Friday, March 23, 1866

COUNCIL OF THE GOVERNOR GENERAL OF INDIA

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Abstract of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 & 25 Vic., cap. 67.

The Council met at Government House on Friday, the 23rd March, 1866.

PRESENT:

The Hon'ble H. Sumner Maine, Senior Ordinary Member, *presiding*.
His Honour the Lieutenant-Governor of Bengal.
His Excellency the Commander-in-Chief.
The Hon'ble W. Grey.
The Hon'ble G. Noble Taylor.
The Right Hon'ble W. N. Massey.
The Hon'ble Colonel H. M. Durand, C. B.
The Hon'ble Mahárájá Vijayaráma Gajapati Ráj Bahádur of Vizianagram.
The Hon'ble Rájá Sáhib Dyál Bahádur.
The Hon'ble W. Muir.
The Hon'ble D. Cowie.

PRIVATE WATER-COURSES' BILL.

The Hon'ble MR. MUIR moved that the Report of the Select Committee on the Bill to provide for the appropriation of land required for private water-courses from Canals, be taken into consideration. He said that the Committee had received valuable suggestions from various Officers in the North-West Provinces and the Panjáb. He might specially mention Mr. C. B. Thornhill of the Allahabad Board, Colonel Dyas and Captain Crofton, and Mr. A. O. Hume, C. B., as having furnished many of the amendments which had been adopted. His learned friend the Assistant Secretary to the Council had also taken great pains with the Bill, and had simplified and improved it. In fact, nearly the whole of it had been entirely re-drawn by him.

Instead of providing for a proprietary transfer of the land, an accessorial right to form and maintain the water-course was all that was needed: and this change had simplified the measure.

An opportunity had also been given for objectors to lodge their complaints before the Collector, who was better qualified to judge of certain classes of objections than the Canal Officer; and power had been given to the Collector to hold the requisite investigations.

A Section had been added to provide for the adjustment of claims in cases of land occupied prior to the passing of the Bill.

The Lieutenant-Governor of Bengal had given his opinion that the Bill was not at present required for that Province. But the Lieutenant-Governor of the Panjáb had expressed a wish that it should be made applicable to the Panjáb and its dependencies. The Panjáb had therefore been substituted for Bengal.

Power was also given to the Local Government of other Territories to extend its provisions.

The Motion was put and agreed to.

The Hon'ble MR. MUIR moved that the following words be added to Section 11: "and shall forward to the Collector the plan and a copy of the memorandum."

Also that in Section 12, for the last clause, the following words be substituted:—

"If the Commissioner agree with the Canal Officer, the Commissioner's decision on the points in dispute shall be final. If the Commissioner disagree with the Canal Officer, the whole case shall be referred to the final decision of the Local Government."

Also that in Section 14, line 8, after the word "formed" the following words be inserted: "The Canal Officer shall enter upon the intervening lands and mark out the limits of the proposed water-course; and thereupon."

Also that in the same Section the last sentence be omitted.

Also that in Section 15, the word "Collector" be substituted for "Canal Officer" and "Officer."

Also that in the same Section, line 14, the words "enter upon the intervening lands and mark out the limits of the proposed water-course, and shall thereupon" be omitted after the word "shall."

Also that in Section 16, the word "Collector" be substituted for "Canal Officer."

MR. MUIR, in moving these amendments, explained that they had been rendered necessary by communications received from certain Officers after the Committee had submitted their report.

It had been objected that the Commissioner of the Division who, under the Bill as settled in Committee, was the final referee on points in which the Canal Officer and Collector differed, would be incompetent to form an opinion on

professional matters. It was therefore provided that where the Commissioner agreed with the Canal Officer his decision should be final; but where he differed, he should submit the case to the Government for its final decision.

Another amendment provided that the Canal Officer should enter upon and mark out the land, a process necessary as a preliminary to the adjustment by the Collector of the amount of compensation, rent or revenue.

The remaining amendments were intended to place the duty of requiring payment, and of arranging for the security of the rent, &c., in the hands of the Collector, as it had been pointed out by the Canal Officers themselves, that the Collector was in a better position than the Canal Officer to perform this duty effectively.

The Motions were severally put and agreed to.

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

The Motion was put and agreed to.

OUDH LIMITATION BILL.

The Hon'ble MR. MUIR moved that the Report of the Select Committee on the Bill to exempt certain suits in Oudh from the operation of the rules of limitation in force in that Province, be taken into consideration.

He said that the Bill had been forwarded for the opinion of the Chief Commissioner of Oudh before its introduction, and advantage had been taken of the observations of that Officer and of the Financial Commissioner, in the preparation of it as finally introduced. Since then, another communication had been received, in accordance with which some further amendments were made in Committee, to bring the measure into more entire conformity with the local law and with the agreements entered into by the Talukdars.

In reference to these agreements, MR. MUIR might add that they related to certain classes of cases in which villages held by Talukdars under *Sunnuds* were claimed by mortgagors. It had been held on the part of the Talukdars that the terms of the *Sunnuds* barred the claims of the mortgagors for redemption. But the Talukdars, admitting in such cases the equity of the mortgagor's title, had waived the claim which it was believed they possessed to bar the mortgagor's suit. In acknowledging this act, the Governor-General in Council had communicated to the Talukdars his high appreciation of the motives which had dictated this measure; and had added that "the sense of justice which had

thus let them to forego privileges which they considered to be conveyed by the *Sunnuds*, was most creditable to them, and was the best augury His Excellency could receive, that they would endeavour to discharge their important functions as landlords with integrity and consideration for the interests of those over whom they had been placed."

MR. MUIR added that the Secretary of State had communicated his entire concurrence in this view.

The Hon'ble COLONEL DURAND would not have approved of the Bill had not the Report of the Select Committee showed that, on the part of the Talukdars, there was a distinct and clear assent by them to the proposed measure. This had removed any doubt which he might have had with regard to the Bill. Their unanimous assent was much to their credit, much also to the credit of Mr. Wingfield, through whose influence no doubt that assent had been obtained. COLONEL DURAND concurred in the Report of the Committee, and was prepared to vote for the passing of the Bill. He repeated that much credit was due to the Talukdars for this concession, which would greatly increase the desire that the Government had always felt to be punctiliously scrupulous with reference to their rights and privileges.

The Motion was put and agreed to.

The Hon'ble MR. MUIR moved that the Bill be passed.

The Motion was put and agreed to.

POST OFFICE BILL.

The Hon'ble MR. GREY moved that the Report of the Select Committee on the Bill for the management of the Post Office, for the regulation of the duties of Postage, and for the punishment of offences against the Post Office, be taken into consideration. He said that the only parts of the Bill which seemed to have attracted much interest were those parts which related to the rates of postage.

The Council would recollect that, at a meeting of the Council some time ago, he (MR. GREY) had stated that the Government thought it desirable to call for reports with the view of ascertaining whether the present very low unit of weight did really, as was supposed by some persons, act as a bar to the use of the Post Office by the bulk of the population. The returns to that enquiry had not yet been received, but the Council would have learnt from the Report of the Select Committee, that the Government had intimated its willingness, if the result of the enquiry should be to show that this low unit did really

affect the use of the Post Office by the population at large, to introduce a modified scale of weight. He would only therefore add, now, that from no quarter had any spontaneous representation on the point been received.

As to the rates of newspaper postage, the Council would remember that when the Bill was introduced, he had said that although he was not able to acquiesce in the particular reason advanced for an increase of weight by those who had memorialized for it, he was yet prepared to think that the case on its own merits might deserve consideration. The result of an enquiry which he had made had established this to a greater degree than he should have supposed. Taking the postal statistics of two newspapers, *The Friend of India* and *The Englishman*, it appeared (excluding those copies sent by post beyond sea) that of the aggregate mileage over which the aggregate number of newspapers were conveyed in India, no less than 67 per cent. in the one case, and 71 per cent. in the other case, was by railway. Only 18 per cent. in the one case, and 20 per cent. in the other case, was by runners or boats, the remaining quantities being by mail-cart or horse-dâk. This result had satisfied the Select Committee of the expediency of allowing an increase to the weight of newspapers, and the Director General of the Post Office, he was able to say, was entirely of the same opinion.

