

MADRAS RECORD OFFICE.

Government of Madras.

Judicial DEPARTMENT.

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Proceedings of the Madras Government, Judicial Department,
24th February 1865.

No. 238. Read the following Proceedings of Government in the Legislative Department, dated 17th January 1865, No. 15.

Communicating observations in review } (Vide Proceedings, Legislative Department, dated 17th January 1865, Nos. 15—45.)
of certain objectionable Sections of the }
"Civil Procedure Code."

No. 239. ORDER THEREON, 24th February 1865, No. 312.

To be recorded.

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

Exd. T, O'Connor,

Read the following papers:—

From P. P. HUTCHINS, Esq., Acting Registrar of the High Court of Judicature at Madras, Appellate side; to the Honorable A. J. ARBUTHNOT, Chief Secretary to Government, Legislative Department, Fort Saint George, dated 15th November 1864, No. 66.

Adverting to the Proceedings of Government, dated the 6th of July last, No. 180, Legislative Department, I am desired by the Chief Justice and Judges of the High Court to forward the enclosed observations on the new Draft Code of Civil Procedure.

2. It will be seen that the observations are in two distinct parts. Part A contains some remarks which were drawn up by the Chief Justice and Mr. Justice Bittleston some time back, at the request of the Honorable Mr. Harrington. As they have been already communicated to the proposer of the Bill through the Bengal Secretariat, it will probably not be thought necessary to forward another copy to the Legislative Council. The additional remarks contained in Part B are new and have not been communicated to Mr. Harrington.

3. Mr. Justice Phillips and Mr. Justice Frere desire me to intimate their general concurrence in the views of the Chief Justice and Mr. Justice Bittleston, but both are opposed to the suggestion made with reference to Sections 633, 634, that some modification should be made in the amount of Stamp duty leviable under Schedule B, Act X of 1862. They remark that the rates have not been found excessive in the Courts of the Interior, and the litigants in the High Court are usually richer and better able to pay.

4. The Chief Justice and Judges strongly recommend that the Sections should be distinguished by the ordinary Arabic numerals. The Roman numerals, especially when high numbers are used, are not easily understood by Natives; nor is a rapid reference so easy even in the case of an educated English reader.

5. Some observations from Mr. Justice Holloway will follow.

A.

Some observations on Mr. Harrington's Bill for consolidating and amending the laws relating to the Procedure of the Courts of Civil Judicature in British India, with special reference to Chapter XIV thereof.

Before adverting particularly to any of the Clauses of the proposed New Code, we will mention some omissions, which it seems desirable to supply.

First.—The Code contains no provision as to the mode of instituting and conducting suits by or against infants, married women, or persons of unsound mind; and, as a Code of Procedure, applicable to a Court administering English Law, it can hardly be considered complete without such provision. According to the rule of the English Courts, any person is entitled to sue as the next friend of an infant, and the next friend is subject in various ways to the control of the Court; but the rule by which any person may sue as next friend has never, we believe, been accepted in the Courts of the East India Company, and it is a rule which it would probably be dangerous to introduce simpliciter into all the Mofussil Courts. The Regulations respecting the Court of Wards and the subsequent Acts of the Indian Legislature, relating to minors and persons of unsound mind, do not appear to provide adequately for this matter—(see Section 23 of Madras Regulation V of 1804), and we think the new Code ought to deal with it. It is suggested that the English rule might be adopted with the qualification that the leave of the Court should be obtained for the institution of the suit. Since the establishment of the High Court at

Madras, all infant suits have been instituted by next friends according to the practice of the Supreme Court; but some suits have been brought by married women against their husbands without the intervention of a next friend, which was formerly required on the Equity side of the Supreme Court. It is perhaps unnecessary in the case of married women to do more than provide that in cases in which they are entitled by law to sue alone they may bring the suits in their own names; but in the case of persons *non compos mentis* it is, at all events, highly desirable that the proper provisions necessary for the conduct of their suits and the protection of their interests in litigation should be found in the Procedure Code.

Secondly.—No adequate provision is made, as it seems to us, for carrying out decrees in certain suits, such as those for the partition of family property. Suits for foreclosure of mortgages and sale of mortgaged property, or for the administration of the estates of deceased persons. The chapter relating to the execution of decrees is directed wholly to the object of enforcing by various means the surrender of property by the defendant to the plaintiff, or of rendering the property of the defendant available for the purpose of satisfying the money claim of the plaintiff. The only provision for sale in execution of a decree is strictly limited to a sale of the defendant's interest in the property specified; but it is obvious that such a sale is useless and inapplicable in cases such as those above-mentioned (in which sales of property have been always directed on the Equity side of the Supreme Court) for the purpose of satisfactorily carrying out the decrees in such suits. Clause 347* is the only clause which

* In the revised Bill Section 361.

provides for the execution of decrees for division of an estate; it is confined to the case of an estate paying Revenue to Government, and for the security of the Revenue places the division in the hands of the Collector. It is therefore manifestly inapplicable to many suits which may be instituted in the High Court, even if it can be considered a sufficient provision for all such suits in the Mofussil, where no doubt generally the object of a division is to obtain a share of the corpus of the family property. But as regards suits by mortgagees, whether in the Mofussil or the Presidency town, justice cannot be completely done in many cases without the power of directing a sale of the mortgaged property. The Supreme Court exercised the power under Act VI of 1854, Sections 27 and 34, and not being inconsistent with the Letters Patent, it has in some instances been exercised by the High Court at Madras, through the process provided by Act VIII of 1859. The new Procedure Code being intended to apply to all the Civil Courts, should deal expressly with this subject; and clauses should be introduced similar in effect to Sections 27 and 34 of Act VI of 1854. It may be observed that in suits brought upon mortgages purporting to be conditional sales, the High Court here have on appeal decided that the proper decree is for delivery of the property by a fixed day, unless on or before that day the debt is paid. But it has been considered that a sale cannot be decreed by the Courts in the Mofussil, although in many cases justice would be more completely done by so decreeing.

Thirdly.—There are some other provisions of Act VI of 1854, as well as some provisions of Act XVII of 1852 which might, we think, be usefully incorporated in the new Code, so far at least as respects the Procedure of the High Court. The old jurisdiction remaining, it seems expedient that the old and simple procedure provided by Sections 24 to 26 of Act VI of 1854, should remain also; and that creditors, legatees, or next of kin should still be able upon summons and without suit to obtain an order for the Administration of the estate of a deceased person. The Procedure Code does not seem to contemplate persons coming in as creditors to prove debts against an estate without being made parties to the suit, and there would be great difficulty and expense in making a large number of creditors parties. It seems also desirable that upon the application of Executors and Administrators without suit, accounts of debts and liabilities should be taken and other proceedings had, as provided by Sections 18 to 25 of Act XVII of 1852. Probably these provisions are still in force as not inconsistent with the Letters Patent by force of the 9th and 11th Sections of Acts XXIV and XXV, Viet., Cap. 104. Indeed we believe that the High Court of Calcutta has so held. But in framing the new Procedure Code, it would be well to take advantage of the opportunity thus afforded for considering what old enactments relating to the Procedure of the Supreme Courts should be continued in force and for modifying and adopting them to the new system introduced

by the Charters of the High Courts. It is further suggested that the provisions relating to special cases contained in the earlier Sections of Act XVII of 1852, should also be imported into the Code. To some extent Clause 202* of the proposed Code provides for the stating of questions

* In the Revised Code Section 211.

of law or fact by agreement of the parties; but the Procedure under that clause is not so convenient in many cases as the Procedure under the Special Case Act. In the first place Clause 202 requires that a suit should be instituted; and, secondly, it requires the parties to enter into an agreement specifying the definite result, which is to follow from a decision of the issue in the affirmative or negative. Questions not unfrequently arise as to the interests, which a variety of persons take under wills, marriage settlements, or other like instruments; and upon a special case stated under Act XVII of 1852 the parties readily obtain the opinion of the Court as to the proper construction of the instrument upon which their respective rights and interests depend; but in such cases very great difficulty would be found in drawing up before the decision, such an agreement as Clause 202 of the proposed Code provides for.

Fourthly.—With reference to costs of suit, there appear to be two omissions in the Code: one generally applicable to all the Courts: one having special reference to the High Court. The former is this: that if the plaintiff withdraws from the suit, there is no provision requiring

† In the Revised Code Section 143.

him to pay the defendant's costs down to the time of withdrawal. Clause 136† of the Code only authorizes the Court to impose terms as to costs when plaintiff withdraws with the permission of the Court, and at liberty to bring a fresh suit; but the plaintiff may withdraw at any time without such permission, and one or two instances have occurred in the High Court of Madras in which the plaintiff has withdrawn just before the hearing and after the defendant had incurred all the expense of preparation for trial; yet the Court held that it could make no order upon the plaintiff for payment of the defendant's costs. This injustice would be remedied by the addition to Clause 136 of words to the following effect:—"and shall pay to the defendant the costs incurred by him to the time of his receiving notice of such withdrawal." The latter omission has arisen, no doubt, from the fact that the Civil Procedure Code as originally framed, was not intended to have any application to the Supreme Courts; and certainly the provision, which seems now required, could not have properly found a place in Act VIII of 1859.

Section 392‡ of the new Code, however, simply adopts the language of Section 187 of Act VIII of 1859, generally empowering the Courts to award and apportion costs as they may deem proper; but there are in previous Acts of the

‡ In the Revised Bill, Section 306.

Indian Legislature applicable to the Supreme Courts several provisions, directing that in certain specified cases no costs should be allowed; in others that costs as between attorney and client should be allowed,—(see Act IX of 1850, Sections 100 and 101, Act XIII of 1856, Section 112), and we think that the general language of Section 292 should be modified by words which would exclude from its operation those specified cases, though without that modification the High Court of Madras has decided that Section 101 of Act IX of 1850 is still in force, notwithstanding the 37th Clause of the Letters Patent, by which Act VIII of 1859 is adopted as a Code of Procedure for the High Court—(see 1st Volume of Madras High Court, Report 115). If it is thought better that the High Court should have an absolute direction in all cases as to costs and that all prior special provisions should be rejected, that intention should be clearly expressed.

Fifthly.—As respects the jurisdiction of the Courts, alike under the Code (Section 10) and under the Letters Patent (Clause 12), (which are now properly made to agree), there are two points on which it appears to be desirable that the Code itself should give some explanation:—

First, as to the words, "if the cause of action shall have arisen;" these words of course throw upon the Courts the necessity of deciding in each case, in which the jurisdiction depends upon it, the question where the cause of action arose; and it will hardly be denied that that would often be a very perplexing question to many of the Courts, whose Procedure is to be regulated by this Code. It has been the subject of many judicial decisions in the English Courts, and since the amalgamation of the

Courts has arisen two or three times in the High Court of Madras—(see pages 200 and 202 of Madras High Court Reports), and also in the High Court of Calcutta. A reference to the cases decided upon the same words in the English County Court Act as well as to the earlier decisions of the English Courts respecting the jurisdiction of inferior Courts will suffice to show that many of the Indian Courts may reasonably require some assistance in deciding this question; and it would be in accordance with the practice of the Indian Legislature to render such assistance by introducing an explanatory clause, to the effect *ex. gra.* that in suits for money lent the cause of action should be deemed to have arisen in the place where the money was lent; in suits for goods sold and delivered; where the goods were delivered to the defendant or to his Agent; in suits on Promissory Notes and Bills of Exchange or Hoondies against the makers and acceptors, where the Note was made or the Bill of Exchange or Hoondie accepted, unless a particular place of payment be appointed, and if so at that place; and so in suits upon all contracts for the payment of money, if payable generally, where the contract was signed or made; and in suits upon other contracts either for the delivery of goods or the performance of any other act, if no particular place of performance be appointed, where the contract was signed or made; otherwise, where the contract was to be performed.

2nd.—As to the words (which were not in Act VIII of 1859, Section 5) “if the defendant shall carry on business;” these in ordinary cases would probably create no difficulty, but there are cases in which they might and are likely to do so, and to meet such cases it would be well to introduce into the Code an explanatory enactment. The suits alluded to are those against Government and its Officers, Corporations, and Companies, which may very often be said to carry on their business in many different places, but with regard to which it would be highly inconvenient to hold that they are liable to be sued in every place where any part of their business is carried on. The English Courts have held, with reference to the same words in the County Court Act, that Railway Companies must be considered as carrying on their business at the principal office of the Company only; and recently in the High Court of Madras it has been held that “Government” understanding by that word “the Government of Madras,” is liable to be sued in that Court on the ground, that it carries on its business in Fort Saint George, within the meaning of the Letters Patent—(see page 286 of Madras High Court Report). It is stated, however, that in the High Court of Calcutta a different decision has been come to on the ground that the words “carry on business” have no applicability to the Government; and if that be so, the reason for an explanatory enactment is made stronger. No inconvenience is likely to result from a declaration that the Government shall be deemed to carry on its business at the place where the Governor’s Council is held, except that in some cases it might involve the necessity of bringing officers of Government from a distance to the Presidency town. In cases depending upon evidence as to matters of fact if the Government witnesses were in the country, so generally would be the plaintiff’s witnesses, and his own convenience would induce him to bring his suit in the District Court; but in other cases depending chiefly upon some matter of law, it would probably be more convenient to the Government to have such cases decided at the seat of Government; and so in the case of suits improperly brought against the Government for some wrongful and unauthorized act of its officers, the non-responsibility of the Government, for the Act would be at least as easily and conveniently established by the Government in the Presidency town as in the District where the act was done. As respects Railway and other Companies, the English rule might be adopted, without inconvenience; at all events, some rule should be laid down with regard to these cases. Judicial decision might after the lapse of several years settle the rule; but considering how numerous and widely scattered are the Courts, and how many of them are constituted, there appears to be a very sufficient reason for some Legislative exposition of the words in question.

II. We proceed now to offer a few remarks on the particular provisions of Chapter XIV the “Special Rules relating to the High Court.”

*In the Revised Bill, Sections 629 and 630.

First.—As to Clause 614 and 615.* There seems no reason for these Clauses so far as they simply repeat the Clauses of the Letters

Patent. As far as the doubt the power of the Governor General’s Council to make the alteration. The 1st proviso of Section 614* takes away jurisdiction in certain suits, over which the High Courts by certain have jurisdiction, and the 2nd proviso would have the same effect if any other words should be inserted in that proviso, and if the sum of it. The alteration of jurisdiction in one or other or both of these points may or may not be desirable, but if it can be made by an Act of the Governor General’s Council, then the jurisdiction of the High Courts may be altered in all other respects by the same authority, and looking at the terms of the Status 24 and 25 Victoria Chapter 67, Section 22;—24 and 25 Victoria Chapter 104, Sections 9 and 11, and of the Letters Patent 10, 15, 26, 27, 29, 37, 38, it is difficult to come to the conclusion that it was the intention of the English Legislature to confer that general power. By Sections 22 of 24 and 25 Victoria Chapter 67 the Governor General’s Council is prohibited from making any law which should in any way affect the provisions of any Act passed in that Session or thereafter to be passed, affecting Her Majesty’s Indian territories or the inhabitants thereof. Then Chapter 104, a statute of the same Session provides (Section 9) that each of the High Courts, which Her Majesty is there established, shall have and exercise all the jurisdiction, which she by Her Letters Patent may grant. To take away any jurisdiction conferred by the Letters Patent, is therefore as it seems to us to violate Section 22 of Chapter 67. As to some matters certainly the Legislative power of the Governor General’s Council are expressly saved: thus the concluding paras of Sections 9 and 11 of Chapter 104 expressly reserve the power of the Council to alter the jurisdiction of the High Courts so far as that jurisdiction is by those clauses simply transferred from the abolished Courts; and so in like manner the Clauses of the Letters Patent above referred to expressly save the power of the Governor General’s Council to legislate upon the matters (principally of which those clauses refer. But *expressio unius est exclusio alterius*, and we find no authority to authorise any limitation or withdrawal by the Governor General’s Council of any jurisdiction which is conferred by the Letters Patent. The only words upon which any opinion could be rested, are those at the end of Section 9 of Chapter 104, “and without prejudice to the Legislative powers in relation to the matters aforesaid of the Governor General in Council,” but upon reading the whole Section that reservation seems to be limited to the latter half of it relating to the transferred jurisdiction and to apply to the jurisdiction conferred by the Letters Patent, though the words in relation to the matters aforesaid of the Secretary of State confirms this view. Further, the objection above mentioned, it does not appear to us that there is any sufficient reason for taking away altogether the jurisdiction of the Court of the District where the cause is brought, in suits against the representations of deceased persons. That enactment is to great inconvenience, and the interests and convenience of the defendants in such suits would be sufficiently guarded by requiring the plaintiffs to obtain the leave of the Court for their institution if brought elsewhere than in the District where the defendant resides.

The same course applies equally at the proviso to the end of Section 10 Chapter 2 and it may be added that if Clause 631 at the end of Chapter XIV is retained, there is no need for any special rule for the High Courts on this subject, unless the above-mentioned Council should be thought to render the High Courts and the other Courts of the

as the clause was originally left blank, though it has since been filled up with Rupees it is supposed that some alteration of the clause was contemplated, and the Province of the Governor

Council, we may add that since the establishment of the High Court at Madras the suits for small amounts chiefly by parties in person have increased, though the plaintiffs get no costs; and that it would be an improvement in the law if the Small Cause Court had exclusive jurisdiction to at least the extent of Rupees 300.

* Sections 631 and 632.

Secondly.—As to Clauses 616 and 617.* These clauses also affect the jurisdiction of the High Courts, but instead of limiting or withdrawing any part of the jurisdiction conferred by the Charter, they add a jurisdiction not conferred by it, leaving therefore unaltered that which the Charter has given. This perhaps may not be open to the objection noticed with reference to Clause 614. It is quite right that the

Section 629.

High Courts should have power to try suits for immoveable property situate partly within and partly without the local limits of their ordinary original Civil jurisdiction, as provided by Clause 616, without any leave obtained, as is required by Clause 18 in the case of other District Courts or Courts subordinate thereto. Such leave could, in the case of the High Court exercising Original jurisdiction, only be given by the High Court exercising Appellate jurisdiction and would involve useless expense.

But with reference to Clause 617, providing for suits for immoveable property situate partly within the jurisdiction of one High Court and partly within the jurisdiction of another High Court, we would propose that instead of the Clause as it stands, the enactment should be that the plaintiff might bring his suit in either Court by leave of the Court, and that the Court in which the suit was brought should have power to try the same, unless the defendant should object to the suit being tried by that Court, in which case only it should be necessary to obtain the concurrence of the other Court.

† Sections 646, 59.

Thirdly.—As to Clause 631 and 56.† These Clauses are noticed here because they touch upon a question of jurisdiction. Clause 56

of the Code provides for suits against several defendants, some of whom only are resident within the local limits of the Court's jurisdiction; and enacts that as against the defendant or defendants so residing the suit shall not be rejected on that ground. There is no special provision for such cases in Chapter XIV, but the effect of Clause 631 is to render Clause 56 applicable to the High Courts as well as to the Mofussil Courts; and some provision on the subject is required. Act XXIII of 1861, Section 4, met the case, by providing that the District Court, if the suit was instituted in a Court subordinate thereto, or the Sudder Court might order in what Court the suit should be heard, and that appears to us preferable to the enactment in Clause 56 of the Code; for, as we understand the latter, its effect would be to render it necessary in all such cases either to sue where the cause of action arose, or to bring separate suits in each jurisdiction in which any of the defendants dwelt. In other words it has no effect at all because without it the result under Section 10 would be the same, Act XXIII of 1861 being repealed. In the High Courts plaintiffs might be allowed to bring such suits with leave of the Court first obtained; and as regards the other Courts the same provision might be made, except that upon objection of any defendant out of the jurisdiction, the question should be referred for decision to the District Court or High Court.

‡ Sections 633, 634.

Fourthly.—As to Clauses 618 and 619.‡ These Clauses cannot of course be brought into operation so long as the suitors are required to pay fees to the officers of the High Courts, but Stamp duties may be conveniently introduced in lieu of the fees now taken. At the same time some modifications of Schedule B of Act X of 1862, seems desirable in the High Courts.

The suitors in the Presidency towns have for so many years been accustomed to the of Court fees payable in comparatively small amounts at different stages of the that the sudden introduction of a system which imposes a large *ad valorem* duty upon the institution of the suit might have an injurious effect in driving suitors away from the Courts, and might practically operate in some instances as a denial of justice. At all Courts it would we think be

desirable in the Presidency towns (perhaps elsewhere also) to reduce the duty on the plaint by at least one-half, and to levy the difference at subsequent stages of the suit. The stamp on written statements might be increased; and the parties might be required to furnish stamped paper, on which the issues of law or fact framed by the Judge should be recorded, so the stamp duty on decrees and on applications for execution might be sufficiently increased to make up for the reduction of duty upon the plaint. As to Clause 619, it is apprehended that some uncertainty may arise from the wording of it as to the cases in which the stamp of 32 Rupees should be taken. It is only to be taken when the claim is not capable of estimation under any of the rules in Article 11 of Schedule B, but those rules seem really to provide for every case by declaring (paragraph e.) that either the estimated selling price, or if the value cannot be otherwise estimated, the Plaintiff's estimates shall be taken.

Fifthly.—As to Clause 620*. It appears desirable that this Clause should be extended

* Section 635.

so as to include the manner of taking and recording evidence provided by Sections 252 to 263 inclusive, as well as of recording judgments.

In the late Supreme Court, except in cases of great importance, and appealable to the Privy Council, when the parties desired that question and answer should be taken down by the Registrar, the Judges' notes of the evidence were always accepted as a sufficient record of the evidence for all the purposes of the suit; and there is no reason why the same practice should not be adopted on the Original side of the High Court. Now all suits heard by a Division Court in the exercise of the ordinary Original Civil jurisdiction of the High Court are appealable to the High Court exercising Appellate jurisdiction, and a great waste of time would be the consequence

Section 266—274.

of a rigid adherence to the provisions of the Code (Clause 255—263). Hitherto in the High Court of Madras on the Original side the Judges' notes taken in the usual manner have, by consent of the parties, been accepted as the record of the evidence. Incidentally, and with reference only to the Courts in the Mofussil it may be remarked, with respect to Clause 259,† that it seems as important to require that a note should be made of the objection, when evidence is

† Section 270.

rejected, as when it is received notwithstanding objection.

Sixthly.—As to Clause 621.‡ As regards suits on the Original side of the High Court,

‡ Section 636.

heard by two Judges, would it not be a better provision that the opinion of the Senior Judge should prevail, in case of a difference of opinion,

as is suggested in paragraph 23 of Sir Charles Wood's letter. The effect of the Clause might be this: an original suit heard by two Judges; difference of opinion; rehearing before a third Judge; appeal from the decision as the decision of a Division Court to the High Court.

Seventhly.—As to Clause 623.§ If the interpretation of the word "Advocate" in the Chapter of Definitions includes only such Attorneys

§ Section 638.

as have the right both to appear and be heard, then the first part of this clause seems neces-

sary. But the latter part which prohibits the Attorney from pleading in the High Court seems unnecessary; at all events, if introduced it becomes equally necessary, in order to render the Code consistent with the Charter, that the Advocate of the High Court should be prohibited from "acting" in that Court; for according to the Charter the Advocate is as much precluded from "acting" as the Attorney is from "pleading."

The choice of the word "Advocate" as a general term to include all classes of practitioners in all the Courts seems unfortunate, as the same word is used in the Charter of the High Court to designate one class of practitioners only with special and limited functions; and unless some provision is introduced into Chapter XIV, expressly declaring that the several classes of practitioners in the High Court are to confine themselves to the functions respectively assigned.

to them by the Charter, it is not unlikely that some doubt and confusion will result from several of the clauses of this Code.

Clauses 29 and 36* are the only clauses of the Code, in which the word "Advocate" is coupled with the words "not being an Advocate of the High Court;" and Clause 27† is quite general, that whenever a party is required to perform any act, he may perform it by an Advocate.

* Sections 32 and 39.
† Section 30.

So Clause 23‡ provides that all appearances as well as applications shall be made by the party in person or by his recognized Agent "or by an Advocate *duly appointed to act on his behalf.*"

‡ Section 25.

Is not this language at variance with the Charter so far as it applies to *Advocates* of the High Court. Again, Clause 28§ requires the appointment of *Advocate* to be in writing and filed. Is this applicable to *Advocates* of the High Court, who can only plead?

§ Section 31.

Clause 32|| provides that the person appointed to act as *Advocate* on the part of Government in each Court shall be accounted the Agent of Government for the purpose of receiving process. In Madras, the Government are represented by the Advocate General and the Government Solicitor, and by the Government Pleader, on the Appellate side of the High Court—On which of these officers should process be served under this Clause?

|| Section 35.

(See also Clause 98).¶

Clause 571* provides that application for admission of special appeals shall be presented in the High Court by an *Advocate of that Court*. Does that mean "an Advocate" according to the Charter, or "an Advocate" according to the interpretation of the Code, including Advocates, Vakceels, and Attorneys? We suppose that at least Vakceels are intended to be included, but it is very doubtful.

* Section 586.

(See also Clauses 605 and 606.)

Sections 620, 621.
The same doubt arises upon Clause 574†. Would the certificate of a Vakceel be sufficient, or that of an Attorney? It certainly does seem desirable that if the word "Advocate" is retained in the Code in the comprehensive sense given to it by the interpretation Clause, the qualification of it as regards the High Court in Chapter XIV should apply to Advocates as well as Attorneys; and that whenever throughout the Code "Advocate of the High Court" is mentioned, it should be clearly explained whether only those who have been admitted as Advocates of the High Court under the Charter are intended, or whether Vakceels also, who can by the Charter both plead and act, are also included.

† Section 589.

¶ Eighthly.—As to Clause 625.‡ It is very proper that the Court should have this power of reference to a single Judge, but the power ought to be extended so as to authorize a reference to an Officer of the Court in the like cases. Where the Judges are few in number as in Madras, it is very necessary that the power should be so extended, and both here and in Bombay a Commissioner for the investigation of account, has been appointed as an officer of the High Court.

III. The following remarks have reference to other parts of the Code, not already noticed.

§ Clause 19 (now Section 21.)

As to Clause 19,§ it seems unnecessary to require the concurrence of both High Courts upon this point. Would it not be sufficient if leave were given by the High Court of the District where the suit is brought, at all events unless objection were made by the defendant.

• Clause 40 (now Section 43).

Clause 88 (now Section 91).

† Section 234.

(now Section 45.)

As to Clause 43 it would be a simpler and

(Now Section 46.)

Having reference to Clause 17, 18 and 19 of the Code, a slight alteration of the wording of Clause 55 seems necessary. It is suggested

Clause 55 (now Section 58.)
" 56 (now Section 59.)

that the words "no part of" should be inserted between the words "that," and "such land" in the 4th line of the clause; and the word "not" should be struck out in the 5th line.

If Clause 56 should be altered as has been suggested in the course of those remarks on Chapter 14, Clause 631, then it is further suggested that its proper place would be in Chapter 2 of the Code; and that Clause 55 should be further altered by substituting in the 9th and 10th lines the words "none of the defendants are" for the words "the defendant is not."

This clause does not provide as Clause 145 does, for a reasonable time being given to the representative of the deceased plaintiff to come in. Ought not the provision to be the same in both cases? The interests of those who represent a deceased plaintiff are not necessarily safe in the hands of a surviving plaintiff.

Clause 143 (now Section 140.)

Clause 173 (now Section 182.)

In this Clause, line 6, the word "may" is used instead of "shall" which was the word used in the corresponding Clause (121) of Act VIII of 1859. If this is intentionally done for the purpose of leaving it discretionary with the defendant to tender a written statement, the earlier part of the clause seems wholly unnecessary, being included in Clause 172; and the latter part does not properly fall under the head "of written statements."

Clauses 235, 246, (now Sections 245, 256)

There should, we think, be a separate heading for these Sections. At present they are ranged under the heading "of the examination of parties as witnesses."

Clause 246 provides for the decision of questions referred by two Judges, but does not provide for difference of opinion, on which subject see further observations with reference to subsequent Clauses of the Code.

Clauses 264—283, (now Sections 275—294.)

The heading of these clauses should be altered by adding the words "and to investigate accounts." In Clause 270 between lines 1 and 2 ought not the words "beyond the jurisdiction of the Court issuing the commission and," to be inserted: otherwise it might be urged that the High Courts would be bound to issue Commissions to the Small Cause Court except under special circumstances which is not, it is supposed, intended.

The Code requires a special application in order to enforce the attendance of a party as a witness (see Section 229), and his attendance could not be enforced if he was at a place beyond a certain distance. But Section 266 with reference to Commissions is confined in terms to the examination of *witnesses*. A doubt has been suggested as to whether this Section includes the examination of *parties*.

The proviso to this Clause prevents the transmission of any decree of a Court of Small Causes

Clauses 439 (now Section 455.)

for execution by a High Court; but it does not expressly provide how such decrees may be executed within the local limits of the jurisdiction of the High Court. As the pecuniary jurisdiction of the Mofussil Small Cause Courts does not exceed that of the Presidency Small Cause Courts, the decrees of the former may be executed by the latter, if Sections 433 and 434 are to be supposed applicable to the Small Cause Courts of Calcutta, Madras, and Bombay; but at the end of Clause 439 that intention should be distinctly expressed.

The language at the commencement of Clause 452, is not large enough to induce all the

Clauses 452 and 452, (now Sections 467 and 468.)

cases in which, under Chapter 4, application may be made for arrest or attachment of property before judgment. Would it not be better to strike out Clause 452, and alter Clause 453 by substituting in lines 1 and 2 for the words "whenever such attachment is applied for" the words "after application has been made for enforcement of such bond, &c., under Sections 446 and 447," and adding at the end "as if a suit had been instituted on such bond, &c."

