Friday,
20th December, 1901

ABSTRACT OF THE PROCEEDINGS

OF THE

Council of the Governor General of India,

LAWS AND REGULATIONS

Vol. XL

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OF

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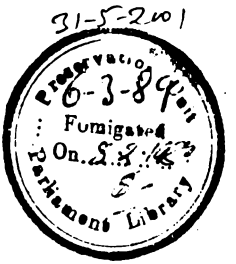

CALCUTTA
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1902

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., c. 67, and 55 & 56 Vict., c. 14).

The Council met at Government House, Calcutta, on Friday, the 20th December, 1901.

PRESENT:

His Excellency Baron Curzon, P.C., G.M.S.I., G.M.I.E., Viceroy and Governor General of India, *presiding*.

His Honour Sir John Woodburn, K.C.S.I., Lieutenant-Governor of Bengal.

His Excellency General Sir Arthur Power Palmer, K.C.B., Commander-in-Chief in India.

The Hon'ble Sir C. M. Rivaz, K.C.S.I.

The Hon'ble Mr. T. Raleigh.

The Hon'ble Sir E. FG. Law, K.C.M.G.

The Hon'ble Major-General Sir E. R. Elles, K.C.B.

The Hon'ble Mr. A. T. Arundel, C.S.I.

The Hon'ble Sir Allan Arthur, Kt.

The Hon'ble Sir A. Wingate, K.C.I.E.

The Hon'ble Mr. F. A. Nicholson, C.I.E.

The Hon'ble Mr. D. M. Smeaton, C.S.I.

The Hon'ble Mr. C. W. Bolton, C.S.I.

The Hon'ble Rai Sri Ram Bahadur.

The Hon'ble Mr. Gopal Krishna Gokhale.

The Hon'ble M. R. Ry. Panappakkam Ananda Charlu, Vidia Vinodha Avargal, Rai Bahadur, C.I.E.

The Hon'ble Mr. L. P. Pugh.

The Hon'ble Sayyid Husain Bilgrami.

The Hon'ble Mr. R. P. Ashton.

The Hon'ble Mr. R. G. Hardy, C.S.I.

The Hon'ble Rai Bahadur B. K. Bose, C.I.E.

NEW MEMBERS.

The Hon'ble MR. GOPAL KRISHNA GOKHALE, the Hon'ble RAI BAHADUR P. ANANDA CHARLU, the Hon'ble MR. PUGH, the Hon'ble SAYYID HUSAIN BILGRAMI, the Hon'ble MR. ASHTON, the Hon'ble MR. HARDY and the Hon'ble RAI BAHADUR B. K. BOSE took their seats as Additional Members of Council.

[*Major-General Sir Edmond Elles; Mr. Raleigh.*] [20TH DECEMBER, 1901.]

CANTONMENTS (HOUSE-ACCOMMODATION) BILL.

The Hon'ble MAJOR-GENERAL SIR EDMOND ELLES moved that the Bill to make better provision for securing house-accommodation for officers in Cantonments be referred to a Select Committee consisting of the Hon'ble Sir Charles Rivaz, the Hon'ble Mr. Raleigh, the Hon'ble Rai Sri Ram Bahadur, the Hon'ble Mr. Gokhale, the Hon'ble Mr. Pugh, the Hon'ble Mr. Hardy and the mover. He said that at the last meeting of the Council held at Simla he made a statement in regard to this Bill which was published in the Gazette of the 26th October.

The motion was put and agreed to.

CODE OF CIVIL PROCEDURE.

