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 3rd March 1865.

PRESENT:

His Excellency the Viceroy and Governor-General of India, *presiding.*
His Honour the Lieutenant-Governor of Bengal.
Major General the Hon'ble Sir R. Napier, K. C. B.
The Hon'ble H. B. Harington.
The Hon'ble H. Sumner Maine.
The Hon'ble W. Grey.
The Hon'ble H. L. Anderson.
The Hon'ble J. N. Bullen.
The Hon'ble Mahárájá Vijayaráma Gajapati Ráj Bahádur of Vizianagram.
The Hon'ble Rájá Sáhib Dyál Bahádur.
The Hon'ble G. Noble Taylor.
The Hon'ble W. Muir.
The Hon'ble R. N. Cust.
The Hon'ble Mahárájá Dhíraj Mahtab Chand Bahádur, Mahárájá of Burdwan.
The Hon'ble D. Cowie.

CALCUTTA GREAT JAIL BILL.

The Hon'ble the LIEUTENANT-GOVERNOR presented the Report of the Select Committee on the Bill to remove the Great Jail of Calcutta from the control of the Sheriff, and transfer it to that of the Government of Bengal.

REGISTRATION ACT AMENDMENT BILL.

The Hon'ble MR. TAYLOR presented the Report of the Select Committee on the Bill to amend Act XVI of 1864 (to provide for the Registration of Assurances).

The Hon'ble MR. TAYLOR also applied to His Excellency the President to suspend the Rules for the Conduct of Business.

He said that he asked His Excellency to suspend the Rules, because it was desirable that the Bill should be passed at once, in order that the Registrar

General of Bengal, and similarly the Registrars General of the other Governments might be in a position to proceed as early as they pleased to visit the subordinate offices in the Mofussil.

The President declared the Rules suspended.

The Hon'ble MR. TAYLOR then moved that the Report be taken into consideration.

He said that on asking for leave to introduce the Bill, he had explained to the Council the primary objects of the measure. In consequence of the various suggestions to which he alluded last Friday, the scope of the Bill had been slightly enlarged in Committee, and it now contained several additional provisions. All the suggestions, from whatever quarter they came, had been carefully considered. Some had been adopted, and others the Committee had not considered it expedient to introduce into the Bill.

A Section had been added providing for the introduction of a few words into Section 10 of the Act, empowering the Registrar General, in the case of the absence of a District Registrar or of a vacancy occurring in that office, to appoint a fit person other than the Judge of the principal Court of original jurisdiction, to be District Registrar. The 10th Section, as it stood, enacted that the Judge should be ex-officio District Registrar whenever a vacancy might occur in that office, which was elsewhere held by the Collector or other executive officer. Having regard, however, to the arrangements about to be made in the North-Western Provinces, under which the Judges would be the ordinary District Registrars, it became necessary to provide for the appointment of some other person to perform the duties of the office during the occasional absence of the Judge. The first Section of the Bill accordingly provided for this.

The Committee had also added a clause to Section 13 of the Act, providing that the Section should not apply to any instrument relating to shares in a Joint Stock Company, notwithstanding that the assets of such Company should consist in whole or in part of immovable property. As a matter of fact, such shares were changing hands almost daily without registration of the instruments by which the transfer was effected, such instruments being executed, however, on stamped paper. There could be no question that if registration were insisted upon, it would lead to a systematic evasion of the law and have an injurious effect on public morality. As doubts had been entertained and different opinions expressed on the subject, the Committee, with the approval of His Excellency the Governor General in Council, had introduced the declaratory clause in question, exempting from compulsory registration instruments relating to such shares.

The next amendment was one for the suggestion of which he (Mr. Taylor) was indebted chiefly to his Hon'ble friend the Mahárájá of Vizianagram. Section 25 of the Act prescribed the course to be followed in regard to the registration of instruments affecting immovable property situate in more than one District. It provided that the District Registrar to whom such instrument might be presented should forward a copy to every Deputy Registrar of *another* District in which any of the property concerned might be situated, but it did not expressly say, though this was obviously intended, that he was also to furnish a copy to each Deputy Registrar in *his own District* in whose jurisdiction any of the property was situate.

The Committee had therefore repealed Section 25, and replaced it by a new Section, in which the intention of the Legislature was carried out more clearly and conveniently than before.

But the most important addition to the Bill, however, was Section 5, which provided for the recognition, under due precautions, of powers of attorney executed by persons who had left India, but which had not been executed or attested in exact compliance with the terms of Section 28 of the Act.

The 28th Section enacted that no power of attorney executed by a person residing in *British India* should be recognised for the purposes of the Act, unless it was executed in the presence of a Registrar and duly attested by him; and as regarded a power of attorney executed by a person residing *out* of India, that it should not be recognised unless executed before, and attested by, an officer of the British Government or a notary public. It had been represented that a considerable number of Europeans had returned home retaining property in India, who, before they left the country, gave general powers of attorney to their agents to sell or otherwise deal with their property. The requirements of the Act had rendered all such powers inoperative; and it was practically very difficult, even if there had been time to do so since the Act came into force, to obtain new powers in substitution of the old ones, from persons who were in various parts of Europe, or who might possibly be travelling in some distant quarter of the globe. Then, again, it had been urged that many powers of attorney executed in Europe had been attested, sometimes by persons who were long resident in India, whose signatures were well known and easy of proof, and sometimes by the Lord Mayor of London or other similar functionary, who did not come within the definition either of an officer of Government or of a notary public. All such powers were in like manner useless under the terms of the Act. Obviously, therefore, on the ground of public convenience, such an amendment of the law was desirable as would bring all such *bonâ fide* instruments

within the provisions of the Registration Act. The difficulty was adequately met by the provisions of Section 5 of the Bill, which prescribed that every power of attorney executed by persons *who were not still in India*, should be recognized for the purposes of the Registration Act, provided that within three months from the passing of the Bill (which allowed ample time for the production of all such deeds) the Registrar General, after making such enquiry as he might think proper, should have certified upon the deed, that it had been duly executed, and that, in his opinion, it might be taken as if all the requirements of the Act had been complied with. This removed all difficulties.

The Committee had not recommended any further alterations or amendments. As he said before, all the suggestions which had been made had received the most careful attention. Among those which it had not been deemed expedient to adopt, some would involve a change in the law; others, the removal of wholesome restrictions imposed by the Act which could not have been removed without impairing its usefulness; and others, again, related to matters of routine, or supposed defects in administration, the remedy for which was in the hands of the controlling officers of the Department.

The Act had been only three months in force, and among those most competent to judge, there was perfect unanimity of opinion as to its admirable working in all parts of the country. Even during the short time it had been in operation, the effect of the measure was said to have been most remarkable in restraining the production of doubtful and fraudulent instruments, and in diminishing litigation. A High Court Judge, not, it should be mentioned, on the Calcutta Bench, was reported to have said, in reference to the falling off of business in the Court, that his occupation was gone, an observation which was not, of course, intended to be taken without some reserve.

This being so—the working of the Act being in every respect so satisfactory—it would clearly be injudicious, or at all events premature, to introduce any change in the law, or to make any alteration of principle in a Bill framed as this was, to supply a few obvious defects, and which it was desirable to pass within as short a period as possible. It would be time enough to do this when longer experience of the working of the Act should have fully shown the necessity for such changes.

The Motion was put and agreed to.

The Hon'ble Mr. Taylor also moved that the Bill as amended be passed.

The Motion was put and agreed to.

INDIAN CIVIL CODE, CHAPTER I.

