

Thursday, May 31, 1877

ABSTRACT OF THE PROCEEDINGS

COUNCIL OF THE GOVERNOR GENERAL OF INDIA

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 Simla on Thursday, the 31st May 1877.

PRESENT :

His Excellency the Viceroy and Governor General of India, G. M. S. I.,
presiding.

His Honour the Lieutenant-Governor of the Panjáb.

His Excellency the Commander-in-Chief, K. C. B.

The Hon'ble Sir E. C. Bayley, K. C. S. I.

The Hon'ble Sir A. J. Arbuthnot, K. C. S. I.

Colonel the Hon'ble Sir Andrew Clarke, R. E., K. C. M. G., C. B.

The Hon'ble Sir J. Strachey, K. C. S. I.

Major-General the Hon'ble Sir E. B. Johnson, K. C. B.

The Hon'ble Whitley Stokes, C. S. I.

The Hon'ble T. C. Hope, C. S. I.

The Hon'ble F. R. Cockerell.

The Hon'ble B. W. Colvin.

MILITARY LUNATICS BILL.

Major-General the Hon'ble SIR E. B. JOHNSON moved that the Bill to facilitate the admission of Military Lunatics into Asylums be taken into consideration.

• The Motion was put and agreed to.

Major-General the Hon'ble SIR E. B. JOHNSON moved that the Bill be passed.

The Motion was put and agreed to.

BRITISH BURMA EMBANKMENTS BILL.

Colonel the Hon'ble SIR ANDREW CLARKE presented the Report of the Select Committee on the Bill to provide for the execution of works urgently required in connection with embankments in British Burma.

BOMBAY REVENUE JURISDICTION ACT AMENDMENT BILL.

The Hon'ble SIR ALEXANDER ARBUTHNOT moved for leave to introduce a Bill to amend the Bombay Revenue Jurisdiction Act, 1876. He said that

the object of the amending Bill was to restore, in certain provisions, whatever jurisdiction had been taken away from the Courts by certain articles in the Act of last year. The Bill had been framed under instructions from the Secretary of State, and the practical changes which it would effect in the law as it now stood were very slight. In fact it would in no way affect the main object with which the Act of last year was passed. Should leave be given to introduce the Bill, he would take occasion, when introducing it, to explain in detail the exact changes which it would effect.

*The Motion was put and agreed to.

CHUTIA NÁGPUR ENCUMBERED ESTATES ACT AMENDMENT BILL.

The Hon'ble SIR ALEXANDER ARBUTHNOT moved for leave to introduce a Bill to amend the Chutia Nágpur Encumbered Estates Act, 1876. He said that the object of the amending Bill in this case was to extend the period within which the Local Government must decide whether an encumbered estate which had been taken under management under the Act of last year should be retained under management or relinquished. The period of six months provided for in that Act had been found by experience to be too short, and it was proposed to extend it to twelve months.

The Motion was put and agreed to.

TRANSFER OF PROPERTY BILL.

The Hon'ble MR. STOKES moved for leave to introduce a Bill to define and amend the law relating to the transfer of property. He said—"As this is a convenient opportunity for stating the views of the Government on codification in India, I propose, with the permission of His Excellency the President, to trouble the Council with some remarks on the subject, premising that they are little but a précis of what learned and enlightened lawyers like John Austin and David Dudley Field have written in England and the United States. As no one ever does so, I need not acknowledge my obligations to their master Bentham, of whom Talleyrand said *Pillé de tout le monde il est toujours riche*.

"In the first place, speaking as I am in India, I feel myself relieved from the necessity of proving the possibility of successful codification. Thanks, chiefly, to the labours of Macaulay, Peacock, Maine, Stephen, William Macpherson (the Secretary to the late Indian Law Commission), and my wise

and learned predecessor, to work under whom was not only a privilege but an education, British India now possesses Codes on the following subjects :—

- I. Criminal Law (Act XLV of 1860).
- II. Criminal Procedure (Act X of 1872).
- III. Civil Procedure (Act VIII of 1859).
- IV. Evidence (Act I of 1872).
- V. Contract in General—Sale of Goods—Indemnity and Guarantee—
Bailment—Agency—Partnership (Act IX of 1872).
- VI. Limitation and Prescription (Act IX of 1871).
- VII. Specific Relief (Act I of 1877).

