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☞ *Separate paging is given to this Part, in order that it may be filed as a separate compilation.*

PART V.

PROCEEDINGS OF THE COUNCIL OF THE GOVERNOR GENERAL OF INDIA.

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 Vict., Cap. 67.

The Council met at Simla on Tuesday the 30th August 1870.

PRESENT:

His Excellency The VICEROY AND GOVERNOR GENERAL OF INDIA, K.P., G.C.S.I., *presiding.*
His Excellency the COMMANDER-IN-CHIEF, G.C.B., G.C.S.I.
The Honourable JOHN STRACHEY.
The Honourable Sir RICHARD TEMPLE, K.C.S.I.
The Honourable J. FITZJAMES STEPHEN, Q.C.
The Honourable B. H. ELLIS.
Major General The Honourable H. W. NORMAN, C.B.
The Honourable F. R. COCKERELL.
His Highness The Honourable Sarámade Rájáhae Hindustán Ráj Rájendra Srí Maháráj Dhiráj Sivái Rám Singh Bahádur of Jaypúr, G.C.S.I.

OUDH TALOOKDARS' RELIEF BILL.

The Honourable Mr. STRACHEY asked leave to postpone his motions relating to the Bill to relieve from incumbrances the estates of talookdárs in Oudh.

Leave was granted.

PENAL CODE AMENDMENT BILL.

The Honourable Mr. STEPHEN presented the Report of the Select Committee on the Bill to amend the Indian Penal Code.

COINAGE AND MINT BILL.

The Honourable Mr. STEPHEN presented the Report of the Select Committee on the Bill to consolidate and amend the law relating to Coinage and the Mint.

EUROPEAN BRITISH SUBJECTS' BILL.

The Honourable Mr. STEPHEN moved that the Report of the Select Committee on the Bill to confirm certain laws affecting European British subjects be taken into consideration. He said that he need not return to the general question involved in the Bill, but some remarks had been made on it which appeared to require notice. It was said that the Bill was defective in so far as it did not confirm the future Acts of the local Legislatures. But the answer to this was that under the Indian Councils' Act the Governor General in Council had no power to do so. The Government of India would address the Secretary of State with a view to the introduction into Parliament of a Bill to confer power on the local Legislatures to deal with European British offenders.

Another objection raised to the Bill was that it would prevent the local Legislatures from modifying their penal Acts heretofore passed, so far at least as those Acts related to European British subjects. This was perfectly true, but the evil was inevitable, and we had to choose the least of two inconveniences. The Secretary of State would be moved to insert in the Bill to which Mr. STEPHEN had referred a clause enabling the local Legislatures to modify those Acts, notwithstanding their having been affected by an Act of the Governor General in Council. Lastly, the Governor of Bombay had objected that the present Bill, in so far as it purported to confirm invalid local legislation, was beyond the power of the Council of the Governor General as limited by the Indian Councils' Act. But this objection Mr. STEPHEN thought rested on a misapprehension. What the Legislature of the Governor General proposed to do on this occasion was simply to adopt certain local Acts as its own; and the Bill did not affect in any way the provisions of the Indian Councils' Act.

The Motion was put and agreed to.

The Honourable Mr. STEPHEN then moved the following amendments:—

That the following words be added to section one:—

"And as if it expressly referred to European British subjects;"

And that the following sections be inserted after section one of the Bill:—

"2. Unless there be something repugnant in the context, all Acts heretofore or hereafter passed by the Governor General in Council which confer summary jurisdiction over offences shall be deemed to apply to European British subjects, although such persons be not expressly referred to therein.'

"3. Act No. XVIII. of 1859 *(to amend the law relating to offences declared to be punishable on conviction before a Magistrate)* shall be construed as if, in sections one, two, and four, after the word 'heretofore' the words 'or hereafter' were inserted."

And that the numbering of the subsequent sections be altered.

These amendments were rendered desirable by a very recent decision of the High Court at Madras, of which information had been received unofficially, since the Committee had signed their Report, from Mr. Mayne, the learned Secretary to the Legislative Council of the Governor of Madras. The Madras High Court, it seems, had held that even Acts of the Governor General in Council giving summary jurisdiction over offences did not apply to European British subjects, unless such subjects were expressly named therein. Mr. Mayne had also pointed out the anomalous state of things produced by the fact that Act XVIII. of 1859 (as to offences made punishable on conviction before a Magistrate) applied only to enactments passed before the 25th of July 1859. The amendments which Mr. STEPHEN now proposed would meet the two difficulties thus raised.

The Motion was put and agreed to.

