ABSTRACT OF THE PROCEEDINGS

COUNCIL OF THE GOVERNOR GENERAL OF INDIA

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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 Simla on Thursday, the 12th July 1877.

The Council adjourned to Thursday, the 19th July 1877.

A. PHILLIPS,
Secretary to the Government of India,
Legislative Department.

Abstract of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 & 25 Vic., Cap. 67.

The Council met at Simla on Thursday, the 19th July 1877.

PRESENT.

His Excellency the Viceroy and Governor General of India, G.M.S.I., *presiding.*

His Honour the Lieutenant-Governor of the Panjáb, C.S.I.

The Hon'ble Sir E. C. Bayley, K.C.S.I.

The Hon'ble Sir A. J. Arbuthnot, K.C.S.I.

Colonel the Hon'ble Sir Andrew Clarke, R.E., K.C.M.G., C.B.

Major-General the Hon'ble Sir E. B. Johnson, K.C.B.

The Hon'ble Whitley Stokes, C.S.I.

The Hon'ble T. C. Hope, C.S.I.

The Hon'ble F. R. Cockerell.

The Hon'ble B. W. Colvin.

PANJÁB COURTS BILL.

The Hon'ble MR. STOKES asked leave to postpone the introduction of the Bill to consolidate and amend the law relating to Courts in the Panjáb.

Leave was granted.

LIMITATION OF SUITS BILL.

The Hon'ble MR. STOKES moved that the Reports of the Select Committee on the Bill for the limitation of suits and for other purposes be taken into consideration. He said that, under ordinary circumstances, he would not have made this motion until the Council had returned to Calcutta. For the Bill dealt with the whole range of civil litigation in India, and the Government desired that Bills of so wide a scope should always, if possible, be passed at the winter sittings. But as the Bill provided expressly for several proceedings under the new Code of Civil Procedure (see, for instance, section 14, clause 2 and Schedule II, Nos. 11, 153, 160, 161, 169, 172, 174, 175) which were not provided for by Act IX of 1871, it should come into force contemporaneously with that Code, that was to say, on the 1st of October 1877; and it should be passed and promulgated a sufficient time before that day to enable the new Act to be translated into the native languages and the public to become acquainted with its provisions. Moreover, the Bill had been carefully revised in Calcutta by a Committee composed of Sir Arthur Hobhouse, Sir Edward Bayley, Mr. Cockerell and Mahárájá Jotíndra Mohan Tagore, who concurred in recommending that the Bill, as then settled, should be passed: the revised Bill was published, in order to elicit criticism, in the Gazette of 31st March: few criticisms had since been received: few alterations in substance had since been made, and of these none, as MR. STOKES thought the Council would admit, were of sufficient importance to require that the Bill should be republished and its passage postponed.

The first of these alterations was the omission, in section 6, of the paragraph which excluded from the provisions of the Limitation Act appeals from, and applications to review, decrees and orders of the High Courts in the exercise of their original jurisdiction. These appeals and applications were now regulated, in the case of the High Courts at Calcutta, Madras and Bombay, by rules made under the Charters of 1865. But, in the opinion of Mr. Justice Macpherson, there could be no possible reason for excluding them from the operation of the Limitation Act. Moreover, as Mr. Justice Kennedy had observed in his brief but valuable criticisms on the Bill,—

"There are many inconveniences in the present rule in the Calcutta High Court. The time for appeal now runs from the date of pronouncing the judgment, not from the day of the decree being passed. I think that this ought to be altered, as the effect of the judgment is not unfrequently mistaken until the decree is finally settled. Also the time for obtaining a copy of the judgment ought, as in the Mufassal, to be excluded; there is no refresher allowed for attendance to hear judgment, and, in the case of a written judgment especially, it is not always possible for Counsel to be sure what has been decided by the Bench,

even if they be present in Courts constructed on such wretched acoustic principles as are those here."

We had therefore provided, in accordance with the opinion of Sir Richard Garth, Mr. Justice Macpherson and Mr. Justice Kennedy, that the period for such appeals and applications should be twenty days (the period allowed for appeals from decrees by the present practice of the High Courts at Fort William and Bombay) from the date of the decree or order. The period allowed for appeals from orders was, in the Bombay High Court, twenty days, in the Calcutta High Court, four days. We had followed the Bombay rule in this respect; Mr. Justice Kennedy saw no objection to our doing so, and Sir Michael Westropp had informed MR. STOKES that, in the High Court at Bombay, the rule had worked very well. In computing these periods of twenty days, the time requisite for obtaining a copy of the decree appealed against or sought to be reviewed and of the judgment on which it was founded would, under section 12, be excluded, and, under section 5, the Court would have power, in proper cases, to enlarge the period. The High Court at Allahabad had no ordinary original civil jurisdiction. But the period for appeals from, and applications to review, decrees made in the exercise of its extraordinary original civil jurisdiction would, under Nos. 156 and 173 of the second Schedule to the Bill, be ninety days, the period fixed under its present rules.

