COUNCIL OF THE GOVERNOR GENERAL OF INDIA

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

The Council met at Government House on Friday, the 4th November 1864.

PRESENT:

His Excellency the Viceroy and Governor General of India, *presiding.*
His Honour the Lieutenant-Governor of Bengal.
The Hon'ble H. B. Harington.
The Hon'ble H. Sumner Maine.
The Hon'ble W. Grey.
The Hon'ble C'aud H. Brown.
The Hon'ble J. N. Eu'len.
The Hon'ble Maharaja Vezeram Guzzeputty, Raj Bahadur of Vizianagram.
The Hon'ble Raja Sahib Dyal Bahadur.
The Hon'ble G. Noble Taylor.
The Hon'ble R. N. Cust.

The Hon'ble MESSRS. TAYLOR and CUST took the oath of allegiance, and the oath that they would faithfully discharge the duties of their office.

REMARRIAGE OF NATIVE CONVERTS BILL.

The Honb'le MR. MAINE, in moving for leave to introduce a Bill to legalize under certain circumstances the remarriage of Native converts to Christianity, deserted or repudiated by their wives or husbands, said that there was probably no subject which had been longer before the Indian legislature than that to which his motion related. Ever since the Supreme Government of India possessed true legislative power, *i.e.*, since the Act of William the Fourth passed in 1833 there had been always before it some proposal, and generally a multitude of proposals, for giving relief to Native converts to Christianity whose wives persistently refused on religious grounds to cohabit with them. Among the papers in the Legislative Department, there were two separate Bills framed to permit the remarriage of such converts, one of them bearing the name of Sir Charles Jackson, the other that of Sir Barnes Peacock. MR. MAINE's immediate predecessor, Mr. Ritchie, had just before his death obtained leave to introduce a Bill on the subject, so that the present motion constituted the fourth instance in which positive action had been taken. He (Mr. MAINE) ventured to say of this

long delay, what could not often be said of delay in matters of Government, that it was far from discreditable to those who had caused or acquiesced in it. There was no trace in all the papers which he had read of any carelessness or want of interest. All the officials who had taken part in the discussion had expressed the strongest sense of the importance of the subject, and had manifested the most sincere anxiety to discover some admissible measure of relief; and, indeed, MR. MAINE would say that the documents he had perused, extending over thirty years, went far to exonerate the Government of India from that charge once so often brought against it, that, of all the races and classes committed to its care, none had so little of its tenderness as the converts to its own faith. Still less did the papers disclose any sign of undue timidity on political grounds. Although Lord Canning's Government undoubtedly expressed an opinion, that any law on the subject ought to be a Government measure, neither it nor any other Government or person appeared to have ever thought that, on such a point, the view of the Hindu or Mahomedan part of the population ought to prevail; indeed, the obvious probability was that the matter was entirely indifferent to Natives of India not converted to Christianity.

The reasons of the hesitation which had so often shown itself were of a very different description. First there were those objections which grew out of the moral or religious creed of the persons composing the executive and legislature. Some had thought a law like this doubtful on moral, and others on theological, grounds, and a great number has manifestly been unwilling that, in its first legislation expressly relating to Native Christians, the Christian and dominant race, of which the legislature was then exclusively composed, should place on record anything like a lax or equivocal construction of conjugal obligations. But, doubtless, the chief cause of the delay was the perplexity caused by the extraordinarily various and conflicting proposals of those more immediately interested in removing the grievances of the converts. It was natural that Missionaries and Missionary bodies should look upon the subject under a special aspect. Whenever one of those excellent persons persuaded himself that the remarriage of a convert, whose wife declined to follow him, was not forbidden, he naturally formed some theory to justify his persuasion, and then he invariably pressed the Government to adopt it. MR. MAINE would give two instances of such theories as samples, two of a remarkably large number which had been pressed on his attention. Some of the most active Clergymen and Missionaries in India were of opinion, that unconsummated marriages between children of tender years are void by the law of God, or of nature, and hence they were willing that the law should permit the remarriage of a person married in infancy, but repudiated by his wife before cohabitation. But they would not go further. There were others again who, holding the more tenable opinion, that the law which governed the solemnization of the marriage ought to govern the dissolution, looked rather to the

