ABSTRACT OF THE PROCEEDINGS

COUNCIL OF THE GOVERNOR GENERAL OF INDIA

LAWS AND REGULATIONS.

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ABSTRACT OF THE PROCEEDINGS

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Abstract of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 *&* 25 *Vic., cap.* 67.

The Council met at Government House on Wednesday, the 25th Nov. 1874.

PRESENT:

His Excellency the Viceroy and Governor General of India, G.M.S.I., *presiding.*
The Hon'ble B. H. Ellis.
Major-General the Hon'ble Sir H. W. Norman, K.C.B.
The Hon'ble A. Hobhouse, Q.C.
The Hon'ble E. C. Bayley, C.S.I.
The Hon'ble Sir W. Muir, K.C.S.I.
The Hon'ble John Inglis, C.S.I.
The Hon'ble Rájá Ramánáth Tagore, C.S.I.
The Hon'ble R. A. Dalyell.
The Hon'ble J. R. Bullen Smith.

PROBATES AND LETTERS OF ADMINISTRATION BILL.

The Hon'ble MR. HOBHOUSE moved for leave to introduce a Bill to amend the law relating to Probates and Letters of Administration. The object of the measure was to enlarge the local area over which a grant of probate now operated. The subject was at present regulated by the Indian Succession Act (X of 1865), section 242. By that it was provided that a probate should operate throughout the province in which it was granted. Then occurred the question why should it not operate beyond that province and throughout the whole of British India? If different parts of British India were subject in this respect to different legislatures, there would be a very good reason why a probate should not operate beyond the sphere of its own legislature. Or if, again, British India were subject to different fiscal regulations, as is the case with India and England, there might be very good reason why a grant should not operate beyond that area to which it paid tax. But there were no such reasons here, and it seemed to him that the present law was simply the outcome of incidental circumstances, and would not bear close examination. Those who passed it were familiar with independent Courts of judicature in India in the different presidencies, and they were also familiar with the local operation of probates under the old English

system, and those two streams of tradition combined to produce the present law, by which a probate was confined to the province in which it was granted, the question not having been raised in the year 1865, whether it was convenient or reasonable to confine it to that province. But when that question was raised, he thought it would be seen that it was more consistent with principle that a personal representative, duly constituted anywhere, should be recognized everywhere, just in the same way as the heir-at-law takes the place of his ancestor everywhere, and not in one locality alone.

It was not however merely for the purpose of some theoretical improvement that this measure was introduced. Unless there had been some practical hardship and inconvenience arising from the present state of the law, he did not think that the Council would have been troubled with this measure; but the Government was moved by the Madras Chamber of Commerce, who had sent a statement of cases in which they showed that practical hardship had resulted. He would read to the Council two or three of those cases, and they would see that they were dealing with an actual mischief and not an imaginary one.

The Madras Chamber of Commerce said :—

"Captain W. H. Campbell, of the Madras Staff Corps, had four shares in the Bank of Madras and other assets here to the additional value of rupees 5,000. The costs for obtaining letters of administration in Madras amounted to rupees 226, exclusive of stamp-duty. He had also six shares in the Bank of Bombay and no other assets in Bombay. An exemplification of the letters taken out here, together with a power-of-attorney, had to be sent to Bombay to take out letters of administration there. These cost rupees 387, exclusive of stamp-duty."

The Council would see in this case that the necessity of taking out a separate probate in Bombay cost more than the necessity of taking out administration in the place where the testator was residing.

Again, the Chamber said :—

"Mrs. A. J. Murray, a widow with small means, died at Sholapúr, leaving a little property there and assets in Madras to the value of rupees 3,500. Her Will was proved and probate thereof taken out from the District Court of Poona. Letters of administration are required to be taken out in Madras."

Then they cited another case relating to the estate of Colonel Anderson.

"Colonel J. C. Anderson, of the Madras Engineers, left assets in Madras to the value of about rupees 2,700, had six shares in the Bank of Bombay and funds in Calcutta. Because three separate letters of administration are required to be taken out in the three presidencies, his estate is left unadministered to, though he died some few years back."

Of a fourth case they said :—

"Mr. Percy Gough, a member of the firm of Messrs. Lecot and Company and of this Chamber, writes as follows regarding a case which came under his personal observation :—

"I was one of the administrators to an estate comprising property in Madras and Bombay. If letters of administration could have been taken out in Madras for the whole of the above property, the law-charges would have been only rupees 380; whereas an additional expense on this account, amounting to rupees 440, was incurred in Bombay. The agency commission of one per cent., amounting to rupees 1,486, would also have been saved but for the necessity of the reference to Bombay."

Now after reading these cases, MR. HOBHOUSE thought the Council would be of opinion that the Madras Chamber of Commerce were right in asking that we should alter the law. Of course one must not exaggerate the consequences of altering the law. If estates are to be administered by a person living at a distance, agents will still be necessary and must be paid for; but what would be saved would be the necessity of a second payment of court-fees, the necessity of employing a professional person to take out letters of administration, and the necessity of going through the same formalities as in the first instance.

Objections had been made to any alteration of the law on these grounds. First, that the remedies available to creditors would be interfered with if the executor resided in one Presidency and the creditor in another; secondly, that the present system was calculated to afford greater protection to the assets, and therefore was better for the beneficiaries. With reference to these objections, he would ask the Council to consider the actual working of the present law. He thought they would find that it never was devised for the purpose of meeting those objections, and that it did not meet them at this moment. Take the case of a man residing at Arrah, leaving property there, dying there, and appointing an executor who also resides there. He takes out probate in Arrah, which operates over the whole province of Bengal. Suppose, again, that the testator possessed property in Chittagong and Benares. The probate taken out at Arrah makes the executor absolute owner of the property in Chittagong, many days' journey from Arrah. But with regard to the property in Benares, which was, so to say, under the executor's own hands, which he could attend to personally, he could not touch it without going to the High Court of the North-Western Provinces, or some Court in the North-Western Provinces, and taking out administration all over again. Such instances of the actual working of the law made it quite clear that what MR. HOBHOUSE stated at the outset was true, and that the law was not devised in the interests of the creditors

nor of the beneficiaries, but was the mere product of two currents of old thought and old traditions; the tradition of the independence of the presidencies of one another, and the tradition attached to probates in England, where separate probates were granted in each diocese or province. Nor did he see what right creditors had to say that money should be spent in order to bring the person of their debtor closer to them. How far that was an advantage to them, MR. HOBHOUSE did not discuss: there might be a few cases in which it was some advantage. But the person they trusted was the testator, and while the testator lived he could only be at one place. If a Bombay creditor trusted a man at Madras, his right of suit would be regulated by that circumstance amongst others. But why in the world should the death of the debtor alter the case? When the debtor was dead, why should the creditor be entitled to say that his representative estate should be split up into fragments so that one fragment might be better brought within his reach?