Under section 7 of the Bill, where a person entitled to institute a suit was a minor at the time from which the period of limitation was to be reckoned, he was entitled to institute the suit within the same period after he attained majority as would otherwise have been allowed from the time at which the cause of action arose. At the recommendation of Mr. Justice Turner and of Sayyid Mahmud, an Advocate of the North-Western Provinces High Court, the distinguished son of a most distinguished father, we had excluded from this section suits to enforce a right of pre-emption. Sayyid Mahmud observed that "the limitation of one year for a claim of pre-emption is perhaps not unduly long if the pre-emptor is not under legal disability at the time of the sale. But this period can at any time be extended indefinitely, a circumstance which not only works a great hardship upon the vendor but also upon the vendee." Then, after citing a judgment of Mr. Justice Turner (Indian Law Reports, 1 All. 207) as to the evils resulting from the right of pre-emption, and quoting the Hedáya, he concluded by expressing an opinion that, under Muhammadan law, the limitation for a claim of pre-emption was considerably less than one year, and that it was very doubtful whether the right of pre-emption was ever intended to be conferred upon persons suffering from a legal disability at the time of sale. Mr. J. W. Smyth, now one of the

Judges of the Panjáb Chief Court, also recommended that pre-emption suits should be excluded from the operation of section 7, on the ground that—

"it would be an intolerable evil to allow a person, a minor at the date of the sale, to come into Court, it may be ten or fifteen years afterwards, and ask to have the sale transferred to him. The evil is not so much felt in provinces where the strict Muhammadan law of pre-emption applies, and where, unless a claim is at once made with certain forms, the right is forfeited. But in the Panjáb no preliminary form of claim need be gone through (*vide* Act IV of 1872, sections 9 *et seq*); and here a vendee of land may be kept for years in suspense, in fact till a year after all persons in a village who were minors at the time of sale have attained their majority. The mere statement of the case in this way is sufficient to show the absurdity of the rule as it affects pre-emption cases."

We had altered section 10 and the second Schedule in accordance with a suggestion of Mr. Justice Green, one of the Judges of the Bombay High Court, so as to preclude the litigation likely to arise from the use of the words "good faith," and to protect a purchaser for valuable consideration from an express trustee, whether the purchaser had or had not notice of the trust at the time of the purchase. In this respect, our law would then agree with the present English law of limitation (3 & 4 Wm. IV, c. 27, sections 2, 24, 25), save that the lapse of time necessary to give protection would be twelve instead of twenty years; and this difference would disappear on the 1st January 1879, when the statute 37 & 38 Vic., c. 57, would come into force.

Section 14 of the present law excluded the time of a defendant's absence from British India, unless service of a summons to appear and answer could, during such absence, be made under the Code of Civil Procedure. But the Calcutta Trades Association, from whom we had received some practical remarks on the Bill, pointed out that it was frequently difficult, if not impossible, to find the address of a debtor after his departure from this country, and that a compliance with the requirements of the Code was therefore not always reasonably practicable. Of course, where the summons could not be served the clause requiring service would not apply: but it was proverbially difficult to prove a negative. The Committee felt the force of these remarks and struck out the exception in question, which, by the bye, did not occur in the corresponding provision of the English law (4 Anne, cap. 16, section 19) as to persons absent beyond the seas.

In section 19 we had struck out the exception which allowed oral evidence to be given of an acknowledgment wrongfully destroyed by the person upon whom it was binding. The case was one which could seldom occur, since the plaintiff had ordinarily the possession of the document. We had thought it simpler to make no exception to the rule in this clause, which excluded oral evidence of such documents.

In section 20 we had extended the effect of part payment to all debts, whether arising out of a contract in writing or not. "Why," asked Mr. Wilkinson, the Recorder of Rangoon, "should a part payment endorsed on a promissory note by the payor, or one admitted as such, in his own handwriting in the payee's bill-book, be entitled to more consideration than when a customer signs to a payment on account of principal in a shopkeeper's book or on the bill which he has made out in respect of articles that were purchased over the counter?" We thought, too, it would suffice to provide that the fact of part payment should appear in the handwriting of the person making it. The ordinary case of a debtor making a part payment by letter would thus be provided for.

We had provided not only that several partners or executors but also several joint contractors or mortgagees should not be chargeable by reason only of an acknowledgment or payment made by one of them. This was in accord with 19 & 20 Vic., c. 57, s. 14, and 3 & 4 Wm. IV, c. 27, sec. 28.

