

Wednesday, October 24, 1866

**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 Simla on Wednesday, the 24th of October 1866.

PRESENT :

His Excellency the Viceroy and Governor General of India, *presiding*.

His Excellency the Commander-in-Chief.

The Hon'ble H. S. Maine.

The Hon'ble W. Grey.

The Hon'ble G. N. Taylor.

The Right Hon'ble W. N. Massey.

The Hon'ble Colonel H. M. Durand, c.b.

The Hon'ble W. Muir.

The Hon'ble H. P. Riddell.

MORTGAGES AND TRUSTEES' PROPERTY BILL.

The Hon'ble MR. MAINE, in moving that the Report of the Select Committee on the Bill to consolidate and amend the law relating to the conveyance and transfer of property in British India vested in Mortgagees and Trustees, in cases to which English law is applicable, be taken into consideration, said that he had explained on a former occasion that the Bill was purely technical in its character; that it only referred to cases in which English law was applicable; that it was founded on English Acts which had been framed by a most competent draftsman, the present Lord Justice Turner, and that the Judges of the High Courts thought the Bill wanted. Under these circumstances he would have asked the Council to pass the Bill summarily, but that, since its publication in the *Gazette*, the Indian Succession Act had come into operation and necessitated the changes which he would proceed to notice briefly. The chief object of the Bill might shortly be described as being to meet the difficulties arising from the devolution of the fiduciary interest in property, under the laws relating to intestate and testamentary succession, on a person other than the trustee contemplated by the creator of the trust. These difficulties were formerly in India, and still in England, aggravated by the circumstances that the devolution of personalty or moveables was different from that of realty or immoveable property. This distinction had happily been abolished in India by the Indian Succession Act;

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but the provisions of that Act did not apply to any will made, nor to any intestacy occurring, before the 1st January 1866. It was therefore necessary to make the Bill (which had been framed, it would be remembered, before the passing of that Act) apply to two states of circumstances,—cases where trustees held under wills made or intestacies occurring before the 1st January, and cases where they held under wills made or intestacies occurring on or after that day. The interpretation clause of the Bill, as amended by the Select Committee, accordingly contained the following provisions:—

“In the case of a will made or an intestacy occurring before the 1st day of January 1866, ‘heir’ shall mean the person claiming an interest in the immoveable property of a deceased person under the laws concerning descent applicable to such property: and ‘devisee’ shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the immoveable property of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent.

“In the case of a will made or an intestacy occurring on or after the 1st day of January 1866, ‘heir’ shall mean any person claiming an interest in the immoveable property of a deceased person under the rules for the distribution of an intestate’s estate; and ‘devisee’ shall mean any person taking immoveable property under a bequest, and any person, other than an executor or administrator, claiming an interest in immoveable property, not as entitled thereto under the said rules, but by a title dependent solely upon the operation of the laws concerning intestate and testamentary succession.”

Although the Committee had retained the terms “heir” and “devisee” as being properly applicable to persons claiming immoveable property under intestacies occurring or wills made before the 1st January 1866, the phrasology of the Bill had, in other respects, been made to harmonize with that of the Indian Succession Act. “Hold” and “holding,” for example, had been substituted for the technical expressions “seized” and “possessed,” and “immoveable property” for “land” “real property.” The definition of stock had been altered so as to make it comprise shares in ships registered under the Merchant Shipping Act, 1854, or at any port of British India. This was in accordance with the Statute 18 and 19 Vic., cap. 91, Section 10. The definition of “High Court” had been altered so as to make the Bill apply, not only to the High Courts at the three Presidency towns, but also to the High Court of the North-Western Provinces, and to the Chief Court of the Punjab.

MR. MAINE added that he assumed that, after the 1st January 1866, conveyances of immoveables in trust had been and would always be made, not to trustees and their heirs, but to trustees and their executors or administrators; and the difficulties connected with the devolution of the trust property would from the nature of the case be practically simplified.

The Motion was put and agreed to.

