

Saturday, January 22, 1859

**LEGISLATIVE COUNCIL  
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gistrates, and for constituting those Officers Registers of Deeds" to the President in Council, in order that it might be submitted to the Governor-General for his assent.

Agreed to.

MERCHANT SEAMEN.

MR. CURRIE moved that Mr. Ricketts be requested to take the Bill "for the amendment of the law relating to Merchant Seamen" to the President in Council, in order that it might be submitted to the Governor-General for his assent.

Agreed to.

PENAL CODE.

MR. LEGEYT moved that a communication received by him from the Bombay Government, forwarding an extract of a Despatch from the Court of Directors, relative to the expediency of enacting a severer punishment than that prescribed by the Penal Code for the offence of attempting to create a panic, be laid upon the table, and referred to the Select Committee on "The Indian Penal Code."

Agreed to.

BREACHES OF CONTRACT.

MR. FORBES moved that a communication received by him from the Madras Government be laid upon the table and referred to the Select Committee on the Bill "to provide for the punishment of Breaches of Contract by Artificers, Workmen, and Laborers, in certain cases."

Agreed to.

RECOVERY OF RENTS (BENGAL).

MR. CURRIE moved that Mr. Ricketts be added to the Select Committee on the Bill "to amend the law relating to the recovery of rent in the Presidency of Fort William in Bengal."

Agreed to.

The Council adjourned.

*Saturday, January 15, 1859.*

PRESENT :

The Hon'ble the Chief Justice, *Vice-President.*

Hon. B. Peacock,	H. B. Harington, Esq.,
P. W. LeGeyt, Esq.,	and
Edward Currie, Esq.,	H. Forbes, Esq.

THE MEMBERS assembled at this Meeting did not form the quorum required by Law for a Meeting of the Council for the purpose of making Laws.

*Saturday, January 22, 1859.*

PRESENT :

The Hon'ble the Chief Justice, *Vice-President,*  
in the Chair.

Hon. J. P. Grant,	P. W. LeGeyt, Esq.,
Hon. Lieut.-Gen. Sir	E. Currie, Esq.,
J. Outram,	H. B. Harington, Esq.,
Hon. H. Ricketts,	and
Hon. B. Peacock,	H. Forbes, Esq.

CIVIL PROCEDURE.

THE CLERK presented a petition from the Indigo Planters' Association, concerning the Bill "for simplifying the Procedure of the Courts of Civil Judicature not established by Royal Charter."

MR. PEACOCK moved that the above petition be printed.

Agreed to.

PRESCRIPTION AND LIMITATION.

THE CLERK presented a petition from under-tenants of Burdwan, praying that twelve years be prescribed as the period of limitation for the institution of suits for the enhancement of rent.

Also a petition of landholders of Bengal against the 11th Clause of Section XVI of the Bill "to provide for the acquirement and extinction of rights by prescription and for the limitation of suits," which proposed a limitation of twelve years for suits to enhance the rent of land held at a certain rent without a written engagement.

MR. HARINGTON moved that the above petition be read.

Agreed to.

The petition was read accordingly.

THE VICE-PRESIDENT thought it would be desirable to defer the consideration of the Clause to which this petition related, if the Council should get so far on with the Bill, until the petition was printed and circulated. It seemed to him, however, to be founded on an ignorance or forgetfulness of the present state of the law, as established by certain decisions of the Court of Sudder Dewanny Adawlut, in suits for the enhancement of rent. There were, if he recollected aright, some earlier decisions, to the effect that the right to enhance rent was not subject to the ordinary law of limitation. But when he first drew this Bill, his attention had been called to at least one later decision in which the contrary was held, and which involved some of the consequences to the land-owners alluded to in the petition. He had, therefore, framed this Clause, which, if it subjected such suits to a law of limitation, provided a protection far cheaper and more convenient than that contemplated by the petition, of bringing a suit to enhance every twelve years, namely, that of taking a kubooleut or written engagement from the ryot. It was quite necessary for the Legislature to deal with this question. Either it must adopt a Clause guarded and restricted as his was; or it must, in the Rent Bill of the Honorable Member for Bengal, declare that the right of the landlord to bring a suit to enhance was subject to no limitation. If it passed the question over *sub silentio*, Courts of Justice might treat, as they had already done, such suits as subject to the general law of limitation, and in that case might, in the construction of this Act, apply to them even a six years' limitation.

