ABSTRACT OF PROCEEDINGS

COUNCIL OF THE GOVERNOR GENERAL OF INDIA

LAWS AND REGULATIONS.

VOL 8

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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 10th December 1869.

PRESENT:

His Excellency the Viceroy and Governor General of India, K. P., G. C. S. I., *presiding.*
His Honour the Lieutenant Governor of Bengal.
His Excellency the Commander-in-Chief, K. C. B., G. C. S. I.
The Hon'ble G. Noble Taylor.
Major General the Hon'ble Sir H. M. Durand, C. B., K. C. S. I.
The Hon'ble John Strachey.
The Hon'ble Sir Richard Temple, K. C. S. I.
The Hon'ble F. R. Cockerell.
The Hon'ble Gordon S. Forbes.
The Hon'ble D. Cowie.
Colonel the Hon'ble R. Strachey.
The Hon'ble Francis Steuart Chapman.
The Hon'ble J. R. Bullen Smith.
His Highness Saramade Rájáháe Hindústán Ráj Rájendra Srí Mahárájá Dhiráj Siváí Rám Singh Bahádur, of Jaypúr, G. C. S. I.

SALT (MADRAS AND BOMBAY) BILL.

The Hon'ble MR. STRACHEY moved that the report of the Select Committee on the Bill to enhance the price of salt in the Presidency of Fort Saint George and the duty on salt in the Presidency of Bombay, be taken into consideration. He said, the objects of this Bill were so thoroughly well known to the Council that it was unnecessary to make any further remarks upon them. He would merely say that the Select Committee had made some slight alterations of which the only one of any importance was the following. Under section 44 of Act VI of 1844, power was given to the Governor General in Council, not to the Local Government, to reduce the duty on salt in Madras if it thought necessary. As this was a power which the Executive Government possessed in no other part of India, it seemed to the Committee that there was no use in preserving it. The effect of the alteration would be to put the whole of India in that respect on the same

footing. Section 45 of Act VI of 1844 provided a procedure in case of export of salt that had paid the full price, which procedure had for some years been disused. The Committee therefore proposed to repeal this section as obsolete.

The Motion was put and agreed to.

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

The Motion was put and agreed to.

ALIMENTARY SALT (N. W. P., &c.) BILL.

The Hon'ble MR. STRACHEY also moved that the report of the Select Committee on the Bill to provide rules for the manufacture, storing and sale of alimentary salt in the North-Western Provinces, the Panjáb, Oudh and the Central Provinces, be taken into consideration. He said the Committee had made a slight addition to the Bill as introduced. The Acts now in force in the territories to which the Bill would apply provided for levying the duty of three rupees per maund on salt crossing the Customs-line. There was no provision for levying duty anywhere else than at the line. It would be necessary to levy it also at the salt-works which it was proposed to open, but this was not provided for in the Bill as originally framed. The defect was remedied in the Bill as amended. The Committee had inserted two sections, one providing for the levy of a duty not exceeding three rupees per maund on salt manufactured in the territories comprised in the Bill, the other empowering the Local Government to prescribe rules for the collection of such duty at such places as should seem fit. This had necessitated slight additions to the title and preamble.

The Motion was put and agreed to.

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

The Motion was put and agreed to.

EXPROPRIATION BILL.

The Hon'ble MR. STRACHEY also moved that the Bill to consolidate and amend the law for the acquisition of land needed for works of public utility be referred to a Select Committee with instructions to report in six weeks. He said that, when he introduced this very important Bill in March last, he stated that it was the desire of Government that it should be subjected to the greatest

possible amount of public criticism, and he said that it would not be right to proceed further with a Bill of this character until the Council had before it all the information that could be obtained, and had received the opinions of the Local Governments and authorities best calculated to form an opinion on the subject. In the eight or nine months that had since elapsed, a great number of valuable criticisms and opinions had been received from the various Local Governments and other authorities, and the papers containing them had been some time in the hands of all the members of this Council. He thought, therefore, that the Council was now in a position to proceed with the consideration of this measure. He need not repeat the reasons which led the Government of India originally to the conviction that legislation on this subject was necessary. Although there had been differences of opinion as to the remedies to be applied to the evil, there had been hardly any difference of opinion as to the necessity of amending the existing law. For several years past this had been the opinion of the majority of the Local Governments throughout India.

