

Friday, December 15, 1865

**COUNCIL OF THE GOVERNOR GENERAL
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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 under the
provisions of the Act of Parliament 24 and 25 Vic., cap. 67.*

The Council met at Government House on Friday, the 15th December 1865.

P R E S E N T :

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

His Honour the Lieutenant-Governor of Bengal.

His Excellency the Commander-in-Chief.

The Hon'ble H. Sumner Maine.

The Hon'ble G. Noble Taylor.

The Hon'ble Colonel H. M. Durand, c. s.

The Hon'ble J. N. Bullen.

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

The Hon'ble Rājā Sāhib Dyāl Bahādur.

The Hon'ble W. Muir.

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

The Hon'ble D. Cowie.

The Hon'ble Stewart St. John Gordon.

PARTNERSHIP LAW AMENDMENT BILL.

The Hon'ble MR. MAINE introduced the Bill to amend the Law of Partnership in India, and moved that it be referred to a Select Committee, with instructions to report in six weeks. He said "When the Council gave me leave to introduce this Bill, I stated the grounds on which it appeared to me defensible in principle, and as the question is almost wholly one of principle, I have little to add now that I introduce the measure. I have, however, one observation to make. In the discussions which I have read or heard on the Bill, I perceive that it has become common to call the relation established between the borrower and the lender who is remunerated according to the rate of profit a Commanditarian Partnership. And there is some convenience in so styling it, because we have not at present any compendious phrase expressing the relation. There are, however, some disadvantages attending such a description. In the first place, it tends to give a false idea of the Bill. This is not a Bill for legalizing Commanditarian Partnership. Commanditarian Partnership is a purely French institution, founded on a system

of rules, which perhaps may be better than the old law of England, but which appear to me from their minuteness to be very difficult to work out among Englishmen. It is founded, moreover, on distinctions between classes of associations and between forms of liability, which are unknown to English law and English commercial usage. In the next place, the phrase seems to carry with it an admission that there is some natural or necessary connection between a partnership and a loan of the sort contemplated by the measure. Now the whole argument for the Bill proceeds on a denial of that proposition. We say that there is no natural or necessary connection between a partnership and a loan dependent for its rate of interest upon the profits of the business. We say that such a loan never ought to have constituted the lender a partner; and we say, moreover, that it never would have done so but for the legal fiction which Lord Mansfield was accidentally led to invent for a temporary purpose. I cannot help thinking that all the proposals one hears for limiting the operation of this measure spring from a lingering notion, that there is something in a loan remunerated out of profits which naturally makes the lender a partner. I should greatly prefer the terms "Commanditarian Lender" and "Commanditarian Loan", to "Commanditarian Partner" and "Commanditarian Partnership."

As to matters of detail, the Bill departs in two points only from the English measure. The first is not important. The explanation added to Section 1 is not placed there because the proposition contained in it is not a legitimate inference from the proposition contained in the Section itself, nor because a Court of justice would not be sure to draw that inference, but because the case is one which happens to be particularly interesting to the Indian mercantile community, and because it is important that our legislation should be readily intelligible, not only by lawyers but by laymen who are concerned with it. The meaning is that a person retiring from a partnership and severing his connection with his house of business is not to be construed to continue a partner because he leaves his capital in it, or, in other words, because, instead of taking his money out and then putting it back again, he is contented with a mere adjustment of accounts and with having his share of capital credited to him in the books of his old firm as a commanditarian loan. The second departure is more serious. I have omitted the Section of the English Act which in effect provides that in case of insolvency the commanditarian lender is to get nothing until all the other creditors have been paid sixteen annas in the rupee. Now this is a matter on which I have a strong opinion, though of course I am ready to waive it in deference to any arguments which may be urged to-day or in Committee, or by the Associations to which this Bill will be referred. I was in England when the Bill was discussed in Parliament, and I must confess a decided impression that the Member of Government in charge of the

