Thursday,
26th January, 1882

ABSTRACT OF THE PROCEEDINGS

OF THE

Council of the Governor General of India,

LAWS AND REGULATIONS

Vol. XXI

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ASSEMBLED FOR THE PURPOSE OF MAKING

LAWS AND REGULATIONS.

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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 Thursday, the 26th January, 1882.

PRESENT:

His Excellency the Viceroy and Governor General of India, K.G., G.M.S.I., G.M.I.E., *presiding.*
His Honour the Lieutenant-Governor of Bengal, K.C.S.I.
His Excellency the Commander-in-Chief, G.C.B., C.I.E.
The Hon'ble Whitley Stokes, C.S.I., C.I.E.
The Hon'ble Rivers Thompson, C.S.I., C.I.E.
The Hon'ble J. Gibbs, C.S.I., C.I.E.
Major the Hon'ble E. Baring, R.A., C.S.I., C.I.E.
Major-General the Hon'ble T. F. Wilson, C.B., C.I.E.
The Hon'ble H. J. Reynolds.
The Hon'ble Mahárájá Jotíndra Mohan Tagore, C.S.I.
The Hon'ble L. Forbes.
The Hon'ble G. H. P. Evans.
The Hon'ble C. H. T. Crosthwaite.
The Hon'ble A. B. Inglis.
The Hon'ble Rájá Siva Prasád, C.S.I.
The Hon'ble W. C. Plowden.
The Hon'ble W. W. Hunter, C.I.E., LL.D.
The Hon'ble Sayyad Ahmad Khán Bahádur, C.S.I.
The Hon'ble Durgá Charan Láhá.

TRANSFER OF PROPERTY BILL.

The Hon'ble MR. STOKES presented the final Report of the Select Committee on the Bill to define and amend the law relating to the Transfer of Property.

The Hon'ble MR. STOKES also moved that the further and final Reports of the Select Committee on the Bill to define and amend the law relating to the Transfer of Property be taken into consideration. He said that only six of the amendments described in those Reports were of sufficient importance to require mention in this Council. The Committee had declared that nothing in Chapter II should be deemed to affect any rule of Hindú, Muhammadan or Buddhist

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law. It did not, in his opinion, affect any such rule, otherwise than by putting Natives, as regards their power to make settlements on unborn persons, on the same footing as Europeans. But it laid down, in accordance with the decisions of the Courts, a rule against perpetuities, and two of the Native members who much disliked this rule, and who thought that judge-made law was more likely to be altered than statutory law, pressed the Committee to exempt their personal law from this chapter. They had also saved the rules of Hindú and Buddhist law from the provisions of the chapter on gifts, save only that which required, in the case of a gift of land, writing, registration and attestation. The rule that a Hindú father might, in case of necessity, resume gifts made to his son (*Dáyabhága*, II, 57), would thus remain unaffected.

Section 70 of the Bill as referred to the Committee recognized the validity of a power of sale conferred by a mortgage-deed where the principal-money originally secured was five hundred rupees or upwards. They were of opinion that there were parts of the country in which such a power was liable to be abused by Native mortgagees, and they considered it safer to provide that such powers should be valid only, first, where the mortgage was an English mortgage (as defined by the Bill) and neither mortgagor nor mortgagee was a Hindú, Muhammadan or Buddhist; secondly, where the mortgagee was the Secretary of State in Council, or thirdly, where the mortgaged property, or any part thereof, was situate in the Presidency-towns, Karáchí or Rangoon. They had amended the section accordingly, and they had taken the opportunity to declare that the provisions of the Trustees and Mortgagees Act, 1866, should be deemed to apply to English mortgages wherever in British India the mortgaged property might be situate, when neither of the parties was a Native. As to this, it appeared there was some doubt, owing to the ambiguity of the expression "cases to which English law is applicable," which was found in Act XXVIII of 1866, section 45.

They thought that the provisions of section 38 (as to the apportionment of obligations relating to property on its severance) might possibly sometimes cause hardship in the case of agricultural leases. They had, therefore, provided that nothing in that section should apply to such leases unless and until the Local Government so directed.

After section 56, they had inserted a section, taken from the Property Act, 1881 (44 & 45 Vic., c. 41, s. 5), giving the Court power, in the case of sale of immoveable property subject to any incumbrance, to provide for the incumbrance and to direct that the property should be sold freed therefrom. In case of an annual or monthly sum charged on the property, this would be done by paying into court such amount as, when invested in Government securities, the

Court considered would be sufficient, by means of the interest, to keep down the charge. In case of a capital sum charged, the amount to be paid into court would be such as would be sufficient to meet the incumbrance and any interest due thereon. Thereupon the Court might declare the property free from the incumbrance and make proper orders for giving effect to the sale and for applying the capital or income of the fund in court. This section had been hailed in England as likely to effect one of the greatest reforms ever made in the law of real property; and there was reason to believe that it would be equally beneficial in India. But to prevent any chance of error in the exercise of a novel jurisdiction, the Committee had taken two precautions: first, it had confined the jurisdiction to the High Courts, the District Courts and any other Courts specially empowered by the Local Governments. And, secondly, they had declared that an appeal should lie from all directions and orders given under this section.

They had re-drafted the last paragraph of section 71 of the same Bill (now 73), and added a provision limiting the amount for which a mortgagee might, in the absence of a contract to the contrary, insure the mortgaged property against loss or damage by fire. This also was in accordance with the same Statute, section 23.

They had not extended the Act in the first instance to Bombay, the Panjáb or British Burma, as the present Local Governments of those provinces did not wish it to apply to the territories under their administration. But they had empowered them to extend the Act to the whole or any part of those territories; and they had authorised every Local Government to exempt, throughout the whole or any part of the territories administered by it, the members of any specified race, sect, tribe or class from all or any of the provisions relating to transfer by an ostensible owner (section 41), and the mode of effecting a transfer by sale (section 54, paragraphs 2 and 3), by mortgage (section 59), by lease (section 108), and by gift (section 124). This exemption might be retrospective from the day on which the Act came into force. They thought that the proposed Act should not come into force till the 1st April, so that time might be given to the Courts and the public to become familiar with its provisions, especially those requiring written instruments in case of sales, mortgages, leases, gifts and exchanges.

And now, having mentioned the changes recently made by the Select Committee, it would be convenient to say a few words as to this important Bill and its history.

The primary object of the Bill was, as MR. STOKES had explained to the Council nearly five years ago, when no one who now heard him was present, to

complete the Code of Contract Law (Act IX of 1872), so far as related to immoveable property, and thus to carry out to some extent the policy of codification which the Government of India had happily resumed. Its secondary object was to bring the rules which regulated the transmission of property between living persons into harmony with certain rules affecting its devolution upon death, and thus to furnish the necessary complement of the work which this Council commenced by passing the law of succession (Act X of 1865), continued by passing the Hindú Wills Act (XXI of 1870) for the Lower Provinces and the Presidency-towns, and would soon, he hoped, end by extending the latter Act to Hindús and Buddhists in the rest of India. Another object of the Bill was to amend the law of mortgages and conditional sales, which had, at least in Madras and Bombay, got into a somewhat unsatisfactory condition.

The Bill was originally framed by the Law Commission, to which the Government were indebted for the Succession Act and for all that was good in the Contract Act (IX of 1872), and which then comprised the late Master of the Rolls, Lord Romilly, Sir Edward Ryan, formerly Chief Justice of Bengal, Mr. Lowe (now Lord Sherbrooke), Sir Robert Lush, Sir John MacLeod, the distinguished Madras Civilian who helped Macaulay in framing the Penal Code, and the late Lord Justice Sir W. M. James: all now gone except Lord Sherbrooke. It was sent out in 1870 by the Duke of Argyll, then Secretary of State for India, with instructions to take the necessary steps for passing it into law. In 1876, towards the close of Sir Arthur Hobhouse's tenure of office, when he had become convinced of the expediency and practicability of codifying the substantive law of this country, he took up this Bill and carefully revised it, and some of the points with which it dealt were discussed and settled in the Executive Council. The sections on Powers, which the Bill then contained, were re-drawn by him. The Bill, thus revised, was sent home early in 1877, and in the following April the Government received permission to proceed with it. Sir A. Hobhouse having left India, the Bill fell into MR. STOKES' hands, and was subjected to renewed examination by his learned friend Mr. Phillips, then Legislative Secretary, and himself. In June 1877, he introduced the Bill, and the Council referred it to a Select Committee, composed of Sir Edward Bayley, Sir Alexander Arbuthnot, Mr. Cockerell and Mahárájá Jotíndra Mohan Tagore, to whom his learned friends Messrs. Paul and Evans were subsequently added. The Bill was then circulated to the Local Governments for publication and translation, and numerous valuable criticisms and suggestions came in from all parts of India.

In February, 1878, the Committee presented a preliminary report, stating that, in revising this important measure, they had been guided by the three

principles by which the Government of India desired to regulate its policy of codification, namely, first, that as little change as possible should be made in the existing law, whether established by the legislature or declared by judicial decisions; secondly, that no additions should be made to the law which were not either necessary or clearly expedient; and, thirdly, that interference with contracts fairly made and usages long established was, *primâ facie*, undesirable. They had also borne in mind the great deference due to the late Indian Law Commission, by whom the bulk of the Bill was framed, and to Sir Arthur Hobhouse, by whom it had been settled.

In 1878 the Bill thus revised was republished, and again circulated to the Local Governments, and another mass of criticism was received.

The principal objections taken to this Bill in its second form were, first, that, as a whole, it was heterogeneous, and, secondly, that certain parts of it were neither necessary nor expedient. It was said, for instance, that, though the bulk of the Bill dealt with transfer of property *inter vivos* by act of parties, it also treated of conditions in wills, and of succession to a deceased person. It was said, again, that the chapters dealing respectively with the rights and liabilities of owners of limited interests and with property held by several persons belonged rather to the subject of the enjoyment, than to that of the transfer, of property. It was urged that settlements (in the conveyancer's sense of the word) were hardly ever made in India; that what are technically called "powers" were almost unknown; and that the chapters dealing with those subjects were certainly not necessary, and could hardly be said to be expedient. The Committee felt the force of these objections. In fact, they had always felt them. But they were not responsible for the first draft of the Bill, whatever were its excellences or defects. The matters thus objected to, together with others, such as registration and trusts, still more foreign to the proper subject of the Bill, were all dealt with by the draft prepared by the late Indian Law Commission and revised by Sir A. Hobhouse. The great deference due to the Law Commission and to Sir A. Hobhouse had hitherto prevented the Committee from dealing freely with the Bill. Until the opinions of the Local Governments and the results of local experience had been obtained, for them to have altered it would have been to set their individual views against those of the able and learned men who were answerable for the Bill as introduced. But now that these opinions and results had been obtained, the Committee saw that, if the Bill was to go on at all, it must be strictly confined to the subject of transfer of property by act of parties, that was to say, by contract or gift.

