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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.

1881.

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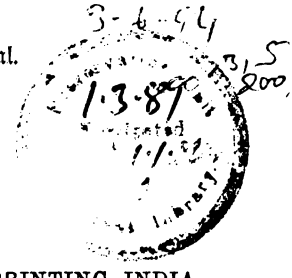

CALCUTTA:
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1882.

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

The Council met at Government House, Simla, on Wednesday, the 15th June, 1881.

PRESENT:

His Excellency the Viceroy and Governor General of India, K.G., G.M.S.I., G.M.I.E., *presiding.*
His Excellency the Commander-in-Chief, Bart., G.C.B., C.I.E.
The Hon'ble Whitley Stokes, C.S.I., C.I.E.
The Hon'ble Rivers Thompson, C.S.I., C.I.E.
The Hon'ble J. Gibbs, C.S.I., C.I.E.
Major the Hon'ble E. Baring, R.A., C.S.I., C.I.E.
Major-General the Hon'ble T. F. Wilson, C.B., C.I.E.
The Hon'ble C. Grant, C.S.I.

INDIAN TRUSTS BILL AND INDIAN EASEMENTS BILL.

The Hon'ble MR. STOKES introduced the Bill to define and amend the law relating to Private Trusts and Trustees, and moved that it be referred to a Select Committee consisting of the Hon'ble Mr. Gibbs and the Mover. He also introduced the Bill to define and amend the law relating to Easements and Licenses, and moved that it be referred to a Select Committee consisting of the Hon'ble Mr. Gibbs and the Mover. He said:—"Your Excellency,—On the 20th January, 1876, the then Secretary of State for India sent us a despatch in which he declared that he could not regard the question of giving a Civil Code to India as in any sense an open one; that the completion of a Code of law was an accepted policy which could not be abandoned without great detriment to the people and serious discredit to the Indian Government; that many of the Indian appellate judges were in the habit of borrowing from the recognized English authorities English rules ill suited to Oriental habits and institutions (for instance, three of the four High Courts have held, in accordance with English law, that an invasion of privacy is not an actionable wrong); and that the only way of checking this process was by substituting for these rules a system of codified law adjusted to the best Native customs and the ascertained

interests of the country. He then, after referring to the Indian Succession Act and the Indian Contract Act, requested the opinion of the Government of India as to the order in which the remaining branches of the law should be taken up, and whether each branch should, as in the case of the Contract Act, extend to the whole country, or should, like the law of Succession, apply only in the first instance to certain special classes or provinces.

"In reply, the Government of India, in its despatch of the 10th May, 1877, enumerated the branches of substantive law which remained uncodified, recommended (amongst others) that the subjects of Trusts and Easements, or, as they are sometimes called, Servitudes, should be taken up; and expressed an opinion that the proposed laws dealing respectively with these subjects might safely and usefully be applied in the first instance to every one in British India.

"To this despatch the Secretary of State replied on the 9th August, 1877, sanctioning the course suggested by the Government of India.

"I accordingly prepared Bills dealing respectively with private trusts and easements. They were sent home to the Secretary of State in 1878, circulated to Local Governments in the same year, and revised by me in 1879 with reference to the criticisms thus elicited. Copies of the revised drafts were in the same year sent to the Secretary of State, circulated to the Local Governments, and, finally, submitted to the Indian Law Commission, composed of Sir Charles Turner (the present Chief Justice of Madras), Mr. Justice West and myself. The Law Commission carefully revised the Bills, and recommended that they should be passed into law—the Trusts Bill extending, in the first instance, to the whole of British India, the Easements Bill to the whole of British India, except the scheduled districts mentioned in Act XIV of 1874. Mr. West, however, whose drafting of the first part of the Commission's Report has been so much admired for its unpedantic simplicity and clearness, thought that the introduction of the latter Bill might, 'without public detriment, be for a short time postponed,' and desired 'not to be finally committed to all the details of the Bill, should further information suggest modifications in them.'

"The Bills as revised by the Law Commission were then, in pursuance of the permission of the Secretary of State contained in his despatch of the 7th October, 1880, published in the *Gazette of India* for the 13th November, 1880, and were also circulated to the Local Governments.

