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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 and 25 Vic., Cap. 67.

The Council met at Government House on Tuesday, the 8th April 1873.

PRESENT :

His Excellency the VICEROY AND GOVERNOR GENERAL of India, G.M.S.I., *presiding*.
 His Honour the LIEUTENANT-GOVERNOR of Bengal.
 The Hon'ble SIR RICHARD TEMPLE, K.C.S.I.
 The Hon'ble B. H. ELLIS.
 Major-General the Hon'ble H. W. NORMAN, C.B.
 The Hon'ble A. HOBHOUSE, Q.C.
 The Hon'ble R. STEWART.
 The Hon'ble J. R. BULLEN SMITH.
 His Highness the MAHARAJA OF VIZIANAGRAM, K.C.S.I.
 The Hon'ble J. F. D. INGLIS.
 The Hon'ble Rájá RAMANATH TAGORE.

OATHS AND AFFIRMATIONS BILL.

The Hon'ble MR. HOBHOUSE presented the final report of the Select Committee on the Bill to consolidate the law relating to Oaths and Affirmations. He said, it would be unnecessary, as this matter had been explained on the last occasion very fully, to notice any other parts of the present Bill except those passages by which some alteration or modification of the existing law would be effected. The first of these was in section 5, where it was provided that oaths or affirmations should be made by such and such persons, and among them, under head (c), were jurors. At present, in India, jurors in the Presidency towns, and he thought also jurors in Rangoon and Maulmain, were all sworn. But jurors in the Mofussil it had not been the practice to swear. We had been recommended by a great many authorities in different parts of the country, the most important of whom was the Madras Government, to put all jurors on the same footing. We saw no reason why that should not be done, especially considering the extreme simplicity of the present law, which provided that, if any person objected to taking an oath, he would only be required to make a simple affirmation. In section 7, it would be found that oaths and affirmations would be administered in such forms as the High Court should prescribe, and, until forms were so provided, the forms now used would continue in force. He was not sure whether that was an alteration of the law or not. There was no particular form prescribed by any general law, and whether or no the High Court could by its general authority prescribe the form of oath, he did not know. Nor

was it worth while to enquire. It was obviously a matter of convenience that the power of moulding such formulæ should exist, and should be in the High Court; until the power so vested in the High Court was exercised, the existing practice would prevail.

There was no other alteration of the existing law until we came to clause 9, to the proviso at the end, the meaning of which was fully explained in the preliminary report of the Committee, and also by himself orally in Council. It was simply intended to prevent an abuse of this section. It would not interfere with the free use of the provisions of the section, and it had the assent of His Honour the Lieutenant-Governor, who was more the author of the sections relating to peculiar oaths than any other man.

Clause 13, it would be found, was a reproduction of section 5 of Act VI. of 1872, except that we had added the words "or shall affect the obligation of a witness to state the truth." We thought it somewhat doubtful whether the clause, which very rightly provided that irregularity in the mode of taking evidence should not affect the validity of the proceedings, would save the whole liability of witnesses to be prosecuted for giving false evidence. The definition of false evidence in the Penal Code was somewhat precise and artificial, and to meet it we provided that such irregularities should no more affect the liability of a witness to be prosecuted for giving false evidence, than they should affect the validity of the proceedings. The Council would observe that, in clause 14, we had provided that a person giving evidence should be bound to state the truth. To anybody who did not know the language used in the Penal Code in the definition of false evidence, it might seem to be a solemn trifling with the Council to write down in this Act that a person called for no other reason than that he should state the truth should be bound to state the truth. The necessity of such a provision arose from the peculiar definition of false evidence. The definition was that the witness must either be legally bound by an oath to state the truth, or be so bound by some express provision of law; if then he stated what was false, he was guilty of the offence of giving false evidence. The only express provision of law was to be found in the form of the oath, and when you were dispensing with forms, it was advisable to have a general provision of law fitting exactly into the language of the Penal Code. That was the only reason for the introduction of clause 14. There was also another clause in the Bill that fitted into two sections of the Penal Code, namely, sections 178 and 181. Section 178 related to the case of a man who, being bound to take an oath, refused to do so, and thus subjected himself to a penalty. That would be rendered nugatory by providing that a witness may make an affirmation instead of an oath at his option. It was provided by the Bill that the refusal to take an affirmation should be placed on the same ground as the refusal to take an oath. And in section 181 of the code it was provided that, where a man who was legally bound by an oath to state the truth gave false evidence under certain circumstances, he should be liable to a certain punishment. But under this Bill he might not be legally bound to give evidence under an oath, but only under an affirmation: consequently the penalty imposed by the Code would not attach to such cases. Those were the only points in which the Bill was not an exact expression of the existing law.

