

Friday, December 22, 1865

**COUNCIL OF THE GOVERNOR GENERAL  
OF INDIA**

**VOL. 4**

**JAN. - DEC.**

**1865**

**P. L.**

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

---

The Council met at Government House on Friday, the 22nd December 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.  
His Excellency the Commander-in-Chief.  
The Hon'ble H. Sumner Maine.  
The Hon'ble W. Grey.  
The Hon'ble G. Noble Taylor.  
The Right Hon'ble W. N. Massey.  
The Hon'ble Colonel H. M. Durand, c. n.  
The Hon'ble Maharájá Vijayaráma Gajapati Ráj Bahádur of Vizianagram.  
The Hon'ble Rájá Sáhib Dyál Bahádur.  
The Hon'ble W. Muir.  
The Hon'ble Maharájá Dhíraj Mahtab Chand Bahádur, Maharájá of  
Burdwan.  
The Hon'ble D. Cowie.  
The Hon'ble Stewart St. John Gordon.

SUMMARY PROCEDURE ON BILLS OF EXCHANGE BILL.

The Hon'ble MR. MAINE, in moving for leave to introduce a Bill to provide a summary procedure on Bills of Exchange, and to amend in certain respects the Commercial Law of British India, said that this Bill, like others he had recently introduced, was an adaptation of English legislation to India. In the present measure, portions of no less than four English Statutes had been incorporated. The most important Sections were those numbered 2 to 8, which provided a summary procedure on Bills of Exchange. He might describe it shortly as a measure designed to carry out to the full the theory of negotiable instruments. The policy of the Law Merchant during many centuries, over the whole of Europe, had been to assimilate Bills of Exchange to money. MR. MAINE was not stating a comparison, but describing the actual object which he supposed the interpreters of that law had in view. They wished to make the transfer of a negotiable instrument as easy and effectual as the transfer of current coin. It was not till a few years ago that the

last step was taken in adapting practice to theory. Up to that time, the holder of a Bill of Exchange which had been dishonoured had to bring an action in the ordinary form against the person liable to pay it. Now the experience of all persons connected with litigation on negotiable instruments shewed that the defences to such actions were in the enormous majority of cases artificial—that was, not necessarily frivolous or fraudulent, but invented by an afterthought. If the person liable to pay had had the money, he would have paid, but he had it not, and so dishonoured the Bill, and then had recourse to the dexterity of his legal adviser to enable him to gain time or perhaps to evade payment. These inconveniences were mitigated by the new summary English procedure. The plaintiff summoned the defendant before a Judge and said to him, in effect, ‘If you will swear that you have a defence on the merits, let the action go on; but if you will not burden your conscience with a false oath, let me have a decree and be paid my money.’ The measure had worked so well, that it had been extended to Ireland and the County Courts. Now, as regarded the proposal involved in the Bill, to imitate this procedure in India, there seemed to MR. MAINE, as with most commercial reforms, to be even more reason for introducing it into India than for adopting it at home. Under the Code of Civil Procedure, even when a case was undefended, it was necessary for the plaintiff to make out so much of his own case as *prima facie* entitled him to recover, and in defended cases, for technical reasons which he would not state, the burden of proof was heavier on the plaintiff than at home. Thus, a bill might have been drawn by one merchant in Calcutta upon a house in Bombay in favour of another merchant in Calcutta. It might have been indorsed over to some one in Bombay and dishonoured: the indorsee in Bombay would have his remedy against the indorser in Calcutta, who again might have to sue the drawer in this city. In such a suit, the plaintiff would have to prove dishonour in Bombay—no easy thing, considering the distance between the two places. But under MR. MAINE’S new procedure, the defendant would be forced to swear to the nature of his real defence. The Judge would tie him down to the defences indicated in his affidavit, and the plaintiff would only be called upon to prove dishonour when the very case of the defendant was that no dishonour had taken place. As regarded the Sections following Section 8, they were open to two remarks; one was that, like the English Statute on which this portion of the Bill was founded, it was a hotchpot measure: the Sections were miscellaneous and had no natural connection with one another. The other remark which might be fairly made upon them was, that when the new Civil Code should have been prepared, it would certainly settle all the points adverted to, in the same manner in which they were settled by the Bill. But, remarkable as was the pace at which the Indian Law Commissioners were proceeding, considering their manifold occupations, no small space of time might pass

before they were ready with a draft of law embracing the various matters contained in this Bill, and in the mean time it did not seem just that the Indian mercantile community should be deprived of the advantages enjoyed by the mercantile community at home.