"The replies of the Local Governments and the opinions of the selected officers concerning the revised Bills have now been received, and I will give the Council abstracts of the contents of those replies and opinions.

"*I.—As to the Trusts Bill.*

"Before giving the précis relating to this Bill, I would ask leave to read to the Council the first three paragraphs of the Statement of Objects and Reasons:—

"'Trusts, in the strict sense in which that term is used by English lawyers, that is to say, confidences to the existence of which a 'legal' and an 'equitable' estate are necessary, are unknown to Hindú and Muhammadan law. But trusts in the wider sense of the word, that is to say, obligations annexed to the ownership of property which arise out of a confidence reposed in and accepted by the owner for the benefit of another, are constantly created by the natives of India and are frequently enforced by our Courts. "There is, probably," says Mr. Justice Phear (4 Ben. O. C. J. 134), "no country in the world where fiduciary relations exhibit themselves so extensively and in such varied forms as in India, and possession of dominion over property, coupled with the obligation to use it, either wholly or partially, for the benefit of others than the possessor, is, I imagine, familiar to every Hindú." So, too, in the case of Muhammadans, where a woman is entitled to a share of her deceased father's estate in the hands of her brother (W. R. 1864, p. 377), or to exigible dower in the hands of her husband (6 W. R. 111). Trusts created by an old man for his own maintenance and ulterior purposes, for a widow, for a daughter, step-daughter or daughter-in-law and her children, are of pretty frequent occurrence amongst the Natives, whether Hindú or Muhammadan, and it is desirable to keep them free from the complication of double estates in which, without the intervention of the legislature, they are certain to become entangled. But apart from the Native property-holder, there is the large body of domiciled Europeans and Eurasians who have for nearly a century enjoyed and taken advantage of a trust-law recognised by our Courts: the number and wealth of this class have increased, and in suits between members of this community every Court in the country may be called upon to administer a trust-law. Nevertheless, with the exception of certain provisions in the Penal Code, the Specific Relief Act, the Code of Civil Procedure and the Limitation Act, the Indian Statute-book is silent on the subject so far as regards the bulk of the population; for the Statute of Frauds, sections 7 to 11, is in force only in the Presidency-towns, and the rules contained in Acts XXVII and XXVIII of 1866 extend only to cases to which English law is applicable, and are, in themselves, incomplete.

"'The object of the present Bill is to codify the law relating to trusts in the wider sense above described; but it saves the rules of Muhammadan law as to *waqf*, and the mutual relations of the members of an undivided family. And it leaves untouched religious and charitable endowments established by Hindús and Buddhists, as being matters in which the legislature cannot at present usefully interfere further or otherwise than has been done by Act XX of 1863.

"'With the few exceptions mentioned in this Statement, the rules contained in the Bill are substantially those now administered by English Courts of Equity and (under the name of "justice, equity and good conscience") by the Courts of British India.'

"The précis of the papers lately received from the ten Local Governments is as follows:—

"(*a*) The Bengal Government gives no opinion on the Bill, but considers that 'legislation in this direction is premature and altogether in advance of

the requirements of the time.' Why it is premature, or how it is in advance of the requirements of the time, does not unfortunately appear. The learned Advocate General (Mr. Paul) and Legal Remembrancer (Mr. Allen) naturally think the Bill not required. On the other hand, two of the three Native Judges whom the Lieutenant-Governor has recently consulted (Brajendra Kumar Seal and Amrita Lál Chattarjí) seem in favour of the proposed legislation. Grish Chandra Ghose and Mohendra Náth Bose also gave, in 1879, opinions in favour of the Bill as it then stood. I mention this merely as exemplifying what I have often noticed, that the Native judiciary are in advance of some of their European official superiors in intelligent appreciation of the advantages of codified law.

"(*b*) The Madras Government expresses no opinion on the Bill, but forwards reports from the able and learned Advocate General (Mr. O'Sullivan) and certain District Judges,—all strongly in favour of the Bill. I would ask the particular attention of the Council to the following remarks of Mr. Wigram (Officiating District Judge, South Malabar) dated 20th December, 1880, as to the beneficial effects likely to result from enacting it. They embody in a short space almost all that I could say in favour of legislation on the subject:—

"'The Act will contain no law that we are not at present bound to administer without its assistance. The only difference will be that, instead of groping for principles and precedents to guide our decisions, the principles will be ready to our hands.