They had, therefore, omitted chapters VII to XII, both inclusive, which dealt with settlements, powers and the other matters just mentioned.

They added, on the margins, references to the reported decisions of the Indian Courts and the Judicial Committee, which justified the rules contained in the Bill. The Council would see that but few of these rules were devoid of this valuable support. The assertion that the Bill would introduce a mass of new law into India must, therefore, be due to ignorance of the extent to which English law (under the name of justice, equity and good conscience) was actually administered to the Natives by the Anglo-Indian Courts. The function of the Bill, like that of all Indian Codes, was to strip English law of all that was local and historical, and to mould the residue into a shape in which it would be suitable for an Indian population, and could be easily administered by non-professional judges. But the Bill would introduce hardly any new substantive law, and it would not (except in the case of the procedure relating to mortgages) displace any existing enactment. The rules, for instance, as to the relation of landlord and tenant, contained in the local Acts, X of 1859, XVIII of 1873, XIX of 1868, XXVIII of 1868, Bengal Act VIII of 1869 and Madras Act VIII of 1865, would all remain untouched.

To the body of local usages and contractual incidents which in India, as in other countries, existed as to the transfer of land, the tenderest care was shewn by theBill. Not only was local usage expressly saved in the sections 98, 106 and 108, but the effect of section 2, clause (*a*), would be to maintain intact the statutory force which the legislature had given to local usage in those two *pays de coutumes*, the Panjáb and Oudh; and throughout India all the many incidents of a mortgage or a lease, which were not inconsistent with the provisions of the Bill, would remain wholly unaffected.

The Bill was then simultaneously circulated for the third time to the Local Governments, and referred to a Commission, composed of Sir Charles Turner, the present Chief Justice of Madras, Mr. Justice West of the High Court of Bombay and himself.

That Commission made several amendments, both in the wording and substance of the Bill, but the important additions were only three. First, they set out in full on the face of the Bill, several rules applying to transactions between living persons, which in the original draft were only expressed by way of reference, *mutatis mutandis*, to certain sections of the Succession Act dealing with matters such as election, contingent bequests, conditional bequests and bequests with directions as to application and enjoyment, and which, therefore, could never

have been applied by unprofessional Judges without risk of serious error. Secondly, they required, at the suggestion of Sir Henry Maine, who was a strong advocate of the continental system of a public transfer of land, a written and registered instrument in certain cases of sales, mortgages, leases, exchanges and gifts of immoveable property. Thirdly, at the suggestion of one of the Hindú critics of the Bill, they inserted a chapter on gifts.

The Report of the Indian Law Commissioners, 1879, was duly communicated to the Select Committee, which then consisted of Mr. Pitt Kennedy (a very eminent master both of English and Hindú law), Mr. Colvin, Mahárájá Jotíndra Mohan Tagore and himself,* and they carefully considered it, as well as the mass of comments on the Bill which had come from all parts of India. As to sales, they agreed with Sir Henry Maine as to the desirability of rendering the system of transfer of immoveable property a system of public transfer; and they were inclined to go a little further in this direction than seemed good to the Law Commissioners. Thus, they thought that, in the case of a reversion or other intangible thing, though its value might be less than Rs. 100, the transfer should be made only by registered assurance: they had altered section 54 accordingly, and the Government of India, in its executive capacity, approved of this alteration.

As to mortgages, the Committee agreed with the Law Commissioners that the requirement of registration would not only discourage fraud and facilitate investigations of title, but that it would also preclude some difficult questions of priority. A majority of them, however, thought that, when the principal-money secured was less than Rs. 100, the mortgage-deed need not be registered, and they altered the Bill accordingly. A majority of them also thought that equitable mortgages by deposit of title-deeds should be valid when made in the Presidency-towns, Rangoon and Karáchí. To this the Government of India in its executive capacity had also agreed.

As to leases, they all thought that the chapter would be of practical use in the case of leases of buildings, gardens and mines, and they agreed with the Law Commissioners that it should not of itself apply to agricultural leases, in other words, to the relations between zamíndár and raiyat.

As to gifts, they agreed with the Law Commissioners that registration should be required in the case of gifts of immoveable property of whatever value. Such gifts were, as a rule, made by a written instrument, and as, under the Registration Act, the registration of such instruments was compulsory, the change of the existing law here proposed was almost nominal.

* The Hon'ble Messrs. Grant and Paul were also members of the Select Committee, but neither of them attended its meetings in 1881, and neither signed its report.

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The Council would see that both the Government of India and the Select Committee approved of the proposed requirements of writing and registration in the case of most transactions relating to immoveable property. It was right to say that this approval was to a large extent due to the arguments of the present Chief Justice of Bengal, and, as the matter would probably be much discussed to-day, MR. STOKES thought it right to read a few extracts from his Lordship's minute. Referring to a letter from the present Chief Commissioner of British Burma, Sir Richard Garth observed:—

"It is stated in paragraph 5 of that letter that 'as an abstract question there appears to be a general concurrence of opinion, *that it is highly desirable that there should be a complete contemporaneous record of all transactions relating to land*, and that the system of transferring immoveable property should be made, as it is on the Continent of Europe, by a publicly-recorded transfer.'

"I rejoice to find that there is a general concurrence of opinion upon this most important question. But then Mr. Bernard goes on to say in the same paragraph:—

"'To what extent this could be carried out in practice is open to some doubt. It could not be done completely, *without requiring a written record of every such transaction, and barring parol transactions relating to immoveable properties*; in other words, without the introduction of some kind of a Statute of Frauds, *for which the country is certainly not yet prepared*.'

"Now, here is a proposition for which, as it comes from so high an authority, I presume there must be some good foundation, though at present I have been unable to discover it.

"If there is such a general concurrence of opinion that a contemporaneous record of all transactions relating to land is desirable, why is it that this country should not be prepared to accept that which would assuredly prove to it a very great blessing?

"I suppose it is almost undeniable that to compel such transactions to be reduced to writing, and to have them publicly registered, is about the most effectual means that any Government can provide of preventing fraud in such matters.

"I suppose it is also undeniable that there is as much fraud and forgery and perjury committed in this country, with reference to such transactions, as there is in any country in the world.

"It is really almost impossible for any one who is inexperienced in the proceedings of Courts of Justice in India to imagine the amount of wickedness of that particular kind which is habitually practised there.

"It is literally true that there is hardly any case of importance relating to land in which one or other of the parties does not himself attempt, or charge his opponent with attempting, some fraud or perjury; and it is almost a common form in most suits for each of the parties to allege that some at least of the documents which are filed by his adversary are forgeries.

"The utter disregard of truth and moral sense which this practice involves is most deplorable. There seems to be little or no feeling of shame or disgrace, even amongst men of good position and fortune, when they are charged with, or even found by the Courts to have committed, such offences. A wealthy zamíndár who is accused by his opponent of forging a deed or a rent-roll, or of having been privy to such forgery, never troubles himself, as a rule, to go into the witness-box to deny the charge; nor does he seem to think the worse of himself, nor do his family and friends seem to think the worse of him, when the Civil Court finds him guilty of it.

"So much has this system become habitual, that sometimes, when a suitor has a perfectly honest case and sufficient reliable evidence to support it, he will nevertheless resort, or allow his friends and advisers to resort, to some forgery or perjury in order to improve, as he imagines, his position; and many a man has run a great risk of losing a righteous case in that way.

"Now, this is nothing short of a monstrous national evil. It is frequently subversive of justice. It gives rise to the grossest immorality. The Courts may check it in some degree by prosecutions for perjury and the like, but the system is so deeply rooted, and Natives of all classes think so lightly of its iniquity, that it is often difficult to obtain convictions in such cases, and it is to the legislature, and the legislature only, that the nation must look to repress the mischief in any material degree.

"And the legislature have the means, if they would only exercise it, of greatly decreasing the mischief. They have the same means which has been successfully resorted to for the same purpose in England and other European countries, where the evil is much less formidable and the necessity for remedying much less pressing.

"That means consists simply *in requiring all contracts and transactions relating to land to be in writing, and registered.*

"So far as registration is concerned, this has already been enforced with regard to all written transactions exceeding Rs. 100 in value, and, if the recommendations of the Registration Committee are carried out, the obligation will extend to all written transactions.

"It would then only remain to require all contracts and transactions relating to land to be reduced into writing; but for this, we are told, '*the country is not prepared.*'"

Sir R. Garth then enquired, first, what proportion of transactions relating to land were at the present time not reduced into writing, and, secondly, what proportion of those which were now effected by parol were honest, *bonâ fide* transactions. He proceeds:—

"Now", he says, "as regards the first of these questions, I have been at some pains to obtain a correct answer to it from gentlemen of experience in all the districts of Bengal. I have consulted judges, vakíls, zamíndárs and others whom I considered most likely to give and to procure for me the most reliable information, and the result is very much what I had expected.

"My question, be it remembered, has reference to contracts, arrangements and conveyances relating to land of all descriptions, sales, gifts (other than testamentary), mortgages, partitions, exchanges, transfers, trust-deeds, family and other arrangements and leases of all kinds, always excepting leases made to cultivating raiyats. And I learn from the best authority that a very

small proportion indeed of such instruments are now effected by parol, and that this small proportion is yearly and rapidly becoming smaller. Men of all ranks and classes are realising more and more the wholesome and undoubted truth that oral arrangements, especially in a country like this, are utterly unsafe and unreliable; and that, if it is worth a man's while to acquire property and give money for it, it is also worth his while to secure it by an instrument in writing, properly authenticated and registered.

"Moreover, from the answers which I have received to the first of the above questions, I have gathered a great deal of valuable information from reliable sources, which virtually answers the second question, namely, what proportion of these transactions which are now effected by parol are honest and *bonâ fide?*

"The answer is,—comparatively few. The arrangements which, speaking generally, are now effected by parol are partitions of small family-properties, gifts and exchanges of small pieces of land between members of the same family, small grants of land to mem bers of a family or the village-priest, and the like; but a very large proportion of these so-called parol arrangements are made for the purpose of defeating creditors, or with some other fraudulent object; they are generally brought forward in Courts of justice to defeat the title of some *bonâ fide* purchaser for value; and in the large majority of cases they are disbelieved by the Courts and found to be fraudulent.

"The fact is, that, so long as the law allows facilities to people to defeat *bonâ fide* purchasers, the dishonest and ignorant try to take advantage of them; and it is, of course, a much easier thing, and involves less risk, to set up fraudulent transactions by word of mouth than by a written instrument, more especially as, in all transactions above Rs. 100 in value, the written instrument is useless unless it is registered.