Bill, Sir Roundell Palmer, the present Attorney General, when he was called upon to defend the Section was a little ashamed of it. The fact is, it was a concession to the adversaries of the measure; and, so far as that was its office, it may have been successful; for of course if you provide that when a crash comes the commanditarian lender is virtually to get nothing, there will be fewer commanditarian loans. Sir, in my Statement of Objects and Reasons, I said in general language that the Section was at variance with the spirit of the Bill; but the practical objection to it is this—and I beg the particular attention of my Hon'ble friends at the other end of the table to it, because until it is removed I do not see how the Section can be defended—you cannot prevent the commanditarian lender from having materials for conjecturing the state of the business in which his money is embarked. It is not a question of stipulating for a power of looking into the books or having accounts rendered. From the nature of the case his receipts and his income will vary with the profits, and he will therefore have some knowledge whether the business is being profitably conducted. Now, under ordinary circumstances there is no reason to suppose that he will be frightened by a few bad years; but see how this Section will work. You tell him that if insolvency does follow, he alone among the creditors is to get nothing from the wreck. Well then, you increase the anxiety which he will feel through the temporary depression: in other words, the distinct tendency of the Section is to create in him a temptation to withdraw his loan sooner than he otherwise would; and thus a passing difficulty may be converted into absolute ruin. It is very possible that the Section may have been benevolently intended to operate in the interest of creditors; but I say that, taking creditors as a whole class, it is distinctly to their detriment, inasmuch as it tends to make them creditors of insolvent rather than of solvent firms.

The Hon'ble MR. COWIE said, that of the general principle of this important measure he cordially approved. He believed that its practical working would benefit both the general public and the individual trader, and that, if it had become law twenty years ago, the extension of commerce would have been even more rapid and satisfactory than it already had been. He formed this opinion on the merits of the Bill irrespective of any consideration as to whether it followed the French law of Partnership or not, a point which he thought immaterial.

The omission of Section 5 of the English Statute was an important feature, which would no doubt give rise to discussion in Committee. He believed that an argument generally advanced for retaining this clause would be, that a commanditarian lender would naturally stipulate for access to the books and accounts of the firm, and, on seeing it drifting into insolvency, would secure his

own funds to the detriment of other creditors. He must acknowledge that the Hon'ble Member, Mr. Maine, had just now very ingeniously turned this identical argument against those who would use it.

The details of the Bill would no doubt be fully discussed in Committee, to which he understood both Mr. Bullen and himself would be nominated.

The Hon'ble MR. BULLEN said that, whilst agreeing with what had fallen from his Hon'ble friend opposite (Mr. Cowie), there was another argument against the omission of a Section corresponding with the 5th Section of the English Statute, with which the Hon'ble mover of the Bill had himself supplied them, when asking leave at the last meeting to introduce the Bill to adapt to this country the English Companies' Act of 1862. The Hon'ble gentleman had then argued that, when a principle had been adopted by the more active and numerous commercial society of England, it might fairly be tried in the commercial society of this country, provided that no argument could be used against it, which might not have been urged in England and had not prevailed. Now, objections were taken to this Section when the measure was discussed in the House of Commons, but though there was a large majority of the Committee in favour of the general principle of the Bill, the mover of an amendment that this Section should be omitted did not venture to press it to a division. He (MR. BULLEN) thought the question of omitting this Section required great consideration, and he reserved to himself the right of moving at a future stage that it be inserted in the Bill.

The Hon'ble the MAHARAJA OF VIZIANAGRAM said, that he concurred with the Hon'ble gentleman who had introduced the Bill, in all that he had said in its support.

To him it appeared that the provisions contemplated by it were admirably adapted to this country, as being in harmony with the system carried out by the Natives of India, among whom mercantile transactions to a great extent were entered into with the direct management of which they were not concerned.

In the absence of any positive law defining the extent to which those who embarked in such transactions might be liable, by the failure or ill success of a mercantile firm, or any other Joint Stock Association, consequent on want of skill or lack of honesty on the part of those to whose immediate care and conduct it had been entrusted, Native Capitalists, however desirous of investing their money so as to secure the largest returns, would not feel confident and

come forward to support and engage in undertakings which might be very profitable and advantageous, but with the working of which they were not very familiar.

The Hon'ble Mr. Maine's Bill would effect all that might be desirable on this point.

The Hon'ble RAJÁ SAHIB DYÁL BAHADUR said that, under the first Section of the Bill, a lender advancing money upon a contract that he was to receive a rate of interest varying with the profits, or a share of the profits arising from the trade or undertaking in support of which he had made the advance, was not thereby made a partner in the business, and was absolved from responsibility as such. To this principle he could not give his adhesion, as he considered that an advance made upon such terms constituted the lender a *de facto* partner and entailed on him all the responsibilities of that position.

The position, however, of a lender who made an advance upon a contract that he was to receive a certain fixed rate of yearly interest to be increased to a superior fixed rate as the business improved was different; and he, the Rájá thought, did not thereby either become a partner or render himself liable as such.

With reference to Section 2 of the Bill, he observed that, in India, agents were generally paid by a share of two, four, six or eight annas of the profits, in lieu of any other remuneration, and only received interest at the rate of six per cent. per annum for any funds they might advance in support of the business; they were, however, when so paid, held responsible in case of reverses, and should they be now exempted from such responsibility, mercantile interests would be injuriously affected.