The Honourable MR. HOBHOUSE also moved that the final report be taken into consideration.

The Motion was put and agreed to.

His Honour the LIEUTENANT-GOVERNOR moved the following amendment:—

"That the last clause of section 6, namely, 'In every other case the witness, interpreter or juror shall make an oath,' be omitted."

He said the Council were aware that he had been somewhat averse to the consideration of this Bill by the Council at the present time. He had been fully persuaded that it would be totally impossible to pass a modern Act with such an *omnium gatherum* as would be contained in an Act which was intended to be literally and simply a consolidation measure. He felt sure it would be necessary, before a modern Act was passed, that some changes should be made: and the honourable member in charge of the Bill had told us that some changes had been made; some very beneficial changes, some very material changes—such as that regarding the administration of oaths or affirmations to jurors—and other changes apparent on the face of the Bill as now brought up. And so the present Bill had, in that respect, been very much improved; so much improved that, in His Honour's view, the Bill was altogether unexceptionable, except in one particular which stood somewhat minor in prominence, but still, in his view, a particular which was of very considerable importance—he meant the clause of which he moved the omission. The effect of the section was that Hindús and Muhammadans were exempted from the taking of oaths, and also all persons who objected to taking an oath. Nevertheless, to a witness, interpreter or juror, who was not a Hindu or Muhammadan, an oath must be tendered. He might, it was true, object to take an oath, but the oath must be tendered. His Honour had, on a former occasion, reminded the Council that the great mass of witnesses and jurors in the country were Hindus and Muhammadans, and that people who were not Hindus or Muhammadans were a very small fraction. Yet, while to Hindus and Muhammadans an oath would not be tendered, to Christians and other persons who were not Hindus or Muhammadans—that small and heterogeneous class of people who were not either Hindus or Muhammadans—an oath must be tendered. He ventured to believe that that was not so much a real consolidation of the law as the preservation of a fossil of ancient English superstition. That superstition was that nothing was evidence which was not given on oath. The Bill proposed to do away with that superstition, in so far that it provided that no person who objected to take an oath should be required to take an oath, whether he were a Christian or anything else; but it retained the rule that an oath must be tendered to a very few people. It was a mere fossil: a very ancient antediluvian fossil. That, he considered, was a very serious blot in the Bill, and he was at a loss to see why it should be retained. He believed that, as a rule, Muhammadans had no religious prejudices to the taking of oaths; whilst Christians and others who were not Hindus or Muhammadans might have religious scruples to take an oath. It seemed utterly unrea-

