

Wednesday, February 5, 1862

***INDIAN LEG.
COUNCIL
DEBATES***

Vol. 1

18 Jan. - 24 Dec.

1862

P. L.

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

The Council met at Government House on Wednesday, the 5th February 1862.

PRESENT :

His Excellency the Viceroy and Governor-General of India, *presiding*.
His Honor the Lieutenant-Governor of Bengal.
His Highness the Maharajah of Puttiala, K.S.I.
The Hon'ble Sir H. B. E. Frere, K.C.B.
The Hon'ble Cecil Beadon.
Major General the Hon'ble Sir R. Napier, K.C.B.
The Hon'ble W. Ritchie.
The Hon'ble H. B. Harington.
The Hon'ble H. Forbes.
The Hon'ble C. J. Erskine.
The Hon'ble W. S. Fitzwilliam.
The Hon'ble D. Cowie.
The Hon'ble Rajah Deo Narain Singh Bahadoor.
The Hon'ble Rajah Dinkar Rao Rugonauth Moontazim Bahadoor.

FOREIGNERS.

The Hon'ble MR. BEADON presented the Report of the Select Committee on the Bill to revive and continue in force for a further period Act XXXIII of 1857 (to make further provision relating to Foreigners), and gave notice that he would at the next Meeting move that the Bill be taken into consideration and passed.

EMIGRATION (FRENCH COLONIES).

The Hon'ble MR. RITCHIE introduced the Bill for the amendment of Act XLVI of 1860 (to authorize and regulate the emigration of Native Laborers to the French Colonies), and moved that it be referred to a Select Committee. He said that the object of this Bill was simply to adapt the law already passed, to an alteration made in the Convention with the Emperor of the French. He would propose that the Select Committee should be

Instructed to report within one month. The alteration in the Convention was not material, and this period would be sufficient for the publication and consideration of the Bill in Madras and Bombay.

The Motion was put and agreed to.

STAMP DUTIES.

The Hon'ble MR. HARRINGTON introduced the Bill to consolidate and amend the Law relating to Stamp Duties, and moved that it be referred to a Select Committee with instructions to report within a fortnight. He stated that the Bill had been introduced into the Legislative Council and already published.

The Hon'ble MR. RITCHIE said that a fortnight would be rather scanty time. The Bill in its present shape contained some new provisions which had not yet been published, and ample time should be afforded for their consideration.

The Hon'ble MR. HARRINGTON said that the Bill, containing the most important of the alterations proposed in the existing law, had already been published, and that, where any change had been made subsequently to the publication of the Bill, it would be found to be almost always of a mitigating character and in favor of the public. But he never contemplated that the Bill should pass into law until ample opportunity had been given to the communities of Madras and Bombay, as well as Bengal, to know what was proposed, and to offer any opinions or suggestions upon the various provisions of the Bill. For this purpose it was his intention to propose that the Bill should be republished for a certain time as soon as it had gone through the Select Committee and a Committee of the whole Council, but before it passed into Law and came into operation. He thought that the interval would be ample for the public to make themselves acquainted with the Bill and to offer any observations upon it.

His Excellency THE PRESIDENT said that there could be no doubt as to the desirableness of full publicity being given to this Bill. The Rules of Business provided for a pause in the proceedings after the Report of a Select Committee was received, but they did not contemplate a Bill passing through a Committee of the whole Council. Under the 17th Rule the Council could suspend the publication of a Bill till after report by a Select Committee, and after the presentation of the Report, might pause before it was taken into consideration.

The Hon'ble MR. HARRINGTON suggested that the Bill might be republished after it was considered by the Select Committee. He consented to the motion being altered by the substitution of the period of one month for a fortnight.

The Motion was put and agreed to, and His Excellency THE PRESIDENT declared Rule XVII to be suspended.

GOVERNMENT SEAL.

The Hon'ble MR. ERSKINE introduced the Bill to amend the Law relating to the use of a Government Seal, and moved that it be referred to a Select Committee with instructions to report in a fortnight. He stated that the Bill had already been published and postponed for a considerable time.

The Hon'ble MR. RITCHIE stated that the Bill was purely of a formal character, and he thought that the time proposed by Mr. Erskine would suffice in this case.

The Motion was put and agreed to.

WHIPPING BILL.