He thought, however, such agents might be exempted from responsibility, if at the time of their appointment they gave due notice of such exemption in all places and countries where they proposed carrying on business or establishing branches of such business, and also to every owner of any portion of the capital of such business.

His Excellency the COMMANDER-IN-CHIEF said, that he was not aware that the principle of the Bill was likely to be opposed, but it appeared from what had dropped from the last speaker that such opposition was really to take effect from a quarter least expected. It was the more necessary, therefore, to take notice of this, as although the principle was not contested openly by the two Hon'ble gentlemen, it did appear that they were probably enemies in disguise, inasmuch as it seemed they were not prepared to carry that principle to its

legitimate logical conclusion. The Hon'ble Rájá Sáhib Dyál was not aware that the Bill was especially designed to further the interests of that large Native population which he more especially represented, that is to say, that the object of the measure before the Council was more particularly directed for the assistance of the great number of small capitalists as distinguished from the large ones. He would quote the golden words of the great authority who had first made *commandite* partnership, as understood in France, popularly known in England—Mr. John Stuart Mill, the Hon'ble Member for Westminster:—

“It is, above all, with reference to the improvement and elevation of the working classes that complete freedom in the conditions of partnership is indispensable. It is only by combining, that the small means of many can be on anything like an equality of advantage with the great fortunes of a few. The liberty of association is not important solely for its examples of success, but fully as much so for the sake of attempts which would not succeed, but by their failure would give instruction more impressive than can be afforded by anything short of actual experience. Every theory of social improvement, the worth of which is capable of being brought to an experimental test, should be permitted, and even encouraged, to submit itself to that test. From such experiments the aspiring among the working classes would derive lessons which they would be slow to learn from the teaching of persons supposed to have interests and prejudices adverse to their good; and would discover, at no cost to society, the limits of the practical worth of their ideas of social regeneration, as applicable to the present stage of human advancement.”

This counsel was especially applicable to India and its people, which of all peoples in the world was one that relied on tradition and the habits of its forefathers, instead of appealing to the progress and science of the day to advance its own welfare. If, therefore, the Hon'ble Mover should be the means of awaking them in a very important respect, and inducing them to withdraw their hoards from a state of useless idleness, and applying them to the great purposes of trade, he would deserve well indeed of India. His Excellency had had opportunities, lately, of watching the conduct of the population under all the excitement of trade in a strange crisis. The people of Bombay in their eagerness behaved very much as an European population would have done; but in the Mofussil, on the contrary, we beheld a different scene—people standing still, as it were, and not knowing how to act. Those who lived in the great Presidency Towns were apt to forget the difference of the population before their eyes, from that which lived in the Mofussil and depended altogether on traditional custom. He would therefore strenuously urge the importance of a measure which, besides its own particular object, would help to develop the Native intellect for the application of the hoards of the small capitalists to the purposes of trade.

His Excellency would now advert to the arguments of the Hon'ble Messrs. Bullen and Cowie. He would ask why, if we were convinced of the

soundness of a principle, we should halt half way in its application; why should we convert a wholesome measure into one which would create a bastard partnership, for the real essence of this measure would cease to come into play if the commanditarius lender was to be frightened from the liability which it was proposed that he should incur? His Excellency was glad that Mr. Maine had drawn the distinction between the phrases commanditarius *partner* and commanditarius *lender*. There was no doubt that an erroneous impression regarding liability was conveyed by the former expression. In introducing a measure embodying a principle hitherto new and strange, it was especially desirable to be careful in the choice of terms. He therefore hoped that the expression "Commanditarius partner" would be set aside, and that of "Commanditarius lender" invariably substituted.

His Excellency took the object of the Bill to be this—to have co-operation of all classes for commercial purposes, without saddling them with the liability of partnership. It was therefore necessary not to allow the logic of the measure to be interfered with by a feeling which was the remnant of prejudice, following on the fifty years' opposition in England to the introduction of the limited liability principle.

The Hon'ble Mr. MUIR said that, before giving his vote in favour of the motion, he wished to say a few words lest his silence should be construed into an entire approval of the Bill as it stood. He merely desired to hold himself free as to the course he should adopt at any future stage of the Bill, in reference to the question of commanditarius lenders being placed on the same footing as ordinary lenders, by the omission of the 5th Section of the English Statute. He confessed that, so far as the argument had yet gone, the balance appeared to him in favour of those who desired to retain that Section. It seemed to him that there was great weight in what had fallen from his Hon'ble friend Mr. Bullen, that by the admission of the Hon'ble mover himself, the Commercial Law of India should, *prima facie*, be in entire accord with the Commercial Law of England. And on the merits of the question, it did not, at first sight, appear unreasonable to hold that those lenders who participated by rateable shares in the profits, had by the very fact of such participation a greater concern in the business, and consequently might be naturally and justly involved in a greater responsibility and risk, than the ordinary lender. In this view of the case, the ordinary lender might have just cause of complaint if, in the event of failure, the commanditarius lender were placed on precisely the same footing as himself in respect of the liquidation of his claim from the assets.