sonable that if he and his *khidmatgar* were required to give evidence, he should be sworn because he could not offer a conscientious objection to take an oath, and his *khidmatgar* should not be called upon to take an oath, because he was a Muhammadan. He did not understand the nature of such a distinction. Was it that the oath would be more effectual in eliciting the truth from him, or that he was not to be believed unless he took an oath, while the Muhammadan was to be believed without one? It seemed to him that the distinction was an unreasonable distinction, and that it was a blot in the Bill. Therefore, he proposed to remove that distinction, and make the Bill a reasonable Bill. It was not only a matter of principle. It was not only a question why he should be sworn, and a Hindu or Muhammadan should not be sworn. It was also a matter of extreme practical inconvenience to insist on the tendering of oaths to the rare persons, not either Hindus or Muhammadans, who should come before the Courts. By thus providing, we insisted that every Court should keep a sort of swearing-armoury. They must provide themselves with a Bible, a Zendavesta, a Confucius and other means of swearing persons of various religious persuasions, and must tender to those rare people those oaths which the persons who were to take the oaths might or might not take at their option. Munsifs in remote parts of the country must be provided with this swearing-armoury. He submitted that, if it was expedient that the great majority of the people, Hindus and Muhammadans, should be exempted from the taking of oaths, why should the small minority, the rare persons who were not either Hindus or Muhammadans, be placed under this peculiar law, this ban if he might so term it? The result of the omission which he proposed would in practice be this, that in the Courts and parts of the country where the great majority of the people were either Hindus or Muhammadans, oaths, as a rule, would not be administered, except under the special provisions in the latter part of the Bill. But it would be possible that any person of swearing races called to give evidence, either in the original jurisdiction of the High Court, or in those parts of the country or in those Courts where oaths were the fashion and habit, under the direction of the High Court, might be offered an oath. That being so, His Honour thought that the omission of the clause to which he objected, would leave the law in a state of which no body could complain. There would be no necessity to tender oaths, but nevertheless the discretion of the presiding Judge would not be affected in regard to those Courts in which it was considered desirable to tender oaths. That being the case in regard to what he might call normal oaths, we should have this state of things, that oaths, as a rule, would be abolished. We should have no ordinary oaths: but the administration of oaths would be reserved as a special, solemn, and peculiar sanction, to be applied in peculiar cases under what he might call the voluntary provisions in the latter part of the Bill. For these reasons, he moved that the rule compelling oaths to be tendered to certain persons should be omitted, and that it be left optional to the Courts to tender oaths or not to persons not being Hindus or Muhammadans.

The Honourable Mr. INGLIS said that the amendment proposed by His Honour the Lieutenant-Governor would, it seemed to him, if carried, throw the law relating to the administration of oaths in this country into utter confusion. If the words in clause 6 to which His Honour objected were struck out, there would then be no direction as to the course to be pursued in the case of persons who were not Hindus or Muhammadans, and who did not object to taking an oath; so that it would be in the power of every Judge or Magistrate to administer to such persons either an oath or an affirmation according to his fancy. A law allowing such diversity of practice would, it appeared to him, be extremely objectionable. But however this might be, Mr. INGLIS objected to the amendment on the ground that it was contrary to the express understanding under which this Bill was introduced, and under which it had been discussed in Committee. This was that the Bill was a purely consolidation measure, and that no change in the principles of the existing law should be made. The Committee had acted in accordance with this understanding, for the alterations noticed by the Honourable Mr. Hobhouse just now were not alterations in principle, but related to mere matters of detail, or had been adopted to make the existing law clear on doubtful points. When this Bill was before the Committee, Mr. INGLIS proposed that section 8 and the following sections, which authorized the administration of all kinds of queer oaths, should be struck out. He did so, because he was certain that these sections were dangerous and mischievous, and because he believed that they were admitted into the Bill last year without sufficient consideration. As the Honourable Mr. Chapman said the other day, this Bill was brought forward last year at a time when we were fully occupied with the Criminal Procedure Code, the Evidence Bill, and the Contract Bill, and when we had neither leisure nor opportunity to consider carefully the way in which these sections might be worked. But cases had already occurred which showed that the apprehensions then expressed by the Honourable Mr. Robinson were well founded; which showed that these sections would certainly be used by unscrupulous persons to defeat the ends of justice, to extort money, or to evade payment of debts justly due by them, by taking advantage of the extreme repugnance felt by all Natives to take oaths of the solemn nature that might be tendered to them under the provisions of these sections. Mr. INGLIS believed that, as the Act became more generally known, such cases would be numerous, and that no long time would elapse before the repeal of these sections would be urgently called for. He therefore thought that it would be wise to get rid of them at once before much harm had been done. He believed that this was the opinion of the majority of the Committee, and that these sections would have been struck out had it not been urged that to do so now would be contrary to the express understanding under which the Bill had been brought forward and had been referred to the Committee; that they were bound to confine themselves to the consolidations of the existing law, and that they were not at liberty to make any alterations or improvements in it affecting any principle. The Committee accepted this view of the case and reported accordingly. Mr. INGLIS objected to any alterations being made in the Bill now, and to any departure from this understanding in the absence of some of the members of the Committee who signed that report, and who, he believed, were strongly opposed to the retention of these sections. He thought that the Council should either pass the Bill as it stood, or that, if any alterations in principle were contemplated, the Bill should be referred back to the Select Committee, in order that the very important questions involved