SIR JAMSETJEE JEJEEBHAY'S  
ESTATE.

THE CLERK reported to the Council that he had received a communication from the Home Department, forwarding a copy of a Despatch from the Secretary of State for India, returning for revision the Bill "for settling a sum of money and a mansion-house and hereditaments called Mazagon Castle, in the Island of Bombay, the property of Sir Jamsetjee Jejeebhoy, Baronet, so as

to accompany and support the title and dignity of a Baronet lately conferred on him by Her present Majesty Queen Victoria, and for other purposes connected therewith."

MR. LEGEYNT moved that the above communication be printed.

Agreed to.

#### CANTONMENT JOINT MAGISTRATES.

THE CLERK reported that he had received a communication from the Secretary to the Government of the North-Western Provinces, forwarding a copy of a letter from Major Williams, the Superintendent of Cantonment Police, proposing that a provision for allowing an appeal to the Sessions Court be introduced in the Bill "for conferring Civil Jurisdiction in certain cases upon Cantonment Joint Magistrates, and for constituting those Officers Registers of Deeds."

MR. HARRINGTON said, the Bill to which this communication related having been read a third time at the last Meeting of the Council, and ordered to be submitted for the assent of the Right Honorable the Governor-General, he apprehended that it now rested with His Lordship to determine whether he would give his assent to the Bill in its present form, or refer it back to the Council for the consideration of any particular point, and that, consequently, there could be no action upon the communication which had been just read to the Council beyond directing that it be laid upon the table, and he accordingly begged to make a motion to that effect. At the same time, he must remark that Major Williams, the Superintendent of Cantonment Police in the North-Western Provinces, who now proposed that all decisions passed under the Bill should be open to appeal, however simple might be the character of the suit, or however trifling the amount or value in dispute, had made no such proposition when the Bill, after being read a second time, was published for general information, but had confined himself to recommending that some provision should be introduced into the Bill to prevent false complaints or suits, and to punish them when made, which had been done. The only reason assigned by Major Williams for his present pro-

position was, that an appeal would be useful as a check in preventing irregularities. Now he need not tell the Council that, although, under the existing system, an appeal lay from every decision of a Civil Court in a regular suit, an Act was passed in the year 1854, which declared that "whereas every case in appeal ought to be determined upon the merits, without regard to technical errors or defects, no order or decision of any of the Civil Courts of the East India Company shall be reversed, altered, or remanded on account of any error, defect, or irregularity not productive of injury to either party," and a similar provision had been introduced into the proposed new Code of Civil Procedure under the head of Appeals. If this rule was just and proper as regarded the Civil Courts, and he (Mr. Harington) apprehended that no one would deny that it was so, it appeared to him that, *à fortiori*, the principle of the rule should be extended to the decisions which would be passed by Cantonment Joint Magistrates under the Bill introduced by him. It was scarcely necessary for him to say that the suits which would be instituted under the Bill would generally be of the simplest character and of a very small amount, and he did not think that it would be expedient to give an appeal in them solely for the purpose of maintaining regularity of proceeding. In the letter from the Secretary to the Government of the North-Western Provinces, it was stated as an additional reason for allowing an appeal in cases coming under the Bill, that the Government would not be able always to find Officers thoroughly fit for the office of Cantonment Magistrates. Now, allowing that such might occasionally be the case, he would observe that the Bill did not constitute every Cantonment Joint Magistrate *ex-officio* a Civil Judge. On the contrary, it left it to the Government to determine what Officers should be invested with the Civil jurisdiction mentioned in the Bill, and when an Officer might be appointed to a Cantonment Joint Magistracy, who, in the opinion of the Government, was not competent to exercise that jurisdiction, he (Mr. Harington) supposed that it would not be given to him, and that the Civil suits arising within the