In saying so much he (Mr. MUIR) wished simply to indicate his first impressions on the subject, and to leave himself at liberty to vote for the addition

of the English Section 5, if after the further discussion of the point it should appear to him advisable.

The Hon'ble MR. MAINE—'Sir, the observations of His Excellency the Commander-in-Chief, to which I am sure the Council must have listened with much interest, relieve me from the necessity of troubling it with any lengthened reply. But I think I ought not to pass over the objections hinted at, rather than stated, by the Hon'ble Mr. Cowie and the Hon'ble Mr. Bullen. As regards the remarks which fell from the two Native Members, it will be observed that the statements of the Hon'ble Rájá Sáhib Dyál as to Native custom are neutralized by the contradictory statements of the Hon'ble Mahárájá of Vizianagram. One affirms that the Natives do, and the other that they do not, practise among themselves a system of commanditarian loan. Under these circumstances it is proper that I should mention the authority upon which I committed myself, a fortnight ago, to the position that the Bill is in harmony with Native usage. I have heard indirectly from the first Judge of the Calcutta Small Cause Court, Mr. Boulnois, who necessarily comes much into close contact with Native litigants and witnesses, that when a person, who has lent money on commanditarian loan to a trader in the Mofussil, is brought into Court, nothing can exceed his astonishment and dismay at finding himself involved, through the English law which prevails here, in the unlimited liabilities of partnership. The balance of testimony appears therefore to me to be in favour of the view taken by the Hon'ble Mahárájá by my side. The Hon'ble Mr. Bullen answers me out of my own mouth by the argument that in commercial matters Indian law ought to follow English law, unless there is a special Indian reason to the contrary. But I do think there is a special Indian reason here. I do not believe that there are any great capitalists here, who are so well contented with their own position that they decline to consent to any alteration of the *status quo*; and who, at the same time, command so strong a following in Parliament that it is worth while conciliating them by a truncated Bill. A graver objection is that which the Hon'ble Mr. Cowie has described. I gather from him that some persons object to the omission of the English Section on the ground that the commanditarian lender has an advantage over other creditors in his knowledge of the state of the business, and that he may use that advantage to get himself paid in full by withdrawing his loan; and they think that he ought to be placed under a compensating disadvantage when insolvency occurs. The true question, however, is, not whether the commanditarian lender is in a better position than other creditors, but whether he is in a better position than other lenders. Now I deny that he is practically in a better position than other lenders, even if he uses his advantage to the utmost. Sir, it is a very rare thing under the present law for a house of business to become a borrower for the sake of

increasing its capital. I might appeal to the experience of my two Hon'ble friends. I ask them whether they ever heard of such a case. When, then, does a firm ordinarily become a borrower? Scarcely ever except when it is in embarrassment and difficulty, which of course may be temporary, but which still exists. It goes to a Bank or Financial Association and requests accommodation and assistance, which is given on terms extremely advantageous to the lender. Is, then, the Bank which lends, under such circumstances, in any different position from a commanditarius lender as regards knowledge of the borrower's situation? Why, the very fact of asking for accommodation is notice of embarrassment. So that in that respect the commanditarius lender has no advantage over the lender under the present law. Moreover, he has no advantage in respect of his power of getting himself paid in full. For a Bank does not grant accommodation without requiring security; Government Paper or something equally valuable is deposited, and these securities the lender is entitled to hold against the other creditors. Every body knows that, in cases of insolvency, it is the secured creditors who exhaust the assets to the prejudice of the unsecured, and these secured creditors, in the great majority of instances, are lenders who have advanced money under the existing law. It follows that the commanditarius lender has no advantage over other lenders through any supposed privilege of recovering the whole of his loan. In point of fact he will ordinarily enjoy less advantage. For I suppose that, when a commanditarius loan is taken, the borrower will ordinarily stipulate that it shall not be withdrawn without reasonable notice, say a year or eighteen months. Such a stipulation will tend to prevent the commanditarius lender from escaping the insolvency, and instead of getting paid in full he will only share with the other creditors. I can see, therefore, no shadow of reason for placing him under greater disadvantages than other lenders, by providing that under no circumstances, if his money is left in the firm when the insolvency occurs, is he to recover anything out of the assets. At the same time, to be perfectly candid, I do not pretend to deny that, through the general operation of this Bill, or, again, through the omission of this Section, the general creditors may, in individual cases of insolvency, get less than they would have got under the old law. But the Bill, particularly if this Section be omitted, promises to multiply commanditarius loans, and thus to add to the general stability and solidity of all houses of business. Even now, happily, creditors as an entire class are vastly oftener creditors of solvent than of insolvent firms, and this Bill tends to raise the whole level of solvency. Sir, it is too much the habit of legislatures—and particularly when they are under the guidance of lawyers—to sacrifice great ends to small ones; and I think we should be falling into that error if we directed our legislation less to solvency, which is the rule, than to insolvency, which is the rare exception, and if we sacrificed the great aug-