Section 9 provided that the consideration for a guarantee need not appear in writing or by necessary inference from a written document. Owing to a peculiarity of language in the Statute of Frauds, a Statute which had some application—though only a limited application—in India, it was very early held that on a guarantee it was necessary not only to state the promise, but the consideration. Now in practice, people, unless legally advised, constantly omitted to state the consideration. The result was that there were a number of fine-drawn distinctions intended to take as many cases as possible practically out of the rule. At last the Legislature stepped in, and, in accordance with common sense, enacted that the consideration need not appear in writing.

Section 10 was to the effect that a guarantee to or for a firm should cease upon a change in the firm, unless the intention of the parties that the guarantee was to continue binding notwithstanding such change should appear either by express stipulation or necessary implication. This provision was intended to prevent an injustice formerly by no means of infrequent occurrence at home. In England and in English dependencies, the name of a firm, as was well known, meant nothing. It might continue, although every single member of the firm had been changed. But the old law of England was that a guarantee given to a firm continued in spite of changes, and thus a person who had intended to warrant the credit of particular individuals, might find himself answerable for the debts of persons whom he had never heard of. The new law now provided that, unless it were otherwise provided, the guarantee should cease when the firm changed.

Section 11 provided that the acceptance of a bill, whether inland or foreign, should be in writing. This had been the law in England, as regarded inland bills, ever since the reign of George III, and, as regarded foreign bills, for the last six or seven years. Mr. MAINE believed that European merchants in India invariably accepted their bills in writing. The practice, however, as regarded Hundis was not so uniform—possibly because Native bills were usually made payable so many days after date and not after sight, so that, strictly speaking, no acceptance at all was necessary. If the Hon'ble Rájá Sáhib Dyál would sit on the Committee, he would be able to tell them how far the proposed law interfered with Native custom. No doubt the provision in the Section was abstractedly desirable, since no words were too strong for the fraud and confusion arising out of a system of constructive acceptance.

The purport of the 12th Section was that all bills drawn in British India should be deemed to be inland bills. The Section was so framed, because MR. MAINE believed that it stated the existing law. He was aware that a different impression had prevailed, and that it had been supposed that a bill drawn in another Presidency was, relatively to this Presidency, a foreign bill. No doubt the idea had grown out of the convenience attending the protest or notarial attestation of dishonour, which, when properly obtained, was *prima facie* evidence that the bill had been dishonoured. But MR. MAINE could not persuade himself of the correctness of this view, and he thought it somewhat dangerous for the mercantile community to get into the habit of treating bills drawn in another Presidency as foreign bills, since they might be led into errors in applying the Stamp law. Nevertheless, MR. MAINE was willing to entertain in Committee a proposal for making the protest of a bill in any part of India *prima facie* evidence of dishonour in any other part. At the same time it should be understood that the plan would be an entire novelty, for a Notary Public was not a personage known to municipal law. His office existed under the comity of nations, and was designed to furnish evidence of transactions in one country which the Courts of another country would recognize. It should be further recollected that, under the new procedure, the issue of dishonour would only be tried when the defendant had expressly sworn that his case was that no dishonour had taken place. Under such circumstances it did not seem very hard that the plaintiff should be called on to prove dishonour by the ordinary evidence.

The later Sections of the Bill related to a somewhat technical matter. A bill of lading might be described as being, in India, and, till recently, in England, an imperfectly negotiable instrument. The indorsement of a bill of lading transferred the property in the goods, but at present did not transfer the contract. Certain inconveniences arose from this defect which these Sections would remedy.