The Hon'ble Mr. MAINE moved that the Report of the Select Committee on the Indian Civil Code, Chapter I, be taken into consideration. He said—"Sir, postponing for a few moments any discussion to which the amendment proposed by my Hon'ble friend Mr. Muir may give rise, I do not think that I can usefully occupy the time of the Council with observations of any length in asking it to take the report into consideration. The Select Committee has most carefully considered the Code, both in the whole and in the detail. Together with the revised Code of Civil Procedure introduced by my Hon'ble friend Mr. Harington, it has formed a principal portion of the labours of a most laborious Session. The Committee have said in their Report that they have bowed to the opinions of gentlemen so eminent and learned as the Indian Law Commissioners, and accordingly the amendments they have proposed, though not inconsiderable in number, can hardly be styled of great importance. Some few of the points discussed in Committee the Commissioners themselves would allow to be disputable. But the dissentient Members have preferred the opinion of the Commissioners to their own. Of the amendments, a few are corrections of manifest errors: others are additions to the illustrations, and will contribute greatly to the intelligibility of the new law: others are transpositions and changes of arrangement which I believe to be of much value, and will greatly increase the facility of reference. There seem to me to be only three changes which can be deemed to be at all material. The principal of these is the extension to other races besides Hindús and Muhammadans of the exemption from the Code. These are contained in the last two Sections of the Bill. Both in my Statement of Objects and Reasons, and in my remarks to the Council when introducing the Bill, I said I believed that there were many races in India, not included within the exceptions of Hindú and Muhammadan, to which it would be unwise or inexpedient to apply the new law. All the papers which have since come in have strengthened my conviction, and recently a despatch has been received from Her Majesty's Government expressing acquiescence in this view. The Secretary of State suggests that exemption from the Code should be accorded to all races of India which have definite rules of succession and inheritance. It is, however, somewhat difficult to frame a provision founded entirely on the definiteness of such rules, for want of any satisfactory criterion of definiteness. And thus, while practically giving effect to his opinion, in which we concur, we have not carried it out in precisely the way recommended.

The papers received from British Burmah show that all the Buddhistic races have a system of law definite in the same sense as the laws of the Hindús

and Muhammadans—definite, that is to say, as being prescribed by their sacred books. We have therefore not hesitated to add Buddhists to Muhammadans in the exempting Section. We have further provided for the contingent exemption of other races by empowering the Governor General in Council, either retrospectively from the passing of the Act, or prospectively, to exempt from the operation of the whole or any part of the Act the members of any race, sect, or tribe in British India. Whether the Parsees will have to be exempted under this Section by order of your Excellency in Council will depend on the result of the impending discussion on the two Bills in charge of my Hon'ble friend Mr. Anderson.

Sir, we have further altered the title of the Bill. The Secretary of State, speaking apparently on behalf of the Law Commissioners, has suggested that they may not wish this part of the Code to be its first Chapter. Now nothing can be more capricious than the arrangement and classification adopted by existing systems of jurisprudence, and I can quite conceive a Code of laws which had a Chapter on Succession for its first Chapter. But the Commissioners are of course entitled to settle the order of Parts in the body of jurisprudence which they have prepared; and I can quite understand that they may wish at all events to place all their definitions at the beginning of their Code. We therefore propose to change the title "Indian Civil Code, Chapter I," and to call the Act "The Indian Succession Act, 1865."

We have also made a not immaterial alteration in the system of probate proposed by the Commissioners. Their scheme not only provides that the Zillah Judge shall be the principal Judge of Probate in his District, but that he shall have power in non-contentious cases to delegate his authority to a functionary called the District Delegate. This latter machinery was probably provided in the expectation that the Code would have a much wider operation than is likely at first to belong to it. We do not think that the additional labour thrown on the Zillah Judge by the granting of probate and letters of administration under this Code will, for a time at least, be considerable. Moreover—though it is a point on which I cannot myself express a confident opinion—those members of the Select Committee who are most familiar with the Mofussil believe that the power cannot safely be confided to any lower authority than the Zillah Judge, and are afraid that any other arrangement will afford facilities for forgery and fraud.

I may add that we have saved the powers of the Administrator General in their plenitude, and have added a schedule of fees payable when probate or administration is taken out, or when a caveat is lodged.

Sir, though we thus propose to contract greatly the primary sphere of the operation of this new law, I do not feel inclined to modify the language which I employed when I introduced the Bill to the Council, as to its great importance to India. To the European community it will prove, I believe, an unmixed advantage, and will even deliver them from dangers which perhaps they do not quite appreciate, but which I regard as imminent and serious. But I must describe it as scarcely less of a boon to the rest of the people of India. Sir, insensibly and gradually, large sections of the Hindú and other communities have acquired the power of testamentary disposition, which probably, and indeed certainly, was not enjoyed by them under their ancient usages. Now, there is no stronger stimulant to civilization than the liberty of testation ; but I am afraid that there is a heavy set-off against its advantage in India through the encouragement afforded to fraud. Your Excellency in Council, if this Bill becomes law, will probably think fit to enquire of those who are most competent to speak with authority, whether the provisions of this Code relating to testamentary disposition might not safely be extended to all the races of India who have the power of making Wills. I must further bring to the notice of the Council that this Bill contains a part of a vast mass of law, which is accepted as law by all the civilised races of the West, independently of express enactment. The rules I refer to are deemed to embody first principles, or direct deductions from first principles. Whatever be their true origin—and the better opinion is that most of them descend from the Roman Civil Law—they have long commended themselves to the common sense of all European communities. Even in England, this body of rules has never been put into so intelligible and accessible a shape as it is placed by this law. English practitioners have to gather it painfully from dispersed treatises and detached law-reports. Even if this part of our Code were nothing more than a repertory of these rules, it would be difficult to overrate its value, for the want of such a repertory is greatly felt in our Mofussil Courts, and I have no doubt that the definite rules contained in it will rapidly fill the void which is now somewhat vaguely occupied by inferences from the not very certain canon of "equity and good conscience." But beyond all doubt, the great influence of this Code will be its influence as a model and a type. Judging by experience, there are no limits to the influence which a clear and simple body of written law exercises in absorbing less advanced systems of jurisprudence. The great example of this is of course the French Codes, which, violently detested and vehemently decried after the collapse of the French Empire in 1815, give now in 1865 the law to all but a fragment of Continental Europe. Through the effects of this power of absorption, I have no doubt that, if our Bill become law, it will ultimately deserve the title which at present we hesitate to give it, that, namely, of "The Indian Civil Code."

The Motion was put and agreed to.

The Hon'ble MR. MUIR—"Sir, in pursuance of the notice which has now been in the hands of the Council for several days, I beg to move this amendment, namely,—

That the following Sections be omitted from the Bill, and their consideration deferred until the portion of the Civil Code on Marriage and its effect on property is brought forward.

Section 43.—"No person shall, by marriage, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried.

Section 44.—"If a person whose domicile is not in British India marries in British India a person whose domicile is in British India, neither party acquires by the marriage any rights in respect of any property of the other party not comprised in a settlement made previous to the marriage, which he or she would not acquire thereby if both were domiciled in British India at the time of the marriage.

Sir, my Hon'ble friend, on the occasion of introducing the Code, made use of the following remarks :—

"One thing more I have to say. I venture to predict that when the first chapter of the Civil Code has been examined and discussed by the Council and its Committee, the strongest impression left on their mind will be respect for the Commissioners who prepared it."

He added—

"I may say that their labours are probably destined to exercise hardly less influence over the countless communities obeying English Law than the French Codes have exercised and still exercise over the greater part of the Continent of Europe."

