

Friday, March 31, 1865

**COUNCIL OF THE GOVERNOR GENERAL
OF INDIA**

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

The Council met at Government House on Friday, the 31st March 1865.

P R E S E N T :

His Excellency the Viceroy and Governor-General of India, *presiding*.
 His Honour the Lieutenant-Governor of Bengal.
 The Hon'ble H. B. Harington.
 The Hon'ble W. Grey.
 The Hon'ble H. L. Anderson.
 The Hon'ble J. N. Bullen.
 The Hon'ble Mahārājā Vijayarāma Gajapati Rāj Bahādur of Vizianagram.
 The Hon'ble Rājā Sāhib Dyāl Bahādur.
 The Hon'ble W. Muir.
 The Hon'ble R. N. Cust.
 The Hon'ble Mahārājā Dhīraj Mahtab Chand Bahādur, Mahārājā of Burdwan.
 The Hon'ble D. Cowie.

STAMP ACT AMENDMENT BILL.

The Hon'ble Mr. HARRINGTON presented the Report of the Select Committee on the Bill to amend Act X of 1832 (to consolidate and amend the law relating to Stamp Duties.)

CIVIL AND CRIMINAL COURTS' (PUNJAB) BILL.

The Hon'ble Mr. CUST presented the Report of the Select Committee on the Bill to define the jurisdiction of the Courts of Judicature of the Punjab and its Dependencies.

CIVIL COURTS' (CENTRAL PROVINCES) BILL.

The Hon'ble Mr. HARRINGTON moved that the Report of the Select Committee on the Bill to define the jurisdiction of the Courts of Civil Judicature in the Central Provinces be taken into consideration. He said that the publication of the Bill had been followed by the receipt of some very useful suggestions from the Judicial Commissioner of the Central Provinces, in which the Chief Commissioner had expressed his concurrence. The Select Committee, to which the Bill was referred in the usual course, were of opinion that most

of these suggestions might be adopted with advantage, and, as noticed in their Report, they had recommended that the Bill should be amended accordingly. The proposed alterations would, he believed, greatly improve the character of the Bill, and conduce to its satisfactory working. But the Judicial Commissioner had made two suggestions, to which the Select Committee, after much discussion, considered that they could not properly assent. One of these suggestions was that the Government should have power to invest any person with jurisdiction to try Civil suits of a given amount. This was considered necessary by the local authorities with reference to the character and circumstances of certain Chieftains or Zemindars in the Central Provinces. The other suggestion was that the Judicial Commissioner and the other local Appellate Courts should be allowed to continue the exercise of the power with which they were now invested, of reviewing, of their own authority, and without any appeal, application, or objection on the part of any interested party, the decisions and orders of the subordinate Courts at any time within one year after the passing or execution of such decisions and orders, and of altering or reversing the same. As regarded the former of these suggestions, it appeared to the Select Committee that the preferable arrangement would be to establish a Court of one of the grades mentioned in the Bill within the tract of country belonging to any of the Chieftains or Zemindars referred to, when such tract formed part of the British Territories in India, and was subject to the Acts of the Indian Legislature, or to appoint a Naib Tahsildar and to invest him with Civil jurisdiction in such tract, for which the Bill made provision. With respect to the other suggestion, which proposed to continue a practice forming part of what was generally known as the patriarchal system, the Select Committee had observed as follows: "We do not concur in the suggestion of the Judicial Commissioner that every Appellate Court should be empowered, within a year after any order shall have been passed by a subordinate Court, to call up the case and revise the order. Where, as is the case in the present Bill, all proper facilities for appeal are allowed, we do not think it expedient to permit an Appellate Court to interfere except on appeal regularly preferred. In the absence of an appeal, it is only fair to presume that all parties are satisfied with the decision or are willing to submit to it, and it would be opposed to every principle of justice to allow any Court, of its own motion, to re-open the matter after an interval during which the decree has probably been executed and the whole litigation settled."

A further suggestion made by the Judicial Commissioner in respect to investing Judges of Courts of Small Causes with powers corresponding to the powers of a Principal Sudder Ameen, had been anticipated by the framers of the Act, lately passed, for consolidating and amending the laws relating to the

establishment of Courts of Small Causes beyond the limits of the Presidency Towns of Calcutta, Madras, and Bombay. The fifty-first Section of this Act contained a provision similar to that suggested by the Judicial Commissioner, and appeared to have done all that was necessary in the direction of that suggestion.

