Tuesday, June 27, 1871

ABSTRACT OF THE PROCEEDINGS

COUNCIL OF THE GOVERNOR GENERAL OF INDIA

LAWS AND REGULATIONS.

VOL 10

Book No. 2

March to Dec.

1871

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 Simla on Tuesday, the 27th June 1871.

PRESENT:

His Excellency the Viceroy and Governor General of India, K. P., G. M. S. I., *presiding.*
His Honour the Lieutenant-Governor of the Panjáb.
His Excellency the Commander-in-Chief, G. C. B., G. C. S. I.
The Hon'ble John Strachey.
The Hon'ble Sir Richard Temple, K. C. S. I.
The Hon'ble J. Fitzjames Stephen, Q. C.
The Hon'ble B. H. Ellis.
Major-General the Hon'ble H. W. Norman, C. B.
The Hon'ble F. R. Cockerell.

PANJÁB REGULATIONS BILL.

The Hon'ble MR. STEPHEN moved for leave to introduce a Bill for declaring what laws are in force in the Panjáb. He said that the object of the Bill was to place the law of the Panjáb on a definite footing, which at present could not be said to be the case. Before 1861, it had been supposed that the Government of India had the same right to make laws for newly conquered provinces as Her Majesty had to make laws for Crown colonies, but doubt had subsequently been thrown on this opinion. In consequence of this doubt the 25th section of the Indian Councils' Act was passed, the effect of which was to confirm every "rule, law or regulation" previously made by the Governor General or the Lieutenant-Governor. The Government had since that Act proceeded on the supposition that it negatived by implication the existence of the power in question. When the Panjáb was annexed, however, the older opinion prevailed, and the Board of Administration to which the Government of the Province was entrusted, was accordingly intrusted by a despatch from the Government of India, with very wide discretionary powers for that purpose. Under those powers, as every one knew, the

province was administered with exemplary vigour and perfect success. The Board of Administration naturally issued a large number of orders for the Government of the Province, and, amongst other things, directed their Officers and were themselves directed, to conform generally to the system of administration which prevailed at the time in the North-Western Provinces. The orders made by the Board, and afterwards by Lord Lawrence, first, as Chief Commissioner and then as Lieutenant-Governor, were in some cases confirmed as they stood; in other cases they were confirmed under qualifications; in others they formed the subject of a correspondence which led to no very definite result, but which was afterwards indirectly referred to, possibly in reference to other Provinces. In other cases Lord Lawrence had occasion to refer to particular regulations in force in the North-West. These references were usually made in very general terms, as was natural and inevitable under the circumstances, and without any thought on the part of Lord Lawrence, or apparently on the part of the Government of India, that these references amounted to legislation. This state of things went on from 1849 to 1861, when the section of the Indian Councils' Act already referred to was passed. Its authors would appear to have known vaguely that a great mass of matter of the nature already described had practically the force of law in the Panjáb, though they did not know specifically what was its nature. Such as it was, however, it was all converted into law by the enactment in question, and to this day it formed an unknown and unexplored region with which it was simply impossible for any one to acquaint himself who had not access to the archives of the Panjáb Government, and the industry and time to master their contents. It was highly undesirable to allow an undefined mass of rules and regulations, about the legal validity of which no one could be sure, to constitute a portion of the law of the province. These rules and regulations owed their existence to the necessity under which the Government of India was placed of providing forthwith for the administration of a newly-conquered province. The measures for this purpose had to be taken at once, and there was no time for simplicity and brevity. Moreover, at the time the general law of India was such, that it was natural for the Government to shrink from extending it to such a province as the Panjáb. Great as were the merits of the Regulations, they were intricate in many parts and difficult to understand. An idea as to the condition of the criminal law might be gained from a perusal of Beaufort's Digest—a work of great merit which showed the existence before the Penal Code of a more intricate and troublesome state of the Criminal Law than existed even in England. The Government did not like to burthen the official staff with so cumbrous and perplexing a system, but having no better system to give them, it was reduced to the necessity of directing