Having had the honour of a seat in the Select Committee which has been engaged now for some months in carefully and patiently reviewing this Code, I am in a position heartily to concur in this praise, and in the eulogy which my Hon'ble friend has just passed upon it. I do not yield to any Member of the Committee in gratitude to the framers of the Code for their disinterested labours, and the benefits thereby conferred on India, nor in admiration of that most sound, substantial, and symmetrical system of law now before the Council.

Upon any question of a legal character, I should not have ventured to controvert the opinion of those eminent authorities, nor to have differed from my Hon'ble friend, to whose views I wish always to defer, and whom upon legal questions I should be disposed implicitly to follow.

But, Sir, this is not a matter of mere legal bearing : it has a reach far beyond that of any ordinary point of law. And it is because I believe that the provisions contained in Section 43 will injuriously affect the frame-work of society and the foundations of domestic life, that I have ventured to call them into question.

This Section lays down the normal rule of the married relation, that is, the rule which shall prevail in the absence of any special stipulation. It provides that "no person shall by marriage acquire any interest in the property of the person whom he or she marries." The husband will acquire no interest whatever in the property of the wife, nor the wife in the property of the husband. Each will possess the respective property existing at marriage, or acquired after marriage, altogether independent of the other. The wife will have the right to manage her own property, and to receive all rents, profits, and revenues thereof, on a footing entirely separate and distinct. For the Section goes on to say that neither party shall "become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried. The wife is thus empowered to act separately and independently in respect of her property, to enter into obligations, to bind herself, for example, as a surety, to trade, to speculate, to sue and be sued, not only without the consent, but even against the will of her husband. In fact she will have as entire and absolute a right of property, and as separate and independent a right of action in respect of it, as if she had not married.

Now, what I wish to urge upon the Council is, that this is a state of law different from any which has ever existed, or which does at present exist anywhere, excepting, perhaps, among the Mahometans. I wish to urge that the nearest approach to such a condition belongs to a period when society was demoralized and the conjugal relation lax. I will also show that the tendency of European society has been to recede from such separation of interest between the husband and wife, and to re-establish in greater or less degree a community of interest between them.

As remarked by my Hon'ble friend, the Roman Civil Law forms the substratum of the law generally adopted in Europe; and I will therefore state its provisions on the subject. In the earlier periods of Roman history, the marriage ceremony placed the property of the wife entirely at the disposal of the husband; it passed *in manum viri*; and so strongly was the integrity of the family preserved, that the wife was regarded at law as a daughter.

To this extreme stringency succeeded an equally extreme laxity. Marriage came to be an ordinary contract into which the husband and wife entered on equal terms, each retaining a right of property altogether independent of the other. But the wife could not transfer her property to the husband without a full consideration; so that the system had this advantage, that it protected the wife. Now this independent right of property in the wife existed during a period when society was marked by an extraordinary laxity of manners, and looseness of

the marriage bond. As remarked by Mr. Burge, at this time "the frequency of divorces and the frivolous causes for which they were granted, formed a striking contrast to the simplicity and purity which distinguished the earlier period of Roman history."

The rule of separate property having been thus incorporated in the Civil Law, was naturally pressed by the advocates of that Code, more or less, upon the nations of Europe. But the intuitive sense which prevailed as to the unity and integrity of the family, resisted its application, and at length secured in every nation community of interest in a greater or less degree between the husband and the wife.

I will begin with Spain, because the Civil Law of marriage seems to prevail there more completely than in any other country. Originally, in fact, the law of marriage in Spain was precisely that of the Civil Code. But by degrees a community was introduced of this nature :—the wife retained her title to the property which she possessed at marriage; but all gains, rents, profits, and acquisitions, whether from the wife's property or other sources, *subsequently to marriage*, fell into the common stock. This is called *communio quæstuum*, and is now the law of Spain. "This community," says Burge, "silently and imperceptibly acquired a place amongst the usages of Spain." In fact, the national instinct rebelled against the unnatural rule of the Civil Law, and reverted spontaneously to the natural law of community. The wife cannot trade without her husband's consent; and I may add that, in Trinidad, an order of British Council still further modified the Spanish law by introducing a somewhat greater degree of common responsibility of husband and wife for their respective debts.

I will now allude briefly to the laws of other European nations.

In Holland, when there is no express stipulation to the contrary, there prevails "universal community," which brings under a joint interest the entire property of husband and wife, both that which existed prior to marriage, and that which may be acquired after marriage. Even when this arrangement is specifically excluded, there still remains the "particular" or restricted community, which (like the *communio quæstuum*) extends to all acquisitions during marriage. The husband is also curator of the wife's property; as such, manages and administers it.

This is also the law in Ceylon, the Cape of Good Hope, and British Guiana.

For the law of France, I beg permission to quote from Storey :—

"When no special stipulations exist, the case is governed by what is denominated the rule of community, *le régime de la communauté*. This community or nuptial partnership gener-

ally extends to all the movable property of the husband and wife, and to the fruits, income, and revenues thereof, whether it is in possession at the time of the marriage, or it is subsequently acquired. It extends also to all immovable property of the husband and wife acquired during the marriage; but not to such immovable property as either possessed at the time of marriage, or which came to them afterwards by title of succession or by gift. The property thus acquired by this nuptial partnership is liable to the debts of the parties, existing at the time of the marriage; to the debts contracted by the husband during the community, or by the wife during the community with the consent of the husband; and to debts contracted for the maintenance of the family and other charges of the marriage. The husband alone is entitled to administer the property of the community; and he may alien, sell, and mortgage it without the concurrence of the wife.... The husband becomes the head of the family; and the wife can do no act in law without the authority of her husband. She cannot, therefore, without his consent, give, alien, sell, mortgage, or acquire property."

The same law prevails in the Mauritius, St. Lucia, and French Canada.

In Scotland, marriage establishes a community of movable property. The wife retains the title to her heritable property, but all its proceeds fall into the common stock. The husband is curator of the wife's estate, which she cannot alienate without his consent. If there be issue, the husband acquires a property in his wife's estate.

The law of England need be but briefly mentioned. By it, marriage is a gift to the husband of the wife's personal property; it confers upon him the freehold of her real property for his joint life; and if there be issue, for his entire life. The wife cannot contract in respect of any property not settled for her separate use.

In America the law is based upon that of England, the several States following it more or less closely; excepting Louisiana, where a rule prevails resembling the communio quæstuum.

This detail (for the length of which I must apologize to the Council) was necessary to prove my position. It does prove, so far as I have been able to prosecute the enquiry, that there is no European nation, or European dependency, of which the law at all resembles that which is laid down in this Section. In all, there is a community more or less complete; absolute and universal as in Holland; restricted as in England and Scotland; or still more restricted as in France and Spain. The weakest form existent anywhere is the communio quæstuum, or community of acquisitions during the marriage.

I need not stop to point out how completely different is the effect of this Section, by which the wife possesses her property, acquired either before or after marriage, entirely separate from her husband; and possesses a power over it as independent and uncontrolled as if she had never married.

As the wife is not responsible for the debts of her husband, and the husband possesses no controul over the property of his wife, it might be contended that neither is the husband in equity responsible for his wife's debts; but that she should be responsible for her own debts both in her property and in her person.

I apprehend, however, that this would be a state of things that could not consist with the usages of civilized society. And yet, if the husband is to bear an *unlimited responsibility* for his wife's debts, it is only natural that he should have some control over the disposal of her property,—at any rate over that part of it which was not settled by an ante-nuptial contract for her own separate use. By existing law, the husband does now bear this unlimited responsibility; and he will continue so to do, unless that responsibility be removed in the future portion of the Code which relates to marriage. I ask, then, how can we fairly perpetuate the responsibility of the husband for the debts of his wife, when we have taken from him the corresponding right of controul over her property?