“These seven Codes apply to persons of every race and religion in British India. There are, besides, the following, which, as yet, apply only to limited classes of the population :—

- VIII. The Succession Act (X of 1865), which deals with domicile, wills and intestacies.
- IX. The Divorce Act (IV of 1869).*

“Passing over the Specific Relief Act, which has not yet undergone sufficient probation, it is admitted by all unprejudiced and capable persons that, with one exception (the Code of Civil Procedure, Act VIII of 1859, which will soon be replaced by Act X of 1877), these Codes are working smoothly, and have been found reasonably adequate to provide for the cases that occur in the administration of the branches of the law with which they respectively deal.

“This being so, one might have supposed that no deliberate pause would have been made in the completion of this great and useful work. But such, unfortunately, is not the case. With the solitary exception of the Guardian and Ward Act XIII of 1874 (which does not apply to Bengal, Madras or Bombay), the codifying of our substantive law has since April 1872 totally ceased in India. We know the causes of this cessation, but it would not be expedient to state them.

“Under these circumstances it seems worth while to consider the current objections to codification, and to mention the advantages which may be expected from resuming the work.

* Besides these, we have comprehensive Acts which may be regarded as Codes, dealing with the following special subjects ; Public Companies (X of 1866), the Post Office (XIV of 1866), Telegraphs (I of 1870), Merchant Seamen (I of 1859), Sea Customs (VI of 1863), Inland Customs (VIII of 1875), Articles of War (V of 1869), Stamps (XVIII of 1869), Court Fees (VII of 1870), Expropriation (X of 1870), Coinage (XXIII of 1870), Paper Currency (III of 1871), Emigration (VII of 1871), Ports and Port-dues (XII of 1875), Administration by Public Officers of trust and intestate estates (XVII of 1864 and II of 1874). In a redistribution of the matter of our law, some of these Acts might form parts of what the New York codifiers call a Political Code.

“The current objections to codification are four in number. It is said—

(1) that a Code cannot provide for future cases, in other words, that it is necessarily incomplete;

(2) that in the attempt to be systematic and concise the language of codifiers must be left open to different interpretations;

(3) that a Code is inflexible and does not adapt itself to the expanding wants of the society for which it is framed; and

(4) that the Codes which have been framed for foreign countries, in particular France and Prussia, have been failures.

“But these objections have often been answered. As to the first, it is true that a Code cannot provide for all cases, but is that any reason for not providing for as many as possible? Moreover (as Austin points out) this objection is equally applicable to all law—whether it be a Code, a body of judiciary law, or a body of judiciary law supplemented by statutes.

“The second objection—that the language of a Code must be open to different interpretations—is also equally applicable to judge-made law, the specimens of which manufactured in this country are certainly not always free from ambiguity. But the best reply to this objection is, that in India we can continue to follow the system of using concrete illustrations, and that our experience of the Penal Code shews that this method is admirably adapted to preclude uncertainty as to the meaning of the abstract propositions of which the bulk of a Code consists.

“The objection as to the inflexibility of a Code seems as futile as those already discussed. It comes, in India, to this, that it is better for the barrister-judges (who, as a rule, lead the High Courts) to make the law as they go along, than for the legislature, aided as it is by the advice of every capable person in the country, to make the law as a guide beforehand. I feel as strongly as any one that the development of a country's law should be, as far as possible, the natural outgrowth of its material and social wants and of its highest ethical ideas. But for ascertaining these wants, for recognizing these ideas, the supreme Indian legislature is, and must always be, far more favourably situated than a body of judges whose experience is, as a rule, limited to their courts, who are generally ignorant of the languages of the people, and whose ability and learning (considerable as they are at present) will steadily deteriorate as the pecuniary attractions of India diminish. We should remember, too, that the machinery of Indian legislation is singularly swift and simple,

and that as soon as the expediency of any amendment is established there is no difficulty in having it at once effected.

“The last objection—that certain foreign Codes have been failures, and that therefore all codification must fail—hardly requires to be answered. But the answer may as well be given. The Codes referred to—that of Napoleon and the Prussian Code of the Great Frederick—were first attempts, framed when the science of law-making was not understood as it is now. For instance, those Codes contain no definitions of technical terms, no explanations of leading principles and distinctions. The result is that they have not superseded the old law, and that they have had to be supplemented by numerous volumes of more or less authoritative interpretations. But such defects are obviously accidental, not inevitable, and they have been avoided in framing the recent German Commercial Code (*das allgemeine Deutsche Handelsgesetzbuch*, 1869) and Penal Code (*Deutsches Strafgesetzbuch*, 1870), the Italian *Codice Civile* (which is an admirable model), Livingston’s Louisiana Codes, and, I believe, other Codes (those of Holland, Austria, Spain, Lower Canada, Portugal, Brazil), of which I do not speak positively as I have not seen them.