As to the book-packet rates of postage, the alteration made by the Committee was to reduce the single unit of weight from 20 to 10 tolahs, thereby putting book-packets on the same footing as newspapers. It was reasonable to conclude that pretty much the same classes who received English newspapers received also book-packets, and therefore it might be safely assumed that the result which he had just mentioned, about the proportion carried by railroad, would be found to apply approximately also to book-packets. In making this alteration, we should be following in fact the English practice. In England, the newspapers which had special privileges were those which paid the stamp duty. Unstamped papers and books were exactly on the same footing. As the Section was drawn, however, the book-packet postage in this country would be on a more liberal footing than it was in England, for it would admit of any class of articles whatever being sent by the Book-Post which the transmitter might be willing to send packed in the special way which might be required by the Book-Post rules. The same privilege was partially conceded in England by means of the Pattern-Post, by which, however, the postage-rates were double those of the Book-Post.

There remained to be mentioned a simple alteration made in the rate of postage on the conveyance of closed parcels by the Banghy-Post, a business

that did not properly appertain to the Post Office. The general effect of the alteration would be to increase the rate of postage on all parcels carried very short distances, and to reduce it on small parcels when carried a greater distance than 100 miles. Thus, a small parcel under 20 tolahs weight, instead of, as at present, being charged two annas for less than 100 miles, and six annas for a distance exceeding 100 miles and less than 300 miles, would be charged a uniform rate of four annas up to 300 miles; for a distance between 300 and 600 miles it would be charged eight annas, instead of twelve annas; between 600 and 900 miles twelve annas, instead of one Rupee two annas; and between 900 and 1,200 miles one Rupee, instead of one Rupee eight annas. A similar alteration and reduction would take place on parcels weighing more than 20 tolahs and less than 50 tolahs.

There was no other alteration in the Bill, as amended by the Select Committee, on which it was necessary for him to make any remark.

The Right Hon'ble MR. MASSEY said that he thought that the recommendations of the Select Committee were marked by moderation and good sense. With regard to raising the unit of weight, he considered the Post Office so potent an engine of civilisation, that no Government would be justified in allowing fiscal considerations to stand in the way of such an improvement. At the same time, as the measure would involve in the first instance a considerable loss of revenue, he would impress on his colleagues the advisability of acting with caution. But if they should arrive at the conclusion that the existing unit of weight did check correspondence and was oppressive to the poorer class of correspondents, he could only say that he would not recommend his colleagues to do otherwise than give a liberal reception to that conclusion. He was glad to find that newspapers would come in for a share of the benefits conferred by the new Bill, and he might add that the concession of that boon was not likely to be attended with any loss to the revenue.

The Motion was put and agreed to.

The Hon'ble MR. GREY said that he had some amendments to make. He proposed to omit, in Section 43, the words "and every person who shall aid, abet, or conceal any of the offences mentioned in this Section," and the like words "or shall aid, abet or conceal any of the above-named acts" in Sections 49 and 50, and also the like words "or shall aid, abet or conceal any such acts" in Section 51, and to add a new general Section after Section 51 to the following effect:—

"Whoever abets, within the meaning of the Indian Penal Code, or conceals any offence made punishable by this Act, shall be punished with the punishment provided for such offence."

And then he should move that the Sections of the Bill which were now numbered consecutively as 52 to 64 be numbered consecutively as 53 to 65.

The Motions were severally put and agreed to.

The Hon'ble MR. GREY also moved that the Bill as amended in Committee, with the additional amendments now approved, be passed.

The Motion was put and agreed to.

PARTNERSHIP LAW AMENDMENT BILL.

The Hon'ble the PRESIDENT moved that the Report of the Select Committee on the Bill to amend the Law of Partnership in India, be taken into consideration. He said that the Select Committee had recommended that the Bill should be passed without amendment, that is, with the omission of a Section corresponding with the Section of the English Act, which in case of insolvency postponed the commanditarian lender to other creditors. The Select Committee gave as its reason that it considered the Bill a beneficial measure, and saw no reason for limiting its operation. The fact was that all the arguments for the Bill were arguments for omitting the fifth Section of the English Act. If there was anything in them at all, they proved the expediency of the measure without qualification or restriction. He would not repeat the reasoning which he employed when the Bill was before the Council on a former occasion, nor the more cogent reasoning of His Excellency the Commander-in-Chief. But he would submit to the Council that, considered as a question of principle, there were two sides to the question before it, and no more. The rule which the Bill proposed to set aside might be regarded from the point of view of jurisprudence, or from the point of view of political economy; and under both aspects it appeared open to fatal objections. First, as to jurisprudence: the rule which said that participation of profits should of itself constitute the lender a partner was open to the objection that it created a contract without that which was essential to the existence of a contract—namely an agreement. Partnership was a contract. It was a contract under which one intending partner agreed with the other, that that other should be his agent in matters within the sphere of the business. But this rule created a partnership, not only without the agreement of the parties, but in the teeth of their violent disagreement. If you asked the commanditarian lender and the commanditarian borrower whether they desired to make one an agent for the other, they would answer with an emphatic negative. Of course MR MAINE did not deny that there were cases when the law created a contract by implication. If one man paid money to another by mistake, the law implied an agreement or promise on the part of the receiver that he would pay back the money. But the ordinary

juristical explanation of that was, that if the receiver were a person of good conscience, he would under the circumstances actually make the promise. But in order to apply that principle to the present case, it was necessary to assume that when a lender advanced money upon interest varying with and coming out of the profits, his conscience was burdened with the necessity of promising to pay all the borrower's debts, whereas if he advanced money at a certain percentage on the advance, there was no such burden on his conscience, but in equity and good faith he might recover the whole of his loan and protect himself with any kind of indemnity. It was a curious commentary on the theory that there was some natural connection between partnership and participation in the profits, that the connection could only be established by violating the nature of a contract.

Turning, on the other hand, to political economy, surely there was no plainer proposition than that when a trader or a trading firm borrowed money, there was no legitimate fund out of which interest could be paid for the loan, and no fund out of which it could in fact be paid for any length of time, except the profits of the business. Mr. Maine supposed it would be allowed that interest could not be paid out of the losses, and, if it were paid out of capital, it was a process which must soon come to an end. Now then, take two classes of lenders; one, the commanditarian lender, was remunerated in exact proportion to the profits. If the profits were large, his interest was large; if the profits were small, his interest was small; if there were no profits, he got no interest at all. Under no circumstances could he transgress the limits of the legitimate fund. If the firm failed, it must be through ill-luck or mismanagement, it could not be through absorption of the profits. The other class of lender, the ordinary lenders, who were paid at a fixed rate, were entitled to their interest, profit or no profit. There was nothing to prevent their eating into the capital of the firm year after year, and thus contributing to its ultimate insolvency. It would seem, then, on principle, that if any lender required protection and encouragement, it was the commanditarian lender. But the proper course was to leave both classes of lenders to the ordinary laws of trade. Mr. Maine could not conceive a greater economical paradox than was occasionally witnessed, as he was informed, in Calcutta. Some unlucky Natives, trusting to a supposed usage, had advanced money to a firm on the commanditarian system. The firm became insolvent, and when its affairs were investigated before the Court, it turned out that the factor or banyan, who was the intermediary between the firm and the bazaar, had been lending money to the firm at 40 or 50 per cent., and now claimed from the commanditarian lenders all his advances which he had not covered by assignment to himself of the assets.

The truth was, that the only argument against the Bill was the conservative argument that the system had not been tried, and therefore ought not to be tried, or tried only under such restrictions as would mutilate or paralyse it. And no doubt the defenders of the Bill were under a difficulty from the comparative paucity of precedents to point to. Nobody had heretofore come into contact with the commanditarian system in England except by ill-luck. There was, however, one example the other way, of comparatively recent date, which might serve to illustrate the commanditarian system approximately, if not exactly. It would at all events serve to show that it was something very unlike what it was generally supposed to be.

Mr. Maine imagined that if anybody opposed this measure, it would be the great Joint Stock Banks and their Managers. Mr. Maine had not the smallest reason for saying that there was such opposition actually; but the Banks had at present a monopoly of the lending business; and this measure would undoubtedly have the effect of introducing the competition of private lenders, though not for the same class of loans. Now, upon what principle did the Joint Stock Banks do business? He might presume the Council to be aware that they traded, not only on their paid-up capital, but also largely and in some cases very largely, upon the deposits of their customers. These deposits were in effect loans to the Bank, and Mr. Maine would observe at starting, that whatever objections existed to trading partly with the capital of a partnership, and partly with auxiliary capital taken up on loan, applied with full force to the trading of Joint Stock Banks. If there were any thing in the argument against the Bill, it ought to prove that the fewer deposits a Bank obtained, the greater was its stability. But unfortunately for the objection, the reasoning of the commercial world was the other way, and it was generally believed that the greater was the number of depositors, the greater the solidity and prosperity of the Bank. What, however, might perhaps escape notice was that these deposits were, not immediately but ultimately, not exactly but nearly exactly, commanditarian loans. The Joint Stock Banks in England now invariably paid interest to their depositors, at a rate varying with the value of money in the market; higher when money was dear, lower when it was cheap. The actual standard followed in most instances was, he believed, the rate of discount of the Bank of England. It was, however, well known that the periods at which money was dear were the periods at which the Banking business was most profitable; and hence the rate of interest paid to depositors was in the long run a rate varying with the profits of the Bank.