"'As an illustration of what I mean, I may mention that only a few weeks ago I was asked by a gentleman who was executor of a will whether he was at liberty, with the consent of the beneficiaries, to invest money on mortgage instead of purchasing an annuity as directed by the will, and whether there was any limit as to the amount he might advance on the security of a mortgage.

"'The answers to both these questions are to be found in sections 11 and 20 of the Bill; but I was only able to inform my querist what was the proposed law.

"'Again, by far the most important part of the Bill is Chapter IX [of certain obligations in the nature of Trusts]; and for myself I may say that it would be of incalculable advantage to all the mufassal Courts to have the clear principles there laid down for our guidance.

"'Not a month passes in which some case does not come before me as an Appellate Court in which sections 81 and 86 are applicable; and I can recall to my recollection cases in which sections 83, 85, 88, 89, 91 and 93 contain the rule of law which should have governed the decision and which had to be evolved by much labour from the Contract Act, English text-books and precedents, and the Judge's own inner consciousness.'

"(*c*) The Bombay Government thinks the measure premature, though the Legal Remembrancer and two District Judges,* whom it has consulted, consider that its provisions will prove beneficial. 'If, however,' says the Bombay Government, 'it be

* Mr. Coghlan, Judge of Thána; Mr. Wedderburn, Judge of Ahmadnagar.

considered advisable to pass anticipatory measures of this kind, this Government has no detailed objections to offer to the Bill as now amended, provided that the local extent of the Act be a matter left entirely to the discretion of the Local Government.' The Council will see that this is precisely the course which the Government of India proposes to follow, so far as regards the Presidency of Bombay.

" (*d*) The Government of the North-Western Provinces gives no opinion for or against the Bill, but sends opinions from three District Judges and the Judicial Commissioner of Oudh, each of which is to the effect that the Bill is unobjectionable. Messrs. Moens and King express doubts whether it is needed.

" (*e*) The Panjáb Government is now in favour of the Bill, though it would prefer that power to invest District Courts with authority to act under certain sections should be left with the Lieutenant-Governor. Mr. Justice Barkley (whose opinion is enclosed) thinks that the Bill 'will be a very useful addition to our Statute-book.'

" (*f*) The Central Provinces Government expresses no opinion on the Bill, but forwards two opinions from the Officiating Judicial Commissioner and his Registrar, which seem to be in its favour.

" (*g*) The Burma Government would apparently have the Act in Rangoon. Its express recommendation resembles that of the Bombay Government, and is that the Bill 'should not be made applicable to the whole of British India, but only to the districts, tracts or places to which the Local Government may extend it.' The Recorder of Rangoon (Mr. Wilkinson) and the Commissioners of the Arakan and Pegu Divisions are in favour of the Bill. The Commissioner of the Tenasserim Division is against it, except in the case of domiciled Europeans and Eurasians.

" (*h*) The Chief Commissioner of Coorg and the Judicial Commissioner are in favour of the Bill, the latter making only one suggestion for its amendment.

" (*i*) The Chief Commissioner of Ajmer and Merwára gives no opinion, but forwards that of Mr. Saunders, the Commissioner, which is to the effect that the Bill is well drawn, but that it makes trusts too irksome, and that it should not at present be extended to the whole of British India 'and more particularly so to Ajmer-Merwára.'

" (*j*) The Chief Commissioner of Assam (Sir Steuart Bayley) generally approves of the Bill, and considers it as it stands to be a complete statement of the law, so far as any exists, and generally in accordance with reason and equity.

"To sum up, it would seem that the Trusts Bill, in its present form, might, with the assent of the Local Governments, be applied at once to the whole of British India, except the Lower Provinces, the Presidency of Bombay, British Burma and, perhaps, Ajmer. The Local Governments might be empowered to extend it to the excepted provinces.