The Hon'ble MR. MAINE then said that, since the Select Committee had made their report, a communication had been received from the Local Government requesting that the provisions of the Bill should be made applicable to the Straits' Settlement. He would therefore, with the permission of his Excellency, move the following amendments:—

That the following words be inserted in Section 1 after line 9 :—" and so much of Act No. XIV of 1852 (for extending the provisions of Acts XXIV of 1841 and XVII of 1843 to the Straits' Settlement) as extends the provisions of the said Section to the Settlement of Prince of Wales' Island, Singapore and Malacca;" that the word "are" be substituted for "is" in line 10 of the said Section; and that the words "or Act" be inserted after "Section" in lines 11 and 13;

That the following Section be added to the Bill :—

"55. On and after the first day of February 1867 (but not till then), the powers and authorities given by this Act to the High Courts, shall and may be exercised by the Court of Judicature of the Settlement of Prince of Wales' Island, Singapore and Malacca, with respect to moveable and immoveable property within the local limits of the jurisdiction of that Court; and, in the said Settlement, Section 2 of this Act shall be read as if the words and figures '1st day of February 1867' were substituted for the words and figures '1st day of January 1866.'"

The 1st day of February 1867 was mentioned in the Section which MR. MAINE proposed to add, as that was the day on which it was intended that the Indian Succession Act should come into force in the Straits' Settlement.

The Motion was put and agreed to.

The Hon'ble MR. MAINE then moved that the Bill as amended by the Select Committee, with the additional amendments now approved, be passed.

The Motion was put and agreed to.

TRUSTEES AND MORTGAGEES' POWERS BILL.

The Hon'ble MR. MAINE, in moving that the Report of the Select Committee on the Bill to give to Trustees, Mortgagees and others, in cases to which English law is applicable, certain powers now commonly inserted in Settlements, Mortgages and Wills, and to amend the law of property and relieve Trustees, be taken into consideration, said that this Bill, like that which had just been passed, was of a technical character. It would only apply to cases to which English law was applicable, and it had been framed on the basis of the useful Statutes known as Lord St. Leonards' Acts. The changes recommended by the Select Committee in their report, were directed to supply certain defects which had been observed in the English Statutes.

Section 5 of the Bill, as introduced, provided that monies arising from sales by Trustees, should be laid out in the manner indicated in the instrument containing the power of sale, and that, until the money was so laid out, it should be invested in Government Securities. The Committee proposed to provide further that, if the instrument contained no such indication, the Trustees should invest the money in the same way, and pay the interest to the persons to whom the rents of the property sold would have been payable if the sale had not been made.

The Committee had also provided that nothing contained in Section 10 should be construed to authorize the mortgagee of a term of years to sell and convey the fee simple of the property in cases where the mortgagor could have disposed of the fee simple at the date of the mortgage. This would preclude the power unintentionally given by the Statute 23 and 24 Vic., cap. 145, Section 15, from which Section 10 of the Bill, as introduced, had been transcribed.

In Section 34 the Committee had provided for the case of all Trustees retiring simultaneously, and also for that of there being two or more classes of Trustees of the same instrument. These were *casus omissi* in the Bill as introduced, and also in the corresponding Section of the Statute 23 and 24 Vic., cap. 145.

The Committee had retained Section 42, which referred to the distribution of the assets of a testator or intestate, after a notice given by his executor or administrator. This retention would preclude the doubts which were understood to have arisen with regard to the application of the corresponding Section (320) of the Indian Succession Act, 1865.

The Bill had been made to extend not only to the High Courts in Calcutta, Madras and Bombay, but also to the High Court of the North-Western Provinces, and the Chief Court of the Punjab.

The Motion was put and agreed to.

The Hon'ble COLONEL DURAND asked whether there would be any doubt as to the precise meaning of the expression "Government Securities" as used in Section 5 of the Bill.

The Hon'ble MR. MAINE did not think it likely that any such doubt would be raised. "Government Securities" was a phrase of frequent use in Indian legislation—see, for example, Section 7 of Act VIII of 1855—and meant Government Promissory Notes, for the payment of which the credit of the Government was pledged. It would certainly not include shares in the Banks of Bengal, Madras and Bombay.