The Hon'ble MR. BEADON moved for leave to bring in a Bill to authorise the punishment of whipping in certain cases. He stated that the Bill was in most essentials a reproduction of the Bill passed last year by the Legislative Council. The principle almost unanimously adopted by that Council was, that the punishment of flogging was in some cases absolutely necessary, but there had been some difference of opinion as to the particular crimes for which the punishment might be inflicted, and as to the mode of its infliction. In framing the present Bill he had desired to depart as little as possible from the conclusions at which that Council had arrived. As to crimes, he had adhered precisely to the catalogue in the Bill passed by the Council, except in having added Dacoity. When his Bill was submitted to a Select Committee, probably some other offences might be added, and the punishment might be deemed inapplicable to some which he had included. As a general rule, he thought the punishment should be confined to cases of a degrading nature and to habitual offenders. He had used the term *whipping* as being more in accordance with recent Acts of Parliament and with the actual mode in which the punishment would be inflicted. In no case would it be obligatory on a Court to order the punishment, but the Bill would be permissive only. He proposed to substitute a cat-o'-nine-tails for the rattan as the instrument of punishment, as there would be less danger of permanent injury; and the punishment being lighter, the maximum strokes would be increased to fifty. In the case of juvenile offenders under the age of sixteen, he would adopt the mode of punishment in force in Bengal. A Clause had been added to provide for the case of a Medical Officer forbidding the infliction of the punishment. The offender in that case might be kept in prison by the Court, for a period in addition to any period named with the whipping, but the entire period of imprisonment should not exceed that prescribed by the Penal Code for the offence. The Bill would not affect any existing provisions for Jail discipline.

The Hon'ble MR. COWIE said that he was opposed to all corporal punishment, except in the case of juvenile offenders.

His Excellency THE PRESIDENT stated, that he wished to advert to the reasons why the Bill passed by the Legislative Council had not received his

assent. As that Council had not met again for the transaction of business, he had not had an opportunity of communicating his sentiments. He had no doubt on the point of principle, but there were serious defects in the details of the measure. The definition as to age was very vague and not sufficient as a guide to the Courts. There appeared to be too much detail, and that not of a very judicious character, as to the mode of inflicting the punishment. Security was wanting for a safe and judicious medical supervision, and there was an absence of a provision, so desirable in all such cases, for the exercise, at any rate to some extent, of the discretion of the Local Government. The present Bill, he believed, would be found to be a considerable improvement on the former.

The Motion was put and agreed to.

RELIGIOUS ENDOWMENTS.

The Hon'ble MR. BEADON moved for leave to bring in a Bill to enable the Government to divest itself of the management of Religious Endowments. He stated that this Bill was the last of a series of measures taken by the Government during several years for divesting itself of the management of religious trusts. The subject had led to much correspondence in this country and with the Home Government, but it was only necessary for him to advert to a Despatch of the Secretary of State in 1860, directing the repeal of Regulation XIX, 1810, of the Bengal Code, and Regulation VII, 1817, of the Madras Code, and the transfer of the institutions, now superintended by the Local Agents, to trustees subject to the jurisdiction of the Courts. In accordance with the terms, though not with the spirit, of that despatch, a Bill had been introduced, the whole scope of which was to repeal those Regulations, and to provide that the Civil Courts should have jurisdiction in all cases arising out of these trusts. That Bill had been strongly opposed in Madras and the North-Western Provinces. There had been two classes of objectors. *First*, there were those who thought that the Government should simply repeal the Regulations, and leave all the institutions, now superintended by Government, to take care of themselves. But such persons seemed to be forgetful of the obligations already contracted, and that the course they recommended would be scarcely consistent with good faith. *Secondly*, there were those who thought that special provision ought to be made for the superintendence of these trusts, as for instance, by the establishment of some Board, which should be authorized to deal with all cases connected with them, without reference to the Civil Courts. The present Bill was drawn more in accordance with the Despatch, by giving jurisdiction to the Civil Courts in cases of misfeasance.

There were two classes of institutions to be dealt with,—some, in which the managers were elected by the persons interested, without any confirmation from Government; and others, in which the Government had to nominate the managers. As to the first class, the object in view was attained by a repeal of the Regulations, and by providing that the managers should be responsible

to the Courts. As to the other class, he proposed that the Government should once for all nominate a Committee from among the persons interested in each trust, vesting in that Committee all the powers now exercised by the Sudder Board or the Local Agents, but rendering such Committee subject to the Civil Courts. The Committee would henceforward be self-elected, that is, on the occasion of any vacancy the remaining members might elect; but in the event of their failure to do so, any person interested in the trust might apply to the Civil Court to nominate a successor. He thought that there was a wide difference between the Government by its Officers sanctioning every appointment, and the Civil Courts interfering, on the special application of persons interested, to nominate a trustee, on those rare occasions in which such interference would be necessary.

The Motion was put and agreed to.

KING OF OUDE BILL.

The Hon'ble MR. BEADON postponed till next week his motion for leave to bring in a Bill to provide for the service of legal process issued against His Majesty the King of Oude, and for taking the examination of His said Majesty when required as a witness.

MARRIAGE BILL.