Then it was said that the beneficiaries would be affected. No doubt, the beneficiaries were above all persons the persons to be considered. But MR. HOBHOUSE very much mistook the feelings of beneficiaries if they would not prefer to save hard cash, and to have the disadvantage, if it was such, of a single representative, than to have a number of representatives with the disadvantage of having the estate diminished by so much. The Madras Chamber of Commerce, who were promoting this measure, represented beneficiaries, and they told the Council what were the feelings of beneficiaries. Probably they represented creditors also. Indeed, if an estate were insolvent, the creditors were the beneficiaries, so that they then had an interest in saving unnecessary expenditure. MR. HOBHOUSE himself felt the greatest confidence that, in altering the law in this respect, we should be legislating in the interests of all parties.

He had spoken only of testators and probates and executors, but the same considerations applied equally to intestates and to letters of administration and administrators.

There were two other and minor objects aimed at by this Bill. One was that occasionally too high a stamp-duty was paid on probates, owing to a mistake in the valuation of estates. There was no provision of law enabling a person who had made an excessive payment to recover the excess paid by him. The Government had been in the habit of taking such cases into consideration, dealing with them justly, and returning the money paid in excess. But the Financial Department would be glad that the right should be given to recover such excess payments. Another object for which the Bill made provision was

to meet cases where a second court-fee was paid in consequence of more than one probate being found necessary for the same estate, as, for instance, in case of all the executors becoming extinct and leaving no representative. According to law a second stamp duty had to be paid. The Government had, in such cases also, been in the habit of returning the second court-fee or stamp-duty; but there was no right to call on the Government to make a refund. The Bill would give that right.

These were the reasons for the introduction of the Bill.

The Motion was put and agreed to.

CIVIL APPEALS BILL.

The Hon'ble MR. HOBHOUSE also presented the Report of the Select Committee on the Bill to amend the law relating to Civil Appeals in the Presidency of Fort William. He said:—

"In presenting this report I shall be glad to take the opportunity of making such statement as time allows me respecting the course which the Committee have advised and the reasons which have influenced them. We advise that the Bill shall undergo some alterations; that it shall then be re-published; and that it shall not be passed until some little time has elapsed; a time sufficient for the consideration of what the Committee have said, and of what I have now to say, and for the preparation of amendments, should any Member of Council think fit to move any.

"It will be convenient if I first read to the Council exactly what the Committee have said about the general scope of the Bill and their present treatment of it. They say:—

"'The marginally noted communications from the Rájshahai Association, from the Secretary to the British Indian Association, and from the Pleaders of the High Court, Calcutta, all raise objections to the whole principle of the Bill, so far as it restricts the right of appealing. These objections are principally founded on the insufficiency of the existing Courts below the High Court to dispose of suits in a way satisfactory to the suitors. The Rájshahai Association submit proposals for improving the Mofussil Courts, but whatever consideration such proposals may receive from the Government, we have not considered them within the scope of our functions.

"'We think that the fears expressed about the operation of the measure are to a considerable extent due to an imperfect apprehension of the mode in which it is calculated to work, and in particular to some forgetfulness of the fact that, at the present time, there is no second appeal from a decision on the facts, even though the District Court may have reversed the decision of

the Court below, and may be clearly shown to have erred in so doing, and that the Bill proposes to open a door to appeal in such cases.

"'We do not wish to make light of the fears expressed about a change which everybody admits to be tentative and which it is therefore prudent to introduce cautiously. And we have made some important alterations with the view of meeting those fears to a considerable extent. For this reason we have wholly struck out the limitations placed by the Bill as introduced on first appeals, and have left them to be regulated by the existing law, namely, Act VI of 1871, section 29. We have, by section 5, clauses (c) and (d), conferred a much larger measure of discretion on the High Court to admit second appeals; and we hope we have made it clear, both by direct enactment and by illustration, that rent-suits as well as other suits raising questions of general interest will be fit subjects for a second appeal. Perhaps we ought hardly to describe this last point as an alteration, because it was the intention of the Bill as introduced; but the language then used may not have been sufficiently clear to prevent doubt whether it included all the classes of suits intended.

"'We have not felt justified consistently with the maintenance of the measure in going any further in the direction of greater latitude of appeal, and in our opinion the measure is one the main principles of which will be beneficial to the community they affect.'

"Now I do not wish to shelter myself under a general statement that those who differ from us have misapprehended the case. I wish to address myself specifically to what they have said, and to show where I think they are mistaken. It seems to me that they have over-rated the effects which they deem to be disadvantageous to them in this Bill, and have under-rated those which they deem to be advantageous; that they have compared the plan of this Bill, not so much with the existing law, as with a non-existing state of things in which two appeals are open to everybody; that they have assumed too readily that restrictions upon litigation are evil and facilities for it good, and that they have criticized the Bill rather by isolating its parts than by looking at their combined result.

"To show all this I must of course state my own views in my own way, and cannot promise that in all things I shall say exactly what my colleagues are thinking. Indeed, no two men can be expected to concur in a long train of reasoning on any but purely scientific subjects. But I hope to represent with tolerable fidelity the general upshot of the considerations which have led us to sign the sentences I have just now read.

