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 25th November 1864.

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 Sir C. E. Trevelyan, K.C.B.
The Hon'ble W. Grey.
The Hon'ble H. L. Anderson.
The Hon'ble Claud H. Brown.
The Hon'ble J. N. Bullen.
The Hon'ble Mahárájá Vijayaráma Gajapati, Ráj Bahádur of Vizianagram.
The Hon'ble Rájá Sáhib Dyál Bahádur.
The Hon'ble G. Noble Taylor.
The Hon'ble W. Muir.
The Hon'ble R. N. Cust.
The Hon'ble Maharaja Dhíraj Mahtab Chand Bahadur, Maharájá of Burdwan.

OATHS OF JUSTICES OF THE PEACE BILL.

The Hon'ble MR. MAINE moved that the Report of the Select Committee on the Bill to substitute certain declarations for the oaths of qualification taken by Justices of the Peace be taken into consideration.

The Motion was put and agreed to.

The Hon'ble MR. MAINE also moved that the Bill as amended be passed.

The Motion was put and agreed to.

ABKARI ACTS EXTENSION BILL.

The Hon'ble Mr. MAINE also moved that the Report of the Select Committee on the Bill to provide for the extension of Act XXI of 1856 (to consolidate and

amend the Law relating to the Abkárí Revenue in the Presidency of Fort William in Bengal) to the Provinces under the control of the Lieutenant-Governor of the Panjab, be taken into consideration.

The Motion was put and agreed to.

The Hon'ble MR. MAINE also moved that the Bill be passed.

The Motion was put and agreed to.

CIVIL AND CRIMINAL COURT (PANJAB) BILL.

The Hon'ble MR. CUST, in moving for leave to introduce a Bill for altering the constitution and enlarging the jurisdiction of the Chief Court of Civil and Criminal jurisdiction in the Provinces under the Government of the Lieutenant-Governor of the Punjáb and its dependencies, remarked that the Punjáb was a Non-Regulation Province, and that the final Court of Appeal, Reference and Revision was presided over by a single Officer called the Judicial Commissioner: that owing to the annually increasing amount of business, it had been found that one officer could not satisfactorily discharge the duties of the Court, and moreover that to constitute an effective Court of final jurisdiction, there was a necessity for more than one Judge: this had been strongly represented by the Local Government. The time was not come yet for establishing a High Court of Judicature, but the measure now proposed was in that direction, *viz.*, to appoint two or more additional Judges to form a Court to be called the Chief Court of Judicature of the Punjáb.

For the present one additional Judge only would be appointed, and he would be a Barrister, with the same qualifications that were required from a Judge of the High Court. The Court thus constituted would disposed of all the appellate business according to rules framed by themselves and sanctioned by the Local Government

But the Court would have an original, as well as appellate, jurisdiction: on the Civil Side the Court would be able to call for and transfer to its own file for decision any case pending in any subordinate Court; in fact, it would be vested with the same powers which were possessed by the High Court in its extraordinary civil jurisdiction. Such cases would generally be those of peculiar importance, and specially those where a knowledge of English law was necessary.

The Court would also in its original criminal jurisdiction try offences committed by European British subjects, which at present are triable by the High Court of Calcutta only. The attention of the Council was called particularly to this part of the scheme. Owing to the great distance of the Punjáb from Calcutta, the inconvenience and expense of sending parties charged with offences

and all the witnesses was very considerable. The number of European British subjects was annually increasing, and the increase of European crime was considerable: in fact in a certain class of offences there was a complete impunity to the European British subject. Under this Bill such trials would be held by the Barrister Judge with the aid of a Jury. The details of the procedure would be settled in Committee.

The Motion was put and agreed to.

INDIAN CIVIL CODE, CHAPTER I.