"And the present law, too, works injustice in this way. So many of these oral transactions which are set up in Courts of justice are found to be fraudulent, that judges are sometimes induced to mistrust, and often to reject as fraudulent, the few that are genuine."

The Chief Justice then concluded with the following weighty opinion:—

"On the whole, I would strongly advise the Government to consider the expediency of making that which now is undoubtedly the general rule the law of the land. I am satisfied that it would be the means of preventing a vast amount of fraud and litigation, that it would be a great blessing to the whole community, and especially so to those who want security and protection most, namely, the poorer and more ignorant classes."

The Bill was then republished in the *Gazette of India*, with the Committee's third report. It was also published in the local Gazettes in English and (except in Burma) also in the vernacular languages. It had been before the public, in what was substantially its present form, since the 12th March, 1881. Since then the Committee had received no criticisms of importance, and the Bill seemed now to be approved by all the Local Governments, except those of the Panjáb, British Burma and Bombay.

The Bill, as now settled, seemed to the Select Committee a systematic and useful arrangement of the existing law. But they agreed with the Law Com-

missioners that, when the body of substantive civil law enacted for India was recast in a more compact and convenient form than that of a series of fragmentary portions from time to time passed by the legislature, the chapters on Sale, Mortgage, Lease and Exchange, contained in the present Bill, would probably be placed in close connection with the rules contained in the Contract Act. Till then they might fitly be left in a law containing what the Contract Act did not contain, namely, general rules regulating the transmission of property between living persons.

MR. STOKES trusted, then, that the Council would to-day permit the Bill to become law. No Bill in the course of his eighteen years' experience of this Council had ever been so carefully considered. It had been thrice circulated to the Local Governments for opinion and publication. It had been criticised by over a hundred of the ablest and most experienced officers in the country, of whom nineteen were, he was happy to say, Natives. It had been five times reported on by Select Committees. It had been carefully revised by the late Indian Law Commission. The Committee thought, therefore, of this Bill, as of the Bill dealing with negotiable instruments, that it was not now likely to be improved without the experience to be gained from its actual working.

The Hon'ble DURGÁ CHARAN LÁHÁ said he had only a few remarks to make in regard to the Bill. The alterations which had been recommended by the Select Committee in their last report, to the effect that nothing in the second chapter of the Bill should be deemed to affect any rule of Hindú, Muhammadan or Buddhist law in respect of the transfer of property, was, in his opinion, a decided improvement, and removed the objection which was justly taken by the Hindú community. It showed that the legislature had no intention to interfere with the personal law of the Natives regarding the transfer of property. He thanked the hon'ble and learned member and the Select Committee for the consideration they had shown in this matter, and it afforded him much pleasure to give his support to their recommendation.

The Hon'ble SAYYAD AHMAD said: "My Lord, I wish, with your Excellency's permission, to say a few words before the discussion on this Bill closes. The Bill is one of the most important ever introduced in this Council, and I congratulate my hon'ble colleague, Mr. Stokes, for having brought it to the stage which it has now reached. I have carefully read the Bill with the special object of discovering whether any rule contained in it is such as would disturb the customs and usages of the people of India, and especially the Mussulmán community. And I have no hesitation in saying that none of its provisions is

calculated to affect any portion of the Muhammadan law. Nor, indeed, so far as my knowledge of Hindú law extends, can I see anything in the Bill which can interfere with the customs and usages of my Hindú fellow-countrymen. The wise rule, always kept in view by the Indian legislature, of saving the personal laws of the people of India, has been duly observed in this instance, and I believe not a voice can be raised against the Bill by the people of India on the ground of its interfering with their personal laws.

"But, my Lord, it is not only on this ground that I am anxious to give my humble support to the Bill. Independently of any considerations of expediency with reference to the sentiments of the people of India, I look upon this piece of legislation as a great step in the direction of that great object which, I trust, will, before many years pass away, be fully achieved. I refer to the formation of a code of substantive civil law as complete and precise as our Penal Code. The law which is to govern the transfer of property *inter vivos* must necessarily form an important chapter of the Civil Code in contemplation.

"My Lord, if anything I can say can be regarded as representing the feelings and opinions of my countrymen, I will take it upon myself to say that this Bill will be welcomed by the Native public when it becomes law. It will be welcomed by those who possess property, by those who are under the necessity of transferring it, by those who wish to acquire property or to advance money on landed security. It will be welcomed alike by the suitors who quarrel, and by the Judges who have to decide those disputes. And, in saying this, I am expressing the convictions that have grown in me during an experience of half a century, as a citizen of the British Empire in India, as one who has had the honour of serving Government as a judicial officer for no less than thirty-five years, as one who has frequently been consulted in private life by intimate friends in regard to their personal transactions, such as will be governed by the provisions of this Bill when it becomes law. My Lord, I make these observations personal to myself, for I believe that the best way in which I can support this Bill is to base my conclusions in favour of its becoming law, not on theories, but on facts—not on speculation, but on my actual personal experience of the past. And, my Lord, since this Bill is the most important outcome of the policy which brought about the establishment of the Law Commission of 1879—since this Bill is a decided and significant step towards the codification of our substantive civil law, I trust your Lordship will permit me to say, in as few words as possible, what I consider the state of the real Native feeling to be in regard to the important question of codification. I am mournfully aware that codification has its opponents, some of them gentlemen holding high rank in the Administration, and entrusted with large responsibilities, and to whose

opinion weight should, no doubt, be always attached. But I cannot be far wrong in saying that almost all the opposition comes from those who are least likely to become subject to the uncertainty and risk to rights and property which the absence of codified law involves. So far as I am aware, the Native public has never raised its voice against codification. To them, codified laws mean the introduction of certainty where there is uncertainty—precision, where there is vagueness. Nor can it be said that codification is unpopular even among the most conservative sections of my countrymen. I must have lived to declining old age amongst them in vain if I am not, even at this time of life, in a position to say confidently, that of all the innumerable blessings of the British rule, the one my countrymen esteem most is justice; that justice, in their eyes, means peace and order, which, in other words, mean security to life and property—the sole aim and end of Government. At present, whilst a splendid Penal Code and a Criminal Procedure regulate criminal matters, the civil law is administered on the somewhat vague, though noble, principle of 'justice, equity, and good conscience,'—a principle much of whose beauty is practically spoilt by the fact that individual judges in similar cases do not take the same view of that noble maxim. The result is an uncertainty as to rights which reduces litigation to a form of pecuniary speculation, from which springs that most deplorable class of suits in which the parties, agreeing as to facts, have no authoritative means of ascertaining the law. Codification, and codification alone, can remedy the evils which arise from uncertainty of the law; codification alone can enable the public to know their exact rights and obligations; codification alone can enable proprietors and litigants, advocates and judges, to know for certain the law which regulates the dealings of citizens in British India; codification alone will enable the deliberate will of the legislature to prevail over the opinions of individual judges; and litigants will then be more anxious, before going into Court, to consult the Statute-book of the land than the mental proclivities of the individual judges before whom their disputes may have to go for decision. To say that the Native mind is unfamiliar with the idea of living under systematically codified law, is to say what the truths of history do not justify. The Institutes of Manu furnish a noble example of ancient codification, and the law-abiding tendencies of the Hindú mind have made them adhere to its behests to this day. The history of the Muhammadans furnishes a long series of attempts to codify their laws. In the earliest days of the Caliphs of Bagdád, books were compiled under the authority of the Caliphs, to supply the requirements of a code. These books from their very names indicate that they were meant to be codes. The attempts at codification continued down to the time of the Mughal Emperor, Aurangzeb, and, in the *Fatawa-i-Alamgiri*, we find, perhaps,

the most magnificent and most durable monument of that remarkable monarch's reign. The conditions of life in India have since undergone a great change, and, whilst the personal laws of Hindús and Muhammadans are secured to them, the British rule has asserted its right to regulate purely temporal matters so as to suit the more advanced requirements of the present age. The people of India have gladly and loyally accepted this fact, and there can be no justification for saying that the mind of the Native public is unprepared for codification, or that attempts on the part of the Government to supply them with a systematic code will be regarded with feelings other than those of satisfaction.

"My Lord, I should not have digressed into these somewhat general observations had I not felt that much misapprehension prevails in regard to the attitude of my countrymen towards codification, and also that I could find no better opportunity for giving such support as lies in my power to the policy of codification,—a policy of which the Bill now before us is an illustration of considerable importance.

"My Lord, the Bill, as it now stands, is in my opinion fit to pass into law without any further amendment. Delay in passing it would only postpone those advantages which, I feel sure, will accrue from it to the public. Enough thought and consideration have been bestowed on it, and the outside public have had ample time to know its provisions.

"My Lord, I shall therefore vote in favour of the Motion that the Bill, as it now stands, be passed into law without any further delay."

The Hon'ble RÁJÁ SIVA PRASÁD said he had had some objections to the Bill, but as the Select Committee had been good enough to accept his amendments, he had now simply to explain the objections he had taken. He did not object because he thought that the Bill touched upon the Hindú law as interpreted by the Judicial Committee of Her Majesty's Privy Council and the English Judges of the Indian Courts, but because it affirmed those decisions on certain points regarding the right of a Hindú to dispose of his property by creating perpetuities or bequests in favour of unborn persons. The Hindú community did not acquiesce in those decisions, and they did not wish to see them affirmed by the legislature until they had had an opportunity of contesting the points fairly, and, if necessary, of proposing a legislative enactment on the subject. Of all the perpetuities, the worst was that of mistakes, and he hoped that these vexed points might be satisfactorily settled during His Excellency's brilliant rule.

The Hon'ble MR. CROSTHWAITE said that, in the position which he held as Judicial Commissioner of the Central Provinces, the presiding Judge of a non-chartered High Court, and in the face of the opposition undoubtedly existing in certain quarters, he felt bound, in spite of his reluctance to occupy the valuable time of the Council, to give reasons for the vote he was about to record.

The opposition was of two kinds. There was an opposition to the principle of codification, denying the possibility, and doubting the utility, of formulating the civil law. And there was a more definite opposition directed against this particular measure.

It might be enough to say that the principle of codification had been, as he believed it had been, definitely accepted by the Government, both here and in England, and that no choice was left to the Council in the matter.

He would, however, go beyond this argument, and would endeavour to answer some of the objections that had been made. The obstacles in the way of codifying the law in India were, no doubt, great, and were probably best appreciated by those who had had to frame and carry through this and similar measures. They arose, however, not so much from any inherent difficulty in making a law which should contain rules both for simple and for complicated cases, but from the numerous conflicting interests to be cared for, and the widely varying conditions of the different races for whom the Council had to legislate. The compromises necessary to reconcile such interests had naturally left their mark upon the Bill, which was thus laid open to the charge of being incomprehensive and incomplete.