"Now I am always very sorry to repeat myself, but this is a matter of considerable complexity and minuteness of detail, and I find it very necessary to refresh my own memory about it when I come to it after an interval of time. I will therefore take the liberty of recapitulating, though very briefly and only in outline, the mode in which this measure was presented to the Council on the

two occasions when I moved for leave to introduce the Bill and when I actually introduced it.

"The case stood thus—

"The main subject of our Bill is not that of appeals generally, but that of second appeals, or appeals from appellate decrees—those appeals which, though their nature has been radically varied, have for some 70 years borne the name of special appeals. There never has been a time when second appeals have been granted in all cases at the will of the suitor. They have always been subject to some very substantial limitation, either of pecuniary value, or of the discretion of the Court to admit them, or of subject-matter. Special appeals, properly so called, are those which are subject to the discretion of the Court, and are only admitted specially by it. That kind of appeal was created in the year 1803 so far as regarded the Provincial Courts of Appeal, and in the year 1805 so far as regarded the Sadr Díwání Adálat. It lasted till the year 1843. For it was then substituted a regular appeal of a mutilated nature; that is to say, an appeal lying at the option of the parties; not specially allowed by the Court; not resting on anything special in the case; but confined to points of law, and not admitting of any review of the facts. That species of appeal has lasted to the present day, and it has—I cannot say how long, perhaps always, certainly for many years past—given deep dissatisfaction to those who have to administer our laws, at least in Bengal. Its principal defects are the two that I will state. Lying as it does at the option of the parties, it is used by many in suits of a very trivial character for which the action of two Courts ought to be sufficient, and thus it causes a waste of power both to the State and to the parties. Excluding as it does the most important part of most cases, namely the facts, from discussion, it cripples the action of the High Court; it enables District Courts or Subordinate Judges who have only seen the dead record, to reverse the Munsifs who have seen the living witnesses, in a final and conclusive way; and it brings about the practice of remands, which is dilatory, expensive, and very uncertain in result. Other defects it has which are less direct than these, and I will not now mention them again.

"Thus it appears that in one way the present system gives too great a latitude of appeal; in another way it impairs the efficacy of appeals. I therefore set out by saying that the two main objects of the present measure were to check the undue latitude of appeal, and at the same to provide for the more efficient hearing of appeals in proper cases.

"In order to effect these combined objects we made the following proposals: First, that a second appeal should not lie as of right when the two Courts be-

low have concurred in a decree. Secondly, that a second appeal should not lie as of right when the value of the suit is below Rs. 200, or some lower limit to be fixed by the Local Government. Thirdly, that the Judge who pronounced the decree should have unlimited discretion to say that there shall be an appeal from his decree. Fourthly, that the High Court should have power to allow an appeal when the value of the suit is not measurable in money. Fifthly, that the same power should exist when the question involved is one of public or general interest. Sixthly, that the same power should exist when necessary for the purposes of justice; but that apparently wide rule was very much limited by an explanation which showed that it did not refer to error in the judgment of the Court below, but to miscarriages in the mode of administering justice. Seventhly and lastly, we proposed that in cases open to second appeal the facts as well as the law should come under review.

"Such were the proposals, and their principles may be summed up thus: First, a second appeal should be shut out when the suit is too trifling in value to justify our bringing three tiers of judicial guns, one being of the largest calibre, to bear upon it; and also when it may be fairly presumed that justice has been done as far as human tribunals can do it. Secondly, that a second appeal may be let in again, when the judge pronouncing the second decree thinks that it should be, when the money-value of the suit is no measure of its importance, and when its interest to others compensates for its want of value to the parties, and again when the presumption that justice has been done is rebutted by other circumstances. Thirdly, that parties should not be judges in their own cases, but that the Courts should judge for them under which class they fall.

"There was one other part of our measure, as it was introduced, which dealt with appeals from original decrees. It was proposed to prohibit such appeals in cases of the Small Cause type decided in the ordinary Courts, when the value did not exceed Rs. 20, but subject to the same safeguards and qualifications as affected the prohibition of second appeals.

"Now I come to the comments which have been made upon these proposals, principally in three memorials; one proceeding from the British Indian Association, one from the Rájshahai Association, and one from the Pleaders of the High Court, communicated in a letter from Mr. Allan to myself. I may here mention that I am indebted to Mr. Allan for advice and assistance in framing the illustrations which we have added to the Bill.

"I have already stated that in my opinion the memorialists have fallen into some errors. But I should add that their language is temperate and their

arguments perfectly fair and straightforward. As for mistakes, if I succeed in showing that there are such, I repeat that the subject is one of much complication and difficulty. I have had to go over it several times, yet often find myself falling into mistakes about it; and it is not surprising if others who are going over it for the first time should make some too.

"Before I apply myself to the points which are properly in issue between us, let me first clear off one or two matters about which no controversy was raised by me or need now be raised.

"One of these matters is the assumption that part of the ground-work of this measure is an attempt to repress an over-litigious spirit peculiar to the Bengalees. The British Indian Association say—

"'It is, your memorialists believe, *generally supposed* that the people of this country are fond of appeals, and that the greater the number of appeals the more are they apt to have recourse to them.'

"The Rájshahai Association come to closer quarters, and they say—

"'But it seems that the honourable mover of the Bill thinks that they [the mischiefs] are attributable to a morbid litigious tendency in the people of these provinces; it is accordingly proposed to make changes curtailing the power of appealing with a view to discourage this tendency.'

"And both the Associations set themselves to prove in detail that the fact is not as supposed.