The Hon'ble Mr. MAINE introduced the Indian Civil Code, Chapter I, and moved that it be referred to a Select Committee. He said that though it was difficult to over-rate the importance of the measure, he proposed to introduce it with very few observations. Probably the Council would think it due to the eminent names appended to the Report to refer the Bill at once to the Committee. Moreover, he thought that he could not usefully add anything to the analysis of their work which the Commissioners themselves had furnished, and in his Statement of Objects and Reasons he had said everything which he had to state as to the probable effect of this Code on certain races and classes. He only wished to suggest for the consideration of the Council the course which it seemed to him most expedient to follow. The Council might have observed that, in his Statement of Objects and Reasons, he had expressed himself doubtfully as to the applicability of the Code to certain wild tribes who did not fall within the exception of Hindus and Muhammadans—such, for example, as the Bhils, the Khonds, and the Kols, whose gradual civilization had lately been attracting notice both at home and in India, the Buddhist tribes spread along the crest of the Himálaya, such as the Thibetans in the valley of Spiti and the Lepchas about Darjíling. He believed it was found that in proportion to the barbarism of a tribe was the faintness of the notion of individual right as distinguished from family right. Thus, while the rights of one household against another might be clearly ascertained, the rights of the members of each household *inter se* would probably be faintly and vaguely defined. When, then, all that you knew of a particular race was that it was barbarous, the presumption was, as he had said in the Statement of Objects and Reasons, that a system of conjoint family-enjoyment during life was combined with a system of conjoint family-succession after death. It was accordingly difficult to say what might be the effect produced by a law of succession like that of this Code on a set of barbarous customs. A violent disturbance of them might be effected by the very sharpness and precision with which the rights were declared. Being aware of this danger, the Government requested the officers in charge of these tribes carefully to consider the effect which this first Chapter of the Code would have on their customary law. Little information of the kind had, however, come in, and that was not surprising. For it was by no means easy to ascertain the details of

a body of barbarian custom : when ascertained, it was harder still to state it in intelligible language ; and more difficult still to define what would be the effect upon it of a civilized body of law. MR. MAINE was afraid that if they waited for all the information they required, the enactment of that part of the Code would be inordinately delayed. He therefore proposed that if the Council was satisfied of the wholesome operation of the new law upon the more civilized races to whom, as it stood, it applied, it should be enacted with a section empowering the Governor-General in Council to exempt from its operation any race, sect, or tribe ; and, moreover, to exempt them retrospectively from the moment of the passing of the Bill, so that there might be no inconvenient interruption in the devolution of rights. He trusted that under this power it would not be necessary to exempt a race so numerous as the Burmese. Turning to the more civilized races, the first place among them was of course taken by the Europeans. He was happy to say that all the information he had received led him to believe that this part of the Code would be received by them with favour. Outside the Presidency towns, it would be heartily welcomed ; and, indeed, no one could contemplate the utter doubtfulness and uncertainty of the European law of property in the Mofussil without feeling that a much worse set of provisions than this would be the greatest of boons.

He would advert to one or two criticisms—he could hardly call them objections —which had reached him as to this Chapter of the Code considered as a modification of English law. He had received a printed paper which had possibly been sent to other Members of Council. The writer professed to be a Scotchman, and to speak the feelings of a number of Scotch gentlemen who were settled in India. He was warmly in favour of this part of the Code, and wished that it should become law with the least possible delay, but expressed a fear that it might compromise a principle which he and his countrymen prized on moral and social grounds ; the principle of legitimation *per subsequens matrimonium*, that is, the principle by which under Scotish Law natural children were legitimated by the after-marriage of their parents. The objection, MR. MAINE thought, was founded on a misconception. It was true that the Code declared that none but legitimate children should succeed ; but it no where as yet defined legitimacy. Whatever, therefore, were at the present moment the law of India determining the legitimacy of a Scotchman's children, a question upon which MR. MAINE would be sorry to offer a very positive opinion, it would be wholly unaffected by the enactment of this part of the Code. Doubtless the question—and it was a most difficult one—would have to be decided hereafter whenever the Chapter on the Law of Persons came before them for consideration. But it was probable that that Chapter would be the last taken up by the English Law-Commissioners.