Perhaps my Hon'ble friend will be good enough to explain to the Council what will be the future course of legislation in this respect;—whether it is intended to retain the unlimited responsibility of the husband for the debts of his wife: and if so, by what corresponding provisions it is contemplated to protect the husband; whether her property is to be primarily responsible for her debts, and the husband only in the second degree; or in what other way their relative responsibility will stand.

I contend that, until these points are known, the bearing of this Section cannot be satisfactorily understood. To make a sweeping change of this nature, while as yet its ultimate effect is hidden from us, is to legislate in the dark. However much we may respect and trust Her Majesty's Commissioners, the Council should not thus be called on to pin their faith to a proposal which is only half developed.

The only indication which I can find of their intention is in Sections 183 and 189, where it is laid down that probate and letters of administration cannot be granted "to a married woman without the previous consent of her husband." She will, therefore, not be able to bind her property by any acts performed in execution of a will or administration of an estate, undertaken without her husband's consent. But there must be a multitude of other restrictions to which the husband is equally entitled if he is to be held unlimitedly responsible for the debts of his wife.

Sir, I object not merely to the separation of property introduced by Section 43; I object altogether to this piece-meal legislation which gives us the

part of a law, and leaves the complement necessary to the full comprehension of its bearing and effect, indefinitely to some future period. I cannot think that this style of legislation is right and proper.

In justification of the change, it has been urged that, although the law of England is as I have stated, it is yet habitually over-ridden by marriage-settlements; and that the effect of marriage-settlements is the same as the new law. Thus the Commissioners in their report say:—"such powers as we propose to confer on the wife are frequently reserved to her, even in England, by the terms of her marriage-settlement." The law of marriage-settlements is dangerous ground for the uninitiated to tread upon. But I believe I may appeal to my Hon'ble friend to support me in saying that the state of property produced by an ordinary marriage-settlement is essentially different from the project under discussion. For, in the first place, that arrangement secures to the wife the property settled for her separate use, in such wise that (as under the old Civil law) she has no power to transfer it to her husband. Now under Section 43, the wife may at any moment give away and surrender the whole of her property or any part of it to her husband; she possesses full and absolute power of alienation to her husband, as to any other. I need not point out that this provides no satisfactory protection to the wife; and instead of that Section producing the same state of things as an ordinary marriage-settlement, that, on the contrary, marriage-settlements will be hardly less necessary under it than at present. In the second place, an ordinary marriage-settlement confers no power on the wife save and except over the specific property separately settled upon her; whereas Section 43 confers on her an absolute and unrestricted right of contract and disposal in respect of all property whenever possessed or however acquired. I believe, therefore, I am justified in asserting that Section 43 will create a state of property in the wife, entirely different from the disposition of property prevailing under ordinary marriage-settlements.

It was also urged in Committee, that, although the husband does lose in being cut off from any interest in his wife's property, he will obtain a corresponding advantage, since his wife's property will not be liable to seizure for his debts. Sir, this appears to me a very questionable argument. For in the first place, it proceeds on the assumption (which the supporters of the Section deny) that the husband does possess a natural and equitable interest in his wife's property; and secondly this provision will often tend to defraud the creditor of his just dues. For it enables the husband to contract debts, arising probably out of the common necessities and obligations of the family, and yet it holds back from the creditor property that is fairly liable for such debts.

But, Sir, for any minor objection of this nature, I should not have ventured to oppose the new provision. I oppose it because I think that its tendency will be detrimental to society, and will affect the unity of domestic life.

I adhere to the ancient belief that the family is, by the very constitution of human nature, an indivisible unit. And any legislation tending unnecessarily to break up that unit, must produce a baneful effect. In the family, the children are bound in obedience to the parents ; the husband is the head of the wife ; and thus he is the head of the whole family. It may be the fashion of modern views to decry this ancient belief, and assert the equal and independent rights of women. I cannot share in these views ; I believe them to be fraught with danger. I think that the drift of the new law is in this direction. As the Hon'ble Mr. Campbell has remarked :—

"The question then really is—shall we now enact by one Section in a Chapter on successions, that marriage shall no longer be that intimate and unlimited partnership on which the institution of the family as a corporate unit is founded, or shall we leave that great question to be settled in its proper place ?"

I confess my own conviction that the proposed law will have a tendency to sow the seeds of disunion and alienation in the married state ; to introduce division, where the normal relation of husband and wife implies unity, of right and title ; to break up the family into two distinct heads, each with its separate property and establishments, separate obligations and responsibilities, separate and it may be antagonistic interests.

In so far as this state of things prevails, the common authority of the parents will be weakened. A separation of interest between them will distract the filial devotion of the children, and diminish the motives for honor and obedience. The bond which knits the family together will be enfeebled.

For these reasons, I concur in the opinion expressed by the Hon'ble Mr. Seton-Karr in a passage of his report upon the Bill, which I trust the Council will permit me to read in their hearing.

"This Section seems to me to involve a very important, and, I must say, a dangerous deviation from the principles on which marriages have been hitherto concluded. I am aware that this change finds favour with several eminent Law Reformers; but, in my own opinion, it is a change of a novel, undesirable, and formidable kind. A question of this sort will always more depend on, and be ruled by, social and domestic feelings, than by logic or knowledge of law. But I think that feeling, past experience, and that reason which we apply to the ordinary transactions of life, are equally against the new view now set up. The onus of proving the paramount necessity of such an alteration lies on those who propose it. I cannot think that

it will tend to increase the number of happy marriages. On the contrary, it may have the effect of sowing dissensions where none existed previously, and of adding to any existing sources of discontent between man and wife. It involves a fundamental change in the conditions of married existence, which seems to me wholly uncalled for; likely to create feuds or to increase them; at variance with a principle well known, popularly accepted, and long established in England; subversive of the harmony and well-being of the closest social intercourse; opposed to the wholesome relation in which the woman stands to the man; destructive of mutual dependance and honour, and a mere concession to the levelling spirit of the present age, presented under the guise of a questionable liberality.

"Had I a vote to give, I would unhesitatingly give it against any such proposal which seems to me much at variance with the other parts of this excellent Code."

I ask, then, on what account it is proposed to introduce this dangerous innovation? Is it to protect the wife against her husband? I have before shewn that it will fail to afford her any adequate protection. She may, the very next day after marriage, surrender her property into the husband's hands. At times of weakness, distress, or necessity, the inducement to such surrender will no doubt be often irresistible. I repeat, then, this Section affords no protection to the wife against a bad, designing, and selfish husband. And I contend that the same object may be equally well secured, perhaps secured much more efficiently, without abandoning that community of interest recognized everywhere.

Is it a reason in favour of this new principle, without a parallel in Christendom, that it is in conformity with the Mahometan law? Sir, I cannot think this a happy augury. From my own observation I may say that the Mahometan rule on this point, without raising the female sex, has plainly tended to produce disunion and dissension, to create and to fan feuds of family, to encourage litigation, and to break up the household into parties, the children siding one way or the other. I am far from saying that there are not other causes at work in Mahometan society to produce these evil results; but the distinct influence of this rule in producing, as its natural and legitimate result, the effects I have described, cannot escape the careful observer. It has forced itself painfully upon the notice of Mr. Campbell, whose long experience as Judicial Commissioner in Oudh gives special weight to his opinion. He thus writes:—

"Among them (the Mahometans) only has this law hitherto prevailed in India. It is now proposed to extend it to all, Englishmen, Christians, and others, as the *lex loci* of the land. After administering justice for some years in the greatest and wealthiest Muhammadan city in India, I have become so deeply impressed by experience of the disunion and ruin of families worked by this law of husband and wife, that I think it my duty to state my apprehensions before that law is so widely extended."