limits of the Cantonment, to which such Officer might stand appointed, would be left to be decided under the existing law. At the same time, looking to the large Criminal powers which were now exercised by Cantonment Joint Magistrates, and to the fact that the decisions of those Officers in the great majority of the cases disposed of by them as Criminal Judges were not open to appeal, he (Mr. Harington) could scarcely believe that any Officer would be selected for the situation of Cantonment Joint Magistrate who would not be found fully competent to discharge, without the check of an appeal, the Civil duties which might be entrusted to him under this Bill.

The motion, that the communication received from the Secretary to the Government of the North-Western Provinces should be laid upon the table, was then put and agreed to.

#### MERCHANT SHIPPING ACT.

THE CLERK reported that he had received from the Home Department, for consideration in connection with the Indian Merchant Shipping Bill, a copy of papers respecting a proposed adaptation of the Sections 214 to 220 (Volunteering into the Navy) of the English "Merchant Shipping Act 1854," to enable seamen to volunteer into the Indian Navy.

MR. CURRIE observed that this communication was also too late, as the Bill had been read a third time and passed. It was not, however, a matter of much consequence, as he believed that the Council could not deal with the question, which was that of placing volunteering for the Indian Navy on the same footing with volunteering for the Royal Navy. He (Mr. Currie) apprehended that such an enactment would be opposed to the provisions of the English Act, and therefore beyond the powers of the Council.

The Merchant Shipping Act gave the Master of a merchant vessel, in all parts of Her Majesty's dominions, a remedy in cases of desertion, except only when the deserter volunteered into the Royal Navy. Now, if we extended that exception to the ships of the Indian Navy, we should deprive the Master, in a certain class of cases, of the remedy

given by the English Statute, which would be tantamount to an alteration of the Statute, and, therefore, beyond the power of the Council. This was, he believed, the opinion of the learned Advocate-General and of his Honorable and learned friend opposite (Mr. Peacock). He should therefore make no motion on the subject, but leave the Executive Government to apply, if they thought necessary, to the Imperial Legislature.

MR. PEACOCK said, he agreed with the Honorable Member in the view which he took upon the matter. By a Clause in the Merchant Shipping Act, if a seaman left his vessel to volunteer for the Royal Navy, he was not amenable to punishment, and as that Act had been passed subsequently to the Charter Act, the Council could not alter its provisions. Whether the Statute lately passed for the transfer of the Government of India to the Crown would extend to Her Majesty's Indian Navy those provisions of the Merchant Shipping Act which related to volunteering for the Royal Navy, was a question of construction which no legislation by the Council could settle; so that it did not appear very important that the communication was not received in time to come before the Council before the third reading of the Bill.

#### REMOVAL OF PRISONERS.

MR. CURRIE presented the Report of the Select Committee on the Bill "to make further provision for the removal of Prisoners."

#### FRAUDULENT TRANSFERS AND SECRET TRUSTS.

MR. LEGEYT moved the second reading of the Bill "for the prevention of fraudulent transfers of property and of secret trusts."

THE VICE-PRESIDENT said that, as he would not have an opportunity of being present when the Bill came back from the Select Committee, he would, with the permission of the Council, say a few words as to its provisions. As regarded nuncupative wills and verbal directions to a widow to adopt an heir, there could be no doubt of its merits: it was in the highest degree expedient

to put an end to the frauds and perjuries which were so frequently perpetrated, when it was attempted to change the legal course of succession by proving dispositions of this kind. He gave every credit to his Honorable and learned friend (Sir Arthur Buller) for the care and attention which he had bestowed on the Bill, in order to strike at the root of the benamée system; and he should indeed be glad if these efforts should prove successful in destroying a system so thoroughly bad; but he must confess that he was not very sanguine as to the success of the provisions of the Bill, if passed into law, for the destruction of so deeply-seated and inveterate an evil.