"*II.—As to the Easements Bill.*

"In the case of this Bill also, before giving the précis of the replies and opinions of the Local Governments and their selected officers, I will quote the commencement of the Statement of Objects and Reasons :—

"'This Bill is intended to form part of the Indian Civil Code, and attempts to state, clearly and compactly, the rules relating to Easements, that is to say, the rights [such as rights of way, rights to discharge rain-water, rights to support] which a man sometimes has over one piece of immoveable property by reason of his ownership of another. As to these rights our present statutory law is silent, except so far as regards the acquisition of easements by long and continued possession, the limitation of suits for disturbing them, and the granting of injunctions to prevent such disturbance; and three of our most experienced Judges—Sir Michael Westropp, Mr. Justice (now Sir Louis) Jackson and Mr. Justice Innes—have expressed their opinion that it is desirable to codify the law on the subject, which is now (to quote the Chief Justice of Bombay) "for the most part to be found only in treatises and reports practically inaccessible to a large proportion of the legal profession in the mufassal and to the subordinate Judges." There is much litigation in the case of urban easements, and a late Judge of the Panjáb Chief Court asserts that this is largely due to the fact that neither the people themselves, nor the majority of the Courts, understand the principles upon which such disputes should be determined. The Bill is mainly based on the law of England, which, being just, equitable and almost free from local peculiarities, has, in many cases, been held to regulate the subject in this country; but a few deviations (hereinafter specified) have been made from that law, and rules as to some matters which have not hitherto come under the cognizance of the English and Indian Courts have been adapted from the writings of modern jurists.'

"The précis of the papers relating to this Bill, which have been lately received from the Local Governments, is as follows:—

"(*a*) The Bengal Government is of opinion that there is at present no pressing necessity for any legislation on the subject. But Mr. Grant, the District Judge of Hugli, is satisfied that a law on the subject is called for, and that the proposed law, so far as he can judge, will admirably answer the purpose, and is not unfitted in any way that he can see for practical adoption in this country. 'Matters,' he says, 'involving rights of easement are constantly coming up in the Courts of this province, and can be decided only by reference to the English law; but it is obviously inconvenient that a system of law which is not of real authority in our Courts, and which is not thoroughly understood by the presiding officers, should be administered thus incompletely.' And Mr. Beveridge,

the Officiating District Judge of Patna, thinks 'the Bill may be applied to the whole of Bengal, and even to some of the Scheduled Districts, *e.g.*, to Jalpaiguri.' On the other hand, Mr. Paul (the Advocate General) and Mr. Browne of Patna are opposed to the Bill—the former considering it too elaborate, though if it were a whit less elaborate he would certainly, and rightly, have blamed it as incomplete: the latter maintaining that it should be based on totally different principles, one of which is the somewhat startling assertion 'that easements do not include rights arising from contract.'

"(*b*) The Madras Government expresses no opinion on the Bill, but sends up six opinions from local officers. Of these, five (though some, I am glad to say, contain acute criticism) are on the whole in favour of the Bill. The Advocate General, for instance, thinks 'it meets most cases that are likely to arise in practice, so far as it is possible for legislation to anticipate such cases; and there can be no doubt, in my view, that such an enactment will prove of great service to the public.' The Native Subordinate Judge, Madura (Mr. A. L. V. Rámana), says that the Bill appears 'to be calculated to meet a want long felt,' and that its provisions 'when enforced as law will be highly beneficial to the public.' The Collector of Madura does 'not think that any of the provisions of the Bill are likely to cause difficulty in this part of India except, perhaps, that in section 17 (*d*), where it is declared that a right to surface-water not flowing in a stream cannot be acquired by prescription.' The sixth, Mr. Plumer, District Judge, North Arcot, cannot say that the Bill is urgently needed, but adds that the Bill may be found to meet a want in parts of the Madras Presidency where extensive mining operations will in all probability be undertaken—'in such cases,' he says, 'it will, no doubt, be of advantage that the law on such subjects as the right of support of surface and the right to appropriate water flowing in a defined, and water flowing in an undefined, course should be clearly and succinctly set forth.'