Heathen than to the Christian rule of divorce, and adopted a theory that, under Hindu and Mahomedan law, a convert to Christianity was *ipso facto* divorced,—in the case of Mahomedans by the express ruling of their religious authorities—in the case of Hindus by a consequence derived from the principle of what may be called religious death. On this theory, there was of course no difficulty in permitting a convert, at least a male convert, to contract a second marriage. There appeared to be in existence at least a score of such speculative views of the question, some altogether distinct from the doctrines which he (MR. MAINE) had described, some involving more or less modification of them. It was inevitable that the Government, entertaining the greatest respect for the Missionary view of the subject, should hesitate to make a selection between these conflicting theories—to take its stand on one of them, and to introduce a Bill confined to the limits of that one theory. Hence, in their embarrassment, successive Governments had been tempted to leave the question alone, perhaps in the same hope which seemed to possess not a few of the Missionaries themselves, the hope that the knotty point, if you did not touch it, would solve itself. Now, unquestionably, there was in politics such a thing as judicious inaction; some questions when left to themselves settled themselves, but not, as MR. MAINE thought, when the *status quo* contradicted, so to speak, a law of nature. The true mode in which this particular question had been solving itself had been brought out by that valuable law, the new Marriage Act—valuable, though it might require some modification—framed by Mr. Anderson and passed by the Council in the Spring. That law, the Council were aware, imposed penalities on persons celebrating marriages not in accordance with its provisions, but a remarriage under the circumstances to which MR. MAINE'S Bill would relate was not allowed by Mr. Anderson's Act, and hence to celebrate it was a publishable offence. The remonstrances which this state of the law had elicited, shewed that a considerable number of the Missionaries did habitually celebrate these marriages—and probably, rather than tolerate open concubinage among their converts, they would feel it their duty to defy the law and continue to solemnize such marriages at the risk of punishment.* This was in itself an urgent reason for no longer postponing legislation, unless the Council should be positively of opinion that the remarriage of converts under these circumstances ought not to be permitted for some reason of religion, morals or policy. MR. MAINE for his part had convinced himself that a measure of relief was not only admissible but obligatory, but, before he stated the grounds on which he rested his view, he would say at once that he entirely objected to any enactment adjusted to the limits of such theories as he had been attributing to the Missionaries. The Council would remember that any such enactment would in fact amount to a legislative affirmation of the speculative basis of the theory selected for application. Now he (MR. MAINE) held that it was not the business of that Council to affirm propositions of law, and still less of theology. Their duty was not to say what the law was, but what it ought to be; and, on the other hand, there was an ob-

vious incongruity (he might almost say indecency) in that Council, composed as it was, saying what was or was not sound Christian theology. The only aspect under which they could consider questions was their moral or political aspect and, no point of policy here arising, the argument which he (MR. MAINE) would employ to justify his Bill would wholly derive its force from moral considerations. It was true that, although his view was quite independent of purely theological reasoning, it would be difficult or impossible for him to place it fully before the Council without seeming to travel into the province of theologians; but the fact was, it was necessary for him to go into the history of the controversy which had always existed on the subject in the Christian world, and, in order to do that, he must state shortly the theological views which from time to time had been adopted by the disputants.