The Motion was put and agreed to.

The Hon'ble MR. HARRINGTON, with the permission of His Excellency the President, moved that the following new Section be inserted after Section 24 of the Bill. He apologized for not having circulated a notice of the proposed amendment in time to admit of Hon'ble Members considering it before they met to-day, but there had been some delay in printing the Section which had only just been put into his hands.

“The Governor-General of India in Council may, by an order to be published in the Official Gazette, extend the provisions of this Act to the Province of Oude, but not so as in any way to affect the provisions of Act No. XVI of 1865 (to remove doubts as to the jurisdiction of the Revenue Courts in the Province of Oude in suits relating to land, and to enlarge the period of limitation in such suits). On and after such extension, the Civil Judge of Lucknow shall be considered a Deputy Commissioner, and the Assistant Judge of Lucknow an Assistant of the third class, within the meaning of this Act. Appeals from the decisions and orders of the Civil Judge of Lucknow, when allowed by the Code of Civil Procedure or any other law, shall lie as at present to the Court of the Judicial Commissioner”.

The Hon'ble MR. HARRINGTON proceeded to say that this Section was proposed to be added to the Bill at the request of the Chief Commissioner and Judicial Commissioner of Oude, with whom he had been in communication on the subject. Those Officers were of opinion that the Bill, with the addition of the Section which he had just read, would be well suited to the circumstances of the Province of Oude, and that its extension to the Province would be attended with considerable advantage, and would place the Courts of the Province on a proper legal basis. It was right he should mention that the Judicial Commissioner of Oude, equally with the Judicial Commissioner of the Central Provinces, was anxious that the local Appellate Courts should retain the power which they now possessed of interfering with the decisions and orders of the Courts subordinate to them, although there should be no appeal, and although no objection should be taken by any one affected by the decision or order. The provision to this effect, which now formed part of the Code of Civil Procedure as in force in Oude, was, he believed, introduced

on the recommendation of Mr. Campbell, one of the learned Judges of the High Court at Calcutta, at the time he held the office of Judicial Commissioner of Oude. Having lately had an opportunity of speaking to Mr. Campbell on the subject, he gathered from what fell from him, that he considered that the time had passed when the power in question could be exercised beneficially or for the interests of suitors, and that he was of opinion that the power should be withdrawn. In this opinion he (Mr. Harington) entirely concurred.

The Motion was put and agreed to.

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

The Motion was put and agreed to.

PARSEES' MARRIAGE AND DIVORCE BILL.

The Hon'ble Mr. ANDERSON moved that the Report of the Select Committee on the Bill to define and amend the law relating to Marriage and Divorce among the Parsees be taken into consideration. He said—"This Bill has undergone the most careful examination by the Select Committee, and many material alterations in its provisions have been made: I have no hesitation in submitting it now to the Council as a measure which has been greatly improved, and as one which will attain the objects which it had originally in view. Those objects were the prevention of bigamy among the Parsees, and the establishment of such a tribunal for the vindication of the obligations arising out of the marriage contract in that community as would command the respect of those appealing to it for protection or redress. I think it very possible that the Parsees will not regard the Bill with the same favour as the Code prepared under their immediate instructions; but as they are each and all of them emphatically men of business, I have a just confidence that they will, on full consideration, recognize the great superiority of the Bill as it now stands to the Bill in the form in which it was originally presented to the Council.

The principal alteration in the Bill is the substitution of Parsee Matrimonial Courts for Pancháyats. With reference to Pancháyats, I would wish to offer a very brief explanation. The term taken by the Parsees from the Hindus around them, has not been very happily chosen, and it does not convey the idea of the kind of tribunal which it was in contemplation to establish. That tribunal was one of which the members were to be chosen by the Parsees themselves, of which the members were men in whom the Parsees had confidence. But it was never intended that the rude "under the tree" mode

of investigation which the idea of a Pancháyat suggests, should be adopted. But I freely admit that the Parsee Matrimonial Courts will constitute far more efficient tribunals than the Pancháyats, and that they will fulfill all the conditions which the Legislature has a right to impose on an institution which it invests with grave responsibilities. It is proposed, then, to establish Parsee Chief Matrimonial Courts in the Presidency Towns of Calcutta, Madras, and Bombay, and Parsee District Matrimonial Courts in such places as the discretion of the Governor General in Council and the Local Governments may suggest. A District under the Act may include more than one ordinary judicial District; and such places in which, on account of the fewness of the Parsee inhabitants, the Local Governments shall not deem it necessary to establish Matrimonial Courts, are to be regarded as under the jurisdiction of the Chief Matrimonial Courts in the Presidency Towns. The Matrimonial Courts in Calcutta, Madras, and Bombay are to be presided over by the Chief Justice, or other Judge of Her Majesty's High Court of Judicature in those Towns, aided by eleven Delegates, and the District Matrimonial Courts by a District Judge aided by seven Delegates.

