Friday,
9th January, 1891

ABSTRACT OF THE PROCEEDINGS

OF THE

Council of the Governor General of India,

LAWS AND REGULATIONS

Vol. XXX

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OF

THE COUNCIL OF THE GOVERNOR GENERAL OF INDIA,

ASSEMBLED FOR THE PURPOSE OF MAKING

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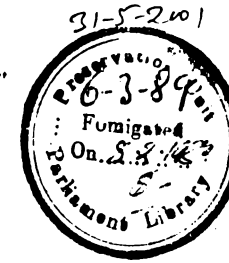

CALCUTTA
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1892

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 Vict., Cap. 67.

The Council met at Government House on Friday the 9th January, 1891.

PRESENT:

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

His Honour the Lieutenant-Governor of Bengal, K.C.S.I.

The Hon'ble Lieutenant-General Sir G. T. Chesney, K.C.B., C.S.I., C.I.E., R.E.

The Hon'ble Sir A. R. Scoble, Q.C., K.C.S.I.

The Hon'ble P. P. Hutchins, C.S.I.

The Hon'ble Sir D. M. Barbour, K.C.S.I.

The Hon'ble Khan Bahádur Muhammad Ali Khan.

The Hon'ble Sir Alexander Wilson, Kt.

The Hon'ble F. M. Halliday.

The Hon'ble Rao Bahádur Krishnaji Lakshman Nulkar, C.I.E.

The Hon'ble Nawab Ahsan-Ulla, Khan Bahádur.

The Hon'ble H. W. Bliss, C.I.E.

The Hon'ble Sir Romesh Chunder Mitter, Kt.

The Hon'ble G. H. P. Evans.

The Hon'ble J. Nugent.

NEW MEMBER.

The Hon'ble MR. NUGENT took his seat as an Additional Member of Council.

CATTLE-TRESPASS ACT, 1871, AMENDMENT BILL.

The Hon'ble MR. HUTCHINS presented the Report of the Select Committee on the Bill to amend the Cattle-trespass Act, 1871.

EASEMENTS BILL.

The Hon'ble SIR ANDREW SCOBLE moved that the Bill to provide for the extension of the Indian Easements Act, 1882, to certain areas in which that Act is not in force be referred to a Select Committee consisting of the Hon'ble Khan Bahádur Muhammad Ali Khan, the Hon'ble Mr. Nugent and the Mover.

The Motion was put and agreed to.

INDIAN MERCHANDISE MARKS ACT, 1889, AND SEA CUSTOMS ACT, 1878, AMENDMENT BILL.

The Hon'ble SIR ANDREW SCOBLE also moved for leave to introduce a Bill to amend the Indian Merchandise Marks Act, 1889, and the Sea Customs Act, 1878. He said;—

"When I introduced the Merchandise Marks Bill in 1888, I took occasion to say that the success of the measure would depend greatly on the extent to which the mercantile community co-operated with the officers of Government in carrying out its provisions, and I expressed the hope that that co-operation would be freely afforded in order to secure the efficient working of the Act without unnecessary friction or expense to the public. The Act has now been in force for nearly two years, and, I believe, I am justified in saying that, like the corresponding Statute in England, it has been beneficial to the commercial interests of the country, and that the Customs-authorities have carried out its provisions with great fairness, and with a due regard to the requirements of honest trade.

"It was to be expected, however, that novel legislation of this kind, which had a tendency to check the rapid delivery of imported goods, would produce at the outset some inconvenience to those whom it was designed to benefit; and representations were made to the Government by mercantile bodies both in England and India that certain difficulties had arisen in regard to the working of the Act, which might be removed without in any way diminishing the protection against fraudulent practices which the Act was intended to furnish. In February last a Committee consisting of three officers of the Government, a representative of the Bengal Chamber of Commerce, and a representative of the Calcutta Trades Association, was appointed by the Governor General in Council for the purpose of considering these representations, and the last paragraph of the report of the Committee, which was submitted in March last, contained the following recommendations:—

'(1) We consider that a section should be inserted in the Act giving power to the Governor General in Council to define from time to time the term "piece-goods." Such an amendment is required to give statutory effect to the regulation we have proposed that only certain goods should be treated as piece-goods.

'(2) It has been suggested to us that it is a hardship to require in section 10 of the Act the name of both place and country on goods not made in the United

Kingdom or British India. We think the objection reasonable and that it is sufficient to require the name of the country. We recommend that section 18 (*e*) be amended accordingly.

'(3) We recommend the insertion in the Act of a section giving the Governor General in Council such a power with respect to yarns and certain other goods as in the case of petroleum is given to the Local Governments by section 8 (*1*) (*e*) of the Petroleum Act, XII of 1886.

'(4) We also recommend the insertion in the Act of a provision similar to that contained in section 125 of the Indian Evidence Act, 1872, as amended by Act III of 1887. We make this suggestion because we think it desirable that Customs Collectors should not be compelled to disclose the names of their informants.'

"The Governor General in Council accepted the suggestions of the Committee; and the object of this Bill is to give effect to those suggestions.

"With regard to the first point, I may say that the provision for stamping the length on all 'piece-goods, such as are ordinarily sold by length or by the piece,' though introduced at the express request of the Chambers of Commerce in this country, has been found to have too wide an application. It is proposed therefore to empower the Government, in making regulations under the Act for the guidance of Customs-officers, to declare what descriptions of goods are to be treated as piece-goods for the purposes of the Act. A list of such goods has been carefully prepared by the Committee, and may be added to, from time to time, as occasion may require.

"Upon the second point, the Indian Act goes beyond the English Statute in requiring both the place and the country in which a foreign article has been manufactured to be indicated. A Parliamentary Committee, which has recently been enquiring into the working of the English Act, has reported that, although the substitution of the words 'made abroad' for the actual indication of the country in which the goods were produced could not be allowed, yet 'the name of the country might be held to be a sufficient indication of origin, without in all cases insisting on the name of the particular place in which the goods were made.' The Bill will, therefore, bring the Indian into conformity with the English law in this respect.

