ABSTRACT OF PROCEEDINGS

COUNCIL OF THE GOVERNOR GENERAL OF INDIA

LAWS AND REGULATIONS.

VOL 8

1869

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 26th February 1869.

PRESENT:

His Excellency the Viceroy and Governor General of India, K. P., G. C. S. I., *presiding.*
His Excellency the Commander-in-Chief, G. C. S. I., K. C. B.
The Hon'ble G. Noble Taylor.
Major General the Hon'ble Sir H. M. Durand, C. B., K. C. S. I.
The Hon'ble H. Sumner Maine.
The Hon'ble John Strachey.
The Hon'ble Sir Richard Temple, K. C. S. I.
The Hon'ble F. R. Cockerell.
The Hon'ble Rájá Shioráj Singh, C. S. I.
The Hon'ble Maháráját Sir Dig-Bijay Singh, Bahádúr, K. C. S. I., of Balrámpúr.
The Hon'ble G. S. Forbes.
The Hon'ble D. Cowie.
The Hon'ble M. J. Shaw Stewart.
The Hon'ble J. N. Bullen.

DIVORCE BILL.

The Honble MR. MAINE moved that the Report of the Select Committee on the Bill to amend the law relating to Divorce and Matrimonial Causes in India be taken into consideration. He said:—"This measure is obviously one of great social importance; but I do not think I need trouble the Council at any wearisome length with an analysis or description of its provisions. It is substantially a consolidation measure. It puts together the English Statute-law on the subject in a more orderly form, and, I trust, in clearer language, and it incorporates the principal recent decisions of the Divorce Court. But in the main its principles are those of the statutes regulating the jurisdiction of the English Court of Divorce and Matrimonial Causes. I shall therefore probably discharge my duty to the Council by calling its attention to the points in which

the Bill differs from the English law, and to the provisions in it which are specially characteristic of India.

The first important section which requires remark is the second. In connection with it, I will take leave to remind the Council of the history of the Bill. It has been seven years before the Council of the Governor General. On examining the parliamentary debates upon the English Divorce Act, I find it was then distinctly contemplated that a measure of divorce relating to India should be passed either in India or at Home. The Secretary of State appears to have preferred Indian legislation, and directed the Government of India to submit to this Council a Bill corresponding with the English Act. It was in Sir H. Harington's hands when I came out here in 1862, and he transferred it to me. But I did not carry it through more than a single stage on account of the doubts which I felt myself, and which were strongly stated by some of the Judges, as to the power of this legislature to enable the Courts to decree divorces of persons married in England which the English Courts would recognise. Though the matter is somewhat technical, I must attempt to explain to the Council what the legal difficulties were. At that time the opinions of lawyers were much divided as to the relative authority to be attached to two cases which have become famous in connection with this subject. *Lolley's case*, which is considerably the older of the two, was as follows:—Lolley was a man who married a wife in England and took her to Scotland, where he obtained, or rather forced her to obtain, a divorce from the Scottish Consistorial Court on the ground of his adultery. He then returned to England and married again. Afterwards he was indicted for bigamy and convicted, the point whether he had been legally divorced being at the same time reserved for the consideration of the Judges. The Judges decided that the conviction must stand, in terms which were long considered to establish that a foreign Court could not dissolve a marriage that had been solemnized in England. Long afterwards, in 1835, the House of Lords decided the case of *Warrender* v. *Warrender*. Here the appellant and respondent, Sir George and Lady Warrender, had both a Scottish domicile, but the marriage had been celebrated in England and the adultery was alleged to have been committed in France. Lord Brougham gave judgment in terms which would appear to sanction the rule which seems to be the general rule of Private International Law, that personal status follows domicile, and that the question whether a man is a minor, or a married man, or a divorced man, is to be determined by the law of the country in which he is domiciled. Lord Brougham, who had been Counsel for Lolley, spoke in *Warrender v. Warrender* with much doubt of the authority of *Lolley's case*, and it might almost be considered to have been overruled, if it had not

been for the observations of Lord Lyndhurst, who followed Lord Brougham, and who, while agreeing with the decision of the House, stated that he did not intend in any way thereby to throw discredit on the older decision. Hence lawyers had to decide between two decisions which are certainly difficult to reconcile. The Government of Lord Elgin wrote to the Secretary of State, who admitted the weight of the doubts which had been felt in India, and stated that Her Majesty's Government would bring a Bill into Parliament. After waiting two years, Sir John Lawrence's Government, which had been much pressed by the applications of East Indians for relief, begged the attention of Her Majesty's Government to the subject, but was told that a Royal Commission was about to be appointed at Home to investigate the whole subject of marriage and divorce in India and the colonies, and that there could be no English legislation till its report had been received. Another interval of two years occurred, and the Government of India again pressed the subject on the Queen's Government. They were told in reply that the Commission had found the subject of marriage so difficult that there was no near prospect of their entering upon that of divorce. We were therefore requested to legislate to the extent of our power, or in other words to exclude from our measure persons who had been married in England, large and increasing as the class appeared to be. In this rather unsatisfactory state of things the Select Committee recommenced its labours, but it turned out that, just at the same time, the House of Lords was giving a decision which appeared to incline the balance against *Lolley's case* and in favour of the doctrine of *Warrender* v. *Warrender*. This was *Shaw* v. *Gould*. Here the judgments of Lord Cranworth and Lord Westbury appeared to lay down the law in much the same terms as Lord Brougham—that a foreign Court could dissolve an English marriage when the parties were domiciled abroad. Section 2 of the Bill, however, does not make it a condition of jurisdiction that the petitioner should be domiciled, and it is with a view of explaining this omission that I have made this long statement. In the first place, though a man's domicile of origin is easily proved, a new domicile is proverbially difficult to establish. It depends partly on length of residence in the foreign country, partly on intention to stay there. I myself heard the present Lord Chancellor, Lord Hatherley, describe domicile as a function of time and intention, and when an eminent Judge defines it in terms half mathematical and half metaphysical, it may readily be inferred that it is not a thing easy to be proved. Moreover, as the House of Lords has recently remarked, the question of domicile hardly ever arises with regard to living persons. Now, not only will the persons who will petition under this measure be living, but they will have a clear intention of not staying permanently in India. A still further perplexity arises from

the fact that the substantive law of domicile in India has recently been altogether changed. The following are the provisions of the Indian Succession Act on the subject of new domicile :—

"A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin.