The Delegates are to be Parsees, appointed by the Local Governments, and to be in number not more than thirty for a Presidency Town, and not more than twenty for a District as constituted under this Act. From the Delegates thus appointed are to be chosen in due rotation those who assist at the trial of suits in the Matrimonial Courts. The appointment of a Delegate is to be for life, or until resignation, with the usual provision attached to a judicial office of "*quam diu se bene gesserit.*" The Local Governments, we may be sure, will always be cautious to appoint the most respectable and intelligent Parsees to this office, and I sincerely trust that the position of a Delegate may hereafter be an object of honorable ambition to Parsee gentlemen. In suits tried in the Matrimonial Courts, all questions of law and procedure will be determined by the presiding Judge, but the decision on the facts is to be the decision of the majority of the Delegates assisting at the trial. Should such be the wish of either party to the suit, the case may be heard with closed doors. The procedure is to be as far as possible that of the Code of Civil Procedure, and an appeal will lie from the decisions of all Matrimonial Courts, whether Chief or District, to Her Majesty's High Court of Judicature.

Now, I think that the Courts which it is thus proposed to establish, will exactly attain the objects which the Bill had in view. All suits for the declaration of nullity of marriages, for dissolution on account of desertion, for divorce and judicial separation, and for restitution of conjugal rights, will in effect be decided by the Parsees themselves; while the presence and active supervision

of an experienced Judge will be an ample guarantee to the general public, not merely that the investigation will be a fair one—for that, as far as intention goes, would be the result if the matter were left exclusively to the adjudication of the Parsees—but that the complex rules of evidence and the various minutiae which are involved in the conduct of a trial are duly observed, and, what is an important point with an inexperienced tribunal, that the zeal and ability of Advocates have no more than their just weight with those in whom the power of decision is vested.

The Select Committee have made some other important alterations in the Bill. The arrangement that an experienced Judge shall preside in the Matrimonial Courts disposes of the provision that the presidency of the Surat Panchayat, should be vested hereditarily in the family of Khursadjí Dosabhai Dávar. This change has been further recommended by the fact that there is not an entire unanimity on the subject among the Parsees of Surat, and still more forcibly by the natural repugnance which is generally felt, and in which I participate, to making a judicial office the subject of hereditary succession. I should, in justice to the Parsees, state that the provision relative to the Dávar did not form a part of the original Code prepared under their instructions, but was introduced at the suggestion of the Government of Bombay as a kind of compromise of some more extensive claims preferred by the Dávar's family.

Another important alteration in the Bill, is the omission of the clause which made a change of religious belief, subsequent to a marriage, a ground for rendering the marriage voidable at the instance of either party. The question involved in this alteration received very careful consideration from the Select Committee, and the impression which generally prevailed was, that the principle presented for discussion was too important to be dealt with otherwise than in a separate measure. The Council has just invited the consideration of all India to the measure relative to the remarriage of Native Converts. Now, I do not mean to imply that the provision in the Parsee Bill stands on the same ground as the relief proposed for Christian Converts. In the one case a man says,—“on account of my religious belief my wife has left me, either compel her to live with me or let me go free.” In the other case, the man says,—“on account of my religious belief my wife has left me, let me go free.” It is obvious that there is a material difference between these two propositions. In the one the man says,—“I want my wife to live with me.” In the other the man says,—“I do not want my wife to live with me.” But though there is this variance in the scope of the two propositions, they both in some measure raise the issue of whether a change in religious belief is a valid ground for ren-

dering a marriage voidable. The Council has been desirous that this question should receive the most ample consideration, and it would be obviously impolitic, therefore, at the present time, that a species of liberty should be granted to the Parsees in the matter under discussion. If the Bill of my Hon'ble friend Mr. Maine should become law, as I trust it will, it will then be for the Parsees to apply for relief, and to support their appeal by adequate evidence. But when the Council is acting with extreme caution as to granting a certain relief to a portion of the community, it is obvious that it cannot grant what is more than relief—what is relaxation—to another portion of the community. I think, then, that the Select Committee was compelled, if only on the lower ground of legislative expediency, to omit the clause, and in saying this I am not insensible to the fact that some may be inclined to take the higher ground of regarding any such concession as wrong in principle.

