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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.

1876.

WITH INDEX.

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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 & 25 Vic., cap. 67.

The Council met at Government House on Wednesday, the 22nd November 1876.

PRESENT:

Major-General the Hon'ble Sir H. W. Norman, K. C. B., Senior Member of the Council of the Governor General of India, *presiding*.
His Honour the Lieutenant Governor of Bengal, K. C. S. I.
The Hon'ble Arthur Hobhouse, Q. C.
The Hon'ble E. C. Bayley, C. S. I.
The Hon'ble Sir A. J. Arbuthnot, K. C. S. I.
The Hon'ble R. A. Dalyell.
The Hon'ble T. C. Hope.
The Hon'ble D. Cowie.
The Hon'ble Rájá Narendra Krishna Bahádur.
The Hon'ble F. R. Cockerell.

SPECIFIC RELIEF BILL.

The Hon'ble MR. HOBHOUSE presented the report of the Select Committee on the Bill to define and amend the law relating to certain kinds of Specific Relief.

He said it was a Bill that did not deal with any very large principles, neither had the Committee made very numerous alterations in it, and perhaps no alteration would be generally considered as of great importance. At the same time it was a much more important Bill in the eyes of lawyers than in those of laymen; and as the publication of the Bill and the remarks made on its introduction had elicited some extremely valuable professional criticism, it would probably be expedient that he should now briefly state how the Committee had dealt with some of the main points in it.

He had explained to the Council, when he introduced the Bill, that the measure was intended to occupy a middle ground between the Contract Act on the one hand, and the Civil Procedure Code on the other, touching both but not encroaching upon either. The Contract Act laid down rules for regulating the

validity and nature of contracts; the Civil Procedure Code laid down rules which informed people how they were to get the remedies they were entitled to. The intention of this measure was to indicate the nature of the remedies, whether they should be by way of specific relief or by way of compensatory relief. Then it was pointed out to the Committee that they had not closely adhered to the language of the Contract Act, and inasmuch as the two Acts were intended to work into one another, that the use of different language was likely to lead to difficulty; and also that in two places the Bill encroached somewhat on the provisions of the Contract Act.

The first of these objections was met by altering the language of the Bill, and the Committee had adopted throughout, for the same subjects, similar language to that of the Contract Act, and they had provided, in section 3 of the new draft which he now laid before the Council, and which was labelled Bill No. II, that "all words occurring in this Act which are defined in the Indian Contract Act, 1872, shall be deemed to have the meanings respectively assigned to them by that Act." Therefore, he hoped there would be no conflict, when this Bill passed into law, between the two Acts, except as regarded two points in which the Committee had intentionally displaced provisions of the Contract Act.

One of these points was a matter of considerable legal importance. It related to the question whether there should be a general right to specific performance of contracts by which disputes were referred to arbitration. Some of the gentlemen who had been kind enough to favour the Committee with comments had stated that they saw no reason why there should not be specific performance of such contracts. There were, however, objections of considerable practical force. The two most ordinary forms of agreements to refer disputes to arbitration were, first, one which provided that the arbitrators should be appointed by the parties themselves, and, secondly, one which specified a particular individual as arbitrator. But how was the Court to make any effective decree if, in the first case, the parties would not name an arbitrator, or if, in either case, the arbitrator died or became incapable or refused to act? In order to make the decree effective, you must go a great deal further, and give the Courts powers which no Court of law now possessed. You must give them power to appoint arbitrators themselves, or themselves to sit as arbitrators. But that was not the specific performance of an agreement; it was making an entirely new agreement, which the parties had not entered into and never thought of entering into.

Now there were provisions in the Civil Procedure Code for the purpose of carrying into effect all those agreements for reference to arbitration

which really could be performed *in specie*. Those were cases in which the parties had named arbitrators who were able and willing to act, or cases in which the parties agreed to refer to any person who should be named by the Court. For the due performance of these contracts there was quite sufficient provision in the Civil Procedure Code. But if he (MR. HOBHOUSE) agreed to refer a claim to an arbitrator, say Mr. *A. B.*, it was because he had confidence in the skill, integrity, or force of character of Mr. *A. B.*; or if he agreed to refer to an arbitrator to be named by himself, it might be, and usually was, the case that he had somebody in his eye in whom he had confidence. Now, not to go into more refined considerations, but to take the simplest cases that could happen; suppose that an arbitrator named or in contemplation for some reason could not act, or died, or refused to act. It would be an exceedingly strong thing to say that his (MR. HOBHOUSE'S) agreement was to be converted into a totally new agreement, and that his affairs should be referred to another person in whom he had no confidence at all. Broad considerations of that kind had led the Court of Chancery to lay down a general rule that an agreement to refer to arbitration was not susceptible of specific performance.