A man is not to be considered as having taken up his fixed habitation in British India merely by reason of his residing there in Her Majesty's Civil or Military service, or in the exercise of any profession or calling.

Any person may acquire a domicile in British India by making and depositing in some office in British India (to be fixed by the Local Government) a declaration in writing under his hand of his desire to acquire such domicile, provided that he shall have been resident in British India for one year immediately preceding the time of his making such declaration."

Now this domicile under the Succession Act is a forensic domicile. It is a domicile artificially created as a foundation for rights and remedies. But it is not the domicile of Private International Law, nor is it the domicile spoken of by Lord Brougham, Lord Cranworth and Lord Westbury. The difficulty is so great that the Select Committee might have found it insuperable but for Lord Colonsay's modification of the law as laid down by the other Law Lords in *Shaw* v. *Gould*.

"It was said that a foreign Court has no jurisdiction in the matter of divorce unless the parties are domiciled in that country; but what is meant by '*domicile*?' I observe that it is designated sometimes as a *bonâ fide* domicile, sometimes as a *real* domicile, sometimes as a *complete* domicile, sometimes as a domicile *for all purposes*. But I must, with deference, hesitate to hold that on general principles of jurisprudence, or rules of international law, the jurisdiction to redress matrimonial wrongs, including the granting of a decree of divorce *à vinculo*, depends on there being a *domicile* such as seems to be implied in some of these expressions. Jurisdiction to redress wrongs in regard to domestic relations does not necessarily depend on domicile for all purposes. If the decisions to which I have referred proceeded on the ground that the resort to the foreign country was merely for the temporary purpose of giving to the Courts of that country the opportunity of dealing with the case according to their own law, and thereby obtaining a dissolution of the marriage, and that such was the object of both parties, these decisions might be said to derive support from principles of general law, on the ground of being in *fraudem legis*. But if you put the case of parties resorting to *Scotland* with no such view, and being resident there for a considerable time, though not so as to change the domicile for all purposes, and then suppose that the wife commits adultery in *Scotland*, and that the husband discovers it, and immediately raises an action of divorce in the Court in *Scotland*, where the witnesses reside, and where his own duties detain him, and that he proves his case and obtains a decree, which decree is unquestionably good in *Scotland*, and would, I believe, be recognized in most other countries, I am slow to think that it would be ignored in *England* because it had not been pronounced by the Court of Divorce here."

I apprehend that Lord Colonsay has here described with exactness the position of Europeans in India. They are resident here, but their residence falls somewhat short of domicile: their duties keep them here, and under the provisions of the Bill they can only invoke the new jurisdiction when the adultery is committed in India. I have much confidence that the English Courts will recognise Indian adjudications under this measure. There seems to me to be much weight in the dictum of a high authority, Dr. Lushington, in *Conway* v. *Beazley*. He doubted—

"whether it was the intention of the Judges to decide a principle of universal operation absolutely, and without reference to circumstances, or whether they must not, almost of necessity, be presumed to have confined themselves to the particular circumstances that were then under consideration."

The truth is that the hesitation of English Judges to recognise foreign divorces has manifestly arisen from the fact that the divorces before them had in all cases been Scotch divorces, from their feeling that Scotland was very near to England, and perhaps from a suspicion that, as Scotch marriages are easily contracted, so Scotch divorces are easily obtained. But let the Council consider whether the sort of divorce to which the English Courts are likely to object can be obtained in India under this measure. First of all, the parties must come to India, which is a very different thing from going to Scotland; then the adultery or other offence must be committed in India. In a case of an improper divorce there would almost inevitably be collusion or connivance, and, moreover, collusion or connivance under very suspicious circumstances. All the careful machinery of the Bill for the detection of these would come into play, and the judgment of divorce would never be given. So much for persons married in England. Over all the other classes indicated in section 2, we have power to give the Courts a complete jurisdiction.

Section 4 raises a question which I will not call doubtful, but upon which some of the persons who have addressed the Committee are divided. It is the question whether the District Courts shall be allowed a jurisdiction in divorce. The main reason why the Select Committee had given this jurisdiction, was that the refusal of it would amount to a denial of relief to large classes of persons affected by the Bill. It would be a mere mockery of East Indian clerks in distant cities, and of Native Christians in Mofussil villages, to tell them to come to the High Courts in the presidency towns for judgments of divorce. It is, however, said that the District Courts are not equal to these duties. The argument is one which I look upon with great distrust. If it be established that certain new legal rights and remedies should be created for the benefit of