"(*c*) The Bombay Government 'have no objection to offer to the details of the Bill in its present form; but they most strongly deprecate its indiscriminate extension to the mufassal, and would, therefore, make the law permissive.' So far as regards the Bombay Presidency, this is the course which the Government of India proposes to follow. On the other hand, the Legal Remembrancer believes that it 'might advantageously be extended to the whole of this Presidency.' The District Judges of Thána and Ahmadnagar approve of the Bill. The Collector of Satára also approves, but would not immediately apply it to any part of the Presidency beyond the town of Bombay. The Commissioner of the Northern Division would apparently extend it to large towns such as Bombay, Ahmadábád, Broach, Surát, Puná, where the city surveys have been completed. Mr. Justice West, after

having recommended as a member of the Indian Law Commission that the Bill should become law, subject to the qualification above quoted, now asserts that 'the best legislation for the present would be a single clause commanding that in every case of easements and accessory rights, the local custom should be given effect to.' He does not say what is to be done where there is no ascertainable local custom, or where the so-called custom is (as is often the case) unreasonable, or uncertain, or not compulsory, or not immemorial. He would, I presume, continue the present practice of referring to the treatises of Gale and Goddard, books of which no one but an English lawyer can thoroughly understand a single page. And he apparently forgets the numerous savings of local customs and their incidents which the Bill contains, and to which I will, by and bye, call the attention of the Council.

"(*d*). The Government of the North-Western Provinces and Oudh opposes the Bill on the ground that it is unnecessary in those Provinces, and that it 'will not be understood by the vast majority of those who may have to administer it, not to speak of the uneducated masses whom it will affect.' If, however, it is to become law, the Lieutenant-Governor would urge 'that its extension to any special province should be left to the option of the Local Government.' As regards the North-Western Provinces and Oudh, this will be done. Mr. Plowden, the Commissioner, Meerut Division, opposes the Bill on the ground that it 'goes beyond the limits of existing custom'; and in support of this assertion he quotes a custom (that a right to discharge rainfall on adjacent land cannot be acquired by prescription) which has been illegal, and therefore no custom at all, since 1871—see Act IX of 1871, sec. 27, which is merely repeated in the present Bill. The senior Government Pleader, Jwála Prasáda, approves of the Bill, making, however, two suggestions for its amendment. The distinguished Native lawyer, Pandit Lakshmí Náráyan of Lucknow, though he was at first opposed to the Bill (and his opinion was therefore sent up and has recently been quoted by the Local Government), has written a second and very elaborate opinion (which has by some accident not been sent up or noticed by the Local Government, but has been circulated to Hon'ble Members), in which he says: 'When writing my remarks on Bill No. I, I premised them by saying that it was undesirable to codify the law relating to the rights of easement, as most of the rights which it was intended to regulate were in a crude and undeveloped state. Since writing those remarks, I have reconsidered the subject, and think there is much force in the reasons assigned by Sir Michael Westropp, Mr. Justice Jackson and Mr. Justice Innes for holding the codification of the rules which govern the rights of easements to be necessary. There certainly are not many judges in the mufassal who understand anything about the rights of easements; and while

this is the state of the judicial mind on this subject it is not extraordinary that the knowledge of the legal practitioners who practise before them is not much better.'

"(*e*) The Panjáb Government approves of the Bill in its present form, but would give the Local Government the option of extending it to such areas as it thinks fit. Mr. Justice Barkley, on the other hand, so far as the Panjáb is concerned, does not think this option necessary. 'The Bill,' he says, 'as now framed is not likely to conflict with usage, while it provides principles for guidance as to matters on which custom would be silent; and if the law does not supply such principles, our Courts must determine what principles shall be applied, very likely borrowing them either from English or Roman law, or from the Act, though this may not have been extended.' Mr. Elsmie, the Commissioner, Lahore Division, now acting as a Judge of the Panjáb Chief Court, is of opinion that the proposed law will work well, and be of material use to the Courts and people, and 'can see no reason why, so far as the Panjáb is concerned, the extension of the law should be made permissive.' Mr. Ibbetson thinks that the proposed Act 'should be extended to large cities and nowhere else.'

"(*f*) The Chief Commissioner of the Central Provinces is satisfied with the Bill as it stands, and says that he has no reason for asking that the extension to those Provinces should be made permissive. 'In the absence of any evidence as to the existence of local customs with which the provisions of the Bill would conflict, he considers it unnecessary to distinguish between urban and village easements, and therefore thinks it desirable that the clear and complete exposition of the principles of the law on the subject of easements which the Bill contains should be made of general application.'