"The third amendment relates to the making of rules for testing whether goods which purport or are alleged to be of uniform number, quantity, measure,

gauge or weight, really answer their description. This is particularly necessary in regard to yarns.

"The last amendment extends to Customs-officers the same protection in regard to proceedings under this Act which they already enjoy with reference to offences against the public revenue. It is, I think, obvious that they should not be compellable to say from whom they have got their information, as otherwise persons would be chary of putting them on the track of breaches of the law."

The Motion was put and agreed to.

The Hon'ble SIR ANDREW SCOBLE also introduced the Bill.

The Hon'ble SIR ANDREW SCOBLE also moved that the Bill and Statement of Objects and Reasons be published in the Gazette of India in English, and in the local official Gazettes in English and in such other languages as the Local Governments think fit.

The Motion was put and agreed to.

INDIAN PENAL CODE AND CODE OF CRIMINAL PROCEDURE, 1882, AMENDMENT BILL.

The Hon'ble SIR ANDREW SCOBLE also moved for leave to introduce a Bill to amend the Indian Penal Code and the Code of Criminal Procedure, 1882. He said:—

"Under section 375 of the Penal Code, the offence of rape is constituted when a man has sexual intercourse with a woman under certain specified circumstances, one of these being when the intercourse takes place, with or without the consent of the woman, when she is under ten years of age. No exception is made in favour of married persons, but, on the contrary, it is provided that sexual intercourse by a man with his own wife, the wife not being under ten years of age, is not rape, that is to say, that her consent will not liberate her husband from the operation of the general law, unless she has attained the age at which consent may be given by women as a class. The proposal in the Bill which I now ask leave to introduce is to raise the age of consent, both for married and unmarried women, from ten to twelve years.

[9TH JAN., 1891.] [*Sir Andrew Scoble.*]

"I think it desirable to state at the outset that no new offence will be created by the Bill. This disposes of the argument, which I have seen put forward in some quarters, that the existence of the marital relation renders it impossible for a man to commit a rape upon his own wife, because it is of the essence of the offence that the carnal knowledge of the woman should also be unlawful and this cannot be the case between husband and wife, because of the matrimonial consent which she has given. That such intercourse may be unlawful under certain circumstances is established by the Penal Code,—it has been the law in India under that Code for more than thirty years,—and the reason for it is thus given by the Indian Law Commissioners:

'There may be cases in which the check of the law may be necessary to restrain men from taking advantage of their marital right prematurely. Instances of abuse by the husband in such cases will fall under the fifth description of rape.'

"I do not suppose that any one will question the right and duty of the State to interfere, for the protection of any class of its subjects, where a proved necessity exists for such interference; and I shall therefore proceed to state briefly the reasons which have led the Government of India to propose this amendment of the law.

"The object of the Bill is two-fold. It is intended to protect female children (1) from immature prostitution, and (2) from premature cohabitation.

"As regards the first aspect of the proposal, which affects all classes of children, Europeans as well as Natives, there can scarcely be any ground of objection. The *Indian Medical Gazette* for September, 1890, states—'Very cursory observation in Calcutta suffices to indicate that females are trained and prepared for a life of vice from a very tender age;' and what is said of Calcutta may, I fear, be said of other parts of the country. The consent of a girl so trained would be a matter of course, and it would be intolerable to allow the reprobate who had ravished her to escape from well-merited punishment on the ground that his victim had consented to the outrage.

"With regard to the second aspect of the proposal, which is equally wide in its scope, the suggestion has been made that to prohibit premature cohabitation is an interference with the religious law of the Hindus. It seems therefore desirable to explain that no interference with the Hindu law of marriage is intended, or will be occasioned, by this measure. The question of child-marriage has been discussed, from both points of view, by men of great erudition and authority: but

it is not necessary for me to attempt to decide between them, for the question of child-mariage is left untouched by this Bill. I will, however, venture to say that, out of all these discussions, two propositions have emerged and stand established. The first is that the sages enjoin, and the custom of many castes requires, that a girl should be given in marriage before she attains puberty; and the second, that the Shastras denounce in the strongest terms, and award the most terrible punishments, both here and hereafter, to the sin of connection with an immature girl. I scarcely think that sufficient stress has hitherto been laid on the latter proposition. In an eloquent appeal to his fellow-countrymen, Pundit Sesadhur Turkachuramoni thus states the orthodox doctrine:—

'It is true we advocate early marriage (but not before the eighth year), but we condemn the custom of cohabiting with a wife before she has attained puberty. We do not support early marriage of boys. We believe it to be a great sin to cohabit with a girl before her puberty, and we believe it to be the terrible cause of our degeneration. We know that Hindu society does not believe this custom to be a great sin, and hence the degradation of the Hindus.'

"It seems to me therefore that I am justified in saying that the teachings of the sacred books of the Hindus are not in conflict with the proposals of the Bill; if modern practice, under the guise of religious observance, disregards and violates those teachings, it cannot be allowed to invoke them to justify its own disobedience to their commands.

"A better argument, or rather an argument that would be better if it were well-founded, is that the Bill is not necessary, in the first place, because the mischief intended to be guarded against is not of common occurrence, and, secondly, because the existing law is sufficient to punish the infrequent cases that occur. I am unfortunately not able to accept either of these contentions.

"Upon the first point I readily admit that the practice is not equally common in all parts of India, and that among the more enlightened classes everywhere it is viewed with increasing disfavour. But as regards Bengal, for instance, Sir Steuart Bayley reports that—

'it is a general practice for Hindu girls, after they are married but before puberty is even indicated, much less established, to be subjected to more or less frequent acts of connection with their husbands. The custom appears to be widespread—less universal among the higher than among the lower classes of Hindus—but it prevails generally over Bengal Proper, especially over Eastern and Central Bengal. It does not extend generally to Behar, nor is it prevalent in Orissa, and the aboriginal tribes are apparently free from it.'