When MR. STRACHEY introduced the Bill, he gave some examples to show the way in which, under the operation of the existing law, the public had been, he might say, swindled, for he really could use no milder term. He might have laid stress with equal truth on the fact that a change in the law was also necessary for the protection of private property. There was no doubt, he believed, that in some parts of India, where unfortunately there were no checks of public opinion on the actions of Government officers, their zeal in what they thought the interests of Government had sometimes led to unjust interference with the rights of private property. He had good reason to know that this was a feeling which had been not uncommon among intelligent Natives of the country, and the Head of one Indian administration had, as the Council would see from the papers before it, declared his belief that a change in the law was necessary, not for the protection of the Government, but for the protection of the people, and he approved of the provisions of the present Bill for this reason, that it would give a far better protection to the rights of private property than that afforded by the existing law.

When the Government came to the conclusion that it was necessary to amend the law, it considered that the main evils of which complaint had been made arose from the fact that the existing law contained nothing whatever to show the principles on which the valuation of land taken up for public purposes ought to be regulated. In determining what these principles were to be, it seemed to the Government that it could not do better than base its legislation on the principles which had long been established and acted on in England. The Government thought there was little danger that, if we took the law

of England as our basis, it would fail in securing the just claims both of private property and of the public. Sections 46 and 47 of the Bill, which were the most important sections of the whole measure, contained those principles. He regretted that, when he introduced this Bill, through some forgetfulness which he could not now account for to himself, he omitted to explain—although it was one of the most important facts connected with the Bill—that it was the special desire and intention of the Government that the law and practice of England should, so far as those principles were concerned, be adopted in the Bill. If he had then made it clear that the principles of this measure were really identical with those obtaining in England, and with the law of all civilized European countries (for there was really, as far as he had been able to discover, little or no difference in this respect in the different countries in Europe), although it might have been argued that there were special reasons which made the law and practice of Europe unsuitable in this country, still there would hardly have arisen the supposition in any quarter that the principles of the Bill were contrary to the commonly received ideas of equity in respect of private rights of property. MR. STRACHEY thought the Council would be satisfied that he had now given a correct description of the principles of the Bill when he said that they were those of the law and practice of England, when he quoted the remarks contained in a memorandum drawn up by the Secretary in the Legislative Department, which was issued under the special authority of Mr. Maine before he left. The Note said:

"The sections in question have been objected to as novel, harsh, unjust, and retrogressive. The object of this Note is to show that they are little but a statement, in a clear and compendious form, of the law prescribed by the English legislature, or laid down by the English Judges; and that, so far as they differ from English law, the difference may be said to be in favour of the person interested in the property."

He would now briefly state to the Council what these principles really were. Section 46 of the Bill declared that, in determining the amount of compensation to be awarded for property taken up for public purposes, the Judge, or the Judge and assessors, as the case might be, should take into consideration the market-price of the property, and the damage, if any, sustained by the person interested by reason of severing such property from his other property, or by reason of the acquisition injuriously affecting his other property in any other manner. With an exception which he would mention presently, these provisions were founded on the English Lands Clauses' Consolidation Act, section 63. Compensation would be given on account of every sort of actual injury caused by the acquisition of the property. Suppose (to quote some examples given by one of the critics of the Bill) that it was necessary to take up a tank

from which land was irrigated. Here, in addition to the actual value of the land occupied by the tank, the owner would also receive compensation for the loss sustained by the withdrawal of irrigation from the land previously irrigated by the tank. So, if a house were taken, the owner would get compensation for the expense of removing his furniture; and the provision for compensation for damages in respect of earnings would meet the case of the trader whose business was interrupted, or who was compelled to seek premises with a less advantageous position. In the last respect, regarding compensation for the loss of earnings, the Bill dealt decidedly more liberally with private interests than the English law; for mere obstruction or inconvenience to trade was not now regarded by the English law as supporting a claim for compensation. MR. STRACHEY might mention here that it had been suggested, and he thought rightly, that the intention of the first clause of this section would be better expressed if, instead of saying that the price should be taken into consideration which the property would fetch by public auction, it were laid down that the price to be taken into consideration was the market-value of the property. The auction-value, it had been said, and he thought truly, might be a very uncertain criterion of the value of immoveable property. The intention of the section was to prescribe that the best means should be adopted to ascertain the actual market-value of the property.