It appeared to him, moreover, that two provisions of the Bill were open to the objection taken to them elsewhere, that they would be inconsistent in their operation and tend to neutralize each other. The third Section of the Bill said that, unless the trust were declared in writing, it should not be enforced against the trustee at the suit of the *cestui que trust*. This, according to the ordinary motives by which men were actuated, seemed calculated to effect its object. The next Clause, however, imposed a heavy penalty upon the person lending his name as trustee in a benamée transaction; and this provision manifestly tended to prevent any such trustee from taking advantage of the third Clause. It must be recollected, too, that the fraudulent *animus* of a benamée transaction rarely appeared until both trustee and *cestui que trust* united in saying that it was really what it purported to be, in order to defeat creditors or other persons claiming against the real and beneficial owner. But suppose the penal Clause which would affect the operation of the third Section struck out, he (the Vice-President) feared that the third Clause, even when allowed its fullest operation, would in this country be likely to fail of its object. He judged from experience. They all knew that the existing Sale Law declared that no Court should recognize or enforce the rights of the real or beneficial owner against the benamée purchaser at a sale for arrears of Government revenue. Similar provisions had existed in the Sale Laws which had been in force almost since 1793. Some

*Mr. Currie.*

of the earlier Regulations, that in particular of 1822, imposed penalties on such transactions, though penalties which could only be enforced within a short period after the sale. Yet they all knew that benamée purchases at sales for arrears of Government revenue were by no means unfrequent. Such a transaction had been before him (the Vice-President) judicially only the other day.

There was another provision in this Bill (the 10th Section), on which he was anxious to offer a few remarks. It adopted, almost in words, the 10th Section of the Statute of Frauds; and enacted that no contracts for the sale of goods above £10 should hold good, unless the buyer should pay something as earnest-money, or unless the contract was reduced to writing. Now he (the Vice-President) believed that the provision as to earnest-money would prevent this Clause from having a very extended operation in this country, as the payment of *bynah* or earnest-money on a contract of sale was the usual custom amongst the natives of this country. He had always thought the exception in the Statute of Frauds and Perjuries an odd one, since the payment of earnest would often be proved by parol evidence, and when proved would leave all the terms of the contract to be also determined on parol testimony. But if this exception did not avail to make in this country the Section of little or no value, he should have considerable misgivings about requiring all contracts for goods above a hundred Rupees in value throughout all the Hauts and Bazars of the Empire to be in writing. When he recollected the amount of litigation to which the question, whether a contract was within this Clause of the Statute of Frauds, had given rise in England, he doubted the policy of introducing it here; and on the whole should prefer to see the Bill pass into law without the 10th Section.

MR. LEGEYT said that he was only the sponsor of the Bill, which he had introduced in the absence, and at the request, of his Honorable and learned friend, Sir Arthur Buller; but he begged to thank the Vice-President for the exposition of his views on the measure, which he had no doubt would have due weight

with the Select Committee when under their consideration.

The motion for second reading was then carried, and the Bill read a second time.

#### PREScription AND LIMITATION.

THE VICE-PRESIDENT moved that the Council resolve itself into a Committee on the Bill "to provide for the acquirement and extinction of rights by prescription, and for the limitation of suits," and that the Committee be instructed to consider the Bill in the amended form in which it had been recommended by the Select Committee to be passed.