The first two of these Clauses provide for difference of opinion amongst the Judges on regular appeals; the next two on applications for review of judgment, and the last two provide for cases being heard by two Judges but do not provide for any difference of opinion. We suggest certain alterations in these Clauses.

Clause 515.—When a case is re-argued upon a point of law on which two Judges have differed in opinion, it would be better to provide for its being re-argued before the same two Judges when practicable and one other Judge. Further discussion may induce one of the Judges who first heard the appeal to alter his original opinion, and the result may be an unanimous decision which is always desirable and may prevent further litigation.

As regards Clauses 582 and 246, it seems necessary to make provision for the case of difference of opinion between two Judges. In cases in the High Court heard by two Judges, one being the Chief Justice, and a difference of opinion arising, his opinion should prevail.

We think 30 days is an unnecessarily long time to allow for appealing from a decree of the High Court in the Original side; and though execution would not be delayed thereby, considerable inconvenience might be sustained by parties not being able to get back their exhibits without application to the Court to be founded on special reasons (Clauses 190 and 192), the High Courts might properly be left to regulate this by rules of their own. There seems no reason for requiring the decree to recite the opinion of a dissentient Judge. The judgment is required to state this. This provision seems (Section 55) at variance with principle on which the Clauses of the Code prescribing what the decrees are to contain, have been framed, viz., that they should as succinctly as possible, state the relief granted, without any unnecessary recitals.

Clause 563 (now Section 578.)

(True Copy.)

(Signed) P. P. HUTCHINS,
Acting Registrar, Appellate side.

B.

Further Observations on the New Code of Civil Procedure, in addition to those of the Chief Justice and Sir Adam Bittleston, forwarded to Mr. Harington through the Secretariat at Calcutta.

Section 2.

This provision is repeated in nearly the same words in Section 669.

The enactment that the procedure prescribed by the Code is to be followed in all miscellaneous cases and proceedings in any Court, "as far as it is or can be made applicable," is vague

and unsatisfactory. The objection might, we think, as regards at all events the variety of proceedings in the High Court, be removed in a great measure, by adding a Chapter or Sections, prescribing a certain course of procedure upon all applications not otherwise provided for, as by petition filed, and motion thereon, after notice to the parties interested, with provisions as to use of affidavits or written statements or oral examination of parties or witnesses. Some provisions of Act VI of 1854 might be usefully introduced.

Applications for writs of Certiorari or Habeas Corpus in the High Courts, with reference to Civil matters, might be said to come under the class of miscellaneous cases and proceedings, and it would be difficult to say how far and in what respects the procedure prescribed by the Code could be made applicable thereto. See also observations on Section 173.

Though the language of this Section is general, Section 664 excepts from its operation, and generally from the operation of the whole Code, the Small Cause Courts of the Presidency Towns, throwing it however upon the local

Sections 3 and 664.

Governments to decide whether any, and if any, what parts of the Code should be applied to the latter Courts. Their procedure is at present regulated by Act IX of 1850; and the local Governments cannot apply to them many parts of the Procedure Code without, in effect, repealing that Act; and this is the proper province of the Legislature. In many respects certainly the procedure of the Code is neither so expeditious nor so economical as that of Act IX of 1850; and in our opinion the extension to those Courts of the system of settling issues, filing written statements, &c., would be mischievous; but, at all events, we think the Legislature should decide the matter and not the local Government in each Presidency; and in passing this Code they will have the fullest opportunity of considering which of the Sections are adapted to the Presidency Small Cause Courts, when their applicability to the Mofussil Courts of the same class is under notice. Schedule A does not touch Act VI of

Section 4.

1854, Act XVII of 1852, or any of the other Acts relating to the procedure of the late Supreme Courts, all of which are expressly made applicable to the High Courts by the Statute 24 and 25 Vict., C. 104. Portions of these Acts are impliedly repealed by the absolute inconsistency between them and the Code but portions only, and the repealing clause of the New Code should specify what portions. The Code is made generally applicable to procedure in the High Court (Section 646), and its operation in this respect should be rendered as clear and distinct as possible.

The language of this Section is not large enough to include all suits which might properly be prohibited on the principle of *res judicata*.

Section 7.

A suit, for instance, brought for possession of land upon the terms of a mortgage instrument, and another suit brought for the recovery of the money due upon the same instrument, could not strictly be said to be brought upon the same cause of action, yet precisely the same matter might be in issue in both suits.

This observation, if entertained, would be met by substituting for the words "brought on a cause of action which," the words "in which the matter or matters in issue," with a corresponding alteration at the end of the Section, or by the addition of the words "or of any suit in which the matter or matters in issue shall have been heard."

Why should not this Section be applicable to Small Cause Courts? If "bodily infirmity" sufficient ground for allowing parties to

Section 27.

appear by recognized Agents in other Courts, the suitors in the Small Cause Courts (though the interests at stake may be smaller) have a reasonable claim to the same privilege; but it may be doubted whether, in any case, it should be extended to such bodily infirmity as would prevent the party from attending Court "without inconvenience." The language should be "without risk or serious inconvenience," or equivalent words.

As respects the High Courts of Calcutta, Madras, and Bombay, the Letters Patent prohibit any body from "acting" for a suitor, but a Vakeel or Attorney, or a co-suitor, consistently with the Charters no recognized Agents can be admitted in those Courts; and we think the Code should be framed accordingly.

This Section contains the words "the process requires to be served," the correctness of this language.

Payment into Court of the sum required for service of process is not necessary when the process is served by Attornies under Section 639; and an exception of such cases should be introduced into this Section.

The summons should contain a demand of the costs incurred down to the time of payment.

One of these Sections (113) provides for the case of a defendant being required to give security; and the other (117) for compensation to a defendant arrested on insufficient grounds; but no provision is made for payment of the

defendant's costs, if he should succeed in showing cause, except where the Court shall be satisfied that the application was originally made on insufficient ground; and the Court might think the plaintiff had fair grounds for making the application, though sufficient cause might be shown for not requiring security.

The same observation arises with reference to applications under Sections 119 and 127, and also Section 136, and several other Sections of the Code. The application may be rejected, and the defendant may be put to expense in resisting it; but the Court is not authorized (at least not expressly) to award costs. Whether the Code could be construed impliedly to give that authority is very doubtful, for in some places (as in Section 152) the power of awarding costs is expressly mentioned; and the Sections 306, 307 relate only to the awards of costs of suit at the time of final judgment in the suit. This is a matter of special importance for consideration as regards procedure in the High Court.

A general clause might be introduced in Clause 16 of the Code, authorizing the Court to award costs to either party at the time of disposing of any application made under any provision of the Code, or to reserve the consideration of the costs for any future stage of the proceedings if the Court should think fit.

It is to be observed, further, that Section 113 does not express what is to be done if the defendant should fail to give security when ordered, though Section 116 does say that, if he should fail to give fresh security (after the discharge of the original surety), he may be committed to gaol.

The powers of arrest and attachment before judgment are given to the Mofussil Small Cause Courts without appeal, though every other Court exercises those powers subject to appeal. We are inclined to think that it would be better to withhold those powers, as the framers of the Code have withheld the power of granting injunctions from the small Cause Courts.

Sections 114 and 124.

Sections 136—142.

If an alleged compromise be denied, how is the question to be tried? The case has occurred in the Madras High Court. The plaintiff in a suit alleged a compromise of that suit, and of a crosssuit between the same parties.

The compromise had been effected by the Attornies, and the defendant denied her Attorney's authority. This took place between the settlement of issues and the day appointed for the

hearing; and an additional issue was upon the plaintiff's application framed, raising the question whether there had been any binding compromise. But this course is attended with the inconvenience that both parties must come prepared to try all the issues raised, and it would be better to prescribe some mode of separately trying the question of compromise in the first instance.

It would however, in our opinion, be better still not to recognize any compromise in the course of a suit, unless admitted by both parties under the next Section (146). No return of Stamp duty would, we suppose, be made, if the defendant denied the compromise, and equally, we think, the judgment in the suit should not be founded upon the terms of an alleged but disputed compromise.

The Court should have the same power as is given by Section 152 of awarding to the defendant costs to be recovered from the estate of the insolvent through the Insolvent Court.

It seems desirable to add a proviso to this Section, to the effect that it should not apply to any case in which notices to produce may be served by Attornies pursuant to Section 639.

Why is this provision confined to this particular case? We do not see why written statements verified should not be received either in support of, or in opposition to, any of the applications which may be made under the

Code, as affidavits have usually been received in the Supreme Courts (see observations on Section 2). As regards applications on the Appellate Side, experience has shown the necessity for such provision.

No provision here regarding costs as there is in Section 164. If the defendant's non-appearance was in consequence of his not being served with the summons, he ought not, of course, to be required to pay any costs; but if his attendance was prevented by some other sufficient cause, it might be proper to set aside the judgment only upon the terms of his paying costs.

Section 175.

Section 176.

Sections 179 and 180.

Sections 192 and 197.

The same remark applies to this Section as to the last. These Sections should have a distinct heading "Of payment into Court." It is not expressly said in this or any other Section when the Court is to decide upon the admissibility of the documents; but in the framing of the Code as it stands, there appears some ground for the inference, that the intention was that it should be done at the time of the production of the documents, viz., the first hearing. This is well enough when the case is disposed of at the first hearing; but if at that time issues only are settled, the Judges may not be in a position then to decide, conclusively, as to the admissibility of all the documents which the parties may produce; and the final hearing is the proper time for deciding all questions as to the admissibility of evidence. Practically, in the High Court of Madras all such questions have been reserved for the final hearing, and the matter is only noticed here in consequence of an impression that the present framing of the S. S., headed "Production of Documents," raises an inference that the documents are to be received or rejected at the first hearing, whether issues are then settled or not. In Section 197, line 10, ought not the word "may" to be substituted for the word "shall."

Section 198.

In line 6, after the words "by the Court," it should be added "or by the Registrar or Clerk of the Court where there is such an Officer."

Section 210.

Would not this Section be more properly placed in Clause 4?

The parties to a suit might be allowed to state the issues between them by agreement, without entering into the written agreement mentioned in the latter part of this Section.

Sections 211 and 212.

The plaintiff would show what relief was sought; and the Court might dispose of the suit, according to the finding, upon the issues presented by the parties themselves. Section 523 provides for raising questions of fact or law without suit, and in that case the parties must previously agree upon the result to follow from the finding of the Court, or simply leave it to the Court to declare the rights of the parties, as is the practice upon special cases under Act XVII of 1852. This might be done by an additional provision to this effect, when the parties to a suit are agreed, &c., they may state the same in the form of an issue; and if the Court shall be satisfied that the same is fit to be tried, it may proceed to record and try the same, &c., as if the issue had been framed by the Court, and may upon the finding, &c., give judgment in the suit. In some cases the expense of coming before a Judge to settle issues is incurred very unnecessarily, and we think it desirable to encourage parties in such cases to frame the issues by agreement. In the High Court issues so framed might be filed with the Registrar and the case set down for hearing in its turn without any application to a Judge.

The words "Small Cause Court" are appended to this Section; but as the Sections relating to a "first hearing" are not applied to Small Cause Courts, they should be struck out.

Section 213.

The first three of these Sections are inapplicable when the summons is served by an Attorney under Section 639; and the 235th Section only authorizes proceedings to be taken

Sections 232—235.

for the attachment of the moveable property of a witness in cases in which the summons cannot be served in either of the ways "thereinbefore specified," and upon the certificate of the serving Officer. Some alteration is needed to adapt these Sections to the case of service under Section 639. Perhaps the Attorney should be required to make the return of non-service, upon the summons, either with or without verification by the person who attempted to serve, if any proceedings are to be taken against the witness.

Sections 238—242.

The first of these Sections appears to be unnecessary. It merely repeats the provision of the Evidence Act (II of 1855, Section 19.

The other Sections 239—242, differ from the enactment in Section 19 of Act II of 1855; in this respect that, whereas, under the latter, parties to suits could not be compelled to attend for the purpose of giving evidence in any but the Supreme Courts, except subject to the rules prescribed by Act XIX of 1853. Under these Sections, neither in the High Courts nor in any other Court can the attendance of parties as witnesses be compelled without the special leave of the Court. We do not see any sufficient reason why a party to a suit should not be as liable as any body else to be summoned as a witness in his own suit; and we would omit these Sections 238—242, and would also repeal the proviso to Section 19 of Act II of 1855. We do not imagine that the power of summoning an opponent as a witness is one which could be or is likely to be much used for purpose of annoyance or vexation, but in order to guard against a possible abuse of it, a clause might be introduced, authorizing the Court to compensate any party who had been unnecessarily and vexatiously summoned. To require an application to the Court in every case, involves suits in the High Court, at all events, in an expense which might well be avoided.

These Sections require a separate heading. Is "a proclamation fixed up in the Court House" sufficient notice to the parties of the day appointed for determining the question referred? Notice might be given to the parties

Sections 245—256.
Section 250.

through the Court by which the question was referred, or the statement of the question might be accompanied by a statement of the residence of the parties to whom notice might then be sent by Post.

If these Sections are retained at all, we think they should provide in the alternative that the Court may "either order such person to be brought from gaol to be examined" or "issue commission, &c." Further, why should the Court be compelled to issue the commission to one of its officers? The distance of the gaol from the Court or other circumstances might render this inconvenient. After the words "to any officer of the Court," the words "or other person" might be introduced.

Sections 284—286.

Is the earlier part of Section 285 intended to apply only to the case of an examination in a gaol? If so, why the distinction? The parties to the suit ought in every case, when practicable, to have the opportunity of attending the examination if they desire it, but in many cases it is not practicable and, at all events, if the officer in charge of the gaol, or some person appointed by him be present, the Commissioner even, though not attended by the parties, would be as likely to take the examination properly in a gaol as elsewhere.

As to Section 286. Why should there be the double proceeding of a commission to another Court, and then a commission by that Court, when the gaol is in a different district from that in which the suit is brought? Whether the gaol is in the same or a different district, we would suggest that the Court, in which the suit is brought, should be given a discretionary power to issue a commission to any Court or person whom it may think fit to appoint for the purpose of taking the examination in the gaol, unless the Court should think it right to order the prisoner to be brought up for examination in Court.

Why should not this Section be made applicable to Small Cause Courts? The Judges of those Courts may, we think, safely be trusted with the exercise of a discretion as to the cir-

Section 289.

cumstances under which evidence taken under a commission should be received as evidence in the suit, though the cause for so taking it may have ceased.

We very much doubt the expediency of authorizing Small Cause Courts to issue commissions for local investigation. In suits for small

Section 290.

amounts, the additional expense of such an investigation would, in most cases, be more than it was worth, and probably more harm than good would come of it.

This enactment may throw upon the Court an inquiry into nearly all the matters which would have been the subject of investigation upon a plea of *plene administravit* at common

Section 330.

law, or in an administration suit in a Court of Equity. But no provision is made as to the manner of conducting this inquiry. It appears to be intended that no such inquiry should take place until after the decree; and though the inquiry might involve investigation of complicated accounts, it is apprehended that after decree no reference to a Judge or a Commissioner to take the accounts could be made.

This Section is made applicable to Small Cause Courts, and under it *lands* are rendered liable to attachment and sale in execution of

Section 332.

decrees of those Courts; if so, ought not the subsequent Sections relating to the sale of lands also to be made applicable to those Courts?—See Sections 344, 345, 372, 374, 383—7, 397, 404—13, 416, 417, 421, 422.

After the word "Court House," we suggest the addition of the words, "and also in some conspicuous place on the building, land, or other immovable property," following the provision of Section 417.

Section 374

We do not see why this provision should be confined to the case of money, &c., deposited in a Court of Justice, or in the hand of an officer of Government. Such bodies as the Municipal

Section 375.

Commissioners, Banking Companies, and even private Mercantile houses frequently hold Govern-

ment Promissory Notes as securities for the fulfilment of contracts, or the faithful discharge of duties by those employed under them; and if the words "or other person" were introduced after the words "Officer of Government," all such cases would be provided for.

The power to appoint a Manager for the purpose of collecting debts is appropriate to a case where the debts are numerous and disputed,

Section 384.

but we think it would be expedient to add a

distinct provision, that in the case of undisputed debts, the Court might order the debtor or debts to pay the same to the decree holder, or so much thereof as would satisfy the decree.

As the Code is now framed, if the debtor does not choose to pay the debt into Court under Section 380, there seems to be no course open to the Court except to order a sale (see Sections 382, 418); and then when the debt is sold under Section 418, all that the purchaser gets is an order, prohibiting the debtor from paying any one else, not an order commanding the debtor to pay him. The sale of the debt places the purchaser in the position of the execution creditor, but has no positive effect towards compelling the debtor to pay the amount.

If the debtor were summoned to show cause why he should not pay the debt to the decree holder instead of to the original creditor (the defendant in the suit), the Court might be empowered upon such summons either to order payment of the amount, or to give the execution creditor leave to sue the alleged debtor. The order for payment must be made subject to appeal, in the case of a disputed debt.

These Sections do not, I think, provide with sufficient clearness for the case of claims to attached property, where the execution debtor is entitled to some share or partial interest only

Sections 390 and 391.

in the property attached, as when the execution debtor is mortgager or mortgagee of the property, or the member of an undivided Hindoo family, or a partner. It is presumed that the intention, is that the property should not be released from attachment if the execution debtor is entitled to any interest in the property attached, which may be made available for satisfaction of the judgment debt, and this intention would be more clearly expressed if the words "either wholly or in part," or words to the like effect were introduced, so that Section 390 would read thus—"If it shall appear, &c., that the property was not in the possession of the party against whom execution is sought, or of some other person in trust for him *either wholly or in part*, or in the occupancy of a tenant, &c., or that &c., it was so in his possession not at all on his own account or as his own property, but *wholly* on account of, or in trust for, some other person, the Court shall, &c." A corresponding alteration would be necessary in Section 391. Further, the investigation may not, in some cases, take place till after the sale (see Section 393); and in those cases, if the claim was established, the order ought to be for setting aside the sale as well as releasing the property from attachment.

In the Presidency Towns advertisement in the newspapers is the most effectual mode of publication, and the enactment should, I think, direct that mode when practicable. The

Sections 399 and 400.

notification affixed in the Court House would probably be seen by few persons, and the time of sale should be 15 or 30 days from the date of advertisement, or the date of public proclamation on the spot, rather than the date of fixing in the Court House.

Why should not the order, confirming the sale under Section 409, have this effect given to it? The certificate, *plus* the order, seems unnecessary. If the certificate is retained, must

Sections 412 and 413.

it be stamped? and much the amount of the purchase money be inserted, pursuant to Section 51 of Act X of 1862? Under the existing Code, it has not been required in the High Court that the certificate should be stamped or contain the amount of purchase money; but the attention of the Legislature ought to be directed, with reference to this enactment of the Code, to the note appended to the general exemption in Schedule A of the Stamp Act (X of 1862), of "any deed, instrument, or writing, &c., made by any Government Board, Court, &c." from which note

it appears that the purchaser at a sale, in satisfaction of a decree, is to "receive from the officer conducting the sale a deed of sale executed on the proper stamp." If the purchaser gets a stamped deed of sale from the officer conducting the sale, of what use is the certificate under Sections 412, 413? Since the amalgamation, the Sheriff of Madras has not been in the habit of executing bills of sale to purchasers; but several certificates have been issued by the High Court under Section 259 of the present Code (8 of 1859). The late Sudr Court of Madras ruled that those certificates should be stamped, from which it would appear that it has not been the practice in the Mofussil to give to the purchaser a stamped deed. In the new Code the matter should be cleared up.

Section 418.

See the observations on Section 384.

Section 420.

It is doubtful whether, under this Section, the surplus is to be distributed amongst those only who have taken out execution *in the same*

Section 424.

Court, or generally amongst all who may have

taken out execution *in any Court*. If the latter, is the distribution of the surplus to be delayed until advertisements have been published, calling upon execution creditors to make their claims? Is there any sufficient reason why the first attaching creditor should be satisfied in full, and the second only take his share with the third and fourth?

Further, is the distribution to take place only amongst the creditors who have attached the particular property which has been sold, or generally amongst all creditors who have attached and specific property, or who have obtained an order for a general attachment of the defendant's moveable property? The words, "who may have taken out execution of decrees," would include the latter.

We doubt very much the propriety of extending this clause to the Small Cause Courts. It would give to those Courts power to set aside a

Section 425.

decree in a previous suit, on the ground of fraud, at the instance of a third party and without any

power of appeal. Indeed, even with a power of appeal, which is given by Section 426 in all Courts, except the Small Cause Courts, it may be doubted whether, if a decree has not been impeached by any of the parties to the suit in which it was pronounced, it should be open to the decree holder in another suit to impeach it otherwise than by a regular suit for the purpose. No period of time is fixed by this Section, within which the application of the decree holder is to be made.

There does not appear to be any sufficient reason *why* an order under Section 424, for a distribution of surplus proceeds according to that Section, should be made subject to appeal.

Section 426.

The language of this Section limits its operation to the case in which the decree of any Court in British India, or established by the authority of the Governor General in the terri-

Section 449.

tries of any Foreign Prince, is to be executed within the jurisdiction of "any other such Court;" but there are places in India where there is no other *such* Court; and the Code makes no provision for the execution of decrees in such places.

Secunderabad may be referred to as a place where there is no *such* Court, though it is in contemplation to establish a Civil Court there; but there is a large Military Cantonment under British authority at Secunderabad, and warrants might be sent there by a special bailiff or otherwise for execution in the manner provided by Section 448. In Act VIII of 1859 that Section (448) followed the Sections relating to execution of decrees beyond the local limits of the jurisdiction of the Court by which they were passed; but in the present Code it precedes them, and there seems no doubt that, as it stands, it is confined to the execution of process in Military Cantonments within the jurisdiction of the Court pronouncing the decree, but provision might conveniently be made for the transmission and execution of process in Military Cantonments where there was no Civil Court.

Section 460. The reference in this Section to Section 441 seems to be a mistake for Section 457.

Section 476. It is suggested that the words "or delivery" should be added after the word "sale."

This Section requires the Court to refuse the application if (amongst other things) the allegations of the petitioner do not constitute "a

Section 485. ground of action." In Act VIII of 1859 the words of the corresponding Section were a "reasonable ground of action;" and if the omission of the word "reasonable" is intended to deprive the Judge of all discretion as to the reasonableness of the petitioner's claim and probability of its success, it can hardly be regarded as an improvement. We think it advisable that the language of the Section ought to be such as to leave it open to the Judge to consider not simply whether all the allegations of the petitioner, if fully believed, constitute a legal cause of action, but whether, with reference to all the circumstances which may be elicited by examination of the petitioner, there is reasonable ground for believing that the claim is well founded.

We would suggest an extension of this clause so as to include all matters in dispute. The words, "or any other matters in difference between them," might be introduced.

Section 495.

A similar alteration would be required in this Section. It would be better to leave it optional

Section 499.

with the Court either to fix the time for the delivery of the award, absolutely leaving any further enlargement of the time to the Court, under Section 505, or to name a time in the order, but to give the arbitrators themselves power to enlarge the time as might be necessary. The Court would be able to judge when the arbitrators could be trusted with that power, and whenever it could be safely given; the expense and trouble of applying to the Court would be avoided.

By whom is the award to be submitted to the Court? By the arbitrators themselves, or are the parties to procure it from them and submit it to the Court? Are the arbitrators to

Section 507.

give up the award without payment of their charges? Section 510 authorizes the Court to make orders respecting the costs of the arbitration, but does not meet these questions, which should be provided for.

It does not appear clear that the party seeking to set aside an award would have immediate

Section 518.

notice of its submission to the Court. It is suggested that the words of this Section should be "within ten days after notice to the party making the application that the award has been submitted to the Court."

Section 598.

Notice of the day fixed for hearing the reference ought to be given to the parties in the same way as provided by Section 555.

Is it intended that this should apply to the High Court in the exercise of its ordinary original jurisdiction? A single Judge or Division

Section 610.

Court of the High Courts might be trusted to pass these orders without appeal.

There is some clerical error or misprinting in this Section. The words between the first word "if," and the word "decree" in the third

Section 623.

line apparently should be struck out.

Section 669.

As to this Section, see remarks on Section 2.

(True Copy.)

(Signed) P. P. HUTCHINS,
Acting Registrar, Appellate Side.

From J. W. CHERRY, Esq., Civil Judge of Salem; to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Madras, dated Salem, 20th July 1864, No. 9.

Adverting to the Proceedings of the Madras Government under date the 6th instant, forwarding a "Bill for consolidating and amending the laws relating to the Procedure of the Courts of Civil Judicature in British India" for any remarks or suggestions I may have to offer on the provisions of the Bill in question, I have the honor to inform you that on a careful perusal of the said Code I consider that its early introduction is highly desirable, inasmuch as it supplies many deficiencies in the existing Code.

2. I beg to add that I have no remarks or suggestions to offer in reference to the said Bill.

From C. R. PELLY, Esq., Acting Civil Judge of Madura: to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Madras, dated Madura, 29th July 1864, No. 206.

I have the honor to acknowledge receipt of the Proceedings of the Madras Government, Legislative Department, 6th July 1864, together with copy of a Bill for consolidating and amending the laws relative to the Procedure of the Courts of Civil Judicature for such remarks or suggestions as I may have to offer on the provisions of the Bill.

2. The present Code of Civil Procedure has worked admirably, and simple as it is, any thing that will tend still further to simplify Procedure cannot but prove advantageous especially in the case of the Subordinate Courts.

3. The following are the observations which have suggested themselves on perusal of the Bill.

4. Section 16.—The addition of the words "and is covered by the stamp on "which the plaint is written where a stamp is required" would appear hardly necessary, I presume no Court would, in the case of joinder of causes of action, hesitate about requiring that the stamp should be sufficient to cover the entire claim.

5. The addition to Section 66.—"The plaintiff may, if he think proper, deliver "the original document to be filed instead of a copy," will prove useful, and many parties will avail themselves of this provision. I would, however, suggest that a similar addition be made to the following Section 67, the Court marking the entry.

6. Section 116 provides for defendant being committed to Jail in the event of his not furnishing *fresh* security. I do not, however, observe provision for what is to be done in the case of a defendant not furnishing any security as set forth in Section 78, Act VIII of 1859.

7. Deposit in lieu of bail which was provided for by Section 77, Act VIII of 1859, has apparently been wholly omitted; this I think is to be regretted.

8. Sections 159, 160.—It is almost incredible the reluctance of parties to deposit the cost of process in due time, however small the amount, presentation with the plaint of a sum adequate to meet the cost of issuing summons to defendants ought, I think, to be rendered compulsory.

9. *Section 221.*—I would also make it compulsory on the party applying for a summons to present with his application the sum requisite for the expenses of the witnesses or other persons to be summoned, and failure to do this, should of itself and without any order of the Court nullify the application, this might be effected by a slight addition to the wording of the above Section.

10. *Sections 243 and 244.*—Provide for the Court of its own accord at any time summoning any party to the suit, or any person other than a party to attend as a witness, but makes no provision for the costs of the process, or expenses of the witnesses if not deposited by either party, this was met by Section 9, Act XXIII of 1861, which authorizes this being paid by the Collector, and I would suggest that a Section to this effect be inserted after Section 244.

11. *Sections 298 and 299.*—It does not appear how the attendance of the Assessors is to be procured; it will, it appears to me, be necessary to invest the Court with power to enforce this as well as to lay down some rules as to what persons are liable to be called on to discharge the duties of Assessors.

12. *Sections 308 and 309.*—As regards the decrees I would suggest that a printed tabular form be used, the following would contain all that is required by the Act, and their introduction would save labor, secure uniformity and facilitate reference.

ORIGINAL SUIT, No. of 186 .
In the Civil Court of
Present.

Plaintiff.		Defendant.		Particulars of the claim.	Relief granted or other determination of the suit.	Costs.	
Name.	Description.	Name.	Description.			By Plaintiff.	By Defendant.

Judge.

APPEAL SUIT No. of 186 .
In the Civil Court of
Present.

Appellant.		Respondent.		Memorandum of Appeal.	Relief granted or other determination of the Suit.	Costs.	
Name.	Description.	Name.	Description.			By Appellant.	By Respondent.

Judge.

13. There can be little doubt that the material addition to the Bill, viz., the provision for the examination of witnesses confined in Jail under Criminal process, for enabling the Court to obtain the testimony of skilled persons on any question relating to the law of the religion of the parties, and for regulating procedure in enforcing, without a suit, bonds, &c., registered under Act XVI of 1864, will be of general advantage, especially that which refers to suits brought to enforce the performance of any one or more acts under a contract without waiting for the time when the whole of the acts required to be performed under the contract ought to have been performed, many suits will at first be instituted under this provision, and when it becomes generally known, fraudulent breaches of contract will, I am of opinion, become, comparatively speaking, of rare occurrence.

14. Translation of the Bill not having as yet been received I have deemed it better to despatch this letter without waiting for the opinion of the Subordinate Native Judges, these will be forwarded in due course.

From M. CROSS, Esq., Judge of the Court of Small Causes, Negapatam; to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Madras, dated Negapatam, 2nd August 1864, No. 139.

I have had the honor to receive the Proceedings of Government, No. 180, 6th July 1864, Legislative Department, with Bill for consolidating and amending the Laws relating to the Procedure of the Courts of Civil Judicature in British India, and in obedience to the Orders of Government, I beg to submit the only suggestion which occurs to me, in the application of the amended Code to Small Cause Courts.