Let the Council, however, observe that the Banks, though they borrowed money on the system just described, always lent money on the old or ordinary

system. It followed, therefore, that all this great and flourishing business of Joint Stock Banking, which had received such immense extension of late years, was organised on the principle that borrowing on the commanditarian system was advantageous to the borrower, while lending on the ordinary system was advantageous to the lender. The Banks borrowed on one principle, and lent on the other, and made their profits between the two. But it would be seen that the whole of the argument against the Bill proceeded on the opposite assumption to that practically made by the Banks. It was assumed by the objectors, that lending on the commanditarian system was so advantageous to the lender that he ought to be placed under a disadvantage to compensate him for his natural advantage. On the other hand, it was assumed that if a man lent on the ordinary principle, he enjoyed no such advantage as ought to prevent his exercising to the full his rights as a creditor.

Other interesting illustrations of the probable effects of the measure might be gathered from the Joint Stock Banking system. Thus, deposits were never taken at interest except under a stipulation that a certain notice should be given before withdrawing them; and indeed, if he were called upon to furnish an analogy to the partnerships trading partly with their own capital, partly with auxiliary capital borrowed from commanditarian lenders, which might be expected to grow up under this measure, he should point to the Joint Stock Banks. The partners would correspond to the shareholders, the commanditarian lenders to the depositors, and the analogy would be nearly complete. It seemed, therefore, to him that, unless the Council believed all Joint Stock Banking to proceed on an unsound basis, they must pass the Bill: and, further, unless they thought that the depositors ought to be postponed to all other creditors of the Banks, they must pass the Bill without the English Section.

The Motion was put and agreed to.

The Hon'ble Mr. Muir moved as an amendment—

That a Section be added to the Bill to the general effect of Section 5 of the Act of the British Parliament passed last year, To amend the Law of Partnership.

"*Section.*—In the event of any such trader becoming insolvent, or taking the benefit of any Act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than sixteen annas in the rupee, or dying in insolvent circumstances, the lender of any such loan, as aforesaid, shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a good-will, as aforesaid, be entitled to recover any such profits as aforesaid, until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied."

Mr. Muir said he had felt unwilling to take any prominent part in the proceedings respecting this Bill, because it related to a question in which he

had no special experience. But the more he had studied the subject in the light of the debates in Parliament, and the reports received from the several Provinces, the more convinced was he that the opinion which he had ventured to express on the introduction of the Bill was well-founded, and that serious risk to commercial credit would ensue throughout the country if the Bill were passed without the English Section, of which he had now moved the addition.

During the past Session, the Imperial Parliament, after a careful and prolonged discussion, had proceeded as far as was found prudent and safe, in freeing the liability of trading capital.

Following the French commanditarian system, Parliament had established a new species of liability. Persons could now contribute capital in the shape of a loan, for which they might stipulate to receive a rateable share of the profits, or interest varying with the profits, and yet not be held responsible as partners. But they were to be in the position of "postponed creditors," that is, they could not recover from the firm, if it proved insolvent, till the ordinary creditors had been paid up in full.

Here, then, was a distinct and definite form of liability. Before this enactment, there had been two forms of liability, unlimited and limited. Now there was established a third or mixed form. The commanditarian sharer, as regarded the public, was liable to the extent of his contribution; as regarded the firm itself, his liability was determined by the contract. No registration was required as in the case of Limited Joint Stock Companies; but, on the other hand, if the commanditarian sharer interfered in the management, he might incur an unlimited liability.

Such, then, was the effect of the English Act. It created a new and distinct species of liability. And the public knew, or might easily know, with what form of Trading Association they were dealing.

Now he (MR. MUIR) would observe, that the present Bill was introduced as a counterpart of the English Law. The Hon'ble Member, in recommending the measure, had stated distinctly that he expected it to produce, in India, "the same effects" as had been realized in France and in England. He would quote his words:—

In the Statement of Objects and Reasons, he said—

"The Bill is expected to produce the same effects as the French system of partnership *en commandite*."

And in his speech introducing the Bill, he told the Council—

"That the Bill which he had the honour to ask leave to introduce was, with some alterations necessitated by Indian procedure, transcribed from a Statute which passed the English Parliament during the last Session. If it became law, he hoped it would have the same effect as the French system of partnership *en commandite*."

But in reality, by the omission of the 5th Section, the enactment had been entirely altered, and the effect would be essentially different. Instead of a definite form of interest with a distinct liability, there was, under this truncated Bill, no definite or distinct form of liability at all. The public would not know with what they were dealing, and he (MR. MUIR) apprehended that the action of the Bill in this shape would be seriously to endanger commercial credit.

He would now ask what reasons had been alleged for the omission of the 5th Section. It appeared to him that there were but two. First, that the Section was illogical; and second, that borrowers and lenders should be allowed to make what terms they pleased.

As to the first ground, *viz.*, want of logical consistency, it did not seem to him to deserve much consideration. It was said that in the first Section we declared that to receive a share in the profits did not of itself constitute a man a partner; whereas Section 5 enacted a liability only justifiable on the ground that he was a partner. But it was quite conceivable that, though a man might not be a partner in the technical and full sense of the word, he might yet possess a degree of interest equitably involving a modified liability. At any rate, they had the best of all reasons for the provision in the practical logic of experienced and prudent merchants, who deemed the precaution to be necessary.

The other reason required greater attention. It was said that we ought not to trammel the money market. A trader should be free to borrow capital in any way he liked. If he chose to contract a loan, stipulating to give the lender a full share of the profits, exempting him at the same time from all risk, why should the law step in to interfere with these terms and vary them?

He (MR. MUIR) fully admitted that we had no right to interfere with the terms of such contracts. But he would ask, between whom was the contract made? Simply between the trader and the lender; and it bound them. But it bound no one else. It did not concern third parties, and could not by any possibility bind them. It was a private contract, and not known to the world.

It would be quite different, if, in all transactions with third parties, the trader were previously to tell them of such contracts: if he were to warn them that such a portion of his stock-in-trade was not to be held liable for his engagements. If the trader had thus disclaimed liability, then, and not till then, it might be urged that the public was justly affected by the contract. As Joint Stock Companies were not exempt from unlimited liability until they had announced the limitation to the world, so it seemed to him that any limitation of liability stipulated in a private contract could not equitably bind the public until it had been announced to them. And, in the absence of such

warning, he held that the liability of the parties to the contract in respect of their creditors was determinable by an entirely different principle.

What, then, was the principle by which the liability of a commanditarian lender was to be judged? He (MR. MUIR) held that it was by outward appearances. Wherever a person shared in the profits, he was presumed by the public to be responsible in the capital on which those profits were calculated. What was apparent, was identity of interest in the profits; what was concluded, was identity of risk in the stock. Thus, in the English debate the Attorney General had said:—

"But it could not be denied that the ordinary creditor would be inevitably influenced by the capital visibly employed in the trade, by the stock-in-trade, and by the means which the trader was able to present to the world as the foundation of his undertaking. Credit was therefore given to the trader on account of his visible means of stock-in-trade."

In fact, the idea that to share in the profits necessarily implied a corresponding risk in the capital did not (as the Hon'ble introducer of the Bill had said) arise out of a mere legal fiction. It may have been overlaid and disguised by that fiction. But it was a popular idea prevalent all over the world. The connection of profits with risk was so axiomatic, that there was absolutely no word in any language that he knew of to express the opposite, that is to express the relation of a person who shared in the profits but did not share in the risk. That there was no such word in the English language he had on the authority of the Hon'ble mover himself, who stated in his speech—

"That it had become common to call the relation established between the borrower and the lender who was remunerated according to the rate of profit, 'a Commanditarian Partnership.' And there was some convenience in so styling it, because we have not at present any compendious phrase expressing the relation."

