

Friday, February 16, 1866

**COUNCIL OF THE GOVERNOR GENERAL  
OF INDIA**

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*Abstracts 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.*

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The Council met at Government House on Friday, the 16th February 1866.

P R E S E N T :

His Excellency the Viceroy and Governor General of India, *presiding*.

The Hon'ble H. Sumner Mine.

The Hon'ble W. Grey.

The Hon'ble Colonel H. M. Durand, C.B.

The Hon'ble Mahārājā Vijayarāma Gajapati Rāj Bahādur of Vizianagram.

The Hon'ble Rājā Sāhib Dyāl Bahādur.

The Hon'ble W. Muir.

The Hon'ble Mahārājā Dhīraj Mahtab Chand Bahadur, Mahārājā of Burdwan.

The Hon'ble D. Cowie.

The Hon'ble Stewart St. John Gordon.

The Hon'ble George Ross.

ASSAM COMPANY'S BILL.

The Hon'ble MR. MAINE introduced the Bill to repeal Act No. IV of 1855 (for incorporating for a further period, and for giving further powers to the Assam Company), and moved that it be referred to a Select Committee, with instructions to report in a fortnight. He said that he had explained to the Council on a former occasion that this Bill was necessitated by a provision in the private Act of Parliament, 28th and 29th Vic., cap. CXXIX, for the incorporation of the Assam Tea Company. One of the Sections of that Act provided that it was only to come into force when a Bill had been passed by this Council to repeal Act IV of 1855. But the Act of Parliament was not to come into operation until two months after the passing by this Council of the repealing Bill. The Bill which he now introduced proposed to repeal Act IV of 1855. But as he could not suppose that Parliament intended that for two months the Assam Tea Company should be without any constitution, the Bill continued provisionally for two months the incorporation, powers, rights and liabilities of the Company.

The Motion was put and agreed to.

## PUNJAB CHIEF COURT BILL.

The Hon'ble MR. MAINE, in moving for leave to introduce a Bill to amend the constitution of the Chief Court of Judicature in the Punjab and its Dependencies, said that the three motions which stood next in his name on the paper were intended to put an end to a doubt which appeared to be entertained by Her Majesty's Secretary of State as to the validity of the Bill, passed at their last sittings, to establish the Chief Court of the Punjab. That Bill now stood on the Statute Book as Act No. XXIII of 1865. MR. MAINE, did not himself share in the doubt, but he thought the Council would concur with him in considering that, when the matter in question was so serious as the establishment of a Court having not only Civil but Criminal and indeed capital Criminal jurisdiction, the very possibility of doubt ought to be obviated and removed. In order to explain the nature of the doubt, he would have to retrace the history of the measure.

It was unnecessary to remind His Excellency that, during the summer of 1864, a series of measures was discussed and decided upon by the Government of India, intended partly to improve the administration of Civil and Criminal Justice throughout the country, and partly, and perhaps chiefly, to mitigate the scandal and injustice of bringing down European British subjects for trial at the Presidency Town. The first of these measures, and that which most attracted public attention (and, as MR. MAINE thought, engaged it unfortunately, because, taken by itself, the measure was likely to be misunderstood) was such an alteration of the Criminal procedure of the High Court as would enable it to be worked out and applied at places distant from the Presidency Towns, where the supply of material for juries was scanty. The second was the creation of a High Court for the North-Western Provinces under the High Court's Act, 1861. The third was the establishment of a Chief Court for the Punjab which might be described as a minor High Court, that is, a Court which might improve the administration of justice in that Province by giving to it greater regularity and stability, but which at the same time would not disturb the system characteristic of that Province (a system for which MR. MAINE thought great public gratitude was due) so much as it would probably be disturbed by a complete High Court established under the parliamentary legislation of 1861. The experiment, it would be seem, was on a considerable scale and extremely costly. Nor could it be said to be yet completed, for some less cumbrous and costly machinery was clearly required for the repression of the petty offences of that class of Europeans in the Mofussil with which MR. MAINE supposed the Europeans interested in the great industries

of this part of India had extraordinarily little sympathy. It was quite inevitable that the parts of this great scheme should be laid before the Council and the public piecemeal and in a fragmentary shape. The reason was that the legislative power to carry out these various measures was not uniformly distributed. The entire legislative power to reform the Criminal procedure of the High Court resided with that Council, because it was expressly reserved to them by the Letters Patent of the older High Courts. On the other hand the entire legislative power to establish the High Court for the North-Western Provinces belonged to the Secretary of State for India, who, in the name of Her Majesty, could alone create a High Court. Lastly, the power to establish the Chief Court of the Punjab was divided between this legislature and the Secretary of State for India in Council. Almost the whole legislative capacity to create such a Court was lodged with that Council, but there was an exception in one particular on account of the language of 3 and 4 Wm. IV, cap. 85, Section 46, which provided as follows:—