any class of Her Majesty's subjects, and the Indian Courts are incompetent to administer them, the proper inference seems to be that the Courts should be reformed, not that the rights and remedies should be refused. But the charge is, in truth, often hastily made, and, moreover, there is nothing specially difficult in questions of divorce. They are important on account of their social importance, but they for the most part involve very simple questions of fact. The Lieutenant Governor of the Panjáb has observed that he does not think that his Deputy Commissioners are equal to the new jurisdiction. He has apparently not noticed that, under the interpretation-clause, the District Judge is, in a Non-Regulation Province, a Commissioner, and I really cannot see why the Commissioners in the Panjáb cannot dispose of these cases. Only the other day two gentlemen with military titles decided a case successively, in which the Government were interested to the extent of a million sterling, and in which very difficult questions of public law were involved; and their decree was confirmed by the Chief Court. If, however, it once be granted that the District Courts must have jurisdiction, their exercise of it is by the measure fenced round with many safeguards. The High Courts can call up at any time any case that presents special difficulty. Nor do we provide a mere appeal from their decisions, because the parties may be poor or they may have an understanding with one another and thus there might be no appeal. We have applied to the decrees of the District Courts the same principle which is applied in India to capital sentences, and have required that they be confirmed by the High Court, which has full powers of calling for fresh evidence. Sir Donald Macleod has also remarked on the provision in section 7, that the principles and rules of the English Divorce Court are to be followed by the Indian Judges, and he remarks that the Panjáb officers have no time to master these principles and rules. It is necessary that I should explain that this Bill is substantially a Code: it is not easy to conceive a point arising which it will not dispose of. There was, however, no obligation imposed on the Committee to construct a Code, and therefore it is possible that a question may arise which is not expressly provided for. To meet such a case, it is necessary to indicate the source whence the rules applicable to it are to be taken. There is, however, no more hardship in having to look for that source than in having to search for principles in other departments of law, which the Panjáb Courts must constantly be doing. I imagine, too, that any specially difficult case will always be called up by the High Court.

I have some remarks to make on section 10, which I will postpone; but I will now call attention to the second clause of the section, which provides that a wife may have a divorce on the ground that since the marriage her

husband has exchanged Christianity for some other religion, and has gone through a form of marriage with another woman. The provision has been necessitated by a judgment of the High Court at Madras. The facts of the case are very strange, and are almost as curious an illustration of the effect of our rigid legal ideas upon loose Native notions of custom, as was the discovery which we made the other day as to the state of the law on Native marriages. A Hindú was converted to Christianity, and, as a Christian, married a Christian girl. He then reverted to Hindúism, and it seems to have been found out that he could be readmitted to caste on certain conditions, the principal of which was, as I am informed, that he should submit to have his tongue pierced with a red-hot iron. He then proceeded to marry one or more Hindú wives, and was indicted under the Penal Code for the offence which corresponds with English bigamy. The High Court, however, decided that, having relapsed into Hindúism, he reacquired his rights of polygamy. The Bishop of Madras and the Missionaries of Southern India are most anxious that this decision should be set aside by legislation. I apprehend, however, my Lord, that, according to the ideas which now prevail as to the almost reverential respect which is due to what a part of the Natives of this country declare to be their custom, social or religious, it is not safe for this Council to revise legislatively the law of the High Court, or to deny the proposition that a Native of India may acquire a right to a plurality of wives through the actual cautery of the tongue. But I think I shall have the whole Council with me in saying that we can and ought to relieve the wife from the marriage-bond. It will be allowed that, from the Christian point of view, the husband has been guilty both of adultery and desertion. But the adultery is not legally adultery owing to the decision of the Madras Court, nor is there desertion, since the husband may always say that it is open to the Christian wife to live in his house with the others.

At this point, it is proper that I should advert to an omission which the Select Committee sanctioned, but which has been much complained of by several ladies and gentlemen who have addressed me in private letters. They ask that what they term "a validity clause" may be inserted in the Bill. I presume the complaint is that we do not propose to confer on the High Court the special jurisdiction which is vested in the Divorce Court by a separate Statute, 21 & 22 Vic., cap. 93. That Statute enables the Court to make declarations of the validity or invalidity of a marriage, or of the legitimacy or illegitimacy of children. There is no doubt that, so far as regards that branch of it which relates to marriage, its principal object was to establish marriages of which the validity had been doubted, and thus to quiet scrupulous consciences and to settle

rights. It can hardly be said to have been designed as a contrivance for making decrees of nullity on grounds less material than those set forth in the Bill. The Select Committee considered the matter carefully, and refused to create the jurisdiction out of deference to the authority of Chief Justice Sir Barnes Peacock and Mr. Justice Norman. The latter has given his reasons at length—

"To the question whether it is desirable to add a clause to the Indian Divorce Bill, empowering the Courts to make declarations of legitimacy, and of the validity and invalidity of marriages, I would answer in the negative.

Such decrees would not have an extra-territorial operation. They would not determine conclusively the status of the parties, or be necessarily accepted as binding on English Courts with reference to questions as to the inheritance of land.

The decrees would not be like decrees *in rem*, binding and conclusive on all persons even in this country. The rights of parties not cited would have to be saved, as is done by the 8th section of the 21 & 22 Vic., cap. 93.

We have in this country considerable experience on the subject of suits for declarations of right. And, for myself, I have no hesitation in saying that such a suit against a person who has no actual present interest in the matter to be litigated, is a very unsatisfactory mode of bringing a question before the Court for adjudication. There is sometimes no real contest. The parties against whom the declaration is sought do not feel any deep interest in a question which at the time affects them but very remotely. In such cases, at least, the Court has to act on imperfect information, even if no fraud is practised upon it.

If the defendants or parties cited do take an interest in the matter, it appears to me that they are subjected to a great hardship in being compelled to litigate, perhaps at great expense, a question in which at the time they have not, and possibly may never have, any actual pecuniary interest, and the answer to which depends on facts of which, in all probability, they have no personal knowledge."

I have always, myself, ventured to think this jurisdiction of doubtful expediency even in England. There is always danger in enabling a Court to exercise its powers when there is not before it any distinct issue or dispute between parties. When, however, it is considered that, were the jurisdiction to be conferred on the High Courts, their decrees would not operate extra-territorially, and a person remarrying on their authority might be indicted for bigamy in England—when, further, we remember that the witnesses would constantly have to be examined under commission in England, and that the persons who would have to be cited to defend their rights would constantly be living at the other end of the world—there can be little question that the Select Committee has acted prudently in denying such powers to the Indian Courts.

