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 December 1868.

PRESENT:

His Excellency the Viceroy and Governor General of India, *presiding.*
The Hon'ble G. Noble Taylor.
The Hon'ble H. Sumner Maine.
The Hon'ble John Strachey.
The Hon'ble Colonel H. W. Norman, C. B.
The Hon'ble F. R. Cockerell.
The Hon'ble Sir George Couper, Bart., C. B.
The Hon'ble Mahárájá Sir Dirg-Bijay Singh, Bahádur, K. C. S. I. of Balrámpúr.
The Hon'ble Gordon S. Forbes.
The Hon'ble D. Cowie.
The Hon'ble M. J. Shaw Stewart.

The Hon'ble MR. SHAW STEWART took the oath of allegiance, and the oath that he would faithfully discharge the duties of his office.

EVIDENCE BILL.

The Hon'ble MR. MAINE moved that the Bill to define and amend the Law of Evidence be referred to a Select Committee with instructions to report in two months. He said that the Council were no doubt aware that, on referring a Bill to a Select Committee, what was affirmed was the principle of the measure or the expediency of legislation within the general principles of the measure. This being understood, MR. MAINE did not suppose that the Council would ever seriously think of refusing to refer to a Select Committee a Bill prepared by the Indian Law Commissioners, and therefore he should say very little in commending it to the Council. The consideration of the measure was essentially a consideration of its detail, and to that detail the Select Committee would doubtless give the most careful attention, not, as MR. MAINE hoped, for the purpose of setting its judgment against the judgment of the Commissioners in matters which lay legitimately within the sphere of their great judicial and forensic experience, but for the purpose of seeing

whether their specific proposals required in any way restriction or extension with regard to the special circumstances and facts of this country.

On the general expediency of obtaining a codified law of evidence for India, MR. MAINE did not suppose that there could be two opinions. He ventured to think that the Commissioners had, if anything, rather understated the grounds on which such a law was desirable. They observed that India did not possess any uniform law on the subject. After stating that within the Presidency towns the English law of evidence was in force, modified by certain Acts of the Indian legislature of which Act II of 1855 was the most important, they went on to say that a customary law of evidence prevailed in those parts of British India where English law was not administered. "This customary law," they added—

"has not assumed any definite form; the Mahomedan law, since the enactment of the new Code of Criminal Procedure, has ceased to have any validity in the country courts, even in criminal matters; and those courts have in fact no fixed rules of evidence except those contained in Act II of 1855. They are not required to follow the English law as such, although they are not debarred from following it where they regard it as the most equitable."

On looking, however, at the two Indian Evidence Acts, it would seem that they implied that the English law of evidence, except where they modified it, was in force in the bulk of India, the Mofussil. During the last ten or fifteen years the doctrine that the English law of evidence was *vi propriâ* in force throughout the whole of the country had certainly gained strength, and the habit of applying that law with increasing strictness was gaining ground. No doubt much evidence was received by the Mofussil Courts which the English Courts would not regard as strictly admissible. But MR. MAINE would appeal to Members of Council who had more experience in the Mofussil than he had, his hon'ble friends Sir George Couper and Mr. Cockerell, whether the Judges of those Courts did not as a matter of fact believe that it was their duty to administer the English law of evidence as modified by the Evidence Acts. In particular, MR. MAINE was informed that when a case was argued by a barrister before a Mofussil Judge, and when the English rules of evidence were pressed on his attention, he did practically accept those rules, and admit or reject evidence according to his construction of them.