The Honourable Mr. STEPHEN then said that the adoption of the first of the amendments just carried rendered necessary two formal amendments—one in the preamble, the other in section one; and he would accordingly move that the following words be inserted in the preamble:—"and whereas doubts have also been raised as to the application to European British subjects of certain Acts of the Governor General in Council:"

and that in section one, line one, after "Act" the following words be inserted:—

> "Passed by the Governor of the Presidency of Madras in Council, or by the Governor of the Presidency of Bombay in Council, or by the Lieutenant-Governor of Bengal in Council."

The Motion was put and agreed to.

The Honourable Mr. STEPHEN then moved that the Bill as amended be passed.

The Honourable Mr. COCKERELL said that he believed that the words "unless there be something repugnant in the context," which occurred in the first line of the first amendment, excluded its application to the Code of Criminal Procedure. He had himself no doubt as to this being the effect of those words; but he thought it right to draw special attention to the subject, and to appeal to his honourable and learned friend the Mover of the Bill for a confirmation of his (Mr. COCKERELL'S) impression, inasmuch as if the full effect of these words was overlooked or imperfectly understood, the idea might get abroad that, through the instrumentality of this Bill, a serious alteration of the law was being brought about. That, in short, by a sort of side-wind, that is to say, in the form of a hurried amendment of a Bill, in the original form of which no alteration had been proposed by the Select Committee, an attempt was being made to render the European British subject liable to be tried and convicted by tribunals to whose jurisdiction he had never been previously subjected, and to which the propriety of his subjection had been so much canvassed in the discussions which preceded past legislation in this matter.

The criminal law of this country was, as the Council knew, now entirely to be found in, first, the Penal Code and the Criminal Procedure Code (by which latter the jurisdiction in respect of offences made punishable under the former was regulated), which were general; and, second, the various Municipal and Police Acts, the enactments regarding offences against the Revenue, and the laws relating to Military Cantonments (some of which had been enacted by this Council and others by the local Legislatures), which were all of mere local application.

Now, the punishments to which persons were liable for offences under this last class of enactments, *i. e.*, enactments the operation of which was confined to particular localities, were, with rare exceptions (notably certain sections of the Calcutta Police Act, IV. of 1866), fines of greater or less amount in the first place, and imprisonment only in default of payment.

The Bill, therefore, in declaring the European British subject equally with other persons liable to summary conviction and punishment under these laws, in no way infringed, or went beyond, the principle of past legislation—such as, for example, 53 Geo. III, cap. 155, sec. 105, and Act VII. of 1853—in this matter.

But if the amendment were to include the Criminal Procedure Code as an "Act heretofore passed by the Governor General in Council conferring summary jurisdiction over offences," the case would be very different, and its effect would be to bring about a grave alteration of the law without due notice or consideration.

The Honourable Mr. STEPHEN said that the only effect of the Bill was to make the law as to European British subjects that which, till lately, every one had supposed it to be. It increased no powers of punishment possessed, or supposed to be possessed, by Magistrates, and it did not confer jurisdiction on any Magistrate who was not a Justice of the Peace. The Code of Criminal Procedure was clearly not affected by the Bill as now amended.

The Motion was put and agreed to.

INSOLVENCY BILL.

The Honourable Mr. STEPHEN moved for leave to introduce a Bill to amend the law relating to insolvency. He said that the law relating to insolvency, as it stood at present, was contained, as regarded the three Presidency Towns, in an Act of Parliament, 11 & 12 Vict., cap. 21, which had been adapted to the circumstances of the Presidencies from the English laws relating to bankruptcy then in force. As regarded the Mofussil in general there was no law of insolvency; but there was a section in the Code of Civil Procedure which, to a certain extent, answered the same purpose. This was section 271, which provided that "if, after the claim of the person on whose application the property was attached has been satisfied in full from the proceeds of the sale, any surplus remain, such surplus shall be distributed rateably amongst any other persons who, prior to the order for such distribution, may have taken out execution of decrees against the same defendant and not obtained satisfaction thereof: Provided that when any property is sold subject to a mortgage the

mortgagee shall not be entitled to share in any surplus arising from such sale." In illustration of the objections to the manner in which this section worked as a substitute for a Bankruptcy Act, he might refer to an able pamphlet lately published by Mr. Broughton, the Administrator General of Bengal, upon the state of the law in the Non-Regulation Provinces. Mr. Broughton's remarks were as follows:—

"By that law the first creditor who gets a decree and takes out execution is entitled to be paid in full, while the rest come in *pari passu* and divide what is left. As a natural consequence, in places where there is no Insolvent Law, that is to say, in all India except the three cities of Calcutta, Madras, and Bombay, there is no sooner a rumour of a trader being in difficulties than all his creditors in self-defence rush into court and contend among themselves for the first decree against him; his property is attached and sold on the spot, always at a considerable loss, and the rival claims of different creditors often produce a contest, sometimes carried out to physical extremities. Perishable goods are hurried away at the best to improper receptacles, and in most instances are considerably damaged, while the judgment-debtor, to avoid these disastrous consequences, finding that his property is unprotected by the law, is tempted to resort to all sorts of fraud and chicanery to avoid the consequences of his position. In the early part of the year 1867 this change in the law operated in a manner which for the time caused a complete paralysis in the trade of Rangoon and flooded the Courts with litigation."