mentation of stability and solidity which this measure will bring about to minute provisions for saving a little more in particular cases for the creditors of an occasionally insolvent firm. There is a story of an old ship-Captain who said it was a shame to build iron ships, because, if they went to pieces, there would be so much less timber to cling to. The answer is, that iron ships are more easily and safely navigated than wooden ones, and therefore there would be fewer wrecks. Just so, if this Bill becomes law, the creditors of an insolvent may, here and there, get a little less than they do at present, but there will be fewer insolvencies. I believe that the measure is as distinctly in favour of creditors as a class as it is in favour of debtors."

The Hon'ble the LIEUTENANT-GOVERNOR said, that although the Hon'ble Mover had replied, he hoped he might be permitted to say one or two words in support of the Bill. His HONOUR had heard a special Indian reason given for it—namely, the relief which it would afford to Mahomedan traders. It was very well known to the Council that Mahomedans were prohibited by their law from taking interest for a loan, but that they were not prohibited from sharing in the borrower's profits. The difference between interest and profits was well known to Mahomedan traders, but in default of a law like the present Bill, they were obliged to resort to all sorts of expedients. The present Bill would exactly meet the case. Every Mahomedan with a small capital who wished to invest his capital, would, if the Bill became law, be enabled to lend with perfect security and without doing violence to his conscience. In that respect he (the LIEUTENANT-GOVERNOR) had no doubt—indeed he had been positively assured—that the measure would prove particularly acceptable to the Mahomedan community.

The Motion was put and agreed to.

PLEADERS, MOOKHTARS AND REVENUE AGENTS' ACT AMENDMENT BILL.

The Hon'ble MR. MAINE moved for leave to introduce a Bill to amend the Pleadars, Mookhtars and Revenue Agents' Act, 1865. He said the object of this Bill was to defer in one or two respects the operation of the Pleadars, Mookhtars and Revenue Agents' Act, one of the valuable measures for which we were indebted to Mr. Harington. The Act required the High Court to make rules for the qualification, examination and removal of Pleadars and Mookhtars, provided for their enrolment and for the issue to them of stamped certificates, and declared that uncertificated persons, other than Advocates and Attorneys of a High Court, practising as Pleadars or Mookhtars, were to be liable to fine and imprisonment, and to be incapable of recovering fees. The provisions as to persons practising in the Revenue Courts corresponded

with those applicable to Pleaders in Courts of Law. The Act would come into operation in Bengal in a fortnight. But the High Court had not yet framed the necessary rules, nor had any steps been taken by the practitioners in the Mofussil to become enrolled and procure stamped certificates, matters which obviously required some time to effect. Under these circumstances, unless the operation of the Act were to some extent postponed, legal business in the Mofussil would come to a stand-still. The present Bill declared that all persons qualified as Pleaders, Mookhtars or Revenue Agents on the 1st January 1866, the day on which Act No. XX of 1865 would come into operation, might continue to practise for six months from that date as if the Act had not been passed. The Bill also provided that sums payable by any person in respect of the fees of his adversary's Pleader should be payable during the six months as if the Act had not been passed. In other respects the Act was left to operate on the 1st January 1866. He proposed, if the Council would allow the Bill to be introduced, to ask them to pass it summarily at their next meeting.

The Motion was put and agreed to.

The following Select Committee was named :—

On the Bill to amend the Law of Partnership in India—His Excellency the Commander-in-Chief, the Hon'ble Mr. Grey, the Right Hon'ble Mr. Massey, the Hon'ble Mr. Bullen, the Hon'ble Rájá Sáhib Dyál Bahádúr, the Hon'ble Mr. Cowie and the Mover.

The Council adjourned till the 22nd December.

WHITLEY STOKES,
Asst. Secy. to the Govt. of India,
Home Dept. (Legislative).

CALCUTTA, }
The 15th December 1865.