“That it shall not be lawful for the said Governor General in Council, without the previous sanction of the said Court of Directors, to make any law or regulation whereby power shall be given to any Courts of Justice, other than the Courts of Justice established by His Majesty’s Charters, to sentence to the punishment of death any of His Majesty’s natural born subjects born in Europe, or the children of such subjects, or which shall abolish any of the Courts of Justice established by His Majesty’s Charters.”

It followed that the previous sanction of Her Majesty’s Secretary of State for India in Council was required to give validity to Act No. XXIII of 1865, because, under the Act for the better Government of India, which transferred that Government from the East India Company to the Crown, the words “Secretary of State for India in Council” were to be read wherever in an Act of Parliament the expressions “East India Company” or “Court of Directors” occurred.

That being the state of the law in 1864 the Government addressed the Secretary of State a despatch in which this passage occurred:—

“Although the Select Committee have been directed to make their report within six weeks from the date of the introduction of the Bill, it is not our intention to propose that the Bill should pass into law until we hear from you, and are informed of the views of her Majesty’s Government on the subject of the important changes now proposed in the constitution of the Chief Civil and Criminal Court of the Punjab and its Dependencies, but as it is most desirable that the Bill, if approved, should come into operation with the least possible delay, we venture to solicit an early reply to this letter.”

As soon as the despatch reached home, MR. MAINE had reason to believe that it received the attention and indeed the anxious consideration of the Secretary of State in his Council, and the result of that consideration was that full and unreserved sanction was given to the measure. While, however, the discussion was proceeding at the India Office, time was passing here, and the period during which the additional Members could conveniently be kept together was drawing to a close. Accordingly, on the 20th March 1865, the Governor General telegraphed to the Secretary of State by the Indo-European line, which had recently been opened, to the following effect:—

“ With reference to Section 46, cap. 85, 3 and 4 Wm IV, will you sanction by telegram our passing the Punjab Chief Court Bill to come in force whenever the Government of India shall order, such order to await your consent ”

To which the Secretary of State replied by telegraph—

“ Previous sanction to Punjab Bill being necessary, sanction has been sent by last mail to Bill in the shape sent home. Previous sanction would be equally necessary for altering Bill.”

The meaning of the concluding words MR. MAINE would explain presently.

Now when the last telegram arrived, MR. MAINE had left India for Europe. But Mr. Harington, with his customary sagacity, perceived the necessity of being absolutely sure that the previous sanction had been sufficiently given, and under his advice, His Excellency consulted the Acting Advocate General on the point. Mr. Graham replied on the 7th of April.—

“ I have the honour to state that in my opinion the sanction given by the Right Hon'ble the Secretary of State to the Bill in its original form is sufficient to enable the Council of the Governor General to legally pass the Bill as finally settled ”

Thus advised, the Governor General, on the 17th April 1865, gave his assent to the Bill, and in the opinion of the Government of India a law or regulation had been made, which, though it transferred the Criminal jurisdiction over Europeans in the Punjab from High Court to the Chief Court, had received the previous sanction of the Secretary of State for India in Council.

When the Act assented to by His Excellency reached the Home Government, MR. MAINE had reason to believe that two difficulties, one of a very formidable character, suggested themselves to the legal advisers of the Secretary of State. One of them was indicated in the last words of Sir C. Wood's telegram. It took the form of a doubt whether, when previous sanction is required for any measure of an Indian Legislature, such previous sanction