He would first observe that his endeavours to acquaint himself with the view actually entertained by the various sections of the Christian community in India on this subject had been greatly facilitated by an interesting series of papers, the records of the Panjab Missionary Conference. All the opinions current among the Missionaries in any part of India, were, he believed, more or less indicated in that volume. At the same time, the discussion at the Panjab Conference had, as a complete account of the matter, the serious defect of being wholly confined to the modern and recent aspect of the controversy. All the speakers appeared to have been ignorant, or to have designedly omitted all mention, of the fact that the question of the remarriage of Christian converts had an ancient as well as a modern history. The truth was that the controversy was one of the oldest of those which had ever agitated the Christian church, and it had only lost its interest through the conversion of the entire Western World to Christianity, and the consequent cessation of marriages between Christians and Heathens. He (MR. MAINE) would presently show how important a bearing this fact had on the argument for the Bill. He would now observe that the only difference between the controversy as now debated between Indian Missionaries, and the controversy in its ancient stage, consisted in the different Scriptural grounds on which the disputants based their reasoning. In the early Christian Church, the dispute turned wholly upon the proper application of an analogy. It was conceded on all sides that divorce was lawful on the ground of adultery; it was then contended, in conformity with a metaphor common in early Christian times, that Heathenism was spiritual adultery; and hence it was concluded by those who took the affirmative side, that obstinate persistence in Heathenism on the part of husband or wife was an adequate justification of divorce. MR. MAINE did not assert that this argument was always thought satisfactory, but he did assert, as a matter of history, that the preponderant weight of authority was always in its favour. How strong was the persuasion which it carried with it, might be seen

from a passage which he had with him, from a writer so old that portions of his treatise were often found inserted at the end of the oldest manuscripts of the New Testament—the author of the book called the Shepherd of Hermas. (The substance of the passage was, that adultery was not only corporeal but spiritual, and that Heathenism, being spiritual adultery, justified divorce). Mr. MAINE cited that passage, not to insist on its cogency, but to show the antiquity of the theological opinion with which the Bill was in harmony. And the reason for bringing into prominence the opinions of the early Christian Church was his strong impression, that many of the speakers at the Panjab Missionary Conference were actuated by a half-conscious fear, that it was only the temporary convenience of the moment which was producing a belief in the lawfulness of remarriage by converts. They appeared to distrust a conclusion which was so obviously expedient in the interest of Christian missions. But when it was once seen that the opinion with which the Bill harmonized was certainly not the fruit of the peculiar position of Christians in India, when it was seen that this opinion had been strongly held ever since the first appearance of Christianity in the world, and had only been lost sight of through the Christianization of the West, they would probably display less timidity in approaching the question, and yield up their minds more unreservedly to the more modern, and dauntless in some eyes the more satisfactory, arguments in favour of the lawfulness of re-marriage. Sir Charles Jackson had correctly stated that those modern arguments turned entirely on the interpretation of a single text—" But, if the unbelieving depart, let him depart; a brother or sister is not under bondage in such cases; but God hath called us to peace," 1 Corinth. VII, 15. Now it would not be expected that he (Mr. MAINE) should offer to the Council any theological commentary or criticism on that passage, but there were two remarks which he would wish to make, not as a theologian, but as having some acquaintance with legal antiquities. It was said by some opponents of the measure, that the text justified at most a divorce a *mensâ et thoro*—a judicial separation. That view involved an anachronism. The only divorce known in the world when the words were written was an absolute divorce —*a vinculo matrimonii*. Mr. MAINE, speaking from recollection, would say that divorces *a mensâ* were of later date by some hundred years. Other persons who doubted the lawfulness of the measure expressed an opinion, that the words of the passage, whatever were their meaning, were not sufficiently marked, distinct and strong to warrant the conclusion drawn from them. Mr. MAINE, still speaking as a lawyer, asserted that stronger language could not have been used. The words employed were the technical words of Roman Law implying absolute divorce. He might appeal to the school-day recollections of the European Members of Council, who would remember that the ordinary formula of divorce was *abi, discede*, or, as the phrase would run, when turned into the third person, *let him depart*. The writer of the passage was, as everybody knew, a Roman citizen;

he was plainly well-acquainted with the Roman Law of Persons, under which he lived, and here he had simply translated into Greek the usual legal phrase implying that absolute divorce which carried with it the power of remarriage.