As an example of the difficulties that had had to be met, he would give to the Council the history of section 69. It was the custom among English people, when money was lent on the mortgage of land, to insert in the mortgage-deed a power of sale, authorizing the mortgagee, subject to certain conditions, to sell, without the intervention of a Court, the mortgaged property if the money was not paid when it became due.

But it had always been held by the most experienced Indian authorities that a power of this kind would work mischievously in rural India. Hence, in the first drafts of the Bill, such powers were declared to be invalid.

The Indian Law Commissioners, however, for reasons given on page 35 of their report, altered the drafts and declared the power to be valid in all cases in which the mortgaged property should be five hundred rupees or upwards.

Representing, as MR. CROSTHWAITE thought he was bound to do, the interests of the ignorant landowners of Upper and Central India, who borrowed money without the aid of legal advice, and dealt with men far above them, as a rule, in intelligence and astuteness, he felt himself compelled to dissent from the opinion of the Law Commissioners, and the section was altered so as to enable the Local Governments to declare the areas within which this power of sale should be valid. It appeared, however, that this alteration was not in accordance with the views of the gentlemen whose interests his hon'ble friend Mr. Inglis so ably represented—interests which must be respected by all who had the true prosperity of the country at heart. A fresh consideration of the matter became necessary, and the result the Committee arrived at was embodied in the present section 69 of the Bill, and which, if it satisfied Mr. Inglis and his friends, as he believed it did, was also quite sufficient to guard the interests of those whom he had in view.

MR. CROSTHWAITE mentioned this to show what difficulties had had to be met, and how impossible it was that a code of this nature, which was not always understood by those who were affected, or thought they were affected, by it, could be otherwise at first than imperfect, incomprehensive and, to the stiff legal sense, disfigured by compromises and exemptions.

Much had been heard, in relation to the Bill, of the difficulty that would arise to the people if it was passed. The two hundred and fifty millions of India were cast in the teeth of the Council, and the unfortunate peasant was represented as driven to distraction by the complicated provisions of the law.

Now, as to any difficulty of this nature which arose or was likely to arise from this Bill, it was, he believed, very much exaggerated. Codes of the kind were like arithmetic books, with the exception that people were not obliged to learn them. A man whose whole transactions consisted of a few simple acts of barter had no occasion to trouble himself about the rule of three or compound fractions. And, in like manner, it was only those whose transfers were subject to conditions and interests, multifarious and complicated, who would be affected by the more complex and intricate provisions of the Bill.

The necessity of codification arose from the present state of the law, combined with the nature of the Courts. It was the fashion to speak as if the present Bill would supersede a code of clear case or statute-law. Whatever might be the case within the jurisdiction of the Calcutta High Court, there was certainly, in the parts of India with which he was acquainted, no clear body of law on the subjects dealt with in the Bill. To use the words of one of the officers, Mr. Quinton, who had recorded an opinion on the Bill—"Our Courts

have to grope through the wilderness of precedents on the subject of sales and mortgages."

The progress of a difficult case was somewhat in this wise. The Court of original jurisdiction had not much legal training or learning, and, as the Government did not provide it with text-books or commentaries, or even Law Reports, its law-library was usually confined to copies of the Acts and Regulations. It was puzzled by the precedents produced by the contending parties, who, being at liberty to pick and choose among the decisions of four High Courts, had no difficulty in showing authorities for every view of the point in issue. If there was no ruling on the matter by the Court to which the Judge was subordinate, he eagerly grasped the precedent which seemed most to the purpose. On appeal, the Lower Appellate Court, which was more experienced and better informed, and received copies of the Indian Law Reports, was often compelled to differ from the Judge below. The result was a second appeal, in which the High Court, having more information, a better library and more leisure to go thoroughly into the authorities on the point, was often obliged to take a different view from either of the Courts below.

And no one could say what the decision of the Judicial Commissioner would be, unless that Judge had had a similar case before him, or unless the matter had been decided by the Privy Council; for he also might pick and choose between the rulings of four chartered High Courts and was bound by none. He was often like a man standing at a place where four roads met, and where there was no sign-post. It might end by his following none of the made roads, but taking a straight line of his own across country. Whatever might be the result of the present state of things, it was not certainty.

How far this was a true description for Bengal and for the Courts under the Calcutta High Court, MR. CROSTHWAITE left his hon'ble friend Mr. Evans to say.

Now, he did not venture to hope that the present Bill would remove all uncertainty; and, for a time, until the meaning of each section had been thoroughly understood by the first Courts, it would probably increase litigation. But, speaking as a non-professional Judge, and even admitting, what he did not admit, that all the charges of imperfection brought against the measure were sound and true, still he said that the Bill was a step in the right direction, and he thought that he had with him the great body of the non-professional Judges, whose opinion was in this matter to his mind the best guide. For it was not to an athlete that a person would go for advice as to the best description

of crutch. He could well understand the feelings of a thoroughly able and learned lawyer with regard to a Bill of this kind. It dealt with matters as familiar to him as his alphabet, and it dealt with them in a way that did not quite suit his sense of taste as a legal artist. He thought that he could have done it better himself, and he felt that the cut-and-dry sections of the law would tie his hands and prevent him from doing that perfect justice at which it was the pride of all the Judges to aim. MR. CROSTHWAITE could well understand this. But, at the same time, he was sure that for the non-professional Judge, who must, for obvious reasons, preside in the Courts for some time to come, anything was better than the present chaos, in which imperfect knowledge had to struggle with the conflict of authorities.

He would briefly notice some of the more definite objections taken to the present Bill.

It was questioned, he believed, by some whether it correctly represented existing law. This was a point on which his opinion would not be taken. But perhaps his hon'ble and learned friend Mr. Evans would state his opinion on the matter. He might quote from the notes of many of the officers who had criticised the Bill. He contented himself with citing the opinion of the Hon'ble Mr. Justice Field, because he believed no man was better acquainted than he was with the statute and case-law of India. He said:—

"I have again carefully examined the Bill as altered and revised, and, speaking generally, I think it has now been brought into harmony with the law of India, and will, in all probability, prove a useful measure."

It had been urged—urged indeed in a very forcible manner by the Panjáb authorities, who had exempted themselves from the operation of the law—that the Bill would interfere with and override many of the old customs so dear to the people. He had searched the papers in vain for any specific instance of a custom so overridden, and he ventured to say that such customs must be few indeed. He was speaking of the Bill apart from its saving clauses. There were many customs of inheritance, marriage, adoption and other social matters. But customs, properly so called, regarding sale or mortgage or gift, there were, he believed, none or very few.

MR. CROSTHWAITE could not help thinking that much of the outcry about custom arises from a lax and unscientific use of the word. A legal custom,—his hon'ble friend the Law Member would set him right if he was in error,—a custom, that was, which the law would recognise and the Courts act upon, must be immemorial, invariable, reasonable and established beyond doubt. Now, it could be hardly doubted that this was not the sort of custom which

some of the opponents of the Bill contemplated. For example, he quoted from a letter by the Secretary of the Panjáb Government, which was printed on page 221, Vol. I, of Mr. Tupper's *Panjáb Customary Law*:—

"His Honour had always held that directly any attempt is made to legalise a custom its virtue as a custom is lost. The reason why the legislature provides for the observance of customs in judicial decisions is because such observance provides for the fluctuation of public sentiment and for the development of national ideas, and enables the Courts to take into consideration both the one and the other in adjudicating on questions of social interest. As soon as the impress of the legislature is stamped upon such customs, they become to all intents and purposes unalterable records of a state of things which may continue and may change, while a change in the body of substantive law thus formed is very difficult to effect without the pressure of an influence which a social revolution only could exercise."

Now, Mr. Crosthwaite ventured to say, with all deference to the gentleman who wrote that letter, that the object of the legislature was not what he described. A custom fluctuating with public sentiment was a contradiction in terms. To administer civil law on the basis of the changing sentiments and imperfectly known usages of the people would lead to a confused labyrinth of decisions in which no right would be secure, and in which the unfortunate Judges, and more unfortunate suitors, must wander like the blind led by the blind.

It must be remembered that, when a Court had once decided that a custom existed, the custom was as binding and rigid in its operation as a legal enactment; nay, more so, for the legislature, especially in India, would always be more reluctant to repeal a custom than to amend one of its own laws. But, leaving this question aside, the Bill had been so framed as to save every custom or usage that could have any title to legal recognition. Mr. Tupper, than whom there could be no better authority, admitted this, although he opposed the extension of the Act to the Panjáb. On page 35, Vol. I, of *Panjáb Customary Law*, Mr. Tupper said:—

"The Transfer of Property Bill saves the provisions of any enactment not thereby expressly repealed. Sections 5 and 7 of the Panjáb Laws Act are therefore unaffected; also section 16 of the Panjáb Land-revenue Act. Accordingly, the whole of our customary law, and the existing system for enforcing it, so far as that measure is concerned, remain intact."

The same applied, *mutatis mutandis*, to the Central Provinces, where there was in force an enactment similar to the Panjáb Laws Act.

It was impossible, therefore, that any custom properly so-called should be overridden by the Bill.

Coming now to the personal law of the Hindús, Muhammadans and Buddhists, MR. CROSTHWAITE believed it also was perfectly safe under the Bill.

Scrupulous care had been taken not to touch the personal law of any race. MR. CROSTHWAITE, for one, would be reluctant in the extreme to do anything that would trench on the province of Hindú law—a law for which he entertained a great respect, and which was in many ways eminently suited to the genius of the people who lived under it. The only sections which were intentionally drawn otherwise than in accordance with that law were those sections which required certain descriptions of transfers to be made by written instruments. And, in order to prevent any possible hardship to the more backward tribes from this provision, power had been given to the Local Governments to exempt the members of any race, sect, tribe or class from all or any of those provisions—a power which would, he hoped, be exercised carefully.

So far as he could discover from the papers, none of the Hindú lawyers who had criticised the Bill accused it of touching their law. The only specific charges brought against the Bill in that respect were contained in a paper forwarded to the Select Committee on the 9th instant by the Hon'ble Mr. Justice Cunningham. Anything coming from a Judge of Mr. Cunningham's eminent learning and ability must have great weight. MR. CROSTHWAITE confessed, when he first read Mr. Cunningham's note, in which he represented the Bill as making piecemeal alterations in Hindú law, he was startled. But, after the best examination of the subject which he could give to it, he came to the conclusion that the matters referred to by Mr. Cunningham were unimportant. He objected to some words in section 6, which the Committee had already omitted for other reasons, but which he believed, in their intention at any rate, were not contrary to Hindú law, and came, if he was not mistaken, from the hand of a very eminent lawyer well acquainted with Hindú law, Mr. Pitt Kennedy. Mr. Cunningham took exception to the wording of an illustration as inaccurate. That the Committee had corrected. Another section to which he objected, and which dealt with the rights of a *bonâ fide* purchaser of property subject to a charge for maintenance, was undoubtedly in accordance with existing law. The second clause of section 44, which dealt with the rights of a transferee of a share of a joint family dwelling-house, might be new, that was, there were no rulings to support it. But it was reasonable and in accordance with Hindú sentiment, and was, he believed, suggested by his hon'ble friend the Mahárájá Jotíndra Mohan Tagore.