“Another objection (chiefly made by critics with a smattering of German jurisprudence) is that our Codes are not scientific enough; while a still larger body of critics, who are wholly innocent of law, declare loudly that they are too scientific, reminding one of those would-be military authorities who assert that already the arms put into the hands of infantry are superior to the average human capacity for using them with effect. But these criticisms are mutually destructive and may be left without further notice.

“So much for the practicability of codification and for the objections usually taken against it. Now as to the expediency of continuing and, if possible, completing the work which has been so well begun in India.

“First of all, it will save the Judges and Pleaders the vast amount of labour now forced upon them in searching for precedents in reports and text-books, which, in the mufassal at least, are seldom thoroughly understood. This, of course, will facilitate the despatch of business, cheapen the cost of litigation, and in some places, perhaps, enable us to diminish the number of our Judges.

“Secondly, an untrained Judge (and most of our Judges in India are, and will probably always be, untrained) is far less likely to go wrong in construing a well-framed Code than in drawing inferences from a crowd of half-understood decisions, or in submitting to the guidance of English text-books, written solely with reference to the system of English law—a system

from which we, in India, have widely diverged in many important particulars. It is obvious that the number of appeals will thus be greatly lessened, and one urgently needed reform of our system of civil procedure will thus be effected without depriving the Natives in any degree of a right which they have come to regard as an indispensable security.

“Thirdly, the reduction of the whole of our law to a Code would necessarily have the effect of precluding our barrister Judges (and our Civilian Judges misled by barristers) from introducing into India English technicalities and doctrines unknown to litigants and unsuited to this country. Even before the amalgamation of the Supreme and the Sadr Courts this practice had begun, and I could easily produce the most amazing rulings as to champerty, estoppel, laches, inadmissibility of oral evidence, and opening conditional sales which have become absolute. Since that amalgamation the technicalizing of our law has gone on with renewed vigour, and Your Lordship will remember that the Judicial Committee of the Privy Council has recently recommended us to abolish by legislation one of the doctrines so introduced.

“Fourthly, the process of codification affords an opportunity for settling, by legislative enactment, many disputed questions which the Courts would never be able to settle. Take one or two illustrations of what I mean. For years our High Courts had been disputing whether title could be acquired by positive prescription, and as to the time necessary to give an absolute right to the use of light, of a way, of water, or other easements. One learned Judge thought the proper time might be ‘four, five, or six years;’ some said it was twelve; others twenty; others that the law applicable to India was the English law before the passing of the Prescription Act in 2 & 3 Wm. IV; others that there was no law at all on the subject. The result was constant and ruinous litigation and great waste of time on the part of the Courts. At last the legislature interposed, and by two short sections (27 and 28 of Act IX of 1871) settled the matter apparently for ever. So far as I know, not a single serious doubt has been raised during the past six years as to the meaning of these sections. Take, again, the subject of Majority. Hindús, Muhammadans, East Indians, Europeans, Jews, Pársís, had each a different law on this subject. The age of majority according to the Hindú law was, in Bengal, the commencement of the 16th year: elsewhere, the commencement of the 17th year. Then the Courts held that Natives under eighteen were minors for some purposes, but not for others. Till the legislature interposed the state of affairs might be described as insoluble doubt and endless expense and litigation. But the Mahárájá of Vizianagram passed his Act (IX of 1875), and in three months the Courts were happily relieved of a useless and time-consuming

branch of their business. Take, again, the question as to what offences can legally be compounded. As to this the High Courts are hopelessly at variance. A single section would remove the difficulty.

“Fifthly, codification would be the safest and easiest method of introducing into the social law of the Natives reforms which are urgently needed, but which only a few of them are enlightened enough to demand. Take, for instance, the abolition of infant marriages. The Courts would never venture to hold such marriages illegal; and the legislature might well hesitate to raise, by an isolated measure, such a storm of excitement as was produced by the Act (XXI of 1850) declaring that rights should not be forfeited by loss of caste, or by the Act (XV of 1856) permitting Hindú widows to marry again. But I believe that by a comprehensive measure dealing with the whole law of Husband and Wife, a measure framed with due regard to social needs and physiological laws, we might abolish infant marriages without meeting anything more than the trivial and transitory opposition of few professional agitators. I mention this merely by way of illustration of my meaning. There is no intention of passing any such law.