The Hon'ble MR. MAINE then said that, since he had presented the Report of the Select Committee, the Local Government had asked that this Bill also should be made applicable to the Straits' Settlement. He would therefore, with his Excellency's permission, move the following amendments :—

That in Section 1 the following words be added to the definition of High Court :—"and the Court of Judicature of the Settlement of Prince of Wales' Island, Singapore and Malacca."

That the following Sections be added to the Bill :—

"46. This Act may be called The Trustees and Mortgagees' Powers Act, 1866.

"47. On and after the first day of February 1867, but not till then, this Act shall apply to the Settlement of Prince of Wales' Island, Singapore and Malacca; and, in the said Settlement, Section 29 of this Act shall be read as if the words and figures 'first day of February 1867' were substituted for the words and figures 'first day of January 1866.'"

The Motion was put and agreed to.

The Hon'ble MR. MAINE moved that the Bill as amended by the Select Committee, with the additional amendments now approved, be passed.

The Motion was put and agreed to.

STRAITS' SETTLEMENT COURTS OF REQUESTS' BILL.

The Hon'ble MR. MAINE, in moving that the Report of the Select Committee on the Bill to enlarge the jurisdiction of the Courts of Requests in the Settlement of Prince of Wales' Island, Singapore and Malacca, be taken into consideration, said that he would ask the Council to pass the Bill on the authority of the Local Government by whom it had been framed, and at whose request it had been introduced. The Code of Civil Procedure did not extend to that Settlement, and the procedure set forth in the Bill was different from any in force in England, and very different from that with which they were familiar in India. The only question was as to whether the Council would adopt the recommendation of the Select Committee and enlarge the jurisdiction of the Courts of Requests from 32 to 50 dollars. The Bill, as introduced, proposed to extend the jurisdiction to suits in which the matter in dispute did not exceed the value of 100 dollars; but the Local Government had lately represented that the necessity for extending the jurisdiction of these Courts to suits in which the matter in dispute might exceed the value of 50 dollars had ceased to exist. The requisite alterations had consequently, with the assent of the Governor of the Straits' Settlement, been made in the wording of the different Sections of the Bill. Fifty dollars were 100 Rupees; and as the Indian Small Cause Courts, with which the Courts of Requests in the Straits most nearly corresponded, had jurisdiction to a much higher amount, he thought that the Council could have no objection to adopt the recommendation of the Committee.

The Motion was put and agreed to.

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

The Motion was put and agreed to.

STRAITS' SETTLEMENT ABKARI BILL.

The Right Hon'ble MR. MASSEY, in moving that the Bill for amending the laws for collecting a Revenue of Excise on Spirituous Liquors and Intoxicating Drugs in the Settlement of Prince of Wales' Island, Singapore and Malacca, be taken into consideration, said that on the last day of meeting he had explained the objects of the Bill, and the circumstances under which it was introduced. No objection had been made to the changes in the law which the Bill, if enacted, would effect—changes, he might repeat, which had been set forth with much minuteness in the Statement of Objects and Reasons. He therefore thought it unnecessary to trouble the Council with any further observations.

The Motion was put and agreed to.

The Hon'ble MR. MAINE moved as an amendment that the following sentence be added to Section 1 of the Bill :—

"Section 53 of Act No. XIII of 1856 (for regulating the Police of the Towns of Calcutta, Madras and Bombay, and the several Stations of the Settlement of Prince of Wales' Island, Singapore and Malacca), shall be read as if the reference therein made to the said Act No. XIV of 1851 were made to this Act."

This amendment was necessary, as the Bill proposed to repeal Act No. XIV of 1851, the present Straits' Settlement Abkari Act.

The Motion was put and agreed to.

The Right Hon'ble MR. MASSEY then moved that the Bill as amended be passed.

The Motion was put and agreed to.

The Council then adjourned.

WHITLEY STOKES,

*Asst. Secretary to the Govt. of India,
Home Dept. (Legislative).*

SIMLA,

The 24th October, 1866.