There was certainly no phrase of the kind in the Indian languages; the idea seemed to be unknown; and the difficulty of explaining it had no doubt led to a good deal of the vagueness and uncertainty in the replies which had been received from the Native merchants. In short, the dissociation of profit from risk was opposed to the popular notion of right and wrong. He might quote some remarks of the Bengal Chamber of Commerce on this head. Their Secretary wrote:—

"On the other hand, I am instructed to urge that, as a matter of fact, such commanditarian loans are unlikely to be made in this country, except in the expectation that the condition stipulated for, of sharing in the profits, is likely to prove much more remunerative to the lender than a mere interest on his money, and that it is just and right that if the lender has all the benefit and advantage of participating in trade profits, he should also bear its risks to the

extent of his capital embarked in such trade, The lender would then practically be in the position of a shareholder in a Limited Company, liable only to the extent of his capital embarked therein, but not entitled to a return of any share of such capital in the event of a winding-up until the claims of all *bonâ fide* creditors had been met. Immunity to this extent against the unlimited liability of partners, under the existing law applicable to private trading partnerships, is all that, in the opinion of the Committee, is required to induce the investment of capital in such partnership, under the provisions of this Bill. And it is all, in their opinion, which commanditarian lenders can reasonably or equitably require."

He (MR. MUIR) was therefore entitled to conclude that, wherever the public found a lender sharing rateably in the profits, it presumed that he was responsible for loss in respect of his capital; and that unless the public were distinctly warned to the contrary, they might equitably hold the sharer in the profits so responsible.

Mr. Göschen, an authority that would not be disputed on the opposite side, had made a statement in the debate in Parliament, implying that the two things were correlatives :—

" He believed that the proposed system would not lead to fraud in the way suggested, and that the managing partners would not allow those who advanced money to share in the profits without sharing in the losses."

He would now proceed to state some of the practical objections against the omission of the 5th Section. And in so doing he would refer to cases in which the commanditarian lender took his full share of the profits. The Hon'ble President, in the speech he had just made, had confined his remarks to cases of loans at simple rates of interest, varying with the profits; and if the Bill could have been limited to such cases, no ill effect might have ensued. But the measure embraced persons taking a full and unlimited share in the profits, and he (MR. MUIR) was entitled to direct his argument to such cases.

He would speak first of transactions in which there was no subterfuge or bad faith. Now, even here, the omission of Section 5 might injuriously affect third parties. The greater portion of the stock of a concern might belong to a commanditarian lender. In a series of prosperous years, he might have reaped extravagant returns; then follow a series of losing years, in which, by virtue of his exemption, he contributes nothing to maintain the stock. In such a case, notwithstanding what the Hon'ble Mover had said, the capital might virtually be reduced by the profits of the commanditarian lender. A crisis comes: is it fair that he who, by his long drain on the profits and neglect to share in the losses, mainly contributed to the failure, should share in the assets equally with the outside creditor in ordinary trade, who naturally looked upon the commanditarian lender as responsible to the extent of his capital, but now finds that, by a private contract, he had exempted him-

self from liability? The Attorney General in alluding to such a contingency had said:—

"But supposing the person who took no share of the risk furnished all the means, then the whole resources of the undertaking would be derived from the loan so made, and there could be no doubt that there might be some risk of injury, if the creditor who went in for an unlimited share of the profits were able to go in also for a share in the assets of the business to which the credit might have been given. The person who advanced the money had sent the trader into the world with the appearance of solvency, and the stock-in-trade ought, therefore, in the first instance, to be subject to the ordinary *creditors*."

It had been objected that the same result might follow from the lender stipulating for exorbitant rates of interest. The Attorney General had shown that—

"if a man lent money at the ordinary rate of interest, he could not be said to be investing it in the business, because he left all the benefit as well as all the risk to the man who was carrying on the trade."

But where the interest was exorbitant, the Attorney General had stated that, if the provisions of the Bill were evaded in that way, he would not be—

"unfavourable to the drawing of a line, if it could be done, beyond which it should be determined that a high rate of interest was a mere cover, and of placing such persons in the same situation as the lender who contracted for a share of the profits."

He (Mr. Muir) did not quite agree in this view. He thought that a distinction might be drawn between the lender of money on interest, whether moderate or exorbitant, on the one hand, and the commanditarian sharer on the other, based on a wider and truer distinction. The two classes were in fact separated by a broad line of discrimination.

When a person contributed funds carrying their share in the profits, what was the impression on the public mind? As already shown, the impression was, that the stock was responsible for the engagements of the house. It added to its stability in outward appearance. Traders dealt with it, and gave credit, partly on the appearance and presumption thus created. And in case of failure, the public justly held the commanditarian lender's capital, with the rest of the stock, responsible for the engagements of the firm.

The case was entirely different with an ordinary loan at interest, whether moderate or exorbitant. Such a loan did not necessarily add to the credit of the house. In some instances, being forced to seek a loan might rather detract from its credit; and the higher the rate of interest the more it might detract. The public did not look to that loan as an asset for the fulfilment of the firm's engagements. And whatever the rate of interest, the public, consequently, had no right to hold such a contribution liable.

In short, the commanditarian lender took his stand on the side of the house, shared in its profits, had access to its accounts, was immediately and deeply concerned in its success. Therefore, though not a partner, he might be held equitably a sharer in its fate as in its profits, to the extent of the capital he had embarked upon it. The lender at interest, on the other hand, was over against the house; he belonged to the class who had claims against it.

He had spoken hitherto of cases in which there was no *malâ fides*. But if the 5th Section were omitted, third parties might suffer also from bad faith.

Under the shadow of the Bill, the real trader might put forward men of straw, and himself keep in the background. It was true that if interference was proved, such a trader might be made liable. But it was notorious that interference and collusion were extremely hard to prove. And if not proved, if the trader successfully stood aside, to outward appearance, he could not be made responsible though he had enjoyed nine-tenths of the profits. He might even have secured his pretended loan by a lien on the assets, and thus, coming in to the exclusion of the ordinary trade creditor, sweep all the assets away. It was to guard against abuses of this nature that Section 5 was especially required. He would again quote from the Attorney General;—

"It had been suggested that by possibility the real trader might not hold out his name to the world, that he might furnish all the means and stipulate for the profits, and in that way avoid running any risk. This clause was intended to supply a practical security against any evasion of the law of that description. It might be objected that the lender could withdraw the amount of his advances before the other creditors got possession of the bankrupt's property, but in such a case an investigation could take place to ascertain whether there had been a fraudulent preference, and if so, it could be dealt with by the existing law. What was proposed by the Hon'ble Member for Brighton (Mr. Moore) would enable the person who might be the real trader to come in at the last moment and sweep away the ostensible means of the business *pari passu* with the other creditors, or perhaps in preference to them.

"The clause would in reality act as a check on the formation of a fraudulent undertaking between the trader and the partner who advanced him money on the condition of participating in the profits of the business. The partner enjoyed the benefit of the business if it was prosperous, and if it was not prosperous he ought to share to the limited extent to which he had embarked capital in it in the loss which it entailed. He was of opinion, then, that they would be proceeding safely and cautiously, and taking good securities against abuse, if they were to adopt this clause."

Such being the case, he (Mr. Muir) was justified in concluding that if the Bill were passed without the English Section, the tendency would be to create distrust and want of confidence in the mercantile community. No one would know with what they were dealing. It might outwardly be a substan-

tial house, and credit given accordingly. In reality it might be a house built as it were of cards, that would fall at the first touch, the whole stock having by special agreement been exempted from liability. It was very much on grounds of this nature that the Bengal Chamber had urged the retention of Section 5. The Secretary had thus reported:—

"I am instructed further to point out that, though the exceptional privilege which will be conferred on commanditarian lenders by this Bill, should it pass without a Section corresponding to the 5th Section of the English Act, may encourage advances by way of loans to trading firms, yet that their stability may not thereby in reality be practically increased. A firm obtains credit on the reputation which it enjoys of having a certain capital invested in it proportioned to its extent of business, and available to satisfy the demands of creditors in the event of losses; but if a great part, or, as may prove in some cases, the whole, of such capital, is not capital in this sense, but merely loans which the commanditarian lender can at any time withdraw, or for which, in the event of insolvency, he can rank on the debtor's estate in competition with other creditors, no confidence will be placed in such firms. Their ordinary trade creditors will press them whenever general confidence is in any degree shaken, and what might under other circumstances have proved a mere temporary pressure may, through a withdrawal of support at a critical moment, result in disastrous failure. On these grounds, and also on the general ground of the undesirableness that any difference should exist between the law in India and the law in England on this subject, my Committee respectfully recommend that a Section similar to Section 5 of the English Act be introduced into the Bill.