We had struck out the clause relating to successive trespassers, which was based on the opinion apparently held by the late Lord Romilly in *Dixon* v. *Gayfere*. The Committee were not sure that the proposed rule was right, and in any case it would have been of little or no practical utility.

In the second Schedule we had made a few changes as to the time from which the periods begin to run. Thus, in the case of suits to enforce a right of pre-emption, the present law provided that the period should begin when the purchaser took actual possession under the sale impeached. But in the North-Western Provinces High Court a doubt had been raised (I. L. R. 1 All. 315) as to the application of this provision to cases in which the subject of the sale was an equity of redemption, a reversionary interest or any other thing that did not admit of what the High Court termed "visible and tangible possession." The Committee, after much consideration, had determined on making the time run in such cases from the time when the instrument of sale was registered. Incidentally, the change would have the effect of promoting the use of written instruments in such transactions and of encouraging the practice of registration.

In the case of suits for money lent under an agreement that it should be payable on demand, we had made the time run from the date of the transaction, instead of from the demand, the date prescribed by the present law, the framer of which in this respect had followed a judgment of the Bengal High Court (6 Beng. 160), which judgment rested on what the authority of Mr. Justice

Holloway (*quis jure peritior ?*) emboldened MR. STOKES to call a mistake of Austin's. It seemed unreasonable that a creditor should be able to give himself an unlimited time to sue by merely abstaining from making a demand. Moreover, as Mr. Justice Innes, one of the Judges of the Madras High Court, observed, in a minute to which the Committee were much indebted—

"It is a well known principle of English as well as Continental law, that the words 'payable on demand' are not a condition. The creditor, by the clause, does not seek to impose a conditional obligation, he merely gives notice to the debtor that he is to be ready to pay the debt at any time when called upon. If the obligation depended upon a personal act of the creditor (as Savigny observes), it would be extinguished by his death before demand, which is not the case. Consistently with this view it has always been held in England that a debt payable on demand was a debt from the date of the instrument, on which date therefore the cause of action arose (*Norton* v. *Ellam*, and other cases), and that time runs from that date and not from date of demand."

The Committee agreed with Mr. Innes in thinking it desirable that the law in India and that in England should be in accord on this point, as they were prior to the enactment of Act IX of 1871.

No. 125 related to suits during the life of Hindú widows to have their alienations declared to be void except for their lives, and No. 141 dealt with suits for possession of land to which the plaintiff was entitled on the death of a Hindú widow. We had extended the scope of these Numbers so as to meet the case of Muhammadan widows. Mr. J. W. Smyth informed us (and he was confirmed by the Panjáb Government and by Sir Edward Bayley) that—

"in the greater part of the Panjáb, Muhammadan widows succeed to their husbands' lands when there are no sons or descendants in the male line, and they hold such lands for life or till they marry again, exactly in the same way as Hindú widows succeed. Suits to set aside alienations made by Muhammadan widows, or to have them declared void, except for the life or till the remarriage of the widow, are quite as numerous in the Panjáb as suits to set aside alienations made by Hindú widows."

This fact, coupled with the existence of the undivided family system among the Muhammadans of the Lower Provinces of Bengal, shewed how cautious we should be in assuming that the profession of Islám involved the adoption of the Muhammadan law of property.

We had thought it better to restore the limitation of sixty years in the case of suits for foreclosure and redemption and suits by the Secretary of State in Council. The reasons for this change were clearly stated by Mr. Naylor, the Remembrancer of Legal Affairs, Bombay:

"There are many unredeemed mortgages of very old standing in this Presidency, and from the commencement of our rule we have always taught the people to think that there is virtually no period of limitation for the recovery of mortgaged property. The sudden change from sixty to thirty years will very much affect the nature of mortgage transactions, and whilst it can do no good it may do much harm. Sixty years is also, in my opinion, not too long a period to allow for suits on behalf of the Crown. I doubt, in fact, whether it is expedient to prescribe any limitation at all for such suits in a country where the rights of the State are so apt to fall into abeyance and get lost sight of; but if some period is thought necessary it should no be less than sixty years."

As regards mortgages, Mr. Naylor's opinion was supported by the authority of Mr. Gore Ouseley, the Financial Commissioner, Panjáb, and as regards suits on behalf of the Crown, by that of Colonel MacMahon, the Commissioner, Hissar Division.

We had extended from thirty to sixty days the period allowed for applications under sections 363 and 365 of the Code of Civil Procedure by persons claiming to be legal representatives of deceased plaintiffs and seeking to have their names entered on the record. Our reasons were two: first, because last February, when the Bill was introduced, Mahárájá Jotíndra Mohan Tagore said that "in most cases thirty days was the time of mourning for Hindús, and unless the time was extended, it might operate harshly; a man could not be expected to come forward and put in his claim within the period of mourning:" secondly, because Mr. Broughton, the Administrator General of Bengal, had also stated that thirty days seemed too short a time to obtain representation—"at any rate, "he said, "in my case, for it is the practice now to issue citations, in all but very exceptional cases, when I apply for letters of administration."

