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MADRAS RECORD OFFICE.

Government of Madras.

Judicial DEPARTMENT.

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Proceedings of the Madras Government, Judicial Department,
21st January 1863.

106. Read the following letter from C. F. CHAMIER, Esq., Registrar of the High Court of Judicature, Madras; to the Honorable A. J. ARBUTHNOT, Chief Secretary to Government, Fort Saint George, dated Madras, 5th January 1863, No. 2.

1. I am directed to acknowledge receipt of the Order of Government, dated the 18th September last, forwarding for the observations of the Chief Justice and Judges copy of a Bill for conferring on the High Courts of Judicature in India, the jurisdiction and powers vested in the Court for divorce and matrimonial causes in England; and communicating certain other papers connected with the same subject.

2. In reply, I am directed to transmit the accompanying observations recorded by the Chief Justice and Judges on the provisions of the Bill in question.

Remarks of the Honorable the Chief Justice, the Honorable Sir Adam Bittleston, and the Honorable Mr. Justice Phillips.

The following are the remarks which we think it right to make in respect of the Bill for conferring upon the High Courts of Judicature in India the jurisdiction exercised by the Court for divorce and matrimonial cases in England.

The points which we consider open to doubt are chiefly those in which the Bill departs from the English Act; first, by omitting the provisions respecting the trial of contested matters of fact by a Jury, and secondly, by introducing the procedure of Act VIII of 1859.

Upon the first point we prefer the provisions of the English Act* which leave it discretionary with the Court to direct the trial by a Jury of questions of fact, except on petitions for dissolution of marriage; in which case either of the parties may insist on that mode of trial. Hitherto no doubt the late Supreme Courts, in civil matters, have been the sole Judges of fact as well as law; but the adoption of that system may be attributed rather to the difficulty of obtaining a sufficient supply of properly qualified Jurymen without considerable inconveniences to the community, than to any preference of the system itself. We believe that in cases now coming under the ordinary original civil jurisdiction of the High Court more questions of fact would often be more satisfactorily decided by a Jury; and in matrimonial causes under the proposed Act, we think that many instances are likely to occur in which it would be most desirable to have the verdict of a Jury, (say of five persons taken from either the Grand Jury or the Petty Jury list, or partly from the one and partly from the other) upon which to lease the decree of the Court. In a matter of so much social importance as the dissolution of marriage; and considering the nature of the charges involved in suits of this description, it seems to us proper that the litigant parties should have the opportunity of submitting all questions of mere fact to the consideration of a Jury; the tribunal which in the Presidency towns in India, and now to some extent also in the Mofussil, is appointed, as in England, for the trial of all criminal charges.

It is not likely that the cases will any where be so numerous as to render the duty of serving as Jurymen a burthensome one to the community; and rules may be formed in such a manner as to make the discharge of the duty fall very lightly upon those who might from time to time be called upon to serve.

Secondly, we object to Section 4 of the Bill because we think it is calculated to lead to confusion and uncertainty. In the first place, subject to the express provisions of the Indian Act, the Court is directed to act upon the principles and rules on which the English divorce Court acts; and next it is directed to regulate its proceedings by the Civil Procedure Code, but "subject as above," that is, subject to the provisions of the Indian Act, and subject also to conformity to the principles and rules on which the English divorce Court acts.

If the Civil Procedure Code is to be followed at all, we think that the particular parts of it which are to be adopted should be carefully selected and distinctly specified; otherwise very perplexing questions seem to us likely to arise, as to the applicability of many of the provisions which it contains; framed as the Code has been mainly with reference to suits respecting

* 20 and 21 Vic. Cap. 85, Sections 23 and 36.

property. But we think it would be better to adopt the simple procedure established by the rules of the divorce Court in England. This jurisdiction in India is confined to the High Courts, and in the Presidency towns we see no necessity for requiring a first hearing before a Judge for the purpose of settling issues, and certainly the powers of final disposal given to a Judge at such first hearing, could hardly be considered applicable to divorce suits.

Another observation suggests itself to us as regards the 26th Section of the Bill. It is taken from the English Act, and seems framed with reference to the law of evidence in England, as settled by 16 and 17 Vict. Cap. 83, Sec. 2, by which husbands and wives are incompetent to give evidence for or against each other in any proceeding instituted in consequence of adultery. But the Indian evidence Act No. 2 of 1855, Section 20, provides without any such exception that husband or wife shall in every civil proceeding be competent to give evidence for or against each other, and Clause 26 of the Bill, as it stands now, seems calculated to raise doubts as to the competency of husband or wife to give evidence on the question of adultery.

Remarks of the Honorable Mr. Justice Strange.

The jurisdiction in matrimonial cases is of a peculiar order, and it will centre in but one Court in each Presidency. I can see no objection to regulating this jurisdiction by a Code of procedure particularly adopted thereto, if this should be of a more appropriate order than what the general Code of Procedure may afford. The procedure in England in matrimonial suits has been thus specially adapted to the nature of such suits, and from what I can learn thereof for simplicity and facility of use it is decidedly preferable to our Code of Procedure, and especially in the rules for enforcing judgment wherein our Code is, I consider, very cumbrous, and likely to prove unsuitable to matrimonial cases. By adopting the English practice in these cases we shall have the full benefit of the decisions given in England upon all points connected with this jurisdiction. Step by step there will be the best precedents to guide the Courts in carrying it out here.

The trial by Jury is not necessarily connected with the English Procedure on the general conduct of the suits in question. I think, however, that it would be advisable to adopt this part also of the English practice. The decision of the Jury on the delicate subjects to be investigated is more likely to be satisfactory to the people than that of Judges who are foreign to them.

I would not object to the introduction of Section 26 in the proposed Act. It is consistent with the existing law of evidence, and I see no objection to the law being thus declared as applicable to a newly created jurisdiction.

Remarks of the Honorable Mr. Justice Frere.

I concur in proposing to omit Section 26. If retained, it might seem to imply that the evidence of husband or wife for or against one another is not admissible in cases of adultery other than those there described; which, as pointed out by the Chief Justice, is not the case under the Indian evidence Act No. II of 1855.

I also concur in the opinion that the terms of Section 4 require amendment; and that the Section should more clearly set forth the points with reference to which the rules of the English Courts are to be followed. I understand it to intend rules of law as distinct from practice and procedure, but this should I think be more clearly specified.

With regard, however, to trial by Jury and the law of Procedure, I would introduce no alteration into the Draft Act. The arguments in favor of the former system would, as it seems to me, apply to many civil cases of other kinds which are not now tried by Jury in India, and I think it better that the change, if made at all, should be general. Nor do I think that the adoption of a separate and distinct law of procedure in the cases contemplated by the Draft Act would be attended with such advantages as would justify this course. If procedure should be simplified, as Mr. Strange argues, I am disposed to the opinion that this simplified procedure should be introduced uniformly into all civil trials.

Proceedings of the Madras Government, Judicial Department,
21st January 1863.

No. 107. No. 80, 21st January 1863.

Forwarded to the Home Department of the Government of India, in reference to Mr. Secretary Bayley's letter of the 8th September last, No. 4,867.

(Signed) A. J. ARBUTHNOT,
Chief Secretary.

Exd. T. McMootry.

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No 80 - 21st January 1863.

Forwarded to the Home Deptt of the Govt of India, in reference to Mr Secretary Bayley's letter of the 8th Septr last, No 4867.