The next section of the Bill (47) enumerated the matters which were not to be taken into consideration in determining the compensation to be made. The first of these was the degree of urgency which had led to the acquisition. This was so obviously consistent with common sense that it was hardly necessary to have said anything about it in the Bill. Regarding the second matter he would speak presently. The third matter was that the officers were not to take into consideration any damage sustained by the proprietor, which, if caused by a private person, would not render such person liable to suit. The object of this provision was to exclude vexatious claims which might be made on account of trifling inconveniences caused during the progress of the works. This was in accordance with the ruling of the English Courts, to the effect that, unless something was done which would be actionable if done by a private person, there was no right to claim compensation. MR. STRACHEY did not think there had been, or could be, any difference of opinion regarding that principle. The fourth principle was that the valuers were not to take into consideration any damage which, after the time of awarding compensation, was likely to be caused by or in consequence of the execution of the proposed work. This also, as the Note of the Legislative Department would show the Council,

was in accordance with a ruling of three distinguished English Judges, to the effect that the jury had no right to assess prospective or future damages caused by a work, since the extent of damages could not be ascertained till after the damage had been actually inflicted. There had been some misunderstanding in some quarters regarding the effect of this provision. As the Bill was drawn, any person interested in the property might at any future time recover, by suit, compensation for any damage which could not be foreseen when the property was taken. All that was intended was that, in fixing the value at the time of taking the property, the official valuers should not take into consideration purely speculative or imaginary damages. The fifth and sixth provisions were taken from the French law. They were obviously equitable, and as he was not aware that they had been objected to, he would not say anything about them.

The only question of real difficulty that arose under this section was under the second clause, which provided that the valuers should not take into consideration any disinclination of the person interested to part with the property acquired. Regarding this part of the question there was more doubt and difficulty than regarding any other part of the Bill. There was a common, and he thought natural, feeling that, in many cases, when land was taken up for public purposes, something more than the fair market-value of the land ought to be given. For example, the case had been put of a Muhammadan community compelled to give up a cemetery in which their fathers were buried, or of an agricultural proprietor compelled against his will to part with his ancestral land. It was commonly felt to be a hardship that, in such cases as these, nothing should be given beyond the mere market-value of the land. It seemed to MR. STRACHEY that two questions which were really separate questions had been mixed up in the discussions that had taken place on this subject. As far as the mere question of value was concerned, with which alone this Bill as it stood had attempted to deal, it seemed to him that there could be no question that it was quite impossible to take into consideration the unwillingness of the owner to part with his property; and as the Council would see from the Note of the Legislative Department which he had already referred to, this was in accordance with the English practice.

"It is obvious," the Note said, "that to allow so vague and inappreciable an element as personal feeling or unwillingness to be taken into consideration in fixing the value would render it impossible to come to any satisfactory conclusion. One of the critics of the Bill puts the case of a Christian or Mussulman being compelled to part with the tombs of his people, and asks 'shall property hallowed to the owner by similarly sacred associations be valued at so many annas and pie per square foot like ordinary arable land?'"

The Note went on to say that this very question of the proper mode of assessing a churchyard had actually arisen in England in a case in which Chief-Justice Lord Truro laid down the following dictum:

That the value was to be ascertained in relation to the situation of the property generally, and its applicability to ordinary purposes, discharged of any prescribed appropriation.' In England, again, the question has been raised as to whether compensation should be given for destroying a picturesque effect, or interfering with a sentimental association, such as that attached to a ruin. The Companies have always refused to recognise claims on such grounds, and it is scarcely necessary to say that no one has ever ventured to bring such a claim into Court. No compensation is obtainable in England for annoyance to the amenities of a claimant's property, or for mere personal inconvenience."

That this was right, MR. STRACHEY thought quite clear; but, although in making an estimate of the actual value of property such considerations must be rejected, the question was much more difficult whether, after the actual market-value of the property had been determined, some compensation ought not also to be made to the owner on account of the compulsion to which he had been forced to submit, and this, as the Council would perceive, was really a different question from that of the value of the property itself. The case had been put with extreme clearness by His Honour the Lieutenant Governor in the very valuable remarks which had been submitted by his Government on the Bill, and which were now in the hands of the Council.