“Sixthly, when we possess a complete Code the decisions of the Courts will necessarily be nothing but decisions as to its construction, and the system of reporting which we have established for the four High Courts at the annual cost of about Rs. 50,000, may then be replaced by the inexpensive practice of periodical communications from the Registrars of those tribunals to the Government of India in its Legislative Department. The amendments thus suggested could then be considered and (if approved) made by the legislature.

“I might dwell on other benefits sure to accrue from codification—the diminution of the bulk and expense of the libraries with which lawyers and judges must now be provided at their own cost, or at that of the Government: the improvement in the character of the legal profession which would result from making the law simple and scientific: the diffusion among the people of a more accurate knowledge of their rights and duties than could be obtained in any other manner: the effectiveness of good Codes as instruments of education: the beneficial influence which our Codes would exercise on the legislation of England and some, at all events, of her Colonies. But these results are remote and comparatively unimportant.

“I will now describe with some particularity the work which remains to be done before Indian law can be said to be completely codified.

“First, we have to finish and then to arrange our Code of the law of Contract. Here the following subjects have still to be dealt with: Sales of immovable property; Mortgages and charges on land; Leases; Fixtures: Settlements; Powers; Exchanges; Insurance (Marine, Fire and life); Carriers (Marine and Inland); Bottomry, Respondentia and other liens on Moveables; Negotiable Instruments. All these subjects, with the exception of Exchanges, Carriers, and certain liens on Moveables, were handled by the late Indian Law Commission: we possess their drafts in the Legislative Department; and on one of these drafts the Bill which I now ask leave to introduce is founded.

“As regards the law relating to Persons, we already possess Acts dealing directly or incidentally with Minors and Lunatics; and no further legislation seems necessary at present in this respect.

“Save as regards the infractions provided for by the Penal Code, the law relating to Personal Rights is almost wholly untouched by our legislature. So far as regards the right of protection from bodily injury, defamation and insult, it would be most conveniently dealt with in a Code of the law of Torts or Actionable Wrongs; but to deal with Wrongs one must obviously first know the correlative Rights, and as in many cases these have not yet been ascertained and declared, I would not now take up this subject of Torts.

“We then come to the law of Personal Relations, namely, Husband and Wife, Parent and Child, Guardian and Ward, Master and Apprentice, Master and Servant. So much of the law of Husband and Wife as relates to the solemnization of Marriage and to Divorce, has already been codified so far as regards Christians and persons not professing the Christian, Jewish, Hindú, Muhammadan, Pársí, or Buddhist religion; and I have here only to suggest that it would be convenient to amalgamate the Marriage Acts III and XV of 1872, and to withdraw the anomalous power to grant marriage-licenses, which the Presidency High Courts now possess.

“As to Parent and Child, their respective rights and duties, our Statute-book is almost a blank; and some painful litigation as to the rights of fathers to the custody of their children has, consequently, been the result. The law on this subject might easily and usefully be codified; but of course the proposed measure should leave untouched Hindús and Muhammadans, whose parental rights—at all events in the Presidency towns—are secured to them by statute. It might fitly apply to Europeans domiciled in India, East Indians, Armenians, Jews, Native Christians and, probably, Pársís.

“The law of Guardian and Ward is already codified, so far only as regards Europeans, their children and grand-children, in territories not under a chartered High Court, by Act XIII of 1874. I would extend this law to the rest of British India, and make it apply to the whole population except Hindús, Muhammadans and, perhaps, Buddhists.

“The law of Apprentices has been dealt with by Act XIX of 1850 and a section in Act I of 1859. But the law of Master and Servant is still uncoded, though various Acts (such as XIII of 1859 and IX of 1860), have been stuck patchwise on the mass of reported cases in which the bulk of it is contained. Many of these cases are contradictory: all (except to lawyers in the Presidency towns) are inaccessible; and I think there is no subject which might more fitly be taken up and dealt with in a spirit of fairness to the employer as well as to the employed. Much of the harshness with which Europeans and East Indians sometimes treat Native servants is due, I am convinced, to the absence of any distinct, ascertainable law as to their respective rights and duties.