2. Under the following headings:
- 1. Of arrest before judgment.
 - 2. Of attachment before judgment.
 - 3. Of exparte orders to perform a contract or part of a contract.
 - 4. Of injunctions.

provision has been made for compensation to defendants in cases where proceedings are shown to have been taken on insufficient grounds.

3. This very wholesome provision, I am of opinion, should extend to *all* suits instituted in Small Cause Courts, the power to award compensation being discretionary with the Court, in cases where the

• Section 42 of Act IX of 1850.

plaintiff* "shall not make proof of the demand to the satisfaction of the Court,"

and where the Court is further satisfied that the suit was a vexatious or false one.

4. The Judges of the Presidency Small Cause Courts possess this power under the Section marginally quoted above, and it is found to work very beneficially.

From L. C. INNES, Esq., Civil Judge of Ootacamund; to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Madras, dated Ootacamund, 13th August 1864, No. 154.

In conformity with the Order of the Madras Government in their Proceedings of the 6th ultimo, I have the honor to forward the following remarks on the Bill "for consolidating and amending the laws relating to the Procedure of the Courts of Civil Judicature in British India."

2. I would add to Section 289 the words "in any case in which the Court may so act, it shall record its reasons

Section 289. The Court may at its discretion, dispense with the proof of any of the circumstances mentioned in the last preceding Section, or may authorize the evidence of any witness being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence has ceased at the time of reading the same.

Section 288. Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same may be offered, unless it be proved that the witness who gave the evidence is beyond the jurisdiction of the Court or dead or unable from sickness or infirmity to attend to be personally examined, or is exempted by reason of rank or sex, or by the provisions of Section 275 from personal appearance in Court, or unless the evidence is only a question relating to the law of the religion of the parties or any of them (Small Cause Courts.)

"in writing." Otherwise I apprehend too great laxity would creep in, in receiving in evidence depositions taken under a commission; and Section 288 which lays down certain conditions under which alone (except with the sanction of the Court as provided in Section 289) such depositions can be read in evidence, would become a nullity.

3. I think that Section 303 should be altered to express that a translation of the judgment shall be given when required by either party, except where the judgment is final, in which case the Court shall not be bound to furnish a translation except at the demand of the party against whom the judgment was given.

Section 303. Whenever the judgment is written in any other language than that which is in ordinary use in proceedings before the Court, the judgment shall be translated into the language in ordinary use in such proceedings, and the translation shall be signed by the Judge (Small Cause Courts.)

4. Translations of judgments written in any other than the language of the parties are seldom required by them for any other purposes than that of appeal; good translators are very rarely attached to the Courts, it being next to impossible to obtain them, as most men who are sufficiently well educated to be good or rather tolerable translators look for and soon attain to higher positions in the service; the translations of any but the most simply expressed judgments are never without some errors, which render the grounds on which the judgment is given unintelligible, and if every judgment is translated a great portion of the time of the Judge ought to be taken up in carefully going through and correcting these translations; time which might be far more profitably employed.

5. On the other hand if the Court is only bound to give translations when actually required by either party in appealable cases, and at the demand of the cast party alone in unappealable, the Judge might without difficulty give his attention to the comparatively few translations that would then be made and might ensure their accuracy.

6. The parties would always be able to ascertain from the decree the nature of the award although they might occasionally be unaware of the exact grounds on which it was passed. It is the factum of the decree, however, which, in the majority of the cases, the parties are concerned about, the grounds being to them but a very secondary consideration.

7. Section 334 provides that no adjustment of a decree in whole or in part shall be recognized by the Court

Section 334. No adjustment of a decree in part or in whole shall be recognized by the Court unless such adjustment be made through the Court, or be certified to the Court by the person in whose favor the decree was made or to whom it may have been transferred. (Small Cause Courts.)

unless it be made through the Court, or be certified to the Court by the original decree holder or transferee. Thus leaving no room for disputes of parties as to amounts which may or may not have been paid.

ing no room for disputes of parties as to amounts which may or may not have been paid.

8. Section 445 on the other hand, which is the old Section 283 as amended by Act XXIII of 1861, seems to contemplate cases in which disputes may arise regarding "sums alleged to have been paid in discharge or satisfaction of the decree," and authorizes the Court to investigate them. The only investigation which under Section 334 the Court could make would be to turn to its records and see what sums had been paid in, and as the wording of the Section is calculated to mislead the Courts into supposing that

Section 445. Questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject matter of a suit between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the

suit in which the decree was passed and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by a separate suit. (Small Cause Courts.)

some further investigation is authorized by it, and is, I happen to know, a source of doubt and difficulty to some of the Judges of this Presidency, I think it should be now clearly expressed.

9. I think it would be far better to allow the application authorized by Section 428 (old Section 273) to be made by persons arrested in execution of a decree, to be made in the first instance verbally, and to give authority to the Court, on such application being made, to take applicant's evidence in writing as to the particulars required by Section 428 to be embodied in the application.

Section 428. The applications shall contain a full account of all property of whatever description belonging to the applicant, whether in expectancy or in possession, and whether held exclusively by himself or jointly with any other person or by any other person in trust for him (except the necessary wearing apparel of himself and his family and the necessary implements of his trade), and of the place where such property is to be found, or shall state that, with the exceptions abovementioned, the applicant is not possessed of any property and the application shall be subscribed and verified by the applicant in the manner hereinbefore prescribed for subscribing and verifying plaints. (Small Cause Courts.)

10. Illiterate and pauper debtors are not, when arrested, in a position to have the application required by this Section drawn out for them and ready to present to the Court as soon as they are brought before it, and the Court is not authorized to suggest this course to them.

11. It is, therefore, very seldom made, as now required, in writing, and defendants are frequently committed to Jail in cases where, if the course I suggest were adopted, there would be no necessity for any commitment.

12. Similarly I would alter Section 439 (old Section 280) as follows:—"On his making the application required by the preceding Section (438) the Court shall send for him and examine him as a witness and shall require from him a full account of all property &c."

This I think is a more reasonable course than expecting that a defendant in prison should be able to comply with the forms required by Section 439.

13. It has lately been ruled by the High Court, page 441 of the reports 1862-63, that the discretionary power of a Judge to detain a defendant in custody otherwise than by committing him to prison in execution of a decree is confined to the case provided for in Section 8 of Act XXIII of 1861, corresponding with Sections 429 and 430 of the present Bill.

14. The case provided for in Section 8, Act XXIII of 1861 is that of a defendant who, on being brought before the Court, may make formal application for his

release accompanied with schedule of property. In most cases, however, the object of the decree-holder is not to imprison the defendant, but to induce him under terror of the arrest to come to some definite arrangement with him. The hour at which the defendant may be brought before the Court under arrest cannot always be arranged so as to secure time for the attainment of this most desirable object, and it occasionally happens that, from the decree-holder or his advocate being unaware of the day or hour at which the defendant will appear, he is not present to arrange with him, or does not arrive until too late to admit of an arrangement being made, before the rising of the Court. Very few defendants are aware of the provisions of the law as to making a verified application accompanied by a schedule of property, and even when aware are seldom in a position to have such an application drawn out for them; and the Court would be deviating from its proper functions were it to suggest to them this means of avoiding or staving off imprisonment.

15. Under the ruling adverted to, if the defendant does not so move the Court, it has no alternative but to commit him to prison. In nine cases out of ten the commitment to prison would entirely defeat the decree-holder's object. The indignity once suffered, resentment takes the place of any desire there may have previously been to come to a satisfactory arrangement.

16. The practice of the Courts has always been to permit the defendant to be in custody of the Nazir, himself paying the fees, until the decree-holder or his advocate, after conferring with the defendant, has stated distinctly to the Court that he wishes him to be imprisoned.

17. The practice has been attended with good results, and the mode of detaining the defendant in custody having the assent of both parties, and the custody being of a less rigorous kind than that of the Jail, the practice cannot in itself be objectionable, and might, I think, advantageously have the sanction of law.

18. I would, therefore, alter Section 430 of the present Bill as follows:—"Pending any enquiry which the Court may consider it desirable to make into the allegations of either party, or *pending any arrangement which the decree-holder or his advocate may inform the Court that he is desirous of coming to with defendant, or otherwise pending information by the decree holder or his advocate before the Court that the decree-holder wishes defendant to be imprisoned*, the Court may leave the defendant in custody of the Officer of the Court to whom the service of the warrant was entrusted, on the defendant or the decree-holder (if he is willing to do so) depositing the fees of such Officer, &c., &c."

19. The additional words I would introduce, are those which I have underlined.

The above are the only alterations which appear to me to be required. In all other respects I think the Code, in its proposed form, is very superior to what it was.

20. Section 27 embodies an admirable provision which was very much required,

21. Sections 131 to 135 "treating of exparte orders to perform a contract or a part of a contract" introduce, in connection with Section 23, provisions which cannot fail to be attended with the most beneficial results.

From J. D. GOLDINGHAM, Esq., Judge of the Court of Small Causes of Madura; to J. D. MAYNE, Esq., Secretary to Government, Legislative Department, dated Madura, 3rd September 1864, No. 59.

I have the honor to acknowledge the receipt of the Order of Government, No. 180, 6th July 1864, together with a copy of the Bill for consolidating and amending the laws relating to the procedure of the Courts of Civil Judicature, and to inform you that, in my opinion, the Bill is so comprehensive and displays so much careful study that any suggestion I might offer would appear almost presumptuous. In accordance, however, with the order of His Excellency I beg to append the following remarks which suggested themselves to me on considering the Bill in connection with the Acts now in force of the same nature.

Chapter II, Section XXIII and Sections CXXXI to V, Chapter IV. Under the existing law Courts of Small Causes have no power to entertain Suits for specific performance, this species of redress is not in much request in this District, but I think that if it is sought for, the Small Cause Courts can very beneficially be empowered to grant the relief.

Chapter III, Section XXVII. This Section will be of very great convenience to females and to those of rank especially, but I would also extend its provisions to the Courts of Small Causes. Indeed it is

The Court may allow any female to appear by a recognized Agent

more wanted there than elsewhere. Female Zemindars frequently resort to the Small Cause Courts for the collection of their rents; but as they know nothing personally of the facts, and as it is troublesome for them to sign Vakaluts in every instance, the law should permit them to appear by recognized Agent. Section XL, it is true, exempts them from personal appearance in Court, but it does not permit them to appear by recognized Agents.

Section XLVIII. Under Section 77 of the present Code the Court has only power to receive a deposit from a *defendant* when offered in lieu of bail. The provisions of this Section go further and permit this to be done in all cases where bail is demanded. This is, I think, a salutary measure as securities are often difficult to realize.

When security is required, a deposit may be made instead.

Chapter IV, Section LIX. The provisions of this Section differ from those contained in Section 4, Act XXIII of 1861, (Amendment Act) which it seems intended to re-place. The wording of the present

Suit against several defendants, all of whom do not reside within the jurisdiction of the Court.

Section is, under the circumstances, set forth. "The suit shall not be rejected as "against the defendant or defendants so residing," the inference then is, that the suit must be rejected against the other defendants if the cause of action shall have arisen beyond the jurisdiction of the Court, but not otherwise.* I would suggest that the words of the Amendment

* Vide Section X.

Act be retained which says "the suit shall not be rejected by reason of all the defendants not residing within the jurisdiction of the Court, but the District Court "or the Sudder Court, as the case may be, may order that the suit be heard in any "Court subordinate to such Court." The following is an instance of a case in point,

and of not unfrequent occurrence—A, B, and C, go over to Ceylon to work in the coffee plantations, A lends B and C 100 Rupees on their joint bond, A and B return to the Madura District while C takes up his residence in Tinnevely. Under the present law A can, by permission of the High Court, sue both B and C, but if this Section is enacted as it stands the suit will have to be rejected as against C, and B made solely liable to the claim.

Section CXCHII. The penalty being only double the amount of the deficient Stamp duty, is very low compared to the scale laid down in Act X of 1862.

How Court may receive in evidence unstamped or insufficiently stamped deeds.

Sections CLXXIX and CLXXX. The provisions contained in these Sections appear to be equally applicable to suits in the Small Cause Courts, I would suggest, therefore, that the words "Small Cause Courts" be added to these Sections.

Section CCXXVIII. It is stated that the summons shall be in the forms contained in Schedule D, or to the like effect. I would suggest that the summons should contain the following caution after the words "and you are not to depart without leave of the Court,"—"and take notice that, in case you neglect to attend without cause, you will be liable to be apprehended and dealt with according to law and that you will be further liable to the (plaintiff)—at whose request this summons is issued, for all damages which he may sustain in consequence of your neglect to obey the same."

Section CCXXXV. Under Section 159 of the present Code the attachment may be made upon the *immoveable* property as well as the moveable, I would suggest that the same provisions should be re-enacted here for Courts other than Small Cause Courts, as moveable property is frequently not forthcoming to satisfy the attachment.

Procedure when summons cannot be served in any of the ways before specified.
Attachment to be made upon the moveable property.

Sections CCLIV and CCLV. It is not distinctly stated that the District Court is bound by an opinion thus expressed, but its from being stated that the High Court is not so bound, I infer that the District Court is bound, I would suggest an additional section rendering the opinion of the District Court not binding in the event of the case coming before it in appeal. A Judge may subsequently, with the whole record before him, have better information, or the Judge who decides the appeal may be another individual and, perhaps, he may differ from the opinion of his predecessor. Without this provision, the parties might be driven unnecessarily to a special appeal.

Provisions respecting appeal cases referred under Section CCLV.
High Court not to be bound by opinion given on reference.

Chapter V, Sections CCCXXVII—XXXI. Under these sections, as under the law now in force, provision is made for the release of judgment debtors on their satisfying the Court that they have

Of arrest in execution of decrees for money.

no present means of paying the debt, and that they are not possessed of any property to satisfy it. Under Section CCCXXX, the Court may keep a defendant in custody *pending any inquiry* the Court may make into the allegation of either party, but not under any other circumstances. It frequently happens, however, that a defendant on being brought before the Court says, "I have no present means of paying the debt, but if the Court gives me time say, 15 days or 3 weeks or a month as the case may be, I will try and find the money." The judgment creditor objects to his unconditional release fearing his debtor will abscond, but says, "if defendant is left

in custody of a batta peon (Officers of the Court who serve the warrants) I will give him the time required," to this the debtor agrees and he, accordingly, proceeds to his village attended by a batta peon, and returns, at the appointed time, with the money. Although this is not actually provided for in the Code, nevertheless, it is done by mutual consent of the parties, and I have found the practice to work well in the Madura Small Cause Court, in facilitating the collection of debts which would not have been so speedily collected if judgment creditors were immediately incarcerated or unconditionally released. As, however, I lately

Volume I, Part 3 pages 441 and 442.

saw in Stokes' Reports of the High Court, that a defendant cannot be kept in cus-

tody except under the circumstances indicated in Section 8, Act 23 of 1861, which answers to Section CCCCXXX of the proposed Bill, I would suggest that an additional Section be added sanctioning this proceeding.

Section CCCCLXIII.—Instead of the words "on which the *whole* amount secured thereby became payable," I would suggest that the following words be substituted, on which the whole or any portion of the

amount (where the amount is payable by instalment) secured thereby became payable" to enable bond holders to recover under this Section any such instalment as it fell due. A case, moreover, might arise in which a bond holder, by waiting till the whole amount of the bond became due, would lose his right to recover some former instalment by the operation of the law of limitation. This would occur where the amount of a bond was payable say in 10 yearly instalments, and where there was no proviso that in default of payment of any one instalment the whole amount should be payable. The bond holder, by waiting till the 10th instalment fell due, would lose his right to recover the first four instalments. In such cases he would be obliged to have recourse to a regular suit before any failure was barred by law, that is within six years from the failure of payment of the 1st instalment.

Chapter VII, Sections CCCCXCV and VI.—It frequently happens that the suggestion, that certain matters of difference should be referred to arbitration, comes from the Court, and the proposal is

Reference to arbitration.

eagerly embraced by the litigants. In such cases a deposition is usually taken from the parties, but not upon stamped paper. I would suggest, therefore, that the following addition be made to the 496 Section, "but in cases where the suggestion comes from the Court at the time of hearing, depositions may be taken from the parties or their respective vakils upon plain paper."

Chapter XIII.—I think the provisions of this Chapter are a great improvement on those of the Code which it is intended to supersede. Under the present Procedure, an aggrieved party may, at any

Review of Judgment.

time, apply for a review, provided his petition bears the stamp prescribed for plaints where 90 days have elapsed since date of decree, and I think it is very desirable that this privilege should be restricted within reasonable bounds. Moreover, the heavy stamp duty leviable on such petition will tend to prevent applications being made upon insufficient grounds, while the permission given to the Court in the last Section to refund either the whole or any portion of the stamp duty will have the effect of

protecting the Government revenue, and, at the same time, prevent suitors from suffering from exorbitant charges in the course of their litigation.

Chapter XV—An offence very often committed against the Courts is that of a witness, on whom summons has been served, failing either to attend the Court at all or to appear at the proper time according to his summons.

Of Criminal Procedure for offences committed in or against the Courts.

This offence is at present punishable under Section 174 of the Indian Penal Code on committal to the Magistrate, but the Courts themselves have no summary jurisdiction in the matter beyond apprehending the party, &c., under Section 258. The want of the power of punishing such offenders is very much felt, and I believe the subject has once been before this Government in connection with the Small Cause Courts where the greatest inconvenience ensues from the unpunctual attendance of witnesses, but the High Court did not deem it advisable to confer on these Courts a power which was not enjoyed by the other Courts and so the matter was dropped. I would, therefore, earnestly suggest that this power should be given to all Courts which could be done by making the provisions of Sections DCLII to V also applicable to the offence such as is described in Section 174 of the Indian Penal Code.

From F. M. KINDERSLEY, Esq., Acting Judge of the Small Cause Court of Tanjore; to the Assistant Secretary to Government, Legislative Department, Madras, dated Combaconum, 22nd September 1864, No. 214.

I have the honor to reply to the Order of Government of the 6th July 1864, No. 180, forwarding copy of the Bill "for consolidating and amending the Laws relating to the Procedure of the Courts of Civil Judicature in British India," for any remarks or suggestions which I might have to offer.

2. The Bill under consideration being for the most part an embodiment of former Acts, my remarks on it will not be numerous.

3. The first remark I have to offer is on Section 59, providing for the trial of a suit against several defendants all of whom do not reside within the jurisdiction of the Court. It lays down that if one or more defendants shall reside within the local limits of the jurisdiction of the Court, the suit shall not be rejected "as against the defendant or defendants so residing." It seems to me that these words "as against, &c." would be construed that, as against the defendants not residing within the local limits, the suit shall be rejected. It would then be necessary for the plaintiff to institute several suits according to the number of jurisdictions in which all the defendants are residing. This would be a very hard provision and, I cannot suppose, was intended to have that effect.

4. I would suggest the addition to this Section of the following: "But the District Court, if the suit is pending in any Court subordinate to such District Court, or the High Court may order that the suit be heard in any Court subordinate to such High or District Court and competent, in respect to the value of the suit, to try the same."

5. The next Section I would refer to, is Section 113, providing that in cases of arrest before judgment the defendant may be called upon to give security. From the wording of this Section it would seem that the only security to be given is by

surety. I would suggest the insertion of a Section to the following effect—"Should a defendant offer, in lieu of bail for his appearance, to deposit a sum of money or other valuable property sufficient to answer the claim against him with the costs of the suit, the Court shall accept such deposit."

6. In Section 150 after the words "shall be made," I would insert "within reasonable time" as in Section 152, or else fix a limited period say three months.

7. Section 275 provides that no person shall be bound to attend in person to give evidence if he is resident more than 50 miles from the place at which the Court is held, unless the Court specially order his attendance. I would suggest that the same provision be inserted here, as in Section 73, viz., "unless he be resident within the local limits of the jurisdiction of the Court." As the Section stands at present, many individuals residing in the Zillah, would never have to attend unless specially ordered; for, in many Zillahs, the Principal Court is more than 50 miles distant from some places within its jurisdiction.

8. I would protest against the indulgence shown to co-sharers in Section 405 of the Code. The provisions of the Section seem to me calculated to deter parties bidding at the sale of any undivided share of an estate. It would not be worth their while to go to the trouble and expense of attending at the auction, to have the lot, when knocked down to them, snatched away by a co-sharer. When land is actually put up to auction, I am of opinion that no distinction should be made or preference shown among the parties bidding; to do so destroys the whole advantage to be derived from a sale by public auction.

9. Under Section 411, it is provided that when a sale of immoveable property is set aside, the purchaser shall be entitled to receive back his purchase money with or without interest. If interest be awarded, from whom is it to be collected? Under Section 408, a sale is to be set aside only on the ground of irregularity in publishing or conducting it. It is quite clear that any irregularity of this kind must be on the part of the Court, not on that of either the applicant, plaintiff or defendant in the case. It would, therefore, be unjust to make either of them pay the interest on the purchase money: and, if they do not, who is to pay the interest if awarded?

10. I would take this opportunity of urging the necessity of Civil Courts, especially Small Cause Courts, being invested with power to fine witnesses not attending in obedience to Summons. To have to produce the witness before the Magistrate to procure his punishment under the Penal Code, is, in many cases, equivalent to the witness not being punished at all. Many Courts are situated at some distance from any Magistrate competent to try such an offence. In the case of this Court, for instance, it would be necessary to send the parties 22 miles: the service of Summons and non-attendance would have to be proved by Officers of this Court, who would, consequently, be absent from their legitimate duties for at least 3 days supposing the Magistrate was to take up the case on the day fixed for hearing it. Many Moonsiffs' Courts are situated at even a greater distance than this.

12. I would, therefore, submit the expediency of conferring upon District Moonsiffs the power of punishing this offence by a fine not exceeding Rupees 50, or 14 days imprisonment in the Civil Jail, unless the fine be sooner paid, and Judges of other Higher Courts by a fine not exceeding Rupees 200, or one month's imprisonment in the Civil Jail, unless the fine be sooner paid.

From J. W. CHERRY, Esq., Civil Judge of Salem; to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Madras, dated Salem, 29th September 1864, No. 13.

I have the honor to forward the remarks and suggestions offered by the District Moonsiff of Tripatoor, who is the only Moonsiff capable of offering any opinion on the Bill for consolidating and amending the Laws relating to the Procedure of the Courts of Civil Judicature in British India. I have no remarks of my own to make on them.

Remarks and suggestions on the provisions of the Bill "for consolidating and amending the Laws relating to the Procedure of the Courts of Civil Judicature, submitted by the District Munsiff of Tripatoor."

Sections X and LIX.—In a Code intended to be complete as far as practicable I think definitions should be supplied for determining the locality where causes of action, may be deemed to arise in various classes of suits. It may be difficult to provide for all cases but the attempt should be made.

I also consider that Section LIX should stand next to Section X.

Section XI.—In the Madras Presidency the lowest Courts are those of the Village Moonsiffs. Section DCLXII certainly says "nothing in this Code shall be held to alter or affect the jurisdiction in Civil cases of Village Munsiffs," but something more explicit is wanted if it be intended that to resort to those Courts is to be left optional.

Section XIII.—The initiative Procedure to be adopted by a Court after receiving a suit by reference from another Court is not laid down.

Sections XXVII and XXVIII.—Recognized Agents should produce written appointments, and I beg also strongly to suggest that any party having merely to make payment of money into Court be allowed to do so through such Agents, and that a provision to that effect be inserted unless indeed Section XXVIII, as it stands, be though sufficient for the purpose.

Section LXX.—In suits regarding immoveable property, I think that, besides Defendant being served with notice, a written notification should be posted on the property itself. This was done under the old Procedure and was beneficial as a check against collusion, &c.

Section LXXXIV.—It is deserving of consideration whether this rule may not be extended so as to admit of service of notice on the wife of a defendant.

Sections CXI, CXIX, CXXXVI.—These Sections provide for arrest, attachment and injunctions only *pendente lite*. It, however, some times happens that execution of a decree is sought against the representative of a deceased defendant, or, after the lapse of one year, without proceedings. In these cases preliminary notice must issue under Section CCCL. Thence arises delay, and, as a result, considerable risk of absconding or removal or waste of property against which the Courts can afford no aid. This deserves remedy.

Section CXX.—Plaintiff can seldom specify property within doors, and it seems hard he should in default, be barred of his remedy.

Section CXXI.—By the close of this Section, the Court may direct attachment *summarily*, but Sections CXX and CXIX, in laying down what Plaintiff's application shall contain, do not prescribe any demand for summary process. The Court is thus left, *suo motu*, to advance beyond the limit of the application. I have met with this discrepancy in actual practice, and, though a slight one, think it deserving of removal.

Sections CLII and CLIII.—It deserves consideration whether these Sections will not affect the provisions of Act XXVII of 1860, debarring recovery of debts without certificate of administration.

Section CLVIII.—It is not specified how Plaintiff is to obtain notice of the date of the first hearing, or how either party should receive notice of subsequent hearings. The consequence has been diversity of practice, and, I am afraid, in some instances, no notice at all. The approved plan however, I believe, has been to post written notices in some conspicuous part of the Court House. On this very important point, however, I think there should not be any hiatus in the Code.

Section CCLXVI.—I would respectfully propose that the words "any Courts" be substituted for "any class of Courts" as the latter are needlessly restrictive, and may prove an obstruction. The provision is an excellent one, and, if enforced as regards the District Munsiffs Courts, would at last ensure obedience to the provisions of the Code respecting the mode of taking evidence. At present the law is notoriously disregarded in the great majority of instances. Mere "notes" can form no proof that evidence has been taken under "personal superintendence"—as these notes may be (and are sometimes beyond doubt) compiled from depositions taken by ministerial officers under circumstances that rendered intelligent supervision impossible, it being a common practice to allow the examination of several cases to go on together.

Section CCCIV.—Under a beneficial ruling of the High Court, the Small Cause Courts have not hitherto recorded "judgments," and to compel them to do so would, in my humble opinion, be unnecessary and injurious to efficiency. It is to be noted that the Presidency Small Cause Courts give no "judgments" excepting orally.

Section CCCVII.—When a party takes an adjournment in consequence of non-attendance of witnesses duly summoned, he is sometimes directed (intermediately) to pay the costs incurred at the hearing by the opposite side. These are "costs necessarily incurred," and yet cannot, I should say, with propriety be made *costs in the Suit*.

Section CCCXIII.—Parties arrested on being brought up often ask for a few days time to raise funds, &c. This used to be granted by making the warrant returnable on a subsequent date, and the practice might be legalized as being beneficial. By a late ruling it has been declared inconsistent with the law.

Section CCCXLIII.—This application should be "verified," that is Plaintiff should be required to declare that he has not obtained satisfaction.

Section CCCCI.—Sale *instante* should be allowed where there is urgent danger of property perishing.

Section CCCIV.—"Before sunset of the fifteenth day from the date of sale."—There is a show of precision in these words which is delusive, as "from the date" may either mean inclusive or exclusive of such date. This doubt on a very important point should be removed as it is in Section DXXXIII, where the words are "the days shall be reckoned from and exclusive of the date of the Decree."

Section CCCXLV.—Questions relating to sums alleged to have been paid in discharge or satisfaction of a Decree are, by this Section, to be determined by order of the Court executing the Decree; but, under Section CCCXXXIV, "no adjustment of a Decree, in part or in whole, shall be recognized by the Court, unless such adjustment shall be made through the Court, or certified to the Court by the person in whose favor the Decree was made." It results that the only order a Court can pass regarding an allegation that a Decree has been satisfied out of Court is, that no such transaction can be recognized. There seems an apparent discrepancy in this which would operate severely against a party making a payment from ignorance, &c., as no summary order in his favor could be passed, while, on the other hand, he would be debarred from bringing a separate suit.

From G. J. P. HARRIS, Esq., Civil Judge of Trichinopoly; to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Madras, dated Trichinopoly, 19th October 1864, No. 276.

In obedience to the Order of Government, dated as per margin, I have the honor to report that the several provisions of the Draft Code therewith received, seem to me in every way sufficient to meet the requirements of the service.

2. The opinions of the Moonsiffs will be forwarded when received by me.

From J. H. GOLDIE, Esq., Civil Judge of Tinnevely; to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Madras, dated Tinnevely, 24th October 1864, No. 657.

I have the honor to state for the information of Government that I have not any remarks or suggestions to offer on the provisions of the "Indian Civil Code" Bill, and the Bill "for consolidating and amending the Laws relating to the Procedure of the Courts of Civil Judicature in British India," and that I see no objection to the passing of those bills, if it should please the Legislature. The delay in forwarding this report has been owing to my having awaited the reports of the District Moonsiffs on the Bills, but these reports cannot be submitted until they receive translations of the Bills, which they have not yet received.

From G. A. HARRIS, Esq., Civil and Session Judge of Coimbatore; to the Assistant Secretary to Government, Legislative Department, Madras, dated Coimbatore, 10th November 1864, No. 239.

Your Official Memorandum of the 7th November 1864, No. 294.

2. With reference to the Proceedings of the Madras Government in the Legislative Department, dated respectively the 6th July, and 6th August 1864, Nos. 180, and 207, I have the honor to state that I have no remarks or suggestions to offer upon the provisions of the Bills therewith received.

From G. ELLIS, Esq., Civil Judge of Cuddalore; to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Madras, dated Cuddalore, 11th November 1864, No. 23.

With reference to the Proceedings of Government, dated 6th July, and 6th August 1864, I have the honor to state that I have to offer no remarks or suggestions on the provisions of the Bills therein alluded to.

2. The copies of Tamil translations of the Bills in question applied for by me on the 19th July, and 13th August, for distribution to the District Moonsiffs, have not as yet been received.

From H. D. COOKE, Esq., Civil Judge of Calicut; to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Fort Saint George, dated Calicut, 11th November 1864, No. 402.