"The only doubt," it was said, "that can, in His Honour's opinion, be reasonably entertained is, whether a person, in consideration that he is forced to sell his property, should not receive something *in excess of the value of it*. But it could not properly be left to the discretion of a Court to determine what that something should be. The only issue that can properly be put before the Court and assessors is, what *is* the market-value of the property. They cannot be properly asked whether the special circumstances of each case require that something, and, if something, how much, in addition to the value, shall be given. But the law may require that a fixed percentage above the ascertained value shall in all cases be given, if the legislature sees fit to say so. It is certain that any such concession can only be made in the form of a fixed proportion on the value of the property. Government could not undertake to gauge, nor could it prudently delegate to any Court a discretion to gauge, the particular degree of hardship which may be entailed in such a case as that of the owner of a property being forced to sell it at a time when he might think it (and when it might really be) more prudent to retain it.

"Much may be said in favour of allowing something beyond the actual market-value to persons who are summarily compelled to part with their property for the common good. Something also against it may be said in the interest of the general community out of whose pockets payment for the property has to be made. The Lieutenant Governor will not at present attempt to strike the balance, but will content himself with suggesting the point for the consideration of the Government of India."

Although His Honour the Lieutenant Governor had thus refrained from expressing any final opinion on this point, MR. STRACHEY thought it might be presumed from the terms in which His Honour had written that he was on the whole in favour of allowing a fixed percentage, in addition to the actual value of the property, in consideration of the compulsion to which the owner had been subjected. This was also in general accordance with the view taken by the Government of the Panjáb. It had also been expressed by the Chief Commissioner of Oudh, who, while he gave a decided opinion that it was impossible to take into consideration matters such as these in making a valuation of the property, still thought that some separate compensation ought to be made for the compulsion to which the owner was subjected. Although the Statute-law of England was silent on the subject, MR. STRACHEY understood that it had been the common practice in England to give on this account same percentage over and above the actual value of the property. He understood that some years ago it was not uncommon on this account to give as much as twenty-five per cent., and that, although of late years the allowance had very much diminished, something was still very commonly given. He believed that, under the law of other civilized countries of Europe, no such allowance for compensation could be made. Although he had himself come to a different conclusion, he could not deny that there was great weight in the arguments of those who said that no such compensation on account of compulsory sale ought to be made. He might quote to the Council a passage from a valuable criticism on the Bill in which this view was taken, and he quoted it specially because he had been informed that it was also the view of a very high authority, whose opinion would be received with the greatest respect by the Council,—he meant Mr. Turner, one of the Judges of the High Court of the North-Western Provinces.

"The principle on which the disinclination of the proprietor to part with his property is to be recognized, in the computation of the compensation to be awarded him, is somewhat incompatible with the paramount right of the State, and it is a principle obviously extremely difficult of application. Any uniform percentage would be, if considerable, most unjust to the State,—that is to say, to the whole tax-paying public. It is quite possible to conceive cases in which owners have no disinclination to part with their property. Yet if the right to compensation for disinclination be conceded, it is to expect them to be more than human if they do not simulate reluctance and claim compensation beyond the actual value of their property. If it is just that compensation for disinclination to sell is to be awarded, it should be proportionate to the disinclination. How is this to be ascertained, and how is it to be valued? There are many persons who would make extravagant sacrifices to acquire or retain property to which from some sentimental reason they are attached. These persons can never receive an adequate compensation for the deprivation of such property. In our opinion this sentimental damage ought to be put out of the computation entirely. If the owner receives the full value of his property, he receives all that he can in justice claim from the State. He must be taken to

know that he held his property subject to the paramount right of the State, and, that being so if he gets its full market-value, he gets all that in fairness the State should be required to pay. Nor would this be the only instance in which the law refused compensation for sentimental damage. If A's coachman, by unskilful driving, runs into and destroys B's favourite charger, B recovers only the actual value of his charger, although he would not have sold it for any sum of money. If a Railway Company negligently loses A's portmanteau containing a watch which, from some particular circumstance, A values beyond price, all that A could recover would be the actual market-value of his watch. Why should the case be otherwise when the State exercises a right to which it is unquestionably entitled."