MR. CROSTHWAITE confessed that the examination of the Hon'ble Mr. Cunningham's paper satisfied him that the Bill had not trespassed on the sacred ground of Hindú law.

But another class of objectors arose at the last moment, represented by his hon'ble friend Rájá Siva Prasád, for whose opinion as a learned Hindú he had great respect. This gentleman and his friends objected to the Bill, not because it infringed Hindú law, but because it did not infringe it. They wished the legislature to go behind the decisions of the Judicial Committee of the Privy Council and of the Indian Courts, and to adopt the interpretation of Hindú law which some Pandits of Benares thought to be right. The question which they would raise was a very large one—whether Hindús had the power of creating perpetuities or not. The Privy Council (Judicial Committee) had decided that they had no such power, and the Bill in section 14 was framed accordingly.

It was impossible, if the question was to be dealt with in the Bill at all, to do otherwise than follow the rulings of the highest Appellate Court. But there appeared to be so strong a desire on the part of the Hindús, so far as the Committee could judge, that these rulings should not be affirmed by the legislature until the Hindús interested in them had been able to contest the point further, that they thought it best to save Hindú, Muhammadan and Buddhist law from the operation of Chapter II.

This, to a certain extent, weakened the Bill, and it was a kind of legislation which to him personally, and no doubt to others of those who had consented to it, seemed feeble and unsatisfactory. But it was clearly inexpedient to deal with a very large question of this kind, the decision of which could hardly be said to have been part of the direct object of the Bill, otherwise than with the greatest caution and deliberation. There was, therefore, no course open to the Committee but to delay the Bill and put it off *sine die*, or to exempt the personal laws of Hindús from the operation of Chapter II.

MR. CROSTHWAITE objected strongly to delay, as he thought that no advantage could possibly arise from it. The only chance of getting a more perfect law was by the experience gained in working this. A Bill of this kind lost its continuity by passing through a multitude of hands, and ran the danger of becoming a piece of patchwork. The second course had, therefore, been followed, and his hon'ble friend Rájá Siva Prasád was now free to use his efforts to procure for the Hindús a power little consonant with the present state of things,—a task in which, considering the rapid progress now being made by his countrymen, he could hardly succeed.

As to the technicality of the Bill, of which much had been said, a law of this kind must be technical. MR. CROSTHWAITE could not understand how a law on such a subject could be written within reasonable compass without using technical terms. It was perfectly intelligible to any one who understood English

and had the requisite elementary knowledge of the subjects dealt with. The best proof of this was the mass of criticisms elicited from non-professional Judges—criticisms which showed beyond doubt that they understood the Bill. And, if the Judges could not understand a Bill like this, what hope would there be of their understanding cases that would come under the law? There was, however, one thing he would like to urge on the attention of the Legislative Department. The Local Governments should be asked to take more than ordinary care in the translation of these codes. No one but a lawyer who was also a scholar could translate them accurately. But there was no difficulty in finding competent men, whether Natives of India or Englishmen, to do the work. It might perhaps be necessary to pay them somewhat more than was given to the ordinary translator. But the cost would be comparatively a mere trifle, and, as the Bills had already been translated, and only needed revision, it was a work that could not require more than a week or two to complete.

The Hon'ble MR. EVANS said he felt bound to detain the Council for a short time with a few remarks which he had to make on the subject of this Bill. But he hoped His Excellency the President would pardon him if he asked for information on a point of procedure. He wished to know whether any vote was intended to be taken on the present discussion, or whether it would be taken on the amendment which appeared in the notice-paper.

His Excellency THE PRESIDENT observed that that must depend upon circumstances. The Council would be entitled to vote on the present question, and again, subsequently, on the motion of the Hon'ble Mr. Plowden. At the present moment, no opposition had been expressed to the motion before the Council, and, consequently, so far as the discussion had gone, HIS EXCELLENCY supposed that no vote would be taken upon it. But, if his hon'ble friend had any general observations to make, this appeared to be the proper stage for him to make them. Mr. Plowden's motion was a definite motion for postponement, and, strictly speaking, the discussion ought to be confined to that particular question.

The Hon'ble MR. EVANS continued.—He trusted the Council would not deem it a waste of time, if he briefly reviewed the circumstances which led to the introduction of this important measure. Even in England there was a steadily growing feeling in favour of codification. But there the law, though contained in that "wilderness of single instances"—the Reports—was the slow and gradual growth and development of centuries; and there the judges were all professional lawyers of eminence, familiar from long and daily practice with the principles of law and the method of applying them, and able, by lifelong study, to find their way unhesitatingly through the labyrinth of Law Reports, and they had the

assistance of an able and highly trained Bar. Here matters were very different. The Hindú law relating to inheritance and some other matters remained in full vigour partly because it was intimately bound up with religion. But the greater portion of the ancient civil law of the Hindús relating to contracts—the traffic of man with man in the ordinary relations of life—had become obsolete and sunk into oblivion.

When the English began to rule this country, they found that, after securing to the people such laws as they found in living existence, there was a great void to be filled, and this they did by the simple injunction to the judges in the Mufassal to decide all cases not otherwise provided for according to equity and good conscience. Where were the judges to look for the rules of equity? They could find little or no guidance among the collection of archaic rules and customs which stood out amidst the debris of the ancient Indian systems, and naturally fell back on the rich store-house of English law. That law, elaborated by eminent jurists in the course of centuries, with the aid of the invaluable legacy left us by the Roman Empire, was naturally resorted to by all who were in search of principles.

The whole history of our judge-made law for the last century was an illustration of this process.

Sometimes broad and general principles of universal application were laid down; sometimes narrow and technical rules peculiar to England were introduced and subsequently exploded; and still the course of formation, destruction and alteration went on till the records of it reached the unwieldy proportions of the present mass of Law Reports.

Then it was felt that something ought to be done.

Very few of the judicial officers in India were trained professional lawyers. Most of the Courts of first instance had no libraries of any sort, no text-books, no means of reference, and yet their judgments were all liable to come before higher and better-instructed tribunals, and ultimately before the High Court, where those judgments were set aside because they ran counter to rules contained in cases which the authors of those judgments had no knowledge of and no means of knowledge.

The perplexities of judicial officers in this state of things had been well described by his hon'ble friend Mr. Crosthwaite, and the sentiments of the suitors as to the uncertainty of the law could not be better represented than they had been by the Hon'ble Sayyad Ahmad Khán with his long and varied experience.

The law relating to the transfer of property was the subject now before the Council.

It was long ago decided by the Home and Indian Governments that the codification of this branch of law was desirable. The importance of it was manifest. Nothing could be more important than the security of titles and the avoidance of uncertainty and confusion in dealing with property. That uncertainty and confusion in matters connected with property depreciated the value of property was undeniable and self-evident.

No better proof of the necessity of taking some steps to remedy the existing state of things as to titles and mortgages in India could be given than the well-known fact that the wealthy and powerful Land Mortgage Bank (Crédit Foncier Indien) had, after some years' experience, to give up lending money on land in India, because the titles and the law and procedure as to mortgages were in so unsatisfactory a state that the high interest obtained did not cover the risk.

Taking up the present Bill, the Council would find it divided into chapters.

Chapter I called for no special remark on this occasion, except that Bombay had been exempted for the present from the operation of the Bill. This exemption was made in consequence of the Bombay Government applying at a very late period to be exempted. It had been granted by the Executive in accordance with instructions from the Secretary of State not to introduce the Bill at once into the territory of any Local Government which objected to it. But MR. EVANS saw no materials before the Council which would lead him to doubt the suitability of the Bill to the civilised portions of the Bombay Presidency.

In Chapter II, several rules were introduced from the Succession Act, 1865, defining the limits within which property could be tied up by settlement *inter vivos*, and laying down the rule restricting perpetuities. He had always been apprehensive that these rules would unduly extend the powers now possessed by Hindús (under the rule in the *Tagore case*) of tying up the properties after their deaths. The rule in the *Tagore cass*, which prohibited gifts or bequests to unborn persons, was now the Hindú law as declared by the highest tribunal, except so far as the rules now proposed to be embodied in the Act had been made applicable to the wills of Hindús in Bengal by the Hindú Wills Act, 1870.

The Hindú Wills Act was passed before the Privy Council had finally laid down the doctrine that no interest could by Hindú law be created in

favour of an unborn person, which doctrine, as they pointed out, obviated the necessity for any rule against perpetuities under Hindú law, and also explained why no such rule could be found in the Hindú law. How far the Hindú Wills Act did in fact abrogate, in the case of wills in Bengal, the rule in the *Tagore case* was a disputed point now in course of settlement by the Courts. It appeared to him that the question, whether extended powers of tying up property should be granted by legislation to Hindús, was one of grave public policy not to be lightly settled.

MR. EVANS' difficulties on this point had been removed in a singular manner. The Hon'ble Máhárájá Jotíndra Mohan Tagore and the Hon'ble Rájá Siva Prasád, conceiving, in common with many of their fellow-countrymen, that the rule in the *Tagore case* did not correctly represent the Hindú law, and that Hindús were by their own law empowered to tie up their property for ever without any restriction, had rejected the extensive powers conferred upon them by the Bill as too limited, and had asked that a clause should be added to Chapter II, providing that nothing contained in that chapter should affect any rule of Hindú law. As the effect of this was to leave this important question as it stood for the present, and to give an opportunity for its full consideration in future, he had gladly acceded to the proposed amendment, though regarding it from a different point of view from that taken by its proposers. For his part, he would sooner repeal the corresponding sections in the Hindú Wills Act, and stick to the rule in the *Tagore case*, with an exception in favour of bequests to, or settlements on, unborn children of a Hindú daughter to take effect on the death of the daughter.

The difficulties arising from settlements of land in England should make the Council chary of extending the existing powers of settlement in India.

The chapter on sales of immoveable property provided for written instruments and registration, and laid down rules as to the rights and obligations of buyer and seller.