ought not to be given to every line and iota of the contemplated Bill. Consequently it was doubted whether, if the Bill was altered in Select Committee, a fresh sanction was not required for the change, and so on for every subsequent amendment however small. That doubt MR. MAINE had described as formidable, not for its effect on this Council, because its measures rarely required previous sanction of any sort, but because the words "previous sanction" occurred in the Indian Councils' Act. For example, the previous sanction of the Governor General was required for all alterations of the Penal Code effected by a local legislature, and, as there were few Bills which did not prescribe penalties, the necessity for His Excellency's sanction was continually arising. If, however, this sanction, once given, was invalidated by every petty change in the detail of Bills, it was not too much to say that the whole action of the local Councils would be paralysed ; and all local legislation would tend to resolve itself into the shape which it wore before 1861—an interminable correspondence between the Imperial Government and the Governments of the Presidencies. Fortunately, however, the point was referred to the Law-Officers of the Crown—the Attorney and Solicitor General—assisted by Mr. Forsyth, the Counsel to the India Office. Their opinion had recently reached the Government of India, and was to the effect that the previous sanction was sufficiently given if the principal and main provisions of the Indian Act obtained previous sanction, as was the case in the present instance. This opinion exactly agreed with the grounds assigned for his view by the Acting Advocate General, and so far, therefore, the result was eminently satisfactory.

There was, however, reason to believe that it was further doubted by the Secretary of State, of course under legal advice, whether a previous sanction communicated by telegraph was sufficient, and whether the Governor General ought not to have waited and read the signed despatch of the Home Government before he gave his assent to the Bill. Such an objection MR. MAINE did not think tenable. The telegraphic wire in the one case, the paper and the mail in the other, were only media of communication, and it seemed to MR. MAINE indifferent, in point of law and reason, whether the mind of the Secretary of State was communicated to this Government through one medium or the other. Moreover, not only did the telegram communicate the previous sanction, but it also stated that a written despatch had left England which also signified it. There was yet another fact bearing on the point. Though MR. MAINE was not then in India, and could not speak of these matters as known to himself personally, he had reason to believe that even the written despatch reached India in time to be read by His Excellency before he gave his assent to the Bill, although His

Excellency, having been advised that sufficient previous sanction had already been given, did not think fit to await it. It was detained at Allahabad, and was there received by the Governor General on his way up country. Under such circumstances Mr. MAINE thought it impossible that any objection to the validity of the Chief Court Act could be successfully raised before a Court of Law. However, the despatch from the Home Government covering the opinion given by the Law-Officers of the Crown ended with the following words :—" This opinion implies that the sanction conveyed by my letter of the 17th March reached you before the passing of the Act." In themselves, the significance of these words might be open to question, but, as Mr. MAINE had explained, the doubt was known to have existed, and accordingly the Secretary of State was asked by telegraph whether the Punjab Chief Court might be established. He replied by a reference to the last paragraph of his despatch, which had already been quoted, and thus, on the whole, Mr. MAINE was disposed to infer that the Secretary of State adhered to the view of the insufficiency of a telegraphic sanction. If that were so, however, Mr. MAINE could not doubt that his duty was to ask the Council to re-enact the measure, not only because every shadow of a question on such a subject ought to be removed, but because, if the Secretary of State did entertain such a doubt, it was clearly his duty to withhold his assent from the Act ; and such assent had not been received in any absolute form.

Mr. MAINE's reasons for asking the Council to re-enact the Bill summarily and as a matter of form were these : It had received the completest approval on its merits from the Home Government. It was most fully discussed in Council and sifted in Committee. It passed without a division and without verbal opposition, for the very gentleman, Mr. Bullen, who had felt objections to some part of the series of measures which Mr. MAINE had described, had waived those objections so far as this particular measure was concerned, and had concurred in the urgent necessity for passing it.

The Motion was put and agreed to.

The Hon'ble Mr. MAINE having 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 introduced the Bill, and moved that it be taken into consideration.

The Motion was put and agreed to.

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

The Motion was put and agreed to.

**PUBLIC MUSEUM (CALCUTTA) BILL.**

The Hon'ble MR. MAINE asked leave to postpone the Motion which stood next on the List of business ; for leave to introduce a Bill to provide for the establishment of a Public Museum at Calcutta, as the necessary preliminary arrangements with the Asiatic Society were not as yet sufficiently advanced.

Leave was granted.

**SUMMARY PROCEDURE ON BILLS OF EXCHANGE BILL.**

The Hon'ble MR. MAINE also presented the Report of the Select Committee on the Bill to provide a Summary Procedure on Bills of Exchange and to amend in certain respects the Commercial Law of British India.

The following Select Committee was named :—

On the Bill to repeal Act No. IV of 1855 (for incorporating for a further period, and for giving further powers to the Assam Company)—The Hon'ble Messrs. Cowie, Gordon, Ross and the Mover.

The Council adjourned till the 23rd February.

**WHITLEY STOKES,**

*Asst. Secy. to the Govt. of India,*

*Home Dept. (Legislative).*

CALCUTTA :

The 16th February 1866. }