“The law of Property, which would stand next in a scientific arrangement of a complete Civil Code, is, to a large extent, dealt with by one of the drafts already mentioned. There seems no pressing need for declaring the law as to certain matters not so covered, such as the property of the State and the ownership of animals wild by nature. There remain the three subjects—all of peculiar importance in India—of Trusts, Servitudes (or Easements) and Boundaries. As to Trusts, though one learned Judge has held (4 Beng. O. C. J. 231) that trusts cannot be created by Hindús, another learned Judge of the same High Court (*ibid.* 134) lays down (I venture to think correctly) that there is no country in the world where fiduciary relations exhibit themselves so extensively and in such varied forms as in India, and that possession of dominion over property, coupled with the obligation to use it, either wholly or partially for the benefit of others than the possessor, is familiar to every Hindú. Nevertheless we have no law on this subject save what is scattered through the library called the Equity Reports. Except so far as regards the acquisition of a prescriptive title, the law of Servitudes has also been left untouched by the legislature; and the Indian Courts are consequently left to the guidance (when they can get it) of a host of English cases often conflicting and sometimes unintelligible. The subject of Boundaries in their civil aspect is also untouched save by some local laws dealing with petty matters, such as disputes and the erection and repair of boundary-marks.

“The subjects of Shipping, Corporate Property, Patents, Copyright and Trade-marks may also here be mentioned. But with the exception of Copyright, they have already been dealt with by the Indian legislature, well enough,

at all events, to render immediate codification unnecessary. As to Copyright, our present law (Act XX of 1847) does not provide for works of the fine arts, photographs and lectures. It is also defective as to piracies by translations. Our law as to Patterns and Designs (Act XIII of 1872) is a dead letter.

“We now come to the law relating to the acquisition of Property, by (1) Occupancy or Prescription; (2) Accession; (3) Transfer *inter vivos*; (4) Will; and (5) Succession.

“Prescriptive titles are sufficiently dealt with by the Limitation Act IX of 1871.

“As to acquisition of property by Accession, we have no law as to Fixtures, except what may be revealed by English text-books. The Bill which I now ask leave to introduce deals, I hope satisfactorily, with this subject. The law of Alluvion and Diluvion is in a land like this, of huge, silt-laden and shifting rivers, obviously of the very first importance; but it is still contained in an old Bengal Regulation (XI of 1825), which is not only incomplete but obscure; and which is encrusted with decisions of the late Sadr Courts, the High Courts, and the Judicial Committee of the Privy Council, many of which are conflicting. Moreover, it does not apply to Sindh, where I believe the only rules on the subject are certain executive orders which, under the Indian Councils Act, section 25, have gained the force of law. The law of Accession to Moveable property is untouched, save by sections 155, 156, 157 of Act IX of 1872.

“Transfer *inter vivos* has, so far as regards sale of moveables, been dealt with by the Contract law, and will, as regards land, be dealt with by the Bill which I now ask leave to introduce, supplemented, as that measure will be, by the Registration Act. But the subject of Gifts *inter vivos* is as yet untouched, though Donations *mortis causâ* are dealt with by the Succession Act.

“Acquisitions under Wills are provided for by Act X of 1865, so far as regards Europeans, East Indians, Armenians, Jews, Pársis, and Native Christians; so far, also, as regards Hindús in the Lower Provinces and the Presidency Towns. The testamentary portion of this Act might now, I think, usefully be extended to Hindús in the rest of British India. But on this matter the Local Governments must first be consulted.

“Succession *ab intestato* is provided for by the same Act, so far as regards the whole population except Hindús, Buddhists and Muhammadans.

“I have hitherto said nothing as to the possibility or the expediency of codifying the Native laws. But as the Advocate General of Madras, in a book

of which a large number of copies has been sent to the Legislative Department, proposes to codify "the whole Hindú law"—(including, I presume, the law of Ordeals),—a few remarks may be made on this subject.

"There would obviously be great political danger and no practical advantage in codifying the Muhammadan law, which, as every one knows, is founded on the Kurán, and the Traditions and the Maxims which have been developed out of them.