He might also quote the opinion of the Madras Chamber of Commerce. It had resolved:—

"That the Chamber, while cordially approving the principle of the Bill introduced into the Legislative Council of India, for the amendment of the Law of Partnership in India, is of opinion that the clause in the English Act relating to the position of commanditarian partners in cases of insolvency, should be retained in the Indian Act, and that its omission would be calculated to remove a salutary check on reckless lending and borrowing, and to lessen the stability of commercial firms."

By all means let such reckless trading and firms resting on no certain basis of capital exist if they pleased; but let it be on a system by which society at large might be aware of the high pressure and dangerous machinery which they brought into play. And if there was no means of warning the public, then he (MR. MUIR) thought that the Council could not safely dispense with the English Section.

He considered it highly creditable to the gentlemen of both Chambers that, though they might naturally have been swayed by the additional convenience to themselves which, on retirement, they might enjoy if the Section were omitted, they had looked beyond these attractions, and had wisely

considered the injurious results which might thereby accrue to commercial credit at large. The Trades' Association, on the contrary, had apparently been dazzled by the advantages to retiring partners, and in their report had made no allusion whatever to the possible risks that might be apprehended.

MR. MUIR proceeded to examine the Native usage in respect of commanditarian partnership. He reviewed the opinions which had been elicited by the enquiries made by Government, and contended that, though there were occasional vagueness and inconsistency in the replies, the general sentiment prevailed almost universally, that to share in the profits of a business necessarily involved a sharing also of risk in respect of the capital embarked. Apart from theoretical opinions on the Bill, the evidence, he said, went to shew that this was the usage and custom of the country. MR. MUIR also read extracts of a letter from Mr. Thornhill of Allahabad to the same purport.

The Bill without Section 5 would thus, MR. MUIR said, place the law in opposition to the Native usage. The Hon'ble the President would tell him that, if such a usage were proved, then the Bill (which merely provided that the receipt of profits did not *of itself* constitute partnership) would not relieve the commanditarian lender from liability. But he (MR. MUIR) needed not to point out that it was extremely difficult to give legal evidence of a usage. The reports now before the Council amply proved this. There might be no moral doubt of the usage, and yet it might be almost impossible to prove it in the courts. And if any such cases as those he had before supposed should hereafter occur,—if in opposition to Native usage and through the force of this law, a person who had shared in the profits were, on insolvency, to share also in the assets—he need not say what a shock would be given to credit throughout the country. Mercantile credit was a tender and sensitive plant, and we ought not to countenance any system by which it might be rudely assailed. He therefore earnestly begged the Council to pause before they gave their sanction to a measure which might be productive of such grave results.

In conclusion, MR. MUIR said that he had gone into these objections against the omission of Section 5, though it really was not necessary for him to have done so. Because the burden of proof rested upon those who wished to depart from the provisions of the English Act.

He took his stand upon two principles—

First.—That in our Indian legislation we were bound to follow the English commercial law, unless we could prove a speciality in the circumstances of this country requiring deviation from it.

Second.—That we ought to provide the same safeguards against an abuse of the law, which Parliament had established in England, unless we could shew that the corresponding risks had no existence here.

On the first of these points he could not do better than quote from the remarks of a gentleman whose late departure from India and from this Council they all so much regretted. They coincided exactly with his own sentiments :—

"There was another argument against the omission of a Section corresponding with the 5th Section of the English Statute, with which the Hon'ble mover of the Bill had himself supplied them, when asking leave to introduce the Bill to adapt to this country the English Companies' Act of 1862. The Hon'ble gentleman had then argued that, when a principle had been adopted by the more active and numerous commercial society of England, it might fairly be tried in the commercial society of this country, provided that no argument could be used against it, which might not have been urged in England and had not prevailed. Now, objections were taken to this Section when the measure was discussed in the House of Commons, but though there was a large majority of the Committee in favour of the general principle of the Bill, the mover of an amendment that this Section should be omitted did not venture to press it to a division. He (Mr. Bullen) thought the question of omitting this Section required great consideration, and he reserved to himself the right of moving at a future stage that it be inserted in the Bill."

On the second head, no argument whatever had been adduced to shew that the same risk and danger of evasion and subterfuge did not exist here as it was admitted to do in England. On the contrary, voices of warning had been raised against the omission of the fifth Section from all parts of the country, and from the Native community, as he had shewn, equally with the European. Was commercial credit so much more hardy and vigorous in India, that we could here dispense with securities deemed absolutely necessary in England? And not in England only, but in France, in the United States, and he believed in every country in the world: for, so far as he could ascertain, there was no country in which the proposed relaxation of liability prevailed.

That being the case, it would require some weighty and convincing argument indeed, such as he had yet to hear, for introducing a change so vital and so serious into the law of trading liability;—a law which had been anxiously discussed at every point, in both Houses of Parliament, by men of the highest mercantile experience, and which had met with the emphatic and unqualified approval of so distinguished a Law Reformer as Lord Brougham.

Those who would reject the Section might think that in this small Council there was greater wisdom than in the collective Houses of Parliament. For his part, he (MR. MUIR) preferred to follow the conclusions of the Imperial Legislature.

The Hon'ble MR. COWIE said that, as he was a Member of the Committee on this Bill and concurred in its report, it might have been unnecessary for him to say any thing on the present occasion, but he held it to be more courteous to those of his brother merchants who differed from him in opinion, that he should briefly state in this Council his reasons for supporting the Bill as it stood without the introduction of Section 5 of the English Act.

He conceived that Section to be entirely opposed to the spirit of the Bill before the Council. That spirit was to conduce to the influx and extension of capital among private firms on principles of limited liability; but he asked, what capitalist would be tempted to become a commanditarian lender when he was told by this Section 5 that, if he placed money in a firm and it became insolvent, he would in ninety-nine cases out of a hundred lose the whole of it. Practically, this would be the effect of the Section, for it was unfortunately matter of history in all countries, that in a commercial insolvency, whether it arose from unavoidable misfortune, or wreckless trading, or an ignorance of some of the first principles of business, the result was a dividend or dividends, but never, except in very rare and honourable exceptions, twenty shillings in the pound. The commanditarian lender in such circumstances would never receive a penny from the insolvent estate.

When this Bill was first introduced, he (MR. COWIE) mentioned an argument as likely to be used against it, viz., that the lender would have the advantage over other creditors of inspecting the affairs of the borrower and of drawing out his money when he saw that they were in a precarious position. That argument was used, but he thought there was more to be said against it than in its favour. The public had two safeguards against this: one that the Bill only declared that the lending money for a share in profits should not *of itself* constitute a partnership. But there were many modes in which a partnership might be proved, and he could readily fancy the ingenuity of the law fixing a man as a partner for exercising that precise degree of supervision of a business which he had flattered himself would enable him as a commanditarian lender to withdraw his funds in critical times. The other safeguard was, that no firm in its senses would take such funds without stringent arrangements as to the circumstances and periods of their withdrawal.

The Hon'ble Member (MR. MUIR) had expressed his regret that he had had no personal experience in matters of partnership. He (MR. COWIE) gave the personal fact for what it was worth when he mentioned that he had been for twenty-four years a member of a firm in this city, wherein he had been connected with seven or eight partners, senior and junior, and with that experience he cordially voted for this Bill, excluding Section 5 of the English Act.

The Hon'ble Member in one part of his address appeared to him (Mr. Cowie) to assume that the more a firm had the command of, in the shape of capital, commanditarian or otherwise, the more recklessly speculative it would become. His experience of mercantile life had been different. He had always found that it was the men of small means who thronged the avenues of Basinghall Street and the High Court, and not men who had started with real capital. With reference to the opinion received from the Madras Chamber of Commerce, he was able to state that the retention of Section 5 was debated in a full meeting of twenty-one members, of whom eleven were for, and ten against it.

The Hon'ble Rájá Sáhib Dyál, speaking in Hindústání, said that if the lender who advanced money in consideration of receiving a share of the profits were declared irresponsible for the losses of the firm to which he had made such advance, mercantile credit would undoubtedly be seriously affected, and as credit was the basis of all mercantile transactions, commerce itself would be checked and its interests would suffer. The principle of the lender's not incurring the responsibilities of a partner by lending money on the above terms might be a good one when applied to Companies whose stock was divided into a number of shares of fixed amount; it was not, however, applicable to Indian mercantile firms in which there were only two partners. According to the custom prevalent in India, there were three privileges attached to partnership:—

1.—To receive a share in the profits.

2.—To inspect the accounts.

3.—To direct the affairs of the firm.