There were also provisions as to insolvency in some particular provinces. For instance, the document called the Civil Code of the Panjáb contained such provisions, and others of a similar character contained in what was called Sparks's Code, after its author, Major Sparks, had been in force in British Burmah. The validity of the Panjáb provisions was, as he (Mr. STEPHEN) believed, at the present moment under the consideration of the Chief Court of that province, and there would seem to be considerable doubt as to the legal force of many parts of the Code, upon which different decisions had been given by various authorities. The Burmese Code, or at least that part of it which related to the subject of bankruptcy, had been superseded there by the introduction of the Code of Civil Procedure.

The general extension of commerce into various parts of India, and the variety of the provisions which at present obtained upon the subject, suggested the propriety of introducing a general measure. The one which he now asked leave to introduce had been adapted from the Bill passed last year in England, which might be regarded as embodying the result of controversies carried on, and of experience acquired, for upwards of three centuries: for the first English Bankruptcy Act was 34 & 35 Henry VIII., cap. 4, passed in the year 1542-43, and the last was passed in 1869. During the interval between these dates, and especially during the last half-century, the subject had been almost continually under discussion, and a long series of important changes had been made in the arrangements by which the object of dividing the property of an insolvent amongst his creditors had been attained.

The system finally arrived at, which it was proposed to introduce into British India, had, at all events, the merit of simplicity, and, as he (Mr. STEPHEN) thought, of common sense and justice. Its essential provisions might be stated in a very few words, although unfortunately when they were thrown into a legal shape, and when the persons appointed to act under the Bill had been armed by express provisions with all the necessary powers, the result was a measure of somewhat formidable dimensions.

In a few words the system proposed to be established was as follows:—When a man committed any one of a certain number of acts of insolvency and was unable to meet his engagements, he might be adjudicated an insolvent upon a petition by his creditors. His property would upon adjudication pass to a trustee, whose duty it would be to realize it under the inspection, and according to the directions of a committee of creditors, and to divide it amongst them rateably. If the dividend paid amounted to eight annas in the rupee, or if the creditors were of opinion that the failure to pay so high a dividend arose from circumstances for which the insolvent could not justly be held responsible, and if they desired his discharge to be granted, he could be discharged. If a smaller dividend were paid, the insolvent would have three years in which to make up his payments to the amount in question, and any balance that remained unpaid at the end of that period would constitute a judgment-debt, which might be enforced by leave of the court. English experience seemed to point to the conclusion (after many experiments), that this was a fair compromise between the object of favouring commerce and the object of enforcing a complete execution of the contracts into which a trader might enter.

These were the main provisions of the Bill, but it contained other provisions, which were unavoidably rather long, upon the various points which it was necessary to provide for, in

order that the scheme might be properly worked, such as the appointment and powers of trustees, the meetings of creditors, the effects of insolvency upon the property of the insolvent and that of other persons, the distribution of assets, and the jurisdiction of the courts. Provisions also were inserted to enable creditors, if they thought fit, to take the matter entirely into their own hands, and to provide, by a process which had been called liquidation by arrangement, for the objects contemplated by the law.

Every effort had been made to render the Bill complete in itself, so that all the law upon the subject might be contained in one measure, and that as little necessity as possible might exist for subsidiary legislation by the courts in the shape of rules of procedure.

The reason for introducing the Bill at Simla was that it might be published as early as possible in the *Gazette*, so that the Government might have the advantage of receiving the opinions and advice of the mercantile community in general, and especially of the three Chambers of Commerce, before the measure was discussed in committee.

There was only one other subject which he (Mr. STEPHEN) need mention. He proposed to follow the English example of separating the two questions of the distribution of an insolvent's assets and the punishment of fraudulent debtors. The latter question would be dealt with separately, and if it were decided to revise the Penal Code the addition of several provisions upon this subject would form an important part of that process.

The Council then adjourned to the 6th September 1870.

WHITLEY STOKES,

Secretary to the Council of the Governor General for making Laws and Regulations.

SIMLA,
The 30th August 1870.

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