"Speaking roughly, the only parts of the Hindú law (by which I mean the inspired *Dharmaśāstra*) which are now administered by our Courts relate to Inheritance, Maintenance, Partition of undivided Property, Widow's Estate, Mortgages and Adoption. I exclude the law of *Hundís* (Native bills of exchange), which, so far as I know, is not divinely revealed, but is merely part of the custom of Hindú merchants. There are serious difficulties in the way of touching any of these laws: first because they are all believed to be founded on a divine revelation, and great suspicion would certainly be excited if we *mlechchhas* attempted to meddle with them; secondly, because they vary, more or less, in Bengal, Madras and Bombay (take, for example, the power of a widow to adopt a son to her deceased husband), and uniformity, one great object of a Code, could not therefore be secured save with the certainty of change and the probability of much irritation; thirdly, because many of the sources of the Hindú law have either not been translated at all, or (like the *Vyavahāra Mayūkha*) translated so badly as to mislead rather than guide; fourthly, because even supposing we succeeded in codifying the Hindú law, the result would certainly not be applicable to the Hindús and Sikhs of the Panjáb, nor to the non-Aryan and non-Brahmanic population of the south of India, nor, I believe, to the Hindús in the Central Provinces, where local custom overrides Brahmanic jurisprudence, nor to the aboriginal hill tribes anywhere; lastly, because by codification we should stereotype laws which, however interesting from the archæological point of view, have (like all laws based on theological ideas) something irrational and inhuman about them. For instance, suppose we codified the Hindú law of Inheritance, we should have to found it on the notion that the right of each relation to succeed depends on his comparative efficacy in performing the obsequies of the deceased, and we should consequently have to exclude sons who chanced to be either blind or deaf, and brothers who were addicted to any vice. Suppose, again, we codified the Hindú law of Adoption, we should have to declare that an orphan could not be adopted, because, forsooth, there is no one to give him to his adoptive parent (2 Madras High Court Reports, 129). This, surely, is not the kind of jurisprudence that a civilized nation should try to perpetuate. The wisest and, I believe, the most welcome measure that could possibly be passed

affecting the Hindús would be an Act enabling them to discard their own law of property, in other words to adopt (without prejudice to vested rights) the legal status of Europeans domiciled in India, the change of status being formally registered, publicly announced, and, when once made, absolute and irrevocable. This suggestion is immediately due to Mr. J. D. Mayne's paper (*Madras Journal of Literature and Science*, 1864-65) on the administration of Native law in the Courts of the Madras Presidency, the ablest essay that I have ever read on the subject of the law which should be applied to a conquered nation. The ultimate source of the suggestion is of course the well known decision of the Privy Council in *Abraham v. Abraham*, 9 Moore, I. A. 195.

"I have thus, I hope, shewn—

- (a) that laws may be successfully codified in India:
- (b) that the current objections to codification are groundless:
- (c) that it is expedient to continue the work of codification except as regards the Native laws:
- (d) that much remains to be done before that work is complete.

"In determining the order in which subjects should be taken up for codification, we should, of course, be influenced more by the actual wants of the country than by any love for logical arrangement, legal symmetry or scientific completeness. Bearing this in mind, we should, I think, first take up the three Bills which the late Indian Law Commission framed with a view of completing their Code of Contract law (Act IX of 1872). These are:—

"The Transfer of Property Bill, which deals with sales of land, mortgages, leases, fixtures, settlements, and powers, and which I now ask leave to introduce:

"The Insurance Bill, which deals with fire, life and marine insurance:

"The Negotiable Instruments Bill, which deals with bills of exchange, cheques and promissory notes, and which we propose to make an embodiment of the actual law on the subject in India and England.

"These three Bills no doubt require considerable modifications; but they could in a few months be made most useful measures, and would be welcomed by every one whose interest is not to keep the law obscure and inaccessible. The subject of Fire, Life and Marine Insurance is one of growing importance in India, but (like the law of Master and Servant) it is contained in about two thousand reported English cases, patched with four Acts of the Indian Legislature. The Natives have no other law on this subject, though I believe that

Hindú merchants have a custom of insuring goods sent by land or river from one part of British India to another. As regards Negotiable Instruments, no doubt we should abstain from contravening the custom of Hindú merchants as to hundis. But the proposed law need not be inoperative as to these instruments, for the Calcutta High Court has held that when the analogy between hundis and bills is complete, the English law applies. The opportunity, too, might be taken to remove the doubts whether a hundi payable to order is negotiable without the written endorsement of the payee (1 Hyde, 155): whether notice of dishonour is necessary in the case of a hundi (Coryton, 88). Of course the provisions as to cheques and promissory notes would extend to Natives as well as Europeans.

“We might then take up the subject of Master and Servant, to which I have already referred. The opportunity might be used to amend the law as to the right of servants to compensation for injury caused by the negligence of foremen in their master’s employment, and to enable the Local Governments to establish a system of registering domestic servants.