The first conclusion therefore which he (MR. MAINE) drew was, that the measure which he asked permission to introduce would neither offend the opinions of the whole Christian world, nor the better and more instructed opinion of any Christian sect or community. The fact was that, taking Christendom as a whole, there was even a greater weight of authority in favour of the remarriage of converts under the circumstances contemplated by the Bill, than in favour of the principle of divorce on the ground of adultery. For, as was well known, the Roman Catholic Church did not permit divorce on the ground of adultery ; it did however permit the remarriage of converts on the authority of the text he had cited, as he (MR. MAINE) had gathered from some documents which had been forwarded to the Government from the Roman Catholic congregations in the south of India. He did not pretend to speak with any certainty of the Roman Catholic doctrine on the subject, but he believed it to be founded on the assumption that it was at the option of the Church to recognize heathen marriages, and that persistence in Heathenism justified non-recognition.

The preliminary difficulty which would have arisen from the repugnance of the Christian community being thus removed, the next thing was to enquire what positive reason there was for interference on the part of the Council. On this point he (MR. MAINE) would reason as follows. It was absolutely necessary to adopt, in India, the theory which obtained in most European countries, of a distinction between the secular or civil and the religious or ecclesiastical power. It needed only to examine the composition of the Council to see that no other doctrine than this could possibly be propounded in it. The Council then, representing the secular power, had the right to guide itself by reasons of morality as distinguished from religion, for nobody had ever doubted that the purly moral view of questions was, to employ the figure which had been so often used to illustrate this distinction between the powers, one of the things which are Cæsar's. Now he (MR. MAINE) asserted, that the law of marriage in India, in its application to Native Christians, had a tendency to produce—he very much feared it did actually produce, but at all events it had a distinct tendency to produce—immorality. The state of things was this. The great majority of Hindus were married before they reached the age of reason. Converts to Christianity were, however, brought over by the operation of reason, and the condition of Native society was such, that reason had necessarily much greater influence over one sex than the other. Hence, the tendency of the law in its present state was to produce a celibate class. Now, MR. MAINE would lay down, even of European countries, that a law which by its direct incidence assisted in creating a class condemned to

celibacy was immoral and bad. And if that was true of Europe, how did matters stand in India? The subject was one which could only be touched upon lightly, but it was certain that all the essential differences between Oriental and Western Society tended to augment the immorality of the law in India. They must not forget that touch of asceticism which European Societies, even Protestant Societies, had derived from the middle and early ages, one result of which was that, to a European, a life of prolonged celibacy seemed intelligible and tolerable. But was it necessary to prove elaborately that, to an Oriental trained in the zanana, the very conception of such a life was probably unintelligible, monstrous and against nature? MR. MAINE well knew that some of the Missionaries asserted, that their converts underwent a moral purification which rendered the trial endurable to them. That might be true in some, perhaps in many cases; but he contended that the assumption of its truth was one which the secular power had no right to make. It could only look at the law in its normal and ordinary application to Oriental nature.

The measure therefore would be an interposition of the State, or Civil power, from its own point of view. It would be a law of liberty and constrain no man's conscience. Nobody would be compelled to remarry converts, if he had scruples on the point; but, on the other hand, the State would decline to impose penalties on a Clergyman remarrying them. People might take what religious view they pleased of the position of the convert remarried, but the law would not refuse him or her civil conjugal rights, and the children would have the civil rights attending legitimacy. If the doctrine or discipline of any Christian community forbad remarriage while the first wife was alive, its Ministers need not celebrate remarriages: their power to keep the convert from remarriage without risk to morality would be a strong proof of their influence over him, it being understood that the responsibility of refusing to remarry rested on them, and not on the State. On the other hand, the principle of the Bill would give room for all partial theories of the lawfulness of divorce. Any sect, persuaded that divorce was lawful up to a certain point or under special circumstances, might, within the limits of the law, work out its own theory.

The Bill, which was not yet completed, would be founded partly on Sir Charles Jackson's draft, and partly on Sir Barnes Peacock's. It would not permit remarriage till a considerable interval had elapsed, which would be reasonable evidence of final desertion or repudiation. It would provide for the examination of the parties by a Judge, and he (MR. MAINE) thought it would allay some scruples if the proceeding in the first instance took the form of a suit for the resumption of conjugal society. It would also be a desirable addition to the older drafts, if provision were made for the convert having the opportunity of trying his own persuasions on his wife, in an interview not overlooked or controlled by her family.