The Hon'ble MR. RALEIGH moved for leave to introduce a Bill to consolidate and amend the Law relating to the Procedure of the Courts of Civil Judicature. He said:—"The Code which we now propose to take in hand for revision was originally known as Act VIII of 1859, and was placed upon the Statute-book by the energy of Sir Barnes Peacock. It was redrafted in 1877 by Mr. Whitley Stokes, who was then Secretary in the Legislative Department, and in many chapters the present form of the Code is due to Lord Hobhouse, who, at that time, was Legal Member of Council. It was again revised in 1882. Experience has shown that the Code, in many important particulars, requires further revision; and in 1893 the Government of India resolved that both the great Codes of Procedure should be passed under review. My predecessor, Mr. Chalmers, with the aid of Sir Henry Prinsep, who was placed on special duty for the purpose, was able to complete the revision of the Code of Criminal Procedure. Sir Henry Prinsep was also engaged for a time on the Code of Civil Procedure. I ought to say that for the Bill now submitted that learned Judge is in no way responsible, but we have had the advantage of the notes which he made on the subject, and when he brings his judicial mind to bear upon the Bill, I have no doubt that he will recognise some part of his own material in the composite fabric which is now submitted for criticism. Without underrating the labour involved in revising the Code of Criminal Procedure, I may say that Civil Procedure is a subject beset with special difficulties of its own. The administration of criminal justice is a task which demands the highest qualities in our Judges and Magistrates, but the objects of the procedure are few and simple. The charge is restricted to a limited number of definite points, the prosecution is controlled in all cases by Government, and the opportunities of the defence, while carefully

guarded, are also limited so as to prevent delay. In a civil suit, on the other hand, the conduct of the case must be left, generally speaking, to the parties. No forms of procedure with which I am acquainted can altogether neutralize the advantage of the longer purse, nor can we always cope with the arts of evasion and delay. We must be content if our procedure is such that in ordinary cases the civil administration of justice will be as expeditious and as cheap as circumstances permit. In preparing amendments with this general object in view we have constantly referred to two sources of information. In the first place, we have before us a very large number of suggestions for the amendment of the Code made by judicial officers in all parts of the country. Wherever it has appeared to us that these suggestions ought to be discussed, we have framed amendments with a view to bringing them in a definite shape before the Committee which will sit upon this Bill. I dwell on the point for a moment, because it is important to make it quite clear at the outset that the Government is not to be supposed to be finally committed to anything that is new in this Bill. In many cases we have proposed an amendment with the view of raising a question. We have to be guided in this, as in all matters relating to procedure, mainly by the opinions expressed by the Judges. If we say to the Judges in general terms that a suggestion has been made for strengthening this or that part of our procedure, we may receive from them an equally general reply. On the other hand, if we place before them an amendment which gives effect to the suggestion, they may accept or reject or modify, but, in any case, we shall have their opinion in a definite form. In the second place, we have before us a very large number of judicial decisions on points of the Code which have led to litigation and dispute. The Government has no authority to review these decisions—to say which of them are right and which are wrong. If a rule of the Code has received one interpretation in Bombay and another in Calcutta, we have to consider not which of the Courts is right in interpreting the law as it is, but what, looking to the reasons which have been given for both decisions, we think is the rule which it is most expedient to enact for the future, and in this way we may find—and I hope on most points we shall find—that we are in agreement with all the Courts, because while two Courts may differ in their interpretation of the law as it is, they may at the same time be quite agreed when they come to discuss the question what the law of procedure ought to be.

"We do not propose to alter the general arrangement of the Code. It begins in the usual way with definitions, which we have recast and re-arranged. It then proceeds to speak of jurisdiction, and here, for convenience, the draftsman has placed the important section relating to *res judicata*—the

plea that the question raised in a suit has already been determined in a previous suit. That plea is one which plays a large part in Indian litigation. The case law on the subject is of considerable bulk, and we came to the conclusion that it was not necessary, and that it would not be wise, to attempt anything in the nature of codification. We are content to propose that the section should be made fuller and more precise, so that it may afford all the guidance that is required in ordinary cases. Having dealt with these preliminary matters, the Code proceeds to follow the usual course of a civil suit from the moment of its institution down to the execution of the decree. The litigant must be told what is the Court to which he is to apply. He must be told how to frame his suit so as to show a proper cause of action; and here, in dealing with the causes of action which may be combined in a plaint and the pleas which may be set up against them, we have suggested a rather important addition to the Code in regard to the important matter of set-off. We propose to borrow from England, and to adapt to our own use, the substance of the rules which are in force in the Supreme Court in England. As this is not the only case in which we have borrowed from English practice, I may say, once for all, that it is quite evident that caution must be exercised in adapting English rules to Indian needs. Many circumstances must be considered before we hold that the rule which may be a very good one for the United Kingdom is also a good one for British India. But where assimilation is possible, I hold that the Legislature ought to keep that object in view, not only because the final appeal in Indian cases is to a Committee of English Judges, but also because the assimilation of procedure in different parts of the Empire tends on the whole to the better administration of justice. I hope, therefore, that the additions which we have made to the Code--and borrowed from England—will meet with acceptance. It would be impossible to contend that English practice is a model for imitation, but it is, at least, a store-house of experience, and we may often obtain from it, by careful search, rules which are adapted to our own needs. The Code has also to determine the forms of process by which a party may be compelled to appear in a civil suit and to answer the claims against him. In this country, where evasion of process is in many cases so easy, these particular provisions of the Code are of great importance, and although the changes we have made go too much into detail to be included in an introductory speech, I think that they will be found to strengthen the Courts and to make for expedition.