And again, after asserting the rule of unity and community in the family as the indefeasible law of Christianity, he proceeds:—

"But if it be said that this is not a Christian country, and that the Legislature is not a Christian Legislature, then I shall be prepared to say that the result of my experience goes most strongly to show that, in practice, the freedom of the individual spouse and the reduction of marriage to a mere contract on such terms as may please the parties does not work well; that under such contracts nothing like the family subsists; that man and wife are no more to one another than two partners; that when they have their separate interests, separate rights, separate establishments, the name of marriage is degraded; the status and the honour of families is destroyed; the family itself ceases to exist."

But for whom is this law intended? Hindoos, Mahometans, and Buddhists have been excepted from its operation; and all tribes having their own laws on the subject will also be exempted. The law then will apply to European settlers, to Classes of mixed blood, to Native Christians, and to the Races scattered throughout India not specially exempted from its operation. Do any of these classes desire this novel Law which the Council is about to impose upon them? Do the Native Christians desire it; or those who are the natural guardians of their interests—have they expressed the opinion that it will tend to their welfare? Have the Anglo-Indian classes exhibited any preference for this rule? Is it likely to approve itself to the European settlers? In answer to this last enquiry, I was told, "Oh! if the Settlers do not like the law, they need not *domicile*, and then they will be free from its provisions." Sir, I refuse to accept this as a satisfactory reply. We should not discourage, we should rather encourage, the European settlers to acquire the domicile of the country. We should do this, not simiply by providing facilities for the registration of domicile, but by the enactment of laws conformable to the usages of European nations, and the customs and prepossessions (or, if the advocates of this Section will have it so, the *prejudices*,) of those who come to settle here.

How will the law affect the Native tribes and races scattered throughout the Peninsula? Do they desire it; will it be suitable for them? It has been urged in reply to my argument, that marriage-settlements in England, reserving a separate property for the wife, do not produce disunion or estrangement: why then should those results be apprehended in India? I reply,—I have already shown that the effect of the proposed law will entirely differ from that of an ordinary marriage-settlement; the latter being limited in its operation, and yet forming a perfect protection to the wife. An arrangement of this nature, by previous

consent of parties, in no way resembles the absolute independence conferred by the projected law; the one may be innocent, while the other is dangerous. But farther; a system which may be suitable to the advanced state of civilization in England, will not necessarily be suitable for India. Were it even admitted that the effect of the new law would be precisely the same as of an ordinary settlement compatible in England with domestic harmony, it would not follow that such a law is fitted for the Native classes in India who will gradually fall within its scope, or for the extensive bodies of Native Christians in various parts of the country. These belong to an entirely different stage of civilization, a simple, rude, and backward stage, at which it is of extreme importance to maintain the integrity of the family and to uphold the authority of the husband as its head. For them, at any rate, the projected law would be surely most unsuited.

Sir, I am far from holding that some modification of the English Law of marriage may not be expedient. It may even be indispensable to simplify that law by removing, for example, the subtle distinctions now prevailing between personal and real property; and it may also be possible to afford substantial protection to the wife without unduly weakening the safe-guards of community of property. Possibly this might be done by some approach to, or modification of, the French *régime de la communauté*. But if any change of this nature be attempted, I would urge that it be deferred till the Chapter upon Marriage, when alone, as I have already shown, the full bearing and effect of this measure will be understood.

I have a further objection to the present position of this Section. To that position must, I believe, be attributed the almost total absence of discussion on the subject. Excepting the opinions of the two gentlemen already quoted, the Committee have received no comments whatever on this important point. Nor have I observed the subject discussed—as it is natural to suppose a topic like this of the deepest and widest social bearing would be discussed—in the public journals. I do not attribute the apparent absence of interest towards a change of such vital importance, to any neglect of their duty on the part of the leaders of the public press. Who, in fact, would look for the Law of Marriage in a Chapter on Intestate Succession and Wills? You might as well expect there to find Rules for the Income Tax or for Police, or the Law of Insurance, as there to find the Law of Marriage. In a word, had it been an object to pass this Section in a close and surreptitious manner, it could not have been done more successfully. I am far, of course, from saying that this has been in any measure intended. But the effect has been the same. I repeat, attention has not been attracted to the subject; there has

been absolutely no discussion of it. I submit, therefore, that the Council should not precipitately pass this measure without having the benefit of opinion out of doors. I would urge that if necessary the whole Bill be postponed for such a period as will admit of a fair and full consideration of the measure by those whose dearest interests are affected by it.

In conclusion, Sir, I have shown that the proposed measure differs essentially from the law of every other nation; there is no people among whom community of married interest does not more or less exist, excepting the Mahometans. I have shown that it will maintain the unlimited responsibility of the husband for the debts of his wife, and yet take from him the corresponding controul over her property. I have shown that the effect of this project will be entirely different from that of an ordinary marriage-settlement. I have shown that it may defraud the creditor of his just dues. I have shown, at least, my opinion is, that the abolition of community, and establishment of a separate and independent interest, will be injurious to society, encourage dissensions in the family, and weaken the domestic bond. I have shown that the new law will not protect the wife against a selfish and designing husband. I have demanded proof that the change is desired by the classes for whom it is intended, or that it is suitable for them. I have shown that, at any rate, it should be deferred till the enactment of the Law of Marriage, in the light of which alone its effect and bearing will be fully seen. And lastly, I have shown that the intended change has not received the attention of the public, nor the full discussion to which so vitally important a measure is entitled.

And, yet once again, I ask why this novel and dangerous innovation is to be made in India? Has any European nation found the prevailing law of community so irksome or injurious that endeavour has been made to get rid of it? The tendency has been, as I have shown, rather to revert to that state of community where it had been lost sight of. Have any of the dependencies of the nations of Europe abandoned the law of community as burdensome or inequitable. They are not bound, as it might be said the mother-country is, by ancient prejudices or prescription. They have free Legislatures of their own. Has any change, any attempt at change in this respect, been made by them? In New South Wales, for example, or New Zealand, or Canada, the Cape, Ceylon, Mauritius, in short in any European dependency, have steps been taken to shake off this time-honoured law? Has any one of the American States done so? And yet they are not slow at novel legislation, and sometimes also vaunt the rights of women. I do not know that even there, any endeavour has been ever

made to introduce so sweeping and radical a change. Sir, I have sought diligently for a precedent in the experience of nations to justify this law; and I have sought in vain.

In vain have I sought for a reason to justify to my own mind this strange and novel rule. The only reason which I have lighted upon is contained in the following extract from my Hon'ble friend's opening remarks in the speech already quoted. He spoke thus:—

"I may say that, in proportion to the judicial or professional eminence of an English lawyer is his sensitiveness to the undoubted faults of English law, and his anxious desire that, to that strong and solid structure of common sense which constitutes its mass, there should be added excellencies to which it certainly cannot at present lay claim—simplicity, symmetry, intelligibility, and logical coherence.

Sir, simplicity, symmetry, and logical coherence, are unquestionable excellencies. But I submit that, for theoretical advantages like these, no experiment should be adventured which may imperil the best interests of society. Let those who desire it make the experiment upon themselves; or let it be tried upon some inferior subject. It is usual to say that an untried experiment involving vital interests ought to be made first upon an inferior subject. But I submit that India, and the settlers spread over its plains and mountains, are no such ignoble body as to be made the first and earliest subject of this trial. I therefore urge it upon the Council, and entreat earnestly, that these Sections be omitted from the present Bill, and their consideration postponed until the Chapter upon marriage is reached; by which time some wise and middle course may be struck out which shall combine the undoubted excellencies of simplicity and logical coherence with the adequate protection of the wife, yet without sacrificing that community of interest between husband and wife which is recognized throughout the length and breadth of Christendom."