Although MR. STRACHEY could not deny that there was much weight in this reasoning, his own feeling was in favour of the other view, which he understood to be that of His Honour the Lieutenant Governor. In saying this, however, he desired to make it clear that this was his purely personal opinion, and that he was in no way committing the Government at large to any opinion on the subject. He thought himself that it would be proper to allow something over and above the market-value of the land, in consideration of the compulsory character of the sale. He admitted that it would be extremely difficult—he might say impossible—to make rules which really should apply equitably to all cases, and there was no doubt that there would be many cases where there was really no necessity for giving anything beyond the bare market-value; still, he did think that there was a foundation of equity and also of expediency in the feeling that this was not always enough. And he thought that, whether this feeling was in itself strictly reasonable or not, it was a feeling so common, and, indeed, so universal, that it could not properly be ignored in framing a practical measure of legislation. Injury to property might be not the less real, although it was only a sentimental injury; nor did he think that it was true that even a sentimental injury might not, to a certain extent, be compensated by the payment of money. He would say no more on this part of the subject now. It was a question which would require careful consideration by the Select Committee, and it was one which would rest with the Council at large hereafter finally to decide.

He had now, he thought, said enough regarding the main principles of the Bill. He need not refer in detail to the opinions received from the Local Governments and other authorities, because the papers that had been received from them were before the Council. Excepting the Government of the North-Western Provinces, which would prefer to lay down no rules regarding the principles on which compensation ought to be paid, the Council would see that, generally speaking, the Local Governments had approved of the substan-

tive portion of the Bill. He would only quote further an opinion which was not before the Council, but which had been given by the eminent Judge to whom MR. STRACHEY had already referred. He had stated his concurrence with the opinion expressed by one of the critics of the Bill, to the effect that, "so far as the principles of this Bill are concerned, the measure has been framed in a manner which will earn the concurrence of all jurists, and that, if accepted by the Council, it will be not the least valuable chapter in the codified law of India." MR. STRACHEY quoted this opinion with the less hesitation, because his own personal share in the preparation of this Bill had really been of very secondary importance.

It only now remained for him to say a few words regarding the procedure by which the Bill proposed to carry these principles into effect. It was proposed in the first place that the Collector should cause the land to be marked out and measured. He would then give notice to all persons interested in the property to state the nature of their interests and their claim to compensation. He would then enquire summarily into the value of the property and estimate the market-value. If the parties accepted the offer of the Collector, the matter would be disposed of; but if the parties objected to his valuation, the matter would be referred to the determination of a Judge, with or without the help of assessors, as the owners of the property might desire. If the Judge and the majority of the assessors agreed in their valuation, their decision would be final. If they differed in opinion, an appeal would lie to the High Court from the decision of the Judge. The Council would see from the papers that were before it, that the Local Governments and other authorities consulted were, generally speaking, entirely in favour of some such tribunal as that proposed in the Bill; but very many valuable suggestions had been made, the adoption of which he hoped would tend greatly to simplify and improve the procedure proposed by the Bill. He need not trouble the Council with details in regard to these points, because he thought the whole subject of the procedure to be followed would require to be considered carefully by the Select Committee, and that it was desirable that the Council should first have before it the result of the discussions in the Select Committee. He might add that he hoped that long before the Committee was in a position to report on this subject, we should have the great advantage of being joined by Mr. Stephen, whose opinions on such a subject as this would necessarily have great weight with the Council.

In conclusion, MR. STRACHEY only wished to repeat what he said when he introduced the Bill, that this measure, being one in which the interests of the public were closely concerned, and in which the Government had really no

interest whatever apart from those of the public, which had to be reconciled to the utmost extent possible with consideration for the just rights of private property, he hoped that the non-official members of the Council would agree to serve on the Committee, and give to the Council the advantage of their opinion on the important questions which would come under discussion.