The arrangements relative to the certification and registration of marriages have been simplified by the Select Committee, and due observance of these arrangements has been secured by the provision of severe penalties.

Many verbal alterations, all of them improvements, have been introduced by the Select Committee, and the Bill may now, I venture to think, be regarded as a complete and symmetrical measure, as one under which there will be no difficulty in administering justice. I feel no diffidence in making this assertion, because I should neither do justice to my own sentiments, nor pay due regard to truth, if I did not state in the most public and unreserved manner, that the Bill is the good Bill it is, through the judgment, caution and fertility of suggestion which have been brought to bear upon it by my Hon'ble friend Mr. Harington. Both in Committee and in private he has given me the aid of his large legislative experience, and I may say, without the slightest affectation, that the Bill, which will, I trust, be a source of substantial benefit to the Parsees, is more his Bill than mine.

Before I conclude, I would wish to say a word regarding a letter which I have just read in the "Friend of India" evidently written by Mr. Manockjee Cursetjee, one of the Judges of the Small Cause Court in Bombay. I wish to speak of that gentleman with all consideration. He complains that the Bill sanctions infant marriages and revives the Pancháyat. To this I would reply that the Bill does not sanction infant marriages, and that Pancháyats have now been superseded by the Matrimonial Courts. There are some clauses recognizing infant-marriages in the Code prepared by the Parsees, but these I struck out before the introduction of the present Bill. The Bill does not, it is true, prohibit infant marriages; but, to make it more clear that the Legislation

does not approve of such contracts, I will propose, with His Excellency the President's permission, to introduce a new clause, to which my Hon'ble Colleagues have expressed their assent. The Council would not be justified in prohibiting the custom of infant marriages which has obtained so largely and prevailed so long, but it takes the wiser course of declining to enforce them. I shall, in common with Mr. Manockjee Cursetjee, be glad to see the day when the custom shall disappear, but if either of us is to see that result, it will not be by following the course which he would seem to suggest.

The Hon'ble MR. HARINGTON said that having on the introduction of this Bill, considered it his duty to object strongly to the provisions which related to the mode in which cases arising under the Bill were to be heard and decided, he thought it right at once to state that all that appeared to him objectionable in the Bill, as introduced, had been struck out, including not only the provisions to which he had referred, but also other provisions to which he thought exception might be taken; and when his Hon'ble Colleague, who was in charge of the Bill, should move presently that the Bill be passed, he would be prepared to give a cordial assent to the motion. He concurred in all that had fallen from his Hon'ble Colleague in support of the amendments which the Select Committee had recommended should be made in the Bill. He had no hesitation in saying that he considered they might place the Bill, altered as proposed by the Select Committee, on the Statute Book with the most perfect confidence. Looking to the nature of the cases to which the Bill was intended to apply, they must all hope that recourse to the provisions of the Bill would not be of frequent occurrence, but when cases such as the Bill contemplated did arise, he believed it would be found that the Bill provided a proper and perfectly competent tribunal for their adjudication, and that under the operation of the Bill as it was now framed, substantial justice would be done between party and party. Their Hon'ble Colleague, who had charge of the Bill, had laid the Parsee community of India under very great and lasting obligations to him by the manner in which he had espoused their cause in connection with the legislation which had occupied so much of the time of the Council during its present sittings, and by the great learning, ability, and skill which he had displayed in conducting the Parsee Bills introduced by him through their several stages; and he ventured to think that the course pursued by their Hon'ble Colleague in respect to the present Bill in its progress through the Select Committee, and particularly his having assented to the various important alterations proposed in Committee, had added very much to the debt of gratitude which the Parsee

community owed to him for his exertions in their behalf. He entertained a confident belief that this would be the feeling generally of the Parsee community when they saw the Bill in operation. He could not close these remarks without begging his Hon'ble Colleague to accept his acknowledgments for the manner in which he had spoken of the part taken by him (Mr. Harington) as a Member of the Select Committee in settling the provisions of the Bill. On this point he would only say that, should his Hon'ble Colleague's anticipations as to the successful working of the Bill, as now framed, be realized (and he had little doubt that such would be the result of their joint labours), it would be a great gratification to him to have taken an active part in giving to the Parsee community, who were so distinguished for their respectability, intelligence, and liberality, this important legislative measure.