The Motion was put and agreed to.

#### GOVERNMENT PAPER CURRENCY ACT AMENDMENT BILL.

The Right Hon'ble MR. MASSEY, in moving for leave to introduce a Bill to amend Act No. XIX of 1861 (to provide for a Government Paper Currency), said that the Bill which he proposed to introduce was one of very limited application, and had reference solely to that Section of the Act No. XIX of 1861 which laid down the conditions on which Government Promissory Notes were issued. Section 9 of that Act made it obligatory on the Currency Department to issue Promissory Notes, *first*, in exchange for the current silver

coin of the Government of India, or, *secondly*, in exchange for standard silver bullion or foreign silver coin; and it was with reference to the last obligation that he proposed now to introduce a modified enactment.

Before the passing of the Currency Act, it was usual for the Government of India to issue from time to time notifications of the period at which Mint Certificates would be cashed, and these periods were calculated with reference to the time at which it would undertake to convert the bullion into coin. But when the Currency Act introduced the obligation of giving notes in exchange for bullion, it was thought unnecessary to maintain a distinction which was practically inoperative, and Mint Certificates were therefore in like manner cashed on demand. Under these circumstances Government was obviously placed in a difficulty in the event of large arrivals of bullion. He therefore proposed to place the exchange of Notes for bullion by the Currency Department on the same footing as the exchange of coin for bullion tendered to the Mint before the alteration of the former practice. The distinction between Notes issued on the deposit of coin, and Notes issued on the deposit of something which was not coin but was afterwards converted into coin by a tedious process, was very manifest. The first was one peculiar to the function of issue; the last was a transaction which more properly belonged to Banking business; and the union of the two under the present law as administered by the Government of India, was a union of a novel character, and, as far as he was informed, was one which had no precedent in the practice of any other Government. It was obvious, also, that every rupee withdrawn from the currency for the purpose of cashing bullion, diminished to that extent the fund which belonged to the holders of Government Promissory Notes, and likewise diminished the certainty of the immediate convertibility of those Notes, which was the indispensable condition of a sound paper currency. In making that remark, he did not wish to be understood as saying that any serious risk was incurred by the Department of Issue in cashing bullion. No suspension of cash payments had ever occurred or was likely to occur. He did not wish to place the question higher than one of convenience and charge to the Government. But it was manifest that, where a large influx of bullion was expected, it was necessary for the Government to make special provision in the Currency Department against the contingency. Now, that could not be done without deranging the transactions of the Department, and imposing on the Government serious expense and great inconvenience. He might say that, in a recent instance, the necessity imposed by the enactment had cost the Government a sum of no less than 60,000 Rupees, and the expense which the Government was likely to incur in respect to the transaction referred to was not even limited to that amount. He maintained that it was neither

reasonable nor just that the Government should be placed in that position. He thought it was not reasonable that the Government should be expected to undertake transactions with which it properly had no concern; and that it was unjust, for the benefit of a particular class of merchants, that a charge should be imposed on the Public. He was quite sensible of the great benefit conferred on the mercantile community by importers of bullion, and he should be sorry to propose any legislation or make any remark calculated in the most remote degree to obstruct or discourage the traffic in that useful commodity. He did not propose, therefore, altogether to withdraw from the importers of bullion the advantages which they at present enjoyed. He only desired to modify the obligation imposed on Government, and the object of the present Bill was simply to make it optional instead of obligatory to cash bullion.

The result would be this, that if, after making adequate provision for Currency Notes in circulation as the first duty of the Department, there should be in the opinion of the Government Officers a surplus of coin which would enable them to meet the demand, that surplus would be freely exchanged for bullion without charge. So that he hoped that the practical result of the proposed legislation would not cause any great departure from existing arrangements. In fact, whenever money was available, it would be freely exchanged for bullion, but Government desired to be relieved from undertaking a duty which did not properly belong to it and was productive of much embarrassment.