When the Bill was drawn, it had escaped his notice that there was a provision in one of the sections of the Contract Act in which the Act went rather beyond its proper scope, and designated the species of remedy which was to be adopted for contracts of this class. In section 28 of the Contract Act, an exception was introduced to the general rule, which makes void such agreements as restrict the action of the ordinary tribunals. The exception was—

"This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred."

And then, within that exception there was a further provision which said that, when such a contract was made, a suit might be brought for specific performance:—

"And if a suit other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party, in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit."

Now that provision admitted of two constructions. According to one construction, in the case of every agreement which was referred to arbitration,

specific performance was the sole remedy either party could have; according to the other construction, it was the sole remedy in cases only of a certain class of such agreements.

The matter had been brought prominently to the notice of the Committee, owing to a recent decision of the High Court at Calcutta, in which the matter was very much discussed, first before Mr. Justice Phear, and afterwards before a Bench of Appeal. The High Court adopted the narrower of these two constructions, and they also affirmed the rule which MR. HOBHOUSE had mentioned as being the rule of the English Court of Chancery; and they expressed the extreme difficulty they felt in understanding whether, and how far, the Indian Contract Act intended to displace that rule. The matter had to be made clear one way or the other, and the Committee had thought the proper principle was that which was affirmed by the High Court, and which was the English principle, namely, that there should be no decree for the specific performance of an agreement to refer to arbitration. In those agreements which the Court could carry into effect, the parties had plenty of remedy under the Civil Procedure Code. In other cases, there would be no failure of justice. The original ground of dispute remained; the Courts were open; let them implead one another.

The Committee therefore proposed to repeal that one sentence of the Contract Act which dealt with this subject. In section 21 of their Bill No. II, they had provided that, except so far as the Code of Civil Procedure provided, no contract of this kind should be specifically enforced. And then they borrowed from the Contract Act a part of the repealed sentence, and declared that—

"if any person who has entered into such a contract and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit."

That was a kind of moral pressure to prevent people who had entered into contracts to refer to arbitration from breaking them wilfully and capriciously. But it left the other and innocent party entirely free to seek the remedy from which he had been apparently shut out by the provisions of the Contract Act.

The other point upon which they had come into conflict with the Contract Act was with respect to a contract to do some act which, in the meantime between the completion of the contract and its performance, had become impossible. The rule laid down in section 56 of the Contract Act was this:—

"A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

The greater part of that rule was obviously quite right. But if it meant that the whole of the contract should become void as against both parties, because some portion of the contract became impossible of performance—if it meant that, and he was not sure that it did—it effected an alteration of the law, and one which was not desirable. There must be some point of time at which the rights of parties in the process of exchanging one property against another became fixed, and in which each party took all risks affecting the property which he had to receive. Well, no time seemed so definite or proper as the time at which the contract was formally concluded. That was the English rule. When a contract was formally concluded each party was considered as the owner of the property he had to receive. They therefore restored that rule—he said restored, if it was intended to be displaced by the Contract Act, as to which he was not quite sure,—and they had provided that, notwithstanding anything which was contained in the Contract Act, the mere circumstance that some portion of the contract which was to be performed had become unperformable should not render the contract wholly impossible of performance. So that if he contracted to buy a piece of land, and that contract was concluded, but there was some delay in its performance, and during such delay the land was swept away into the sea by a flood, he must still perform his part of the contract, because the rights were fixed the moment the contract was concluded.

The next point he would mention was, that the Committee had struck out of the Bill a portion of that which was section 4 of the Bill as introduced. That was a provision that the rules of English law should not be applicable to the kinds of relief here provided for. Now when he introduced the Bill, he had explained at some length to the Council how very much the English law had been influenced by the circumstance of the double jurisdiction of law and equity as it existed there, and again by the provisions of the Statute of Frauds, in which respects Indian law materially differed from English law. The Committee had thought that, as there was so much difference between the two laws, it might be prudent to exclude the Courts from the consideration of English law. But they had been advised by two or three gentlemen whose opinions were entitled to great weight, that by doing so they would only embarrass the Judges. They said, it was quite certain that the English decisions must be and would be referred to for the purpose of illustrating some of the principles which were necessarily stated in very general terms in an Act like this; and if it was only for the purpose of finding out what was the law of justice, equity and good conscience, or such other general principle as the Court thought should govern the case, it was quite certain that the Judges

would have recourse to English decisions to guide them. Therefore it would be better, it was said, not to affect to do that which could not practically be done, but to be silent about the operation of English law. The Committee had felt the force of this argument and had struck the provision in question out of the Bill.