"If this testimony stood alone, I submit, the necessity for legislation would be made out, but there is no doubt that the evil is not confined to Bengal. Where it exists, it should be dealt with as an offence; where it does not exist, the law will have no operation.

"Then, is the law already sufficient? To put it crudely, I should say that a law which permits a full-grown man to violate with precaution a little girl of ten years of age cannot be considered sufficient, except from the ruffian's point of view. 'Female children under the age of puberty,' says Dr. Macleod, in an able paper recently read by him before the Calcutta Medical Society, 'are physically unfit for sexual intercourse, and such intercourse with sexually immature female children, under any circumstances, should be declared an offence punishable by the law.' That is a perfectly intelligible proposition, and is the proposition which I am asking this Council to adopt. But what is the existing law, as laid down by one of the ablest of our Judges in Hari Maiti's case? After pointing out that the law of rape was not applicable, as the girl was over ten years of age, Mr. Justice Wilson goes on to say—

'From that follow certain consequences. One is that, in cases to which the law of rape is not applicable, neither Judges nor juries have any right to do for themselves what the law has not done—I mean not done with reference to girls above the age of ten, that is, to lay down any hard-and-fast line of age, and to say, we think that when sexual intercourse takes place with a female below such an age it is dangerous and must be regarded as punishable, and when sexual intercourse takes place with females above that age it is safe and must be regarded as right. We have no right to do that, because the law has not done it, and therefore in cases of sexual intercourse with females above ten years of age, but of whom it is alleged that they are so immature as to render sexual intercourse dangerous, we cannot take the simple and easy method, as in cases of rape, of enquiring merely into the age of the girl. We have to enquire into all the circumstances of each individual case. And, secondly, when we come to apply the law to the facts of each case, we have no hard-and-fast line drawn for us as in the case of rape, in which the fact of sexual intercourse is the only matter to be enquired into; but we have to do with a wholly different class of evidence, involving many delicate considerations, of intention, of knowledge, of rashness, of negligence and of consequences. . . . . In such cases, we have not to do with any general question as to what is the usual age of puberty, or what we should say, if attempting to lay down a general rule, is the safe age for the consummation of marriage. We have simply to do with the facts of the particular case on the evidence, and to say whether, having regard to the physical condition of the particular girl with whom sexual intercourse was had, and to the intention, the knowledge, the degree of rashness or of negligence with which the accused is shown to have acted on the

occasion in question, he has brought himself within any of the provisions of the criminal law?

"Now I put it to the Council whether all these difficulties ought to be interposed in the way of giving effectual legal protection to these poor little girls, and whether we ought not to lay down a hard-and-fast line, as the learned Judge calls it, whereby enquiries into cases of this class may be simplified, and the people generally may be brought to understand that the exercise of marital rights must be restrained where restraint is necessary for the protection of the wife. I have already shown that the Legislature has a right to impose such a limit. Again to quote Mr. Justice Wilson,—

'Under no system of law with which Courts have had to do in this country, whether Hindu or Muhammadan or that framed under British rule, has it ever been the law that a husband has the absolute right to enjoy the person of his wife without regard to the question of safety to her.'

"The question then remains—what ought that limit to be?

"The proposal of the Bill is to draw the line at twelve years. This is the age which has been advocated by those who have for many years been endeavouring to educate public opinion on the subject. And there appear to be valid reasons for the recommendation. It is in accordance with the practice which already prevails in some parts of India. In a numerously signed petition from Poona, against raising the age of consent, it is stated that consummation of marriage seldom takes place before the girl is twelve years old. In Madras it is alleged that premature cohabitation is of rare occurrence, and in the Punjab conjugal life ordinarily begins after sexual maturity. The Hindu law, as I have already shown, while enjoining the marriage of girls before they attain puberty, strictly prohibits the consummation of marriage before puberty is attained. According to Muhammadan law 'puberty and discretion constitute the essential conditions of the capacity to enter into a valid contract of marriage.' With both the great divisions of the population in India, the attainment of puberty may be taken as determining the appropriate age for consummation of marriage. When, then, is the period at which in the ordinary course of nature puberty is commonly attained by girls in India? There has been much discussion on this subject among medical men, and many are of opinion that a girl is not competent physically or mentally to give her consent to sexual intercourse until she has completed fourteen years of age. But to adopt this limit would involve too abrupt a fundamental revolution in the social life of India; and to

attempt to enforce it by legislation would almost certainly fail of its object. I prefer to submit for the approval of the Council the more moderate view expressed by Dr. Macleod in the paper from which I have already quoted. Speaking of the period of life at which sexual maturity is attained, he says—

'Hitherto the appearance of menstruation has been held to indicate this epoch in the life of a female; and, allowing for the present that it does so in the great majority of cases, what evidence do we possess regarding the age at which menstruation commences in the females of this country? Sushruta, the Hindu sage and physician, lays down that the menstrual discharge begins after the twelfth year, and that is the age laid down for marriage by the great Hindu law-giver Manu. Dr. Allen Webb collected statistics on the subject, and the result, as stated in his *Pathologia Indica*, was that, "out of a list of 127 Hindu females, menstruation began only in six girls under twelve years of age; and as many of them did not again menstruate until a year after this—which they believed a first appearance—it is probable, as suggested by Babu Modusudan Gupta, that a ruptured hymen would better account for that." I am not aware of any other statistics on this subject, but twelve years may, I think, be accepted as the earliest period of appearance of the menses, and probably thirteen would be a safe average. In England, fourteen years is held to be the most frequent age of menstruation, and it is held by law to be a felony to have sexual intercourse with a girl below that age. Making all due allowance for climatic and racial differences, and bearing social customs in mind, it would seem reasonable and right that the age of protection should be raised in this country from ten to twelve.'