"Now this assumption has led to some very interesting statements and reasoning on the part of the two Associations, but it is nevertheless an erroneous assumption. Whatever may have been said at different times about an exceptionally litigious spirit in the Bengalees, the reasons for this measure stand as I put them, and are quite independent of any opinion about the existence of such a spirit. And as regards my own proper self, I have not only not rested the case on any such opinion, but having seen such an opinion expressed in several of the papers before Government, I have carefully abstained from saying a word about it. I have so abstained for two reasons. First, I have a lawyer's weak fondness for evidence and have not found sufficient proof of the fact: indeed, according to my experience, human nature in Bengal seems exceedingly like human nature elsewhere. And secondly, if I were convinced of the fact, I should be slow to draw the supposed inference from it. I should doubt whether it was wise to frame institutions with the view of running directly counter to the spirit of the people in such a matter as this. And I am glad to find that, according to the evidence of these

Associations, there is no unreasonable passion for litigation in the people of Bengal, but that they are likely to be satisfied with a reasonable amount of judicial power to settle their disputes.

"These observations bring me to a matter which is akin to them. Some of the memorialists have pointed out that (I am now reading from the memorial of the Rájshahai Association)

"'the object of Courts, in the humble opinion of your Excellency's memorialists, seems to be, not only the granting of relief in disputes that actually occur, but also the creation of a general satisfaction in the minds of the people as a whole.'

"In that sentiment I most cordially concur. It has formed part of my argument throughout. I have insisted that disputes have their public as well as their private side, and that we must make laws, not for disappointed litigants alone, but for the whole community. If I may quote my own words, I spoke, among other things, as follows:—

"'The State's duty is to provide such reasonable amount of judicial machinery as may satisfy reasonable people that their cases have been fully and fairly heard, even if erroneously decided, so that they may not be driven to take the law into their own hands. When that duty has been discharged, we may apply the maxim, *Expedit reipublicae ut sit finis litium.*'

"But all that is proved by such a principle is that we should get the best judicial machinery that our circumstances require and admit of. It leaves quite untouched the main questions—What do circumstances admit of? What do they require? What is the best judicial machinery? What is most likely to create that general satisfaction which we all agree in desiring? All these questions may, consistently with the principle just admitted, be answered in ways that are favourable to the Bill before the Council.

"There is again another matter, one of great importance, which is common ground between myself and the memorialists. They insist very strongly on the necessity of improving and strengthening the Mofussil Courts. It is no doubt a most important subject; far more important than any contrivances whatever about appeals. When I addressed the Council last June, I expressed my own opinion as clearly and strongly as I could to that effect, and though it is true that I was speaking principally of Courts of First Instance, my remarks were also applicable to, and intended for, Courts of First Appeal. But how to do it? Aye, there's the rub. We must always remember that our grand difficulty is the paucity of trained and fit men for the post of Judge—a difficulty which cannot be overcome in a year, nor yet in a generation in any country, and one which is peculiarly difficult to overcome in the circumstances of this country.

Gradually, as we hear on all hands, the men are acquiring more fitness, and so far so good. Whether we can trust to any other cause of improvement is a grave question. The Pleaders and the British Indian Association do not tell us how they would improve the Courts. The Rájshahai Association do, and I will read their recommendations to the Council:—

"'They would therefore most humbly suggest the following scheme. The special appeals being abolished, the time of the High Court Judges thus saved may advantageously be employed in making circuits for the purposes of sitting with the District Judges to hear such appeals from orders of the subordinate Judges, which are now appealable to the District Judges. The High Court Judges will do this work in the same way as the Judges of the Westminster Courts do Nisi Prius Courts' work in England. In the next place, your Excellency's memorialists would have the appointment of an associate Judge in each District Court for the purpose of sitting with the subordinate Judge or the District Judge in hearing all appeals from the decrees of Munsifs. These associate Judges ought to be selected from among pleaders of position, their salary varying from Rs. 500 to Rs. 1,000 per month. They will be a strong element of the appellate Court, and at the same time be got at a cheap cost. In cases of difference between two Judges hearing appeals, there may be a provision for reference to the High Court without any necessity on the part of the suitor to appeal.'

"Now, I would not make light of either of those proposals. They are well worth considering. I am myself disposed to think favourably of the plan of sending accomplished Judges into the Mofussil, so that they may not only assist in deciding cases of difficulty, but may show, by precept and example, how business should be conducted. But I am not aware that my opinion is largely shared, and there are certainly great practical difficulties about the plan. The Council will observe that these gentlemen combine it with the abolition of special appeals, by which I suppose they mean all second appeals. That is a very radical alteration, and if more efficacious, at all events much fuller of risk, than what we are proposing. As for associate Judges, the irrepressible difficulty recurs—where are the men? If you add to a District Judge a man weaker or no stronger than himself, is it certain that you improve his Court? Is it really true that pleaders of such ability and knowledge and practice as to make them efficient assistants to the District Judges are to be 'got at a cheap cost' or are to be got in sufficient numbers at all? These questions and others would have to be carefully sifted before the suggestions of the Rájshahai Association could be adopted.

"We must remember that this same controversy was raised in the year 1871 when the Bengal Civil Courts Act was passed. It was then said—what is the use of readjusting your judicial arrangements? Shuffling your cards does not make them better ones. The one thing necessary is the improvement of the Judges themselves, and the increase of their strength. The answer

was—that is exactly the thing to which the Government does not see its way: we want much more consideration and delay. Let us make what improvements we can, though they be small ones, and though they do not touch the great and essential foundation of all. I would say the same now.

"Still the matter is one as important as any that can be brought under the consideration of Government, and I feel sure that I am not taking too much upon myself in saying that Government will pay serious attention to it, and that the public owe thanks to those who come forward, as these gentlemen have done, to call attention to it and to suggest remedies in a temperate, thoughtful, and serious spirit. I only wish to add these warnings: don't be blind to the difficulties of the problem; don't put too much faith in arrangements when the thing wanted is a capable man; don't forget that the Government cannot indent for so many good Judges as they can for so many barrels of beer; and don't refuse to consider smaller improvements because you see that greater ones are wanted.

"For, after all, when all this has been said, how does it bear upon the practical question before us, the question whether we shall or shall not accept the present measure? It has no bearing unless you can go on to show that, keeping the Courts as they are now constituted, the proposed alterations are not likely to do good. That is the question to which I addressed myself on former occasions, and I contended, as I contend now, that the scheme of appeal now proposed is sounder in principle, and therefore likely to work better, than that which now exists, and which experience has shown to be highly unsatisfactory.