The two first were highly prized and were great strengtheners of partnerships, but the last being looked upon with disfavour tended to weaken partnership, for if one of the partners was an able man, the management was often made entirely over to him; such was the case when an infant or Purda lady succeeded to a partnership, and retained his or her interest in the house, such infant or lady, in case of reverses, bearing his or her full share of the firm's responsibility. The present Bill enabled persons to enjoy the two first of these privileges, viz., the profits and inspection of the accounts, which, as he had shown, were alone prized, and absolved them from responsibility because they did not enjoy the last, which, as he had already said, was considered of little value.

The transactions of an Indian mercantile firm generally amounted to more than ten times its capital, bills being drawn on consignees against the goods despatched to them. These bills were negotiable, and indeed the commerce of

the country was carried on almost entirely through such bills of exchange. The measure now before the Council would, however, by engendering suspicion in the minds of traders, destroy the credit which rendered the said bills of exchange negotiable, and would thereby paralyse the commerce of the country.

So, in partnerships for one single transaction, there would be danger of collusion; the capitalist, in case of loss, claiming to be a commanditarian partner, and his partner for a consideration affirming his statement. For instance, grain was bought at a time of threatened drought at a high rate per maund; a plenteous rain suddenly fell and the price of the grain so bought fell to a figure that would entail heavy loss on the one of the partners by whom the money for the transaction was to be advanced; to avoid this, he claimed to be a commanditarian partner, his moneyless partner affirming his statement on the understanding that he should receive a handsome present when released from the imprisonment which his insolvency would probably involve. This state of things would evidently be very prejudicial to this kind of partnership, which was the one generally obtaining in the Mofussil.

He would repeat that, unless the Section proposed in the amendment now before the Council were added, this Bill would sow the seeds of distrust and disunion among the merchants and traders; it would strike at the root of credit, and would give rise to endless lawsuits and injury to just rights throughout the country.

His Excellency the COMMANDER-IN-CHIEF had not intended to trouble the Council with any further expression of his sentiments on the Bill now before it. But in the course of debate certain points had occurred which induced him to offer a few remarks. In the first place His Excellency would say that his Hon'ble friend, Mr. Muir, had manipulated the evidence with considerable ingenuity. His Excellency did not read the evidence in the same manner as his Hon'ble friend. It was very true that the latter had been able to present the opinions of eight or ten persons which coincided with his own. But quite as many could be brought forward in the Bengal and Madras Presidencies in favour of the opposite view. How did the case stand if we travelled to the Bombay Presidency, to which the Hon'ble MR. MUIR had not made the faintest allusion? There we found, with one single exception, a considerable number of firms which, as he (SIR W. MANSFIELD) knew from personal acquaintance, stood at the very head of the commerce of the country, and which were prepared to accept the Bill in its integrity. That was very important when we were asked to consider Native public opinion and the manner in which this particular measure was viewed by the Native mind.

With regard to the observations of the Hon'ble RÁJÁ SÁHIB DYÁL, they had already been met by his hon'ble friend MR. COWIE. It was impossible to say that credit was shaken by any method which invited capital for the purposes of commerce, and was based on a sound principle. It was said that the principle on which this measure was founded was unsound. His Excellency joined issue on that. Put the case of a commanditarian lender agreeing to lend on condition of receiving a portion or even the whole of the profits. Nothing could be more certain than that, nothing could be paid out of profits if none existed. It was assumed by his Hon'ble friend, and by those speakers in the House of Commons on whom he relied so much, that there was a constant flow of profits until the firm failed. In his (the COMMANDER-IN-CHIEF'S) opinion the commanditarian lender underwent peculiar risk. In one year he got his profits, the next year, which might be a bad one, he got none. An Hon'ble friend of his, a member of the Committee who was not present (Mr. Ross), had expressed his doubts whether the profits of trade were at all times equal to the interest exacted by lenders of fixed loans. That was a view which had not occurred to His Excellency as one unconnected with trade. But when he reflected on the exorbitant price of loans and discounts in times of great pressure, of panic or of commercial excitement, it was evident that there was reason for the remark, and therefore that they were liable to exceed the profits ultimately coming to the commanditarian lender. Assuming that the ordinary precaution had been taken, of making a special agreement, which the Hon'ble MR. COWIE had described as certain to occur in every case of commanditarian loan, and by which the lender would be bound for a year or a term of years, it was evident that such a lender shared the hopes and fate of the house, instead of standing opposite to it and being an enemy, as asserted by his Hon'ble friend opposite. Then, the lender of loans at fixed interest demanded his right when there were no profits; the commanditarian lender, on the contrary, when there were no profits, was unable to make any demand. Which of the two, then, was the enemy of credit? the lender who supported the capital of the firm not making profits, by abstaining from demand on account of the money lent, or the lender who attacked the capital of the concern—that was to say, who demanded that interest should be paid out of capital when no profits existed? To a question put in that manner there could be but one reply.

His Hon'ble friend proceeded to invoke the mantle of the House of Commons and to demand that our judgment should be entirely guided by a decision recorded by that august assembly. He had as much respect for the House of Commons and its decisions as was well possible. But it required little political experience to know that, when a party was described as consisting of experienced

men, they might often be more fitly designated as interested. He had read yesterday the debate on which his Hon'ble friend laid so much stress; and he must confess that the perusal left no serious effect on his mind. He could only trace the desire of compromise on the part of the introducer of the measure, and of unqualified hostility on the part of those who opposed it. We should therefore not be guided by what he considered an erroneous decision. If any authority were wanted, he would rather take such an authority as John Stuart Mill, supported as he was by such lawyers as Lord Westbury and Lord Cranworth, the late and the present Chancellors, instead of men who might fairly be supposed to have an interest in its opposition.

The Right Hon'ble MR. MASSEY said that, as he was not present when this important subject was last discussed, he was unwilling on the present occasion that the debate should close without his making one or two brief remarks. His Hon'ble friend who proposed this amendment had invited the Council implicitly to follow the course which had been prescribed by the Imperial Parliament with regard to the question. There was no man who had a greater veneration than himself for the British Parliament, and especially for that branch of it of which he had been an humble member for many years. But his experience had shown him that the argument and the vote were not always in unison. This was not the first time he had heard the arguments urged by his Hon'ble friend MR. MUIR. His Hon'ble and gallant friend, the Commander-in-Chief, had really touched the sore point of the question. The Section mentioned in the amendment had originally been introduced, ostensibly on behalf of the creditor, but really because the whole system of commanditarian partnership was opposed by the old established firms, who disliked a system founded on principles novel and, as it appeared to them, disreputable and insecure. He did not wish at all to censure the motives which dictated that opposition. He thought it was a sort of opposition which a proposal of that kind was most likely to encounter. Now the clause was prepared ostensibly in the interest of the creditor. The creditor was formerly a great favourite of the English Law, and a great amount of iniquity and cruelty had been perpetrated to give effect to that partiality. Happily more enlightened counsels now prevailed. But still one might observe, in English legislation, too great a disposition to take care of a person who was very well able to take care of himself. What was the origin of this question? It had originated about a century ago in a decision of the Courts in regard to this particular practice. This system had been introduced into the law of Partnership by the decisions of the Courts of Law, when the principles which ought to regulate commercial affairs were very imperfectly understood by lawyers as well as merchants themselves. And what was the object of this Bill? It was simply to repeal that judge-made law, and to

place the creditor of a partnership precisely on the footing of the creditor of an individual. For his part, MR. MASSEY had heard nothing which would induce him to believe that there was any distinction between the position of a firm obtaining a loan, and that of an individual borrowing money. Nor could he see that, if a person came forward and was disposed to lend his money to a firm on terms that the borrower was willing to accept, he should be precluded from the privileges attached by English law to an ordinary lender. The Council had been told that there might be such things as fraudulent preferences pervading these transactions. Of course, fraudulent preference was a proceeding familiar to persons connected with commercial concerns. It had constantly been the object of commercial legislation to protect the general body of creditors from the preference which a creditor on the brink of insolvency might wish to show. But there was nothing in the amendment proposed by his Hon'ble friend which would meet a difficulty of that sort. His Hon'ble and gallant friend opposite had so completely answered the argument urged by his Hon'ble friend (MR. MUIR), and the President's lucid statement had so entirely anticipated the objections of principle which might be urged in behalf of this particular amendment, that it would be a work of supererogation on his (MR. MASSEY'S) part to pursue the subject further. The analogy between partnerships of this description and Joint Stock Banking Companies was complete and unanswerable, and if he wished to refer in particular to any class of commercial enterprises which had taken a deep root, he would refer to the Joint Stock Banks which had established themselves within the last few years all over Great Britain. That being so, he could not but come to the conclusion that, although this clause had been introduced into the Act passed in England, if the framers of the Bill had not been subject to influences which all connected with the course of English politics would understand, they would have preferred the measure without a clause which was at once inconsistent and injurious.