In saying this, however, I do not mean to say that several of the letters I have received do not tell a very unhappy story. I can only reply that to give the writers relief does not fall within the principles and purposes of this Bill.

I merely call attention, in passing, to sections 16 and 17, which describe the securities against collusion and connivance provided by the measure. In the case of decrees by the High Court, they are to be in the first instance, as in England, decrees *nisi*, and are not to be made absolute for six months. Decrees for dissolution and of nullity by the District Courts are not to receive confirmation before six months have elapsed, during which interval evidence as to collusion or connivance, if it is forthcoming, can be collected.

There was a slight difference in the Committee as to the last clause of section 19, though the dissentients have not thought the matter of sufficient importance to record their dissent. The High Courts inherit from the Supreme Courts, which in their turn inherited from the Ecclesiastical Courts, a jurisdiction to make decrees of nullity of marriage on the ground of force or fraud. It is very rarely put into exercise. But some gentlemen thought that force or fraud should be specified as distinct grounds of nullity, as is done in the New York Code. The objection is that force is quite unknown among Europeans, and equally so among Native Christians. There are many here who can speak with more knowledge than myself on the point. But I am told that what appears to us the extraordinary publicity of Native marriages is a complete security against force. As regards fraud, the Select Committee would have had a difficult undertaking in hand if it had tried to define the kind of fraud which should invalidate a marriage. Absolute personation of one man by another, which is the only fraud indicated in the Canon Law (from which the jurisdiction has apparently descended), is practically impossible in modern society. As to other kinds of fraud, take a very strong case. If a ticket-of-leave man comes to India from Australia, and, concealing his antecedents, marries an European woman, is the marriage to be set aside? A more cruel imposition can scarcely be imagined, and yet I apprehend that modern ideas would require the marriage to be maintained. The Select Committee, however, did not wish to take away from the High Courts any jurisdiction which they at present possess. If those Courts are ever called upon to exercise it, they will discover and apply for themselves the proper existing limitations.

Section 21 embodies a limited application of a principle which lawyers would gladly see engrafted on English law. It is the principle that marriages contracted in good faith, but declared to be null, shall be maintained as far as possible. The section, which is taken textually from the New York Code,

and resembles the provisions of the French Code and the numerous systems descended from Roman law, permits the children to succeed as legitimate to the property of the party competent to marry, and thus relieves them, *pro tanto*, from the stigma of illegitimacy.

On sections 56 and 57 it is merely necessary to remark that this Legislature has, strictly speaking, no power to limit the appeal to Her Majesty in Council. Practically, however, it is found that the Privy Council will respect the limitation imposed by local legislatures on appeal, when such limitations are reasonable. Section 57 permits the parties whose marriage has been dissolved to remarry if no appeal has been presented to the Privy Council. But theoretically it is conceivable that an appeal might be presented after six months. There is but little doubt, however, that the Privy Council would maintain the restrictions of the Bill under its own rules.

I now return to section 10, of which I have postponed the consideration for reasons which the Council will have divined. The section, with the exception of the clause on which I have already commented, is taken from the English statute, and prescribes the grounds of divorce exactly as they are prescribed in English law. The Chief Justice of the High Court of Bengal has, however, submitted a Minute in which he earnestly argues that the grounds of divorce should be enlarged, and that a woman should be allowed to obtain a divorce for the simple adultery of her husband, or, if that cannot be allowed, for his adultery coupled with such acts as, in the judgment of the Court, render it improbable that the wife will ever be reconciled to her husband. As the Members of Council have doubtless read the paper with all the care demanded by the eminent authority of the writer, I will not read it at length, but will give shortly the substance of the several paragraphs. Sir Barnes Peacock states his opinion to be, that he does not think it either just or politic to allow a dissolution of marriage for adultery of the wife, and not to allow it to the wife for adultery of the husband, however flagrant and however open, and however often repeated, provided it be not incestuous. He points out that this is not only his opinion, but that of many lawyers, jurists, men of the world, and legislators. He remarks on the inconsistency of placing the sexes on equal terms as regards judicial separation, but not as regards divorce. He cites a dictum, that separations without divorces *a vinculo* either condemn to celibacy or lead to illicit connection. He quotes a contention to that effect in the Marquis of Northampton's case, reported by Bishop Burnet, and a similar argument used in Lord Rous' case. He appeals to an argument of Lord Thurlow in Mrs. Addington's case that, under the Mosaic Institutions and the Gospel, a woman might be put away for adultery, and might have similar redress against her husband. He

next quotes Lord Eldon's statement that a wife had as good a right as a husband to relief in cases of this description. This statement was made in Mr. Moffatt's case, which was certainly one of extraordinary and cynical depravity in the husband. The Lords, indeed, refused the divorce by a majority of sixteen to nine, but Sir Barnes Peacock observes that it would be painful to the Judges to have to refuse a decree to the wife under similar circumstances, and that the vote of the Peers could not change the principle. The Chief Justice further observes that the House of Lords had a discretion which is not left to the Court under the Bill. He argues that, in a religious point of view, both acts of adultery are equally criminal, and both are alike breaches of the marriage-vow if looked at merely as a civil contract. "A man," he remarks, "may live with another woman in an open and notorious state of adultery revolting to his wife and revolting to society, yet his wife will not be able to obtain a dissolution on account of the adultery alone unless it be incestuous." Sir Barnes Peacock then shows that Lord Brougham, who spoke and voted against Mr. Moffatt's Bill, had apparently changed his mind in 1838. Lastly, in citing Mr. Battersby's case, Sir B. Peacock remarks that the husband had committed bigamy with his paramour and his conduct was in other respects most atrocious. "That case," he adds, "is, I presume, the origin of the words in the English Act, followed in section 10 of the present Bill, 'or of bigamy with adultery.' I do not at all understand how the bigamy strengthens the case of the wife for divorce. It was said 'how could a virtuous wife return to the embraces of such a man as Battersby.' In Battersby's case, however, it was not the bigamy which prevented such return."