"When the ground is thus cleared of several topics not in issue now, it will be found that a large portion of the memorials is disposed of; and I proceed to deal with the actual objections that are made to our Bill.

"A considerable portion of the memorial of the British Indian Association is occupied in reviewing what I said concerning the history of appeals; and having shown that many things are different now to what they were in former years, they say that it is—

"'inconsistent to let the present state of things continue, and justify the abolition of special appeals as a matter of right on the assumption that the proposed plan *is nothing more than a restoration of the old system.*'

"Perhaps it would be inconsistent, but no such assumption has been made. All I said to that effect was that it would be more correct to describe this plan as one for restoring special appeals, than to describe it, as had been done, as one

for abolishing special appeals. I showed that special appeals, properly so called, had been created in the years 1803 and 1805, had been abolished in the year 1843, though the name was continued, and that they did not now exist; and that under this measure there would be special appeals again. It is a mistake to suppose that I either meant or said that the system now proposed is only a restoration of what existed in former years; it does indeed embrace portions of the former system which was swept away in the year 1843, and the destruction of which has been found so unsatisfactory; but the failure to perceive the points in which the present plan differs from former ones lies, as I think, at the bottom of the objections made by the memorialists.

"I do not go into this subject again at length, because it is mainly of historical interest, though I thought it not useless to give the Council a brief account of the events which have brought us to the point where we stand. That which is really important in the historical retrospect is the proof that at no time have the authorities of British India thought it right to give a second appeal pure and simple. They have always placed large and substantial restrictions on second appeals; and we are not now introducing any new principle of restriction, but are only varying the mode of it. That seems to me important, and I find nothing in the memorial which in the least degree displaces what I have said, or affects the bearing in which I use it. It is the more important, because the British Indian Association now propose (and it is their only proposal)

"'to allow a second appeal to the High Court in all cases both on facts and law, and to add to the numerical strength of that Court in order to enable it to meet the increased business which will necessarily ensue.'

"I think it not an immaterial observation on that proposal to point out that it affords scope to litigation very far greater than ever yet has been contemplated.

"The next topic to which this memorial passes is the bad working of the present system. It quotes with approval some sentences in which I described that working, and then proceeds thus—

"'And the obvious remedy, your memorialists venture to remark, for the state of things described above, is that power should be given to the High Court to open the whole case on second appeal. Such would be the logical sequence of the argument of the learned Law Member. But instead of providing this general remedy, he proposes certain provisions which will practically prohibit a second appeal in the majority of cases which are now open to a special appeal to the High Court, and thus keep out of view the injustice done. A wrong is not righted by simply ignoring it.'

"Now it would have been more correct if the memorial had not said 'instead of providing' this general remedy and so forth, but had said '*while* providing' this general remedy. The very essence of this measure is that it combines provisions for the more complete hearing of second appeals and provisions for letting-in to second appeal important cases which are now excluded from it, with provisions for excluding from second appeal cases of small importance which ought not to come before three successive Courts. The present law aims at doing the same thing, but it does it in a way and on a principle that experience has shown to work badly. It does it by separating law and facts; by putting forcibly asunder things which Nature has joined together; by admitting to second appeal points of law, however trumpery, and excluding questions of fact however important. We propose to aim at it in a different way, taking the distinction, not between law and fact, but between cases of greater and those of less importance. Such a plan as this, whether a wise one or a foolish, is directly addressed to righting the wrong that exists, and when it is described as simply ignoring the wrong, it is not correctly described. Indeed, the next sentence of the memorial shows that the memorialists are sometimes aware that the Bill does throw open to second appeal questions which are now shut out from it; but then they are constantly forgetting it again, from the passage I have just quoted, and in fact all the important arguments of the memorial read as if the thoughts of its framers were so attracted by those parts of the Bill which are restrictive, that they lose hold of those parts which are enabling.

"Well, they then go on to deal with the limitation of money-value. I will not go again into the argument that one rupee may be as much to a poor man as a million to a rich man. When I hear a serious affirmative answer to my question whether a case about one rupee ought to go up to the Privy Council, I will set myself seriously to deal with it. Until that time arrives, I shall assume that everybody is practically convinced that there is somewhere a point of value too small to be the subject of unlimited appeal; and if so, the only question is, where that point is to be found?

"But the moment we get off this abstract question, I find the memorialists falling into the errors which I say underlie their objections, namely, a forgetfulness of the enabling provisions of the Bill, and of the restrictive operation of the existing law. Of the poor man they say:—

"'To the poor man a suit of, say, rupees 100 or so, covering rights which might have come down to him from generation to generation, which might involve his ancestral homestead, or involve questions of contract, caste or usage that might affect him for life, is of infinitely greater importance than a suit of rupees 10,000 or rupees 1,00,000 in value may be to the rich

man. The latter has always means to cope with his opponent, but the former has no such means, and to deny him the benefit of a Court in which he has, by reason of its constitution, great confidence would be to deny him justice. The deprivation of this right would, your memorialists fear, be attended with great dissatisfaction and discontent.'

"Now just let us analyse that sentence and see how it bears upon the actual measure before the Council and on the existing law. For it will be found that an analysis of this sentence is an analysis of the principal objections of the memorials.

"First, it is said that a suit may involve an ancestral homestead. But I am not content with a general statement like that. What is the kind of question in the suit which the memorialists contemplate? If one of perfect simplicity, why should not two successive Courts suffice to decide it? Why should the High Court be called in to decide it? What does the law say now? A money-suit may be brought before a Munsif, who gives a decree, say, for 100 rupees. That decree is open only to one appeal. Yet such a decree may have the effect, and constantly does have the effect, of depriving the defendant of his ancestral homestead. If execution is issued against him and he has nothing but the homestead to answer it, the homestead must be sold. Is anybody prepared to propose further facility of appeal on account of that incidental result? No, because the nature of the question in which the fate of the homestead is decided is a simple one. Well, then, is it not clear that it is the nature of the question, and not the nature of the property involved, on which the right of appeal is now made to turn? We propose still to make it turn on the same thing, and the argument of the memorialists does not affect us in the least, but flies wide of the mark, until they come to discuss the nature of disputes, and then they must show that the disputes requiring the strongest judicial machinery will be deprived of its aid.