He had not heard much objection to these latter, but there had been a cry raised against the supposed hardship of requiring writing in the sale of land. Speaking of the civilised parts of Bengal, and excluding any wild tribes who might be ignorant of the art of writing (and who would, as a matter of course, be exempted by the Local Government), he could safely say that his experience, and all the enquiry he had been able to make, led him to believe that this objection was purely visionary, as, in practice, all sales of land of the value of Rs. 100 or upwards were always evidenced by a written document.

On the policy of insisting on writing and registration in order to avoid confusion and uncertainty in titles, MR. EVANS need not dwell.

The chapter on mortgages was the most important in the Act. The law relating to mortgages urgently called for definition and practical amendment.

Mortgages were legislated for in Bengal as early as 1798, but, as the old Regulations gave a somewhat cumbrous and unsatisfactory procedure, and did not cover every class of mortgage, money-lenders had resorted to a simple mortgage-bond, consisting of a covenant to pay and a pledge of the property. This form of mortgage never having been legislated for, there was no protection to the debtor. The practice was for the creditor to get a money-decree, and sell up the mortgaged property without allowing any time for redemption. The sale being an ordinary execution-sale of the right, title and interest of the debtor, whatever it might be, it was usual, when the same property was pledged to different creditors in different mortgage-bonds, for each creditor to hold a separate sale and leave the purchasers to fight out in court the question of what they had bought under their respective sales. There being no machinery for bringing together into one suit the various incumbrancers on the property, endless confusion had been the result, and the decisions of the Courts upon the almost insoluble problems arising from this state of things had been numerous and contradictory. The result was that the mortgaged property could not fetch anything like its value. The debtor was ruined, the honest and respectable money-lender discouraged, and a vast amount of gambling and speculative litigation fostered.

It had been one of the objects of this chapter to remedy these and other similar evils.

MR. EVANS hoped some day, when our registration-system was improved, to see a much greater change, and to see incumbered land sold under a statutory title, leaving all disputed questions to be fought out over the proceeds in court. But, pending this, it was very necessary to do something, and what was done by this chapter would, he expected, remedy, or at least ameliorate, many of the existing evils.

It had been proposed to legalise powers to the mortgagee in the Mufassal to sell without the intervention of the Court. He was strongly of opinion that these powers, which were practically unknown in the Mufassal of Bengal, could not be safely granted except where the property was situated in the Presidency-towns or the parties were Europeans. There had been some doubt as to the validity of such powers. This chapter dealt with this vexed question, as he

thought, satisfactorily. He should have preferred to see equitable mortgages abolished altogether, or at least confined to land situated within a Presidency-town. They produced great confusion in the case of land in the Mufassal, and frustrated the effects of registration.

There was little to be said of the remaining chapters, except that they made very little change in the existing law, and that the small changes made seemed desirable.

It could not be expected that a work of this kind should be free from errors, imperfections and omissions; but it had now been very long before the public, and a great mass of valuable criticism had been received, which had led to many alterations from time to time.

Very probably this Act, like many other Acts, would in time be altered, amended and improved as necessity arose and flaws were discovered in its working. But, after undergoing consideration and criticism for five years, it was not likely to be further materially improved unless it was subjected to the test of being worked.

The Hon'ble MAHÁRÁJÁ JOTÍNDRA MOHAN TAGORE said that, having signed the Report of the Select Committee without dissent, he deemed it necessary to say a few words before the Bill was passed into law. In his opinion, a measure of this kind, to be complete, should, as far as practicable, embrace, within the scope of its operation, all sections of the community, and this, he thought, was the original intention when the Bill was first framed; but, unfortunately, as far as some of its provisions affected the Hindús, the Bill simply gave the sanction of law to certain principles which were laid down by the Courts of justice in later days; but these decisions, the Hindús contend, were not only based upon erroneous constructions of their law, but were also opposed to the rulings of equally high authorities of an anterior period. Some of these modern decisions imposed upon the Hindús disabilities which, he thought, no other nation in the civilised world laboured under: others, again, were so much in accordance with the theories of English law, that they might be said not to interpret Hindú law as it was, but what, according to the advanced notions of modern jurists, it ought to be, and, naturally enough, they ran counter to the thoughts, feelings and ideas of the Native community. He represented this to the members of the Select Committee, and though they were most anxious to preserve Hindú law in its integrity, they were disposed to accept the later decisions of the Courts as containing the true exposition of that law. On the other hand, the Hindú community held as strongly that these decisions, as he had stated, were based upon a misconception of the true spirit of the law, and in this opinion they were supported, not only by the learned Pandits of all parts of the country, but

also by no less an authority than that eminent Sanskrit scholar, Goldstücker, who, as was well known, had declared that many of the translations of the texts of Hindú law were inaccurate; and therefore, he submitted, many of the decisions founded on these incorrect translations were necessarily inaccurate. He and his hon'ble friend Rájá Siva Prasád had brought these circumstances to the notice of the Select Committee, and took the liberty to point out the extreme hardship and injustice to which that community would be subjected should the legislature seal with its sanction those principles to which such strong objection was taken. To institute, however, proper enquiries and to arrive at correct conclusions must necessarily be the work of a long time. It had, therefore, been agreed, as an alternative course, to exclude the Hindús, Buddhists, &c., from the operation of many of the provisions of the Bill. The effect of this would be that, when the Bill would be passed into law, it would not interfere with many of those disputed points of Hindú law as it was at present administered, though it must be observed that it would leave those points in a very unsettled and unsatisfactory state, to be dealt with from time to time by particular Judges according to the light that might be in them, with the chance of those recent decisions, which had overridden the rulings of a former period, being upset in their turn by other decisions at a future time, until the legislature stepped in and, after the fullest and most careful enquiry, determined and laid down principles in accordance with the true spirit of Hindú law, and in consonance with the wants, wishes and feelings of the Hindú community whom they most concerned, and adapted as well to the condition of Indian society.

The Motion was put and agreed to.

The Hon'ble MR. PLOWDEN said that he did not intend to occupy much of the time of the Council, but he was afraid he should have to trespass upon their patience at some length. He would, however, be as brief as he could possibly be, and, for this and other reasons, he was not going to enter into any elaborate criticism of the Bill in its legal aspect. First of all, he had not the legal knowledge which would enable him to give an opinion deserving of the attention of the Council on the subject; in the next place, even if he had the ability, he had not had the time to go thoroughly into an exhaustive criticism from this point of view; and, lastly, the Council had now before them the opinions of certain experts in the law, by which Members of the Council could determine what the value and merits of the Bill might be. He must confess that he was somewhat surprised to find that, in the voluminous papers which had been circulated in connection with the several Bills which embodied this measure, and the history of which had been given to them by the Hon'ble Member in charge of the Bill, amongst the opinions of these experts there was

an extremely valuable opinion, all reference to which had been omitted; and that was the opinion of Sir FitzJames Stephen. His opinion was that of a competent expert, and he gave his opinion in reply to a special call of the Government of India on this Bill and five other codifying Bills of the Indian Law Commission. MR. PLOWDEN supposed that nobody could deny that great weight and great value should be attached to any opinion given by such an eminent authority, and he should like to know what would be thought of the opinion which he found recorded before him. He would read the opinion of that very eminent jurist, which was given in 1879, in respect of the present Bill. He said:—"I am still, however, by no means satisfied that any part of this Bill is really wanted in India, except, perhaps, the chapter on Mortgages and, possibly, the chapter on Leases." He would now request the Council to turn to the Bill No. VII, now before them, and if they looked at it they would find that, in addition to those two chapters which Sir James Stephen did not disapprove of, there were no less than five other chapters, and of these, four were absolutely identical with four of the chapters contained in the Bill which was submitted to him for consideration, and of which he did not approve. MR. PLOWDEN also saw a note the other day, which he supposed was the same which had been just referred to by the Hon'ble Member in charge of the Bill, and which contained the opinion of the Hon'ble the Chief Justice of the Calcutta High Court; and what did the Chief Justice say? The Council had heard that Sir Richard Garth was in favour of the Bill, and MR. PLOWDEN concluded he was, as the Hon'ble Member in charge of the Bill said so. But he did not gather, from what he saw of that opinion, that the Chief Justice was absolutely in favour of that Bill. Sir Richard Garth said in effect that he could not say he quite approved of the principle of the Bill as it had been framed. It went far too much into details, and would perplex Mufassal Judges in the consideration of many difficult questions. MR. PLOWDEN referred to these opinions simply because he had heard it stated lately that there was no opposition to the passing of this Bill on the evidence of experts, except the single-handed opposition of Mr. Justice Cunningham. He thought, from the extract which he had just read from Sir James Stephen's opinion, that he was justified in saying that this was not the case; for here was a very competent man, able to give a valuable opinion, and he was not of opinion that the Bill was absolutely required. MR. PLOWDEN would not enter at any length into the remarks of Mr. Justice Cunningham. He thought that, to some extent, there was great misapprehension in parts of what Mr. Justice Cunningham said. At the same time, he thought that there were other portions of his remarks which required serious consideration before passing this measure, more especially his

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remarks on section 54 of the Bill. Mr. Cunningham said, in reference to that section,—

"The rule making registration in the case of every transfer of an intangible interest, though below Rs. 100, compulsory, is a serious change in the law, and, however expedient, should not be introduced without the fullest notice to the classes concerned. Every such change is an opportunity of fraud upon the ignorant and careless."

MR. PLOWDEN had listened with great interest to the observations which had fallen from Mr. Crosthwaite, to the effect that this Bill was needed. As he (Mr. Crosthwaite) was thoroughly acquainted with the state of affairs amongst the agricultural population of the North-Western Provinces and the Central Provinces, he must be aware that these opportunities of fraud had arisen in other cases, and had been attended by singularly unfortunate results. There was a time when agricultural leases were not necessarily registered; then there came an alteration of the law, and from that time leases from year to year, or a term of years, were obliged to be registered. Notice of this change in the law was not given so much as it should have been to the large agricultural community in the North-Western Provinces and other places, and, sitting as a member of the Revenue Board for the North-Western Provinces, and as a Commissioner, he had found cases in which a landlord and tenant had been quite happy under an unregistered lease, and for some time that lease had been acted upon by both parties. But, all of a sudden, the landlord wanted to enhance his rent; the tenant would not agree, and then the landlord turned round and said "Your lease ought to have been registered." He brought a suit into Court, and he gained it because the lease was not registered, and the tenant could not contest his claim. Then there was another section in Mr. Justice Cunningham's remarks to which he would refer.

HIS HONOUR THE LIEUTENANT-GOVERNOR here observed that he understood from His Excellency just now that Mr. Plowden's motion was to be confined to the postponement of the passing of the Bill: he submitted that he was not in order in commenting upon its general provisions.