With reference to Proceedings of Government in the said Department, No. 180, dated 6th July 1864, I have the honor to forward a Statement of remarks and suggestions received from the Principal Sudder Ameen of Calicut, and another Statement of ditto prepared by this Court upon the provisions of the Bill "for consolidating and amending the Laws relating to the Procedure of the Courts of Civil Judicature in British India."

2. With the exception of the Principal Sudder Ameen of Calicut, none of the other Subordinate Judges, to whom the Bill was referred, have as yet offered any remarks or suggestions.

Statement of remarks and suggestions which the Civil Judge of Calicut offers upon the provisions of the Bill to be called "the Code of Civil Procedure."

Section of the Bill.	Corresponding Section of the Code in force.	Remarks and suggestions.
13	6	Can a suit once withdrawn from a lower Court A, and referred to another lower Court B, at the instance of the Defendant, who had instituted an action in a higher Court against the Judge of the lower Court A, be sent back to the lower Court A, on the subsequent motion of the Plaintiff to the effect that the Defendant's suit had been dismissed? My opinion is that the suit ought to be sent back, for it happens that the party's proceedings against the Judge were merely taken to gain his own object in the withdrawal of his suit.
154	104	If a sole Defendant died, and no application was made either by the legal representative of the sole deceased Defendant, or by the Plaintiff, within a reasonable time, what measures should be taken? Is the Court to order that the suit shall abate, as is done in the case of the death of a sole Plaintiff? If so, any costs to be awarded and to whom? I am of opinion that the Plaintiff should be informed by a notice before any steps are taken by the Court.
359 to 366	223 to 230	The provisions of these Sections would appear to apply <i>only</i> to immovable property. But supposing a moveable property was concerned such as an elephant, a cow, or a jewel. Can the said provisions be made equally applicable to such a case? If so, I think that the Sections require alterations.
365	229	Suppose the resistance has been made by a person claiming <i>bonâ fide</i> possession on a title derived from the Defendant himself prior to the institution of the suit, but which person was not made a party to the suit from collusion between the parties in the suit. Will the provisions of the Section apply to his case? I think a remedy should be provided.
610	365	What imprisonment and fine are here meant? Do they refer to Sections 364 and 401 (228 and 254)?

(Signed) H. D. COOKE,
Civil Judge.

STATEMENT of remarks and suggestions which the Principal Sudder Amin of Calicut offers upon the provisions of the Bill "for consolidating and amending the Laws, relating to the Procedure of the Courts of Civil Judicature in British India."

Section of the Bill.	Corresponding Section of the existing Code.	Remarks and suggestions.
6	1	Can the Courts take cognizance of a suit arising out of an act done by a Clergyman in the exercise of his religious and spiritual functions? I am aware of a suit of this nature having been entertained, but I doubt whether our temporal Courts are competent to inquire into the legality or otherwise of any such act.
13	6	Can a suit partially, or fully tried, by a Subordinate Court be withdrawn from that Court? I think it ought not to be, unless there be some cogent reason; for, otherwise, a party perceiving that he is likely to lose, may move the District Court for the withdrawal of the suit upon some pretext or other, which is often the case.
16	8	A says that the right to manage the ancestral property of his family resides in him, but that B, who is only a distant relation of his, is usurping that right by doing certain unlawful acts, such as mortgaging one land to C, one to D, and one to E, and selling outright one land to F.—Can A, by one and the same suit, brought upon a stamp covering the value of the whole property, seek a Decree declaratory of his right, and nullifying the several acts of B in favor of C, D, E and F? I do not think that this Section was intended to allow of such distinct causes of action being blended in one suit; but suits of a similar nature have been entertained in our Courts, probably under a misapprehension, if not misconception of this provision. In a suit of this form, not only the procedure becomes complicated, instead of being simplified according to the main object of the Code, but also C, D, E and F, whose interests are comparatively of little value and unconnected the one with the other, are unnecessarily put to heavy expenses by being included in a big case. I would, therefore, suggest that the section be worded more clearly.
108	71	"The case shall not proceed," or shall proceed?
115	24, Act XXIII of 1861.	At whose expense is the summons or warrant to issue?
143		"He shall be liable for the costs." Are these costs to be recovered by an order of the Court in the same suit or by a separate suit?
154	104	If no application is made, I suppose the Court should allow the plaintiff a reasonable time, and, upon default, act under Section 219 (148).
159	5, Act XXIII of 1861.	If the sum be brought after the time allowed, and the service of the summons then would not allow the Defendant a sufficient time to enable him to appear and answer on the day originally fixed, can it be received, and another day fixed, when the delay appears to have been without good cause?
350	216	Part of Section 341 is repeated here.
365 & 366	229 & 230	Is it intended that suits numbered and registered under these Sections should be heard at once, or only according to their order on the Register?
375	237	If the money is to be paid to the holder of the Decree, how is the payment to be made, whether by the Court in which it is in deposit or through the Court that attached it?
404	254	The word "sunset" has been viewed differently, as extending, and not extending, to "the first office day after the fifteenth day." This difference being an important one, I would suggest the insertion between "then" and "on the first office day" of the words "before sunset" or "before (such an hour)" according as the intention may be.

STATEMENT of remarks and suggestions which the Principal Sudder Ameen of Calicut offers, &c.—Continued.

Section of the Bill.	Corresponding Section of the existing Code.	Remarks and suggestions.
409	257	There is a misprint of "on" instead of "and."
445	11, Act XXIII of 1861.	This Section has been construed by one officer as authorising the taking of evidence in proof of a payment alleged to have been made without the knowledge of the Court, and by another officer as not applying to any payment made in opposition to Section 334 [206]. It seems to me, therefore, desirable that the wording of this Section should be a little more clear.
451	286	At whose expense are the copies and certificate to be prepared and transmitted?
548	338	I would suggest the desirableness of the following proviso being added to the end of this Section, namely, "provided the Court which passed the decree shall not, before the receipt of the order of the Appellate Court, have taken security from the party in whose favor it was passed, and have ordered it to be executed."
610	365	This Section, allowing appeal, has been construed as applying to an order of forfeiture passed under Section 404 (254), and I doubt the correctness of this construction.
617	376	A doubt has been entertained as to whether reviews of judgments given against the Plaintiff under Sections 216 and 219 (145 and 148) come under this Section or under Section 176 (119).
623		The wording of this Section does not appear to me to be clear enough.

(Signed) J. D'SILVA,
Principal Sudder Amin.

From E. W. BIRD, Esq., Civil Judge of Tanjore; to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Fort Saint George, dated Tanjore, 12th November 1864, No. 1144.

In returning herewith, as requested in the note attached to your Official Memorandum of the 7th instant, No. 294, the enclosure to my letter of the 19th August last, submitting observations on the Civil Procedure Code, I have the honor to forward also the opinions of the 2 Principal Sudder Ameens in Tanjore as well as that of the District Moonsiff of Mannargudy. The observations of the other Moonsiffs have not as yet been received, and will be forwarded as soon as they come to hand.

2. I have been unable myself to find time for the examination and consideration of the proposed Chapter I of the Civil Code, and, therefore, am not prepared yet to submit my opinion on it. It is a subject regarding which I am not conversant and I feel diffident in offering any observations on the same. At the best, such observations will be of little value, if any. None of the District Moonsiffs or the Principal Sudder Ameens of this Zillah have yet sent in their opinions on the proposed law, but I shall, at once, call for and submit them should they be ready to furnish the same.

Remarks by the Civil Judge of Tanjore on the newly proposed Bill entitled the "Code of Civil Procedure."

Section XIII.—This Section seems to embrace Section XII and render the latter unnecessary. It appears objectionable, without the permission of the District Court, to allow any Court subordinate to it to receive and dispose of a suit filed before it in opposition to Section XI.

Section XXIII.—The suit should, however, be valued at that of the entire contract, or, otherwise, it may be found that the entire contract has been upheld by a Court which disposed of

a suit wherein the value of one act only of the contract has been paid for by the Stamp fee. Further, in the next suit brought for completion of the remaining acts, it may be decided that the contract itself is void, thus, in one case, leading to loss of Stamp Revenue, and, in the other to conflicting decisions on the same subject matter.

Section XXVII.—I would oppose this with with most earnest remonstrance. Old women and sick folk will, if this Section be made law, multiply in an astonishing manner, and lead to endless litigation being fostered by the petition writers and others who live by the Courts. Sick people and old women have really no difficulty in retaining advocates, and should never be allowed, if within the jurisdiction, to appear otherwise than personally or by a pleader.

Section CCXXXVII.—It requires to be stated what Court is authorized to impose this fine. The only law in force here to punish an absconding witness evading summons, is Section 174 of the Indian Penal Code, and the punishment, imprisonment and fine, can only be inflicted by the Magistracy (See Schedule to Code of Criminal Procedure). Does Section CCXXXVII mean that the Civil Court is to levy Rupees 1000, the fine mentioned in Section 174 of the Indian Penal Code, as the one the Magistrate "may impose," or does it mean that this Section gives the Civil Court summary power to deal with this offence as a contempt? This should be clearly stated; for, at present, there is much misunderstanding on the subject. (Note; this Section merely re-enacts Section 160 of Act VIII of 1859).

Section CCLXVI.—This Section ought to provide for the contingency of the Judge being, by accident or fatigue, unable to continue writing with his own hand. It would be best to enact a provision similar to that in Section 196 of the Code of Criminal Procedure, by which he can, if needful, dictate the deposition, recording why he does not write with his own hand.

Section CCXCVII.—It would be better to add the word "Parties" to "Witnesses" wherever it occurs in this Section.

Sections CCXCVIII and CCXCIX.—I do not consider these Sections will be of much practical benefit. The Courts are hereby given no authority to summon Assessors or to punish them for wilful absence when summoned before the trial is over, and as the opinion of the Assessors is not binding on the Court, the sole benefit the Judge derives is presumably the assistance they may give him in the examination of witnesses, and the explanation they may afford as to local usage, &c., &c. It is doubtful whether this does not better come from the Vakeels or Advocates engaged in the case, or from sworn testimony at the trial, and certainly, in this Zillah, (Tanjore) experience proves that Assessors do not voluntarily attend at the trials held before the Session Courts, and their help, to such Courts, is of the most trifling character. These Sections should either be omitted, or if they must be retained, fresh Clauses should be added giving power to the Civil Courts to summon and punish Assessors, and to attach, to their opinions, where both parties to a suit wish and the Court sees fit to allow it, somewhat of the final character appertaining to the verdict of a Jury in England, nothing is said in these Sections as to the classes from which the Assessors are to be selected.

Section CCCII.—The application of this Section to the Small Cause Courts is a decided advantage. Judgments, if written out before pronounced, are sure to be sounder and better than if, as at present, they are delivered without such previous consideration and record in writing.

Section CCCXXXIV.—This Section seems opposed to 445, and the present law it re-enacts has always been a difficulty. Section 334 declares a private adjustment pleaded shall not be recognized unless plaintiff admits it. Section 445 declares such a plea shall be investigated and decided on summarily, open to an appeal. If the plea unadmitted be absolutely inadmissible under Section 334, why investigate it under 445? Supposing the plea be true as a matter of fact, say that Rupees 100 were paid out of Court by a judgment debtor to his creditor, in part discharge or adjustment of the judgment debt, as the Court will not inquire into the plea under Section 334 if plaintiff does not admit it, and if it does so under Section 445, is bound to reject it under Section 334, why debar the debtor having recourse to a separate suit (as enacted in Section 445) for recovery of the over payment to the judgment holder? This matter requires re-consideration and decision in framing the new law.

Section CCCL.—There seems no good reason why notice should be issued in these cases. The party against whom the warrant is issued always has opportunity to plead non-liability when he has appeared before the Court. This Section allows an opening for a party to make away with property, and ought, I think, to be left out of the Act.

Section CCCCXI.—It would be equitable to allow this benefit to a purchaser of real property, whose purchase has been set aside in a suit instituted under Section 392.

Chapter VI, Pauper suits.—It would be well that, in this Chapter, it should be provided that a person originally allowed to sue as a Pauper, should, if he afterwards become possessed of property during the pendency of the suit, be called on to furnish the stamps for the Institution Fee under penalty of "judgment by default," if he fails to obey the Court's order.

Section DXLIV.—The Appellate Court ought also to have the power to order any party not included in the Original suit, and who may appear to have an interest in the subject matter of the action, to be made a party. This will be, in fact, to give to the Appellate Court the power conferred on the Court of original Jurisdiction by Section 110.

Sections DCXXI, and DCXXIII.—Are not printed correctly. The Sections are not intelligible as they stand.

TANJORE, 19th August 1864.

(Signed) E. W. BIRD,
Civil Judge.

Remarks and suggestions on the provisions of the Bill "for consolidating and amending the Laws relating to the Procedure of the Courts of Civil Judicature in British India," submitted by the Principal Sudder Ameen of Tanjore.

Section XII.—This Section gives not only vain discretion to the parties to file suits in a Court of higher grade than that of the lowest grade competent to try it, but it also creates additional work to the Court of higher grade inasmuch as it may have to receive and return several plaints for the purpose of being put in, in the proper courts, especially when it is considered that Section XIII authorizes the District Court to transfer suits from one Court to another.

Section XIX.—This Section authorizes that the suit for land or other immoveable property situated within the jurisdiction of different Courts may be brought in the Court within the jurisdiction of which any portion of such land or other immoveable property is situated. As this provision gives a wide discretion to the parties, it appears necessary to limit the discretion by converting the word "any" into "greater."

Section XXVII.—This Section allows females and males of bodily infirmity to appear by recognized Agents, which appears not only to be unsafe but will also tend to encourage litigations.

Section L.—In the Clause 3 of this Section it is ruled that the plaint should contain, among other matters, the time when the cause of action accrued. It should also provide that the place where the cause of action arose should be mentioned for ascertaining (according to Section LVIII) whether the cause of action arose within the jurisdiction of the Court in which the suit is brought.

Section CLI.—This Section allows the Court in the case of the death of a sole plaintiff to proceed with the suit on the application of his legal representative, but it is doubtful whether such application should be made with the certificate of heirship under Act XXVII of 1860.

Section CLIII.—This Section provides that if any dispute arise as to who is the legal representative of a deceased plaintiff, the Court shall stay the proceedings of the suit until the fact has been duly determined by another suit, but it would appear that such another suit is not necessary if the applicant be ordered to prosecute the suit with the certificate of heirship.

Section CXCVII.—This Section provides for the collection of penalty, in all cases, of only double the amount of stamp duty, on unstamped documents, and the Schedule A annexed to this Bill shows that Section XVII of the Stamp Act, which authorizes the Courts to collect penalty under Section XV of the said Act, has been repealed. In the said Section XV there are six Clauses of which the penalty of double the amount specified in Clause 1 has been provided in this

Bill, but the penalty of treble the amount and twenty times the amount of stamp duty alluded in Clause 2 have not been introduced. It is, therefore, doubtful whether the said Clause 2 of Section XV is in force or not.

Section CCXIV.—The discretion allowed by this Section for passing judgments against a defendant who is not at issue with the plaintiff, will, at times, lead the Court to pass contradictory judgments on the merits of the case.

Section CCXXIII.—This Section provides, that the travelling and other expenses of the witnesses or other persons shall be tendered at the time of serving the summons; but it would be better to tender the said sum before the Court, when the witness appears to give evidence, as there is reason to doubt that the trifling sums might not actually be received by the witnesses from the serving peons.

Section CCXXXV and CCXXXVII.—The Section CCXXXV provides that if the summons for the attendance of a witness or other person, either to give evidence or to produce a document, cannot be served, the Court may cause a proclamation to be affixed, and if such witness or other person shall not attend, the Court may make an order for the attachment of the moveable property of such witness or other person to such amount not being in excess of the amount of costs of attachment and of any fine to which such witness or other person may be liable, and the Section CCXXXVII provides that the Court shall order the property to be released from attachment, if the witness or other person shall pay into Court the costs of attachment and fine. These two Sections are ineffectual inasmuch as the Courts are not invested with the powers of fining the witness or other persons under Section 172 of the Indian Penal Code.

Section CCL.—Notice to the party under this Section appears not to be necessary if the execution be applied for after one year, as it is provided in Section CCCXXXIV of this Bill that no private adjustment between the parties shall be recognized by the Court.

Section CCCCII.—In the sale of moveable property also, the defaulter should be made to pay the difference of the proceeds of the 1st and 2nd sales, if in the latter sale the bid is for a less sum, as provided in Section CCCCIV with regard to immoveable properties. (See Section 24 of Madras Act II of 1864.)

Section CCCCXXXII.—The word "defendant" in this and other Sections requires to be converted into "judgment debtor," as the plaintiff may, in some cases, become judgment debtor as in cases of set off and costs of the suit.

Sections CCCCXXXIII and CCCCXXXIV.—The rates of batta allowed by these Sections for Civil prisoners should be increased, as the rates fixed may, in some cases, be found inadequate.

Section CCCCXL.—This Section provides that no discharge of a defendant under the provisions of Section CCCCXLI shall prevent such defendant from being retaken in execution of the decree, but it appears that the Section CCCCXLI referred to in this Section should be Section CCCCCLVII.

TANJORE,
PRINCIPAL SUDDER AMEEN'S COURT,
10th September 1864.

(Signed) T. RUNGASAWMY,
Principal Sudder Ameen.

NOTES ON THE CIVIL CODE, SUBMITTED BY THE OFFICIATING ADDITIONAL PRINCIPAL
SUDDER AMEEN OF TANJORE

Section X.—I do not clearly understand the latter part of this Section, as respects cause of action in the case of the representative of a deceased person. I think it would be better to define in this Section what constitutes the cause of an action, whether the engagement itself to enforce which the action is brought, or nonfulfilment of the engagement. This has formed the subject of debate in the judgment of the late Sudder Court of Madras, in Special Appeal Suit No. 95 of 1859, page 164 of the printed Reports for 1859.

Section XIII.—This Section, I consider, renders Section XII unnecessary.

Section XV.—The word "intentionally" is, I think, necessary to be placed before the words "omit to sue" in this Section.

Section XVI.—I think this Section might further provide that where different causes of action are joined in a suit contrary to this Section, the Court, instead of dismissing the suit altogether on that ground, can allow the plaintiff to conduct it as respects one cause of action alone?

Section XXIII.—This is a new law altogether. I fear that undue advantage will be taken of this Section in some instances. Under this Section, a suit may be brought in a Court to have the genuineness of a contract determined, even where the aggregate value of the several acts involved in such contract may be of a larger amount than it is competent for such Court to decide. Moreover, when the different acts involved in one and the same contract are severally and at different times brought in issue in Courts, the decisions may also be, perhaps, conflicting as respects the genuineness or otherwise of the contract itself. I, therefore, think, that even where a party should bring a suit to enforce the performance of one or more of the several acts involved in a contract, he should value the suit with reference to the whole acts required to be performed under the contract, and bring the suit in a Court competent to decide the same. The Court, in such a case, provided the genuineness of the contract is established, will direct the specific performance of such of the acts thereof for the performance of which time has expired, and will pass a declaratory order as regards the remaining acts.

Section XXVII.—I have strong objections to this Section. I fear it will promote chicanery, and encourage very much that rapacious set of people who go in this District by the name of *செத்துக்கூலி* Yeluttookooly. The services of Advocates of Courts will also be considerably diminished.

The Section does not also state how recognized Agents are to be appointed, whether the authority is to be in writing or otherwise.

It is also questionable, whether a recognized Agent can appoint an Advocate in the same manner as an Officer's Agent can do under Section XXXVIII.

Section XLV.—This Section provides that the sum required to defray the costs of service of each process shall be paid into Court before the process is issued. This has become difficult of practical application in the case of notices issued by the High Court. I think some provision is necessary to be made in the Code on the subject.

Section L.—This Section does not show what is the language of the plaint to be.

Section LXXXIX.—There is no provision in the Code as to the course to be pursued where a plaintiff fails to satisfy the Court that there is reasonable ground for believing that the defendant is keeping out of the way for the purpose of avoiding the service of the summons. The Sudder Court have ruled (Rules of Practice, page 41) that if a defendant be out of the way on account of business, or on any *bona fide* ground, the suit against him should stop. But this is very indefinite.

Sections CXIII and CXXI.—Supposing a Nazir or other Officer of the Court pronounces to be good and sufficient a security which proves ultimately to be insufficient, what is the remedy against loss arising from such insufficiency? Supposing the Court punishes the Nazir, this does not indemnify the party for the loss sustained by him. I think, in such a case, the law should provide that the Nazir or other officer certifying to the competency of a security ultimately proving incompetent shall be held liable for damages in a Civil action.

Section CLII.—With reference to the words "within what it may consider a reasonable time" used in this Section, I think it necessary that this reasonable time should be specified in the Code in order to ensure uniformity. The Sudder Court have fixed three months as the reasonable time. Rules of Practice, page 19.

Sections CLXIII to CLXVII.—The Code makes no provision where Vakeels for parties are present but they are not prepared with the case. The Sudder Court have ruled (Rules of Practice, page 40) that if a plaintiff leave his usual place of abode without instructing his Pleader, and, on the day fixed for the hearing, the Pleader be unprepared to argue the case, the Court may pass judgment against the plaintiff by default, unless it sees fit to adjourn the hearing.

Section CLXXIV.—I think this Section should say that no appeal shall lie against an *ex parte* judgment, unless where such judgment is passed against the defendant on the ground mentioned in Section CCLX.

Section CLXXV.—There are several defendants in a suit, and the judgment is passed *ex parte* against one of them. The judgment has been appealed from by the other defendants affected by the decision. While the appeal is pending, the *ex parte* defendant applies to the Court of first instance under this Section, for an order to set aside the judgment so far as it affects him, and the Court is satisfied that the default on the part of the defendant was accounted for. What is the course to be pursued in such a case? Can the Court set aside the judgment under this Section while the judgment, at the instance of the other defendants, is pending in appeal?

Section CCX.—Can the plaintiff advance under this Section a new plea directly opposed to the one urged by him in the original plaint?

Section CCXIV.—I think this is unsafe. Two defendants are sued on a bond. One of them is not at issue with the plaintiff in respect of the genuineness of the bond. He admits the bond and expresses his readiness to pay a portion of the amount thereof as his share. Can a judgment be at once given against him? Supposing, when the suit is proceeded further against the other defendant, the bond is shown to be a forgery, what is to be done?

Section CCXXXVII.—Supposing a witness does not attend, notwithstanding the proceedings under this Section, I think there must be a provision in the Code declaring Section 10, Act X of 1855, applicable in such a case.

Section CCLIX.—I think the reasonable time referred to in this Section should be specified.

Section CCLXV.—I think there must be some provision in the Code as to whether or not it is necessary for the witness to sign the deposition.

Section CCLXVI.—What is to be done where a judge is sometimes prevented from taking down evidence in his own hand?

Section CCLXXXII.—To whom is the commission referred to in this Section to be issued?

Section CCXC.—The Code should provide, I think, for a Judge making himself the local investigation, where he considers it necessary.

Section CCXCVII.—This Section, besides applying to witnesses, should, I think, include parties also. The word "persons" is made use of in Section 180, Act VIII of 1859, in lieu of which this Section is substituted.

Section CCCXIII.—I think Act XXXII of 1839, as interpreted by the High Court in their decision in Special Appeal suit, No. 188 of 1862, (Stoke's Reports, page 371), should also be taken into consideration in framing this Section, the object of the Bill being to consolidate the laws relating to the Civil Procedure.

Section CCCXXXII.—I think it is better to specify here property not liable to attachment, such as Sepoy's pay, the money allowance paid to a Polygar, &c. Vide Rules of Practice, page 23.

Section CCCXXXIV.—Does this Section bar a regular suit to recover loss caused by the non-recognition of the adjustment in the course of the execution? For instance, a judgment debtor pays privately to the decree holder a sum of 100 Rupees in part satisfaction of the judgment, and obtains a receipt from him for the same. The payment is not, however, recognized under this Section. Can he bring a regular suit to recover the sum paid by him under the receipt? I think this should be distinctly allowed or denied in the Code.

Section CCCXXXVII.—How a decree is to be assigned has not been stated in the Section. I further think, that something is necessary to be stated in it regarding the certificate of heirship being produced under Act XXVII of 1860, where, in consequence of the death of a decree-holder, the decree is transferred by operation of law to his legal representative, and the decree has to be executed in favor of such representative. The Act in question applies only to the collection of debts. While so, the Sudder Court have, in general terms, stated in their Proceedings, 17th May 1861, (Rules of Practice, page 21), that no decree shall be executed in favor of the representative until he has obtained a certificate under Act XXVII of 1860.

Section CCCL.—I am unable to conceive what could be the reason of enacting that a notice of objection should go, where one year shall have elapsed from the date of the decree.

Section CCCLII.—Is remedy for the injury referred to in this Section to be granted summarily or in a separate suit? I think it must be in a separate suit.

Sections CCCXC and CCCXCI.—I think that one of these Sections should contain a further provision that where it shall appear to the Court that the claimant is not in possession of, but simply holds a lien on, the property attached, the property shall be ordered to be sold subject to his lien.

Section CCCXCIII.—I think that instead of saying that a claim to an attached property shall be made at the "earliest" opportunity, the time within which it should reasonably be made should be specified.

Section CCCXCIII.—If the irregularity be on the part of the Court, against whom is the suit for damages to be brought? The Section should, I think, explain this.

Section CCCXCIV.—If the purchaser be the plaintiff himself, is it necessary that he should make the deposit referred to in this Section? The Code, I think, should state that it is not necessary. The Sudder Court have ruled, that where the decree-holder is declared to be the purchaser, at a sale in execution of a decree, the sum which he is entitled to recover may be looked upon in the light of the prescribed deposit and purchase money, so far as it is sufficient for the purpose. Rules of Practice, page 24.

Section CCCCV.—I think the time for making the claim referred to in the Section should be some-what extended.

Section CCCCXI.—I think that instead of saying generally "when a sale of immoveable property is set aside," it must be said "when a sale of immoveable property is set aside whether summarily or in a suit instituted under Section CCCXCII." I say so because where, after a sale under the order passed under Section CCCXCII, the party dissatisfied establishes his right in a suit instituted by him under Section CCCXCII, the purchaser will have to restore the property to him, and because it is necessary that the purchaser should have the benefit of Section CCCCXI in this case also.

Section CCCCXIII.—This Section contains the words "notwithstanding a subsequent attachment of the same property by another party." Is this whether this other party holds a lien or not on the property?

Section CCCCXIV.—This Section states "when any property is sold subject to a mortgage." But there is no provision directing such a sale. I have, therefore, proposed the addition inserted in this note opposite to Sections CCCXC and CCCXCI.

Section CCCCXVII.—I think this Section should also state who is not liable to arrest under Civil Process. The Sudder Court have stated this in Rules of Practice, page 43.

Section CCCXXX.—I think by this Section, a discretionary power should be given to the Court to leave the defendant in the custody of the officer entrusted with the service of the warrant, where he (the defendant) applies for a few days time to pay off the decree amount, and the decree-holder consents to granting him the time. The High Court, in their decision in Referred Case, No. 12 of 1863 (Stokes' Reports, page 441), have refused this in consequence of absence of provision in the Law. If the officer deputed with the warrant could be trusted with the safe custody of the defendant pending the inquiry referred to in this Section, I see no reason why a similar trust could not be reposed in him where time is applied for by the defendant for satisfying the judgment, and the decree-holder chooses to consent to it on condition that the defendant is to be placed during the time in custody of the officer entrusted with the warrant.

Section CCCCXIII. Nothing is said in this Section as to how the monthly allowance is to be paid where several plaintiffs may apply for the imprisonment of a judgment debtor. The Sudder Court, in their Proceedings 24th March 1862, state that each plaintiff must provide the regulated monthly allowance for the debtor's subsistence. (Rules of Practice, page 25.) But I am unable to concur in the propriety of this order.

Section CCCCXVII.—This Section is not clear as to whether a Court can, of its own accord, shorten the maximum term of imprisonment referred to in this Section. The Bombay Sudder Court have ruled that the Court cannot.

Sections CCCXLIII & CCCXLIV.—I fear that the law as contained in these Sections, in respect of decrees below 100 Rupees, will prove a hardship to poor decree-holders.

Section CCCCXLV.—This Section, among other things, provides that questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like shall be determined by order of the Court executing the decree. But I am unable to reconcile this part of the Section with Section CCCXXXIV of the Bill. This latter Section provides that no adjustment of a decree shall be recognized by the Court unless made through the Court. While so, how could there arise any question relating to the sum alleged to have been paid in discharge or satisfaction of a decree? The payment, if made through the Court, would be open to no question. If otherwise, it would not be recognized by the Court.

Section CCCCXXI.—I think it is necessary to enact that the payment or satisfaction referred to in this section should have been registered; otherwise, I fear that false plea of payment will, in all probability, be very often urged.

Chapter VI, Pauper Suits.—I think there should be a Section in this Chapter to the effect, that where a plaintiff, who was originally allowed to sue as pauper, become possessed of property while the suit is pending, he may be required to put in the requisite stamps, and judgment may be given against him if he neglect to do so. The Sudder Court have so ruled. Vide Rules of Practice p. p 35, 50.

Section DXLIV.—I think this Section should further provide, that where there is a defect of parties, it shall be competent to the Appellate Court to direct that any person (whether such person was a party to the original suit or not) having an interest in the subject matter of the suit may be made a plaintiff or defendant. The Sudder Court have so ruled in their Proceedings, 19th March 1860.