"On the ground, therefore, that the age of twelve years approximately may be considered as the average age for consummation of marriage, both according to law and custom, on the one hand, and, on the other, as the lowest safe age as regards physical fitness, I venture to think that the line may be drawn at that age without doing violence to any respectable social usage, or to the religious law, of any portion of the community. And, though this age may be considered by some too low, it must be borne in mind that, while this amendment of the law will afford absolute legislative protection to girls up to the age of twelve years, the remedies of the existing law in regard to cases of brutality will remain available to girls above that age.

"Two other objections to the proposed amendment of the law remain to be considered. In the first place, it is feared that it may lead to the invasion of the privacy of families by the police, not so much for the detection of crime as for the purpose of extorting blackmail. I have found this apprehension so widely entertained that, whether it is justified or not, I think it deserves consideration. I therefore propose that offences by a man against his own

wife under the amended section shall be non-cognisable, that is to say, that police-officers may not arrest without warrant, but proceedings must be taken by summons, and bail may be accepted. This concession, I hope, will remove all ground of alarm on this account.

"The other objection is that legislative action is not likely to have much direct result. This may be so; but for my part I shall be content if the effect of legislation is mainly educative—if it strengthens the hands of fathers of families for the protection of their daughters, and modifies custom so as to diminish the opportunities and incentives which are now afforded for indulgence in this pernicious practice. I cannot, moreover, forget that it was pointed out long ago by Dr. Chevers that the existing law has done mischief to those whose interests it was designed to protect, by fixing too low an age; and I agree with the late Lieutenant-Governor of Bengal in the opinion that though it may not be probable or even desirable that many cases will be brought into Court, yet, if the enforcement of the husband's rights upon a girl below twelve years of age is stigmatised by the law as rape, and it is publicly recognized that those who abet such assaults render themselves liable to punishment, a great improvement will surely be effected, not only in the condition of the class for whose protection the Bill is primarily designed, but in the physical and social well-being of the people at large."

The Hon'ble SIR ROMESH CHUNDER MITTER said:—"The proposed amendment of the *exception* to section 375 of the Indian Penal Code is likely to cause widespread discontent in the country. If it were necessary to protect child-wives from personal violence, or if it were not a departure from the wise and just policy of the Government not to interfere with the religious rites and duties of any portion of the subjects where such interference is not needed for the repression of crimes, or even if it had the effect of remedying to an appreciable degree the evils of early marriage, I should have been very glad to support it.

"So far as the protection of child-wives from personal violence is concerned, they are now sufficiently protected by the provisions of the existing criminal law.

"A husband under the existing law would be criminally liable for acts which constitute an offence of causing death by doing a rash or negligent act, of hurt simple and grievous or of assault against his wife, even if they were done with her consent if she be under twelve years of age. The existing law

therefore affords sufficient protection to a wife under twelve years of age from violence from her husband.

"The proposed measure would be a departure from the wise and just policy of the Government referred to above, because it would interfere with the religious rites and duties of the orthodox Hindus. I desire to be understood that my observations here apply to the orthodox Hindus domiciled in Bengal Proper. Whether they apply to orthodox Hindus domiciled in other parts of the Empire I cannot say.

"In Bengal Proper the orthodox Hindus are guided by the interpretations of the Shasters given in Rughu Nundun Bhattacharjea's *Ashtubinghastti Tuttos*. Whether these interpretations are correct or not is, I venture to think, a question with which legislators in this country should not concern themselves.

"So long as the orthodox Hindus continue to accept this work as containing a correct exposition of their Shasters, we must look to it to ascertain the views of the Shasters upon any particular subject. It is for the social and religious reformers to discuss whether or not the book in question interprets the Shasters correctly. It is upon this line that the question of the propriety of abolishing early marriage amongst the Hindus is being discussed now. But, as I have said, we must refer to this work to ascertain whether the proposed measure would or would not interfere with the religious rites and duties of the Hindus in certain cases.

"Rughu Nundun, in *Sanscar Tawtwa*, treating of *Garbadhan* ceremony, lays down that the proper period of the consummation of the marriage is when the wife attains the age at which a certain well-known physical condition occurs, and the husband would commit a sin if he does not then consummate it. Now, in this country this physical condition is reached in certain cases before the age of twelve.

"In these cases the orthodox Hindu husbands, if the proposed amendment be adopted, would be placed in this dilemma—either they must break the law or disregard the injunctions of the Shasters. It is true that the hold of the Shasters upon the minds of the educated persons, at least so far as the ceremonial portion is concerned, has been to a great extent loosened, and many educated persons amongst the Hindus do not observe the *Garbadhan* ceremony in their families. But the proportion of such families to the strictly orthodox families in which it is observed is small. Although the former do not ob-

serve this ceremony in their families, still they disapprove of the present measure, because it is a departure from the non-interference policy hitherto observed by the Government and guaranteed by the great Proclamation of 1858, which says :—

'We do strictly charge and enjoin all those who may be in authority under Us, that they abstain from all interference with the religious belief or worship of any of Our subjects on pain of Our highest displeasure.'

"Then again, although it is proposed to make the offence when committed by the husband upon his own wife under the amended section non-cognizable, still it would be liable to be abused and be a source of annoyance and molestation in some cases.

"In villages, where party strifes sometimes rage very high, it is not altogether improbable that a judicial officer might be induced to institute criminal proceedings under this section, his suspicion having been aroused by anonymous communications.

"According to the English law as hitherto laid down in decided cases, a husband cannot under any circumstance commit rape upon his own wife, though this proposition has been incidentally doubted in a recent case in which the particular question did not arise. I am not aware whether in any other civilized country a husband can be held guilty of rape upon his own wife.