The Hon'ble COLONEL DURAND entirely concurred with the principle of the Bill, and was not prepared to go with his Hon'ble friend, Mr. Muir, in his amendment, the arguments which had been adduced to the Council in opposition to Mr. Muir's first amendment being very forcible, while, at the same time, they had heard strong reasons, both from his Right Hon'ble friend Mr. Massey and the Commander-in-Chief, why they should not be entirely guided in questions of this kind by a decision of the House of Commons. It appeared to him, however, that one of the points in which the Council should regard this measure was its effect on the mass of the Native community. He confessed, both from the papers put before the Council, and also from his own knowledge

of the country and what he had heard from well informed mercantile men, that so far as the practice and habits of the country were concerned, this Bill was an innovation, and that the mercantile Native community would have, if this Bill was passed, gradually to conform to the novelty. He did not say they would not be able to do so. They would in time. At the same time he must repeat that, respecting the entire mass of the population, this was an innovation. He knew, as the Commander-in-Chief had point out, that the Parsees in Bombay were with but one exception entirely in favour of the Bill. It must be considered, however, that the Parsees were far more like Europeans, far more on the footing of one great mercantile community, than any other class of the Native population; and it was not fair to take them as representatives of the great mass of the Natives of this country. He thought it would be well if some sort of security could be provided. In France, from which country we derived the commanditarian principle, they had been very careful to register commanditarian loans. Very possibly, as the President had pointed out, the French law carried interference in minutiæ to a degree which acted as a check upon the free engagement of capital. Still he (COL. DURAND) thought that some simple system of registration might have been introduced into the Bill, which, without interfering unnecessarily with the affairs of the borrowing firm, would have been felt by the bulk of its creditors as some security. He would not go against the majority of the Committee or the majority of the Council. He agreed with the principle of the Bill as introduced, but he did wish that it had contained some provision for registering commanditarian loans.

His Excellency the COMMANDER-IN-CHIEF said that he would venture to correct what had fallen from the Hon'ble Colonel Durand in respect of the Bombay opinions having come solely from Parsees. The fact was that they came from merchants of every religion, the single exception being from the house of David Sassoon & Co., a Jewish firm.

The Hon'ble the PRESIDENT said that he would have a good deal to say in reply to the observations of his Hon'ble friend Colonel Durand; but he thought that the subject had better be deferred until the Hon'ble Mr. Muir had moved his second amendment, which would raise the question of registration directly. As regarded the first amendment, he would add nothing to the arguments of His Excellency the Commander-in-Chief, and his Right Hon'ble friend Mr. Massey. But he would assign one reason why a provision which might be good in England might be bad in India, in the fact that the amendment proposed by his Hon'ble friend Mr. Muir was completely unworkable. Mr. Muir had fallen into the mistake of supposing that there was any conclusive test of insolvency

other than the result of an examination into the supposed insolvent's affairs before an Insolvent Court. Now there was a system of insolvency in the Presidency Towns, and he believed that there was some rude system of the sort in the Punjab. But India was a great deal larger than the Presidency Towns and the Punjab; and throughout the rest of India, it was impossible to apply the suggested provision. Let a case be supposed to occur in those parts of India where there was no insolvent law. A capitalist has lent two lakhs of rupees on commanditarian loan, and wants them back again. Is the borrower to reply that he is in debt to somebody else? May he decline to refund the money on the ground that he has not paid his khánsáma's bill? Or is a third person to be allowed to intervene and allege that he has a claim against the borrower? Why, the claim may be fraudulent or collusive, or it may be made in good faith but it may be unfounded, or it may be legitimate, and yet if all the assets of the borrower were collected, there might be enough both for the claimant and the commanditarian lender? The state of things was very different in the Presidency Towns. There, when an insolvency occurred, the debtors of the alleged insolvent were called on to pay their debts, and the creditors to prove their claims, and after a balance had been struck between the two, it would be seen whether, in the words of the English Section, the estate paid twenty shillings in the pound. But throughout the rest of India no such conclusion could be reached, and it was impossible to have one system for the Presidency Towns, and another for the Mofussil. You could not have commanditarian lenders enjoying the full rights of creditors on one side of the Hooghly, and not enjoying them on the other; paid in full at Port Canning, but not in Calcutta; admitted to share in Kurrachee, but postponed in Bombay. As regarded the bulk of India, the provision of the Section was impracticable; in the Presidency Towns it was impolitic; but divided between the Presidency Towns and the Mofussil, he did not think he was using too strong a word in calling it absurd.

The Hon'ble MR. MUIR said, with reference to what had just fallen from the Hon'ble the President, that he did not think it could be regarded as any valid objection against his amendment. If the principle of the Section were admitted, it would be easy for legal ingenuity to reconcile its application to Indian procedure.

Moreover, it appeared to him that the Section as it stood would not be inoperative. The result would be something in this way. If decrees were obtained against a firm, one by a commanditarian partner, the other by an ordinary trade creditor, then the trade creditor would be preferred in the execution of such decrees; and until his claim had been satisfied, that of the other would be postponed.

He (MR. MUIR) had not heard anything in the statements of the other speakers which required further reply. And he had only to beg that the amendment might now be put.

The Motion having been put, the Council divided—

AYES.	NOES.
Hon'ble Rájá Sáhib Dyál.	The President.
„ Mr. Muir.	The Hon'ble the Lieutenant-Governor.
	His Excellency the Commander-in-Chief.
	Hon'ble Mr. Grey.
	„ „ Taylor.
	Right Hon'ble Mr. Massey.
	Hon'ble Colonel Durand.
	„ Mahárájá of Vizianagram.
	„ Mr. Cowie.

So the Motion was negatived.

The Hon'ble MR. MUIR now moved the second amendment on the notice paper, viz., that in Section 1, after the words "in writing," the words "and registered" be inserted.

In the House of Commons, Mr. Moore, one of the two members who alone spoke against Section 5, had nevertheless urged that if the Section were omitted, the contracts under which commanditarian partnership was established should be registered. He said that—

"He would suggest that a proviso should be attached to the first clause, to the effect that every contract for a loan of money to a trade, upon a certain rate of interest out of the profits of the trade, should be registered. In the absence of such a proviso, they would be opening the door to a large amount of fraud. It had been stated that registration would be useless, because the person who lent the money would not be known, but he only desired that the fact should be registered."

If a measure of that kind had been thought necessary in England by those who opposed Section 5, how much more necessary would it be in India, where it was notorious that the disposition and facility for the fabrication of deeds prevailed to so much greater an extent than in Europe. It was not any special kind of registration, as that provided for Joint Stock Companies, which he pressed for, but ordinary registration. If this were not insisted on, we should be liable, on the failure of a house, to have commanditarian contracts forged and presented in Court with the view of collusively exempting the commanditarian partner from liability by an *ex post facto* agreement. Without registration, the honest trader would thus be liable to be cheated.

The Hon'ble the PRESIDENT could hardly think that his Hon'ble friend could intend his amendment to be carried as it stood. It would be necessary to say with what Registrar the contract should be registered. MR. MAINE supposed that the Registrar of Joint Stock Companies was intended. That proposal proceeded on a supposed analogy between two forms of limited liability, which, however, had little or nothing in common. The shareholder in a Joint Stock Company was a trader. He elected his Directors, controlled their mode of doing business at meetings, and had a status in a Civil Court which entitled him to an injunction against them if they acted contrary to the articles of agreement. But the commanditarian lender was not a trader. The moment he interfered in the trade, he became, by operation of the words "of itself" in the Section, a partner with unlimited liability. Moreover, his Hon'ble friend had mistaken the object of registering the shareholders in a Joint Stock Company. That object was simply to let the creditors of a Company know who their debtors were. The capital was divided into a number of small shares which were constantly changing hands; and unless the holders were registered, it would be impossible to identify them when the Company was wound up. There was no such object in registration as his Hon'ble friend seemed to have in mind: for Mr. Muir intended, he supposed, to label by registration the firms which took commanditarian loans as in some way inferior to others. Registration, moreover, would lead to some extraordinary results. If these loans were registered, there must be an entry in the register when they were paid off. Now, suppose a creditor inspecting the register, and finding a commanditarian loan of a lakh of rupees first entered as contracted, and then as paid off, what inference was he to draw? Mr. Muir apparently wished him to rejoice that his debtors were free from the incubus of commanditarian loan. But MR. MAINE rather thought his inference would be that they had £10,000 less to trade on. The fact was his Hon'ble friend must make up his mind whether commanditarian loans were or were not good things for a firm. Very remarkable frauds might, moreover, be perpetrated by means of registration. A firm might advertise advances of one lakh of rupees from one person another lakh from another, a third from a third; and all these advances might be imaginary or collusive. MR. MAINE had in fact been informed that such a mode of fraudulently obtaining credit was sometimes actually resorted to in America.