Another remark had been addressed to MR. MAINE on section 4, which declared that " No person shall by marriage acquire any interest in the property of

the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried." A doubt had been hinted whether, on moral grounds, the complete proprietary independence of husband and wife was justifiable. But in this section, marriage meant the mere fact of marriage, and the provisions of any will or marriage-settlement were unaffected by it. It was true that in England under the Common Law, the fact of marriage conferred on a husband certain rights over his wife's reality, and the whole of her personality, past and present. But the operation of the rule was much controlled by certain doctrines of the Court of Chancery, compelling a husband to settle property devolving on his wife, when it happened to be only recoverable through the agency of the Court; and, as regards the property-holding classes, the practical effect of marriage-settlements and wills was to render the rule of very limited application. MR. MAINE imagined that an English father would consider it a great calamity that his daughter should marry without a settlement. Either, therefore, that settlement or some will controlled the enjoyment of the property, and it was only through accident that the naked rule of law was allowed to operate.

Similar considerations carried with them the answer to another criticism which had reached him. This law of succession practically turned Reality into Personalty, and provided that the same rules of succession should govern both. He had been asked whether the extreme sub-division of land which a similar law of succession was supposed to draw with it in France, was, on economical grounds, desirable, either for India or for any other country. Here also apparently a misconception arising from not taking into account marriage-settlements and wills. The reason why the *morcellement*, as it was called, of land in France had gone so far was, not because the French law of intestate succession divided the land equally among all the children, but because the French Code contained a number of most stringent prohibitions against private interference with that law. It might be said that the French Code compelled a man to die intestate, since, if he left children any will which he might make could have only the most limited operation. It was, indeed, notorious that if those restrictions had not existed, a very large part of the soil of France, on the return of the French Nobility in 1814 and 1815, would have been tied up in entails nearly as strict as those which existed previous to the Revolution, even though the law of succession to an intestate was precisely the same as that of the proposed Indian Code. It was further a fact that, in some European countries into which the French Code had been introduced, but in which these prohibitions had been relaxed in favour of certain classes, the existing settlements and entails were even more stringent than those usually found in England, there often not being even a power of portioning daughters. The truth was that, when you were dealing with educated and property-holding societies, the question of the legal consequences which were to follow from the mere facts of marriage and of death had

chiefly a technical importance; and he had no doubt that technical considerations had mainly influenced the Commissioners in framing these provisions. It was quite certain that, when you had once enacted that marriage should not *per se* confer any rights on husband or wife, and that the law of succession to land should be the same as the law of succession to personality, you at one stroke introduced an amount of simplicity into English law which was almost incredible.

The only serious difficulty which would have to be encountered in Committee arose through the proposed application of the Code to the Pársís. The Council might be aware that the Pársís had, under distinguished legal advice, prepared a partial Code of Civil Law, including Chapters on marriage, divorce and succession. MR. MAINE, in his Statement of Objects and Reasons had proposed that the Pársí Code should be considered *pari passu* with the draft of the English Law-Commissioners, who were themselves of opinion that the law which they had framed should suffice for the Pársís. But the heads of the Pársí community objected to that course, on the ground that no one could say how long it would be before the Indian Civil Code became the law of India. MR. MAINE fully admitted the force of that objection as regarded the Chapters on marriage and divorce. He was therefore quite willing that the Chapters of the Pársí Code on those subjects should become law whenever his hon'ble friend, Mr. Anderson, introduced them. But he, MR. MAINE, still proposed to consider the Commissioner's draft of the succession law together with that of the Pársís. He, in fact, hoped that the first Chapter of the Indian Civil Code would be passed before the Council separated in the spring, and therefore the objection of the Pársís as to time would be met. If the Pársís turned out to have an invincible repugnance to certain provisions of the Code, special legislation on their behalf might be carried through before the sittings were ended. MR. MAINE was not unaware of the nature of certain specific objections of the Pársí community to particular rules laid down by the Law-Commissioners; and as to some of them, he had a pretty strong opinion of his own. He hoped, however, that he was not so pedantic as to press an abstract opinion against an ancient and venerated usage, when no great practical evil resulted from it.