"It is an offence which, having regard to the considerations upon which its criminality is founded, a husband should be held incapable of committing. Some of these considerations are obviously the preservation of female chastity and the prevention of indelible disgrace upon the husband and the family to which the outraged female belongs. These considerations cannot apply to a husband.

"It is an anomaly in the Indian Penal Code that a husband under certain circumstances may be guilty of rape upon his own wife. That provision is, however, a dead letter. Since 1860, when the Penal Code was passed, I am not aware of a single conviction under this part of section 375. If the amended section is also likely to prove a dead letter, there is no need for enacting it. If it be, on the other hand, effective in bringing about convictions, even in a small number of cases, the consequences of such convictions upon the marriage relation of the parties would be very deplorable. Could the marriage relation in these cases after the convictions be in any sense happy or cordial? Still the marriages, if they are Hindus, are indissoluble.

"If any amendment of the Code is needed for punishing an offender who is not the husband of the outraged girl, that may be easily done by substituting twelve for ten in the fifth clause of section 375. It is open to doubt whether, reading section 375 with section 90 of the Code, the age of consent as regards persons other than husbands is not already twelve years. But to remove this doubt there cannot be the slightest objection to any amendment which would raise the age of consent in these cases to twelve. But I venture to think that the proposed amendment regarding the husband's criminality would cause widespread discontent in the country and would be a departure from the policy to which I have referred in the beginning.

"The degree of discontent that is likely to be caused may be, to a certain extent, realized if we take a parallel case. Suppose in Great Britain an endeavour be made by legislation to enforce the custom of cremation instead of burial, on the ground that the former is far better from a sanitary point of view: what would be the state of the feeling of the people? It seems to me that legislation upon subjects like these must wait till the public opinion is sufficiently educated. In this connection I may be permitted to throw out a doubt that the proposed measure is likely to put back reformation in the marriage system of the Hindus, which was being slowly and silently effected. The orthodox and the advanced parties were gradually approaching to a common point of agreement. But the agitation in England has had a very baneful effect upon the prospects of the views of the two parties being reconciled to one another, and the proposed measure, I regret to say, would widen the breach still more.

"These are some of the consequences that I apprehend would follow from the proposed measure. On the other hand, no appreciable benefit would be gained thereby."

The Hon'ble RAO BAHÁDUR KRISHNAJI LAKSHMAN NULKAR said:—"I wish to support the Motion that leave be granted to introduce this Bill, inasmuch as it will afford, to a certain extent at least, protection against physical violation of a class of helpless children among large sections of the population.

"As to the religious objection pointed out by my Hon'ble friend, I doubt not that he must be accepted as one of the best authorities on that point. But I would beg to observe that Hindu religious authorities on such matters are so varied and contradictory that it is often difficult to decide as to which of them

ought to be accepted and followed in preference to others. I am aware that the practice of the Courts of law has been to administer such of the provisions as may be found to be generally received and acted upon by the communities concerned. It must, however, be remembered that this practice has often led to the Courts lending themselves to the sanction of practices directly opposed to justice, equity and good conscience; and consequently the Legislature has often felt it to be its bounden duty to step in and amend the law. In the present instance, granting that the Hindu law, as enunciated by my Hon'ble friend, is really claimed to be strictly and invariably followed in any part of India, it is one of those provisions which I think ought to be disregarded in the interests of humanity. I do not, however, admit that it is of the binding character claimed for it. There are other provisions for which a much greater authority and sanctity could be justly claimed, according to which marriage itself is not lawful until a much higher age than that which the proposed Bill provides as the age of consent for consummation.

"As to the unpopularity of the measure, it is very probable that in certain quarters and in certain sections of society it will be at first viewed with disapprobation, and it may even be made the occasion of false alarm. But I feel certain that such a feeling would be temporary, traceable directly to the false issues raised in the course of the heated controversy which has been going on for some years past between social reformers on the one side and those who claim to be conservatives on the other. It is the country's misfortune that the one party should have often overdone their part by appealing for legislative aid in matters which lie quite outside the ordinary functions of the Legislature, and in which it is the duty of society to provide remedies. The other party has naturally retaliated by crying down any legislation whatever, apparently because it was asked for by their opponents. Indeed, these latter have done some harm by claiming the measure now under consideration as specially belonging to their programme of social reform. As a matter of fact, it has as little direct connection with social reform as any other provision of the Penal Code. It simply seeks to remove a glaring defect in the criminal law of India. This true character of the measure will soon become clear to the public, as they have time to consider its nature and effect calmly and dispassionately; because I feel certain that, but for the fact that it was mixed up by one of the parties to the social reform controversy with their demands for all manner of legislative props to their plans, we should never have heard of any misconception on the subject, much less opposition to such an extremely moderate increase of the age of

consent. Indeed, it is extremely probable that, if twelve or even fourteen years had been provided for in the original Penal Code thirty years ago, it would have passed unchallenged by the general public."

His Excellency THE PRESIDENT said:—"I do not think it necessary to add to what has already been said in defence of the Bill on the table except perhaps to the extent of observing that, while we shall always recognize the high authority which attaches to any observations falling from the lips of our Hon'ble Colleague Sir Romesh Chunder Mitter, the Government of India, for the reasons urged by the Hon'ble Member in charge of the Bill in his opening statement, cannot admit with him that the existing criminal law is sufficient for the purpose of affording protection to those whom we propose to protect under this Bill. Nor can we accept his view that the Proclamation of 1858, which the Government of India regards as in the highest degree obligatory upon it, can be considered as absolutely precluding us from interference, simply because for the purposes of this Bill the same protection is extended to married as to unmarried children. Nor, again, can we join with him in thinking that because there have been no prosecutions under the existing section of the Penal Code with its ten-year limit of age, that section can be regarded as having no effect, or, as I think he described it, a 'dead letter.' I believe that I shall be confirmed by those who are more familiar with Indian legislation than I am when I say that the effect of the law in this country is often valuable quite as much for its educative operation as for any results which it may lead to in the matter of legal proceedings or prosecutions. These, however, are points which can be more conveniently discussed at a later stage in the Bill. My object in now addressing the Council is to place Hon'ble Members and the public in complete possession of the views of the Government of India, not so much with regard to the special question dealt with in this Bill, as with respect to certain other matters which are to some extent connected with it in the mind of the public.