Another thing they had struck out was that matter which formed sub-section (*a*) of section 12 of the Bill as introduced. It was there provided that there might be specific performance of any contract in which it was specially agreed that either party might require it to be specifically performed. He mentioned at the time that this was, so far as his experience went, a perfectly novel provision, and that it had been borrowed from the New York Civil Code, and he also intimated that he thought it a rather speculative provision. They had now been advised by professional gentlemen of experience that it was not likely to work well. It was said that this particular stipulation would constantly be put into very inequitable bargains, and that though the Bill did not propose to compel the Court in such cases to give a decree for specific performance, such a decree being in all cases discretionary, yet that the existence of a provision of this kind would practically be treated by a great number of Judges as compulsory upon them. On the whole, the Committee thought it more prudent to strike out the provision.

The only other matter to which he would call the attention of the Council was that which was contained in section 42 of the Bill No. II, corresponding with section 40 of the Bill as introduced. It related to the subject of declaratory decrees. In the Bill as introduced, it was provided that there should be no declaratory decree in cases where the right of the plaintiff was a present existing right. In so doing, they had followed the English decisions without very much examining the grounds upon which they rested. They had received from the Standing Counsel a paper of very great value of which they had freely availed themselves in altering the Bill. Upon this point, he challenged them to show reason why they should so frame the law, and MR. HOBHOUSE confessed that he could not answer the challenge. He would read to the Council what Mr. Pitt Kennedy said:—

> "It is generally of grave importance for every man to know precisely his pecuniary position, and serious difficulties might often be avoided if this could be accomplished. I confess myself unable to discover why, when others advance a claim to property which one believes to be his, whether in possession or not, he should not have the power of settling the point at the earliest period instead of being obliged to wait till his evidence may be lost, and to keep his arrangements for his family uncertain. The old rule was based, so far as I can discover, on the (possibly not unnatural) dislike of Judges to be troubled with the decision of a point

of difficulty if they could in any way avoid it. One singular illustration of the length to which this was carried is to be found in *Bull* v. *Pritchard*, in which the same will was construed as respects the personalty by Lord Giffard in 1826 (1 Russ. 213), and as regards free-holds by Sir J. Wigram twenty years afterwards, 5 Hare 567, with a precisely similar result."

Then Mr. Pitt Kennedy referred to one of the illustrations in the Bill, which supposed *A* to be in possession of land and *B* to be threatening him with litigation, and which proceeded on the theory that *A* would have no right to declaratory relief. And he continued thus:

"Illustration (*e*) does clearly illustrate the section, but why should *A* not have the power to quiet his title? The claim is a serious invasion of his rights, and would no doubt lower the selling value of his property; why should he not have the power of putting *B* to the alternative of renouncing or proving his claim, at the cost of *B*, if *B* had advanced it rashly or maliciously? Doubtless, this section does follow the decisions on the English Act and the Procedure Code, but this Bill is to amend as well as to define; and so far as I can discover, such powers would be no novelties in law; the Scotch action of declarator is, I believe, precisely pointed at such cases. In my own experience, I have known of great difficulties being imposed on a family by the existence of a supposed defect of title in a portion of the family property, which much complicated the testamentary arrangements of the father, and which could easily have been set at rest if effective powers analogous to the Scotch declarator had existed, though the doubt was quite insoluble for the time under English procedure."

MR. HOBHOUSE could not answer Mr. Pitt Kennedy's argument, and he could add something to it from his own experience. When he was practising at the Chancery Bar, it not unfrequently happened that people desired to have some question settled for the purpose of family arrangements, and that there was extreme difficulty, sometimes insuperable, sometimes superable only by the exercise of great professional craft, in finding out how to get up an actual conflict of present rights, so as to compel the Court to decide the question at issue.

The Committee had therefore made an alteration in the Bill, bringing it more in accord with Scotch law than with English. In order to avoid multiplicity of actions and to prevent a man getting a declaration of right in one suit and immediately afterwards a remedy in another, they had provided that, if he was able to seek more substantial relief beyond a declaration, he should do so; but that the mere circumstance of his right being a present right should not prevent him from obtaining relief by way of declaration.

There were other alterations, all of which were mentioned in the Report of the Committee. They thought it right that the Bill should be re-published, so that any one might see for himself precisely how the Bill had been amended.

PRESIDENCY MAGISTRATES' BILL.