MR. RICKETTS said, before the Council went into Committee on the Bill, he wished to call the particular notice of Honorable Members to its technical phraseology. The phraseology of the Bill was so refined, so technical, and so obscure, that no ordinary person could understand it. It was only a day or two ago, that he had read the first Section of the Bill to five persons who happened to be sitting together, all of whom were persons of ordinary intelligence—some he might say of more than ordinary intelligence—and one of whom had been long accustomed to consider papers of this description; and yet all failed to understand it. He would read the first Clause of the Bill, which was as follows:—

"Subject to the exceptions, and with the qualifications hereinafter mentioned, whoever has been in possession, mediate or immediate, as proprietor of any moveable property, for the space of six years, without interruption, shall acquire a title by prescription both at law and in equity to such moveable property. Provided that, if any other title to such property be proved, such possession shall have been adverse thereto; and that nothing herein contained shall be construed to affect any rights arising from the possession of moveable property now recognized by law."

Supposing he (Mr. Ricketts) was to lend a horse to his Honorable friend on his left, who, instead of returning it, was to take it to his own stable at Garden Reach, and keep it there for a period of six years; according to the Clause, as he understood it, the horse would become his property by prescription. But then

came the proviso—"provided that if any other title to such property be proved, such possession shall have been adverse thereto." He had looked into the dictionary for the meaning of the words "adverse possession," but he derived no help as to its meaning from that source, neither could he gain any elucidation from Clause VII, which professed to define when possession was to be deemed adverse; he had also referred to the Law Book he held in his hand, and in page 423 he found that "an adverse possession is a possession acquired by "disseisin;" again, in page 476, he learnt that "adverse possession" was "an occupation with intent to claim against the true owner."

Now all this did not help him a bit. He found himself very much where he was. He supposed that, if the possession had been permissive, if the horse had been retained with his permission and approval, then the title would not be complete, but the meaning was not at all clear to him, and the remark would apply to other Sections of the Bill. The opinions of the Governments of the other Presidencies were very generally the same as his own. The Secretary of the North-Western Provinces wrote as follows:—

"Although the Lieutenant-Governor is very reluctant to press a suggestion which must impose the trouble of re-casting the whole frame and expression of the present Bill, he yet cannot but acquiesce in the force of the objections unanimously taken to it by the judicial authorities in these Provinces; that, as it now stands, it is, in many parts, drawn in a long and involved phraseology, intelligible, no doubt, without difficulty, to practitioners in English Courts, but sure to cause serious perplexity, and much inconsistency and misconstruction, on the part both of the Native Judges and of parties interested in the application of its provisions."

He laid stress upon the necessity of making the language as plain as possible. The Madras Government wrote:—

"You will observe that the Judges of the Sudder Adawlut are of opinion that the proposed Act is cumbrous, and drawn in technical language ill suited to the comprehension of the tribunals and people of this Presidency; and that, excepting the advantage of shortening the period of limitation for unbonded debts, the contingencies proposed to be provided

for may be left to be determined by the existing law and to the adjudication of the Courts."

Whilst the Judges of the Sudder Adawlut designated the Bill as cumbrous and complicated, and drawn up in such technical language as to be ill suited to the comprehensions of the tribunals and people of that Presidency, and the Governor in Council fully concurred in the objection of the Court—the Bombay Sudder Court said:—

"The Court cannot refrain from expressing their regret to observe the publication of Bills clothed, as is this, in technical language only fairly intelligible to those who have had the advantage of an English legal education; because, by such practice, the Legislature would seem to ignore the fact that the vast majority of the Judges who have to dispense these laws, and the millions who are governed by them, can only have access to their meaning through the medium of translations, and it seems very questionable whether, among others, the Bill now before the Judges could be rendered into the vernacular languages of Western India."

He (Mr. Ricketts) thought that they could hardly ignore such opinions expressed by all the subordinate Governments.