The Hon'ble MR. MUIR begged to state, before the discussion on this amendment went further, that the Hon'ble President had entirely misunderstood the object of the amendment. He (MR. MUIR) had distinctly stated that it was not special registration, as in the case of a Joint Stock Company, but "ordinary registration" that was required; registration as in the case of ordinary assurances or contracts to prevent the fabrication of such documents.

The Hon'ble the PRESIDENT observed that, in that case his Hon'ble friend employed the word "registration" in a sense different from the Hon'ble Colonel Durand, and from the English Members of Parliament whom he had quoted. This it was which had misled him. Now, however, his objection was that the registration of partnership deeds was not compulsory under the registration law, but was optional, and there was no more reason to anticipate fraud in contracts of this kind than in any other kind of contract of loan.

The Hon'ble MR. MUIR resumed; it was not, as the President had said, his object by registration to label or stamp the commanditarian partnership, indicating it thus to the world, but simply to prevent the possibility of commanditarian partnerships being fraudulently set up by *ex post facto* fabricated deeds. It was to secure the contract being embodied in a *bonâ fide* genuine deed that he pressed for compulsory registration. That was his sole object.

The Hon'ble the PRESIDENT said that the amendment would then be open to the second class of objections.

The Motion having been put, the Council divided—

AYES.	NOES.
Hon'ble Colonel Durand.	The President.
„ Mahárájá of Vizianagram.	The Hon'ble the Lieutenant-Governor.
„ Rájá Sáhib Dyál.	His Excellency the Commander-in-Chief.
„ Mr. Muir.	Hon'ble Mr. Grey.
	„ Mr. Taylor.
	Right Hon'ble Mr. Massey.
	Hon'ble Mr. Cowie.

So the Motion was negatived.

The Hon'ble MR. MUIR then moved his third amendment:—

"That a Section be added to the Bill to the effect that,—"If by the usage of any class of merchants or traders, the taking of a share of the profits, or of a rate of interest varying with the profits, is held to imply partnership or liability on the part of the lender of any such loan, nothing in this Act shall affect such partnership or liability."

He said he understood from certain remarks which fell from the Hon'ble mover of the Bill in Committee, that this amendment would be a simple enunciation of the law as it now stood. If in a suit it were proved that a person sharing in the profits was by the usage and custom of the class to which he belonged responsible, this Bill would not relieve him from liability, because it simply enacted that the receipt of profits did not *of itself* constitute partnership. He had before stated, in moving the first amendment, that he feared

that this concession to custom and usage would not prove any very sensible advantage, because it was a notoriously difficult thing legally to prove a custom. The reports now before the Council gave ample evidence of this. There might be a full conviction in the mind that the usage existed, and still it might be extremely difficult to bring it to the test of legal proof. Still the Section of which he moved the insertion, might be of some practical advantage. It would at all events keep the declaration of the law in conformity with the usage of the country. It had been objected in some of the reports otherwise in favour of the Bill, that it was so bald and naked in its form, that its provisions and eventual effects would not be intelligible to the Native community. Although, therefore, the amendment might merely state a principle latent in the enactment, he thought it would be of advantage as bringing that principle to view, and showing that the usage, wherever it existed, might be pleaded against exemption from liability, and that there was no intention to interfere with the custom of the country.

The Hon'ble the PRESIDENT said that the amendment was apparently moved under misapprehension of the effect of the Bill. The Bill would simply alter the general *primâ facie* rule, and any usage of trade or understanding between traders could be set up against that rule, if it could be ascertained by the proper tests and proved by the proper evidence. He was afraid that the result of inserting the words would be to tempt the lower Courts to attach importance to usages imperfectly ascertained and proved. It was notorious that suitors constantly attempted to establish almost any thing as a usage of trade; and one of the duties of Courts was to apply strict tests to such alleged customs.

The Motion having been put, the Council divided—

AYES.	NOES.
Hon'ble Rájá Sáhib Dyál.	The President.
„ Mr. Muir.	The Hon'ble the Lieutenant-Governor.
	His Excellency the Commander-in-Chief.
	The Hon'ble Mr. Grey.
	The „ „ Taylor.
	Right Hon'ble Mr. Massey.
	Hon'ble Colonel Durand.
	„ Mahárájá of Vizianagram.
	„ Mr. Cowie.

So the Motion was negatived.

The Hon'ble the PRESIDENT moved that the words "agree in writing to" be inserted after the word "same" and before the word "allow" in line 9 of the Explanation to Section 1.

The Motion was put and agreed to.

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

The Motion was put and agreed to.

JUDGES' COMMISSIONS BILL.

The Hon'ble the PRESIDENT also moved that the Report of the Select Committee on the Bill to relieve the Governor-General of India in Council from the duty of signing the Commissions mentioned in Sections 22 and 44 of the High Courts' Criminal Procedure Amendment Act, 1865, be taken into consideration. He said that the Committee had no amendments to propose.

The Motion was put and agreed to.

The Hon'ble the PRESIDENT then moved that the Bill be passed.

The Motion was put and agreed to.

PUBLIC MUSEUM (CALCUTTA) BILL.

The Hon'ble the PRESIDENT also moved that the Report of the Select Committee on the Bill to provide for the establishment of a Public Museum at Calcutta, be taken into consideration. He said that the Select Committee had added the Superintendent of the Geological Survey of India to the list of *ex-officio* Trustees, and had precluded the Trustees from interfering with such portion of the proposed building as might be set apart for the offices and records of that Survey; that the Committee had provided that the Officers and servants of the Trustees should be public servants within the meaning of the Penal Code; that it had given the whole body of Trustees, and not merely the Chief Justice, the Vice-Chancellor of the University, and the President of the Asiatic Society, the power to appoint Curators of the collections of the Asiatic Society during the interval that must elapse before such collections would formally become the property of the Trustees. The Committee had also struck out as merely declaratory of an indisputable right, the Section giving the Asiatic Society power to dispose of their present house. It had also struck out the Clause binding the Trustees to insure against fire the collections of the Asiatic Society. It would, the Committee thought, be difficult, if not impossible, to effect any such insurance for an adequate sum; and if such

insurance were effected, the monies received in respect of it could not be expended in replacing collections of which a great part consisted of unique objects.

The Motion was put and agreed to.

The Hon'ble the PRESIDENT then moved that the words "But nothing herein contained shall be taken to authorise the exchange or sale of any of the articles mentioned in the thirteenth Section of this Act" be omitted in Section 9. And he also moved that the following words be added to Section 13 :— "All objects taken in exchange under Section 9 of this Act for, and all monies payable on sale under the same Section of, any of such articles, shall be held on trusts and subject to powers and declarations corresponding as nearly as may be with the trusts, powers and declarations by this Act limited and declared concerning the same articles." The agreement between the Government and the Asiatic Society, in which the Bill originated, stipulated that in case the Museum Trust should determine the collections contributed by the Society should again become their property. To carry out this stipulation in its integrity, all articles belonging to the Society's collections had been exempted from the operation of the power of sale and exchange given to the Trustees. But it had been pointed out that it might be highly expedient to get rid of imperfect or decaying specimens and, accordingly, with the assent of the Society, the present amendment was proposed.

The Motions were severally put and agreed to.

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

The Motion was put and agreed to.

INDIAN MARRIAGE ACT EXTENSION (HYDERABAD) BILL.

The Hon'ble the PRESIDENT also introduced the Bill to extend the Indian Marriage Act, 1865, to the Hyderabad Assigned Districts, and moved that it be referred to a Select Committee with instructions to report in a week.

The Motion was put and agreed to.

The following Select Committee was named :—

On the Bill to extend the Indian Marriage Act, 1865, to the Hyderabad Assigned Districts—the Hon'ble Messrs. Grey and Muir, and the Mover.

The Council adjourned till the 24th March.

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

CALCUTTA,
The 23rd March 1866.

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