“The subjects of Alluvion and Diluvion might then be dealt with. In Lower Bengal, in the Panjáb and in Sindh a clear and comprehensive law on these subjects is very necessary, and the text-books in the library of the Legislative Department by American and Italian writers would aid us effectively in working up the decisions of the Indian Courts and the Privy Council.

“I would then take up the law of Servitudes or Easements. The subject is, no doubt, most difficult and complicated. But we have the materials collected in England by Mr. Goddard, one of the gentlemen lately employed under a Royal Commission to prepare a specimen Digest, and we should doubtless receive on such a matter useful suggestions from the local authorities.

“We might then deal with Boundaries. An Act of a very few sections would contain all the rules that are needed on this subject, such as rules as to lateral and subjacent support, trees growing on or near boundaries, the rights of owners of land bordering upon water or bounded by roads, the duties of conterminous owners to maintain boundaries and fences.

“When these measures have been passed it will be found that the Rights of the population will, to a large extent, have been ascertained and declared. Then (but not till then) we should take up the subject of Torts or Actionable Wrongs, laying down clear rules as to the measure of damages in the case of each. It has been objected (strange to say by a judge of the Calcutta

High Court) that a Code of the law of Torts would suggest kinds of litigation now very rare, if not wholly unknown, in India. What if it would? Because the people are now unaware of the existence of their power to obtain redress by civil suit from those who infringe their rights, are we always deliberately to keep them in ignorance of such power?

"But let us examine the learned judge's vague prophecy. The most cursory inspection of our law reports will shew that the Natives are in the habit of suing for each of the three great classes of wrongs, namely, wrongs to the person (such as assault, malicious prosecution, libel, slander), wrongs to immoveable property (such as trespass, stoppage of water, obstruction of lights), wrongs to moveable property (such as wrongful distress, wrongful attachment, false representation).

"Besides these, the Indian legislature has expressly recognized or provided for suits for loss of caste, which, I presume, means suits for compensation for expulsion from caste (Act VIII of 1859, section 298), false imprisonment (IX of 1871, schedule II, No. 21), seduction (*ib.* No. 27), obstructing ways and diverting water-courses (*ib.* Nos. 31, 32), taking, damaging or wrongfully detaining moveable property (*ib.* Nos. 26, 33, 34), misuser of property (*ib.* No. 38), infringement of patents (XV of 1859, sections 22, 23) and of copyright (XX of 1847, section 7), death caused by actionable wrong (XIII of 1855), negligence of carriers (III of 1865, sections 7 and 8), cattle-trespass (I of 1871, chapter VII), damage done to goods in a bailee's possession (IX of 1872, section 180), injury caused to an agent by his principal's neglect or want of skill (IX of 1872, section 225). It must be admitted that the whole of the English law of torts, except perhaps the law relating to slander of title, has been introduced into, and is actually administered in, British India; and if, in codifying that law, it be thought desirable to declare that certain injuries for which an action would now lie in England should not be actionable in India, what can be easier than to do so? I do not know what those injuries are, nor I suspect, does the learned judge; but we ought to make three amendments in our law of torts: first, we should bar suits for mere oral abuse (6 Beng. Appendix 99); secondly, we should finally get rid of suits for criminal conversation, which may apparently still be brought by Hindús; and thirdly, we should alter the law in the Presidency towns so as to allow an injured person to bring a civil suit without instituting criminal proceedings.

"The outline of a complete Civil Code would then be nearly filled in. There would remain the subjects of Parent and Child: Trusts: Gifts *inter vivos*:

Accession to Moveables: certain Liens on Moveables: Carriers (Marine and Inland). The order of dealing with them is unimportant.

“The difficult task of arranging scientifically the various chapters of the Civil Code thus produced would then remain; and to the finished work we should either prefix or subjoin a chapter containing rules for its interpretation. The materials for this chapter are already collected in the works of Dwaris, Maxwell, and the American Sedgwick; and its enactment would afford a good opportunity for getting rid of the pernicious and illogical distinctions between the modes of construing remedial statutes, penal statutes, and statutes imposing charges on the subject, which have been imported from England by judges more familiar with the common-law than impressed by the importance of giving effect to the wishes of the legislature.