Though our District Judges could not always be selected for their legal acquirements, they might understand such language; but such was not the case with the Moonsiffs, Sudder Ameens, Tehseeldars, Kardars, Mamlutdars, and other Native Judges with hard names in different parts of the country. It was not to be expected that they should generally understand such abstruse and technical provisions as those contained in this Bill. It had been suggested to him that alterations might be made when the Bill was in Committee of the whole Council, but he (Mr. Ricketts) could not see how it could be amended effectively in Committee. He should oppose the motion for going into Committee on the Bill, and if a majority voted with him, he would then move that the Bill be again referred to the Select Committee, with a request that they would so alter the phraseology as to make it easy for the translation, which would be necessary, into at least twenty different languages. As the Bill stood, this would be out of

*Mr. Ricketts*

the question. It might not be so difficult to render it into Persian and Arabic, but it would be impossible to translate it into Tamul, Telooqoo, Malayalim, and Canarese.

THE VICE-PRESIDENT wished that his Honorable friend had told the Council in what circumstances he and his friends had formed themselves into the Select Committee Extraordinary on this Bill, of which his Honorable friend had just delivered the Report. The late Sir William Maule, when at the Bar, was reported to have said once that he advisedly lunched on bread and cheese and porter, in order to reduce his faculties to the level of the Judges before whom he practised. He (the Vice-President) could not but fear that the Honorable Member and his intelligent friends must have subjected themselves to similar discipline if they really experienced such difficulty in understanding what was meant by the term "adverse possession"—of the meaning of which he (the Vice-President) imagined everybody who passed an examination for a Moonsiffship must be required to have some notion. His Honorable friend had taken the injudicious course of seeking to explain *ignotum per ignotius*. Puzzled by the words "adverse possession," he had referred to a text-book of English law, and had learned that an adverse possession might be commenced by disseisin. Now "disseisin" was a very technical word; and one which he (the Vice-President) would be sorry to introduce into an Indian Act. But "adverse possession" is a term which must almost necessarily enter into any system of law in which the English language is used. If the Honorable Member would take the trouble to refer to the published Reports of the Decisions of the Sudder Dewanny Adawlut, he would find it repeatedly used. On the application of the term, as used in the first Section, to the case of the horse, put by his Honorable friend, he would only say that he could not see how anybody could treat that possession as adverse which commenced under a contract, express or implied, and was consistent with that contract. The person who claimed the horse by reason of his possession would say nothing of the contract, but rest on his six years' possession; the party who proved that he was the real owner of the horse would

show that there was such a contract, and insist that by reason of it the possession during the whole of the six years, or part of it, was not adverse to his title but consistent with it. He (the Vice-President) did not see how the Judges could avoid the use of the term if they had to deal with the question which the term involved.

He would now endeavor to meet the general charge of difficult and obscure phraseology. The Council was aware that the Bill was little else than a project of law, submitted long ago by the Law Commissioners, and then much discussed. Objections were then made to the phraseology, and the Commissioners then remarked, as he (the Vice-President) now remarked, that it was difficult to deal with a highly technical subject without using technical terms. When the present Bill was published, similar objections, many of them from persons of the highest authority, were undoubtedly made. Some of those objections were temperately, others somewhat extravagantly expressed. He (the Vice-President) confessed he was surprised by what he might call the judicial hysterics into which the perusal of the Bill seemed to have thrown a Member of the Sudder Court at Bombay, since he could not have imagined that to a gentleman holding such an office, it could or ought to be unintelligible.

But he could sincerely say that he had been most anxious to meet the objections; to simplify, as far as was consistent with the objects of the Bill, its provisions; and to make its language such as might be more readily translated. He had told the Members of the Select Committee that he had no predilection for the terms used; he had begged his Honorable friend, the Member for the North-Western Provinces, to whom his best thanks were due for the great care and attention which he had bestowed upon the measure; he had begged the Clerk Assistant of the Council, by whom, as by the Honorable Member for the North-Western Provinces, he (the Vice-President) would necessarily be guided on that subject, to suggest any alterations which would render the Bill more intelligible to Native Judges, and easy of translation into the Vernacular languages. The Select Committee had struck out what



