# *INDIAN LEG. COUNCIL DEBATES*

*Vol. 1*

*18 Jan. - 24 Dec.*

*1862*

*P. L.*

*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 *and* 25 *Vic., C.* 67.

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THE Council met at Government House, on Wednesday, the 24th December 1862.

PRESENT:

His Excellency the Viceroy and Governor-General of India, *presiding.*
His Honour the Lieutenant-Governor of Bengal.
Major-General the Hon'ble Sir R. Napier, K.C.B.
The Hon'ble H. B. Harington.
The Hon'ble H. Sumner Maine.
The Hon'ble C. J. Erskine.
The Hon'ble W. S. Fitzwilliam.
The Hon'ble D. Cowie.
The Hon'ble Rajah Deo Narain Singh Bahadoor.
The Hon'ble Rajah Dinkar Rao Rugonauth Moontazim Bahadoor.
The Hon'ble R. S. Ellis, C.B.
The Hon'ble A. A. Roberts, C.B.

## DIVORCE COURT BILL.

The Hon'ble MR. MAINE moved for leave to introduce a Bill for conferring upon the High Courts of Judicature in India the jurisdiction and powers vested in the Court for Divorce and Matrimonial Causes in England. He said that the object of the Bill was to give effect to the policy embodied in the High Court's Act passed in 1861, and to the Letters Patent issued by Her Majesty for constituting the High Courts. The object of the High Court's Act seemed to have been, not so much to create new branches of jurisdiction, as to constitute and redistribute the power which already existed. The 9th Clause gave power to Her Majesty to confer on the High Courts such matrimonial jurisdiction as she thought fit; but following the principle he had mentioned, Her Majesty did not attempt to confer on the High Court such a jurisdiction as was exercised by the Divorce Court in England. The Secretary of State therefore requested the Governor-General to introduce a measure, conferring a jurisdiction on the High Courts here similar to that exercised by the Divorce Court sitting in London. The course pursued was probably the only one which could have been followed under the circumstances. But it had given rise to a peculiar difficulty, which had been the cause of some delay.

in introducing this Bill. The matter was so delicate and important, that even before the text of the Bill was in hands of the Members, he would state what that difficulty was. He need not say that, before such a Bill as this was brought in, deeply concerning the High Court, it was submitted to the Judges of that tribunal. The Government were in possession of their answers, and two of the Judges of the High Court of Bengal had given specific opinions on the point to which he had referred. They called attention to its being doubtful whether, if the High Court, acting under the authority conferred by the Council, decreed the dissolution of marriage between persons belonging to a certain class of Her Majesty's subjects in India, there was anything in the present state of the Law which would compel the English Courts to recognize those decrees, and to view the marriages put an end to as legally dissolved. One learned Judge (Mr. Justice Norman) was on the whole of opinion, that a decree of the High Court dissolving a marriage would now be recognized in England. The Chief Justice, however, considered it more than doubtful, whether such decrees would be allowed by the English Courts to have this consequence, and though no concurrence of his (Mr. Maine's) could add weight to the opinion of Sir Barnes Peacock on this point, he must say that ever since he had tried to address himself to this subject, he had been struck with the same difficulty. He would attempt to explain what this difficulty was. There was no doubt that the rule of a private international Law, the rule received among communities under what was called the comity of nations, was that every man's status, his personal condition, was to be determined by the law of his domicile, of the country in which he was domiciled; so that a man who was a major or minor, or bachelor or divorced man, in the place where he had acquired a domicile, was a major or minor, and so forth, in every other country. Of course the highest authority by which a man's status could be declared in any country was the authority of a Court of competent jurisdiction, and hence it followed that all tribunals were bound by the comity of nations to respect and recognize the decrees of divorce passed by foreign Courts. Now, then, as the Courts of every dependency of the British Crown, which had a complete and independent judicial system, are foreign Courts relatively to the English tribunals, it would seem that a decree of the High Court dissolving a marriage between domiciled Christians under the measure now to be introduced, ought to be deemed effectual by every English tribunal; and that such a decree would be regarded as valid in respect of one class of Indian Christians, there seemed to be no doubt. When persons had been married in India, and the marriage had been dissolved by the High Court, no difficulty existed, and the dissolution would be held to be complete even in England. But when persons had been married in England, and their marriage had been dissolved in India, it was far from certain that English tribunals would consider them at liberty to re-marry. The doubt