His Excellency THE PRESIDENT said that he was of the same opinion, but, at the same time, he thought it fair to Mr. Plowden to allow him to establish the grounds on which he rested his motion.

MR. PLOWDEN said that, if that was the case, he was perfectly willing to drop further discussion on this part of the question; it was not to the legal aspect of the Bill that he took exception; that was altogether another question. But he was bound to allude to another point, which had an important bearing upon the question which would shortly come before the Council, namely, that this Bill

do pass. To make his remarks clear he must digress. The motion now against his name on the notice-paper was not that he had intended to move. As originally drafted, it stated his wish that the Bill should be considered again when the Council re-assembled in Calcutta. That would give a clear period of eight months, in which certain events, which he would call attention to, might occur. Though the motion was placed on the list of business circulated on Monday in that shape, he had subsequently ascertained from the Secretary in the Legislative Department that, in his opinion, he (MR. PLOWDEN) was out of order in bringing forward such a motion; and, accordingly, he changed the form of the motion to that in which it stood at present, and he hoped it would answer his purpose. His object, briefly stated, was to secure a further reasonable period of time within which endeavours might be made to elicit from the representatives of the Native community a larger expression of their views on the merits of the Bill, particularly in connection with their several local customs and laws. It was not his wish to obtain further criticisms on the legal aspects of the Bill, though that might be desirable. His motion, as it stood, did not go so far as he wished; but, if it was assented to, and if, as he hoped, the facts which he had now put forward would justify the Council in accepting it, he could safely leave it to the Executive Government to determine the time which would be necessary to secure to the Bill more extended publicity, and to endeavour to elicit a larger volume of Native opinion than the Council now possessed. The Hon'ble Member in charge of the Bill had dwelt on the publicity which the Bill had obtained. He would turn to that point shortly. The Bill dealt with the every-day transactions of life of a very large community, and would affect, more or less, the affairs of a very large section of their Native fellow-subjects. Every man who had property which he wished to transfer, however small it might be, would be touched by the provisions of the Bill. In these circumstances, when he learnt that the Bill was coming on for final discussion, he made it his business to see to what extent the Bill would affect those interests, to what extent Native opinion had been obtained on it, and how far the Bill had attained practical publicity. With that object he communicated with the Secretary in the Legislative Department, and he pointed out to MR. PLOWDEN the sources from which he could obtain the information he desired, and subsequently informed him that the number of Native gentlemen who had submitted opinions on this very important measure was 19. It struck him that, considering the very large population that the Bill affected, that was a very scant expression of Nativ opinion. If the Panjáb and British Burma, to which the Bill was not ordinarily applicable, were left out of consideration the Council had received one opinion to about 10 millions of people of the

country. He did not call that a very large expression of opinion. He never thought for a moment that these 19 gentlemen were the only Native gentlemen who had given the Council the benefit of their opinions on the Bill, and he thought it was very natural to come to the conclusion that it was only in reference to the last Bill, which was marked No. V, which was circulated at the end of 1879, that these 19 opinions had been collected. So he turned to the sources of information to which he had been referred, and, reflecting upon the whole matter, the result of his inquiry astonished him. There were not 19 but 21 opinions, and that was all. Ever since the Bill had been before the Council in different shapes, the Government had only succeeded in eliciting from 21 Native gentlemen their opinion upon the matter. It was true the Council had opinions from a great number of officials who, from their point of view, were able to give them, but that was not what the Council wanted. They were legislating for a large Native population, and he should like to see what their opinion was on the subject.

There were one or two other points to which he should like to draw the attention of the Council. He found that, of these 21 Native gentlemen, 18 were Government officers; there were, therefore, only three independent views expressed. Then he found that, of these 21 Native gentlemen, five belonged to Bengal, four to Mysore, three to the North-Western Provinces and Oudh, three to Madras, three to the Panjáb, which was out of the scope of the Bill, one to Ajmer and two to Sindh. There was not a single expression of opinion as to Bombay, and he therefore congratulated the Hon'ble Member in charge of the Bill that he had been able to exempt Bombay from the operation of the Bill. Well, he had no doubt that he would be met with the argument that it was not a fair measure of publicity to point to the number of Native opinions that had been obtained. In fact, he had been told so. But he did not think that the gentlemen in the Council thoroughly understood what the extent of this publicity was. He would endeavour to make it clear how far the Bill had been published. He was aware that the practice was, in consonance with the standing orders of the Council, that Bills should be translated and published in the vernacular Gazettes, and he supposed it was assumed, by gentlemen who considered that sufficient publicity had been given to the Bill, that, in consequence of these translations being published, the people got a very fair view of what was going on, and that, if they wished to address the Council with reference to any objections which they might wish to offer, they would have the opportunity of doing so. But he did not think that was at all the case. It was not possible to obtain much publicity by printing Bills in the vernacular Gazettes. He was only able to ascertain, from the printers of the *Bengal* and

North-Western Provinces Gazettes, to what extent the vernacular copies of the Gazettes were circulated to private individuals. He thought Members of Council here would be somewhat surprised to hear the result of the enquiry he had made so far as Bengal and the North-Western Provinces and Oudh were concerned. He found that the number of private subscribers to the vernacular Gazettes in Bengal was 174. He also found that in the North-Western Provinces and Oudh the number of vernacular Gazettes issued to private individuals was 205. They were reckoned in this way. There were 173 private subscribers for the *Bengalí Gazette*, and there was one gentleman who took in the *Hindí Gazette*. He could obtain no information regarding the *Uriya Gazette*, but he did not think it circulated more widely than the *Hindí Gazette*. Then, in the North-Western Provinces and Oudh, where the Gazette was published in Urdú, 205 gentlemen—some of these might be officials—took in that Gazette. Now, it was a matter of arithmetic. There was one vernacular Gazette issued to every 300,000 persons amongst those which were circulated to private individuals; and, if the English copies of the Gazette which were also privately circulated were added, there would be about one to every 170,000. It seemed to be utterly misleading and an abuse of terms to talk of that as publicity. There was only this small number of private persons who took in these Gazettes, and how could it be thought that publicity was obtained for these measures by securing translations of them in the vernacular Gazettes? Then, there was another point. Hon'ble Members were not aware at what time these translations were issued. In one case, the vernacular Gazette—he thought it was the *Hindí Gazette* for Bihár—was not issued till December; so that it was impossible for a man, however anxious he might be to pay attention to a Bill of this kind, to give a competent opinion upon it by the 10th of January, which was the time when the Bill was brought forward for final consideration in the Council.

His Excellency THE PRESIDENT said that, in the papers before him, he found it recorded that the last issue of the Bill was published in the *Hindí Gazette* on the 24th September and on the 1st and 8th of October last year. He thought the Hon'ble Member was alluding to the *Maráthí Gazette*, which was the only one in which the Bill was published in December.

The Hon'ble MR. PLOWDEN resumed. It appeared from the paper before him, which he had received from the Legislative Department, that the Bill was published in the *Hindí Gazette* on the 6th of December. He thought, therefore, that he had sufficiently pointed out that there had not been real publicity, and on that ground he was anxious that the final consideration of the Bill should be postponed. There was one other point to which he would

like to draw attention. He was told yesterday that the British Indian Association asked for time to consider this measure, to enable them to bring forward their objections to the Bill, and they were met with a flat refusal. He would, therefore, move that the Bill as amended by the Select Committee be re-published.

His Honour THE LIEUTENANT-GOVERNOR said that he had no desire to bring forward any motion which should have the effect of obstructing the passing of the Bill, but he should have been very glad if the Hon'ble Member had seen his way to acceding to a request which he had made to him to postpone his motion for the passing of the Bill. Of course, there might be very strong reasons for pushing on the measure with such extraordinary haste; but these reasons were entirely unknown to any one not belonging to the Executive Council. No reason of any cogency had been assigned to the Council generally. Assuming that such reasons did exist, and that they were strong reasons, he should not make any formal motion in opposition to the passing of the Bill, or urge, in support of his view, rule 29 of the Standing Order of the Council, which provides that the Report of a Select Committee should be in the hands of the Council seven days before a motion is made to pass a Bill. What he desired to say was more in the way of general remonstrance. There was, no doubt, a very strong feeling springing up in the mind of the public, and it was a feeling which he entirely shared, that a number of measures were being hurried through the Council with unwarrantable haste. To prove how very necessary it was that due time should be given for the consideration of the Reports of Select Committees, and to show the inexpediency of hurrying Bills through Council, it was only necessary to refer to what had occurred since last week in respect to this very Bill. There was a motion on the notice-board at their last meeting that day week for passing the Bill. Fortunately, a strong difference of opinion occurred as to the working of section 69, and this difficulty—and this difficulty only—led to the postponement of the passing of the Bill into law last Thursday. The delay, however, of one week had brought forward such strong opposition to the Bill from Bombay, that, in the Bill as amended this week, Bombay was exempted from its provisions. He had not been favoured with a sight of the Bombay remonstrance, but it was evidently considered to be of such force as to compel the Government to omit Bombay.

The Hon'ble MR. STOKES explained that, under the general orders of the Secretary of State to exempt any Local Government which objected to the provisions of the Bill, the objections of the Bombay Government were accepted as a matter of course.

His Honour the LIEUTENANT-GOVERNOR replied that that did not affect his position. The objection must have been held to have had some force in it, and to be a substantial objection, or it would not have come within the scope of the Secretary of State's orders. The result any way was, as it always has been of late, when opposition to legislation had been made by any body or Government, recourse was had to emasculation, and Bombay was left out of the Bill. Then, exactly the same thing happened in respect to the opposition of the Hindús in regard to certain provisions of the Bill. In consequence of the temporary postponement of the passing of the Bill last week, these objections of the Hindús had been discovered to be of importance, though they had been warned before; and a change had been introduced into section 129 which saved rules of Hindú, Muhammadan and Buddhist law. The objections were met, as usual, by the exemption of the protesting class or body, and in this way an attempt was made to disarm opposition. He thought that these facts were enough to show the danger of passing measures such as this in haste, and without giving all classes time to consider the Reports of Select Committees, and, indeed, without giving the Council itself time to consider them. If the Bill had been passed as proposed last week, very serious mischief might obviously have resulted. He again appealed to the Hon'ble Member in charge of the Bill to postpone his motion for a few weeks. He entirely sympathised in the very natural desire of the hon'ble gentleman to see measures over which he had spent so much time, and which had caused him much wearisome labour and anxiety, passed into law; but he could still do that before he left the country by the concession of a short delay. He hoped that always in future more time would be given for the consideration of measures after the presentation of the final Report of the Select Committee.