It will be observed by the Council that these arguments of the Chief Justice are all of a moral nature, and if I were compelled to answer them by arguments of the same character, I freely admit I should have much difficulty in doing so. Doubtless there were members of the Committee who denied absolutely that there was any real equality between the sexes in regard to this matter. But, for myself, there is no direct answer to much that is urged by Sir Barnes Peacock, which is thoroughly satisfactory to my mind. The difficulties which I feel in regard to his proposal are difficulties arising out of considerations of expediency, of the peculiar position of European society in India, and of the relation of this Council to the English Parliament. I cannot help asking myself, in the first place, what will be the view taken by English Courts of our new system of divorce, if we introduce grounds of divorce wholly unrecognised at Home. I have already explained that I attach much importance to Dr. Lushington's declaration, that English Judges are greatly swayed by the circumstances under which foreign divorces actually take place.

Is there not some risk of our impairing the confidence of English Courts in Indian adjudications, if we write on the face of our law that our Courts are occasionally to proceed on principles not yet allowed in England? In the next place, I am not without fear that, by giving effect to these suggestions, we might multiply facilities for connivance and collusion, and there is no doubt, to my mind, that it is the suspicion of connivance and collusion, to which is attributable the jealousy entertained by English Courts of dissolution of English marriages under foreign decrees. Take the case of connivance. It cannot be denied that the securities against it, provided by the English statute, are very considerable. In order to procure a divorce, a woman must do that which will for ever exile her from society, and a man must couple his adultery with acts which will bring him under the criminal law, or with desertion which must take him away from all his ordinary duties and employments, or with cruelty which, even if we can conceive the wife assenting to it, is something from which a man of otherwise coarse fibre will surely shrink, or which he will be loath to attribute to himself. Shall we not be materially diminishing these securities, if we allow the divorce to be obtained either for simple adultery, or for adultery coupled with such conduct as a Court may deem to be a bar to reconciliation? These are difficulties which occur to my mind, but they are not the true reasons why I think it would be undesirable to carry out these earnestly urged proposals of Sir B. Peacock, much as we may be disposed to respect his opinion, and little as we may wish to establish any inequitable difference between the sexes.

I must call the attention of the Council to the dates of the authorities cited by the Chief Justice. The Marquis of Northampton's case occurred on January 11th, 1548; Lord Rous's in 1699; Mrs. Addison's in 1801; Mrs. Moffatt's in 1832, and Mrs. Battersby's in 1840. I presume, too, that, as Sir B. Peacock was in India in 1857, he had formed his strong opinion previously to that year. Can we blind ourselves to the fact that, since these authorities declared themselves, there has been a great legislative ruling on the subject by Parliament? It was in 1857 that the first Divorce Act became law. It was not as if the question raised by Sir B. Peacock was not fairly raised in Parliament. In the House of Lords, Lord Lyndhurst urged the same arguments at great length, and in the House of Commons the question was raised by a long series of amendments. In the discussion on one of them, the Lord Advocate opposed the Bill of his own Government, and argued for that equality of the sexes which is recognised in his own country, Scotland. It cannot be denied that the view of the Chief Justice was fairly put before Parliament, and decisively overruled. Whatever may be thought in general of the

expression "wisdom of Parliament," it seems to me more than a mere commonplace when an English social question is at stake, and I think it would be altogether out of place that this Council, which is a creation of Parliament, should set aside its authority in a matter which is practically the same in England as in India, and is governed by the same considerations in its effect upon English society and on Indian, which is a mere outwork of English society. There is something further to be urged. The measure for India, contemplated during the Parliamentary debates, was a measure corresponding with the English enactment. It was the English measure which was recommended to us by the Secretary of State, which was framed by Sir H. Harington, and which was introduced by me into the Council. Throughout, it has been recommended and probably supported on the authority of English precedent. If the question had been reopened on first principles, how do we know that the Bill would have made any progress at all? One, at least, of the Members of Council in charge of the Bill, Sir H. Harington, held very strict ideas on the subject of divorce, and perhaps would have argued for the absolute indissolubility of marriage if he had thought it open to him to do so. I am not sure that, but for the authority of Parliament, the measure would have reached the present stage, and I am not sure that, but for that authority, it would even now become law.

His Excellency the President said he wished to state, in confirmation of what the Hon'ble Mr. Maine had said regarding the discussions in Parliament on the Divorce Act, that His Excellency distinctly recollected all that occurred when that very important question, whether it was right to place men and women on a perfect equality in regard to divorce, was argued at great length. His Excellency did not now advance any individual opinion; he had the misfortune to differ with the majority of his countrymen on the subject, and his own opinion had been against the whole course of legislation pursued in the matter of divorce. But he was bound to say that, upon this particular question—the equality of rights between the sexes—the opinion of Parliament had been most decidedly and unmistakeably expressed; that it was debated at great length in both Houses; that the view taken by Sir Barnes Peacock was advocated by men of the highest authority, amongst whom was the present Prime Minister; but the principle of inequality was recognised and carried in the House of Commons, on a division taken on the motion of Mr. Drummond, by a considerable majority. The expression of opinion then given was so decided that though, on the question being on a subsequent night put that the clause as amended stand part of the Bill, Mr. Gladstone expressed his views at greater length, but did not ask the House to divide again. The question was

afterwards raised in the House of Lords, and though many different opinions were expressed there, the Lords came to the conclusion that it was wise and desirable to agree to the amendments made by the House of Commons, and that decision was come to after the fullest discussion, and in the most solemn manner.