Section DLXXII.—A judgment is passed under Section CCLXI against a party failing to attend to give evidence. The party appeals, and pleads sickness as an excuse for the default. I think Section DLXXII should be so framed as to justify the Appellate Court referring such a plea also to the lower Court for trial and finding. At present, the Section does not apply, since the plea is not one which the lower Court omitted to try. I find no other Section in the Bill applicable to the case. Section 574 applies to the reception of additional evidence in a case.

Section DCXVII.—I think, in justice to poor parties, a review should be allowed even in unappealable cases.

Section DCXXI.—The latter part of this Section is unintelligible.

Section DCXXIII.—There is something wrong in this Section.

TANJORE, (Signed) T. KRISTNASAWMY,
20th September 1864. O. A. P. S. Ameen.

From R. VASUDEVA ROW, District Moonsiff of Munnargudi; to E. W. BIRD, Esq., Civil Judge of Tanjore, dated Munnargoody, 14th September 1864, No. 167.

With reference to an order issued from the Civil Court under date the 30th ultimo, I have the honor respectfully to submit the following remarks touching the Bill to modify the Code of Civil Procedure, which is herewith returned.

Section CV. Does not provide the course to be pursued when the Officers of Government therein referred to have left the District, or India, or resigned the Public Service. If, with reference to Clause 6, Section 50, the summonses are served upon the present incumbent being the successor in the office from which the act complained of has emanated, there is the following difficulty to be encountered. The successor in office receives the summons, makes the necessary reference to Government, and, so far as the Court is concerned, it is all right if Government do undertake the defence. If not, the successor in office will have to defend, at his own expense, a questionable act of his predecessors. I would, therefore, propose that the course to be followed in such cases should be clearly laid down.

Section CVIII. Should be corrected if I am not mistaken into "or the case shall proceed, &c.," instead of "shall not proceed &c.," the word "not" seems to be a misprint.

Section CLXIII. This Section provides that if the defendant does not attend, the Court shall hear the suit ex-parte on its being proved, to the satisfaction of the Court, that the summons was

duly served. In cases where the summons has been served by an Officer of the very Court, the said officer is called upon to swear to the service and all is right; but in cases where the summons is transmitted to, and served through another Court, how is service of summons to be proved?—I would propose this to be made clear.

Section CCXX. This is a copy of Section 149 of the old Code. Under this Section, parties apply for summons even the day preceding that fixed for the hearing. The witnesses are not generally able to attend within so short a time, even if they are residents of the same station; the consequence is, the case has to be adjourned or dismissed, in which latter case the words "the parties may at any time after issue of summonses to the defendants, or after the issues have been recorded, obtain summonses, &c." furnish a plausible ground for appeal and, in some cases, even for remand. I would, therefore, propose that this Section may be so modified that the time for the application of the summonses may be fixed; so that, if the application be not presented within that time, no summonses shall be granted. The time should, of course, vary according to the distance the witnesses are to come from.

Sections CCXXI and CCXXIII. These have been copied from Section 151 of the old Code. Much inconvenience is felt in acting up to these Sections. The person applying for the summons has to pay into Court the travelling and other expenses of the witnesses. The Court is to keep an account of it. In some cases the suit is subsequently compromised without the attendance of witnesses, or some of the witnesses cited and summoned are subsequently dispensed with; the parties apply for the refund of the amount. The Court has to take the usual necessary precautions in refunding the same. Under Section 223, the sum paid into Court should be tendered to the witness at the time of serving the summons, if it can be served personally. The Nazir or the Head Goomastah, when giving out a summons, has to see what the witnesses batta is and pay it to the serving officer, and in case where the summons is not served personally, the peon returns the batta and the Court has to take it back and refund it to the party if the witness does not appear at all. In some cases, the batta amount is paid by the peon to a wrong party; the witness subsequently appearing denies having received the batta; the parties generally feed their witnesses and supply them with conveyance, &c., all the travelling conveniences, and in cases where the summons has been served upon the adult male member of a witness, who obeys the summons, the party says he has already paid the witness his expenses which the witness admits and the party claims the refund, which must properly be made. In order to avoid all these inconveniences, I would propose, that on the day of hearing, when the witnesses are in attendance, the party citing them is to be called upon to pay each witness his travelling and other expenses according to the scale obtaining in that Court, (Section 222), that the amount should be paid to each witness and a receipt obtained signed by all the witnesses and kept in the record to be included the costs of the suit, and in default of such payment (such cases would, of course, be very rare) the witnesses should not only be discharged without being required to give evidence, but the actual expenses undergone by each witness should also be collected from the respective parties by process of the Court.

Sections CCXCVIII and CCXCIX.—Who are to be these Assessors? How are they to be summoned? How to be dealt with if they do not attend the summons, &c., has not been provided for.

Section CCCXV.—This section provides, that when the suit is for land the Court may provide in the decree for the payment of mesne profits on such land from the date of the suit until the date of delivery of possession. I cannot see how this can be done, inasmuch as the Court can fix the amount of mesne profits only from the evidence on both sides and regarding the profits of a past period, I beg that this may be made clear.

Section CCCXLIII.—I would suggest that the decree-holder under this Section may be made to put in copy of the decree with the application, because the District Moonsiff's Court is not a Court of record, and he (the District Moonsiff) would not be in a position to see whether the application corresponds with the decree as provided for by Section 348 unless the original records are applied for and obtained from the Civil Court, which is a very inconvenient course.

Section CCCCXXIX.—This is a copy of the first part of Section 8 of Act XXIII of 1861. The High Court have recently* ruled, that the discretionary power of a Judge, to detain a defendant in custody otherwise than by committing him to prison in execution of a decree, is confined to the single case provided for in Act XXIII of 1861, Section 8. I see, by daily experience, that the working of this provision is inconvenient. For instance, a party possessing extensive property is arrested under a warrant for a small sum. The party is unwilling to disclose the whole of his property under Section 428. He is, however, most willing to pay it, while he is unable to pay the amount at once, but wants a day or two to raise the amount; the decree-holder is willing to wait and pay the required *batta* to the peon to detain the debtor in custody. I would, therefore, propose that in such cases the Courts should be allowed the discretion of allowing a judgment debtor to remain in peon's charge for at least a week.

Section CCCLXXI.—Unless the phrase "or that he has not derived any property from such deceased person" is added to the end of this Section, I think much reasonable doubt and difficulty would be felt in disposing of such a plea, if put forward when a Registered bond has to be enforced.

Section DLXXX.—Under this Section, as under Section 361 of the old Code, a copy of the appeal decree is alone sent to the Court of first instance. It is, I think, of importance, especially where the original decree is reversed, that the Court of first instance should be made aware of the grounds on which the Appellate Court has based its decision. I would, therefore, propose that this Section may be so modified that copies of decrees as also of judgments be invariably sent to the Court of first instance. I would propose that one more Section may be added to Chapter 15, authorizing Civil Courts to take cognizance of offences† under Section 174 of the India Penal Code, instead of sending such cases for investigation to the Magistracy under Sections 168 and 171 of the Code of Criminal Procedure, as is now done; but which is very seldom done owing to the many inconveniences attending such a course. Under Section VII, Regulation III of 1802, the Courts had the power of punishing witnesses disobeying their summons with a fine of Rupees 500. This Section has been repealed by Act VIII of 1859, and the power taken away. Consequently, summonses are neglected, business is obstructed, parties concerned and witnesses duly obeying the summonses are put to the trouble and expense, either of detention or of returning to their villages and again travelling the whole distance back to the Court to attend on the day to which the hearing may have been adjourned. We have now no power to vindicate our processes except by prosecuting for the contempt and conducting and watching a regular trial before the Magistracy. The inconvenience of this is very great. The Courts are already overwhelmed with work and, consequently, if disobedient witnesses are brought before the Court arrested under a warrant under Section 258, the Courts are rather inclined to accept any excuses that may be pleaded by the witnesses who may have disobeyed their summons and to let them escape with impunity, than adding to their already heavy work and going to the trouble of making the preliminary inquiry provided for by Section 171 of the Code of Criminal Procedure, and forwarding the case for trial to the Magistracy. The people are aware of this difficulty and wilfully disregard the summonses. Whereas if they know that the Courts have the power of punishing such contempts summarily, the legal processes of the Courts would be more promptly obeyed; business would be less obstructed and parties will not have to pay the additional charge of a warrant to procure the attendance of their witnesses. The severe penalties of the Indian Penal Code are not required in these cases of petty contempts of Courts. The power to impose summarily a moderate fine, such as is provided for the Subordinate Magistrates of the 2nd Class by the Madras Act No. I of 1863, is all that is required in the case of District Moonsiffs, viz., simple imprisonment not exceeding 10 days, or fine which may extend to 3 Rupees or both. The said Courts may also be empowered to commit any particular case to the Magistracy under Section 171 of the Code of Criminal Procedure, if they consider the person accused deserving of a more severe punishment.

DISTRICT MOONSIFF'S COURT,
MUNNURGOODY, 14th September 1864.

(Signed) R. VASSUDEVA ROW,
District Moonsiff.

From E. STORY, Esq., Civil Judge of Nellore; to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, dated Nellore, 14th November 1864, No. 64.

I have the honor, in accordance with your communication of the 7th instant. No. 294, to furnish herewith my opinion on the Bills referred to in the Proceedings of Government, Nos. 186 and 207, and dated 6th July and 6th August last respectively.

Remarks of the Civil Judge of Nellore on the "Civil Procedure Code."

Section LXXIII.—When a Railway is close by, might not the distance be extended without inconvenience?

Why make any distinction between a plaintiff and defendant and witnesses who can be summoned from a distance of 100 miles under Section CCLXXV?

Section CLII.—Should not a time be fixed?

Natives are given to procrastination, and what one Judge might deem reasonable time another might consider unreasonable.

Section CLVI. Do. do.

Section CCXII.—Is the judgment in such a case to be final or open to any appeal? I think it ought to be final.

Section CCXIX. Do. do.

Section CCXXV. Do. do.

Section CCLX.—Can the Court proceed against the person as laid down in Section CCLVIII?

Section CCLXXXIV.—If the Jail is at the same place where the Court is sitting and trying the case, why not allow the prisoner to be sent for and examined in Court?

Section CCLXXXVIII.—Why make any exceptions? Under this Section, if Section CCLXXXIV is allowed to stand as it is, the evidence of prisoners will, I think, be a nullity.

Section CCCXIII.—Would it not be advisable to fix a maximum of interest to be allowed?

Section CCCXXVI.—I do not fully understand the meaning of this Section. Do the words "other than a defendant" refer only to a plaintiff?

Section CCCXXXII.—Is not this Section prolix, might it not run "all property whatsoever, moveable or immoveable belonging to the defendant, &c."?

Section CCCLIX.—How is the person who refuses to vacate, to be removed?

Section CCCLXV.—Why not leave the supposed aggrieved person, himself to institute a suit as laid down in the next Section? Why should the Court do it in the former and not in the latter?

Section CCCLXIX.—If the property consists of perishable goods and liable to be damaged, such as grain, cotton, chillies, &c., should not provision be made for selling the same?

Section CCCXCII.—The time granted to bring a suit is, I think, too long, six months appear to me ample.

Section CCCCVIII.—Am I then to conclude that no sale of immoveable property is to be confirmed by the Court till after the expiration of thirty days from date of sale?

Chapter VIII.—Are the judgments under this Chapter final, or open to an appeal? I think they should be final.

(Signed) E. STORY,
Civil Judge.

From C. LUTCHMIAH, Acting Principal Sudder Ameen of Salem; to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, dated Salem, 19th November 1864, No. 27.

With reference to the Proceedings of the Madras Government, dated 6th July 1864, No. 180, forwarding a Bill for consolidating and amending the Laws relative

to the Procedure of the Courts of Civil Judicature in British India, for any opinion I may have to offer in respect to its provisions. I have the honor to state, that I have no remarks to make on the Bill except as regards Section 266.

2. In this Section it is provided that the local Government may direct evidence of witnesses in any District or in any class of Courts to be taken down by the Judge with his own hand in the Vernacular language of the Judges. The time of the Judges is now so much taken up in disposing of Miscellaneous work as well as claims to attached property, that at times they can hardly attend to their more important duties, and the enforcement of the provisions of Section 266, will, I fear, interfere with their work and necessarily impede the despatch of business.

3. As under Section 272 of the Bill the Judges are required, as the examination of each witness proceeds, to make a memorandum of the substance of what such witness deposes, I consider that this provision will suffice to answer the purpose of Section 266, and would accordingly suggest its omission.

4. The other Sections of the Bill need no remarks from me, and may be introduced to supply the deficiency in the existing Code.

From F. C. CARR, Esq., Acting Judge of the Court of Small Causes, Cuddalore; to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Madras, dated Cuddalore, 18th November 1864, No. 72.

In reference to your Official Memorandum, No. 294 of 7th November 1864, calling for my opinion both on the Code of Civil Procedure and Indian Civil Code, forwarded with the Proceedings of the Madras Government, Nos. 180 and 207, dated 6th July and 6th August 1864, I have the honor to state that the only reason I did not at once reply to the latter was, that, agreeing in the objects and reasons for introducing the new Codes, I had no suggestions worthy of being submitted on the subject.

From J. R. KINDERSLEY, Esq., Acting Civil Judge of Rajahmundry; to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Fort Saint George, Madras, dated Rajahmundry, 18th November 1864, No. 357.

As required by the Order of Government, No. 180, dated the 6th July 1864, I have the honor to submit a few remarks and suggestions relating to the Bill for amending Civil Procedure.

2. It may be objected that some of the alterations which I have suggested are merely verbal; but it seems to me that a Code intended for the guidance of persons, of whom the great majority have a very imperfect knowledge of law, ought to be most carefully worded, lest inaccuracy of language should produce confusion of ideas, tending to erroneous practice.

3. I have as yet received no suggestions from any of the Subordinate Courts of this District; but the District Moonsiff of Rajahmundry has reported his general approval of the Bill in a communication, which I have the honor to enclose.

Remarks submitted by J. R. KINDERSLEY, Acting Civil Judge of Rajahmundry, on the new Civil Procedure Code.

Section V. Definitions. "Miscellaneous case." If a case be a combination of facts giving rise to legal consequences, I do not understand how it can mean a "proceeding" taken in a Court of Justice. If a proceeding be meant, why not use that word?

A group or collection of cases may be collectively miscellaneous; but I do not understand in what sense each case of the group taken singly can be called miscellaneous.

Sections XVI, XVII and XVIII. It seems to me that there is some confusion here between causes of action, and the claims which arise from them.

Suggestion.

Section XVI. Several claims founded on distinct causes of action by and against the same parties, &c., &c.

Section XVII. If two or more claims founded on distinct causes of action, &c., &c.

Section XVIII. A claim for land and a claim for mesne profits of the land shall be deemed to be founded on distinct causes of action within &c.

How can a claim be deemed to be the cause from which it has arisen?

Section LVII. If, upon the face of the plaint, or after questioning the plaintiff, it [clearly] appear to the Court that the subject matter of the plaint does not constitute a cause of action, or that the right of action is barred by lapse of time, &c., &c.

I would insert the word "clearly" with reference to the case of *Lakshmi Ammal versus Fikaram Tovejee*, 1 M. H. Court Report 240.

Section LXII. The language of the latter part of this Section appears to me to beto open objection. By opposing procedure to law, it implies a doubt whether procedure under this Code be law.

Special appeals lie only on points of law. I learn from a note to Stephen's on Pleading that Bracton and Britton wrote of trying questions of law. But surely in modern times the word "trial" is applied only to the investigation of issues of fact.

Suggestion.

If the judgment passed in appeals involve any question of procedure, or any other question of law, a special appeal shall lie from such judgment.

Here I would stop.

Suggestion.

If the plaintiff sue upon a written document in his own possession or power, or rely upon &c. &c. Sections XCI, XCIII, XCVIII, &c. — "Transmit" "Retransmitted." Why not "send" and "sent back."

Section CI. I think that the substitution of a letter for a summons is objectionable because it seems to imply, that the person addressed is above the law, and that sum affront is offered to gentlemen upon whom summonses are served.

Sections CXII and CXXI. Is it necessary that the applicant himself should be examined? Would it not at any rate be sufficient to examine his advocate? Probably, the fraudulent removal, &c., might be as well established by the testimony of third parties.

Section CXVI. "Fresh Security." I do not think it is clear what is to be done with the defendant if he do not furnish security when first ordered to do so, under Section 113.

Section CXCIV. "The Court shall make a return &c." "The Court shall pay &c." These being ministerial rather than judicial acts, I should, with reference to the definition of a "Court," prefer the word "Judge." "Make a return." As returns are made to orders, I should prefer "inform" or some different expression.

Section CXCVII. "The name of the party producing it." What if it be produced by a witness under a notice to produce?

Section CXCVIII. I do not understand why this Section is so far separated from Section 192 on the same subject.

Section CCLXVI. As the propriety of such an order would depend on the qualifications of individual judicial officers, and not on those of a class of officers, I think the word "class" might properly be omitted. I think there should also be a provision that the local Government may withdraw such order.

Section CCLXXI. "Shall record, &c" I would substitute "may record," lest the demeanor of each witness should necessarily become the subject of a separate treatise.

Section CCCXXXIII. As the District Moonsiffs' Courts are sometimes closed for some weeks on account of the death illness or absence of the District Moonsiff, I think that the principal Civil Court of the District, should have power to receive payment, or to order any other Court in the District to receive payment.

Section CCCL. "The Court shall issue a notice."—I would insert after "shall" the words "before issuing a warrant," or words to that effect.

Section CCCLXXIX. "Provided that."—I think this expression inelegant in this place. Suggestion, "until the claim" &c.

Section CCCIV. "Eventually consummated." Perhaps this is unnecessarily grandiloquent. I would say. "If the proceeds of the last (or second) sale be less," &c.

Section CCCCVIII. After the words "from the date of the sale" I would insert "of immoveable property."

Section DXII. "No award shall be liable to be set aside except on the ground of corruption or misconduct of the arbitrators or umpire. I believe that similar provisions in the old regulations have led to the present disuse of arbitration in this Presidency. Respectable men would not expose themselves to charges of corruption which were the only form of appeal from their decisions. I think it would be preferable either to allow an appeal in the usual form or to make the award absolutely final.

Sections DCLIII and DCLIV. It is not very clear to my mind what is meant by "forwarding the case." The facts constituting the case for the prosecution cannot be forwarded, though the papers relating to the case or the witnesses who may depose to the facts of the case may be forwarded.

RAJAHMUNDY,
18th November 1861.

(Signed) J. R. KINDERSLEY,
Acting Civil Judge.

From S. RUNGLAH, District Moonsiff of Rajahmundry; to the Acting Civil Judge of Rajahmundry, dated 11th October 1861.

I have the honor to acknowledge the receipt of your Order dated the 12th ultimo, forwarding for my opinion, a copy of the Bill to consolidate and amend the laws relating to the Civil Procedure of Courts.

I regret, that I had to go through the Bill amidst the pressing duties of my office. I have not, however, failed to bestow upon it that degree of attention which a subject of such grave importance demands.

3. I am of opinion, that the alterations and additions, which the Bill proposes to make in the existing law, are not of a little value; that the Bill embraces a complete and successful system of Procedure adapted to the recent changes in the judicial agency, and that it calls for no amendment.

4. I would state my reasons if I have not apprehended, that I would be making this communication unnecessarily long.

From J. RATLIFF, Esq., Civil Judge of Nundial; to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Fort Saint George, Madras, dated Kurnool, 24th November 1864, No. 15.

I have, with advertance to your Official Memorandum No. 294, under date 7th November 1864, the honor to state that a since careful perusal of the drafts of proposed Civil Procedure Code and Chapter I of proposed Code itself, has suggested neither necessity or ground for observation, at the hands of

Your most obedient Servant,
(Signed) J. RATLIFF,
Civil Judge.

From M. J. WALHOUSE, Esq., Civil and Session Judge of Mangalore; to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Madras, dated Mangalore, 22nd November 1864, No. M. D.

In reply to your Memorandum of the 17th instant, No. 307, I have the honor to state that no observations of any moment have occurred to me on looking through the Indian Civil Procedure Code and the Indian Civil Code, Chapter I. The former appears to me framed upon a compendious and useful plan, and the additions over the existing Code calculated to facilitate reference and increase clearness.

2. I beg to suggest whether Section 407 might not be omitted, and whether in Section 409, in place of the words "the Court shall pass an order confirming the sale" the words "the sale shall become absolute" might not be substituted. Any such order or confirmation might be taken to stand in place of the certificate mentioned in Sections 412, 413, and thus relieve purchasers from the necessity of producing the stamp paper on which, it is presumed, the certificate should be written. The mention of the confirming order in Section 410 would thus also have to be omitted. I have not noticed any other provision calling for question or comment.

From H. MORRIS, Esq., Acting Civil Judge, Chicacole; to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Fort Saint George, dated Chicacole, 22nd November 1864, No. 449.

With reference to your Official Memorandum of the 7th instant, I have the honor to send the opinions on the Bill "for consolidating and amending the Laws relating to the Procedure of the Civil Courts of Judicature in British India" from two of the District Moonsiffs under my jurisdiction; but I am unable myself to make any observations on it or on the Bill entitled "the Indian Civil Code Chapter I," as I have only joined the Court recently, and have not had leisure to study them attentively.

Memorandum of proposed Additions to, and Amendments in, the Bill "to consolidate and amend the Laws relating to the Procedure of the Courts of Civil Judicature in British India," submitted by G. DAUSIAH, District Moonsiff of Teekaly in Ganjam.

Section X. Subject to the pecuniary or other limitations as are prescribed by any law for the time being in force, the Courts of each grade shall receive, try and determine all suits cognizable by those Courts, if in the case of suits for land or other immoveable property, or in the case of suits for money due on bonds or other instruments wherein land or other immoveable property shall have been mortgaged or hypothecated, the land or property shall be situate, or in all other cases if the cause of action shall have arisen, or the defendant or any one of the defendants if there be more than one defendant, at the time of the commencement of suit shall dwell or carry on business, or personally work for gain, within the local limits to which their respective jurisdictions may extend.

I consider this Section should be more extensive with reference to Section LIX of the Bill, and to mortgaged or hypothecated property whereupon execution of a Decree does always rest. I, therefore, write this Section anew as it occurs to me.

Section XVIII. A claim for land, and a claim for the mesne profits of the same land, shall be deemed to be distinct causes of action strictly within the meaning of the last two preceding Sections and no other.

If many causes of action such as claims on bonds or other different instruments or on verbal promises, &c., be joined in the same suit, unavoidable delay will occur in the disposal of the entire suit, which would stand on the file for an unlimited period in a complicated position. I find no harm if such suits are separately filed and separately numbered, which would tend to a speedy disposal of each suit.

Section CXCVI. I do not think this Section is at all requisite. It will cause great inconvenience in sending up documents to the Collector's Office to be stamped. The Courts endorsement under Section CXCIV of the Bill, may be allowed to stand with as much force as if the document had been properly stamped.

Section DCLII. I consider this Section should also include Sections 172, 173, 174, 183, 184, 186, and 187, of the Indian Penal Code, and the words "in the presence of the Court" be omitted.

Sections 172 and 174 of the Indian Penal Code are required to be included in this Section, with reference to Sections CCXXXV, CCXXXVI and CCXXXVII in the Bill. Section 183 is also important to be included, as in cases of resistance to Civil Process to attach and seize property in the execution of Decrees, Courts now seem powerless. The other Sections are also of similar importance, as far as I could think.

TEEKALY RAGHOONADAPORE,
19th November 1864.

(Signed) G. DAUSIAH,
District Moonsiff.

Memorandum of proposed Additions to, and Amendments in, the Bill "to consolidate and amend the Laws relating to the Procedure of the Courts of Civil Judicature in British India, submitted by V. SEETAPATHI, District Moonsiff of Aska.

Sections CCXCVIII and CCXCIX. In certain Courts, hearing of suits may be before Assessors.

These Sections may be made extended to the Courts of Small Causes, because the single Judge appointed under Act XLII of 1860 to make quick disposal of Small Causes may have some assistance.

Section CCCIV. Judgment what to contain.

Judgment may contain an abstract of the pleadings and the nature of exhibits besides the particulars mentioned in the Bill, because the reader can be able thereby to understand the case from its beginning.

Section DXXVIII. Appeal to lie from all decrees when expressly prohibited.

This Section as well as the Sections connected therewith may be made extended to the Courts of Small Causes, or a reference shall be allowed to be made under Section 13, Act XLII of 1860, in every case in which the party may wish to appeal, because if no appeal or reference be allowed to be made, no party can get remedy in cases in which the single Judge may have an error.

(Signed) V. SEETAPATHI.

ASKA, 18th October 1864.

From H. MORRIS, Esq., Acting Civil Judge, Chicacole; to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Fort Saint George, dated Chicacole, 24th November 1864, No. 453.

In continuation of my letter of the 22nd instant, No. 449, I have the honor herewith to forward the opinion of the District Moonsiff of Berhampoor on the Bill "for consolidating and amending the Laws of the Civil Courts of Judicature in British India."

Section III.—It is better to prefix (S) within parenthesis to the number of Sections than to affix the words "Small Cause Court" to the Sections.

Section XII.—This Section should be applied for Small Causes also.

Section XVII.—One Suit of Moonsiff Cause in which two or more causes of actions are joined, if separated, for trial, sometimes it might turn into Small Causes; then, how is the Court to proceed on their trial whether in the manner as in Small Causes or that of Moonsiff Causes.

Section XXVII.—Why is not this Section applied to Small Causes?

Section XXXVII.—Why are not the servants of Civil and Revenue Departments allowed to do so, and whether such persons residing in the station of Court are, also, allowed to do so?

Section XXXVIII. Why are not the other Agents in Section 26 authorized to appoint advocates as in this Section.

Section CVIII.—For "shall not proceed" read "shall proceed."

Sections CXIV, CXXIV and CXLI.—The orders should be open to appeal by plaintiff both and defendant.

Section CLXIII.—The Court will adjourn the hearing of suits for three successive Courts and then in the last Court pass *ex parte*.

Section CLXVI.—Who is to pay the costs of such notice?

Section CLXXI.—Can a defendant plead on behalf of another defendant who is alleging contrary to former?

Sections CLXXII and CLXXIII.—"Shall receive" through whom?

Section CLXXV.—The defendant is allowed by this Section to proceed on the case already decided, for having the decision set aside; but no provision appears to have been given in the Code, for the defendant to proceed on the case pending, which has passed over the stage of 1st hearing (*i. e.*, after the issues are settled) *ex parte*, for having the *ex parte* set aside:—as the Section 164 does not give this provision.

Sections CLXXIX and CLXXX.—These Sections will, of course, be applied to Small Causes also.

Section CLXXXI.—This Section will also be applied to Small Causes, but the statements therein may be allowed to be written on plain paper. And these Statements will be presented in the Court at the first hearing or before it in Moonsiff Causes, and at the final hearing or before it in the Small Causes.

Section CCXX.—The applications made for witnesses will, plainly and in details, show that such issue or point in the suit is to be proved by such witnesses; and an application will, also, be made to show that such issue is to be proved by such document.

Section CCXXXV.—Does the proclamation mean the copy of *summons* to be fixed to the outer door, or a proclamation is to be issued in another form?

Section CCXXXVII.—If in Small Causes also the rules of proclamation and attachment, enlarging the time and adjourning the Courts occasionally, be allowed, the cases cannot be closed and decided soon. It will take as much time as Moonsiff Causes, and the minimum number of decisions should, therefore, be reduced to 20 a month: the provisions may, therefore, be allowed to issue warrant to the witnesses just in the opening of the case.

Section CCLIX.—The Witness may be committed to Jail if the Jail be in the station, otherwise it would be better to send him to the lock of the Police Station House or keep him in the custody of Nazir.

Section CCLXIII.—“Orally examined.” It is quite fatal to the parties if the “orally” means not to take down the evidence in writing at all.

Section CCLXV.—The same way of examining the witness may be allowed in Small Causes, to enable the Judge to find his inadvertencies when the case comes for review.

Sections CCLXVI and CCLXXI.—There is no reason why these Sections should not be applied to Small Causes.

BERHAMPOOR,
21st November 1864.

(Signed) IMAM OODEEN SHERRIFF,
District Moonsiff.

From J. WILKINS, Esq., Judge of the Court of Small Causes, Masulipatam; to J. D. MAYNE, Esq., Assistant Secretary to Government; Legislative Department, Fort Saint George, dated Masulipatam, 29th November 1864, No. 339.

Agreeably to the Order of Government, dated 6th July last, forwarding for my opinion copy of a Bill for consolidating and amending the laws relating to the Courts of Civil Procedure in British India, I have the honor to observe that the Bill contains very useful improvements and nearly all that is wanting in the Procedure of Act VIII of 1859. A few useful additions have suggested themselves to me, which I beg to offer below.

2. It would, I conceive, render the Act more perfect by adopting the plan of the Criminal Procedure, Act XXV of 1861, Section XXII, in defining the jurisdiction of each of the Courts, in connection with Section X, instead of leaving that to be ascertained from other Acts and Regulations. This would be particularly useful to parties having occasion to resort to the Courts, who are often at a loss to know before what tribunal they have to apply to for relief.

3. According to Section XV, every suit ought to include the *whole* of the claim arising out of the cause of action, and the only ground on which a suitor is permitted to relinquish any portion of his claim is, whenever he may be desirous to bring the suit within the jurisdiction of any Court. It often happens that a party is inclined to relinquish a small portion of his claim to save excessive stamp and eventual costs, which, he finds, would greatly exceed the amount he is prepared to forego. There appears no objection to concede to a suitor this privilege, and I would, therefore, suggest its being added to the Section in question.