This subject was not now broached for the first time. Before he had the honour of being connected with the Government of India, the matter had engaged the attention of those who were then concerned in the administration of financial affairs, and the present practice was thought so unreasonable that the propriety of limiting the obligations of Government to the exchange of Notes for coin was seriously discussed; but the advantage of encouraging the importation of bullion was felt to be so great that the proposed limitation was considered to be needlessly stringent. He perfectly concurred in that view of the case. The matter had been under the consideration of Her Majesty's Government, and it had been officially signified that the measure which he had now the honour to propose to the Council, would meet the concurrence of that Government. It was not necessary for him on this occasion to trouble the Council with any further observations. He had sufficiently explained the difficulty which required to be removed, and he hoped that the measure which he proposed was so moderate and reasonable that it would meet with the approval of the Council.

He might add that he proposed to pass the measure through its stages on this day fortnight; and as the matter was of some urgency, he hoped that the Council would not then object to passing the Bill summarily.

The Hon'ble Mr. COWIE said, he quite approved of the fairness and reasonableness of such a measure as this, to prevent the inconvenience to which Government might very probably be exposed under the present state of things; but he would, at the same time, suggest for the consideration of the Executive Government, whether a considerable enlargement of the powers of the Mint should not be made in order to be equal to the very heavy and sometimes unexpected importations of bullion, which, with our greatly extending commerce, would every now and then take place.

The Motion was put and agreed to.

#### PLEADERS, MOOKHTARS AND REVENUE AGENTS' ACT AMENDMENT BILL.

The Hon'ble Mr. MAINE introduced the Bill to amend the Pleadors, Mookhtars and Revenue Agents' Act, 1865. He said that he had explained a week ago, that the proposed Bill was concerned with a mere formality. The Act to be amended—or rather postponed—which was a very excellent one, provided a system of examining, admitting and enrolling Pleadors and Mookhtars under rules to be framed by the High Court. So far, however, as related to Pleadors and Mookhtars in actual practice, the conditions of admission were a mere form, inasmuch as they were entitled to be admitted without examination. Still these conditions had to be in accordance with a rule, and as this rule was not ready, the present Bill became necessary. It was not competent for a member of the Legislature to state authoritatively what its intention had been, but speaking as a critic, MR. MAINE thought that the intention appeared clearly on the face of the enactment. The Legislature had obviously supposed that, during the considerable interval which was to elapse between the signature of the Act by the Governor General and its coming into operation, the High Court would draw up rules relating at all events to mere formal matters, such as the preparation of the roll and the mode of admission. These rules would become operative on the 1st January 1866, and then a very few days would suffice for admitting and enrolling the whole of the Pleadors and Mookhtars actually in practice. It might, indeed, be said that, by giving to the High Court six months for the preparation of the rules, the Legislature put it into the power of the High Court to postpone even formal steps for half a year. But of the numerous measures passed by the Council, which were dependent for their operation on rules to be made by the High Court, there



was scarcely one which might not be defeated or stultified if the Court chose to use its power perversely. That Council, however, knew the High Court too well to believe that it would do anything of the kind, and felt perfectly sure that just as it carried out the intentions of the Legislature judicially, similarly it would give effect to their intentions in its administrative or quasi-administrative capacity. The simple truth was that the point, as was natural with a mere formality, did not attract attention till the beginning of December, when the Chief Justice, with his customary acuteness, perceived it and called attention to it. Then, however, it was too late to make rules, and hence this enactment became necessary.

Since it had been determined to amend Act No. XX of 1865, MR. MAINE'S attention had been called to a particular of merely local and temporary importance in which a change might usefully be made. It had been very wisely determined by the framers of the Act, that in future, practitioners in Small Cause Courts should belong to the same class as practised in District Courts. At present, however, junior Pleaders alone practised in the Bengal Small Cause Courts, and if they could only obtain the certificate mentioned in Clause (c) of Section 10, they would be debarred from such practice. Since, then, it was not intended to disturb existing interests, and since the class of persons who would take out the certificates mentioned in Clause (b) was not at present large enough to supply a Bar for the Small Cause Courts, MR. MAINE proposed to introduce a Section which would enable the High Court if it pleased to continue the existing junior Pleaders in their present position.