The Hon'ble MR. MAINE—"The first observation which my Hon'ble friend's speech calls for is a reply to his remark that this Section has not been discussed by the Indian Press. It so happens that it is the only Section which has been discussed. We sometimes suffer from the want of discussion on the part of the Press: but the observations on this provision which I made when I introduced the Bill were really elicited by comments on it in an Indian newspaper for whose readers I intended the explanations which I then offered, and which I am about to repeat.

I submit to my Hon'ble friend that it will be impossible to carry his amendment without going further. I do not wish to obstruct any course he may think fit to take. But I must say that if these Sections are simply omitted, the

result will be almost inextricable confusion. As he himself appears to anticipate, the English Law of Marriage in its application to property will survive, since we have practically confined the operation of the Code to the European community. Now, as I before explained, one of the principal objects of the new law is, to efface the distinction between Real and Personal property, to substitute that between Moveables and Immoveables, and to provide simple rules of testamentary disposition and of intestate succession uniform for property of either kind. But the English Law of Property as affected by marriage, has essentially for its basis the distinction between Realty and Personalty. It has been correctly described by my Hon'ble friend. It gives the husband all his wife's personalty, it confers on him certain limited rights over her realty, over debts due to her and over what are called her chattels real. On the other hand, the wife acquires a right to dower out of her husband's lands. I speak of course of the law of marriage as unaffected by marriage-settlement, or by the provisions of any Will of the person from whom the property has devolved. What then will be the effect? Wills and marriage-settlements are *in pari materia*. Succession after death is just as often determined by one as by the other. Every Will, therefore, made under this Code will be governed by one set of principles: every marriage-settlement will be made under another. There will be entanglement between the two, and so far from having increased the simplicity of the law, we shall have added greatly to its complexity. If the amendment is carried, the first form of the last Section must be restored, and the Code will only come into operation after the Chapter on the Law of Persons shall have been passed. But as the Commissioners will almost certainly take that up last in order, the Code, when it is enacted, will have ceased to have practical interest for anybody now in India.

I have no doubt, however, that my Hon'ble friend has proposed his amendments with a view of raising the question of principle which he has very ably argued. He has stated, though with more moderation, the views expressed by Mr. Justice Seton-Karr in a minute on this Section, which he has forwarded to the Council. To put these objections in a clear light, I will cite a part of Mr. Seton-Karr's animadversions.

'It involves a fundamental change in the conditions of married existence, which seems to me wholly uncalled for; likely to create feuds or to increase them; at variance with a principle well known, popularly accepted, and long established in England; subversive of the harmony and well-being of the closest social intercourse; opposed to the wholesome relation in which the woman stands to the man; destructive of mutual dependance and honour, and a mere concession to the levelling spirit of the present age, presented under the guise of a questionable liberality.'

Sir, I trust I shall not occupy much of the Council's time in showing that the Indian Law Commissioners are not open to these grave charges. Whether I shall present the justification which the Commissioners themselves would give I really cannot say. For I suppose that the last criticism on their Code they would expect would be this. How little these gentlemen, who are not more learned than respectable, can be prepared for the charge that they are intending disturbers of domestic peace, may be inferred from the fact to which my Hon'ble friend has adverted, but without bringing out its full significance, that this Section simply embodies the provisions which are inserted as a matter of course into every well-drawn English Settlement when the property of the lady is brought under it. I venture to say that every lawyer practised in conveyancing—our friend the Secretary to the Council for example—would insert it without a second thought if he had no express instructions to the contrary, or rather he would prescribe a more stringent rule, as my Hon'ble friend seems himself to be aware, though I do not comprehend the argumentative use to which he has put his knowledge of the fact. There is a certain magical formula of English law "to her sole and separate use" which wherever it is found has the exact effect of this Section. But it is usual to take a further step to which, as it seems, my Hon'ble friend must object, *á fortiori*, and to deprive the wife of the power of anticipation, so that not only has she the control of her property, but is unable to divest herself of it in favour of her husband or of any body else. The Law Commissioners therefore appear to me to have followed what is the soundest of all rules in amending legislation. They find the nominal law one way, the actual practice another. They know by experience that the nominal law is altogether over-ridden by inveterate usage. Thereupon they have taken the usage and made it into the law. Sir, it seems to me that the argument of my Hon'ble friend and of these learned Judges Mr. Justice Seton-Karr and Mr. Justice Campbell, lead inevitably to the conclusion, which surely, with all respect, I may venture to call absurd, that in every household in England afflicted with the calamity of a fortune devolving on a wife from her parents, dissension and suspicion must reign, and a generally immoral state of relations be established. Mr. Justice Campbell observes that he has become alive to the mischievousness of this Section from sad experience of the evil effects of a similar rule among the ladies in the zenanas of the Shía Muhammadans in Oude. I venture to think that the experience of English gentlewomen is more germane to the purpose, and I say that the averment that to give them a share in the control of the property they have inherited impairs their sense of conjugal duty is calumnious. I do not indeed mean to say that it is calumnious in the mouth of my Hon'ble friend or of these learned Judges. I attribute a feeling, which to me is perfectly unintelligible, to a small circumstance peculiar to India, which

is not unimportant. Members of the Services in India marry generally under the provisions of their funds, which, in fact, are ready made marriage-settlements. As, then, these Funds are formed by retrenchments from the earnings of the husband, a marriage-settlement in India is most frequently a provision made exclusively by the husband. But a marriage-settlement in England is just as often a settlement of the wife's fortune, and I say that the general sense of equity and fairness prevailing among Englishmen would be severely shocked if there were not reserved to the wife a control over her property, or, at all events, the free exercise of her volition in giving it away. And so strong is this feeling that the property-holding classes have given the benefit of their own practice to the poor, and some recent enactments have been passed to protect the personal earnings of a wife against the Common-Law rights of her husband.

Sir, the first reason which I should expect the Commissioners to give in justification of this Section is this, that by it in an eminent degree they have attained to simplicity. It is no doubt possible for the law-giver to regulate by express legislation the law of property as affected by the status of marriage—to select some system of proprietary relations between husband and wife as in itself the best and most expedient—and yet to construct a tolerably simple body of jurisprudence. But such simplicity can be secured on one condition, which is quite indispensable. It is this—that after choosing your ideally perfect set of relations, you adhere to it, and abide by it—that by express prohibitions you forbid any but the most inconsiderable departure from it. It is, as it seems to me, an inadequate appreciation of this truth which deprives of value my Hon'ble friend's citations from foreign bodies of law. The French Codes, which are doubtless the most liberal of all, and which are destined to absorb almost all the others, provide, as any Hon'ble friend has correctly stated, three alternative forms of marriage-settlement, and ordain that if none in particular be adopted by the persons marrying, one special settlement shall prevail. But, then, under French law, no marriage-settlement is allowed to affect succession after death. Every contract of the kind is subject to the inflexible rules which compel the absolutely equal division of the property among the children. Moreover, the enjoyment of the property by the married persons during their joint lives can only be varied from the provisions of these three ready-made settlements in a very slight degree. Some deviation through what are called "auxiliary pacts"—"collateral articles" as we probably should call them—is permitted, but such deviation is not considerable. Speaking roughly, it may be said that two persons intending to marry under French law are confined to a choice among three forms of marriage-settlement, and can only affect their own life-interests.