The Hon'ble MR. HOPE asked leave to postpone the presentation of the final Report of the Select Committee on the Bill to regulate the procedure and increase the jurisdiction of the Courts of Magistrates in the Presidency Towns.

Leave was granted.

OPIUM BILL.

The Hon'ble MR. HOPE presented the final Report of the Select Committee on the Bill to amend the law relating to Opium.

TREASURE-TROVE BILL.

The Hon'ble MR. BAYLEY moved for leave to introduce a Bill to amend the law relating to treasure-trove. He did not propose to detain the Council with any very full statement of the law which this Bill was designed to amend. He would, for the present, confine his remarks merely to explaining the necessity for some amendment of the law, and this he would do by stating, briefly, that in the first place the law as it now stood was in many parts of India very uncertain, and, secondly, that even where it was certain, it was quite ineffectual at least for any useful purpose. There were in existence two old Regulations, (V of 1817 and XI of 1832) one affecting the Bengal Presidency, and the other affecting the Madras Presidency. With regard to the Non-Regulation Provinces on the Bengal side, it was probable, though by no means certain, that the Bengal Regulation applied to them. In the course of discussion upon certain recent projects to define the substantive law in some of the Non-Regulation Provinces, this point was indicated as one which required determination in some way or other, and accordingly provision was made by legislating in the affirmative as respects several of those provinces. But, in the meantime, a correspondence was sent up by the Government of Bombay, which showed that there was no distinct enactment affecting that Presidency, and that it was extremely doubtful what law on the subject was there in force. Under these circumstances, he thought the Council would admit that, on the ground of the uncertainty of the law, there was at least a necessity for some legislative action in regard to the Presidency of Bombay, and possibly still as to one or two of the Non-Regulation districts of Bengal. But he would propose to go somewhat further, and to point out that the law, even where it was certain, was nevertheless ineffectual.

The object of the law, as it now stood in Madras and Bengal, was to define the rights in treasure-trove, and to protect what were supposed to be the rights of the State. He might say, roughly, that the purport of the law in this respect

was to assert the general right of the State, but to waive that right upon certain conditions in favour of the finder, where the property did not exceed the value of a lákh of rupees. As a matter of fact, he believed—he might perhaps say he was certain—that during his official experience in India, which now extended to above a third of a century, no single case had occurred of treasure-trove exceeding one lákh of rupees in value having ever been found—certainly no well-authenticated and ascertained case. And therefore the law had never brought one single rupee's worth of revenue to the Government Treasury.

But there nevertheless remained a kind of fear widely diffused that Government might claim any treasure-trove. Moreover claims were often made by another class of claimants whose not unreasonable rights the present law wholly ignored, but which the Bill would define and protect. The natural result of all this was that, dreading any adverse interference, the finder, as a rule, endeavoured to conceal the fact that he had found anything, and so, in many cases, articles of extreme value, both in an artistic and historic point of view, had been lost or defaced.

He thought, therefore, he might say that the law as it now stood was both ineffectual and mischievous. From what he had said, it might be gathered that it was his opinion that this defect in the law proceeded from an inherent error in the policy on which it was founded. When he said that this was his opinion, he meant that it was the opinion which was now accepted by the Government of India, and had also been accepted by the Secretary of State, to whom, for certain reasons, it was necessary to refer this project of law before introducing it into the Council.

If leave was given to introduce a Bill, he proposed, in doing so, fully to explain its details, and in connection with them to enter more fully into the policy which it was proposed to substitute for that which governed the existing law.

The Motion was put and agreed to.

SEA CUSTOMS BILL.

The Hon'ble MR. HOPE introduced the Bill to consolidate and amend the laws relating to the administration of the Department of Sea Customs in India, and moved that it be referred to a Select Committee with instructions to report in three months. The present Act (VI of 1863) which regulated these matters had now been for thirteen years in operation, and it had already been found necessary to amend it by more than one special enactment. Numerous other

modifications had at various times been suggested, and although some of them had been of a rather pressing nature, it had not been found practicable to legislate specially on their account. Further, the immense revolution which had taken place in the conditions of modern trade, more especially arising from the opening of the Suez Canal, had so entirely altered the circumstances of the large ports, such as Bombay, Madras and Calcutta, as to render necessary radical changes in the Customs system which had hitherto prevailed, not only in India, but generally in all civilized countries where such changes had not taken place. The necessity for a new law was felt as long ago as 1870, and Sir Richard Temple, the present Lieutenant Governor of Bengal, in August 1870, obtained leave to introduce a Bill for the purpose. Certain difficulties connected with the English law arose, which it was not necessary for him at present to explain, and the Bill was for the time not proceeded with. It had now been found practicable to follow out the idea with which that leave was originally granted. But it had been thought better, instead of acting on the leave then given, to obtain fresh leave by means of publication, under the Rules, with the permission of the President, and to bring in an entirely new Bill.