Therefore, after giving full consideration to the opinions expressed by different speakers in Parliament during discussions at which HIS EXCELLENCY was present, he could not now say that his opinion was that there should be so wide a departure from the provisions of the English Statute as Sir B. Peacock proposed, seeing that the classes of persons affected by the Bill now before Council were to a great extent the same as those for whom Parliament was then legislating. HIS EXCELLENCY thought the Council here would do well to follow as nearly as possible the precedent set by the Parliament at Home, which had been approved generally by the country, and had been found to work well. The real truth was that the considerations from the moral and those from the social point of view were wholly different. From the moral point of view the equality of the sexes as regards the sin of adultery was the same both in the eyes of God and man. But the social considerations were entirely different, some of which were that the proposed change would facilitate the introduction of spurious offspring into families, and that the greater facilities we gave for divorce, the greater facilities would be afforded for collusion and connivance, and that, therefore, if the principle was adopted, it might aggravate the evils that it was hoped to cure. All this led to the belief that Parliament had taken a wise course in the matter, and that we should be acting injudiciously were we to come to a conclusion differing in so important a respect from the law of England.

The Motion was put and agreed to.

The Hon'ble MR. SHAW STEWART said that, in section 3, clause 2, the Bill prescribed the different Courts in which suits might be brought under the proposed Act.

The clause provided—

"District Judge means, in the Regulation Provinces, a Judge of a Principal Civil Court of original jurisdiction,

in the Non-Regulation Provinces * * * a Commissioner of a Division."

In Sind, however, which was a Non-Regulation Province, there were no Commissioners of Divisions, the officers in charge of Divisions being called "Collectors." This had not been observed at the time, and it therefore became

necessary to determine now what Court in Sind should, for the purposes of the Act, exercise the powers conferred on District Judges. It had been considered that the Judicial Commissioner was the officer best suited, in accordance with the rest of the section, to be entrusted with the powers to be exercised under the Act. MR. SHAW STEWART therefore moved—

"That, in section 3, clause 2, line 6, the words 'and Sind' be inserted after 'British Burma.'"

And that, in the same clause, after line 12, the following be inserted—

"in Sind, the Judicial Commissioner in that province."

The Motion was put and agreed to.

The Hon'ble MR. MAINE moved the following amendments—

1. "That in section 1, 'April' be substituted for 'March.'"

2. That, for section 17, clause 2, the following be substituted: "Cases for confirmation of a decree for dissolution of marriage shall be heard (where the number of the Judges of the High Court is three or upwards) by a Court composed of three such Judges, and in case of difference the opinion of the majority shall prevail, or (where the number of the Judges of the High Court is two) by a Court composed of such two Judges, and in case of difference the opinion of the senior Judge shall prevail."

3. That, in clause 4 of the same section, the words "an order confirming the" be substituted for the word "a" in line 4.

4. That the following words be added to the second clause of section 55:—"nor from the order of the High Court confirming or refusing to confirm such decree."

5. That the following clause be prefixed to section 57:—"When six months after the date of an order of a High Court confirming the decree for a dissolution of marriage made by a District Judge have expired, or"

MR. MAINE said that his amendments 4 and 5 were merely intended to secure consistency of language by calling the confirmation of the High Court an order and not a decree. His fourth amendment was meant to make it perfectly clear that there was to be nothing in the nature of a second appeal in India from the decree of the District Court. The confirmation was in point of fact not less but more than an appeal, since it did not require the action of an appellant. The second amendment was intended to secure a strong Court for these confirmations. The last part of it would probably be inoperative, since there was no Court in India composed of less than three Judges except the Chief Court of the Panjáb, and the Government of India had recently recommended to the Secretary of State the appointment of a third Judge.

The Motion was put and agreed to.

The Hon'ble MR. MAINE also moved that the Bill as amended by the Select Committee together with the amendments now adopted be passed.

The Motion was put and agreed to.

ARTICLES OF WAR BILL.

HIS EXCELLENCY THE COMMANDER-IN-CHIEF moved that the Report of the Select Committee on the Bill to consolidate and amend the Articles of War for the government of Her Majesty's Native Indian Forces be taken into consideration. He said that it would be in the recollection of the Council that some time ago HIS EXCELLENCY was obliged to move that the consideration of the Report of the Select Committee on the Articles of War might be deferred in consequence of subsequent representations from certain quarters. The discussion on that Report was accordingly postponed. It would therefore be convenient to notice briefly the alterations which had commended themselves to the Committee and had been described in that first Report.

In the first place, the Committee had added to the list of enactments to be repealed Act XXV of 1857, section 1. That Act contemplated certain forfeitures on the part of sepoys convicted of mutiny, and had since been the law of the land. The Committee, however, thought that the first section of that Act might with propriety be re-enacted in Article 24, which ruled that, when a soldier was sentenced to death, his property should be forfeited. The Committee had also empowered the convicting Court to adjudge forfeiture of property in cases of offenders sentenced to transportation or imprisonment for a term of seven years or upwards. It was first thought advisable to repeal the whole of Act XXV of 1857, but on consideration it was found that there might be soldiers in the country who took part in the events of 1857 and 1858, and who, in such case, would escape with impunity if hereafter apprehended.

Objection had been taken outside to certain forms of oaths in the first draft of the Bill. The objection seemed reasonable. The Committee had accordingly struck out the special form of oath for Sikhs, but they had authorised the Commanders-in-Chief, with the sanction of their respective Governments, to frame forms of oath fitted for the different persuasions obtaining amongst the classes from whom the Native soldiers were supplied.