"They deal with the nature of disputes in the immediately succeeding words—'questions of contract, caste or usage that might affect him for his life.' I hardly understand what questions of contract are here referred to, and I think that the observations I have already made about ancestral homesteads apply to the subject of contracts. Some of the disputes about them will, and some will not, be proper subjects for second appeal. Questions of usage are sure to be questions of general interest and they fall within one of our enabling provisions; questions of caste would probably fall within the same provision, and almost certainly within another, because their value is not measurable in money. I think it will be seen that the moment they come down to particulars and try to specify cases in which the 200 rupee limit will work hardship, the memorialists specify cases which the enabling provisions are calculated

to meet; and that it is only as long as they use general terms applying to a vast variety of cases,—such as 'suits involving an ancestral homestead, suits involving questions of contracts' and so forth—that their objections appear to be substantial.

"I may apply the same kind of criticism to every other passage which bears on the 200 rupee limit. I will read one or two of them—

"'In many districts, such as Sylhet, Chittagong, and other places, the land is held in very small parcels, the value of which is generally much less than rupees 200; and as regards those districts, complicated questions of fact and law not unoften arise in suits connected with land, and it would be a gross injustice to them to deprive them of the benefit of the appellate authority of the High Court.

* * * * * *

"'Further, many suits of small value are what may be called test-suits, being tentative in their nature, and it is of the highest importance to the parties concerned that such suits should be decided by the High Court. The provisoes in section 6 will not meet such cases, for the money-value of the particular suit it is not difficult to ascertain, but its ulterior consequences, though not of importance to the general public, are of the last importance to the parties interested, involving a much larger amount than the value of the claim in dispute. Such, for instance, are possession, lákhiráj and easement cases.

* * * * * *

"'In the words of Regulation XLIX of 1803, 'in causes between landholders or farmers of land and the ryots for arrears or exactions of rent, wherein the rights of landlord and tenant might be at issue, an erroneous decision not revocable by law might be of serious ill consequence.' The later laws, as your Excellency in Council is aware, have introduced changes in the status of the landlord altogether inconsistent with the rights and privileges conferred upon him by the Permanent Settlement Regulations, and even the rights recognized by the existing law are sometimes rudely invaded by arbitrary constructions of law. These constructions are not of course confined to the District Courts, but when a case is decided by the High Court the suitor has one satisfaction, that of having laid it before the highest tribunal in the country. But the prohibition under comment would deprive the landholders of even this small satisfaction. In the same way it may be argued on the side of the ryots. Whether it be a dispute between ryot and ryot, or a ryot and a zamíndár, a suit may involve nice questions of law, or a decree passed by the lower Courts may be wholly erroneous or unjust, and it would be a grievous hardship to the ryot, which he would not forget in his life-time, if he were denied the opportunity of obtaining the judgment of the highest Court in the land. The conditions described in section 6 might not apply to cases of this kind. A landlord may bring a test-suit for enhancement, which would affect perhaps a few of the villages of his estate, and he could not then avail himself of the exception as to the importance of a case to the public.'

"Now the Council will observe that in these passages questions of fact and law are mixed up together, and complaint is made that, when complicated, they are not all allowed to go up to the High Court. It is (so they say) a

gross injustice to deprive them of the benefit of the appellate authority of the High Court. But I beg to say that if it be injustice, it is an injustice under which they suffer at present, and under which they have suffered ever since the year 1843. However complicated or important a question of fact may be, however palpably erroneous the appellate judgment of the District Court upon it may be, that judgment cannot be called in question by the High Court. So far from depriving these cases of the appellate authority of the High Court, we are actually devising methods for subjecting them to that appellate authority in a number of instances, we hope in all in which an appeal is really required. As the Bill was introduced, whenever the deciding Judge thought there ought to be an appeal; whenever the High Court thought that a question of public interest was involved, or that the value of the suit was not measurable in money, or that injustice had been done by mistake or judicial misconduct, an appeal might be granted, though no such appeal can now be had. And though we now propose, in one respect, to limit these large enabling provisions in the case of two concurrent decrees, as I shall presently explain, in other respects we propose still further to enlarge them by enabling the High Court to admit an appeal when the record discloses manifest error.

"I find that even the pleaders, versed as they are in legal matters, have not quite escaped the confusion of mixing up cases in which there is now no appeal but under this Bill there will be, with cases in which there is now an appeal and which will be subject to the 200 rupee limit. They say:—

"'The pleaders crave leave also to observe that the difficulties and complications of law and fact and equitable considerations which arise in the determination of suits relating to immoveable property occur in all such cases, more or less, quite irrespective of their pecuniary limit or valuation.'

"Here they speak of complications of fact, as if the present Bill did something to shut them out from appeal, instead of doing a great deal to let them in. As for 'equitable considerations,' I take it they must be either matters of fact or matters of law, and that this Bill does not affect them in any other character.

"Then with regard to what is said of the Permanent Settlement and its rude invasion by arbitrary constructions of law. I really don't know what is meant by these invasions, and it seems to me that the poor Permanent Settlement is constantly made to do a great deal of duty which it never bargained for. But I am sure that any construction of law, arbitrary or otherwise, substantially amounting to an invasion of the Permanent Settlement, would be a

question of the highest public interest, and would, as clearly as any question that can be suggested, fall within one of our enabling provisions.