MR. MAINE could not help regarding this state of things as eminently unsatisfactory. He entirely agreed with the Commissioners that there were parts of the English law of evidence which were not suited to this country. They heard much of the laxity with which evidence was admitted in the Mofussil Courts,

but the truth was that this laxity was to a considerable extent justifiable. The evil, it appeared to MR. MAINE, lay less in admitting evidence which under strict rules of admissibility should be rejected, than in admitting and rejecting evidence without fixed rules to govern admission and rejection. Anything like a capricious administration of the law of evidence was an evil, but it would be an equal, or perhaps even a greater, evil that such strict rules of evidence should be enforced as practically to leave the Court without the materials for a decision. MR. MAINE would venture to state his impression that the fault of substance ordinarily committed by the Mofussil Courts consisted less in lax admission of evidence, than in averting their attention from the evidence really before them, and in conjecturing the facts of the case upon probabilities derived from a consideration of what the Natives of this country would be likely to do under given circumstances. Another objection lay in the necessity which the Mofussil Judges were thus placed under of depending upon English textbooks. There were excellent textbooks of the English law of evidence, but their usefulness consisted more in refreshing knowledge which had been gained by forensic experience, than in teaching knowledge. The Commissioners would appear to be right in supposing that what was wanted for the greatest part of India, was a liberalized version of the English law of evidence, enacted with authority and thus excluding caprice, and superseding the use of text books by compactness and precision.

Another objection which MR. MAINE entertained to the present state of the law might appear to be speculative, but was really of some practical moment. The doctrine that the English law of evidence without authoritative enactment prevailed *vi propriâ* and of its own virtue, was calculated to encourage the notion that rules of evidence constituted a scientific machinery by which truth as to facts and as to men's actions could be ascertained somewhat as physical truths could be ascertained by the processes in use among men of science. There were certain Continental systems of evidence which did make a pretension to include a process of the kind. And perhaps some such theory did pervade the rules of the English law with regard to presumptions, which he was happy to see the Commissioners had discarded. But the English law of evidence as a whole made no claim to be such a system. It was justly regarded by English lawyers as a model of good sense; but it would probably have never come into existence but for one peculiarity of the English judicial administration,—the separation of the judge of law from the judge of fact, of the Judge from the Jury. It consisted mainly of rules of exclusion, that is, of rules for keeping certain kinds of evidence out of sight of the judge of fact. Such a system, MR. MAINE apprehended, could only be justified on two

grounds. First of all, some evidence must be excluded. If all evidence were admitted, nay, even if all relevant evidence were admitted, if everything were let in which tended to throw light on the matters in issue, the Courts would be overwhelmed. Even in England they would break down, and it would be quite impossible for the Courts to discharge their functions in this country with the notorious habit of its Natives of attempting to help on the proof by accumulating everything which has even the remotest bearing on it. It being, then, assumed that, under the actual conditions of judicial enquiry, some sorts of evidence must necessarily be shut out, the English law excluded those descriptions of evidence which were found practically to affect the minds of all men, except those of the most sagacious judgment, out of all proportion to the real value of such evidence. This was the case of the great department known to English lawyers as 'hearsay.' It was not at all meant that hearsay evidence was not incidentally valuable, and MR. MAINE could well imagine a great Indian statesman conducted in an emergency to a most important conclusion by evidence which a court of justice would reject as absolutely inadmissible. But, taking men as you found them, and taking the average of judicial ability, it was really true that some kinds of evidence did produce an impression on the mind far deeper than was consistent with their real weight. The good sense to which the English law laid claim was evinced by the tests which it laid down for distinguishing those kinds of evidence from those which remained. It would be presumptuous in MR. MAINE to praise the Commissioners' proposals, but he ventured to say that, in his humble opinion, they had wisely availed themselves of the results of English experience, but had wisely modified those results upon two considerations, which they stated as follows :—

"The English practice has been moulded in a great degree by our social and legal institutions and our forms of procedure; and much of it is admitted to be unsuited to the various states of society and the different forms of property which are to be met with in India."

"In a country like India, where the task of judicial investigation is attended with peculiar difficulties, and where it is the duty of the Judge in all civil and in some criminal cases to decide without a jury, there is greater danger of miscarriage from the mind of the Court being uninformed than from its being unduly influenced by the information laid before it."