The Hon'ble MR. RIVERS THOMPSON said that he thought the request made by His Honour the Lieutenant-Governor was a reasonable one, and the concession of further time for consideration would be in accordance with the injunction of the Secretary of State, that not only should these Bills be permissive in their application, but that they should be subjected to the closest examination before they were placed on the Statute-book. No formal suggestion of this kind had been made in Council at the last meeting, but, as regards the proposal now put forward, he was justified in saying that, in fulfilling the desire of the Secretary of State in the matter, the Government were fulfilling their own wish that important Bills of this kind should not be passed with any rapidity, and that they should yield to any reasonable request that further time should be given for the expression of Native opinion and other opinions on it.

The Hon'ble MR. STOKES said that he had no objection to postpone the motion for the passing of the Bill for three weeks.

HIS EXCELLENCY THE PRESIDENT said:—"There seems to be a very broad distinction between the suggestion thrown out by my hon'ble friend the Lieutenant-Governor and the motion of my hon'ble friend Mr. Plowden. That motion is one for delaying the passing of this Bill for a very lengthened period. Most of the observations made by him in support of that motion consisted of criticisms, which may be perfectly just in themselves—though I am not convinced that they are—against the whole mode of procedure of this Legislative Council in regard to the publication of Bills. He says that our methods of publication fail to secure effectual publicity, and that a very small number of persons in the country know what legislation is going on in this Council.

"That, I dare say, broadly speaking, is very true, and even with all the publicity of Parliament and the Press at home, I would venture to say that a very small numerical proportion of the people of England know what Bills are passed in Parliament. No doubt, that proportion is very much smaller in this country, and my wish is that the utmost publicity should be given to every measure brought into this Council. But when my hon'ble friend says that these Bills are only published in certain Vernacular Gazettes, and mentions the number of persons who take in those Gazettes, it appears to me that he omits from his calculation the rest of the Vernacular Press. Now, the Vernacular Press, at all events, should be acquainted with those Bills as published in the Gazettes, and if such Bills do not come into the hands of the writers in that Press, then I venture to say that those gentlemen do not give sufficient attention to an important part of their public duties. Be that as it may, however, of course the Government, and the legislature particularly, can only take certain recognised methods of affording to the public the opportunity of knowing what is going on in this Council, and it rests with the public to avail themselves of that opportunity, or not, as they think desirable. All we can do is to give to the Press and the public sufficient means of informing themselves in respect to such Bills as are before this Council, and I confess that I do not at present see how it would be possible to materially change a practice which has been in existence for a very long time in regard to the publication of such Bills.

"If, however, my hon'ble friend Mr. Plowden will make suggestions with a view to obtaining greater publicity for Bills brought into this Council, we shall be glad to consider them, provided they are such as the Government can adopt.

"As regards this particular Bill, the fact is that leave was given to introduce it on the 31st of May, 1877, and that we have now arrived at the 26th of January, 1882, which is very nearly five years since the Bill was introduced. I find that the Bill has been published four successive times in such newspapers

or Gazettes as the Local Governments thought fit, and it seems to me that, according to the ordinary and general modes of publication, and to the course followed with regard to other legislative measures during that period, this Bill has had a large amount of publication and has been for an unusually lengthened period before the public. I therefore very much doubt whether any further publication would be likely to elicit any additional opinion regarding the measure. I quite understand the advantage of such a delay as my hon'ble friend the Lieutenant-Governor suggests, because public attention is now directed especially to this matter, and, no doubt, within a period of three weeks, a considerable expression of public opinion, favourable or unfavourable, may be brought forward; and I think it therefore perfectly reasonable to accede to that proposal. On the other hand, I consider that such a proposal as my hon'ble friend Mr. Plowden makes would fail to secure the object which he desires. If, as he proposes, the measure is postponed for another year, the result will probably be that in the interval people will not have attended to it any more than they have hitherto, and that, when it comes up again, at the last moment they will examine it as a perfectly fresh matter and start all the same objections to it over again.

"Now, I am very sensible of the necessity for affording every opportunity for the expression of public opinion on a measure of this kind, but of course no one can conceal from himself that it is perfectly possible, by postponing the consideration of such a measure till the very last moment and then asking for an indefinite delay, to bring about the same result as would be accomplished by moving for its rejection, or practically to shelve the Bill altogether. I do not for a moment say that this is the case here. Nevertheless, I quite admit that, if a case has arisen for postponement—and my hon'ble friend the Lieutenant-Governor says it has—we ought not unduly to press on the progress of the measure.

"In conclusion, I would only point out that, so far as the discussion upon the Bill has gone to-day,—and it has been discussed by men of great talent and large experience,—that discussion has been favourable to the Bill as it stands. This debate will be of great advantage to the public; it will guide their opinion in respect to the Bill; it will tend to remove certain impressions which appear to exist in the public mind; and, therefore, though I cannot agree to the motion of my hon'ble friend Mr. Plowden for a lengthened postponement, I am quite willing to agree that the Bill should be postponed for three weeks."

His Honour THE LIEUTENANT-GOVERNOR asked the permission of His Excellency the President to say a few words on the question of publicity. Although it was quite possible that only a certain number of the vernacular

Gazettes might be circulated amongst the Native community, the people who really gave publicity to Bills which were introduced into this Council were the members of the legal profession. Those who were most competent to give an opinion were the pleaders of the various Courts in the mufassal; they criticised the Bills and brought them to the notice of the zamíndárs and others who were their clients. So that, really, Bills were published to a much greater extent than appeared from the figures which had been given to the Council.

The Hon'ble MR. PLOWDEN said that, if the passing of the Bill was deferred for a period of three weeks, he was quite willing to withdraw his motion.

The Hon'ble MR. STOKES wished to explain the circumstances connected with the memorandum of Sir James Stephen which the Hon'ble Mr. Plowden seemed to think had been improperly withheld from hon'ble members. In December, 1878, the Government of India, having determined to appoint a Law Commission, requested the Secretary of State to invite Sir Henry Maine and Sir James Stephen to favour it with their opinion upon four matters, the selection of subjects for codifying, the order in which those subjects were to be taken up, the general arrangement of the Code and the applicability of its various parts,—matters on which the Government of India had, in May, 1877, fully expressed its views,—in order that that opinion might be laid before the Commission. Accordingly, in July, 1879, the Secretary of State sent the Government of India a despatch containing a minute by Sir Henry Maine and one by Sir James Stephen, the latter of which contained, not merely an opinion on the question submitted to him, but also criticisms on the Transfer of Property and the other five Bills submitted to the Law Commission. These minutes were laid before the Commission and carefully considered, and Sir James Stephen's criticisms were, MR. STOKES thought, sufficiently answered in the second part of its Report. It was not the custom of the Government of India to publish minutes made for such a purpose—certainly in the present case they should not be published without the authors' consent; for Sir Henry Maine's memorandum contained a long extract from an unprinted essay of his on the influence exerted upon law by the continental systems of land-registration; and Sir James Stephen's memorandum was hardly calculated to advance that learned judge's reputation. But, if any hon'ble member wished to see those minutes, he could do so at the Legislative Council House.

As to Sir Richard Garth's minute, which the Hon'ble Mr. Plowden seemed to think had also been kept back from the Council, all he could say was, that that minute was written last November, that the learned author, with his usual courtesy, sent him (MR. STOKES) a copy in his private capacity, that

the criticisms which it contained had been most carefully considered, both by the Hon'ble Mr. Evans and himself, and that some of the changes which it suggested had been made in the Bill. But Sir Richard Garth never sent his minute to the Legislative Department, and must, therefore, be taken not to have wished its publication. He had apparently modified his views as quoted by Mr. Plowden, for MR. STOKES had the best authority for saying that the learned Chief Justice now considered the Bill on the whole a very good Bill, though, of course, it had its faults, that it was calculated to do much good, and that he hoped it would be passed at once.

As to Mr. Justice Cunningham's opinions, which had been referred to by the Hon'ble Mr. Plowden, MR. STOKES might add one or two remarks to those made by the Hon'ble Mr. Crosthwaite. Mr. Cunningham asserted that the definition (in section 5) of "transfer" was inaccurate, because "the following sections show that many transfers are to persons not in existence at the time of the transfer". This was not so. Interests might under the Bill be provided for unborn persons, but in such case the transfer was made to living trustees for their benefit. He said that illustration (*b*) to section 26 and illustration (*b*) to section 27 were doubtful law. The former was taken from illustration (*e*) to the Succession Act, section 115, which had been framed by the great judges and lawyers whom he (MR. STOKES) had mentioned in his former speech; the latter from the illustration to section 117 of the same Act, which again was drawn from the decision, in *Underwood* v. *Wing*, 4 D. M. G. 633, of Lord Cranworth assisted by Mr. Justice Wightman and Mr. Baron Martin.

Mr. Cunningham, again, said that "no question has been more fully discussed than the position of the mortgagee who has sued on his mortgage and recovered a money-decree.....The Bill simply ignores the point." He had not, MR. STOKES feared, read the Bill which he criticised. There was a section (99) solely devoted to this point and settling it, MR. STOKES ventured to think, in a satisfactory manner. Then, the learned judge said—"The question, again, as to the interest which passes at a sale in execution of an auction-decree is not free from obscurity"; and took the Bill to task for saying nothing about it. What he meant by a "sale in execution of an auction-decree" was not very apparent. He could hardly mean a sale made under a decree passed by a corrupt judge who had set his decision up to auction. He probably meant an auction-sale in execution of a decree; but to deal with this matter was outside the express scope of the Bill, and should be dealt with, if at all, by an amendment of the Code of Civil Procedure. He said that Chapter VIII was "very inadequate. It lays down no general rule or principle as to transferability of actionable claims." The reason was that the rule was already laid down in its proper place, namely, sec-

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tion 6. Subject to the provisions in that section, clause (*h*), and in sections 131, 132 and 136, all actionable claims would be transferable except mere rights to sue for a fraud or for harm illegally caused. But MR. STOKES would not waste the time of the Council by noticing any more of these criticisms.

The Hon'ble MR. PLOWDEN asked for leave to withdraw the Motion that the Bill to define and amend the law relating to the Transfer of Property as amended by the Select Committee be republished.

Leave was granted.

The Hon'ble MR. STOKES also asked for leave to postpone for three weeks the Motion that the Bill, as amended, be passed.

Leave was granted.

EASEMENTS BILL.

The Hon'ble MR. STOKES also presented the further Report of the Select Committee on the Bill to define and amend the law relating to Easements and Licenses.

MERCHANT SHIPPING BILL.

The Hon'ble MR. STOKES then presented the Report of the Select Committee on the Bill for the further amendment of the law relating to Merchant Shipping.

The Council adjourned to Thursday, the 2nd February, 1882.

R. J. CROSTHWAITE,
Offg. Secy. to the Govt. of India,
Legislative Department.

CALCUTTA;
The 26th January, 1882.

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