In the case of heavy sentences awarded by Detachment General Courts Martial held beyond the limits of British India, it had been found necessary to give (Article 142, clause *f*) the power to confirm, commute, or annul to the

Commander of the Forces with which the offender might be serving, in lieu of the Commander-in-Chief in India, or of the Presidency to which the offender belonged. The object of that provision was very obvious. It might be extremely inconvenient, in the case of bad crimes against discipline being committed by soldiers abroad, if the officer in command of the Forces (as in the case of the Forces lately under Lord Napier of Magdala) had not the power to confirm the severest punishment to which the offender was sentenced, but must be compelled to refer the case for confirmation to a Commander-in-Chief in India.

In like manner it was provided that sentences on Commissioned Officers might be carried into effect when confirmed by the Commander-in-Chief of the Presidency in which the offender was serving. Thus, it would happen that a Bengal Troop or Detachment, as was the case lately, might be serving in Madras or Bombay, and it was obvious that, for the purposes of discipline, such Troops or Detachments should be under the positive command of the respective Commanders-in-Chief of those Presidencies. The reason for the provision was precisely the same as that mentioned in the case of soldiers serving out of India and not immediately under the Commander-in-Chief in India. And the same reasoning applied to the 174th Article, which provided that a sentence of death passed beyond the limits of British India might be carried into effect when confirmed by the Officer Commanding Her Majesty's Forces with which the offender was serving.

In Part III, clause (*b*), it was ruled that military or enlisted debtors should not be liable to arrest for debt. Subsequently to the first Report of the Committee being circulated, letters came from Madras, in which it was represented by the Government of Madras, on the report of the Commander-in-Chief of that Presidency, that it would be expedient to extend the like immunity to all camp-followers and other people attached to an army, as well as to those actually serving in the army as soldiers. This was carefully considered by the Executive Government at the time, who came to the conclusion that it would be inexpedient so far to alter the law of the land as regards people not actually enlisted. As the Bill originally stood, the privilege of exemption from arrest for debt was applicable only to soldiers enlisted. Some objection even had been made to this, with regard to the status of the sepoy in India, but as the Bill was finally settled, the privilege extended to all enlisted persons in the same way as it extended to all private soldiers in the British Army under the Mutiny Act. But to extend it to any unenlisted person—that was to say to camp-followers and others connected with the army and living in cantonments—might interfere very seriously with the rights of property in various

ways. It was therefore considered inexpedient to accede to the whole of the proposition of the Madras Government. On the other hand, it was to be observed that there was a considerable tendency to extend the process of enlistment to non-combatants—people attached to the Commissariat, Ordnance and Public Works Departments, who, although they exercised military functions, were non-combatants. Some of these were enlisted, others were not. But the tendency referred to, coupled with the change made by the Committee, would in some measure perhaps eventually give effect to the wishes of the Madras Government.

His Excellency believed the above remarks exhausted the changes which were proposed in the first Report.

In the second Report of the Select Committee there were but few changes to mention.

In a number of the Articles (3, 4, 73, 77, 79, 142, 152, 156, 160, 161, 164, and in Part III, clause *h*), it had been determined to omit special mention of the Commander-in-Chief in India, and to refer to him as the Commander-in-Chief of a Presidency. His Excellency might mention that the cause of this change was two-fold. In the first place, it was observed by the Judge Advocate General of the Bengal Army that, according to the Bill as introduced, all mention of the Commander-in-Chief of Bengal was omitted, whereas it might happen, as had occurred on former occasions, that the Commander-in-Chief in India might be the Commander-in-Chief of the Presidencies of Madras or Bombay, there being a provisional Commander-in-Chief in Bengal occasioned by the death or sudden departure of the Commander-in-Chief in India. The other objection was one which came from Bombay, *viz.*, that, by the phrase used in the original draft, some new power had been attributed to the Commander-in-Chief in India. This objection appeared at first more formidable than it really was. It was apprehended, as just stated, that the Bill as drawn attributed for the first time extraordinary powers to the Commander-in-Chief in India, and did in point of fact give him the faculty of introducing himself into the minor presidencies for the purpose of immediate command.

When this objection came up, the whole question was referred for the opinion of the Advocate General of Bengal, and after careful consideration of the Acts of Parliament and Warrants under which the authority of the Commander-in-Chief in India was founded, it was established by Mr. Cowie that no power was conferred by the draft Bill which the Commander-in-Chief in India did not already possess, but, on the contrary, that those powers were

conferred by the Acts of Parliament and Warrants issued under those Acts. But it appeared to the Select Committee, both with reference to the opinion of the Judge Advocate General of the Bengal Army which HIS EXCELLENCY had already referred to, and also to prevent the possibility of a mistake in the sense in which the Bombay Government had discussed the matter, that it would be wise to revert to the form of the existing Articles, and erase the title of the Commander-in-Chief in India from the Articles mentioned in the Report of the Committee. But it was necessary, as pointed out by Mr. Cowie, that we should not legislate away the powers of the Commander-in-Chief in India with which he had been specially invested by Acts of Parliament, and which were kept alive by the Warrants conferred on him from year to year. Accordingly, in Part III, clause (*i*), it was stated that nothing in the Act should be deemed to affect the authority conferred on the Commander-in-Chief in India by any Act of Parliament or by Royal Warrant or Commission.

HIS EXCELLENCY thought it right to say, for the information of the Council and also for that of the Governments and Commanders-in-Chief of Madras and Bombay, that there was never any intention to add to the authority or attributes of the Commander-in-Chief in India by those who were responsible for the framing of this Bill. The truth was that, in the matters affected by this Bill, the power to which HIS EXCELLENCY had adverted, although kept alive by Warrants issued by the Crown, was dormant. It was never exercised and would never be exercised unless the constitution of the army should be altered executively, or unless it should be necessary to meet difficulties arising out of circumstances such as those of 1857 and 1858. HIS EXCELLENCY thought it should go forth to the public that there had never been the slightest desire or wish in any manner to add to the attributes of the Commander-in-Chief in India.