Compared, then, with the almost unlimited liberty of making settlements which is permitted by English law, the French system is one of the severest restriction. I suppose, then, the Law Commissioners to have reasoned in this way. "We offer no opinion as to the abstract expediency of the proprietary independence of husband and wife. We are ready to admit, that in particular cases, it may be desirable to give the husband a larger control over his wife's fortune. But we are unable to reconcile any legislation founded on this admission with that unbounded liberty of moulding settlements to the position of the persons and of the property which the English law has long permitted, which the English people have long practised, and which we intend to confer on the people of India. Granting the unshackled freedom of making settlements, we think that the proprietary independence of man and wife is the best point to start from. For it is found by the experience, the consentaneous experience of English lawyers, that if you insert a series of provisions in a law, but permit them to be overruled at the pleasure or caprice of individuals, you make an absolute sacrifice of simplicity. For the immediate result is this :—every line and perhaps every word of every marriage-settlement will have to be framed with an express or tacit reference to the antecedent provisions of the Code. The object is to exclude those antecedent provisions and to substitute others. But this can only be done by a person who has those provisions in his mind and their legal consequences also. The effect will therefore be to defeat one of the principal objects of this legislation, which is to dispense with the absolute necessity of employing professional lawyers in drawing Wills and Marriage-settlements. Probably under no system of law will it ever be quite safe to dispense with professional assistance. But if this Code be not tampered with, it will ensure, as far as is possible, that the intentions of a testator or settler expressed in plain and untechnical language shall have effect." The Commissioners, therefore, secure by this Section, the great legal advantage of simplicity. But let me ask, on their behalf, do they sacrifice morality? Really, Sir, the feeling of my Hon'ble friend, and of the two learned Judges, appears to me utterly inexplicable. They seem to regard it as almost sinful in the law-giver to decline to express a preference for one particular system of proprietary relations between husband and wife, and Mr. Justice Campbell claims the most solemn sanctions for some arrangement which is not clearly explained, but which, at all events, is not that of the Code. But neither my Hon'ble friend nor Mr. Campbell seem to have the smallest objection to allowing their typical system to be over-ridden by the first comer. If, then, the system of the Law Commissioners be sinful, I say that the system of my Hon'ble friend and Mr. Campbell is sacrilegious. If a particular state of the law of property is sanctified at the altar, to allow it to be set aside is to profane

the altar. Sir, the English marriage service still contains the ancient formula by which the Church in the Dark Ages constrained the husband to promise that he would give his wife after his death her dower and thirds, a promise which has given its form to the Common-Law of nearly all Europe. It usually happens that the marriage-settlement, signed a day or two before the ceremony, makes the wife covenant to renounce her dower and thirds. Now, if the meaning of the promise were generally understood, which it certainly is not, does my Hon'ble friend think that it adds solemnity to the occasion, or that it might not be omitted with advantage? I think that there is something like indecency even in a secular Legislature to set up provisions which will certainly be knocked down by everybody like men of straw. But if these provisions have the sanctity which is now claimed for them, there is something worse than indecency.

Another justification which perhaps the Commissioners would offer is that the Section, except in very rare cases, will only have effect when it has been deliberately intended that it should have effect. I asserted once before that there is no practice which diffuses itself so rapidly as the practice of making Wills and Marriage-Settlements, and under the simple forms permitted by this Code, the chances are that it extends itself more widely in India than in England. But if by some accident—and it will only occur through an accident—property should devolve from her relatives on a wife during marriage in such a way that this Section operates upon it, I cannot for a moment admit that there is the smallest objection to requiring the wife's consent before this property is dealt with by her husband. The learned Judges do not seem to me fully to comprehend what my Hon'ble friend has shown that he understands, though it does not help his argument, that this Section does not forbid the wife to divest herself of that control over her property which it secures to her. There will be nothing to prevent her re-settling it the next moment to her husband's advantage. There have been systems of jurisprudence, which, like the Roman law, made it their deliberate policy to keep apart the property of husband and wife. But then the Roman law went on by its prohibition of donations *inter virum et uxorem* to forbid one married partner to alienate his or her property in favour of the other. An English marriage-settlement when strictly drawn has the same effect as regards gifts from the wife to the husband. But this Section puts no obstacle in the way of an immediate re-settlement. What conceivable objection can there be to requiring the wife's consent to it? If that state of relations follow which in the great majority of cases does follow, it would certainly be asked, and that household must be miserably ordered in which the intelligent assent of the wife to an advantageous disposition of the property is not asked, and given as a matter of course. But assume the

contrary—assume that the wife capriciously and maliciously, and to the detriment of the common interest, refuses her consent. Does my Hon'ble friend, who has the peace of families at heart, suppose that he would mend matters by allowing the husband violently to take away that which he has not earned or given? Since the beginning of the world, or at all events since the War of Troy, no great amount of good feeling, so far as I know, was ever created by allowing one person to take away by force what belongs to another. Nothing can be clearer, in short, than the probable operation of the Section. In the great majority of cases the law will correspond with that which, apart from law, would exist in fact. In the few exceptional instances, no good would be done by attempting legislation.

But, Sir, for myself I must admit in all honesty that, according to my individual judgment, it would be better if it were even commoner than it is to give the wife a controul over her own property, and if that controul were more sustained and continued. I wonder that my Hon'ble friend has not learned the same lesson which I have learned from our discussions on this Code. Why is it that after exempting Hindús and Muhammadans from its operation we have been led? successively to except nearly every Native race in India? The reason is the same throughout—the insurmountable distaste which all feel for anything like an equality of privileges between the sexes. Some will allow the woman to have nothing: they say that she should be supported by her parents when she is unmarried; that her husband should maintain her when she is married; and that after his death, since the British Government permits her to live, she should be at the charge of her children or relatives. Others go a step further, and admit that the woman has a right to a share of the patrimonial property. But they affirm that it is an indeterminate share, determinable by her needs or by the sense of equity prevailing in the family. If I had no data to go upon, other than those which these discussions supplied, I should be led to the conclusion which I have arrived at independently, that if there exists any test of the degree in which a society approximates to that condition which we call civilization, it is the degree in which it approaches the admission of an equality of right between the sexes. In this country I am sure that by simply applying that criterion you could construct a scale of barbarism and civilization which would commend itself to every man's perceptions. My Hon'ble friend Mr. Anderson must forgive me for saying, that perhaps the last struggle of barbarism—I do not use the word offensively, but as a term of degree—occurs in the case of his excellent clients the Parsees, who are ahead of the other races in allowing to women a definite share of property and in permitting them to enjoy it independ-

ently, but who seem to consider it a sin against nature if daughters were to take more than a fourth as much as their brothers. I once had a conversation with a very able Native Member of Council on some project of law, and I observed to him that if his view were correct, there would be no difference between wifehood and slavery. "Well," said he, "but that is the very doctrine from which we take our start." Now of course the views of my Hon'ble friend and the two learned Judges are very remote from this—they are very near the other end of the scale. But the question is, whether they are wholly unallied with it? I have always observed that prejudice, when driven to its last stronghold, generally clothes itself in language of a certain vague magnificence; and I cannot help suspecting that something of the doctrine of my Native friend lurks in the generalities of my Hon'ble friend and the learned Judges about the ideal type of the family.

Sir, I think we may claim, not for English Law, but for English Lawyers, the discovery that in order to settle satisfactorily the relations of married life, it is sufficient to rely on the personal obligations of the married couple. You compel them to live together, you settle their rights over their children, you regulate their power of binding one another by contract: their dealings with one another's property you leave them to settle in the way which seems best to them; and if bad is the best, you believe that by minute legislation you cannot make it better."

The Hon'ble MR. COWIE said that, without giving his adherence to the whole tenor of the Hon'ble Mr. Muir's argument, he had intended to vote for his amendment on the primâ facie ground that it would be expedient to defer the consideration of so important a question until that portion of the Civil Code which treated of marriage and its effect upon property should come before the Council. But the Hon'ble Mr. Maine had shown so clearly the inexpediency of this; in fact, had named it as equal to postponing the question for years, that he (Mr. Cowie) was compelled to vote against the amendment.