There would be many difficulties of detail, but he hoped they could be overcome. It was, he might say, a peculiarity of the subject, that points which seemed at first sight immaterial proved to be of great importance, while difficulties apparently of the greatest magnitude turned out to be no difficulties at all. For example, the language of the Bill must be carefully adjusted to the theory of its secular origin; and it was most essential to avoid the mention of divorce, for otherwise the large Roman Catholic community in Southern India, numbering now nearly a million souls, would lose the benefit of the law. On the other hand, the contingency of a convert having several heathen wives, which at first sight appeared most difficult to deal with, was in fact scarcely worth taking into account, as the classes from which the converts came were practically monogamist.

Considering that the law of England, as applied in England, recognized no religious scruple however strong, or personal distaste however unconquerable, as a reason for refusing to resume conjugal society—considering, on the other hand, that every body in India shrank from absolutely compelling the heathen wife to rejoin her husband—MR. MAINE thought that this Bill followed as a consequence. Otherwise they were open to the reproach that, while they were creating a special class by their direct action on the country—partly by the energetic efforts of Missionary Societies, partly (he would hope) by the exhibition of the most eminent ingredient in their own civilization,—they laid on it a burden which they themselves in their own country, did not so much as touch with the little finger.

The Motion was put and agreed to.

ADVOCATES AND ATTORNEYS (N. W. PROVINCES) BILL.

The Honb'le MR. HARINGTON introduced the Bill to regulate the admission, removal and remuneration of Advocates and Attorneys in the Civil and Criminal Courts and Revenue Offices of the North-Western Provinces of the Presidency of Bengal, and moved that it be referred to a Select Committee with instructions to report in a fortnight. He said: "This Bill was introduced at the request of the Hon'ble the Lieutenant-Governor of the North-Western Provinces. The object of the Bill was to make suitable provision for the appointment of duly qualified persons to act as Vakeels or Advocates and as Mookhtârs or Attorneys in the civil, criminal and revenue Courts and officers in the places to which the Bill would apply, and for the remuneration and removal of such persons. At present there was no law, nor were there any rules, so far as he knew, for regulating the appointment and removal of Mookhtârs in the Courts and revenue offices in the North-Western Provinces, and the consequence was, that numbers of utterly unfit persons assumed the office to the serious injury of the persons employing them, and often to the great inconvenience and discredit of the Courts and offices in which they practised. This had been found to be particularly the case in the Criminal Department. As regarded the office of Vakeel, Act

XVIII of 1852 not having been extended to the North-Western Provinces, the only Regulation relating to the appointment and removal of Vakeels in force in those Provinces was Regulation XXVII of 1814. Since that Regulation was passed, as the Council were aware, the constitution, character and procedure of the Civil Courts in the North-Western Provinces, as elsewhere, had been entirely changed, and, however suitable the Regulation might have been at the time of its promulgation, it was felt that it was altogether unsuited to the existing state of things. The Bill, now introduced, repealed such parts of Regulation XXVII of 1814 as were still in force, and following, to some extent, Her Majesty's Letters Patent for the Establishment of High Courts of Judicature at Calcutta, Madras and Bombay in respect to the appointment of persons to act as Advocates and Attorneys in those Courts, it proposed that the Sudder Court and Board of Revenue should, for their respective departments, have power to frame rules for the admission, removal and remuneration of Advocates and Attorneys in the civil, criminal and revenue Courts and offices in the North-Western Provinces, and that the rules so framed, after being approved by the Hon'ble the Lieutenant-Governor, should have the force of law. The Bill would not interfere with the right of any one to appear and prosecute or defend any civil, criminal or revenue case in person instead of employing an Advocate or Attorney. The Bill also maintained the present rule, under which, subject to certain conditions, one of which related to the language to be used, every Barrister and Attorney on the roll of any of Her Majesty's High Courts was entitled as such to appear, plead and act on behalf of any other person in any civil, criminal or revenue Court in the North-Western Provinces. The Bill further proposed, for special reasons, and with the sanction of the Court, to suffer appearance by an Agent, though the Agent was not an authorized Advocate or Attorney. This privilege was formerly allowed, but, for some reason with which he was not acquainted, it was withdrawn. He was not aware that the privilege was abused. It was highly prized by the Native community, particularly by the higher and more respectable classes, and a wish had been expressed in many quarters for its restoration. It was proper he should mention that since the publication of the Bill a communication had been received from His Honour the Lieutenant-Governor of Bengal expressing a desire that the Bill should be extended to the territories under his Government beyond the town of Calcutta. The letter from the Lieutenant-Governor and the correspondence which accompanied it clearly proved that there was the same necessity for some legislative enactment for the Lower Provinces of Bengal, of the nature of that now proposed, which had been shown to exist in the North-Western Provinces, and should the Council allow the Bill to be referred to a Select Committee, he should have great pleasure in proposing in Committee the introduction of a section which would authorise the extension of the Bill not only to the territories under the Government of Bengal, but also to