HIS HONOUR THE LIEUTENANT GOVERNOR wished to make a few remarks after what had fallen from the Hon'ble Mover of the Bill. Mr. Strachey had rightly understood that HIS HONOUR was, on the whole, in favour of giving some compensation on land taken up for public purposes in excess of the actual market-value. HIS HONOUR thought that, on the whole, it was in accordance with the general sense of justice to make such payments; and, having heard what the Hon'ble Mr. Strachey had said against that view, HIS HONOUR must say that it had not at all tended to weaken the feeling he had in favour of giving something in excess of the market-value; for there did not appear to him to be a very perfect analogy between the cases stated by the Hon'ble Mr. Strachey and the payment of compensation for the acquisition of land for public purposes. With every deference to the authority cited by Mr. Strachey, it did not appear to HIS HONOUR that there was a perfect analogy between the two cases. In the case of the watch, the owner was deprived of his property through the effects of an accident, and it would surely offend every one's sense of justice if the person who was the cause of that accident were made to pay largely in excess of the value of the property. In the cases we were considering, the circumstances were entirely different. The hypothesis was, that the land required would contribute to the benefit of the people, and often to its very material benefit; and that being so, there did not seem to be anything very unreasonable that the proprietor should have a small bonus in excess of the actual market-value of the property. As HIS HONOUR said before, he thought that the general feeling was strongly in favour of that view, and that alone was a strong argument in favour of it; because, in a matter of this sort, in which the public was concerned on both sides, HIS HONOUR thought public feeling, so far as it did not go beyond reason, ought to have great weight in determining the question.

The Motion was put and agreed to.

QUARANTINE RULES BILL.

The Hon'ble MR. CHAPMAN introduced the Bill to provide rules relating to quarantine, and moved that it be referred to a Select Committee with instructions to report in a month. He said, this Bill was in itself a very simple

one and was entirely in harmony with the Penal Code. The framers of that Code contemplated the existence of rules of this description, and imposed penalties for their non-observance. He had, therefore, in the Bill, literally adhered to the terms and language of the Code, and had not attempted to define the particular acts which would constitute a breach of quarantine rules. Another reason for adopting this course had been the difficulty, in a general law of this kind, of meeting the requirements of the different parts of India, and of anticipating the conditions under which the Executive Governments might be called on to take action in the matter. He made these remarks because he thought that the practice of substituting rules for fixed law was objectionable, and should not be resorted to where it could be avoided.

He had said that the Bill was a simple one; but he could not disguise the fact that, unless the working of the rules was very carefully superintended, they might be the means of entailing considerable hardship and even oppression. The rules framed by the different Local Governments, and approved of by the Government of India, would, no doubt, be wise and proper; but everything would depend on the way those rules were worked. For example, the rules would probably provide that if a ship arrived from a port where cholera prevailed, it should be subjected to restrictions in its intercourse with the shore; but to place in quarantine every vessel that arrived in Bombay or Calcutta, where cholera was endemic, would entail a great deal of hardship. He would therefore hope that those uncompromising officers, the Sanitary Commissioners, would be very carefully looked after in their application of the rules laid down.

The Council would observe that the Bill contemplated the framing of maritime as well as inland rules. With regard to the maritime rules, it would probably be sufficient to limit their operation to the ports of Calcutta, Madras, Bombay and Karáchi. With respect to the inland rules, MR. CHAPMAN anticipated the greatest benefit from their operation, provided they were carefully framed and judiciously carried out. In many parts of India, it was the practice for a large number of pilgrims to congregate at sacred shrines, and the consequence very frequently was that cholera in its most virulent form broke out, and the disease thus germinated was disseminated throughout the country by the people on their return to their homes. Any measure that should have the effect of checking this great evil, must be regarded as a great blessing.

The Motion was put and agreed to.

HINDÚ WILLS BILL.

The Hon'ble MR. COCKERELL introduced the Bill to regulate the Wills of Hindús and Buddhists in the Presidency Towns, and moved that it be referred

to a Select Committee with instructions to report in a month. He said that this Bill, together with a Statement of Objects and Reasons containing a very full explanation of the policy and details of the proposed legislation, were published under the signature of our late learned colleague, Mr. Maine, in the *Gazette of India* of the 25th September last.

It was therein shown that the propriety of extending the testamentary portion of the Indian Succession Act to the classes heretofore excepted from its operation had for a long time past been under the consideration of the Government of India, that public opinion—Native as well as European—as to the expediency of this extension had been widely canvassed, and that the result was a general consensus of approval of the measure, subject to such reservations as were contained in the Bill.