"We come then to the provisions which are made in the Code for the hearing of the parties and their witnesses and recording the decision of the Court; and here we have suggested a large number of changes with the general

object of giving the Court a greater command over the suit and of freeing our Judges from some of the present rules which appear on reconsideration to be more mechanical than the nature of the case requires. We have enlarged the power of taking evidence by way of Interrogatories and Discovery. We enable the Court to take the initiative in many cases where now we must wait for the initiative of the parties, as, for instance, in compelling the attendance of witnesses. We free the Judge from the mechanical necessity of taking down every word of the evidence and of making a note of every objection to evidence. And finally, when it comes to judgment, we empower the Judge to deliver his decision orally, provided that a written judgment is afterwards prepared, for the accuracy of which he is to make himself responsible. These proposals will probably be criticised, and we may be told that in this country mechanical rules are necessary to compel the Judges to take all evidence which they ought to hear, to deal fairly with objections, and to state fully the reasons for their judgments. I am not, as at present informed, convinced that this is a sound doctrine. If your Judges are competent, you can trust them; and if they are not, I am not sure that any mechanical rules will compel them to decide their cases rightly.

"By common consent the part of the Code which most requires revision is Chapter XIX, which deals with the execution of decrees. There are, as it seems to me, two great evils in our present practice. In the first place, the decree is often used by the creditor who succeeds in obtaining it not as a means for obtaining a prompt satisfaction of his claim, but rather as a thing which he may keep alive and hold over his debtor's head with a view of acquiring more power over him. The other evil is that, owing to the circumstances of this country, evasion of process on the part of the defendant is extremely common. We have endeavoured to provide a remedy for both these evils. In the first place, we have, on this point also, enlarged the powers of the Court, so that execution cases may not be allowed to drift along in the execution department, without the intervention of the Judge, where that intervention may prevent delays and abuses. We have enabled the Court to call upon the holder of the decree for information at every stage of the execution process, and to hold him responsible for going on with it; and on the other hand, we have tried to deal with the evasive debtor by providing additional facilities for the transmission of decrees for execution from one Court to another. These again, My Lord, are changes of detail to be judged by experts. I hope, when they are judged, that the general object which I have stated will be kept in view.

"One important point which has been a good deal discussed in connection with the law of execution is the question of growing crops. We have, at last, proposed to give effect to what I venture to call a sound principle that growing crops ought to be dealt with as moveable property. As such, they will be liable to the process of attachment, but we have endeavoured to introduce very special provisions, which will prevent the process of the Courts from being used in any way that can stop or hamper the proper cultivation of land. We have also added a provision—which will require careful consideration—giving power to exempt from legal process a certain portion of the crops of an agriculturist. I would not contend that in all matters relating to civil process an agriculturist should be considered as a privileged person. He must pay his debts like another man, but we may all admit that the process of our Courts bears very hardly on men who generally live at a great distance from them, and on men who have nothing but their industry, and the crops which stand upon their land, between them and starvation. In such cases it may be wise—it is for the Council to say—to give a power of exemption from legal process, limiting that power as carefully as we can. After dealing with execution, the Code, in Chapter XX, has provided an Insolvency procedure which is used to some extent in the Mofussil, where the Act of Parliament—the Insolvency Act of 1848—is not in force. It has been found that this chapter is considered by those who administer it to be imperfect, and we have endeavoured to provide an Insolvency procedure, simple enough to be applied by the ordinary Courts in this country, which will be effective, on the one hand, in enabling creditors to obtain the distribution of the assets of their debtor, and which, on the other hand, may afford the debtor relief in cases where he is entitled to it. I need not dwell, My Lord, on the particulars of the subsequent chapters of the Code until we come to Chapter XLII, which deals with the very important question of second appeals. The Government of India has expressed the opinion that the right of second appeal ought in some points to be restricted, and having full regard to all the remarks and suggestions that were made upon that expression of opinion, we have proposed to raise the pecuniary limit in those provisions of the Code which relate to second appeals, and we have also proposed that where the decisions of the Court below are concurrent, security for costs may be required. I am well aware that any attempt to restrict the right of appeal in this country is sure to be closely scrutinised and very likely to be opposed. We are often told that the Courts of first instance or first appeal in this country are sometimes deficient in special knowledge of law, sometimes deficient in strength of character, and that for these reasons it is necessary to preserve a liberty of second appeal far wider than would be