the Panjab, the Central Provinces, Oudh and British Burma, whenever such extension might be considered desirable by the Local Governments of those places. The Bill with the Statement of Objects and Reasons having already been published in the official Gazette, he proposed that the Select Committee should be required to make their report in a fortnight."

The Motion was put and agreed to.

OATHS OF JUSTICES OF THE PEACE BILL.

The Hon'ble MR. MAINE introduced the Bill to substitute certain declarations for the oaths of qualification taken by Justices of the Peace, and moved that it be referred to a Select Committee with instructions to report in a fortnight. He said that it was singular that while the Indian legislation on the subject of oaths was very advanced, perhaps, indeed, irrationally advanced, no provision had yet been made for relieving Europeans from their conscientious objections to taking the several oaths, including the oath regarding transubstantiation, hitherto required as a qualification for the office of Justice of the Peace. The effect of the present Bill was, that Justices of the Peace would give the same pledges in substance as the oaths taken to-day by the new Members of Council, and it simply required a solemn declaration that the persons qualifying would bear true allegiance to the Queen, and would faithfully discharge the duties of a Justice of the Peace.

The Motion was put and agreed to.

ABKARI ACTS EXTENSION BILL.

The Hon'ble MR. MAINE also introduced the Bill to provide for the extension of Act XXI of 1856 (to consolidate and amend the law relating to the Abkari Revenue in the Presidency of Fort William in Bengal) to the Province under the control of the Lieutenant-Governor of the Panjab, and moved that it be referred to a Select Committee with instructions to report in a fortnight. He said that we had an Abkari Revenue Act (XXI of 1856) with its supplement (XXIII of 1860), which applied only to the Bengal Presidency. We had another Act which enabled the Governor General in Council to extend the provisions of these Abkari Acts, but only to such Provinces as were under the immediate administration of the Government of India. Now the Panjàb was neither part of the Bengal Presidency, nor was it under the immediate administration of the Government of India. The two Abkari Acts, therefore, did not apply to the Panjab. Its Government, however, was most anxious that these Acts should be extended to that territory. The present Bill had therefore been prepared and introduced in order to comply with their wishes.

The Motion was put and agreed to.

The following Select Committees were named :—

On the Bill to regulate the admission, removal and remuneration of Advocates and Attorneys in the Civil and Criminal Courts and Revenue Offices of the North-Western Provinces of the Presidency of Bengal—His Honour the Lieutenant Governor of Bengal, and the Hon'ble Messrs. Harington, Maine and Cust.

On the Bill to substitute certain declarations for the oaths of qualification taken by Justices of the Peace—The Hon'ble Messrs. Harington and Maine.

On the Bill to provide for the extension of Act XXI of 1856 (to consolidate and amend the law relating to the Abkari Revenue in the Presidency of Fort William in Bengal) to the Provinces under the control of the Lieutenant-Governor of the Panjab—The Hon'ble Messrs. Harington, Maine, Taylor and Cust.

The Council then adjourned.

CALCUTTA,
The 4th November 1864.

WHITLEY STOKES,
Offg. Asst. Secy. to Govt. of India,
(Home Dept., Legislative).

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