MR. MAINE then proceeded as follows:—"One thing more I have to say. I venture to predict that when the first Chapter of the Civil Code has been examined and discussed by the Council and its Committee, the strongest impression left on their mind will be respect for the Commissioners who prepared it. I know of course, that they had the assistance of able subordinates. But still, after making every allowance for that advantage, it remains wonderful that these Commissioners, overtasked Judges, hardworked practising Barristers, gentlemen immersed in politics or in the duties of office, should have found time to superintend and control the preparation of a body of law, in which, not only has each

separate proposition been carefully considered and measured, both as to form and substance, but the bearing of each and every proposition on the residue has been forecasted and ascertained. Perhaps, however, now that I perceive what the true objects of the Commissioners have been, my surprise is less than that of others; for I have seen enough personally of the real luminaries of English law to know the falsity of the ignorant delusion that there is something in great technical knowledge and great practical aptitude which implies a contempt for theoretical perfection. My own experience—it is necessarily limited, but still I state a fact—is that, in proportion to the judicial or professional eminence of an English lawyer is his sensitiveness to the undoubted faults of English law, and his anxious desire that, to that strong and solid structure of common sense which constitutes its mass, there should be added excellencies to which it certainly cannot at present lay claim—simplicity, symmetry, intelligibility, and logical coherence. Knowing this, I scarcely marvel that these gentlemen should have devoted much of a leisure which they can ill spare to the preparation of a Code which, to judge from this first instalment, while it preserves all that is best worth keeping and of most general application in English law, combines it with a simplicity of form and an intelligibility of statement which a French Codifier might envy. And their reward, and that of all who have taken part in these Indian Codes will be—I may say that without presumption, as I have no share in the earlier Codes and expect to have little more than a mechanical part in this—that their labours are probably destined to exercise hardly less influence over the countless communities obeying English law, than the French Codes have exercised, and still exercise, over the greater part of the Continent of Europe."

The Hon'ble MR. ANDERSON said—"I wish Sir, to submit a few observations to the Council on a subject to which allusion has been made by my hon'ble friend, the mover. I have been entrusted by the Pársí community of Bombay with the charge of their Draft Code of Laws, by which it is proposed that inheritance, succession, marriage, and divorce among Pársís shall be regulated. With respect to marriage and divorce, I believe it is universally admitted that the Pársís are entitled to separate and immediate legislation; but the question has arisen, and will hereafter have to be decided, whether, with respect to inheritance and succession, they shall be bound by the provisions of the Civil Code which has now been introduced, or whether they shall be permitted to have a Code of their own. Under these circumstances, I consider it my duty to state briefly to the Council the course which I propose to pursue. I should first mention that the Pársís are strongly averse from being rendered subject to the Civil Code, and I have very recently received a telegram from the President of the Pársí Law Association, stating that on the 22nd instant, a memorial had been forwarded to the Governor-General through the Bombay Government, praying that Pársís might be exempted from