in the retention of sections 8 to 12 might be carefully considered, as well as any amendments His Honour the Lieutenant-Governor might have to propose.

The Honourable Mr. HOBHOUSE could not assent to His Honour's proposal, not only on the ground that it altered the existing law, but that it was an amendment in the direction of greater instead of less inconvenience. With respect to the changes made in the law by the Bill, they were not only very slight ones, some of them being mere matters of course in order to adapt the law which now existed under the Act of 1872 to the Penal Code, but they had been changes in regard to which no difference of opinion had been expressed. They had been unanimously assented to in Committee, and there was no difference about them now. But the change proposed by the Lieutenant-Governor was certainly one which would call forth considerable difference of opinion. There was a great deal in His Honour's speech with which Mr. HOBHOUSE entirely sympathised; and if we were now considering the foundations of the law, and considering whether we should change them for the better, it was possible that he might agree with His Honour's views. No doubt it was correct to say that the clause requiring an oath was a remnant of the law of England. Mr. HOBHOUSE would not himself call it a fossil law, because it was actually living and operating. There were a number of persons who were influenced by the solemnity of an oath, and believed in its superior sanctity. As education and civilization advanced, that belief tended to decay. So far as his own mind was concerned, being disposed to tell the truth, he should not be more disposed to do it under the sanctity of an oath. And if he wished to tell a lie, he should fear only the temporal penalties attached to the giving of false evidence, and not any greater sin in telling a lie under oath than in telling one without oath. We might find a large section of our own countrymen, especially the Irish Roman Catholics, who did still attach importance to the form in which they gave their evidence and to the nature of the oaths they took; and he had no doubt that, in many parts of India, it was the same. We had recently been informed that in British Burma oaths were administered with great solemnity, and that great importance was attached to them.

That being so, he was sure we should find great difference of opinion, when we proposed to do away with the ordinary rule of tendering an oath, except to those classes of people who were excepted. The Lieutenant-Governor said, "how absurdly you act; you except the greater number of the inhabitants of India." That might be so. But Mr. HOBHOUSE did not see any absurdity in the law accommodating itself to the state of things. Now, the state of things was found to be this. So many Hindus and Muhammadans objected to the taking of an oath at all that it was found that they would, even at the risk of penalties, absent themselves from the Courts of justice when called upon to give evidence; that was why Act V. of 1840 was passed, which provided that the Courts of justice should not allow oaths to be administered to Hindus and Muhammadans. That Act had been in operation for thirty-two years; and he did not find that anybody had complained at all that oaths were not administered to Hindus or Muhammadans; or that anybody felt injured or had his self-respect diminished because he was called upon to take an oath, while others were not. At all events, there was no ground for any such complaint now, for since the passing of the Act of last year, it was open to any witness simply to say—"I object to take an oath," and on his so objecting, he was put to make a simple affirmation. Mr. HOBHOUSE could not conceive that that would involve hardship to anybody. But what would be the practical effect of the amendment proposed? It seemed to him that it would throw on the Judges, in every instance, the onus of deciding whether they would ask the witness to swear or to affirm. How was the Judge to decide the question? It would be a very invidious position to place a Judge in, and much more likely to bring the Judge and witness into collision; much more likely to lead to unseemly disputes than the provisions of the Bill as it stood. If the witness objected to take an oath, he had only to say so; and he would be relieved from the necessity of taking an oath. But if you left the Judge to decide the matter, one of the parties might complain that the Judge had not subjected the witness to that test which the witness himself most valued, and which was most likely to elicit the truth from him. He was quite sure that we should have a great many complaints; and probably every Judge in the country would ask to be relieved of the duty thrown on him. It was on these grounds that Mr. HOBHOUSE objected to the amendment.