"So when a suit involves 'nice questions of law,' if those questions are also questions of importance, they will fall within one of the enabling provisions. There may be questions of law which are very nice, but of no importance whatever except to the parties: as, for instance, the construction of a will or a contract. And if they are of none but private importance, why should they not be subject to restrictive rules just as much as questions of fact? Questions of law are not more difficult than questions of fact, but less so. The High Court of Calcutta wrote to us with reference to this Bill thus—

"'An important feature of this Bill is the intended reduction in the number of appeals given as of right. The compensating circumstance, and that which, in the opinion of the Judges, and also it is believed in the estimation of the public, would constitute the great value of the Act if passed, would be that it enabled the High Court to deal effectually with a class of cases which it has hitherto been prevented from reaching, namely, those cases where, although no error has occurred in the decision of any question of law, there has been miscarriage in the application of law to facts, or glaringly wrong and unreasonable inferences have been drawn from the facts themselves. The experience of the Judges tells them that pure mistakes in law are few in comparison with those arising out of imperfect dealing with facts, improper use or appreciation of evidence and failure in procedure.'

"One reason for this, no doubt, is that questions of pure law arise less often than the others; but another is that they are usually less complicated and difficult, and do not require the same grasp or sagacity or training for their solution.

"The reason why questions of law are apt to be more important than those of fact is that they have a general as well as a particular bearing. Take away that generality, and they become as unimportant as questions of fact.

"Again, as regards decrees wholly erroneous or unjust, and as regards test-suits which are mentioned once or twice, they are provided for by the Bill; the former in large measure, and the latter entirely. But it would be unfair to the memorialists if I did not add that, on these two points, the Bill is not now the same as when it was introduced. As to decrees clearly erroneous, we propose to give a much larger measure of discretion to the High Court. And as to test-suits, it was always intended to include them among the enabling provisions, but the language of the Bill was not happily chosen and might fairly raise doubts about the intention—a defect for which I am answerable and which I am glad to have had pointed out.

"Before leaving the subject of the 200 rupees limit, I must notice one other argument, which seems to me rather a strange one. The British Indian Association think that the morals of the people will be corrupted by the temptation to place false valuations on suits in order to bring them beyond the limit in question. How far such a practice would demoralize the people I will not stop to discuss, for I think it will not prevail. It is supposed that people will pay hard money out of their pockets now, because at some future time they may possibly chance to profit by being able to appeal to a higher Court. I say that if Bengális are willing to spend money on such a chance, they must be much more speculative as well as more foolish than other people are, and than I take them to be. To sacrifice the present to a remote and very uncertain future is not so very common anyhow. It is still less common where your enemy is as likely to get the benefit of your sacrifice as yourself, or more so. People who institute lawsuits do so with the expectation of winning, not of losing. And why in the world should a man pay larger court-fees in order that his adversary may be able to dispute the decree he is about to get? When retribution is closing round Macbeth, one of his bitterest reflections is that his crimes have been committed for the benefit of an enemy. 'For Banquo's issue have I 'filed my mind,' he exclaims in his remorse and despair. Equally bitter I should think would be the reflections of a plaintiff who found himself with a decree of the District Judge in his favour, but liable to an appeal to the High Court, because he himself had falsified the value of his suit.

"I pass now to the subject of concurrent decrees, which I may deal with very shortly, because I find no new argument against the principle, except one directed to show that it will seem to reflect upon, and also will demoralize, our Judges. I will read it to the Council—

"'Your memorialists submit it is equally inconsistent to profess confidence in the appellate Court when it agrees with the Court of first instance, and to withdraw that confidence when it disagrees; in other words, to make the judgment of the subordinate Court the criterion of trustworthiness of the superior Court. This half and half confidence, your memorialists respectfully submit, has the appearance of a reflection upon the appellate Courts in the districts. It is observable that the provision will have a demoralizing effect upon the Courts of first instance. Constituted as Mofussil society is, the sympathies and antipathies of the Judges of the District Courts remain no matters of secrecy, and as the prospect of promotion of the subordinate judicial officers depends upon the good-will and recommendation of the District Judges, it would not be unnatural if weak-minded Munsifs should seek to adapt their judgments to the predilections and caprices of the appellate Courts in order to shew a long roll of confirmations of their judgments in appeal. Thus the provision under comment would have a demoralizing tendency and balk the ends of justice.'

"Now I can understand that under all circumstances an inferior Judge may be induced to humour the idiosyncrasies of his superior. But why he should do it the more because the judgments of the superior will be less appealable when they agree with those of the inferior, than when they disagree, it passes my ability to comprehend.

"As to what is said about confidence, I would ask any of these gentlemen what he does in any affair of common life, when two persons, each appointed to pronounce an opinion on some disputed matter and having the best opportunities of forming one, differ about it, does he not feel more doubt than when the same two persons agree? The argument misses the principle on which we defend the finality of two concurrent decrees. We say that, when a man has got a decree in his favour, there is a strong presumption that he is right; that he is in fact right in the great majority of cases; and that when he has got two such decrees, the presumption is much increased; that in fact it has then become so strong that it is wrong to allow him to be further harassed unless you can show that there is something exceptional in the case.

"There are, indeed, the arguments which we have heard before, about the defectiveness of the Courts, and the fear of District Judges affirming decrees indiscriminately in order to escape appeals. The latter argument I answered on a former occasion, showing, conclusively as I think, from other parts of our plan, that a Judge could not, if he would, act in the corrupt way suggested without speedy detection. I do not observe that anything has been said at all weakening or bearing on that answer. And as to the defects of the Courts, I am glad to find that nobody imputes corruption to them; and, failing that, they might be much worse than I believe them to be without destroying the presumptions I have just stated. I believe the Mofussil Courts to consist of gentlemen many of whom are sadly deficient in legal training, but who are men of integrity; the majority of whom are men of good understanding and industry, and the great majority of whom are doing their work as well as they can according to the measure of their several capacities. I say that such men will decide rightly the great majority of cases that come before them. Of course some cases will be too difficult for them, and in others they will make their mistakes, as all of us do in the course of our business. We must remember that even the supremest of Courts are human and will sometimes fall into error. Now let us suppose a case of this kind: a case which contains no point of general interest, in the conduct of which the Judge has acted as a Judge should, the record of which displays no manifest error, and as to which the Judge who decides it feels no such doubt as induces him to think that it should form the subject of a second appeal. I will ask in

how many of such cases is it likely that there will be two successive judgments concurring with one another, and both erroneous? The number must be exceedingly small. I then say that it is our duty to make laws for the good of the community at large; for respondents as well as for appellants; for those who have as well as for those who seek to take away; and for the great majority rather than for the small minority, when their interests are opposed; and that it is a bad law which would allow all successful suitors to be harassed by the unsuccessful, because here and there a mistake may have been made.