“And now, my Lord, I have nearly done. In carrying out this great work of codification the Government of India is well aware that it will meet with the hostility of many and (what is worse) the indifference of most of those for whose sake it is undertaken. Some of the judges will, I fear, oppose codification, because when once it is achieved it will limit their discretion and reduce them from their present position of judicial lawgivers to the comparatively humble, but useful, employment of interpreting and carrying out the will of the legislature. The baser sort of my own profession (not, I am glad to say, the more enlightened and unselfish members of it) will naturally oppose everything that tends to make the law clear and accessible, and thus to diminish litigation. The Indian public will doubtless be as indifferent to codification as the English public has hitherto proved to be. Nor can Your Lordship, or any of my colleagues, or I myself, hope to earn the fame which is justly due to those who finish a vast and useful work. For the measures which I have sketched out cannot possibly be prepared, criticised and passed into law in less than nine years, and before that time expires we shall all, so far as India is concerned, have attained to official *nirvāna*. But let the judges and lawyers be comforted with the assurance that we shall alter as little as may be the substance of the laws with which they are so familiar. The Eumenides shall not say to us, as they said to the younger gods, ‘Ye have overridden the ancient laws’ (*palaious nomous kathippasasthe*). Let the public be consoled with the pledge that no pains will be spared to make our drafts clear, brief and accurate, and that all competent criticism will be heartily welcomed and carefully utilised. And for us, my Lord, let us be satisfied with the consciousness that we shall have resumed, and to some extent carried out, the policy of providing a simple, compact and uniform system of law for the countless millions who now are, and hereafter will be, living and working and gathering wealth, gaining legal

rights and incurring legal liabilities, under the beneficent rule of the Empress of India and Her successors."

His Excellency THE PRESIDENT said :—"The very able exposition of principles, and the lucid and interesting narrative of facts, which the Council has just had the advantage of hearing from the Hon'ble Member, who has asked leave to introduce this Bill, make it unnecessary for me to remind Hon'ble Members that the Bill is part of a great undertaking, and that this undertaking, commenced by men of great eminence and ability, has been, for some time, suspended. But I believe I am in a position to inform the Council that the Government of India now resumes the task of codifying the substantive law of India, not only with the sanction, but I think I may say with the sympathy, of the present Secretary of State. This is an encouraging fact.

"My hon'ble colleague has reminded us that codification has been regarded, not only with reluctance, but with some degree of mistrust, by a large and influential body of legal opinion, which has lent its authority to confirm the impression that codification is either not feasible, or, if it be feasible, not beneficial. However, I noticed with considerable satisfaction some months ago that the Chief Justice of England—of whose genius and patriotism all England is justly proud—did not hesitate, in a public speech he then made, to declare that, in his opinion, the time had come for England herself to follow the example of other civilized States, and make haste to get rid of what a great English Poet has called :

‘the lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances.’

"Now it so happens that my own official life, although wholly unconnected with the legal profession, has led me, at various times, to reside in different continental countries, all of which already possess a completed Civil Code. For instance, I may mention France and Prussia, to which my hon'ble friend has referred; also Austria, Portugal, Italy and Denmark; which latter country was,—according to Bentham,—the first in Europe to codify its law. Perhaps, then, I may be allowed to record the fact that, in all these countries, codification has been found to be not only feasible but exceedingly beneficial to the whole community, and very conducive to the comfort of all classes. I am quite certain that, both in Prussia and France, the present Civil Code, as now revised and amended, is regarded by the whole population as one of the greatest blessings which Government could have given it. Therefore, I think I am entitled to congratulate my hon'ble colleague, Mr. Stokes, upon having in-

augurated his administration of the great Department of Government over which he now presides by the question which I have now to put to the Council."

The Hon'ble SIR EDWARD BAYLEY said that he did not wish for a moment to dissent from the broad principles which his hon'ble friend Mr. Stokes had laid down, or in any degree to depreciate the very great and important task which he had taken upon himself; but at the same time there were passages in his speech, and details of his aspirations, with which he (SIR E. BAYLEY) felt he could not altogether concur; such, for example, as the hope expressed that by codification we should be able to deal eventually with the question of infant marriages. That question, he personally believed, was not matter for legislative action at all. He was by no means prepared to concur in a measure of this kind, and, although in the main agreeing with his hon'ble friend, he wished to record his dissent from any such proposals.

The Hon'ble MR. STOKES explained that he had mentioned infant marriages merely by way of illustration of his meaning. He had expressly stated that the Government of India had no intention of passing any law on the subject.

The Hon'ble SIR EDWARD BAYLEY said he demurred even to the employment of such an illustration.

The Motion was put and agreed to.

The Council adjourned to Thursday, the 14th June 1877.

SIMLA,
The 31st May 1877. }

A. PHILLIPS,
*Secretary to the Government of India,
Legislative Department.*