The Hon'ble MR. MUIR,—"Sir, I have paused before replying, because I had hoped that some other Members of the Council would have spoken at length upon the important question at issue between my Hon'ble friend and myself.

Sir, I do not perceive that there are many points in my Hon'ble friend's speech which call for any reply.

I must repeat my assertion that the subject has not received anything like adequate attention from the public Press. The article to which my Hon'ble

friend alludes must have preceded the introduction of the Bill some considerable time; for, since it has been before the Council, I do not recollect to have seen in the papers a single discussion on the subject. The silence has been complete and ominous.

My Hon'ble friend, it appears to me, has admitted that an ordinary marriage-settlement differs in its effect from the proposed law, inasmuch as it binds the property settled securely to the wife; and that suffices for the completeness of my argument.

My Hon'ble friend has failed to remove the important practical difficulties which I raised respecting the unlimited responsibility of the husband for his wife's debts, although the control over her property is taken from him. Nor has he noticed the appeal which I addressed to him to inform the Council of the probable course which the marriage law will take in this respect. I submit that he has left us as much in the dark as we were before.

Referring to his comments on the restrictions of the French and other continental systems, it will suffice to say that there seems no reason why we should not borrow from them those parts which are good, without adopting unnecessary restrictions not essential to the doctrine of community.

My Hon'ble friend has well remarked that the English practice of marriage-settlements belongs to a period of society the most forward and advanced in the world,—a state of society which can perhaps safely dispense with some of those family restrictions indispensable in an earlier stage of civilization. But I have shown that this Code, as the *lex loci* of India, will embrace indigenous tribes, mixed races, and masses of Native Christians, who belong altogether to a backward stage, unprepared for the great advances of modern society; with whom at any rate, it is of the last importance to maintain the integrity of the family, and the authority of the husband as its head.

If my Hon'ble friend will not consent to omit these Sections from the Bill, I would urge upon him whether it would not be proper and right to postpone the passing of the whole Bill for several months, in order that the subject may be further discussed. However valuable this Bill, no material inconvenience will arise from its postponement. We can afford to get on for a time without it, as we have already. There is no such urgent necessity for it as to demand the hurried and precipitate passing of so important an alteration as that now before the Council, an alteration, the end and full bearing of which are still involved in obscurity."

The Hon'ble MR. TAYLOR said that it must be recollected that a large portion of the Council had been Members of the Select Committee and had taken the opposite view to his Hon'ble friend.

The Hon'ble MR. MUIR said that, as his motion had failed to secure any support in the Council, he saw no advantage in pressing it to a division. He therefore asked permission of His Excellency the President for its withdrawal.

The amendment was then by leave withdrawn.

The Hon'ble MR. HARINGTON said, it having been determined, and as he thought rightly, that Section 43 should stand as part of the Bill, he would now move that the Section be restored to the part of the Bill where it had originally stood, and from which he thought its removal had been proposed by the Select Committee without sufficient reason. The Section was declaratory in its character, and was intended to controul, or to operate in respect to, the entire Bill. This being the case, he considered that the Commissioners had rightly placed the Section at the commencement of the enacting part of the Bill. His motion, which was made with the knowledge, and he hoped he might add with the concurrence, of the Hon'ble Member in charge of the Bill, was that Section 43 stand as Section 4 of the Bill, and that the numbers of the intervening Sections and of the present Section 4 be altered accordingly.

The Hon'ble MR. MAINE said that the Section had been removed from its original place to its present place in order to bring it in contiguity with Section 44. He had had considerable doubts as to the proper place of the Section; but on the whole he felt inclined to acquiesce in his Hon'ble friend's motion, especially because the Law Commissioners had placed it in the position to which Mr. Harington wished to restore it.

The Motion was put and agreed to.

The Hon'ble MR. HARINGTON said that he would now further move that the last Section of the Bill (332) be struck out, and the following Section substituted for it:—

"The Governor General of India in Council shall from time to time have power, by an order, either retrospectively from the passing of this Act, or prospectively, to exempt from the operation of the whole or any part of this Act the members of any race, sect or tribe in British India or any part of such race, sect or tribe, to whom he may consider it impossible or inexpedient to apply the provisions of this Act, or of the part of the Act mentioned in the order. The

Governor General of India in Council shall also have power from time to time to revoke such order, but not so that the revocation shall have any retrospective effect. All orders and revocations made under this Section shall be published in the *Gazette of India.*"

He thought that the Section proposed by him, without altering the principle of the Section as it stood, would bring out more clearly the intentions of its framers.

The Hon'ble MR. MAINE said that he consented to the amendment with pleasure. The Section proposed by Mr. Harington not only empowered the Governor-General in Council to exempt any race, tribe or sect in British India, but also every part of such race, tribe or sect. If necessary, therefore, it would be possible to exempt Native Christians from the operation of the Act.

The Motion was put and agreed to.

The Hon'ble MR. MAINE also moved that the Indian Civil Code, Chapter I, as amended, be passed.

The Hon'ble MR. MUIR moved, as an amendment that, under Rule 29 of the Standing Orders, the Bill as amended in Council be republished, and its consideration deferred for a fortnight. Even within that short period, there would be some opportunity for ascertaining the opinion of the public on the Section which he had opposed.

The Hon'ble Mr. MAINE said he saw no necessity for the proposed postponement.

The amendment was negatived.

The original motion was then put and agreed to, and the Bill passed accordingly.

STAMP ACT AMENDMENT BILL.

The Hon'ble MR. HARINGTON in moving for leave to introduce a Bill to amend Act X of 1862 *(to consolidate and amend the Law relating to Stamp Duties)*, said that the part of the Stamp Act which the present Bill proposed to amend was the thirty-third Section. By that Section the Governor General of India in Council was empowered to reduce the rate of Stamp Duty on all or any of the deeds, instruments and writings described in the schedules at the end of the Act, or altogether to exempt them from Stamp Duty. It might have been supposed that the Section, as framed, was sufficiently large and comprehensive to enable the Government of India to do all that was necessary and

proper in the direction of the Section, and to meet every case in which a reduction of Stamp Duty might be deemed just or reasonable; but experience had shown that the wording of the Section was too restrictive, and that the power given by it required to be enlarged. An application had recently been made to the Government of India to reduce the Stamp Duty chargeable on bonds which were taken under the Indian Customs' Act of 1863. These bonds were at present liable to the same Stamp Duty as all other bonds or obligations for the payment of money. Compared with England, the amount of Stamp Duty on bonds in this country was very high, and as levied on the class of bonds just mentioned, it was found to press heavily upon trade, and particularly upon the bonders of salt cargoes. Looking to the circumstances under which these bonds were taken, and to the fact that actions to enforce them were very rare, the Government were disposed to view favourably the proposition that had been made for the reduction of the rate of Stamp Duty to which they were now liable, and to follow to some extent the English practice in respect of such bonds; but they were advised that, although they had power to lower the rate of Stamp Duty on bonds generally in the whole or any part of British India, they had not power to reduce the rate of Stamp Duty on any particular class of bonds. The object of the Bill which he had asked leave to introduce was to invest the Government with that power as regarded not only bonds, but also all other deeds, instruments and writings liable to Stamp Duty. It seemed right that the Government of India should have the enlarged powers proposed by the Bill, and in giving them, he thought it might be assumed that the Council would not be acting contrary to the intention of the framers of the existing Stamp Law.

The Motion was put and agreed to.

The Council then adjourned.

WHITLEY STOKES,

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

CALCUTTA,
The 3rd March 1865.

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