This Bill which he had the honour to introduce was in the first place a consolidation of the whole existing law, and it was a careful consolidation so far as there had yet been time and opportunity to make it so. There were however a considerable number of modifications which he was sensible the Bill was capable of; some modifications of drafting, such as a consolidation of all the penal clauses into one section, and of all the clauses relating to confiscation into another, which there had not been time to elaborate, and there were also others of greater moment.

The Bill however did contain a few changes, which, being of some importance, he might perhaps refer to briefly. One of these was that, where a dispute arose regarding the proper rate of duty upon any goods, the goods might be taken away by the owner, under proper security, instead of being detained whilst the dispute was being settled. Another was designed to meet the difficulty which was felt every time a change was made in the tariff, owing to goods, which had been in some cases shipped, and in other cases contracted for, at certain rates inclusive of duty, being chargeable on arrival in India with other rates of duty. Every time that the Tariff Act had been changed, the Government had received applications, which, in some cases, it had been able to comply with, and in other cases it had by law been unable to do so. It was therefore now provided that, where a contract was entered into for the supply of goods at a fixed price including duty, and the duty had been altered, the contract-price should be

increased or diminished, as the case might be, by the amount by which the duty had been so raised or lowered. And further that, where the duty was raised during transit by sea to India, the duty payable on arrival should be the reduced duty which the shipper at the time of shipping the goods believed he would have to pay.

The next change was in order to facilitate the rapid discharge of canal-steamers. It was to allow of the entry in the manifest of the name of the ship's agent as consignee of any cargo, so that the whole cargo might be turned out within forty-eight hours of the arrival of the steamer, or whatever time the discharge might occupy, before the real consignees had had time to apply for delivery, for which the vessel was now, strictly speaking, obliged to wait.

Another change in the same direction, for facility of discharge, was the provision to permit bulk to be broken prior to the receipt of the original manifest and entry of the vessel at the Custom-house. Very often the papers of a ship were not fully completed when the ship sailed, and did not arrive until after she had reached her destination. As the law now stood, in such a case the ship might be subjected to detention and inconvenience pending the arrival of the papers.

Another alteration with the view of facilitating trade, was the permission to grant port-clearance before delivery of the manifest. It was frequently found impossible to complete the manifest of a large vessel as soon as the vessel was ready to sail, and so long as security was given that the papers would be delivered within three days of the departure of the vessel, there appeared to be no objection to the grant of the port-clearance.

Again, it was proposed to legalize the practice existing at some Custom-houses, which was exceedingly convenient to traders, of allowing merchants to deposit Government paper, against which might be debited, in a current account, the different items of duty payable by them, instead of obliging them to make separate payments in cash for every individual package they might require to clear, which was a course equally inconvenient to the public and to the Customs Department itself.

One other improvement of sufficient importance to notice here was that, when goods were adjudged to be confiscated, the owner might, at the discretion of the confiscating officer, be allowed the option of paying a fine and taking away the goods; because, in many cases, as long as the owner was subjected to a sufficient penalty, there was no reason for depriving him of the articles themselves.

He hoped the Bill as now introduced was, so far as it went, a considerable improvement upon the existing law. He confidently anticipated that it would receive very large further amendments both in principle and in wording, with the assistance, not only of the Select Committee, but also of the Committee which, at the desire of the Lieutenant Governor, had been convened in Calcutta, and of Committees which it had been suggested to the Governments of Madras and Bombay to convene also. He, for his own part, should be only too happy to consider favourably every suggestion for the purpose of facilitating trade and adapting the law to the present circumstances of the country which was consistent with the safety of the revenue and the necessity for due registration and keeping of trade-statistics.

The Motion was put and agreed to.

The Hon'ble MR. HOBHOUSE moved that the Hon'ble Mr. Dalyell be added to the Select Committees on the following Bills:—

To define and amend the law relating to certain kinds of Specific Relief:

For the better control of dramatic performances:

To amend the Indian Registration Act, 1871.

The Motion was put and agreed to.

The following Select Committee was named:—

On the Bill to consolidate and amend the laws relating to the administration of the Department of Sea Customs in India——The Hon'ble Messrs. Hobhouse, Dalyell, Cowie and Bullen Smith and the Mover.

The Council adjourned to Wednesday the 29th November 1876.

WHITLEY STOKES,
Secretary to the Government of India,
Legislative Department.

CALCUTTA;
The 22nd November 1876.

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