"I would here remark that, if the Bill had been drawn by His Honour the Lieutenant-Governor of the Panjáb himself, it could not have shown greater tenderness for local customs. For, first, it declares that nothing in the Bill shall be deemed to 'affect' (that is, to affect *in malam partem*, to derogate from, or contravene) customary rights over land which any person may possess irrespective of other land and rights acquired before the proposed Act comes into force: secondly, it recognises the easement of privacy, which, founded as it is on the oriental custom of secluding females, is of so much importance in India: thirdly, it recognises the acquisition of an easement (such as the right of a cultivator of village-land to graze his cattle on the common pasture) in virtue of a local custom: fourthly, it allows a way of necessity to be varied in accordance with local custom: fifthly, the chapter containing the rules as to the incidents of easements expressly declares that 'when any incident of any customary easement is inconsistent

with such rules, nothing in this chapter shall affect such incident': and, sixthly, the Bill saves all enactments not expressly repealed, such as, for example, the Panjáb Laws Act, IV of 1872, section 7, and the Oudh Laws Act, XVIII of 1876, section 4. It will thus avoid interference with local usage in those parts of India in which customary law prevails. It is, indeed, hardly too much to say that the Bill will not operate except in the absence of a local custom.

"(*g*) The Chief Commissioner of British Burma apprehends that an enactment of this kind is not at present required in that Province, and would not be understood either by the Burmese people or the Burmese judges. He would possibly extend its provisions to Rangoon. He hopes that, if passed, it may be made extendible to districts, towns and tracts by the Local Government. This will be done. The Commissioner of the Arakan Division is in favour of the Bill. The Commissioner of the Pegu Division has no objections. The Commissioner of the Tenasserim Division opposes it on the ground that it would promote litigation. I am almost ashamed to give the hackneyed answer to this hackneyed objection. The answer of course is, *à priori*, that the Bill, by explicitly declaring the law on points now held doubtful by the people, the bar and the judges, is calculated to check, rather than increase, litigation, and, *à posteriori*, that litigation has certainly been diminished by the codifying measures, such as the Contract law, the Specific Relief Act, the Evidence Act, the Hindú Wills Act and, above all, the Limitation Act, which have been passed in recent years. The Recorder of Rangoon (Mr. Wilkinson) and the late Officiating Judicial Commissioner (Mr. Crosthwaite) are both strongly in favour of the Bill, though the latter informs me that it will be difficult to translate it into Burmese. The same sort of thing was said about the translation of modern scientific books into the cognate language of China; but it is well known that this difficulty was overcome by the early Jesuit missionaries, and that the foreign translators employed at the Kiangnan Arsenal now freely use Chinese for scientific purposes. Messrs. Wilkinson and Crosthwaite would extend the Bill at once to Rangoon, Moulmein, Akyab and Bassein.

"(*h*) The Chief Commissioner of Coorg gives no opinion on the Bill, but forwards one from the Superintendent, 'that the Bill is clear, and there should be no difficulty in applying its provisions.'

"(*i*) The Chief Commissioner of Ajmer and Merwára (Lieutenant-Colonel Bradford) thinks that the provisions of the Bill are neither suitable for, nor required in, the Ajmer-Merwára District. He wisely gives no reason for this opinion.

"(*j*) The Chief Commissioner of Assam (Sir Steuart Bayley) is disposed to think that it would be expedient in the first place to extend the Bill only to towns, leaving the rural population entirely to their local usages. He is of opinion that 'the draft is a valuable and clear exposition of the law as it should be, and that it will be of much assistance to the Courts of this country in deciding cases which in the crowded and populous centres of Northern and Western India may frequently arise.'

