretation of section 520 by the High Courts has been that, while it gives a Superior Court power on appeal or revision to set aside or modify an order by a Subordinate Court in regard to the disposal of a document or other property produced before it in an inquiry or trial, it does not enable such Court to enforce its order by directing restoration of such document or property if the order so set aside or modified has been carried out. The amendment of section 520 proposes to remedy this.

" The present practice of requiring an application to the High Court for the transfer of a case to be made only by motion supported by affidavit or affirmation, except when made by the Advocate-General, has been found to be inconvenient. Such applications are sometimes made direct by the Judicial Officers concerned and with the consent of the parties. Sub-section (3) proposes to give the High Court discretion to act on such references.

" The power of requiring a Court to stay proceedings on notice given that it is intended to make an application to the High Court for the transfer of the case

or appeal is often abused for the purpose only of delay and otherwise prejudicing the course of justice. It is proposed by section 526 (8) to give the Court discretion in such matters, when it has reason to believe that this is the object.

"These are the principal amendments which the Bill before the Council proposes to make. I have abstained from referring to other matters for reasons already stated, but they will all be considered in due course before any alteration in the present Code becomes law, and possibly some of them may form the subject of debate on the report of the Select Committee. In the end we hope that a substantial and lasting improvement in the present law may result. I have no hesitation in expressing my entire concurrence in the remarks which have fallen from the Hon'ble Member who is in charge of the Bill regarding the over-minute character of our Codes of Procedure which has unfortunately too often tended to embarass the prompt action of our Courts. It is, however, too late to regard this as an open question, even if it were possible to remedy this defect with due regard to the conditions of this country and the capacity of our Courts. What the object of the Legislature has always been is to lay down an intelligible procedure so as to ensure a fair trial; and though it has thought proper to be somewhat over-precise in regard to details which, to a professional lawyer, may appear to be unnecessary and cumbersome, it should be borne in mind that those who are called upon to preside in our Magistrates' Courts are often with little experience of such matters. In undertaking this task it is impossible entirely to provide against obscurity in expressing the law or for cases in which, from a variety of circumstances or conditions, different interpretations of the law may be suggested and adopted. It is therefore incumbent on those on whom the responsibilities of legislation have devolved from time to time to solve the difficulties which have occurred in practice by settling the law and expressing it in clearer terms. It is with this object that nearly all the amendments contained in this Bill have been proposed. But with all these minutiæ of detail it should be recollected that the Legislature contemplates and expects that substantial justice shall be done, for it has declared in the Code of Criminal Procedure that no error, omission or irregularity in any technical matter shall be proper ground for setting aside or modifying a finding, sentence or order of a Court of competent jurisdiction, unless it has occasioned a failure of justice."

The motion was put and agreed to.

The Hon'ble MR. CHALMERS introduced the Bill.

[*Mr. Chalmers.*] [15TH OCTOBER, 1897.]

The Hon'ble MR. CHALMERS 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 may think fit.

The motion was put and agreed to.

The Council adjourned to Friday, the 5th November, 1897.

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

SIMLA;
The 15th October, 1897.

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