MR. COCKERELL thought it was unnecessary for him on the present occasion to enter into any recapitulation, either of the reasons for the application of this measure to the wills of Hindús and Buddhists, or of the considerations which had led to the omission from the Bill of certain provisions of the Indian Succession Act regarding the interpretation of wills, and the powers, duties and liabilities of executors or administrators, all of which were so clearly set forth in the statement above referred to.

The only objections which had been raised to legislation for the regulation of wills made by Natives were due to a misconception of the extent to which it was proposed to apply, in the case of such wills, the provisions of the Indian Succession Act. It was apprehended that the projected measure would operate to set aside or overrule the injunctions of the Hindú and Muhammadan laws as to the devolution of property; and if the provisions of section 46 of the Succession Act, which declared that "every person of sound mind and not a minor may dispose of his property by will," were adopted without qualification, that apprehension would be justified; but the Bill, accepting the principle established by several rulings of the Courts, that the right of the Hindú to direct the disposal of his property after his decease was co-extensive with his power of alienation thereof *inter vivos*, provided a similar limitation to his testamentary capacity.

In applying the rules regarding the interpretation of wills to the wills of Hindús and Buddhists, the Bill aimed at a close adherence to the expressed or implied intentions of the testator, and excluded those provisions of the Succession Act which might be said to supplement the directions of the person making the bequest, or which were unsuitable as foreign to the social condition of the Natives of this country.

It had been assumed that the practice of testation amongst Hindús had sprung up under British administration and was wholly unknown to them in a former period. This conclusion was perhaps doubtful, as there was some evidence to the contrary; but it was certain that the Hindú, unlike the Muhammadan, law contained no express definition of testamentary powers or directions as to the discharge of the duties entailed by a will.

The provisions of the Bill, therefore, for the regulation of wills made by Hindús, were absolutely needed to supply the deficiencies of the existing law; but as there was not the same exigency in regard to Muhammadans, and as the extension to their wills of any but the rules as to the mode of execution would be open to grave objections, it was proposed to continue their present exemption.

So much of the testamentary provisions of the Indian Succession Act as related to void bequests had been omitted. They included what was termed the rule against perpetuities, and the provisions as to bequests of the testator's property for religious or charitable objects, to the exclusion of his near relations. As regarded the bequests just mentioned, it might be admitted, on the one hand, that there was little analogy between the circumstances which dictated the policy of the restriction imposed by the English law, and those of the Hindú testator; and, on the other, the bestowal of his property, in certain contingencies, for religious or charitable purposes was regarded by the Hindú as a sacred duty, to which it would be impolitic to apply any legal limitation.

In regard to the creation of perpetuities, the case was different: here, no religious duty or sanction of ancient custom presented itself in conflict with the sound policy of the English law in this matter, and it appeared to MR. COCKERELL that the considerations on which that policy was founded applied with even greater force to this country, where rights of inheritance formed such a fruitful source of litigation.

The application of the English rule was objected to by the Natives as interfering with a valued usage. It was urged that one of the most fondly cherished ideas in the mind of the Native of this country was the perpetuation of his name. The creation of perpetuities in this country, however, could only be coeval with the exercise of the power of testation, and the one derived no more authority from the provisions of the Hindú law than the other.

MR. COCKERELL was very strongly of opinion that the mere prejudice in favour of a weakly supported custom should not be permitted to stand

in the way of a substantial reform, and he trusted that the question would be considered when the Bill went into Committee, with a view to the introduction of the restriction of the English law.

The operation of the Bill was limited to the Presidency Towns, on the the assumption that, as yet, the testamentary power was rarely exercised by Hindus beyond those limits. He ventured to doubt the correctness of this conclusion; there was good reason to believe that, amongst the Hindú population, the practice of making wills was largely on the increase, especially in those parts of the Lower Provinces in which the doctrines of the *Dáyabhága* prevailed. This was indeed only the natural result of the ruling of our Courts, that the Hindú's right of disposing of his property by will was commensurate with his power of alienating such property during his life; for, as the Council were aware, the *Dáyabhága* conceded an absolute power of alienation, *inter vivos*, of property of every description.