"The result seems to be that the Easements Bill in its present form might, with the concurrence of all the Local Governments, be extended in the first instance to Madras, Coorg and the Central Provinces, and be made extendible to the other parts of British India at the option of the Local Government. In so framing the Bill we should follow the precedent of the recently passed Probate and Administration Act (V of 1881)—a precedent, it will be remembered, suggested by the present Secretary of State for India—and the advice of the highest living authority on the subject of codification, as given in a letter dated April 29th, 1881, from which I will read the more important passages:—

"'Many thanks for sending me the reports of committees. These papers, with many others connected with measures of codification which are reaching the India Office, raise the question of the form in which your codifying Bills can be passed, or whether they can be passed at all. I am tempted to call attention to a suggestion which I made to Lytton just before he left India; he did not, if I remember rightly, receive it altogether favourably, but there had not been time to give it much consideration.

"'My suggestion is that, after thoroughly sifting the opinions you have received from Local Governments and other authorities on the various Bills, you should select those provinces in which there appears to be either unanimous opinion or a great preponderance of opinion in favour of a particular measure, and that you should confine yourself in the first instance to applying each Bill to the part of India which distinctly asks for it through its authoritative voices. You would thus outflank the great difficulty which has arisen from the attempt to apply a certain class of measures to *all India*—an attempt which seems to me to have maximised all the objections to codification.

"'Some measures were naturally made of all but universal application, *e.g.*, the Codes of Procedure (including Evidence), the Penal Code, which is really of interest only to the criminal classes, and (more doubtfully) the Contract Act, which after all covers but a part of the subject. I have always thought that, for all or nearly all the remaining measures, the proper precedent to follow was that of the Succession Act. On account of the extreme prejudices

of the great masses of the population, it was applied to a very small class. Yet it has greatly extended its sphere through the natural influence of a rationally expressed and arranged branch of law on popular and legal opinion. You have now a different class of prejudices to contend against, those of the practising lawyers, of the administrative officials, and of Natives copying their ideas; but the way to minimise their objections is the same which was followed in the case of the Succession Act.

"'No doubt it seems absurd at first sight to confine what is really a chapter of a code to (let us say) the Central Provinces or British Burma. But, after all, it is so much gained. The law is on the Statute-book, and serves as a magazine of rules to courts and lawyers everywhere. It is sure to soften opposition elsewhere. And it will at once diminish the great evil of doing nothing, which consists in permitting the Courts and the lawyers to take rules and principles higgledy-piggledy from text-books of English law. West, with whom I conversed on the subject, quite agreed with me in this, and allowed that any complete body of law would, if easily accessible, soon work itself into the minds of judges and vakíls. If this be so, you would have gained your object and frightened nobody. . . . . .

"'The true alternative to codification is the course hinted at by a certain school of administrative officials, that of having no law at all, but of giving the fullest discretionary powers to functionaries of every class. I do not at all deny that a great deal may be said for it. If the history of India could be begun again, and if Parliament were not disposed to do what it did in the old statutes, and to force law upon us by the Courts it established, I am not at all sure that a wise Indian legislator would not go in for universal discretion. But the very Indian officials who denounce law do not seriously believe that it can be got rid of; and the only effect of their objections is to prevent its being improved in the only rational way. Great undigested lumps of English law are finding their way into the law administered by the Courts to the people. I doubt whether in India there are a dozen copies of some of the books from which this law is taken, and these are, of course, written in a language unintelligible to the bulk of the Natives and to the great mass of Englishmen.

"'The true remedy is of course the simplification and articulate expression of law by what are called Codes.'

"Both Bills having been published under the Rules for the conduct of business, it is unnecessary to move for leave to introduce them into this Council.

"But I now propose, with the consent of Your Excellency and the Council, to introduce them and refer them to Select Committees, stating at the same time, in the case of the Trusts Bill, that, so far as regards the Lower Provinces, the Bombay Presidency, Burma and Ajmer, it will be merely extendible at the option of the Local Government, and, in the case of the Easements Bill, that it will apply, in the first instance, only to Madras, Coorg and the Central Provinces, and that, as regards the rest of British India, it will be extendible to such areas as the Local Government thinks fit. The two Bills, as settled by the Select Committees, will then, in accordance with the Secretary of State's orders, be retranslated and recirculated, and will be submitted to him, with the reports of the Committees, before any further steps are taken."

The Motions were put and agreed to.

The Council adjourned to Wednesday, the 6th July, 1881.

R. J. CROSTHWAITE,

SIMLA; *The 15th June, 1881.*

Officiating Secretary to the Government of India,

Legislative Department.

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