4. According to Section XXV, only three classes are authorized to appear in Courts with applications, *i. e.*, the party in person, or his recognized agent, or an advocate duly appointed to act on his behalf. The following Section describes the recognized Agents of parties by whom such applications and appearances may be made; among them are, “persons carrying on trade or business for, and in the name of, parties not within the jurisdiction of the District Court; also

persons being ex-officio or otherwise authorized to act for Government in respect of any suit or judicial proceeding; and persons specially appointed by an Order of the Government at the request of any Sovereign Prince or Independent Chief, &c.” In the absence of any other provision to the contrary, these Agents appear, according to the provision of the said Section XXV, to be compelled to appear before the Court in person with all applications they may have to present or whenever the parties are required to appear, and they may not depute an authorized Vakeel of the Court to represent them, which, in many cases, I conceive, will be attended with very great personal inconvenience to the said Agents. It appears, therefore, desirable that the same permission to appoint an Advocate of the Court accorded to the Agents of Military officers and Soldiers under Section XXXVIII, might be extended to the Agents appointed under Section XXV without any risk.

5. It appears also more desirable that the parties referred to in Section XXVII should be represented by an Advocate of the Court, who is a responsible person and in a position to ascertain the identity of the party he is required to represent, than by an Agent, who may be a stranger to the Court and the fact of whose Agency it may be impossible for the Court to ascertain: hence, after the issue of orders upon the appearance of any reputed recognized Agent, the party may ignore the said Agent, and leave the Court in a dilemma.

6. I would propose that jewels and other property of undoubted value be likewise received in lieu of security under Section XLVIII, as parties called upon to furnish security have sometimes such short notice that they are unable for sometime to furnish any other security than jewels or title deeds belonging to real property &c., the actual value of such property and their liability to other claims can always be ascertained by the Nazir of the Court, that the permission to produce them is not likely to lead to abuse or inconvenience.

7. Section CCCIV appears inadvertently to be made to apply to Courts of Small Causes, as by the present Procedure the points for determination and the reasons for decision are not required in the judgment of any of those Courts.

8. The Courts might, I submit, be empowered to award damages to defendants as in Sections CXVII, CXXVII, CXXXV, and CXLII, in undoubtedly false complaints of a frivolous and vexatious nature.

9. There appears generally a misapprehension of the provisions of Section CCCCXXIII and CCCCXXIV even as they appeared in Act VIII of 1859, and I am informed that a difference of practice prevails in different Courts in carrying out their provisions. The concluding provision in the latter Section appears dubiously worded, as it effects the claims of mortgagees to mortgaged property attached and to the proceeds when it is sold by judgment creditors in execution of decrees.

From A. W. PHILLIPS, Esq., Civil Judge of Chingleput; to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Madras, dated Chingleput, 30th November 1864, No. 172.

With reference to the Proceedings of Madras Government, Legislative Department, under date 6th July 1864, and the Order thereon of the same date No. 180, I have the honor to state that I have carefully perused the Code of Civil Procedure and to submit the following remarks.

Section XXXVI.—It would save much delay if, instead of serving summons on the Collector or Government Pleader at the District Court, one of the Vakeels in the Moonsiffs' Courts was appointed to receive such as the advocate on the part of Government and to get a fee for the same.

Section XLIX.—I cannot see that the verification of a plaint or written statement is productive of any good whatever. Plaintiffs will verify their plaint, however false they know it to be, because, they are perfectly well aware how difficult it is, to convict of fabricating false evidence.

Section LXXI.—Provides for the personal attendance of plaintiff or defendant, should Court see reason to require; but nothing is said about the penalty the Court is empowered to impose should they *not* attend on the day specified.

Section CCXXXV.—Declares that if any witness or other person who is summoned shall fail to appear at the time and place, named in the summons, without giving satisfactory reasons, he shall be liable to have his moveable property attached; but nothing is said about what is to be done if the party, as often is the case, has *no property*, but the cloth round his waist.

Section CCXXXVII.—Speaks of imposing a fine under the provisions of any law for the time being in force, but I am not aware of any law which *does* empower a Judge to impose a fine in such a case, he can only commit the offender to the Magistrate under Section 174 of the Penal Code, and this involves so much trouble that it is almost invariably allowed to pass.

Sections CCXLV and CCXLVI.—Refer to questions arising in the Courts relating to the law of the religion of any suitor; and provides that the Court may take the evidence of any person *learned in such law* or refer to any *recognized authority*; but, in the Mofussil, it is impossible to meet with persons learned in such law. Had there still been a Pandit in the High Court to whom to refer, or a law officer in the District Court, it would be different.

Sections CCXCIII and CCXCIX.—Treat of Assessors.

I cannot see the use of these in either *Civil* or *Criminal* cases; their opinion is declared to be in no way binding upon the Judge with whom the decision rests, and the asking their opinion savors of a farce.

Section CCCCIV.—I think will deter people from bidding at all, unless there is some modification.

Section CCCCLXXXIV.—Says that although a party may register his bond, as laid down in Section CCCCLXII, there is nothing to prevent him from bringing a suit to recover the amount due thereon, subject to the rules of limitation, instead of simply applying for enforcement; but I cannot see the use of granting this indulgence unless *good reason* is given for not having applied for enforcement within prescribed time.

Section DXII.—It appears to me that the losing party will *invariably* set up some objection on the ground of illegality, corruption, &c., and that the award, after much delay, will have to be made by the Court at last.

If parties agree to an arbitration, the understanding should be that that the award of the arbitrators is *final*.

From A. W. PHILLIPS, Esq., Civil Judge of Chingleput, to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Madras; dated Chingleput 9th December 1864, No. 177.

I have the honor to forward herewith copies of the opinions of the District Moonsiffs of Conjeeveram and Tripassoor on the proposed Code of Civil Procedure.

From C. VEERASAWMY, District Moonsiff, to A. W. PHILLIPS, Esq., Civil Judge of Chingleput; dated 11th November 1864.

In acknowledging the receipt of your Honor's Takeed, dated 8th instant, calling upon me to submit my opinions on the proposed Code of Civil Procedure in supersession of Act VIII of 1859, as well as on the 1st Chapter of the Indian Civil Code, copy whereof was furnished to me on the 1st instant, I have the honor to state that the 1st chapter alluded to does not relate to Hindus and Mahomedans, and I consequently feel myself incompetent to give any opinion of mine about the subject therein treated.

2. As for the proposed Civil Procedure Code, I beg to state that not having expected to be called upon so soon as now to give my opinion on it, which contains nearly 700 Sections, I am sorry I have not been able to go through it as attentively as possible.

3. From the slight perusal I have had of it, I find the Bill proposes to consolidate all the laws now existing relating to the Civil Procedure, and does not seem to differ materially with the present laws.

4. I respectfully beg leave to avail myself of this opportunity to observe that the present laws of procedure which are the same as in the present Bill, have rendered the position of District Moonsiffs quite ridiculous in the sight of the people resorting to their Courts, inasmuch as they have no power to punish the offences committed in connection with suits tried before them, and processes issued from their Courts; they cannot even enforce obedience of parties and witnesses to their summons. All powers about it are entirely given to Magistrates, who cannot be expected to know so much as District Moonsiffs, who try and understand the nature of the cases before them.

5. In respect of inconvenience experienced in procuring the attendance of witnesses who treat the summonses and repeated warrants issued from the District Moonsiff's Courts as nothing, I prepared and forwarded to your Honor a Memorandum, dated 27th September last, to which I humbly crave your Honor's kind attention.

6. Here follow my unqualified observations on the Bill of Procedure. Section 16 states that causes of action by and against the same parties may be joined in the same suits. This I consider to be productive of inconvenience to the Judge trying it. Separate suits are recommended by the law of procedure of Macpherson, 1st Edition, page 85.

Section 31 states that the recognized Agent can make application and appearance, but does not say if he can plead and transact business like an Advocate.

Sections 35 and 36 relate to Government Advocates in the District Courts; they are required to receive processes of the District Moonsiffs' Courts against Government; but there is no provision contained as to who should conduct the suit or defence of Government in the Moonsiff's Court. The Government Advocate in the District Court is paid, besides salary, stated centage fee like other Advocates for the conduct of suit and defence of Government. I, therefore, recommend that in the Moonsiff's Court one of its Advocates may be appointed from time to time as Government Agent with no salary; but to receive centage fee. This would save all inconvenience.

Section 49 relates to verification of plaint; which I consider as utterly unnecessary.

Section 71 requires the personal attendance of parties in cases of unavoidable necessity; but no punishment is provided for intentional failure. Moonsiffs should be empowered to punish the failure under Section 172 of the Penal Code.

Section 85 relates to service of summons on defendants. I wish that there should be provided punishment for refusal to acknowledge its service.

Section 91 relates to the execution of summons to defendants subject to another Court. I speak from experience that peons of another Court deputed to serve the same, practice many intrigues with impunity to the prejudice of the interests of the parties. These peons know well that they are not accountable to the Court issuing such summons.

Section 97 states that in suits for immoveable property, service of summons may be made on agents in charge of such property or other immoveable property. I see people in many cases leave their property in nobody's charge, and go away to a distant country.

Section 181 states that written statement may be received from parties; but, from experience, I see that written statements are totally objectionable. These statements throw obstacles in the way of discovering the truth. In many cases I have known parties denying what is therein contained, but charging the persons who wrote it with falsehood, I always examine the parties and their advocates, and thus, preventing the possibility of lengthening the proceedings unnecessarily, establish the truth to the dismay of dishonest parties.

Sections 187 and 188, I strictly adhere to. By so doing written statements are rendered useless.

Section 235 states that if a witness absconds and avoids the service of summons, a proclamation shall be issued requiring his attendance and should he still fail to attend, his moveable property shall be attached to the extent of the cost of attachment and fine under Section 237.

Section 237 states that the attached property of witness shall be sold for cost of attachment and for fine to be imposed upon witness under the existing laws. It is not practicable to seize any moveable property of a recusant witness. In fact many of the witnesses do not possess moveable property at all. It is to be understood that there exists no law at present authorizing Moon-siffs to fine a witness. Since Section 7, Regulation III of 1802, which was extended to District Moon-siffs by Section 4, Act XIX of 1855, was rescinded by Act X of 1861, the District Moon-siffs became divested of power to fine witnesses, which power being given to Magistrates under Sections 172 and 173 of the Penal Code.

Section 265 requires the evidence to be taken in the form of a narrative instead of questions and answers. I would like to give preference to the form of questions and answers which would much help the appeal authority in understanding the drift thereof, but the narrative form would fail to do so.

Section 424 states that when any property is sold subject to a mortgage, the mortgagee shall not be entitled to any share in any surplus arising from such sale. In my opinion, the part under dash should be expunged, it being unnecessary and capable of producing confusion.

Section 456 requires that wrongful acts committed in executing decrees shall be punished by the Civil Courts, whereas there is no power of punishing given to the Civil Court.

The offences enumerated in Sections 172, 173, 174, 176, 177, 183, 184, 186, 187, 206, 207, 208, and 210 of the Penal Code are generally committed by persons connected with Civil suits, and the Civil Courts who had the power of punishing those offences, being divested of it since the Penal Code came into operation, the offenders escape punishment with impunity and the injured parties are left remediless.

Having stated my observations as briefly as possible within a short time, I have had for it, I humbly beg to be excused of erroneous expressions if discovered.

(Signed) E. VEERASAWMY,
District Moonsiff of Cunchi.

(True Copy.)

(Signed) A. W. PHILLIPS,
Civil Judge.

Observations of the District Moonsiff of Tripasoor on the following Sections of the Proposed Code of Civil Procedure.

1. In Section 23 it is not clearly expressed whether a subsequent suit for the performance of the remaining acts of the contract may or may not be brought.

2. In Section 54 it is not specified whether a supplemental plaint can be admitted for property, the mention of which is omitted in the original plaint through mistake, or want of information at the time it was presented.

3. In Section 145 it is not specified whether or not the adjustment of suits by parties by making oath before a pagoda (as has been the practice in some of the Mofussil Courts, to which I strongly object as being inconsistent to moral principles) is allowable; and supposing it is allowable, it remains to be known whether in case the consenting party fails to undergo the ordeal, a judgment can be given against such party.

4. Under Section 147 it would be better if a Clause is introduced what suit shall and what suit shall not survive.

5. The non-enactment of the Act referred to in Section 237 to the present day regarding the fine to be imposed by Civil Courts on witnesses failing to appear as ordered, entails much inconvenience, trouble and loss of time on the part of the Court.

6. Under Section 304 it would be impossible for the Judges of the Small Cause Courts to dispose of as many suits as they now do according to equity and conscience, and there would be no advantage gained, if the judgment in summary cases should contain the point or points for decision, and the grounds for decision as in regular suits.

7. With reference to the summary decisions, Section 350 appears to be inconsistent with Section 22, Act XIV of 1859, as regards the time prescribed for the issue of notice in cases of execution of decrees.

8. Section 404 provides three kinds of punishments for defaulting purchaser at one and the same time, viz, 1st loss of advance money; 2ndly, loss of all claim to the property purchased; 3rdly, to make up the deficiency (if any) in the money realized by resale. The infliction of these three punishments for simple default appears rather severe. Mitigation will, therefore, be desirable.

9. Under Section 494, pauper plaintiffs should be exempted from the operation of this Section in providing beforehand expenses of process, and should the provisions of Section 46 be made applicable to them it would be much better.

10. Under Sections 499 and 505, if the arbitrator or arbitrators wilfully neglect to complete the award within the given time or in the extension thereof, what course should be taken is not specified.

11. Under Chapter VI, a want of provision to meet the cost of the defendant in case the suit is dismissed is felt.

12. The revival of the latter part of Section 9, Regulation 2 of 1802, authorizing imposition of penalty for the institution of frivolous, vexatious, or groundless suits, will be most useful for preventing institution of such suits.

(Signed) T. CHELLAPPAH NAICKER,
District Moonsiff.

18th November 1864.

(True Copy).
(Signed) A. W. PHILLIPS,
Civil Judge.

From T. I. P. HARRIS, Esq., Civil Judge of Trichinopoly, to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Fort Saint George; dated Trichinopoly, 10th December 1864, No. 325.

Alluding to the Proceedings of the Madras Government, Legislative Department, dated 6th July 1864, No. 180, and to your Memorandum, No. 231, dated the 26th August last, I have the honor to enclose translations of the opinions of the District Moonsiffs of conad, Toriore, and Arealore.

to the Draft Code of the Indian Civil Procedure.

2. The Tamil copy of the Code in question, promised in your Memorandum under reference, not having yet been furnished to this office, I am unable to obtain the opinion of the District Moonsiff of Kulutalai.

Translation of the Urzee submitted by the District Moonsiff of Toriore, dated the 21st November 1864.

At present no objection suggests itself to me relative to the Bill transmitted with your Order, dated the 31st August last. The Bill in question together with the Proceedings of Government are herewith returned.

(Signed) APPAHVIAH,
District Moonsiff.

(True Translation.)

(Signed) T. I. P. HARRIS,
Civil Judge.

Translation of the Urzee submitted by the Officiating District Moonsiff of Conad, dated the 9th December 1864.

I have thoroughly perused the Draft Code of the Civil Procedure, and nothing occurs to me towards adding or subtracting anything therefrom.

(Signed) KRISTNIENGAR,
Officiating District Moonsiff.

(True Translation.)

(Signed) T. I. P. HARRIS,
Civil Judge.

Translation of an Urzee submitted by the District Moonsiff of Arealore, dated the 11th November 1864.

I have perused the Indian Civil Procedure, and have nothing to submit further than stating that the Procedure in question is very clear for conducting business in a manner simpler than the measures hitherto in force for the discharge of Civil duties.

(Signed) RAJAGOPALA NAICKEN,
District Moonsiff.

(True Translation.)

(Signed) T. I. P. HARRIS,
Civil Judge.

From H. MORRIS, Esq., Acting Civil Judge of Chicacole, to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Fort Saint George; dated Chicacole, 6th December 1864, No. 473.

In continuation of my letters of the 22nd and 24th instant, Nos. 449 and 453, respectively, I have the honor herewith to forward the opinion of the District Moonsiff of Chicacole on the Bill "for consolidating and amending the Laws of the Civil Courts of Judicature in British India."

With reference to the Order of Government, No. 180, dated 6th July last, I beg to state my objections and reasons on the Bill of Civil Procedure as follows,—

Sections 60,—551.—It may be impossible to a plaintiff or appellant ordinarily residing out of British India and not possessing any land or other immoveable property within the British India to tender security, and, in some cases, it may also be impossible to such plaintiff or appellant even to deposit ready cash, &c. in security, and, by Section 318, the Court is empowered to execute the decree at the same time it was passed if the amount shall not exceed 1000 Rupees, therefore, I think that a provision may be made for taking security from plaintiff or appellant only in those cases in which the defendant or respondent can satisfy the Court that he cannot recover his costs unless such security be taken.

Sections 116, 121, 134, 136.—When the Court commits the defendant to Jail or places him in custody under the provisions of these four Sections, there must be a provision for disposing of the suits out of order.

Sections 117, 127, 135, 142, and 465.—If the loss sustained by the defendant under these Sections exceeds 1000 Rupees, he should be entitled to recover the sum of such loss, therefore, there should be a provision that the defendant is to recover the loss so sustained by a separate suit.

Section 120.—It is impossible to every plaintiff to produce a list of the personal property of the defendant containing the estimated value of each article thereof, therefore, there should be a like provision in this case as in Section 346, that in the case of the plaintiff being unable, to produce a list of the defendant's personal property, he may apply for general attachment of such property.

Section 323.—If the defendant fail to comply with the order of the Court to perform the contract, &c., within six months, and his property has not been attached by any cause, I think it necessary to detain the defendant in Jail until he would consent to perform the contract, &c., according to the terms of the decree, or until the plaintiff shall fail to pay the monthly batia to the defendant.

Sections 334, 445.—It is provided by Section 334, that no adjustment of a decree should be recognized by the Court unless such adjustment be made through the Court or be certified to the Court by the decree-holder; but the Section 445 provides for the determination of any sums alleged to have been paid in satisfaction of a decree by an order of the Court, but not by a separate suit. It is apparent that the former section is in opposition to the latter, and I think that the course laid down in the latter Section is rather tedious and unnecessary to be pursued by the Court, while the plea of payment on one side and the denial on the other might have formed a new cause of action, and, therefore, might have been made the subject of a separate suit.

Section 345.—It is expensive, and in some cases impossible to plaintiff to procure from the Collector's Office an authenticated extract from the register of lands paying revenue to Government; and by Sections 374, 386, and 399, the Collector may be acquainted with the attachment of such lands; therefore, it is in my opinion unnecessary to require the applicant that his application should be accompanied by the above extract.

Section 422.—It appears from this Section that the Court may pass an order, if it thinks reasonable, contrary to the purchaser's right, and that the purchaser should bring a suit to secure possession of the immoveable property bought in the Court's auction; but it would be proper if the purchaser of the attached property be placed in possession thereof through the Court only: and in case of the person other than the defendant who would have been dispossessed of the immoveable property, he should establish his right by a regular suit.

Section 451.—I do not think it necessary to send copy of the decree and the certificate, &c., to the Principal Civil Court instead of sending to the Court by which the holder of the decree wishes the decree to be executed.

Sections 647 and 648.—If it is necessary to a District Moonsiff who has only two peons under him to send the offenders mentioned in these Sections to the Courts of Session or Magistrate, which would be situated at some distance, it would be impossible to send the offender in custody of the peons, but, in my opinion it would be proper to empower the District Moonsiffs to send such offenders in custody of the Police.

It is stated in some Sections of the Code that processes, &c., may be signed by the Registrar or Clerk of the Court where there is such an officer, therefore, the other Courts in which there is no such officer should be empowered to affix the sypher to the processes, &c., on the responsibility of the Judge to enable him to attend to more important work.

(Signed) S. KANKACHELLUM,
District Moonsiff of Chicacole.

The 5th December 1864.

From C. COLLETT, Esq., Civil Judge, Vizagapatam; to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Fort Saint George, dated Vizagapatam, 20th December 1864, No. 337.

I have the honor to submit my views on the amended Code of Civil Procedure according to Order of Government, 180, under date the 6th July last.

2. No remarks have been furnished to me by the Moonsiffs of this Zillah, translations and spare copies of the Code not having been received.

THE AMENDED CODE OF CIVIL PROCEDURE.

General Remarks.

If I may say so, that the language of this Code might be made much more terse, the same objection applies, of course, to the existing Code. I have tested my objection by trying my hand at several Sections, the language would be less polished, but much shorter. It strikes me that all our Indian Codes (except the Civil Code, Chapter I) compare unfavorably in this respect with the French Codes.

I object though greatly to the splitting up of the Sections, it may make the Code in form more correct but facility in every day use is the great thing. Why should a Judge or practitioner have to remember 700 Sections when 350 would answer the purpose? And every one who uses a Code knows how the numbers of the Sections must be learnt. Such a Code is not so much used during the progress of the trial, as during the rapid despatch of miscellaneous motions in every one of which some point of practice is sure to be involved. Of course, no bookseller would ever think of publishing the Code with Roman numerals, why should the official copy use these troublesome figures?

An official index is to be published it is to be hoped that it will be much more minute than any yet published. Compare, for instance, the index to the Penal Code with the index to such a book as Roscoe's evidence.

CHAPTER II.

There are no rules, I think, in the Code regarding infants and lunatics when parties to a suit. As to infants especially provisions are much needed. It is unsatisfactory, and is founded on no law. The effect of a decree against an infant also ought to be stated. It does not appear whether one creditor or shareholder could sue on behalf of himself and others, nor whether a trustee wishing for a declaration as to the rights of several *Cestuis-que trustent* could bring a suit for that purpose, nor whether there could be a suit for the administration of a deceased person's estate, nor where numerous suits are brought on the same right, whether they could be consolidated. The recent instance before V. C. Kindersley of 134 suits upon the same patent is a striking example. Rules for the valuation of suits for the purpose of stamps may perhaps belong more properly to a Stamp Act, but they would not be out of place in a Code of Procedure; they affect also the taxation of costs at least in this Presidency, but the whole system or want of system of costs is most unsatisfactory. It is especially as to costs on interlocutory motions.

Section VII.—“In any other Court.” Will this include a Foreign Court, e.g., a Court of French India or a French settlement?

Is a judgment ever open to revision? The decree is, but surely never the judgment. “Revision” is not, I think, anywhere else used, but only the terms “review” and “appeal.”

“Dwell” shall have arisen.” These words have no doubt been well considered, but I would have as well to define them. There has been a good deal of learned discussion as to what is the *locus contractus*. Suppose the Defendant domiciled in a French settlement, the choice of law by the parties might have the effect of there being applied in our Courts a different law of procedure than would be applied in the French Courts.

“Dwell.” I think it would be as well to define this word, it may mean “shall be domiciled” or it may be stretched to “shall temporarily be.” See case in 1 Indian Jurist 85, that tem-

porary or occasional residence is not enough but *quære* this case. A cause of personal action having arisen in Pondicherry, what is a sufficient dwelling in the Cuddalore Zillah to give our Courts jurisdiction? Are our tribunals open where both parties are foreigners, who are merely transeuntes? Two Persian horse-dealers have some dealings at Hyderabad; come into Masulipatam and there quarrel about the settlement. Can the one sue the other there? The French law would not, I think, allow of it; but would if the Plaintiff was a Frenchman and not a foreigner; but our Code has regard only to the defendant.

Section 24.—This is of course copied from the 15 and 16 Victoria C. 86, S. 50. I do not know that the decisions on that Section can be regarded as very satisfactory. See them collected in 1 Seton on Decrees page 23, I would point especially to what L. J. Knight Bruce said as to declarations of future rights in *Lady Langdale v Briggs* 26 L. J. Cl. 45 and 46. In England the rule is that the case should be such that the Court could if necessary act on it by granting consequential relief. The Madras High Court (1 High Court Report, 182) seems to have held directly the contrary that a declaratory decree never can be acted upon. I think, therefore, that this Section should be more explanatory. This and other Sections taken from the English law are suggestive enough to those acquainted with that law, but by the majority of the Courts they are not appreciated. I would expand the Section so as to settle any doubts arising out of the above cases. I think too it might be made to include what would in substance be equivalent to suits to perpetuate testimony. I refer particularly to such Acts as V and VI Victoria C. 69 and the 21 and 22 Victoria C. 93. Questions of adoption for instance would often be well settled by such suits.

CHAPTER III.

Sections 25 and 30.—I confess that I never could understand on what principle it could be improper to make it impossible for a Miss Shedden to waste the time of three learned Judges for a whole fortnight. The Court should have some discretion to control the folly of a man who has himself for his client. If law is a science which can seldom or never be fully learnt in a life time, and if the practice of the law is an art acquired only by much study and experience, why should the time of the Court be at the mercy of an ignorant and presumptuous person? The French Code requires that parties should always be assisted by professional men and by Article 85, the Court has the discretion to refuse to allow the party to address the Court "*S'il reconnaît que la passion, ou l'inexpérience les empêche de discuter leur cause avec la décence convenable, ou la clarté nécessaire pour l'instruction des Juges;*" which must almost always be the case. It is simply wretched to see a man trying to conduct his own case and examine his own witnesses. I think that except possibly in Small Cause Courts, it should be left to the discretion of the Court to allow a party to conduct his own case or address the Court. I would alter Section 30 for "such party may appear," &c., read "such party shall appear, &c., unless the Court in its discretion shall allow him to appear and act in person" &c.

Section 36.—My experience is that the employing a Government Pleader up country on a monthly salary is now-a-days rather a waste of public money, though the Government is usually very slight and somehow the Government never has the luck to retain the best man. I have presided in more than one Court where the Government Pleader had little or no private practice.

Section 45.—No time is fixed for service of process. May a Christian be well served with process on a Sunday?

CHAPTER IV.

Section 50.—I would draw attention to the judgments in this Section are not sufficiently explicit nor the result is a correct view of the law.

verification be objected to.

Indian Jurist 45.

Section 54.—Amendment of plaint. No power is given as to whether Court should allow or refuse amendment or as to effect of return for amendment. It should be amended or as to effect of return for amendment. It should be amended or as to effect of return for amendment. It should be amended or as to effect of return for amendment.

Court Reports) that time should be fixed and the law of limitations ceases to operate—*Quære* this case.

Section 60.—If the defendant on being served does not appear and ask for security for his costs why should the Court of its own motion be more careful of his interests? "Any land," &c. must surely mean "any sufficient land."

Section 61.—To this there are the like objections. Further why "sole plaintiff"—suppose several plaintiffs so residing abroad, or if one plaintiff is within the jurisdiction, he may not be more than slightly interested, and joined perhaps to evade the requisition of security. In England I believe the absence must be voluntary as distinguished from absence in the service of the State. It seems a fair and reasonable distinction. Suppose a plaintiff in confinement, security would be required in England. So also from a foreign Company suing as plaintiff. So also if plaintiff has no fixed residence or is on a voyage, and there is nothing to show when he may return, but the requisition should always be on motion by the defendant.

Section 83.—Or a partner.

Section 91.—"Shall transmit . . . to any Court." It often happens that defendant is noted as living in such a village, the officer goes and finds that he lives in an adjacent village just within the next Moonsiff's Court's or Civil Court's jurisdiction, he ought to be able to make a good personal service in such a case—all service through another Court leads to much difficulty in case of service being disputed and often tempts to such an objection.

Section 92.—Suppose a lunatic in confinement.—Substituted service on keeper of Asylum has in England been refused.

Section 94.—"If there be a post." If there be not what then? A man goes off to Australia virtually his address is unknown. Plaintiff sues to foreclose a mortgage, Section 89, does not apply, for "is keeping out of the way, &c.," is a condition precedent, I would add, therefore, to Section 89 "or cannot otherwise be served" or some such words.

Section 110.—I suppose that this Section might properly be so worked as to turn the suit in substance into an interpleader suit. If not, there is not, I think, any provision for such a suit. Any how it is indispensable that the party who seeks to drive others to interplead should at once bring the money into Court and for that there is, I think, no provision. These kind of cases do arise, and I have known a lower Court to drive the parties interested into two or three suits when one would have answered, but there is danger of collusion unless the money in dispute is brought in at once.

Section 120.—No doubt it is right to guard cautiously such a process as an attachment before judgment, but this section often throws insuperable difficulties in an applicant's way; he knows defendant a shop-keeper is fraudulently disposing of his stock of goods but it is simply impossible to specify each item of goods in a shop or godown or furniture in a house. I think some discretion should be left to the Court, though I know quite well how often the process of attachment is abused by the Courts in India; in some places it is almost a matter of course for a plaintiff to move for an attachment, and it is granted almost as an order of course.

Sections 136 to 142.—These are no doubt in part suggested by the C. L. Pro. Act 1854, Sections 79 to 82, but if I understand them rightly it is not necessary as under the C. L. Pro. Act that the wrongful Act should have been actually commenced, but there may be a suit and an injunction to restrain a mere threatened injury. If it is not so, it certainly should be. There seems to be one curious omission. Section 140 gives a remedy for disobedience, but there is no such remedy for breach of an injunction under Section 136. Surely it is just as much needed—there is the same omission in the present Code. In Section 138, I would introduce words allowing the Court to take security from a receiver; the late Madras Sudder held that security ought not to be taken—the perfect novelty to most Courts of the provisions regarding injunctions and specific performance has led to their being extremely little used as yet, though it is impossible to have more beneficial remedies.

Section 138.—"Application &c." This would I suppose permit of an allowance being granted to parties pending litigation similar to 15 and 16 Victoria C. 86, Section 57.