had been caused by a judicial decision which had become memorable in that branch of jurisprudence, and which was known as *the King* against *Lolly*, or Lolly's case. Lolly, in 1812, was indicted for bigamy and he pleaded in defence that his first marriage was dissolved by a Scotch decree. All the twelve English Judges held that such a dissolution was of no validity in England; and Lolly, who had been convicted, underwent the punishment to which he had been sentenced. The decision was, as he had heard, consonant with the prevalent feeling of the time, for much anxiety had been caused by the apparent facility with which divorces were obtained from the Consistorial Branch of the Scottish Court of Session, but at the same time it was in flagrant discordance with the rule of private international Law. Hence, a long succession of the best legal authorities had expressed dissatisfaction with Lolly's case, or had attempted to explain it away. Some, with whom Mr. Justice Norman was disposed to agree, had pointed out that the decision turned partly on the circumstance that marriages at common Law in 1812 were incapable of dissolution; so that the Law being now otherwise, the case had lost its authority. Others, including the Judge of greatest experience in matrimonial Law, Dr. Lushington, had observed that the Judges, in 1812, did not seem to have paid attention to the question of domicile. But on the whole, he ventured to think that the better opinion was Sir Barnes Peacock's, who considered that, so long as Lolly's case was not formally over-ruled, it was impossible to say that persons married in England and divorced in India, would be regarded in England as capable of contracting a legitimate re-marriage. This case, too, as the Council would see, was one in which doubt was almost as intolerable as unfavourable certainty; for doubts as to the validity of divorces were doubts as to the lawfulness of re-marriage; doubts as to the lawfulness of re-marriages were doubts as to the legitimacy of children; and doubts as to the legitimacy of children were doubts as to the right of inheritances; so that these difficulties, if not set at rest, might lie in ambush for the third and fourth generation, and fifty or sixty years hence, the right to an estate might be impeached on account of an unsettled question respecting an Indian divorce. The question therefore was what course ought they to adopt in legislating on these subjects. There could be no doubt that, as they were competent to legislate for a large class of Christian subjects, those who had been married in India, they should not delay the relief they could give to such of them as were unfortunate enough to be compelled to resort to the new branch of the High Court. Meantime, the Governor-General in Council had requested the Secretary of State to lay the difficulty before the Law Officers of the Crown. If they, considering the criticisms which had been directed against Lolly's case by so many learned persons, were of opinion, that it was originally decided erroneously, there would be reasonable security for persons married in England who might re-marry after a decree of divorce by the High Court

If they thought that Lolly's case still stood in the way, the Secretary of State would doubtless think fit to apply to Parliament for a remedy, which might take either of two forms suggested by the Judges of the High Court. Indian divorces might be rendered, simply and at once, as binding in England as divorce by the English Divorce Court, or they might be registered there, and if not appealed from within a certain period, they might acquire the validity of an English matrimonial decree.

The Motion was put and agreed to.

## EMIGRATION TO SAINT CROIX.

The Hon'ble MR. MAINE moved for leave to introduce a Bill relating to the emigration of Native Laborers to the Danish Colony of St. Croix, and said that, after a rather protracted negotiation between the Danish and Her Majesty's Governments, it had been resolved to pass a measure giving effect to emigration to that Colony. The Bill had been framed exactly in the same way as former Bills; and as it was a matter of comparatively small importance, he would not take up the time of the Council with any further remarks.

The Motion was put and agreed to.

## ARTICLES OF WAR.

The Hon'ble MR. MAINE introduced the Bill to amend Act XXIX of 1861 (to consolidate and amend the Articles of War for the government of the Native Officers and Soldiers in Her Majesty's Indian Army), and moved that it be referred to a Select Committee with instructions to report in four weeks. He said that the only Clause in the amended Bill which was of great importance was that which conferred certain powers on Officers belonging to small Detachments situated beyond the Seas. The exact nature of all the amendments would be seen in paper marked No. 1. appended to the old Articles side by side.

The Motion was put and agreed to.

## ACT XX OF 1862 CONTINUANCE BILL.

The Hon'ble MR. MAINE also introduced the Bill to continue in force Act XX of 1862 (to provide for the levy of Fees and Stamp duties in the High Court of Judicature at Fort William in Bengal; and to suspend the operation of certain Sections of Act VIII of 1859 in the said High Court) till the 1st January 1864. The object of the Bill (he said) was to supply an omission in the original Bill. By an accident, which very frequently occurred in the preparation of enactments of that kind, provision had not been made to enable the Court to fix the time within which an application for

a review of judgment should be made. Provision had been made for Appeals, and this Bill would put applications for reviews on the same ground. He applied to His Excellency the President to suspend the Rules of Business, in order that the Bill might be passed at once.

His Excellency the PRESIDENT declared the Rules suspended.

The Motion that the Bill be passed was then put and agreed to.

The following Select Committee was named :—

On the Bill to amend Act XXIX of 1861 (to consolidate and amend the Articles of War for the government of the Native Officers and Soldiers in Her Majesty's Indian Army)—Messrs. Erskine, Ellis, and Roberts.

The Council adjourned.

M. WYLIE,
*Deputy Secy. to the Govt. of India,*
*Home Department.*

CALCUTTA;
*The 24th December* 1862.

S. G. P. I.—No. 320 L. D.—4-5-1914.