The Hon'ble Mr. GREY suggested that the retention of junior Pleaders in their present privileges should be made obligatory on the High Court.

The Hon'ble Mr. MAINE said, he preferred leaving it optional, as he understood that it was only in the pettier Small Cause Courts in Bengal that the difficulty arose.

The Hon'ble Mr. MAINE then applied to His Excellency the President to suspend the Rules for the Conduct of Business.

The President declared the Rules suspended.

The Hon'ble Mr. MAINE then moved that the Bill be taken into consideration.

The Motion was put and agreed to.

The Hon'ble Mr. MAINE also moved that the Bill be passed.

The Motion was put and agreed to.

### MADRAS IRRIGATION COMPANY'S BILL.

The Hon'ble MR. TAYLOR presented the Report of the Select Committee on the Bill to define and sanction the rates which the Madras Irrigation and Canal Company is authorized to charge for the supply of water for purposes other than that of Irrigation.

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

The President declared the Rules suspended.

The Hon'ble MR. TAYLOR then moved that the Report be taken into consideration. He said, that although the Bill had only been in the hands of the Members of Council for a very few days, it was so desirable to remove every impediment from the way of the Madras Irrigation Company that he hoped the Council would consent to pass the Bill at once.

The Motion was put and agreed to.

The Hon'ble MR. TAYLOR also moved that the Bill be passed.

The Motion was put and agreed to.

### INDIAN COMPANIES' BILL.

The Hon'ble MR. MAINE introduced the Bill for the incorporation, regulation and winding up of Trading Companies and other Associations, and moved that it be referred to a Select Committee, with instructions to report in six weeks. He said that the Bill, as its appearance shewed, was one of some magnitude, but the questions which arose upon it were almost exclusively questions of detail. If the Hon'ble Mr. Bullen and the Hon'ble Mr. Cowie would consent to sit on the Committee, those questions would be satisfactorily sifted, though he was afraid that the task would not be a light one. The only questions of principle which could possibly be raised were these: first, should the definition of Companies which might lawfully be formed with limited liability be large enough to include Insurance Companies? and secondly, should Companies be formed with a limitation of liability by guarantee? On those subjects he had nothing to add to the observations he had made when he obtained leave to introduce the Bill.

The Hon'ble the MAHARAJA OF VIZIANAGRAM said he had great pleasure in supporting the Bill just introduced, inasmuch as in his view no greater benefit could be conferred by the Legislature on the Natives of this country than the formation of complete codes on various matters of importance and

interest to the community. Such codes had been framed in regard to the civil and criminal administration of the country, to postal communication, and various other subjects of equal importance, and had proved of inestimable advantage to the Natives of this country. The law on each subject being placed before them separately and in a complete form, they had been relieved of the inconvenience and loss of time necessarily involved where references had to be made to a number of enactments on the same subject, which lay scattered over several volumes, and many portions of which might have been repealed. The Hon'ble Mr. Maine's Bill was calculated to confer a similar boon on a class of persons of whom the number he was glad to find was daily increasing; he referred to those who were engaged in commercial speculations of a very extensive character. Many individuals of this class, especially the Natives of this country, did not employ themselves in the study of general law, and it would therefore be a source of great convenience and relief to them, if all the law required for the conduct of their commercial transactions could be brought together so as to be comprised within the limits of a single but complete enactment.

The Motion was put and agreed to.

The following Select Committee was named:—

On the Bill for the incorporation, regulation and winding up of Trading Companies and other Associations—His Excellency the Commander-in-Chief, the Hon'ble Messrs. Grey, Bullen, Cowie, and the Mover.

The Council adjourned till the 5th January.

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

CALCUTTA,  
The 22nd December, 1865. }