Section 141.—"Appeal by the defendant" The refusal of an injunction may work irreparable injury to the plaintiff and it is every day practice in England that such a refusal may be appealed from. The case of *Anwyl v Jones*, 22 L. J., 995 Ch. is an example of an appeal on the same day from a refusal and the Lords Justices made an interim order and clearly if the order had not been made, the utmost injury to the plaintiff might have ensued. I cannot see why our practice should be different.

Section 145.—"Shall be disposed of."

To check the lax practice of our Courts, this Section might be clearer, and go on "a decree being made whenever execution of the adjustment is to be had through the Court." The old practice was to make no decree upon a Razinama and the utmost laxity did and indeed does exist as to granting execution upon Razinamas. The next Section shows only by inference that a decree is necessary for execution. I assume that the Court may refuse to make a decree in accordance with a Rāzināmā the terms of which it is not possible or would be most improper for a Court to attempt to execute. I have known examples of the most extraordinary Rāzināmās; acts agreed to be done of which a Court could not possibly enforce specific performance or agreements which would compel the Court to undertake the management of real estates for years; I recollect one Razinama the execution of which would have extended over 40 years. The form of the decree might be laid down. I think the most proper form is "—that the said deed of compromise be taken and read as and for the decree of this Court." Of course very nice questions as to construction may arise in course of execution. Upon the whole I am inclined to think that the granting of decrees upon agreements or compromises ought to be strictly defined and limited to certain of the simpler kinds of decrees, and it should be shown that the Court may refuse to make a decree.

Sections 147 to 156.—Suppose a total abatement but various proceedings had in ignorance of the fact; what is the procedure to be adopted? If there is a real contest as to who is the legal representative of a sole defendant, the plaintiff of course takes the chance of another suit and costs, but meanwhile he may get a decree and execution against the estate of the deceased and irreparable loss may be done before the right heir succeeds in making out his title. Or plaintiff may be unable to say which of two persons is the right heir, he must name one, but he cannot name both, and he is certain of having a second suit, and perhaps having to prove his case against the estate twice over. Why should not the Court nominate some one to represent the estate for the purposes of the suit? See 15 and 16 Victoria C. 86, Section 44.

Section 154.—"Shall proceed in the same manner."

But of course the new defendant will be at liberty to plead any defence appropriate to his character of legal representative.

What is the procedure on the birth of a necessary party pending the suit?

Section 163.—"And it shall be proved, &c."

Why should not the return of the service be taken as *prima facie* true; it is made by an officer of the Court. There seems to be really no use in having the batta peon up and making him swear that he duly served the process. He would always be willing to do that, but he may be 50 miles away serving some other process—almost invariably he is the only person who could prove service—until the case is called on no one can say if defendant will make default. I have known a defendant to be actually in the veranda of the Court, and purposely not answer when his name was called in Court.

"Hear the suit *ex parte*."

The meaning of this is not defined. In practice a plaintiff is required to produce some evidence in support of his case, often very needless and vexatious delay occurs. A procedure is needed by which a plaintiff or a defendant making default may move to take the plaint *pro confesso* against the defendant, and the Court should have a discretion to make such a decree as may appear to be just accordingly at once. I say at once because an attempt to serve afresh may cause great delay, and now if a case against a defendant is set down *ex parte* at a hearing to settle issues, the Court may then fix any day, the next day if it likes, for final hearing. I always fix a short day for hearing finally a case with is entirely *ex parte*. I can see nothing objectionable in some such a provision

as that in the C. L. Pro Act 1852, Section 27, though I do not appreciate the ground of the distinction as to the defendant residing within or without the jurisdiction.

Section 175.—"Within 30 days after any process," &c. I think that in practice this works very badly. I have known such cases, a defendant purposely keeps out of the way and the plaintiff knows that it is of no use taking out process of execution. But a couple of years after, the defendant returns and the plaintiff takes out execution, defendant moves to set aside the *ex parte* decree. Some examination is needed and this is only really asked for to cause delay. I think that no defendant should be allowed to move to set aside an *ex parte* decree till he has first paid into Court the full amount with costs. But I would add the precaution of causing a notice of an *ex parte* decree having been made to be served on defendant within 15 days after it is made.

Section 179.—Nothing is said as to such a deposit barring all further costs and making plaintiff liable to defendant's costs. It should do so if found sufficient.

Section 181.—In nothing do native litigants delight so much as in long written descriptions of their cases. With our plan for settlement of issues, in fact such statements are very rarely required only in cases where the Court would be certain to call for them, the only really necessary statements I have ever seen up country are those which I have compelled the parties to put in, but defendants will invariably tender some statement or other. If this Section is not to be varied by leaving statements entirely at the discretion of the Court, then I certainly think that both parties should put in their statements on the same day, and I think that day should be the fourth day (leaving three clear days) before the day fixed for first hearing. Now a defendant of course tenders his statement at the last moment.

Section 186.—"Matter irrelevant"—I would add "or scandalous and unnecessary." Natives will often try to introduce scandal, it may almost always be treated as "irrelevant" and be struck out, but it is too often allowed to stand, and the Section might be more explicit.

Section 191.—I would introduce the English practice of notice to admit documents. Section 117 of the C. L. Procedure Act, 1852, is so simple and good that it might be introduced bodily. I think the time for serving the notice should be within eight days after the settlement of issues.

Sections 192 to 198.—"And inspect," "may reject." When the first hearing is for the settlement of issues, it is surely useless for the Court to waste its time in inspecting all the exhibits, and utterly impossible very often to say whether exhibits ought to be rejected or not. When the Court has only got to settle the issues, it has nothing to do with the evidence by means of which each party intends to support his view of the issue. An exhibit is not evidence till it has been duly proved and that can only be at the final hearing, and it is often impossible to reject exhibits at the first hearing. My practice is to receive all such documentary evidence at the first hearing: at the final hearing the documents are by each side duly proved and read in evidence; they are then marked and at the close of the trial, all documents produced, but not proved, are returned. Section 192 may mean this, but it does not say so or says so only obscurely, I would read "may at any stage in the suit."

On another obscurity in the Section, see Mr. Justice Wells' remarks on Sections 39 and 128 in present Code in 1 Indian Jurist, 14. The alterations in the wording of the present Sections do not remove the obscurity. The distinction between a document being "produced" and "filed" is almost impalpable; if all that is meant is that documents returned to plaintiff are to be produced again at the settlement of issues, it would be better to say so distinctly.

Section 192.—"Recording the grounds," &c. Where is the recording to be made, on the document, on the Judge's notes or where? If a document of any real importance is rejected I apprehend that the Court will always notice that in its judgment, but to have to set forth at length the grounds for rejecting every paper an ignorant Native Vakeel tries to foist into the case is an impossibility, in practice no Court does more than note on the document "rejected, not proved," or "not evidence" "irrelevant,"—that is not recording grounds but it is all that can be done. A party has made an equitable mortgage by deposit of his title deeds, a third person ejects him, he wishes to bring a suit, but he cannot for he has not got his title deeds, and his mortgagee is not willing to produce them, and as likely as not is in collusion with the trespassor. Such a case came

in this country, but the labor of writing out every judgment is a great waste of time. A very small percentage of the decrees of a Civil Judge in appeal are in fact further appealed from; and certainly in all cases in which no appeal or special appeal lies it is useless to make a written judgment necessary; and I think that in all cases (even in the Courts of Moonsiffs, not 10 per cent. of whose decrees are in fact appealed from) it might be left to the discretion of the Judge to deliver an oral or a written judgment unless the party at the time or within four days afterwards prays for a written judgment with a view to an appeal, which in such case he ought to be bound to prosecute, by being required to make a deposit at once of at least the stamp fee on an appeal petition, the deposit to be returned on the appeal being really prosecuted, but otherwise to be forfeited. Then why should a judgment in English ever be translated? I have had several Moonsiffs who wrote their judgments in very good English, but the additional labor of translating such judgments was a great discouragement to such an excellent practice. Why should parties be favored by getting such translations? English documents and papers are constantly used in suits and parties never have any difficulty about a translation, it is really quite a superfluous provision at least in the Madras Presidency. What is the "ordinary" language of a District Court? My judgments never are translated, it is simply impossible with our establishments.

Section 300.—No rules are given as to the order in which advocates should address the Courts, and no rules in fact, I believe, have ever been laid down; but in the District Courts, up country, a certain practice has been generally adopted which is in my opinion greatly superior to that in England at a trial at N. P.

Sections 304 and 305.—These are scarcely both needed, the former I suppose is limited to Small Cause Courts; but in every contested suit in every Court an issue must be settled in fact, though it may be done orally; only the issues in Small Causes must be the simplest things possible. But why should such a Court have to record reasons for a decision not open to appeal?

Section 307.—"Necessarily incurred"—not merely fairly and properly. As it is not "necessary" according to the Code to have an advocate at all, can a fee to an advocate be rightly said to be an expense "necessarily incurred"?

Section 308.—I think the terms "judgment" and "decree" are used in the same sense as in equity Courts in England, the former containing the reasons or motives for the latter which alone is the formal order or decision. If so, I will venture to point out some Sections hereafter in which this distinction has not been kept in view.

CHAPTER V.

I do not observe any provision to secure the execution of a decree for payment of an annuity by way of maintenance to a widow or deserted wife. Decrees for this purpose are of course very common in India. There was a Circular Order of the late Madras Sudder Court under the old procedure which worked very well. Such a decree-holder might move that the defendant should show cause why he should not secure the due payment of the annuity for life decreed; and the object was generally attained by an attachment of a house or other real property which was held to give the widow a charge upon it into whose ever hands it passed; or the defendant might be required to deposit Government Bonds, &c., by way of securing regular payment. I think that these decree-holders are a class peculiarly entitled to protection, and some distinct provision is desirable.

Section 321.—"Sold subject to a mortgage." There is not that I am aware any provision for a decree for such a sale. Are Sections 321 to 334 intended merely as examples of decrees to be made, or are they intended to be exhaustive? Mortgages in the English form are finding their way into the Mofussil. There is nothing that would justify a decree for foreclosure, and yet where there is a single mortgage it would be a most convenient and speedy remedy.

Section 322.—I do not see why the remedy provided in this case should be less extensive than in the next Section. I would attach the defendant's property and imprison him till he delivered the chattel or accounted for it, why should he be allowed to set the Court at defiance and simply pay the alternative damages?

Section 330.—"Against a party as the representative." What is meant by "party"? Does it mean a party to the suit, that the representative was a defendant to the suit? If so, then the

Section seems needless, for the question as to the receipt of assets, and their application will necessarily, as it seems to me, have been disposed of during the suit, and the decree would contain a declaration or finding thereon, and the order would be that if such assets of the deceased be not found then the amount shall be levied from the defendant personally or from his proper goods. Besides in almost all cases the defendant would rightly be made personally liable for the costs of the suit.

But perhaps "party" is only used for "person" and the Section may refer only to where the representative of a deceased defendant is substituted for him for the purpose of execution. If so, the procedure is proper enough, but the Section might be much clearer. Section 342 would though suggest that this is not the object of the Section.

Section 357.—This is not satisfactory and in practice is worked very badly. Such a warrant ought to be in force for one year from its date. Now the practice is to make a single attempt to execute the warrant; it is then returned, and a fresh application to the Court is needed. A warrant returned unserved should lie in the Nazir's office and the party at any time and from time to time within a year from its date should be able to apply there, and get a batta peon to serve it without the slightest delay. I have known a defendant give great trouble from the present defect in the law.

Section 377.—Why should a debt be sold? Why should not the debtor be made to pay at once to the judgment creditor the debt due by him to the judgment debtor? Surely the provisions of Section 60 *et. seq.*, of the C. L. Pro. Act 1854, and Section 28 *et. seq.*, C. L. Pro. Act 1860, would be most useful in India; but perhaps attachable debts might be defined.

Section 390.—"Not in the possession." This does not of course prevent a sale of real property where there is a mortgage in possession. What is sold is the right title and interest of the defendant, that is in such case the equity of redemption and the only consequence of the mortgage being in possession is that delivery to the purchaser of the equity of redemption will be under Section 417 and not Section 416.

Section 418.—See remarks on Section 377.

Section 424.—See remarks on Section 321.

CHAPTER VI.

Sections 484 to 487.—I think these Sections might be a little clearer, and I would add much shorter. In Section 484 for "shall proceed" I would read "may proceed." Section 486 would seem to imply that the defendant is to be limited to the objection as to pauperism, but Section 487 says the Court may consider "any objections." I do not think that it is the proper office of a Court to discuss with a plaintiff the merits of his case. If I may say so, there is a little too much of this kind of duty cast by the Code upon a Judge. It is making him too much of an advocate, it is one thing for a Court to notice a decided bar to the suit patent upon the face of a plaint, and quite another for the judge of his own motion to examine a plaintiff and seek out objections. The proper course is that the Court should only notice such patent objections as would be noticed on the filing of an ordinary plaint; notice should then be served on the defendant, and then on a summary hearing of both parties, the Court should be satisfied that the pauper has on the merits *prima facie* a probable good cause of action before the application is admitted. My experience of pauper suits is that a Court must in this country be very cautious in admitting them, any laxity at once begets a number of purely vexatious and unfounded or stale claims.

CHAPTER VII.

Section 508.—"For the opinion of the Court" not for its judgment and decree. No appeal then will lie (see Section 528 and Section 515). It has been so held in England *Gumm v Fowler*, 29 L. J. 189, 2B. But the opinion will in almost every case be sought upon a pure question of law; there ought to be an appeal limited rigidly to an opinion upon a question of law.

Sections 514 and 515.—In both these Sections the distinction between a judgment and a decree seems to have been over-looked. Where there is a complete award, there really is no room for a judgment, all that remains to be done is to draw up a decree according to the award;

and in every case what becomes final or is open to appeal, is, I apprehend, the decree and not the judgment.

Section 516, &c.—These Sections do not seem to go so far as the provisions of Section 11, C. L. Pro. Act, 1854. Those provisions appear to me very wholesome, and besides the question about an agreement to refer not ousting the jurisdiction would be set at rest. I have seen deed between Natives agreeing to refer future differences that might arise.

CHAPTER VIII.

Section 527.—Here there is of course a necessity for a judgment, but the latter part especially of the Section might be simplified thus:—"It shall proceed to record and try or hear the same and deliver judgment thereon and make a decree accordingly upon the agreement." It seems to me as of course that if a decree directs A B, to do this or pay that to C D, execution follows in the ordinary manner without need of express words.

CHAPTER IX.

Section 555.—Notice to be sent to the Court of first instance. I do not see the advantage of this, it is only additional labor to the Appellate Court; if a party moves to stay execution on the ground that the appeal will very shortly be heard, it is for him to satisfy the lower Court on the point.

Section 560.—I have seen this work as a sort of surprise upon the appellant. I think that the respondent should, at least, as soon as the appeal is called on, state that he intends to take the objection. I think, that he should hand in the objection in writing.

Section 564.—Quite useless, no translation should be necessary when the judgment is in English, it is only throwing on the Court establishments work which when the parties want it they can get done for themselves very easily.

Section 576.—The use of the word "points" in this and every other Section should be scrupulously excluded, it is surprising how our Judges, especially the Native Judges, cling to the old and inferior procedure about giving points instead of setting issues. "Issue" is the word which should be used. If the additional evidence is to be received upon an issue already settled, the Appellate Court will indicate that issue; otherwise it will define and settle a fresh issue.

CHAPTER X.

Section 594.—I should decidedly say 1000 Rupees.

Section 614.—I am inclined to think that where an order is not open to appeal, the Court should have power to revise or review the order; the Madras Sudder Court held that this cannot be done. It must not be forgotten that orders on motions are made during the hurry apt to attend the despatch of miscellaneous business.

CHAPTER XIII.

Sections 619 and 628.—The former section will remedy a great abuse, but the latter Section gives too much discretion. Most of our Courts do not really appreciate what a review of judgment should be and great laxity prevails. The stamp should never be returned if the application is rejected. If the application is admitted and the case set down to be heard for review of judgment, the applicant should be required to deposit before hand the costs of the other side of the review, which would be the same, I suppose, as on the hearing of an appeal.

Section 622.—The application for a review is one thing, and the hearing on a review quite another. Of course the latter would never take place without notice to the other side, but the application may very well be admitted or rejected *ex parte* unless of course the motion or the application is to be allowed to become in substance a hearing of the review. It seems a needlessly tedious and cumbrous procedure to have two arguments and a deferred hearing. The simple and sufficient course would be for the Court either to reject the application at once, it being generally a very obvious matter whether there is really a ground or not, or else to admit the application at once which would only operate as a rule *nisi*, and the other side might at the re-hearing contend that there was no ground for a review. Except only when fresh evidence is to be received could a deferred hearing be at all necessary.

Section 628.—See remarks on Section 619.

CHAPTER XIV.

Section 630.—"Either on the agreement of the parties to that effect or for purposes of justice." Very wide words these, the old doctrine of constructive inhabitancy was a far narrower door-way. The results are of course obvious enough; but it is a mere question of policy whether they will be beneficial, and I do not presume to offer any remarks.

CHAPTER XV.

Section 652.—I would add a provision that any one who uses violence or abusive language to a person serving the process or orders of the Court, or uses scandalous or contemptuous words against the Court or the process thereof, shall upon motion on notice to the person so offending be liable to be arrested by warrant of the Court and to the punishment prescribed by Section 352 or Section 228, Penal Code, according as it is the person of the server of process or the Court against which the offence is committed.

There ought to be some provision as general in its nature as the process for contempt; but in form consisting of a fine (say Rupees 500, or one month) for refusing or neglecting to obey a decree or any lawful order of the Court. The arresting of suitors, witnesses or officers of Courts whilst privileged *cundo morando et redeundo* for their necessary attendance at the Court ought to fall within such general provision.

CHAPTER XVI.

Section 662.—I think that it would be better to abolish the jurisdiction of Village Moonsiffs and certainly of Village and District Panchayets in Civil matters. I do not believe in these institutions a bit, and now that District Moonsiffs are Courts of Small Causes up to Rupees 50, and we have got an easy procedure for arbitration, they are not needed at all. As it is they are very little used.

No. From C. T. LONGLEY, Esq., Acting Judge of the Chittoor Court of Small Causes at Vellore, to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Fort Saint George, dated Vellore, 23rd December 1864, No. 223.

With reference to the Proceedings of the Madras Government, Legislative Department, 6th July and 6th August 1864, Nos. 180 and 207; forwarding copies of Bills, "for consolidating and amending the Laws relating to the Procedure of the Courts of Civil Judicature in British India," and of "the Indian Civil Code, Chapter I;" also of the Statements of Objects and Reasons, and of the report of Her Majesty's Commissioners forwarded to me for any remarks or suggestions I may have to offer.

2. I have the honor to state, with regard to the first Bill "for consolidating and amending the Laws relating to the Procedure of the Courts of Civil Judicature in British India," that I propose the following additions and amendments.

(1st).—3. That the authority vested in the Courts under Section 7, Regulation III of 1802, to punish witnesses by fine, who fail to attend the Court in obedience to the summons duly served on them, be added to Section 258 of the Bill.

(2nd).—4. That the powers conferred on the Appellate Courts by Section 35, Regulation IV of 1802 to punish appeals, which may appear to them litigious, by a fine, be added to Chapter IX of the Bill, this will, I think, check litigious and groundless appeals being preferred.

(3rd).—5. I would alter Section 175 so as to limit the time to 30 days after judgment for the defendant applying to the Court to set aside an "*ex parte*" judgment. I think as the Section now stands, (allowing the defendant to apply to the Court within 30 days after "*any process for enforcing judgment has been executed*"), the plaintiff will have some trouble in enforcing the judgment obtained in his favor; and I would, as I said before, limit the time to 30 days after judgment. To show more clearly how, as the Section now stands, a defendant might escape altogether the penalty of an adverse judgment—I will put the following case.

6. A, brings a suit against B, who allows the suit to go "*ex parte*" against him. A gets a judgment in his favor, but as at the time of the judgment, B has no property, A can't realize. Two years after date of decree, A dies, and C (A's son) finds that B has become possessed of property, and moves the Court to enforce the judgment passed in favor of his father A.—B then

applies to the Court under Section 175 to set aside the "ex parte" judgment against him, proving that he was unable to defend the suit. The suit is then replaced on the file; but C not having any knowledge of the cause of action between A (his father, deceased) and B, is unable to rebut the defence set up by B. The former judgment in A's favor is reversed and C, A's heir, loses the suit which A had gained.

The above are all the remarks on these Bills, I have to offer.

No. . From C. COLLETT, Esq., Civil Judge of Vizagapatam, to J. D. MAYNE, Esq., Assistant Secretary to Government, Legislative Department, Fort Saint George; dated Vizagapatam, 26th December 1864.

I have the honor to forward herewith a paper of remarks made by the District Moonsiff of this place upon the proposed amended Code of Civil Procedure.

Remarks made by C. PURUSHOTTAMAYYA, District Moonsiff of Vizagapatam, on the Bill for consolidating and amending the laws relating to the Procedure of the Courts of Civil Judicature in British India.

Section X.—I think that the first part of this Section should contain a proviso prohibiting the institution of suits against parties who take a short sojourn within the local jurisdictions of Courts. The Section provides that a Court shall receive and try any suit other than a suit for land or other immoveable property, if the cause of action shall have arisen, or the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain, within the local limits to which the jurisdiction of such Court may extend.

From this, I do not think that it is the intention of the Legislature that a suit may be brought against a party who arrives and remains within the local jurisdiction of a Court for a day or two on an emergent business.

For instance, A, an inhabitant of Rajam, a town situated at a distance of 100 miles, arrives at Vizagapatam and stays there for two or three days on account of an emergent business. B, a resident of Vizagapatam, taking advantage of this opportunity, and to save him the trouble of performing a journey to Rajam, brings a suit against A, upon a contract executed to him by A at Rajam, though the witnesses to the contract are living at Rajam.

This act of B, seems to me to be unfair, inasmuch as he puts a number of parties to great inconvenience merely to save him the expense and trouble of a journey. Such cases generally occur in small causes.

The Court will have either to summon the witnesses or to issue a Commission for their examination. In the latter case, the Court will lose the opportunity of personally examining the witnesses, and in the former the witnesses will be subjected to a long journey to their own inconvenience and to the detriment of their ordinary avocations. Personal superintendence by a Judge of the examination of witnesses in a Small Cause suit, is not only a great advantage to both parties, but it also enables the Judge to form a satisfactory opinion of the true nature of the case. I suggest this proviso because suits are brought by plaintiffs against defendants who arrive on emergent business within the local jurisdiction of a Court, but who only stay within such jurisdiction for a day or two, under the impression that they have a right to bring so under the provisions of the latter part of Section V, Act VIII of 1859. If what they consider is the true construction of the Section, it seems to me to be incorrect, and I, therefore, think that the part of the Section under consideration should be rendered more explicit to prevent misconstruction.

Section CXXXVI.—I think that the words "any property" in this Section should be more definitely stated. I do not think that an injunction can be granted for moveable property which is not yet admitted by a defendant. I shall here illustrate a case—A, brings a suit against B, for certain jewels usurped by the latter. A, before a summons is issued to B, applies for an injunction commanding B to produce the jewels before the Court with a view to their being committed to the custody of a receiver, as B is about to alienate them knowing that a suit has been brought against him by A for the jewels. A satisfies the Court in such a manner as warrants the Court to grant the injunction applied for at once without issuing a notice to B. The defendant B then appears before the Court, and denies that he has the jewels in his possession. Now, although

Section CXLII provides for a compensation to the defendant B in the event of A's claim being dismissed, yet I think it undesirable that the Court should waste its valuable time in examining a number of witnesses to grant an injunction for property which is not positively known to be in the defendant's possession. At present, by the words "any property" the Courts are bound to grant an injunction for any uncertain articles. In the case I have afore illustrated, the result of the injunction proved nugatory. I therefore think that it would be convenient both for Courts and parties, if the words "any property" be altered to "any specific property" or if any other provision be inserted in the Section under notice, whereby a party would be prevented from applying for an injunction for an uncertain thing like the jewels in the case illustrated above. This measure will operate as a check to vexatious applications, and will save to the Courts, especially to the lower Courts in which such applications are numerous, their valuable time which could otherwise be devoted by them to their other work.

Section CCLVIII.—Inconvenience is daily experienced both by Courts and parties in consequence of the non-attendance of witnesses after due acknowledgment of the service of summonses. This Section only empowers the Courts to order such witnesses to be apprehended and brought before them. This provision is quite insufficient. Non-attendance of witnesses is an inconvenience especially experienced by the lower Courts who, as a rule, are bound to decide a large number of suits every month. The lower Courts, i. e., the Courts of District Munsiffs, are now invested with Small Cause jurisdiction under Madras Act IV of 1863. Under the present rules of practice, District Munsiffs are to hold Small Cause Courts only on two particular days in every week. According to my own experience, I post not less than twenty Small Cause suits for each sitting. Of course all Small Causes are set down for final hearing. Of the twenty suits, ten are ordinarily compromised or otherwise disposed of; and of the remaining ten, I have to adjourn five or six suits to a next Court in consequence of the non-attendance of witnesses to my own inconvenience and to the inconvenience of the litigant parties who arrive from out villages. Under the present procedure, in case of non attendance of witnesses in a suit after due acknowledgment of the service of summonses on them, a Court has either to adjourn the suit to a next Court in order to the witnesses being apprehended and brought before the Court, or to dispose of the suit upon the record directing the party at whose instance the witnesses were summoned to bring a suit against such witnesses for any loss he may have sustained in consequence of their non attendance in compliance with the summonses. The latter course tends to increase litigation, and both courses put the party to additional expense; and it is very undesirable that a party who brings a suit for 10 or 15 Rupees should be subjected to further expenses in addition to the costs already incurred by him on account of the suit. Non-appearance of witnesses without lawful excuse after acknowledgment of the service of summonses is not the fault of the party at whose instance they are summoned. The party in the first instance pays into Court the sum of money required for the summoning and travelling expenses of his witnesses; and to subject such party to further expenses in consequence of an offence on the part of the witnesses is, in my opinion, inequitable. Disobedience to a summons to attend before a Court is an offence under Section 174 of the Indian Penal Code; but there is no provision either in the present Bill or in the Code of Criminal Procedure which empowers a Civil Court to take cognizance of the offence itself. It is inferrible from Section 168 of the Code of Criminal Procedure that the offence is to be committed to a Criminal Court. In my opinion, disobedience to a summons is a contempt of the lawful authority of the Court by which it may have been issued, and such Court must have some power to take cognizance of such contempt. Under Madras Act No. I of 1863, a Subordinate Magistrate of the 2nd Class has power to punish a witness for disobedience of a summons with simple imprisonment not exceeding 10 days, or with fine to the extent of 3 Rupees or with both. The Madras Small Cause Court has power to fine a witness who disobeys a subpoena to the extent of 100 Rupees. Section DCLII of the present Bill authorizes a Court to dispose of itself certain cases of contempt committed before it. To commit to a Criminal Court the offence of disobedience to a summons of a Civil Court instead of itself taking summary cognizance of it, not only entails additional work on the Court, but it also leaves it to the judgment of a Criminal Court either to punish or absolve the offender. It is

therefore, very desirable that the present Bill should contain a provision investing the Mofussil Civil Courts with the power of vindicating their own dignity by taking summary cognizance themselves of the offence of disobedience to a summons committed by a witness without lawful excuse, as otherwise the Courts and parties cannot properly be relieved from the great inconvenience daily felt by them at present.

Section CCLXV.—This Section should also direct that each witness shall sign the evidence given by him when such evidence is recorded in the vernacular language of the witness.

Section CCCIII.—A Native District Moonsiff who writes his judgment in English, is bound under the provisions of this Section, to translate every such judgment into the language in ordinary use in proceedings before the Court. The low salary allowed to the ministerial establishment of a District Moonsiff's Court does not possibly secure to the Moonsiff the service of a translator or a Gumastah, who has at least a fair knowledge of English; hence the duty of translating the judgments devolves on the Moonsiff in addition to his onerous work. Sometimes, a District Moonsiff whose Court is located at a considerable distance from the Zillah station, is hardly able to secure the services of an English Writer or a Copyist on such low salary as 10 or 14 Rupees. Thus, the Moonsiff, though he may be sufficiently conversant with the English language to be able to write a decision in that language, is precluded from writing judgments in English, as, if he does so, the work of translating and fair copying the judgments devolves upon him. There is no doubt that writing a judgment in English by a Native Judge of the lowest grade, facilitates the work of the Appellate Courts; but such Judge must be allowed a competent Clerk who will relieve him from the additional work of translating and fair copying the judgments. In the absence of such relief, a Native Judge who writes his judgments in English, must be allowed some discretionary power as regards the translating of the judgments. I think that it would be sufficient if such judgments only as are appealed against be translated into the vernacular language in use in the Court. All judgments must, as a rule, be read to the parties in full by the Judge in the vernacular language of the District at the time of pronouncing them, and no inconvenience will be experienced by the parties by the non-translation of all judgments other than those appealed against. Judgments appealed against must of necessity be translated, in order to save the parties appealing against them, the trouble and expense of seeking for elsewhere.

Section CCCIV.—From the words "Small Cause Courts" affixed to this Section, it is inferrible that a Small Cause judgment should contain the grounds of decision like the judgment in a regular suit. If it is the intention of the Legislature that a Small Cause judgment should be equal to the judgment in a regular suit, I see no difference between the system of the trial of Small Causes and that of the trial of regular suits. According to the practice now in force, a mere decree in the manner prescribed in Section CCCIX is recorded by a Moonsiff invested with Small Cause jurisdiction omitting the particulars of claim, and the Moonsiff orally sums up the evidence, and orally states his reasons for the decision. This practice enables the Moonsiff to decide ordinarily not less than ten suits on merits at each sitting to the satisfaction of both parties; whereas, he will not be able to decide more than two or three suits on merits if he were to deliver a written judgment with all the particulars required by the Section under notice. I, therefore, think it advisable that the practice now in force should be retained unaltered; and that the Section under comment be amended accordingly.