MR. COCKERELL was indebted to the Registrar General of Assurances in Lower Bengal for some very valuable statistics in regard to the registration of wills.

These statistics showed a very considerable progressive increase of registration of these instruments year by year, and it was specially noticeable that the vast majority of these registered wills were executed by Hindús.

The Council would bear in mind that the registration of wills was not compulsory under the present law, and it was probable, therefore, that the number of wills registered represented only a moderate proportion of the wills executed. It was reasonable to assume, in the absence of circumstances suggestive of any other conclusion, that the considerable increase of registration of wills indicated a proportionate tendency to increase in the number of such instruments executed; and if this were so, there could be no reason for withholding the extension of the rules for the regulation of wills to places beyond the limits of the Presidency Towns; for the Bill asserted the principle that, where the practice of testation prevailed, the restraints upon its improper application, which were provided by the English law, were clearly needed.

The Bill would not go too far in his (MR. COCKERELL'S) opinion, if it extended to the Bengálí districts, or even to the whole of the Lower Provinces of Bengal, and he trusted that the propriety of such extension would meet with the consideration of the Select Committee. If nothing more was deemed advisable, at least a power of extending the Bill to Lower Bengal, and perhaps

to other provinces as circumstances might render expedient, might unobjectionably be vested in the Local Government.

The provisions of the Indian Succession Act in regard to the administration of the property of deceased persons in cases of intestacy had necessarily been excluded from the Bill, as they comprehended rights of inheritance, *ab intestato*, repugnant to the Hindú law; but he thought that the time had arrived for making some advance in our existing legislation on this subject.

Under the present law all that could be obtained by the representative of a person who had died intestate, was a certificate of administration of so much of the estate of the deceased as was comprised in the debts due to the deceased person at the time of his death. Practically, however, in many cases, this certificate, though legally valid only for the purpose of collecting debts, operated to confer on the person obtaining it an undisputed right of administering the entire estate of the deceased.

It seemed to MR. COCKERELL that so much of the Succession Act as regulated the duties and responsibilities of administrators might, without impropriety, be applied to the administration of the estates of Hindús and Buddhists in cases of intestacy; and that the grant of letters of administration should in such cases follow the interest, it being made incumbent upon the person claiming the grant to prove himself to the Court's satisfaction to be the legal representative of the deceased and entitled to succeed according to the Hindú law.

Amongst the beneficial results to be expected from enacting this measure, he looked to the eventual enforcement of an authority to adopt being made in writing. When the advantages of the suppression of nuncupative wills became generally recognized, the validity of an oral authority to adopt could hardly be maintained.

An authority to adopt was equivalent to a testamentary disposition of property, and the one obviously required the same safeguard against fraud as the other. MR. COCKERELL believed that the present state of the law in regard to adoption afforded great temptation and facility for fraudulent practices.

The Hindú childless widow had only to set up a fictitious oral authority given to her by her husband to adopt, and she was thereby enabled to divert the reversionary interest in the deceased's property from his relations to her own. It was to be apprehended that frauds of this description were not of very rare occurrence, and as, in such cases, the devolution of the deceased person's entire

property of every description was affected by the transaction, the measure of the evil engendered by the present system was even greater than in the case of nuncupative wills.

The Motion was put and agreed to.

The following Select Committees were named:—

On the Bill to consolidate and amend the law for the acquisition of land needed for works of public utility—His Excellency the Commander-in-Chief, the Hon'ble Messrs. Taylor, Cockerell, Gordon Forbes and Cowie, Colonel the Hon'ble R. Strachey, the Hon'ble Messrs. Chapman and Bullen Smith and the Mover.

On the Bill to provide rules relating to quarantine—The Hon'ble Messrs. Cockerell, Gordon Forbes, Cowie and Bullen Smith and the Mover.

On the Bill to regulate the Wills of Hindús and Buddhists in the Presidency Towns—The Hon'ble Mr. Taylor, Major General the Hon'ble Sir H. M. Durand, the Hon'ble Messrs. Gordon Forbes and Chapman and the Mover.

The Council adjourned to Friday, the 17th December 1869.

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

CALCUTTA,
The 10th December 1869.

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