With regard to the remarks which fell from his honourable friend, Mr. Inglis, respecting the clauses of the Bill which provided for the administration of peculiar oaths, Mr. HOBHOUSE must say that he had not examined the subject with any care, and did not profess to have formed an opinion upon it. But it seemed to him that provisions of law passed so short a time before ought not to be altered, unless we had before us evidence that they produced some ill effect on such a scale as called for legislation. The clauses may have been passed hastily, but they were passed deliberately; there was discussion on them. Mr. HOBHOUSE had read the whole proceedings and knew what pains had been taken about them by the Lieutenant-Governor, who was more their author than any other man. Mr. HOBHOUSE was not prepared to assert at present that there was a case for altering those sections. There might be such a case hereafter. He knew that many persons objected to them, but he could not find that they did so on actual evidence of mischief.

His Honour the LIEUTENANT-GOVERNOR was aware he was somewhat weighted in this amendment on account of the indisposition of the Council, at this period of the session, to make a change in this Bill of considerable importance. But he had thought it his duty to submit his amendment, in order that the Council might say yea or nay, as he strongly objected to the clause which he proposed to omit as a blot in the Bill, and he was anxious that the Bill should not be passed with that blot in it, without the opportunity being given to remove that blot if the Council thought fit to do so. It seemed to him that his hon'ble friend, Mr. Inglis, who had consistently opposed the present Bill throughout, had entirely misconceived the effect of the amendment. His Honour understood his hon'ble friend to say that the effect of the amendment would be, that there would be no direction in the Bill with regard to tendering

oaths to Hindús and Muhammadans. On the contrary, his hon'ble friend would find that, if the amendment were accepted, the words of the section were most distinct. The section would then stand thus :—

“Where the witness, interpreter or juror is a Hindú or Muhammadan, or has an objection to making an oath, he shall, instead of making an oath, make an affirmation.”

HIS HONOUR did not propose to alter that. Oaths would not be tendered to Hindús or Muhammadans, but only an affirmation. The hon'ble member had entirely misconceived the scope of the amendment. HIS HONOUR's amendment referred solely to the case of persons who were *not* Hindús or Muhammadans.

With regard to the rest of his honourable friend's speech, HIS HONOUR might repeat that his hon'ble friend had throughout been a consistent opponent of the provisions at the end of the Bill. He now said that those provisions were hurriedly considered and accepted by the Council at the close of the session of the last year. But HIS HONOUR did entirely protest against the light which his hon'ble friend had put on the matter. So far from the Council having hurriedly accepted the Bill of last year, it was more fully considered, and the discussions occupied more time, than any other measure then before the Council. The Bill was more tossed about in Committee than any other measure. It had been for years before the Council, and last year it was some months before the Council. It was turned inside out. It was thrashed out most fully; and HIS HONOUR was sure that the decision they came to saved the Council from a very great dilemma. Therefore, he wholly objected to the hon'ble member representing the Bill of last year to be a Bill passed by the Council from want of leisure and opportunity to give it full consideration. He also objected to the hon'ble member springing a mine upon us in asserting that the majority of the Committee of the Council were now opposed to those provisions. HIS HONOUR had no evidence before him to enable him to controvert or deal with that assertion. But he must say that it was not supported by any evidence before the Council. None of the members of the Committee had now expressed that opinion. The hon'ble member in charge of this Bill had told us that he had no such opinion. The hon'ble member alluded to those who had signed the report but who were now absent from the Council. HIS HONOUR had referred to the names attached to the report, and found that there was only one member, Mr. Chapman, who was absent; and he was not aware that Mr. Chapman was opposed to those provisions. He might be opposed to them or he might not. But HIS HONOUR did object to the hon'ble member speaking of the majority of the Committee being opposed to the provisions introduced in the Bill last year, when they reported no such thing and said no such thing.