In Article 93, there was a slight change: for "offences by which such Commanding Officer is personally aggrieved," the Committee had substituted "offences against such Commanding Officer," on which it was perhaps necessary to remark. This Article was one which had caused a good deal of discussion out of doors. When the Bill was introduced some months ago, HIS EXCELLENCY took occasion to remark that no change of substance, as affecting the powers of Commanding Officers when properly exercised, was intended by this Article; but it had been deemed necessary, in the interests of justice, that certain restrictions should be placed on the very extraordinary powers given to Commanding Officers by the Act of 1858. At the same time, so carefully had this Article been amended, that it was impossible to say that any officer who viewed his duty as he should do could possibly say that his authority had been restricted in any

direction in which he could wish to exercise it. In support of that statement His Excellency would call attention to the words used in the Article:—

"Any offence against these Articles, except mutiny, may be tried and punished by Summary Court Martial:

Provided that, when there is no emergent reason for immediate action, and reference can, without detriment to discipline, be made to superior military authority, a Commanding Officer shall not try by Summary Court Martial, without such reference, any of the following offences:—

Offences under Articles 7 to 23, both inclusive, ordinarily punishable by General Court Martial only:

Disgraceful offences under Articles 54, 55, 56, 60, 61 and 64; and

Offences against such Commanding Officer."

It was clear that, if the offence was punishable by a General Court Martial, it should not be referred to an inferior tribunal, because the offender would escape with a punishment inadequate to the crime of which he might be guilty. The offences mentioned in Articles 54, 56, &c., were either offences against property, or such as required a nice appreciation of evidence, and which, in the great number of cases, were made over to the Civil Courts for trial. The offences under the third head were offences against the Commanding Officer himself, which the officer ought obviously, if practicable, to be prohibited from trying himself. His Excellency's attention had, in the execution of his office, been directed to the point that these offences had been so tried by the officers against whom the offences had been committed, and His Excellency was afraid that sentences had been adjudicated in some cases, while the Commanding Officers were themselves labouring under the influence of passion. His Excellency thought, therefore, that no reasonable man could possibly object to these restrictions. The change of expression adopted by the Select Committee had made the Article rather more general than in the Bill as introduced: the reason was that it would be rather difficult at times to decide whether an offence fell within the original phrase of the prohibition, and would perhaps necessitate the taking of evidence on the point; but there could now be no mistake as to the application of the Article.

His Excellency believed he had now adverted to all the changes suggested by the Select Committee.

The Motion was put and agreed to.

HIS EXCELLENCY then moved that the Bill as amended be passed. In making the motion, he would beg to tender his thanks to his gallant friend (Colonel Norman) who had introduced the Bill, and whose place HIS EXCELLENCY had now unworthily taken, owing to Colonel Norman being no longer a Member of the Council.

The Motion was put and agreed to.

CRIMINAL PROCEDURE BILL.

The Hon'ble MR. SHAW STEWART presented the Report of the Select Committee on the Bill for regulating the Procedure of the Courts of Criminal Judicature not established by Royal Charter.

FOREST RULES (BRITISH BURMA) BILL.

The Hon'ble MR. MAINE, in moving for leave to introduce a Bill to give validity to certain Rules for the administration of Government Forests in British Burma, said that this Bill was intended to correct a slight error which had been committed in the Forest Department. Under Act XXX of 1854, the Governor General in Council had power to make rules respecting the floating of timber in the Pegu, Malabar and Tenasserim Provinces, and timber floating contrary to such rules was to be confiscated. He had also power to impose import duties on timber entering the provinces by the rivers. In 1865, strong representations made by the Forest Officers as to the devastation of Indian forests led to the enactment of Act VII of 1865, under which rules were to be made on a great variety of subjects connected with Government forests. Rules were made under this last Act by the Forest Department, which would have been perfectly valid throughout, if unluckily the framer of the rules had not incorporated with them the older rules made under the Act of 1854. This was doubtless done for the sake of convenience; but the effect was to throw doubt on the legality of part of the rules, since Act VII of 1865 only applied to timber the produce of Government forests, and did not apply to timber which had entered British India from foreign territory. Moreover, it was not a Customs' Act. MR. MAINE proposed to ask His Excellency to suspend the Rules in order that the Bill might be referred to a Select Committee, on which he proposed to place his Hon'ble friends Mr. Cowie and Mr. Bullen, and he hoped to convince them that there was no intention of placing any fresh burden on commerce, but merely to correct a not unnatural departmental error, and to protect officials who had been acting in good faith.

The Motion was put and agreed to.

The Hon'ble MR. MAINE having applied to His Excellency the President to suspend the Rules for the Conduct of Business.

THE PRESIDENT declared the Rules suspended.

The Hon'ble MR. MAINE then introduced the Bill and moved that it be referred to a Select Committee with instructions to report in a week. He observed that it was only intended to be provisional. Information had reached the Government which seemed to show that the timber trade of Maulmain was in a very unsatisfactory state. Grave malpractices were alleged to have occurred on the other side of the frontier, and there was an amount of litigation respecting the ownership of timber at Maulmain, which would be disastrous to any trade. It was the absolute duty of Government to take up the subject with as little delay as possible.

The Motion was put and agreed to.

The following Select Committee was named:—

On the Bill to give validity to certain Rules for the administration of Government Forests in British Burma—the Hon'ble Messrs. Cockerell, Cowie, Bullen and the Mover.

The Council adjourned till the 5th March 1869.

WHITLEY STOKES,
Secy. to the Council of the Governor General for making Laws and Regulations.

CALCUTTA,
The 26th February 1869.

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