in substance that the Board of Administration should introduce and act upon it as far as they found it suitable. It was usually supposed that the Panjáb had been governed, as the phrase was, patriarchally without any law at all, and at the discretion of Lord Lawrence and his colleagues. It was impossible to make a greater mistake. Lord Lawrence and his colleagues no doubt possessed great powers. It was most fortunate for the Province that they did, and that they used them with corresponding vigour, but it was by no means true that they ruled without law. On the contrary, one of their very earliest measures was to provide themselves with codes of laws which, if not so complete as the Penal Code and the Codes of Procedure, were an immense improvement on the intricate system which prevailed elsewhere in India. The book called the Panjáb Civil Code was prepared as early as 1853, and many rules relating to Civil and Criminal Procedure were introduced somewhat later. So far, indeed, was it from being true that the great authority of Lord Lawrence could be quoted in favour of personal government as against government by law, that it would be much more like the truth to say that Lord Lawrence's administration of the Panjáb afforded the clearest proof that could be given, not only of the necessity of having laws to govern by, but of the superiority of simple and scientific laws over cumbrous ones. His attempts, however, to introduce such a system met with very partial success. No doubt the laws which he introduced were, from a merely legal point of view, defective in many particulars. It would have been a miracle if this had not been the case, but the collection of rules now published showed conclusively that no man could have recognized more explicitly the necessity of introducing into the Panjáb broad, simple, definite and tangible express laws, or could have made greater efforts to obtain them. As was before observed, there was produced in 1853 the first draft of what was subsequently published as the Panjáb Civil Code. This was an attempt, and an exceedingly able attempt, at codification, and anticipated corresponding attempts that had been made in other parts of India. This volume was sanctioned as a text-book, and some portions of it relating to procedure undoubtedly acquired the force of law. But the Government of India had shrunk from the task of laying down a definite code for the Panjáb, and had continued to sanction or discuss the special orders and suggestions made from time to time by the Local Government. The consequence was that things had gone on till they had reached their present strange condition. One instance of the strange way in which laws had come into existence was the revenue system of the province. The original letter of the Government of India to the Board of Administration had directed the four short circulars, which regulated this subject in the North-Western Provinces, to be taken as the guide

on revenue operations. The language of this letter was that of an ordinary despatch; but it had all acquired the force of law. The result was this: the four letters referred to were immediately afterwards embodied in the Directions to Settlement Officers—a beautifully lucid and simple set of instructions. These Directions referred to and relied upon the Regulations, and in this way the Revenue Regulations had come into force in the Panjáb; in fact, the law was introduced by a circular professedly issued under the law. This was one instance of the extraordinary confusion that had been produced; another was the Panjáb Civil Code. When leave to publish it as law was asked, the Government of India had distinctly refused, and directed that it should be published with the authority attaching to the circulars of the Sadr Court. However, its introduction into Oudh was subsequently recommended by the Governor General, and in his recommendation he observed, in passing, that it had been found very useful in the Panjáb. This had, somewhat strangely, in Mr. Stephen's opinion, been regarded by the Privy Council as an admission on the part of Government that the volume had acquired the force of law in the Panjáb. The question as to how far this was the case had been much debated; and Mr. Barkley, to whose labours they were all much indebted, had, in the course of a very careful investigation, discovered a remark which appeared to be the most distinct recognition of the Panjáb Civil Code on the part of Government that was ever made. But it laboured under the disadvantages of being equivocal, unknown to every one whom it concerned, and of being obviously made without the least intention on the part of the person who made it to legislate. The remark was as follows:—The Lieutenant-Governor, in reviewing the Judicial Commissioner's Administration Report for 1858, observed—'His Honor's assent is fully given to your remarks concerning the necessity and importance of exacting a strict adherence to the letter and spirit of the Panjáb Law and Procedure.'

The Council would probably agree with him in thinking that if a law was to be considered to have come into existence because the Lieutenant-Governor in the course of official correspondence, with no idea of legislation present to his mind, made an incidental remark, which was fished up years afterwards by an industrious official, any one who managed to know what the law was, must be uncommonly fortunate.