The Hon'ble Mr. Muir said that having made some strictures upon the original Bill when it was introduced, and having been a member of the Committee which had been engaged in revising it, he begged to offer a few very brief remarks upon the Bill as it now stood. He entirely concurred in the observations made by his Hon'ble friends Messrs. Anderson and Harington, that the proposed enactment had been most materially improved in its passage through the Committee; and its improvement was mainly owing to the wise and excellent suggestions of Mr. Harington, in conjunction with the labours of the Mover himself.

The serious objections taken to the constitution of the Pancháyats originally proposed, as a Court private, informal, and irresponsible, had now been entirely obviated. The Matrimonial Courts substituted for the Pancháyat would be inferior to no other Courts in the country; they would be presided over by Judges, and be subject to the checks and safeguards of established legal procedure, while the presence of the Parsee Jury, to determine all questions of fact, would secure the confidence and approval of the Parsee community in respect of the trial and disposal of the suits brought before those Courts.

Some of the conditions of divorce contained in the original Bill, which had appeared to him (Mr. Muir) objectionable, had been either removed or modified. And though there were still one or two provisions in the amended Bill, which did not entirely approve themselves to his judgment—he (Mr. Muir) alluded more especially to certain distinctions and conditions contained in the thirtieth Section—still he was prepared to accept the provisions of the Bill as a whole, on the ground stated in the preamble, namely, that they were in conformity with the usages and customs of the Parsees themselves. In this view he was prepared to support the Bill in its present form.

Before concluding those brief observations, he (Mr. Muir) wished to express his concurrence in the remarks which had fallen from his Hon'ble friend Mr. Harington, regarding the part which had been taken by the Hon'ble Mr. Anderson in connection with this measure. He fully agreed with him that Mr. Anderson had laid the Parsee community under a great obligation by the introduction of this Bill; and not less so, by the excellent spirit and candour with which he had received the suggestions made in Committee; and by the careful judgment with which he had brought the Bill into the shape in which he had now presented it to the Council.

The Motion was put and agreed to.

The Hon'ble MR. ANDERSON then, with the permission of His Excellency the President, moved by way of amendment that the following Section be introduced immediately before the thirty-seventh Section:—

“Notwithstanding anything hereinbefore contained, no suit shall be brought in any Court to enforce any marriage between Parsees or any contract connected with or arising out of any such marriage, if, at the date of the institution of the suit, the husband shall not have completed the age of sixteen years, or the wife shall not have completed the age of fourteen years.”

The Motion was put and agreed to.

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

The Motion was put and agreed to.

FINANCIAL COMMISSIONER (OUDH) JURISDICTION BILL.

The Hon'ble MR. CURT moved that the Report of the Select Committee on the Bill to remove doubts with regard to the jurisdiction of the Financial Commissioner of Oudh, be taken into consideration. He remarked that the changes made in the Bill in the Committee were not material. The word “Land” had been so defined as to exclude from the cognizance of the Revenue Courts land situated in Towns and Cantonments. Mixed claims with regard to land and other property relating to inheritance and succession, were also reserved for the cognizance of the Civil Courts. These alterations were made at the suggestion of the Chief Commissioner and Judicial Commissioner.

A change had also been made in Section 5. The extension of the period of limitation was not to apply to tenants at will, tenants with right of occupancy, or tenants at fixed and favourable rates, but only to those whose tenure was of a higher character.

The Motion was put and agreed to.

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

The Motion was put and agreed to.

SUCCESSION AND INHERITANCE (PARSEES') BILL.

The Hon'ble MR. ANDERSON presented the Report of the Select Committee on the Bill to define and amend the law relating to Succession and Inheritance among the Parsees. He said that it had been his intention to ask His Excellency to suspend the Rules for the Conduct of Business, and to move that the Report be taken into consideration, and that the Bill as amended be passed. He had, however, ascertained that there would be another meeting of the Council, at which, without suspending the Rules, the Bill could be passed. He had also received a communication from Bombay, containing some suggestions which deserved consideration. Under these circumstances, he begged leave to postpone the Motions standing next in the list of business.

The Council then adjourned.

CALCUTTA, }
The 31st March 1865. }

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