the operation of the Code. The objection of the Pársís to the Code is not, except on one ground, a general one, but rests upon certain specific considerations. The general ground to which I allude is the impression noticed by my hon'ble friend, that the Indian Civil Code will not become law for the next twenty-five years. That objection has been removed by the resolution of my hon'ble friend, to endeavour to pass the Code Chapter by Chapter a resolution which, in my humble opinion, is founded on the soundest policy. Of the particular objections, some, I think, the Pársís may be induced to abandon; others, I am certain, are insurmountable, and I think, justly insurmountable. The course, then, which I propose to pursue is to submit, at an early date, to the Council, a Bill providing for the regulation of marriage and divorce among Pársís, to offer no objection on their behalf to the Code as it stands, but eventually to introduce a measure exempting the Pársís from the operation, not of the whole Code in relation to inheritance but only from the operation of such particular provisions as may be opposed to their feelings and usages. The proposed measure will also enact what the law as to inheritance will be for Pársís, on the points of divergence from the general Code. By this course, the Pársís will, generally, obtain the benefits of the admirable law which has now been introduced, and they will be saved from the incidence of those provisions to which they are with justice opposed. I say with justice, because I cannot imagine any legislative assembly being insensible to some of the objections which have been urged by the Pársí Law Association, and which have been considered valid by Sir Joseph Arnould and Mr. Newton, two Judges of the High Court of Bombay, who were appointed to investigate and report upon the whole subject. I will briefly mention two of the objections. The Pársís, as a rule partake of the not uncommon feeling of aversion from making wills. By a return with which I have been furnished, I find that only two hundred and forty wills have been registered by Pársís in the late Supreme Court and present High Court of Bombay in thirteen years. The wills thus registered were principally made by those whom we may term "Anglicized Pársís." Under these circumstances, the Pársís, as a community, will be amenable to the provisions relative to an intestate's property. But in the 31st section of the Code, it is provided that when a person dies intestate, an equal division of his property shall be made among all his children. This is totally opposed to Pársí usages and feelings. They would give the female a share, but not an equal share with the male children, and they justify this distribution by the fact that certain religious and social duties are, by their creed and customs, imposed upon the male heirs. The other objection to which I would allude is that the table of kindred given in the 25th section does not accord with their customs as to proximity of relationship. The Council is well aware how close in all oriental countries and communities is the connection between religion and civil law: so complete is generally the fusion between these rules

of conduct, that it is almost impossible exactly to indicate where the one ends, and the other begins. I think, therefore, the Council should be very cautious that, in pressing a civil law upon the Pársís, it does not impose upon them a burden obnoxious to their religious sentiments. The course which I propose to follow will, I trust, be acceptable to the Pársís, as I am convinced that it will, on the whole, be the one most beneficial to their interests, and I hope that the Council will be induced, when the proper times comes, to assent to a measure which will not impair the symmetry of the Indian Civil Code, while it will relieve an ancient race from such provisions as are opposed to their social and religious feelings. I shall feel the less reluctance to ask the assent of the Council to such a measure, because I am strongly of opinion that the Pársís have a valid claim to the sympathy of an enlightened Government. As a community, they have always evinced eminent loyalty, and a most noble public spirit. There are among them citizens of whom any nation might be proud. Since I left Bombay, I have read the speech of Sir Jamsetjee Jeejeebhoy when presiding over a meeting convened to concert measures for the relief of the sufferers from the late cyclone. That gentleman, a most worthy son of a most excellent father, is reported to have called on the natives of the Bombay Presidency, 'to show that they were determined to cast in their lot with the great British Government, and to stand by that Government with their fortunes, as they would, if need were, with their lives.' This is language to which no Government, no section of English society, can ever be insensible.

I have only to add, in conclusion, an expression of my admiration of the wisdom with which the Indian Civil Code has been framed, and to state my belief that it will hereafter occupy a conspicuous position in jurisprudential history."

The Hon'ble MR. MAINE said that the course which Mr. Anderson proposed to take, had his entire approval. No community had a stronger title to the consideration of the Government and the Legislature, than the Pársís. If he, MR. MAINE, still expressed in Committee his doubts of certain of the provisions which they preferred to the rules of the Law-Commissioners, it would not be from obstinate adherence to an opinion, but from a feeling that the Pársís were a rapidly advancing community, and that, therefore, it would be a pity to tie them down to rules which, from a certain point of view, must be regarded as backward or retrograde, and which, in a few years they might wish to have changed.

The Motion was put and agreed to.

The following Select Committee was named :—

On the Indian Civil Code, Chapter I—The Hon'ble Messrs. Harington, Maine, and Anderson, the Hon'ble Rájá Sáhib Dyál Bahadur, and the Hon'ble Messrs. Muir and Cust.

The Council then adjourned.

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

CALCUTTA;
The 25th November 1864.

S. C. P. I.—77 L. D. 2-8-11