"The Hon'ble Member in charge of the Bill has very properly insisted that it does not in any way affect what may, for convenience sake, be spoken of as the marriage law of this country. There is, as far as I am aware, no social or religious custom, or observance, in force among the Hindu community to which this Bill does the slightest violence. We propose merely to protect from the unquestioned evils of early prostitution, or premature sexual intercourse, that great body of the female children of India which lies between

the age of ten, up to which the present law affords them protection, and the age of twelve, up to which we propose that such protection should be extended. Our measure affects the marriage usage only in so far as this protection extends to a married as well as to an unmarried child. Under the law, as it now stands, no distinction is made between them for this particular purpose, and we do not propose that, as a matter of principle, any such distinction should be introduced now. The immaturity of a young girl does not vary according as she is married or not, and we cannot, therefore, consistently give protection to the one class and deny it to the other. That is the beginning and the end of the connection of the Bill upon the table with the marriage law of India.

"It is, however, within the knowledge of Hon'ble Members—and our Hon'ble Colleague Mr. Nulkar has dwelt with great force upon the point—that the proposal embodied in the Bill has recently been associated with other proposals widely different from it—proposals which do most distinctly affect the marriage law and the religious and social institutions of the Hindus. This association has been so closely maintained that the whole group of questions has come to be regarded as indissolubly connected, and it is inferred that, if the Government of India intends to deal with any one part of the subject, we are to a certain extent committed to deal with the rest.

"I desire to correct this misapprehension, and, if Hon'ble Members will allow me, I propose to place them and the public in full possession of our intentions, and to tell them exactly, not only what we propose to do in regard to the group of proposals to which I have referred, but also what we propose to leave undone.

"The proposals to which I refer, and which have lately been brought prominently under our notice, are to be found in a series of Resolutions lately submitted to the Government of India by an English Committee, numbering amongst its members many persons occupying conspicuous positions in public life, and connected at one time or another with high official employments in this country. It is impossible to feel any doubt as to the sincerity of this distinguished body of reformers, or as to the excellence of the objects at which they are endeavouring to arrive. If we do not entirely agree with them in their conclusions, it is only because, being, as we are, in closer contact than most of them with public opinion here, we realise more fully than they can the extreme gravity

of any steps of which it might be truly said that they involve interference with the religious or social institutions of any large section of the inhabitants of India.

"I will, for the sake of convenience, refer in order to the Resolutions adopted by the Committee, and by it submitted to the Secretary of State for India and the Indian Government.

"The first of these Resolutions is in favour of raising the age of consent to twelve. That is the proposal embodied in our Bill, and I need not refer further to it except for the purpose of mentioning that we decided to take this subject up early in the month of July last, and consequently long before we were aware of the movement which had been set on foot in England.

"I may also point out in passing that, in one most important respect, our Bill, in so far as it affects husbands and wives, affords to them a degree of security against undue or inquisitorial interference which they do not at present possess. It does so in the following way:—My Hon'ble friend has explained that in order to minimise the risk of private persecution, or of blackmailing by the police, the offence dealt with by the Bill has, in all cases where the husband is the person accused, been made non-cognizable. As the law now stands, with the lower limit of age, it is a cognizable offence even if the husband is the person who has committed it. While therefore we have in one sense rendered the law more stringent by increasing the age limit, we have in another sense greatly increased our precautions against an abuse of the law, and given the advantage of this new security to a large number of persons who are at present entirely without it.

"The second Resolution suggests the so-called 'ratification' of infant marriages 'within a reasonable time of the proper age,' with the condition that marriages not so ratified shall be set aside. This proposal has, I understand, received a considerable amount of support in influential quarters. I do not, however, think that those who have advocated its adoption can have realised the tremendous gravity of the step which they recommend. It is no exaggeration to say that such a change in the law would simply revolutionise the social system of the Hindus. We are all aware that in their estimation a marriage contract, no matter at what age it is entered into, is of the most absolutely binding and sacred character. To enact that such a contract should subsequently be made revocable, or, in other words, that the original contract should

become little more than a formal betrothal, would involve an interference with the domestic institutions of the people of India, which neither my colleagues nor I are prepared to admit. To justify such interference upon the ground that it would to some extent assimilate the law in India to what used to be the common law as to child marriage in Christian Europe appears to me to be entirely beside the mark. I am, moreover, altogether at a loss to conceive how such a law, supposing it to have been passed, could be enforced, and I observe that even the authors of the Resolution admit that the change could not be made without consulting native Indian opinion, and that they throw out the further suggestion that, should the proposed change meet with serious opposition, it could, in the first instance, be made binding only on such classes of the community as might formally place themselves under it.

"The third Resolution has reference to the much debated subject of suits for the restitution of conjugal rights. It is urged that such suits in their coercive form are open to serious objection, and that the law under which a decree for the restitution of conjugal rights may be enforced by imprisonment should be amended. The Government of India is invited to 'reconsider the whole subject with a due regard to the marriage law and the habits and customs of the people of India.' I am in a position to say that the Government of India have already, on more than one occasion, given to this matter that reconsideration for which the authors of the Resolution have asked. The subject is one of extreme intricacy, and it would be impossible, within the limits of these observations, to deal with it satisfactorily, but I may say that the result of our enquiries has been to satisfy us that suits for restitution are common only in a few localities, and that in these they are usually confined to the lower classes of society, which naturally regard such suits from a point of view different from that of their superiors in social status. We have therefore had to consider how these classes would be affected were we to deprive them absolutely of any of the remedies which the law now affords.