The other alterations which we had made were comparatively unimportant. They were all minutely stated in the final report; and MR. STOKES trusted that the Council would now allow the Bill to become law.

It was, no doubt, imperfect and incomplete. For instance, a Limitation Act should certainly comprise rules as to the time of commencing prosecutions for the various offences under the Penal Code, and we should have inserted the necessary provisions as to this matter, had we not felt the need of consulting the Local Governments before making so important an addition to our law, and for this there was no time. But such as it was, MR. STOKES could honestly say that no pains had been spared by Sir Arthur Hobhouse, Sir Edward Bayley, Mr. Cockerell and himself to make the Bill accurate and useful.

It would doubtless require repairs in the course of six or seven years. "Time," said Lord Plunket, speaking of the law of prescription, "Time holds in one hand a scythe, in the other an hour-glass. The scythe mows down the evidence of our rights, the hour-glass measures the period which renders that evidence superfluous." The great orator, had he been familiar with Indian legislation, would have rendered his metaphor complete by adding that the frame-work of his hour-glass would certainly decay, the glass be broken and the sand escape.

The Motion was put and agreed to.

The Hon'ble MR. STOKES then moved that the Bill as amended be passed. He said that he wished to supply an omission in his remarks on the former motion and to notice the recommendations made by certain officers of Bombay and the Panjáb, and by the Calcutta Trades Association, that the period allowed for suits for unsecured debts should be extended from three to six years.

If the matter were open at present to alteration, he would be inclined to agree with those gentlemen, especially as the English law of limitation for actions of debt grounded on simple contract was six years after the cause of action had arisen, and the facilities for recovering debts were certainly less in India than in England. But we must remember, first, that the present period of three years had been established in India since 1859, and though he could not speak positively as to the reason why so short a time had been fixed, one might fairly conjecture that it was owing to the fact that written evidence of payment was much more liable to destruction in this country than it was in England. Secondly, before making so important a change in the law, it would be necessary to refer the point to all the Local Governments; and judging from an experience now extending to nearly twelve years, the answers to that reference would certainly not be received and considered by the Home Department for six months, that was to say, nearly four months after the new Code of Civil Procedure (with which this Bill should come into force simultaneously) would have begun to operate. No doubt, the commencement of the Code might be postponed. But this would require further legislation; and the postponement might perhaps re-open questions which were now closed and would certainly for some months deprive the debtor-class of the benefits which the Code was intended to confer on them, and which, we had been assured, were urgently required. MR. STOKES hoped, therefore, that the Council would allow the Bill to pass to-day, and it would give some comfort to the gentlemen

in question, and to the Hon'ble Mr. Hope, who, he believed, sympathised with them, if he mentioned briefly the alterations in favour of the creditor which would be made by this Bill if it were allowed to pass as it stood. First of all, the Bill provided for the case of a creditor affected by double or successive disabilities. Secondly, where a debtor was absent from British India, the Bill excluded the time of his absence, whether the creditor could or could not serve him with a summons to appear and answer. Thirdly, in the case of part-payment of principal, the Bill merely required that the fact of the payment should appear in the handwriting of the debtor. As the law now stood, the debt must have arisen from a contract in writing, and the payment must appear not only in the handwriting of the debtor, but on the instrument, or in his own books, or in the books of the creditor. After the Bill had come into force, a part-payment of the amount of a tradesman's bill or a banya's account endorsed on the bill or account by the debtor would give a new period of limitation. In these three respects the position of the creditor would be distinctly improved by the Bill.

The Hon'ble MR. HOPE asked whether he had rightly understood the Hon'ble Member to say that he thought the Bill would probably require amendment in six or seven years.

The Hon'ble MR. STOKES replied in the affirmative.

The Hon'ble MR. HOPE remarked that in that case he could only express his regret that so important a subject as that of the extension of the period of limitation for suits for money debts should be relegated to limbo for so long a time, and expressed his opinion that it would be preferable to defer, if necessary, the passing of this Act, as well as the operation of the Civil Procedure Code, till next January, in order to afford sufficient time to have the question sifted even in a more thorough manner, if possible, than it had already been sifted by the Deccan Riots Commission and others, whose reports on the subject had already been some five or six months in the possession of the Select Committee.

The Motion was put and agreed to.

The Council adjourned to Thursday, the 26th July 1877.

SIMLA;
The 19th July 1877.

A. PHILLIPS,
Secretary to the Government of India,
Legislative Department.

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