Then, turning to his own amendment now before the Council, and to the observations of the hon'ble member in charge of the Bill, His Honour should like to explain that it was not brought forward by him in any spirit of unbelief in the efficacy of oaths. The hon'ble member in charge of the Bill said that the more civilized people became, the more the belief in the efficacy of oaths decayed. His Honour was not so civilised as all that. So far from believing in the efficacy of oaths decaying, he believed that you would make them much more efficacious by making them more solemn. He believed that, in all parts of the world in which oaths were used, they were used with greater efficacy in proportion to the solemnity of the oath. If you made the taking of an oath a mere formality, to be gabbled over by the witness, you lost that solemn sanctity and that efficacy. The whole object of the amendment which he had been at some pains to lay before the Council last year, was, not to do away with the taking of oaths, but to render them more solemn, more binding, and more efficacious. He was of opinion that oaths should not be used as mere formalities to be gabbled over, but that when they were used in a solemn manner and on solemn occasions, they would be really efficacious. His objection to the provision which he now wished to remove from the Bill was that it was inconsistent with the rest of the provisions of the Bill. The great mass of the people, Hindús and Muhammadans, were not to be asked to take oaths, and he therefore thought it was totally unnecessary to ask the rare exceptions of particular classes to take this form of every-day oath, which was contrary to the custom of the Courts of the country. The honourable member in charge of the Bill said that, if this amendment were carried, Judges would be placed in a difficult and invidious position. But in saying that, the honourable member had omitted to notice the system under which the Courts were constituted in this country, namely, the important provision that the Courts were under the general supervision and control of the High Court. If the amendment was accepted, it would not be left wholly to the Courts to determine whether they should or should not tender an oath to the witness; but under the general power of supervision and direction which the High Courts exercised, they would prescribe certain rules for the guidance of the Courts. They would say that, in certain Courts and under certain circumstances, oaths should be administered; but in ordinary Courts and under ordinary circumstances, oaths should not be administered. When that was so, and when moreover it was in the power of a witness to say that he objected to take an oath, HIS HONOUR believed that it was improbable and impossible that the unseemly scenes which the honourable member referred to could occur.

The Honourable MR. HOWHOUSE explained that, if the words proposed to be omitted were struck out, there would be no direction as to the course to be followed with regard to persons not Hindus or Muhammadans, and also as to those who did not object to be sworn.

His Excellency THE PRESIDENT said—“I cannot think that the consideration of this question is at all prejudiced by its having been introduced so short a time before the Government leave Calcutta, because, as the Council will remember, the same question was brought forward by His Honour the Lieutenant-Governor in his speech on the introduction of the Bill, and the Council then considered it among other questions of principle relating to the Bill.

"The opinion of the Council then was that the Bill should be only a consolidation Bill, and that it would be inexpedient to re-open questions of principle, considering the short time that had elapsed since they had been discussed and decided.

"Amongst those questions, there was, on the one hand, that involved in the amendment which is now moved by the Lieutenant-Governor; and, on the other hand, the propriety of the clauses which, at His Honour's suggestion, had been inserted in the Act of last year, and to which the Honourable Mr. Inglis objects.

"The Government, therefore, are not prepared to agree to an amendment of the Bill in either direction."

His Honour THE LIEUTENANT-GOVERNOR explained that the question which was the subject of his amendment was not then before the Council.

His Excellency THE PRESIDENT said—"I believe I am accurate in saying that the general principles of the measure were settled in Council last year; that, although the Act then passed did not consolidate the law, it left the law in what the Council considered to be a satisfactory state."

The amendment was put and negatived.

The Honourable MR. HOBHOUSE then moved that the Bill as amended be passed.

The Motion was put and agreed to.

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WHITLEY STOKES,

*Secretary to the Government of India,
Legislative Department.*

CALCUTTA,
The 8th April 1873. }