"Now, it must be borne in mind that in cases where the husband or wife has property, the Court already has power to attach it, and after a limited time to award compensation to the suitor. It can, therefore, only be in cases where there is no property that any necessity can arise for enforcing the decree by imprisonment, and in such cases imprisonment is probably often the only remedy available. We are of opinion that a serious injustice would be done to the poorer classes of suitors, were it to be enacted that under no circum-

stances shall this remedy be resorted to. Such an enactment would encourage lax customs in respect of marriage where the customs are already deplorably lax, and where it should be our object to render the marriage tie more binding than it is at present. Whatever be the opinion of the more educated members of the community, we have no reason to believe that among the poorer classes the enforcement of a decree for restitution by imprisonment of the wife or husband at the discretion of the Court is looked upon by either party as an outrage. We think, however, that the existing law is capable of improvement. At present the law leaves it to the decree-holder to demand imprisonment as a means of enforcing the decree, and, if he does so, the Court has no option. We think that such an option should be given, and that it would suffice if a proviso were inserted in section 260 of the Civil Procedure Code empowering the Court to refuse to consign a recusant wife or husband to imprisonment, or, should the Court order imprisonment, to restrict the term to such period as it might think fit. We do not, however, regard this question as one of immediate or urgent importance, and we propose to deal with it whenever we next have occasion to revise the Civil Procedure Code. We see at any rate no reason for undertaking legislation in regard to this point concurrently with that which will be necessary with reference to the wholly distinct question dealt with in the present Bill.

"The fourth Resolution has reference to the remarriage of widows, and asks that the legal obstacles that still stand in the way of this should be removed. In regard to this, two proposals are made. Of these the first is that we should alter the law as it is expressed in section 2 of Act XV of 1856, under which a widow forfeits her interest in her deceased husband's property on her remarriage. Now there can be no doubt that this section often has the effect of placing a Hindu widow who marries again in a most lamentable position—a position which is all the more pitiable because, as pointed out by the framers of the Resolution, it is a worse position than that of the widow who, without remarrying, leads an unchaste life. The section is, however, one which we are certainly not prepared to repeal. During the course of the long discussions which have taken place in regard to this branch of the subject, nothing has been more clearly established than that the right given to a widow in her husband's estate is one which she enjoys under very strict and special limitations. She is allowed to assume an interest in her husband's property, not as its natural heir, or with the idea that she is to be free to enjoy it in such a manner as she may deem fit, but because

she is regarded as specially responsible for the performance of certain religious acts essential to the well-being of the deceased—acts which she could not adequately perform if by a fresh marriage she were to become the wife of a different person. This aspect of the question was thoroughly considered at the time when the Act of 1856 was discussed in the Legislative Council, and I will venture to read an extract from a speech delivered upon that occasion by Sir James Colville, who has expressed in language more appropriate than any which I can command, and with an authority to which I cannot pretend, what seems to us to be the sound view of the case. Sir James Colville said:—

'The right thus taken by the widow in her husband's estate was a very peculiar one, and very limited in enjoyment. She had not full dominion over the property, for she could not alienate any part of it except for purposes of strict necessity, or for such pious uses as contributed to the spiritual benefit of her husband. In fact, the law gave it to her not for her own benefit, but from the notion that her prayers and sacrifices, and the employment of his wealth in religious and charitable acts, would be beneficial to her deceased husband in another state of existence. If then this Bill had enabled her to carry into the arms of another man, or into another family, the property which she had so acquired, its opponents might reasonably have objected to it, that it would aggravate those mischievous consequences which often flow from the law as it exists, and that, contrary to Hindu law and Hindu feeling, it enabled the widow to enjoy her deceased husband's estate freed from the condition and the trusts upon which alone the law gave it to her.'

"This view of the case is, I apprehend, as sound at the present time as it was when Sir James Colville's words were spoken, and we do not propose to make any departure from the wise policy embodied in the passage which I have just read.

"The second of the alleged obstacles is said to arise from the insufficiency of the protection afforded to widows desiring to remarry under section 6 of the same Act, which runs as follows:—

'Whatever words spoken, ceremonies performed, or engagements made, on the marriage of a Hindu female who has not been previously married, are sufficient to constitute a valid marriage, shall have the same effect, if spoken, performed, or made, on the marriage of a Hindu widow; and no marriage shall be declared invalid on the ground that such words, ceremonies, or engagements, are inapplicable to the case of a widow.'

This section was obviously intended to afford facilities for such remarriages by giving them validity in spite of any ecclesiastical opposition which they might encounter. These facilities are, however, it is stated, of no avail in consequence of the refusal of the Hindu priests to perform the necessary marriage

ceremonies, and it is suggested tentatively that the State might perhaps provide a form of civil marriage before a Registrar for women desiring to contract a second marriage.

"I am constrained to express my opinion that those who propose to overcome this obstacle by the adoption of such a remedy have altogether underrated the extent of the difficulty with which they have to deal. In order to explain my meaning, I cannot do so better than refer to the manner in which the same point has been dealt with by a well-known writer on Indian subjects who has lately published in the London *Times* a series of papers dealing with these subjects. The writer of these papers sums up his conclusion by advising us not to provide an alternative form of marriage, but to take steps in order to afford protection to individual Hindus who desire to avail themselves of the civil rights already granted to them by British-made Acts against the public penalties inflicted upon them by the Hindu ecclesiastical law, and he explains, in more than one eloquent passage, that the whole of the disabilities under which Hindu women at present suffer in this respect arise from the shortcomings of our legislation, 'which allows the Hindu ecclesiastical law to inflict penalties upon Hindu women for the lawful exercise of their civil rights.' He tells us that the remedy for this state of things 'lies within the power of the Anglo-Indian Legislature,' and that 'the Hindu ecclesiastical law should forthwith be deprived of its power to legally punish women for the lawful exercise of their civil rights.'