The Hon'ble MR. RITCHIE moved for leave to bring in a Bill further to provide for the Marriages in India of persons professing the Christian Religion. He said that the object of the present Bill was to put an end to the uncertainty respecting the validity of certain marriages in which one or both of the parties were Christians. At present there were three modes by which marriage might be contracted, one of which was peculiar to one particular body of Christians. The first was that in which a person in Holy Orders was present. No particular rite or form was necessary, but by a person in Holy Orders was meant in legal sense a person episcopally ordained, no other person ranking higher than a Layman. This was the mode required by the Common Law, but it was doubtful if the necessity for it extended to this country. The second was that under the Statute which sanctioned marriages by Clergymen of the Established Church of Scotland, being Chaplains. That Statute had in 1860 been extended to Clergymen of that Church though not Chaplains. This was the mode applicable to one body of Christians only. A third mode was authorized by the Indian Marriage Act of 1852, under the authority of which an Act had been passed in this country. Previously to that Act great doubts had existed as to whether the Common Law with respect to marriage prevailed out of England. But the great case of the Queen *versus* Millis had decided that it extended at any rate to Ireland. The Indian Marriage Act did not clear up the doubt whether it extended to this country, for it simply declared all marriages to be valid, which had been previously solemnized, in which the only defect was the absence of a person in Holy Orders, and provided for marriages before Registrars; but it did not determine the question as to the validity of future marriages not solemnized under that Act or

without the presence of a person in Holy Orders. Sir Erskine Perry and Dr. Lushington were of opinion that the decision in the *Queen versus Millis* could not apply to countries in which, at the time of the introduction of English Settlers, there were no persons in Holy Orders who were available for the purpose of attending marriages. But the Court of Exchequer had decided that the case did affect marriages in Beyrout. There was therefore considerable uncertainty; and numerous frauds had been committed in this country by persons solemnizing marriages under an assumed authority. One reason why that uncertainty continued, probably was that the Legislative Council could not amend the Indian Marriage Act, as that was an Act passed after the 3 and 4 William IV. But he now proposed to provide that no marriage between Christians should be valid, unless solemnized in the presence of a person in Holy Orders, under the Scotch Marriage Act, or under the Indian Marriage Act, before a Registrar. At the same time he would declare valid all past marriages the only defect of which was non-compliance with those conditions.

The Motion was put and agreed to.

DISSOLUTION OF MARRIAGE (CHRISTIAN CONVERTS).

The Hon'ble MR. RITCHIE postponed his motion for leave to bring in a Bill to provide for the dissolution, in certain cases, of marriages entered into by Converts before their conversion.

FRAUDULENT TRANSFERS AND SECRET TRUSTS.

The Hon'ble MR. RITCHIE moved for leave to bring in a Bill for the prevention of Fraudulent transfers of property and of Secret Trusts. He stated that this Bill was of the same nature as that introduced into the Legislative Council by Sir Arthur Buller. The object was to obviate as far as possible the mischiefs arising from secret and fraudulent Trusts. But the provisions of this Bill would differ from those of the former Bill, in respect of the omission of the Penal Clauses, which were now provided by the Penal Code, and would only deal with the Civil rights of the parties. The Bill would provide that, when any interest in real property was transferred without a declaration of trust, it should be held without any trust, and that the transferee should hold against all, except creditors and the persons whom the transfer might be intended to defraud. The Courts then would be relieved from the necessity of giving to any instrument an effect different from that which it appeared to be meant to have. Instruments in certain cases would be required to be accompanied by a memorandum. Requiring witnesses was of little value, as any number of witnesses might often be obtained.

The Motion was put and agreed to.

BRANCH RAILWAYS, TRAMWAYS, &c.

The Hon'ble MR. RITCHIE moved for leave to bring in a Bill to provide for the construction, by Companies and by private persons, of Branch

Railways, Iron Tram Roads, Common Roads, or Canals, as feeders to Public Railways, Canals, or Roads, or to Navigable Rivers. He stated that a Bill similar to this had been introduced into the Legislative Council by Mr. Seton-Karr, but that Bill was confined to feeders to Railways. The present Bill, would be extended to Roads, Canals, and Navigable Rivers. He had some doubt with respect to Roads, but would introduce the provision into the Bill, subject to consideration. The only difficulty that arose was from His Honour the Lieutenant-Governor of Bengal having given notice of Mr. Seton-Karr's Bill being proceeded with in the Bengal Council. In some respects it might be advantageous that there should be local legislation on the subject. But on the other hand, as a Railroad for which feeders were to be provided might pass through several Districts in different Presidencies, two different Acts might be objectionable. He had ascertained from His Honor the Lieutenant-Governor that, in his judgment, general legislation would be preferable. But at present he would confine himself to obtaining leave to introduce the Bill, and would ascertain what course it would be expedient to follow.

The Motion was put and agreed to.

The following Select Committees were named :—

On the Bill for the amendment of Act XLVI of 1860 (to authorize and regulate the Emigration of Native Laborers to the French Colonies)—the Hon'ble Messrs. Ritchie, Forbes and Cowie.

On the Bill to consolidate and amend the Law relating to Stamp Duties—the Hon'ble Messrs. Laing, Ritchie, Harington, Forbes, Erskine, Fitzwilliam and Cowie, and the Hon'ble Rajah Dinkar Rao Rugonauth Moontazim Bahadoor.

On the Bill to amend the law relating to the use of a Government Seal—the Hon'ble Messrs. Ritchie, Harington and Erskine.

The Council adjourned till Wednesday, the 12th instant, at 11 A.M.

CALCUTTA ;
The 5th February 1862. }

M. WYLIE,
Deputy Secy. to Govt. of India, Home Dept.