necessary, for example, in England. There is force in these arguments, and they require to be considered. At the same time, the objections are often expressed with a considerable degree of exaggeration. My deliberate opinion, formed after a great deal of enquiry, is that the Civil Courts of lower rank in this country do not deserve the terms of unqualified censure, which are sometimes applied to them; and even if they did, it would, in my humble opinion, be a profound mistake to assume that every wrong decision of a lower Court can be set right in a Court of Appeal. Many a questionable decision stands because the parties cannot afford to go further, and when an appeal is presented, the higher Court can only deal with the case as it is presented and recorded in the Court below. If the Court below is not equal to its work, if the proper evidence has not been taken, if the decree is not framed so as to cover the points really in dispute, then the Court of Appeal is unable to do complete justice. The case may be sent back or the appeal may be decided on technical grounds. These, I think, are the reasons why the proposals which we have embodied in our re-draft of Chapter XLII should be very carefully considered.

"I have not attempted, My Lord, to give a detailed account of all that we propose in regard to the revision of this Code. The one object of my speech to-day is to make it clear what are the main objects which we have in view, and how far we regard our re-draft of the Code as being open to consideration and criticism. The re-draft will be circulated in the usual course for opinions, and an adequate time must be allowed for the examination of so large a project of law. This means that I cannot hope to take the Committee stage of this Bill until about a year from the present time. Our time will have been well spent, and our labour will be well rewarded, if the result of our deliberations is to raise the standard of efficiency in our Courts and to promote the even-handed administration of Civil justice."

The motion was put and agreed to.

The Hon'ble MR. RALEIGH introduced the Bill.

The Hon'ble MR. RALEIGH moved that the Bill, together with the Statement of Objects and Reasons relating thereto, be published in English in the Gazette of India, and in the local official Gazettes in English and in such other languages as the Local Governments think fit.

The motion was put and agreed to.

ADMINISTRATORS GENERAL AND OFFICIAL TRUSTEES BILL.

The Hon'ble SIR CHARLES RIVAZ moved for leave to introduce a Bill further to amend the Law relating to Administrators General and Official Trustees. He said:—"A Committee presided over by the Chief Justice of Bengal, which was appointed in 1897 to consider certain questions in connection with the duties of the Law Officers of Government, recommended, among other things, that, when an opportunity occurred, the offices of Administrator General and Official Trustee might, with advantage, be combined, the holder of the appointment being made a Government servant and remunerated by a fixed salary. As the present Administrator General is about to retire, the opportunity is being taken to appoint his successor on the new conditions, and the Bill which I am asking leave to introduce is intended to effect the necessary alterations in the present law. The new Administrator General will be appointed Official Trustee also when that appointment falls vacant; the Government will, in future, undertake the responsibility for his official acts, and he will be subject to the control of Government, which will be exercised mainly through the High Court.

"It is proposed, in amending the present Administrator General's Act, to repeal section 56, which declares that no person other than the Administrator General acting officially shall receive or retain any commission or agency charges for anything done by him as executor or administrator. The repeal of this section formed part of the recommendations of the Committee of 1897."

The motion was put and agreed to.

The Hon'ble SIR CHARLES RIVAZ introduced the Bill.

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The motion was put and agreed to.

The Council adjourned to Friday, the 10th January, 1902.

CALCUTTA:
The 23rd December, 1901.

H. W. C. CARNDUFF,
Offg. Secretary to the Government of India,
Legislative Department.

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