"On this principle we have thought it right that two concurrent decrees should not be disturbed merely on account of the importance of the suit to the litigant parties; but that, in order to disturb them, there should be some interest of a general kind; some manifest error; some misconduct in the administration of justice; or some misgiving on the part of the Judge who pronounced the second decree.

"It is true that, in what I call the enabling provisions of our Bill, we do not propose to make the parties the judges in their own cases, whether or no they fall within those provisions. It is for the Courts to say that. But the duty is one which the Courts will doubtless be careful to discharge with impartiality. Certainly the High Court will have no undue bias against appeals, whatever might be the case with the Courts below.

"I have now gone through what strike me as the principal topics relied on in these memorials. There are of course other matters mentioned, but they are minor ones. I hope I have read such passages as give to the Council a fair account of the arguments employed. I have necessarily abbreviated much, but have tried not to garble or misrepresent. If unfortunately I should have done so, these gentlemen are not here to reply upon me,—I wish they were, but we have resolved that their memorials shall be published together with the Bill and our report. The memorials then will receive the same publicity as my remarks; all people may read for themselves; and so my bane and their antidote will go together. If however I have rightly represented the gist of the memorials, then I think I have shown that they do not quite appreciate the contents of this Bill or its relations to the existing law, and that they do exaggerate the mischiefs to be apprehended from it. And I would put it to the memorialists whether, under the light of my remarks, and considering the alterations made in the direction they desire, they are not satisfied to take the reform which everybody advocates, namely, the opening to second appeal of questions of fact, coupled with the other alterations about which controversy exists.

"For myself, I am apprehensive that, as the Bill stands, it may be found to open too wide a door to disputes, and I am sure that for some time it will give the Courts a great deal to do. But I am confident that the principle of classifying suits according to their importance, and not according to the present distinction between fact and law, is a sound one, and will be found to adapt itself both to the present system of Courts and to any other system that may be established for this country. If my confidence is justified, the errors which the wear and tear of practice is sure to expose will be only errors of detail, and may be cured from time to time by us or our successors.

"It only remains to add a few words on the subject of first appeals. We have been induced, partly by the objections I have referred to, partly by the advice of the High Court, to strike out that provision altogether. It has been pointed out to us that the Bengal Civil Courts Act contains a section empowering the Local Government to invest Munsifs with the jurisdiction of Small Cause Courts up to the value of rupees 50. It seems that the power has been little used; so little that for myself I confess it had escaped my notice altogether. If used however, it will prevent appeals below the limit assigned, and the High Court suggest that it may be more used than it has been. It goes to a greater extent than we proposed, because we proposed a limit of rupees 20, and it lacks the qualifications and safeguards which we proposed; but all things considered, we have thought it more prudent to leave the Local Government to apply this machinery when it finds that it may be usefully applied."

His Excellency THE PRESIDENT said that there was no motion before the Council, but if any honourable member desired to make any observations he was perfectly at liberty to do so. Otherwise the course would be that the Report of the Select Committee would be printed and circulated.

PORT-DUES ACT AMENDMENT BILL.

The Hon'ble MR. HOBHOUSE asked leave to postpone the presentation of the Report of the Select Committee on the Bill to consolidate and amend the law relating to Ports and Port-dues. He said that only yesterday evening a communication was received from the Bengal Government containing some additional suggestions.

Leave was granted.

EUROPEAN BRITISH MINORS BILL.

The Hon'ble MR. HOBHOUSE also presented the Report of the Select Committee on the Bill to provide in the Panjáb and elsewhere for the guardianship of European British minors.

DISTRESSES (PRESIDENCY TOWNS) BILL.

The Hon'ble MR. HOBHOUSE also presented the Report of the Select Committee on the Bill to regulate Distresses for Rents in the Presidency Towns. He said that with respect to this Bill the Council were obliged to Mr. Fagan, the First Judge of the Court of Small Causes at Calcutta, for the pains he had taken to assist the Committee in improving the Bill.

OBSOLETE ENACTMENTS REPEAL BILL.

The Hon'ble MR. HOBHOUSE also presented the Report of the Select Committee on the Bill for the repeal of certain Obsolete Enactments. He said in this Report the Committee mentioned on the face of it their debt to Mr. Field for most laborious work which he had done in respect of the Bengal Regulations. They had embodied a great portion of that work in the Bill.

LAWS' LOCAL EXTENT BILL.

The Hon'ble MR. HOBHOUSE also presented the Report of the Select Committee on the Bill to declare and consolidate the law relating to the local extent of the general Regulations and Acts, and the local limits of the jurisdiction of the High Courts and Chief Controlling Revenue Authorities.

GENERAL ACTS' LOCAL EXTENT BILL.

The Hon'ble MR. HOBHOUSE also presented the Report of the Select Committee on the Bill for declaring the local extent of certain Acts passed by the Imperial Legislative Council.

NATIVE PASSENGER SHIPS' AND MERCHANT SHIPPING ACT AMENDMENT BILLS.

The Hon'ble MR. HOBHOUSE then moved that the Hon'ble Messrs. Dalyell and Bullen Smith be added to the Select Committee on the following Bills :—

To consolidate and amend the law relating to Native Passenger Ships and Coasting Steamers.

For the further amendment of Act No. I of 1859 *(for the amendment of the law relating to Merchant Seamen)*, and for other purposes.

The Motion was put and agreed to.

The Council adjourned to Tuesday, the 8th December 1874.

WHITLEY STOKES,
Secretary to the Government of India,
Legislative Department.

CALCUTTA ;
The 25th November 1874.

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