It was now proposed that this state of things should cease. Lists of the rules and circulars confirmed by the Indian Councils' Act had been called for by his (Mr. Stephen's) predecessor from all parts of India concerned, and the result, so far as the Panjáb was concerned, was the present

volume by Mr. Barkley, which contained all which that gentleman, after a very careful enquiry, considered to be law in the Panjáb. The question was now how to deal with it. Mr. Barkley had forwarded a memorandum which he (MR. STEPHEN) was happy to find coincided in all substantial particulars with one which had already been drawn up by himself. There would, he believed, be no difficulty in reducing the whole volume into an Act of perhaps fifty sections; and when this Act was passed, there would be an end of all non-regulation law. Two principles must, however, be kept in view in the framing of any such Act: in the first place, a large portion of the book could not be regarded as law in any sense of the word. It consisted of mere executive orders which Government was quite competent to enforce on its officials without legislation on the subject. As to these orders, not only was it unnecessary that they should have the force of law, but it was highly inconvenient that there should be any doubt whether they had it or not, inasmuch as, if they had it, Government became bound by them and could not vary them at convenience. In the next place, there were a number of topics as to which it was highly desirable that the Local Government should have power to frame rules; such subjects were the existing track law, the slaughter of kine—a subject which, as recent experience unhappily proved, was eminently likely to provoke animosities between Mussulmans and Sikhs, and required, therefore, to be provided for by special rules. Then there were rules as to armed retainers and grazing rights. Now, if the portion of the book which consisted of alterations in the ordinary law were expressly enacted, if the portion which consisted of mere executive orders were put aside, and power were given to the Local Government to issue rules on the subjects just enumerated, he believed that the rules contained in the book might be safely repealed; and the result would be to get rid of that large mass of non-regulation law which, till now, it had been so difficult to ascertain or define. There would also have to be a section to declare what the law was according to which the Courts were to frame their decisions. It would follow the precedents set by the Bengal Regulations, and would refer to the Acts and Regulations in force in the Panjáb, to the Muhammadan and Hindú laws in the cases to which they respectively applied, and where no other law was available, to justice, equity and good conscience, which was in practice a less vague expression than it might appear to be. What would be done, accordingly, would practically amount to this: such portions of the Panjáb Civil Code as were not mere expositions of Muhammadan or Hindú law, would be re-enacted, except when it was considered unnecessary or undesirable. In some instances, the Panjáb Civil Code deviated considerably from the existing law, particularly in the case of pre-emption, the

effect of custom, and insolvency. Upon the subject of the validity of the rules as to insolvency involving the administration of many lákhs of rupees, a difference of opinion existed, Mr. STEPHEN understood, between the Judges of the Chief Court. As to this controversy, it appeared that the best thing to do was to leave it undecided as regarded the past, to set up everything which had been done heretofore on the assumption of the Panjáb Civil Code having the force of law, and, for the future, to lay down in clear and intelligible language what the law was which the Courts were bound to administer.

His Honour the LIEUTENANT-GOVERNOR said that he did not intend offering any commentary on the statement that his hon'ble friend had just made, but he could not but express the satisfaction which he felt that this troublesome and intricate matter was now to be dealt with. There could be no doubt that the effect of the Indian Councils' Act had been to make a great many things law that could not be regarded as law without a great deal of inconvenience alike to the Government and the people, and he sincerely rejoiced that the matter had fallen into hands so competent as to deal with it in a wise and statesmanlike manner.

The Motion was put and agreed to.

EUROPEAN VAGRANCY ACT AMENDMENT BILL.

The Hon'ble Mr. STEPHEN also moved for leave to introduce a Bill to amend the European Vagrancy Act, 1869. He stated that the Government of Bengal had requested that the European Vagrancy Act should be amended with a view to meeting the case of persons coming from Australia in charge of horses, on engagements which terminated with the voyage, and immediately becoming chargeable as vagrants. In these cases it was impossible to enforce the Act, inasmuch as the persons "to serve whom" the vagrant had come to this country, was the shipper of the horses in Australia. As this was an obvious evasion of the law, it was proposed, by the present Bill, to make the consignee in such cases liable for the expenses of the vagrant.

The Motion was put and agreed to.

The Council adjourned to Tuesday, the 4th July 1871.

H. S. CUNNINGHAM,
Offg. Secy. to the Council of the Governor General for making Laws and Regulations.

SIMLA;
The 27th June 1871.