MR. MAINE had said that he would not comment on the details of the measure, but there was one point of detail which it was necessary to notice, because, as it involved a financial question, the Select Committee would probably not like to deal with it without knowing the opinion of the Executive Government. The Commissioners' draft and the Bill based upon it saved the Registration Act; but it would be observed that they did not refer to the Stamp Act. The

omission in the Bill was explained by its being doubtful whether the Stamp Bill now in the hands of Mr. Cockerell would or would not receive the assent of the Governor General before the present measure. If the Stamp Bill were passed last, it would control the present measure. But another reason must probably be assigned for the omission in the Commissioners' draft, which appeared to be deliberate. MR. MAINE found that the last paragraph of their third Report, on the Law of Negotiable Instruments, was to the following effect:—

"Negotiable instruments have recently been subjected to a stamp duty in British India by an Act which, like the English Stamp Act, renders instruments invalid if its regulations are not observed. This provision of the English Stamp Act has led to the establishment of several rules and distinctions not unattended with inconvenience, and we would suggest that a law which merely imposed a penalty in case of infringement would be more conducive to the public interests. For the present, we have thought it our best course to frame our rules irrespectively of the stamp law."

Now from the Commissioners' point of view, which was the purely juridical point of view, there was no doubt that simplicity would be attained by the course proposed. But what would be the practical effect? His hon'ble friend Mr. Cockerell had had a vast mass of papers before him relating to the operation of the Stamp law. MR. MAINE appealed to him whether the following was not a fair inference from those papers. If effect were given to the Commissioners' suggestion, either there would be an enormous evasion of the law, or that evasion would be prevented by recourse to the criminal Courts for the enforcement of penalties to an extent which would itself be a greater evil than the sacrifice of any branch of revenue. Under those circumstances, the point had been considered by the Executive Government, and MR. MAINE had to state that, having regard to the fact that the stamp duties on commercial instruments were easily levied, and did not press hardly on the people, the Government was not prepared to give up that portion of the public receipts.

The Motion was put and agreed to

DIVORCE BILL.

The Hon'ble MR. MAINE also moved that the Hon'ble Sir George Couper and the Hon'ble Messrs. Gordon Forbes and Shaw Stewart be added to the Select Committee on the 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 though this matter did not permit any discussion, he would, with His Excellency's permission, explain that the Committee had made a preliminary report at Simla recommending the subject for further consideration at Calcutta. The amended Bill had in fact

been sent to the learned Judges of the High Courts, from whom valuable suggestions might possibly be received. There was, however, one imperative reason why the Committee should sit again. The operation of the amended Bill was confined to cases where the husband was a Christian whose marriage had been solemnized in India and who at the date of the marriage had his domicile in India and retained that domicile down to the institution of the suit. This limitation was occasioned by what, when the Committee reported, was believed to be the state of the English law. The balance of legal opinion certainly inclined to the view that the English Courts would not recognise divorces pronounced by foreign courts where the parties had contracted marriage in England. But this doctrine had recently been disturbed by a decision of the House of Lords, which, as was often the case in English law, had come as a surprise on the legal profession. The Select Committee would have carefully to consider the judgment of Lord Westbury in *Shaw* v. *Gould*, 3 Law Reports, English and Irish Appeals, p. 80, and would probably be of opinion that the measure might be made applicable to classes who, as the measure was at present framed, were excluded from its operation.

The Motion was put and agreed to.

The following Select Committee was named:—

On the Bill to define and amend the Law of Evidence—The Hon'ble Mr. Cockerell, the Hon'ble Sir George Couper, and the Hon'ble Messrs. Gordon Forbes, Shaw Stewart and the Mover.

The Council adjourned till the 11th December 1868.

WHITLEY STOKES,
Asst. Secy. to the Govt. of India,
Home Department (Legislative).

CALCUTTA,
The 4th December 1868.

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