"Now I think Hon'ble Members will agree with me that when we speak of Hindu ecclesiastical law, and of legislation for the purpose of depriving it of any of its powers, we should keep before us a clear conception of that which is meant by the expression 'Hindu ecclesiastical law;' and fortunately the writer of the papers from which I am quoting has himself supplied us with an adequate definition, for he proceeds to explain that by the term 'Hindu ecclesiastical law' it is his intention to sum up 'the complex growth of ordinance, usage, and procedure, which forms the religious side of the caste system, as distinguished from its social and commercial aspects.' The struggle therefore upon which the Indian Legislature is invited to embark is a struggle with no less an opponent than the whole system of Hindu religious caste. The hopelessness of such a contest in reference to issues of this kind, even if we were not deterred from it by other considerations, becomes evident if we consider the nature of the penalties by which the edicts of this so-called ecclesiastical law are enforced. What then are

those penalties? We are informed by the same authority that the penalties which the Hindu ecclesiastical law, as thus defined, inflicts upon a couple who have the courage to avail themselves of the Marriage Act of 1856, are threefold. The first of these penalties is, he explains, a social one. The married couple, and such of their friends as have abetted their marriage, are cut off from social and domestic intercourse with their families and caste people. With this penalty the writer frankly admits that 'it would be practically impossible for the British law to interfere.' We may therefore assume that, whatever legislation we may resort to, this penalty, with all its terrors—and it is not easy to overestimate them—will remain in force. It is explained, however, that there are also two religious penalties,—'the woman is denied admission to the temple for the performance of her habitual religious duties, as if she were living in open sin;' and besides this 'an act of excommunication may also issue against the married couple and their abettors, which completely cuts them off from all rights and privileges to which they were entitled as members of a Hindu caste.'

"It is against these penalties that we are asked to protect those who are liable to them, and I gather from what follows that it is intended that such protection shall take the shape of a change in the law which would render any attempt to enforce such penalties punishable under the Penal Code.

"We have anxiously considered this suggestion, and the conclusion which forces itself upon us is, first, that we should not be justified in attempting so far-reaching an innovation as that which would, for example, be involved in compelling the admission of any person to the places of worship of the Hindus in opposition to the religious scruples of the rest of the community. And in the next place we are convinced that any attempt to resort to such legal compulsion would be absolutely illusory so long as the social excommunication, with which it is admitted that we should be powerless to interfere, remains in force. The social and the religious excommunication are two forms of one and the same thing, and, so long as Hindu opinion remains what it is upon these subjects, any attempts to remove either religious or social disabilities in cases such as that under discussion are, we believe, predestined to failure. If any change is to be made in these respects, it must come from within, and not from without, and must be the result of an alteration in the public opinion of the people of this country, and not of a social innovation forced upon them by the British Government. Signs are, I am glad to say, not wanting that, amongst the

more enlightened and better educated classes, such an alteration is already in progress.

"For the reasons which I have given, we do not, with the exceptions upon which I have already touched, propose to proceed in the direction indicated by these Resolutions. We propose for the present to limit ourselves to legislation which, as my Hon'ble friend has pointed out, will not create a new offence, and which will not touch the marriage law. Our object is simply to afford protection to those who cannot protect themselves, protection from a form of physical ill-usage which I believe to be reprobated by the most thoughtful section of the community, which is to the best of my belief entirely unsupported by religious sanction, and which, under the English law, is punishable with penal servitude for life, without any exceptions or reservations.

"I trust that the measure, thus limited and restricted, will receive the support of public opinion, and I cordially commend it to the favourable consideration of the Council."

The Motion was put and agreed to.

The Hon'ble SIR ANDREW SCOBLE also introduced the Bill.

The Hon'ble SIR ANDREW SCOBLE also moved that the Bill and Statement of Objects and Reasons be published in the Gazette of India in English, and in the local official Gazettes in English and in such other languages as the Local Governments think fit.

The Motion was put and agreed to.

INDIAN PORTS ACT, 1889, AMENDMENT BILL.

The Hon'ble SIR DAVID BARBOUR moved for leave to introduce a Bill to amend and supplement the Indian Ports Act, 1889. He said:—

"Clause (*a*) of section 6, sub-section (*r*), of the Indian Ports Act, 1889, gives Local Governments certain powers for the regulation of ships when entering, or leaving, ports subject to that Act, and clause (*h*) of the same section confers powers for regulating the moving of all vessels when in port. The provisions of the Indian Ports Act of 1889 follow in this respect the provisions of the repealed Act XII of 1875. It has hitherto been held that these

provisions conferred on Local Governments very ample powers for the regulation of the movements of all or any classes of vessels within port limits, but a recent legal decision has thrown doubt on this construction. The Commissioners of the Port of Calcutta bring to notice that the recent decision has seriously limited the powers which were supposed to exist for the regulation of vessels within the ports, and the object of the present Bill is to confer on Local Governments those powers for the regulation of vessels in port which they have hitherto been supposed to possess, and which it is essential that they should possess. The Bill also provides for removing all doubts as to the validity of the rules already issued in connection with this matter, and which have hitherto been held to be in force, by providing that such rules shall be deemed to have been issued under the authority given by the Indian Ports Act as it will now be amended."

The Motion was put and agreed to.

The Hon'ble SIR DAVID BARBOUR also introduced the Bill.

The Hon'ble SIR DAVID BARBOUR also moved that the Bill and Statement of Objects and Reasons be published in the Gazette of India in English, and in the Fort St. George Gazette, the Bombay Government Gazette, the Calcutta Gazette and the Burma Gazette in English and in such other languages as the Local Governments think fit.

The Motion was put and agreed to.

The Council adjourned to Friday, the 23rd January, 1891.

S. HARVEY JAMES,
Secretary to the Government of India,
Legislative Department.

FORT WILLIAM;
The 12th January, 1891.

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