Section CCCXIII.—Can a Court award further interest on a debt when the interest on such debt may have accumulated equal to, or beyond the principal money at the date of the institution of the suit?

The present usury law Act XXVIII of 1855 is silent in this respect. It seems to me to be inequitable to award further interest in such cases. At present, some Judges do allow further interest in similar cases, and others do not; and I, therefore, think it very desirable that the Section under notice should contain a general provision on the subject for the benefit of the parties and the guidance of the Courts.

Chapter V. Execution of decrees.—This Chapter is silent in respect of the procedure to be adopted when wanton resistance is offered to the taking of moveable property under the autho-

rity of a warrant issued by a Court in execution of a decree. Much annoyance is not unfrequently experienced by decree-holders in consequence of such resistance both by defendants and other parties. A suitor at his personal labor and expense obtains a decree, and he is wantonly obstructed from reaping the fruits of such decree; and the present Code of Civil Procedure contains no provision empowering a Judge to take summary cognizance of such resistance. The present Code and the present Bill prescribe the procedure in cases of obstruction to execution of decrees for immoveable property and in cases of resistance or obstruction to purchasers in obtaining possession of immoveable property. I shall here illustrate a case. A, obtains a Small Cause Decree against B. A then takes out a warrant for the attachment of the personal property of B. A, indicates the property in the possession of the defendant to the officer of the Court entrusted with the warrant. The officer attempts to attach the property; but B, in company with his relatives and friends, wantonly assaults the officer and prevents him from seizing the property. The officer then returns the warrant to the Court with a report of the case. Now, what is the procedure to be adopted by the Court in such case? Several instances of this nature occurred before me; and in the absence of any procedure on the subject, I was obliged, in each instance, to issue a fresh warrant directing the officer entrusted with the process to attach the property with the assistance of the Police. Resistance to the taking of property by the lawful authority of a public servant is an offence punishable under Section 183 of the Indian Penal Code; and from Section 168 of the Code of Criminal Procedure, I infer that such offence should be referred to a Criminal Court. I have already explained in my remarks on Section 258, the inconvenience which would result from the reference of such cases to a Criminal Court; and even to refer a plaintiff to a Criminal Court would be no satisfaction of the decree obtained by him. In my opinion, resistance to the attachment of property in execution of a decree is not only a contempt of the lawful authority of the Court, but it is also a breach of the peace; and it is therefore very desirable that the Code should prescribe some procedure for the guidance of Courts in such cases, whereby the Courts may have power to vindicate their own authority and to cause the seizure of property from wanton resisters.

Chapter VI of Pauper suits.—This Chapter is silent as to the procedure when, at any sub-
of the suit, it is found that the per plaintiff is possessed of sufficient property.
prescribing the procedure in such case should be added to this Chapter.

DISTRICT MOONSIFF'S COURT,
VIZAGAPATAM, 23rd December 1864.

(Signed) C. PURUSHOTTAM,
District Moonsiff.

*Proceedings of the Madras Government, Legislative Department,
17th January 1865.*

Read the following papers:—

Report of the Judges of the High Court on the Bill entitled the "Civil Procedure Code."
(Here enter 15th November 1864, No. 66. Printed separately.)

Reports of the Civil Judges and other Judicial Officers. (Printed separately.)
Read again Proceedings of Government in the Revenue Department.

Transferring a letter from the Board of Revenue, bringing that Section 193 of the Draft Bill entitled the "Civil Procedure Code," if enacted, is likely to have a most in-
teresting effect on the Revenues of the Government.
The Government may be moved to modify the said Section so as to leave Section 17 of Act X of 1862 unrepealed.

(Dated 13th September 1864, No. 1690).

Read also Proceedings of Government, Judicial Department.
Authorizing the Advocate General to institute a

case against C. C. Streemom Teruven-
ch Ramanoojah Dasen, for
breach of trust in connection with
certain charities, the management of which
was entrusted to him; and directing that a
copy of the Advocate General's letter be
forwarded to the Government of India,
pointing out the defect in Section 97 of the
Civil Procedure Code in not providing for the
payment of costs incurred by defendants in
the event of the plaintiff withdrawing the
suit before judgment.

(Dated 6th January 1865, No. 18).

ORDER THEREON, 17th January 1865, No. 15.

In regard to the observations made by the Judges of the High Court, the Governor in
Council thinks it unnecessary to do more than express his general concurrence therein, especially
with reference to the very important suggestions in Part A, as to matters wholly omitted from the
Code.

As to the difference of opinion between Mr. Justice Frere and Mr. Justice Phillips on
the one hand, and the Chief Justice and Mr. Justice Bittleston on the other hand, regarding the
introduction into the High Court in its original jurisdiction of the system of Stamp duties now
prevailing in the Mofussil, the Governor in Council inclines in favor of the views expressed by
the former. Although the Court fees, for which Stamp duty would be substituted, are only due
from time to time, they are practically, in the majority of cases where parties appear by a Solicitor,
paid in a lump, either in the form of advances, or at the settlement of the Bill of costs. Little if
any difference would probably be felt by the suitors under the new system, nor is there any
suppose that there is less ardour for litigation in Madras than in the Mofussil, where the
burthen of Stamp duty is readily borne.

3. Nor is the Governor in Council disposed to agree with the Chief Justice and Sir Adam
Bittleston, that the provision of Section 634 which enables a Rupees 32 stamp to
be used where the claim is not capable of estimation under Schedule B, is unnecessary. A case
reported at page 154 of the Madras decisions for 1860, where a plaintiff sued for the restoration of
his child, valued for Stamp duty at Rupees 5000, is exactly in point. Many cases might also arise
where a plaintiff sued for a declaration of his right to be considered as an adopted or legitimate
son, where any valuation of his right at the time of suit would be impossible.

4. The provision of Section 193 which authorizes the Court to admit an unstamped docu-
ment on payment of the Stamp duty, and a
penalty of double the amount, has already been
made the subject of a separate communication
to the Government of India.

Letter to Government of India, No. 339, dated 14th De-
cember 1864.

5. In reviewing the suggestions offered by the other Judicial authorities, it will only be necessary to comment upon those which appear to be of weight, adding such other observations as seem to be called for.

6. The phrase "suits of a civil nature" is, in general, taken as opposed to proceedings of a criminal character. But it is sometimes taken as excluding cases into which the religious element enters. The extent to which the Court can take cognizance of caste or religious disputes has been frequently discussed in Madras, and a decision will be found upon the point in the 1st High Court (Madras) Reports, p. 301, where the Court refused to take cognizance of matters of religious observance. On the other hand, in a very recent decision of the Privy Council, (9 Moo. Ind. App. 314) the Judicial Committee entered fully into a question of that nature, without apparently supposing that the subject was unfit for adjudication by a Civil Court. Many points, also, might arise which have never been decided. Could an action be brought against a Chaplain for refusing to christen, marry or bury a person within his District? Could a man bring an action to compel his wife to return and live with him? The old Madras Regulation II of 1802, Section 5, ranges suits and complaints respecting marriage and caste under the general head of "suits and complaints of a civil nature." Do disputes of that class come within the same phrase as used in the Code? The system of illustrations which has been introduced into the Indian Penal Code and the proposed Civil Code might be employed with advantage in clearing up doubts of this nature.

7. There are some forms of redress well known to English jurisprudence, which strictly involve civil rights, and yet can hardly be made the subject of a civil suit. For instance, proceedings by *habeas corpus*, *mandamus* and Interpleader, and those in the nature of a Commission of lunacy. The re-organization of a charity, where the purposes of the charity have failed. The appointment of new Trustees in private trusts, and the steps which may be taken by trustees to relieve themselves from, or to protect themselves in the discharge of their functions. None of the above class of cases seem to be within the cognizance of the Courts under Section 6. Such cases do undoubtedly come within the jurisdiction of the High Courts on their original side, but no procedure is pointed out in Chapter XIV as applying to them when they arise.

8. The Code lays down no rule as to the law which is to be applied, where both parties are of the same religion, or where they differ in religion. This is a matter which seems to come strictly under the head of Procedure, and was expressly, though not in very accurate language, provided for both in the Charter of the late Supreme Court and in the Madras Regulations.

9. Does this Section compel a party who sues for a sum not exceeding ten Rupees to bring his suit before a Village Moonsiff? Suits of this value, for rent or for tolls, might involve interests to an immense amount, and any such obligation would be most undesirable.

10. The words "amount or value of the property in suit" seem to limit this Section to suits for the recovery of property. It would be better to use the words "subject matter in dispute."

11. This Section is taken from the English Statute 15 and 16 Victoria, Cap. 86, Section 50, which has already given rise to many decisions limiting the apparent generality of its language. The law as to such declarations is little understood, and it would be well to make it clear by further definition, or by illustration. It might also be well expressly to enact, what has been decided by the Madras High Court, that execution cannot be sued out upon a merely declaratory decree. (1st High Court Reports, 184).

12. Very strong and numerous opinions have been expressed by the Judicial authorities that this Section, so far as it applies to females, will tend to foster unsound litigation. Nothing is more common than to see Native widows put forward to support claims, which they would never think of maintaining on their own account, but which bring in a handsome profit to some needy relative or agent. Such cases fall to the ground at once if the woman has to come forward herself, and the Governor in Council is of opinion, that this Section will exercise an injurious influence, by enabling her to be kept in the back-ground. No real inconvenience can happen, as she can always appear by a responsible Vakeel, and women of rank, &c., are protected from personal appearance by Section 40.

13. It would be well to add the words "and where" between "when" and "it accrued." For instance, in a suit on a bond, to state not only its date, as in the example given, but the place of its execution, so show that the cause of action arose within the jurisdiction of the Court, and to insert an express averment to that effect; and so in respect of any other circumstances which are relied on as giving jurisdiction. This would often stop a case *in limine* before unnecessary expense had been incurred.

14. It has been invariably held by the Madras High Court, in reference to Act VIII of 1859, Section 39, which corresponds to Section 66, that it only applies to documents "in the possession or under the control" of the plaintiff. It would be well to say so distinctly, because although Section 68 gives the Judge power to admit documents which were not originally produced, this leaves to his discretion what is a matter of strict right on behalf of the plaintiff. The same remarks apply to Section 191.

15. This Section implies that the summons when served upon a soldier will have its ordinary result in compelling his attendance. The Mutiny Act, Section 40, provides that no Soldier shall be liable by any process to appear before any authority for an original debt not amounting to £30. In recent proceedings of the Madras Government it has been proposed to extend this provision to soldiers of the Native Army in Madras. The Governor in Council is of opinion that it would be advisable to insert in the Code any provisions of law which establish a different liability to summons in the case of soldiers and civilians. This is the more necessary as English Statutes are not likely to be within the reach of Mofussil Judges.

16. This Section should go on to provide, that wherever the Government shall undertake the defence of a suit brought against one of their officers, it shall be continued against his successor, in the event of his death, or retirement from the office, or against the Government, if the office should cease to exist.

17. The provision in these Sections which makes the examination of the applicant a condition precedent to the granting of relief seems calculated, in many instances, to defeat justice, and in most to cause useless delay and trouble. The applicant may be in a different country, so as to make his examination impossible, and in the majority of cases he will know little or nothing personally of the facts on which the application is grounded.

18. This Section seems only to contemplate security being given by a surety. It should be worded so as to enable the defendant to deposit money or other valuable property sufficient to answer the claim against him.

19. It appears to the Governor in Council that the first clause of this Section will make it wholly nugatory. It is scarcely possible for

Section 120, pp. 30, 59.

a plaintiff to furnish a list of the various articles of moveable property that are in the defendant's house, which he has probably never entered, and to estimate the value of items which he has never seen. The simplest course would be, on the analogy of a distress for rent, to direct the attachment of so much property as may be sufficient to answer the demand, if so much is to be found.

20. In the opinion of His Excellency in Council there ought to be an appeal against orders made under Section 138 also, which is even

Section 141, p. 51.

more stringent than Sections 136 or 140.

Under the existing Code a defendant may

appeal against an order granting a receiver. (Act VIII of 1859, Section 94). The Governor in Council is also of opinion, that orders under these Sections should be open to appeal by the plaintiff as well as by the defendant. In many cases the injury done to the plaintiff, by improperly refusing the injunction or receiver, will be very much greater than the injury to the defendant by improperly granting it. Take for instance the case of a defendant in a suit for land, who is capriciously felling trees, or destroying buildings. Little if any injury can be done to him by restraining such acts, though he should be finally successful in the suit. But the injury to the plaintiff will be irreparable if the application is refused, and he ultimately has a decree in his favor.

21. With reference to Sections 143 and 144 the Governor in Council wishes to submit for the consideration of the Government of India, a copy of the Advocate General's letter of the 19th ultimo, wherein he draws attention to a report on Section 97 of the present Code (which corresponds to Sections 143 and 144 of the Bill) in permitting a plaintiff at any time before judgment is pronounced to withdraw his suit without payment of costs.

22. The circumstances under which a cause of action survives come, of course, under the

Section 147.

head of substantive law, rather than of procedure. But the Governor in Council is of opinion,

that a few illustrations might, with advantage, be appended to this Section, so as to point out when the action does, and when it does not survive. The opportunity might be taken of explaining, whether the rule *actio personalis moritur cum persona* is to be applied in India according to the law as it stood in England before, or as it stands since 3 and 4 William IV, C. 42, Sec. 2. Act XXVI of 1841 only extends the above Statute to "cases governed by English Law."

23. Probably these Sections would be construed so as to imply that the Court was to wait

Sections 149, 150, p. 29.

a reasonable time in order to admit of an application being made by the legal representative of the deceased plaintiff. But as the words are

expressly inserted in Section 152, which refers to the case of a sole plaintiff, and deliberately left out in the other Sections, an opposite construction might, perhaps, be placed upon those Clauses.

24. The wording of this Section seems to require the personal presence of the parties.

Section 161.

The words "either in person or by properly constituted agent" should be inserted. Those words would include every person whom the

procedure of the Court admitted of as a substitute for personal appearance.

These Sections should be made applicable to the Small Cause Courts.

Sections 179, 180, p.p. 26, 51.

26. The use of the word "debt" in this Section seems to adopt the strict rule of Roman Law, and of the English Common Law, which

Section 182.

only admits a set off where the claim or sides is in respect of a definite liquid

amount. Is it intended to exclude the more liberal rule of equity on this point? In a recent case before the Madras High Court a claim for unliquidated damages was pleaded by way of

set off to a suit on a bill of exchange. The Court in an elaborate written judgment rejected the plea, as not coming within any of the provisions under which it would have been admitted by a Court of Equity. But they expressed their opinion that the language of the Procedure Code was not intended to limit the jurisdiction which they would otherwise have possessed and that they would be willing to go as far as the Courts of Equity in allowing a set off, though it did not come within the technical definition of a "debt."

It is to follow the common law rule, that the debts must be due to and from plaintiff and defendant respectively. But if a trustee were to sue on behalf of his *cestui que trust*, Equity would allow a set off of a debt due from the *cestui que trust*, and it would be expressly to recognize such principle.

It is in force for the punishment of a witness who may abscond or keep out of the way in order to avoid the service of a summons," is Section 172 of the Indian Penal Code. But the Civil Court has no power

Sections 235 and 237.

40, 54, 56, 57.

under that law to impose any fine upon a witness, nor has such power been given by the present Code. See Chapter XV. The Section ought to be amended by authorising the Court to impose upon the party such a fine as is sanctioned by Section 172 of the Penal Code. The Governor in Council is also of opinion, that the Court should be authorized to impose upon witnesses who do not attend, summoned such a fine as is sanctioned by Section 174 of the Penal Code. Very general complaints are made by the Judicial authorities of disregard of their process, while the labor and expense of instituting a prosecution under the Penal Code prevents such a course being ever adopted.

28. No provision is made for the costs incurred under these Sections, Act XXIII of 1861, Section 9 provided that they should be paid by

Sections 243—245, p. 20.

the Collector, unless deposited by either party, and should be costs in the suit. Some such pro-

vision seems to be necessary. It might happen that neither party was willing to incur the expense of taking such evidence, especially if the suit were a collusive one, and yet the ends of justice might render its production indispensable.

29. This Section should provide, as is done with reference to the High Court in Section 255, that the opinion of the District Court given on reference, should not bind it when the case was argued on appeal.

30. No provision is made for any temporary disability on the part of the Judge. The Section might end with the following words, which are contained in the corresponding Section (Section 196) of the Criminal Procedure Code,

"unless the Judge be prevented by any sufficient reason from taking down the evidence of any witness, in which case he shall record the reason of his inability to do so, and shall cause the dictation in open Court."

Council is of opinion that as a general rule, and unless some strong reason exists to the contrary, the evidence of prisoners ought to be taken in open Court in the presence of the Judge who tries the suit.

such a course, but this Code contains no provision enabling

Section 284 does not

be brought up under a Judge's order.

Section 288 evidence taken from a commission from a prisoner can never

be taken from both parties. This requires amendment.

The Code should provide that either party may file a Memorandum of objections (as in Section 573) to the finding of the Commissioner; and that, except upon points specifically objected to, the finding should be conclusive.

unless the Judge, either original or appellate, should himself think fit to open it up.

Section 297, p. 36.

34. Very strong opinions, with which the Governor in Council agrees, have been expressed by the judicial authorities in regard to the uselessness of Assessors who are under no responsibility in the suit, and who exercise little if any influence upon its decision. Unless where personal interest or corrupt motives intervene, it is hardly likely that many persons will take much trouble in forming an opinion, which has no effect when it is formed. The care and attention so generally shown by an English Jury entirely arise from the fact that the verdict is their verdict. The merits of the institution, either as an instrument of judicial investigation or of legal training, would, in the opinion of the Governor in Council, entirely disappear as soon as they descended from the position of Jurors to that of Assessors.

Section 304 p. 31, 57

35. Hitherto Judges of the Court of Small Cause have not written their judgments, and have thereby been saved from great labor, and been enabled to dispose of their cases with much greater rapidity. The Governor in Council can see no advantage in requiring a written judgment, giving the reasons for a decision which is not open to appeal.

Section 312.

36. This Section enables the Court to decree specific performance of a contract which can be performed, where the suit was framed for damages. But there is no provision for the converse case, viz., for awarding damages where the suit was for specific performance, and where it appears that the contract can no longer be carried out. Nor is there any provision for executing such a decree, since Section 323 refers to cases of an absolute decree for specific performance, and Section 324 refers to decrees under Sections 311 and 312.

Section 326, p. 45.

37. This section apparently relates to cases where the decree provides for something being paid by the plaintiff. For instance, in case of a suit by a mortgagor to redeem, where he is ordered to pay off the balance due on the mortgage; or in case of judgment against the plaintiff on a plea of set off. No case, it is conceived, can arise where a decree for money can be made against a person who is no party to the suit. To prevent mis-apprehension, however, it would be well to alter the Section so as to make it run.

"If in any suit a decree for money is made against a plaintiff, the decree may be enforced against him in the same manner as a decree may be enforced against a defendant."

Section 327.

38. There is no provision in this Section that the Court shall execute the conveyance so tendered, nor is any power given to the Judge to direct an alteration in its form, if it does not properly carry out the decree. Further it might happen that a Judge would agree to a conveyance which went beyond the terms of the decree, or refuse to agree to a conveyance which was in conformity with those terms. In either case there should be an appeal, and none such seems to be allowed under this Code. See Section 614.

Sections 332, 375 p. 40.

Vide Letter No. 329, Legislative Department, dated 8th December 1864.

39. A separate communication has already been addressed by this Government to the Government of India, requesting that the right of creditors to attach or take in execution the pay, allowances or pensions of public servants, whether Civil or Military, may be distinctly defined.

Section 335.

40. "The Court whose duty it is to execute the decree" is in all cases the Court by which the first decree was passed. See Sections 584 and 602. It would save the trouble of hunting

through the Code if this rule were at once distinctly stated here. Sections 584 and 602 would then become unnecessary.

Section 338.

41. Where a decree has been transferred, the same right of setting off a cross decree against the assignee should exist as if he had been the original decree-holder. The words "if there be" might be held to exclude such a set off.

cross

42.

Section seems to be founded on the old rule of English Law, that year and a day judgment could not be enforced without a proceeding by *scire facias*. This rule is founded on the presumption that the judgment had in the meantime been satisfied. But as no adjustment of the decree can now be recognized by the Court unless made through the Court or duly certified to it, such a precaution seems useless. The case is, of course, different where the application is made against the representative of the judgment debtor, as he may show that he has no effects.

Section 351.

43. If the application is made against the representative of the judgment debtor, who pleads that he has no assets, for that he has properly spent them, or that he has only enough in hand to satisfy prior claims, it would be necessary to take an account of the entire estate, and no machinery is provided for the remarks of the High Court Judges (p. 15) upon Section 330.

Sections 359—367, p. 33.

44. These Sections regulate the mode in which Section 321, is to be carried out, and only relate to immovable property. No provisions are made for carrying out Section 322 which relates to the delivery up of specific moveables. It would, of course, be quite "practicable to enforce the seizure" of such property wherever it could be pointed out, and no matter in whose possession it might be. But in that case also, provisions analogous to those of Sections 362—367 ought to exist, where a *bona fide* claim is set up by a party, other than the defendant, in actual possession. Claims of this sort would be even more difficult to adjudicate on than claims to real property, as a sale in market overt might give a perfectly valid title to a purchaser, though his vendor had no title whatever.

Sections 369, 400, p. 45.

45. Both these Sections should authorize the immediate sale of perishable commodities, such as meat, fish, vegetables, &c.

Section 390, p. 41.

46. Where it appears that there is a mortgage or lien upon the property it could hardly be said that the defendant held possession "not on his own account or as his own property, but on account of or in trust for some other person." The attachment should then be continued, but subject to the prior claims of the person who had the mortgage or lien.

Section 393, p. 41.

47. The words "shall be made at the earliest opportunity" seem to leave no discretion to the Court where the claim has been postponed for two or three days, however reasonable the delay may have been under the circumstances. The word "promptly" would satisfy what is really intended by the Section.

Section 404, p. 41.

48. Where the decree-holder is himself the purchaser, no deposit should be required from him, his debt being itself a deposit. The time for payment ought to be made clear by using the words "from and exclusive of the day on which the sale of the property took place."

49. The Governor in Council is strongly opposed to this clause. No one will ever take the trouble of attending a sale of undivided property, and coming prepared with his deposit, if he is liable to have it taken out of

his hands, should it prove a good one. If any co-sharer wishes to keep the property in the family nothing is easier than for him to bring money with him, and bid at the sale. It is unfair alike to the judgment of a person who abstains from getting the property sold, and to the person who then step in to carry off a sale in somebody else has secured.

50. There seems to be no objection to confirming a sale to which no one objects. It would be better to provide that the sale should be absolute after 30 days, unless in the meantime objections had been made, in which case only an order of confirmation should be required.

51. It does not appear from what source the interest, payment of which is provided for in this Section, is to be derived, nor against whom payment is to be enforced. The sale can only be set aside "for material irregularity in publishing or conducting it" from which the applicant "has sustained substantial injury" (See Section 408). It is clear, therefore, that the applicant ought not to suffer the further injury of paying interest. Neither ought the judgment creditor who has derived no benefit from the sale, and it is difficult to see any third person who can be called on to pay, unless perhaps the officer of the Court who permitted the irregularity to occur.

52. These sections should provide for the case of persons who are not liable to arrest, either absolutely or from some temporary cause; for instance, soldiers, sailors in the Royal Navy and Marines, witnesses who are privileged from arrest *eundo, morando et redeundo*, and parties in a cause which is actually under trial. Where the ground of exemption is poverty, the Sections seem to require a written application with full particulars of property to be put in at first. But, as has been pointed out, the class of persons to whom this Section will apply, are not likely to be able to put in such an application. It would be better to allow an oral application to the Judge, followed, if he thought fit, by an examination in Court which should be taken down in writing and signed by the applicant.

53. It is strongly urged by several of the judicial authorities, that this Section ought to be amended to the case of a debtor who gives the Court no reason to believe that a short indulgence will enable him to pay his debts. The Governor in Council is of opinion that such an amendment would be equally for the benefit of creditor and debtor. A clerk in a Government office, for instance, if summarily thrown into Jail might lose his appointment, and with it the means of paying his debts, whereas if left at large for a few days, under the pressure of impending imprisonment might be able to settle with his creditor.

54. The word "defendant" in this and subsequent Sections should be altered into "judgment debtor," as the judgment may happen to be against the plaintiff, for instance on a plea of set off, or for costs.

55. The justice of these clauses is not obvious. Small creditors are likely to be poor creditors, and small debts are likely to be debts contracted for necessary purposes, such as daily supplies or unavoidable loans.

It is not apparent why the debtor should be given a facility of escaping from these obligations which he

does not possess in reference to heavier liabilities. If the converse rule had been laid down, it might have been fairly defended, as releasing the debtor from a burthen whose weight was too heavy to be borne. But the Governor in Council can see no reason why he should be relieved from the very debts which he can pay with the greatest ease to himself, and whose non-payment will inflict the greatest suffering upon others.

56. Under what law, and with what penalties are wrongful acts or irregularities in the execution of a decree to be punished? This word apparently refers to proceedings of a Criminal character. But the only power of punishment possessed by the Civil Courts is that conferred by Section 652, none of whose provisions apply to the case.

57. This Section has been construed by one of the Subordinate Judges as excluding an application to enforce a bond payable by instalments, until all the instalments had fallen due. Probably this was not the intention of the framers of the Section. If not, some amendment is advisable to exclude similar doubts.

58. There is an oversight in the last clause. The representative of a deceased person cannot be prevented from pleading, either that he never received any assets from the deceased, or that they have been lawfully paid away, or that they are insufficient to meet the debt.

59. Some provision should be made for compelling a plaintiff who has commenced a suit as a pauper to continue it in the ordinary form, and to supply all the stamps from which he was originally excused, in the event of his becoming possessed of property in the progress of the suit.

60. The former of these Sections should contain the words "or neglect to act," which is quite as common with Native arbitrators as either death, refusal, or incapacity. The latter Section should, in general words, allow the Court to award when the award has not been completed within the period specified. Within the words "good or sufficient cause" for not completing the award. But if one or both of the parties were anxious to have the award, it would be hard that any prejudice should arise from the dilatoriness of the arbitrators.

61. The first clause of this Section is much objected to. Practically, charges of misconduct or corruption are very difficult of proof, and are very seldom credited by the Judge to whom the application to set aside the award is made.

But the fact that these are the only charges which give a chance of setting aside the award, or giving its operation, make them much more common than they would otherwise be, and the probability of being exposed to such charges makes respectable men unwilling to arbitrate. In theory, no doubt, an award ought not to stand if corruption or misconduct can be proved. But it is very doubtful whether in practice the clause under consideration does not produce more evil than it prevents.

62. The Appellate Court ought also to have the power which is possessed by the original Court under Section 110, of adding such parties not included in the original suit as it may be necessary to join, for the purpose of fully and finally settling all matters in dispute.

The latter clause of this Section provides that a party who has been added to a suit may object to the random of objections in a written paper. He would be in if he took his objection verbally. Not only has he to pay for a stamp.

but under Section 534 he is precluded from taking any other objections than those which are contained in the Memorandum without the leave of the Court. It may safely be assumed then that no such Memorandum will ever be put in. The Governor in Council is of opinion that no objections should be allowed unless they are tendered in writing, at least one week before the day fixed for the hearing of the appeal. Such objections constitute a cross appeal, and both for the information of the Judge who is to try the case, and in fairness to the opposite party, due notice should be given that such a cross appeal is intended.

64. The Madras High Court has ruled that the time occupied in the application for a review of judgment, and in the disposal of that application, is to be excluded from the time allowed for appeal. This seems advisable.

otherwise it would be necessary in order to save the appeal time to carry on both proceedings simultaneously, although the success of the review petition might render the special appeal useless. It would be well to incorporate this rule in Section 586. It is to be remembered that the pendency of the special appeal does not dispense with the necessity for review, since on special appeal the suitor must accept all findings of fact against him, however, erroneous and absurd they may be, while such errors in the regular appeal may be corrected on review.

65. This Section excludes an application for review in cases where the decision, whether original or on appeal, is final. That is, in cases where no other tribunal can correct the Judge, if he is wrong, he is forbidden to correct him-

self. This seems to the Governor in Council to be unwise. It may be that cases will not often arise in which a Judge, who is secure from an appeal against his judgment, will still be of opinion that his decision was unsound. But the case may arise, and as the Code is now worded, if the Judge found out the very day after he had pronounced his decision that he had fallen into an error, it would be impossible for him to correct it.

(Here enter letter to the Government of India, No. 16, dated 17th January 1865.)

(True Extract).

Mr. Mayer
Asst. Secretary to Government,
Legislative Department.

To the Honorable the Chief Justice and Judges of the High Court.

„ Civil Judge of
 „ Judge of the Court of Small Causes at
 „ Judicial Department. *with a copy of the printed reports.*
 „ Revenue Department.
 „ Advocate General.

N. B. No comment has been made upon the obnoxious provisions submitted by Mr. Collett, Civil Judge of Virginia, and by Mr. Longley, Judge of the Court of S. C. Cases at N. York, which as I have said, is too late to be taken into consideration in the present proceedings.

Ann. 6. 1865 to 26
Supplement to the Fort St. George
Gazette - 27. August 1864

Supplement

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Letter

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Procedure Code

N^o 312 - 24 January 1865

To be recorded.

288-289.