seemed to be the most difficult Clauses, namely, those which prescribed rules for the calculation of the periods of adverse possession in different cases; and had substituted in the 7th Section what seemed to them to be a sufficiently simple definition of "adverse possession;" and a general rule prescribing the time from which it should be deemed to have commenced. They had made other alterations, but after going through the Bill over and over again, they felt that they could not make the Bill other than it now was, if they wished to effect its objects and retain the substance of its provisions. Now others might be more fortunate; and he could only say that he, and he believed the other Members of the Select Committee, would be most ready to consider any amendments that might be moved in Committee with the object of carrying the process of simplification farther. But the course taken by his Honorable friend, if successful, would throw out the Bill altogether. And he might observe that some of them who had objected to its language as it first stood, had expressed a desire that its substance should become law. His Honorable friend had indeed said that he did not mean to throw out the Bill; that if he successfully resisted the motion to go into Committee, he would move that the Bill should be referred to the Select Committee, with a general direction to simplify it. Now he (the Vice-President) must beg to repudiate that indulgence. In the first place, he did not much like to take back his Bill as a school-boy receives a torn exercise from the school-master with directions to write another. His Honorable friend, who, since he had sat in the Council, had been more apt to take others to task for the quality of their work than to submit his own to criticism, might like the part of the school-master. He (the Vice-President) did not particularly affect that of the school-boy. But even if the sincere regard and esteem which he had for his Honorable friend induced him to waive this objection, he did not see how he could usefully undertake the task. His further stay in this country would be very short, and his time was fully occupied. Moreover, he and the Select Committee had already done their best, and, in the opinion of his Honorable friend, they had

failed. What reason had they to suppose that, on a second attempt, they would be more successful with him, and those who thought with him. This process of sending back might be repeated over and over again. If the Council determined not to go into Committee, but to send the Bill back to a Select Committee, the better course was to appoint a new Committee, of which the Honorable Member himself might form part. He (the Vice-President) could promise to consider the alterations which that Committee might make in no captious spirit, but with a sincere desire to adopt them if they were improvements. But he feared that his Honorable friend, when he really addressed himself to the task of simplification, would find it to be not a very easy one; that he would run considerable risk of sacrificing substance to simplicity, and of finding himself in the position of Jack in the *Tale of the Tub*, who, in his zeal to strip his coat of its unhallowed embroidery, tore out so much of the cloth that the garment no longer answered the purpose for which it was designed.

Mr. HARRINGTON said, the Honorable and learned Vice-President having alluded in the remarks which had just been made by him in reply to the motion of the Honorable Member of Council opposite, to the part which he (Mr. Harington) had taken in the revision of the present Bill, he wished at this stage of the debate to say a few words on the subject. The objection which had been taken by the Honorable Member of Council to the phraseology of the Bill, as noticed by him, was not now advanced for the first time as a ground of complaint against this most important measure, for such he was sure all would allow it to be, and he could not but think that, whatever might be the defects of the Bill, and whether those defects were phraseological or otherwise, the Honorable Member of Council would admit that many of its provisions were an immense improvement upon the Law of Limitation as it now stood.

When a Bill for modifying the existing Statute of Limitation was first published for general information, now upwards of fifteen years ago, he (Mr. Harington) took exception to the language in which it was framed, and being one of the Judges of the Sudder Court

at Agra at the time the present Bill was referred for the consideration and opinion of that Court, he took a prominent part in drawing up the Court's reply. In that communication the Court remarked:—

“His Honor will also observe that many of the Zillah Judges have objected to the technical language of the Bill, which has rendered its translation a task of a most difficult nature, and, however well it may be executed, will, it is to be feared, be hardly intelligible to the great mass of the native community. On this point the Court can only repeat the objections taken by the Lieutenant-Governor of the North-Western Provinces to the technical form of the Draft Act published in 1842. In a country where the law is administered chiefly in the Native and not in the English language, of which the majority of the Judges entrusted with its administration are entirely ignorant, it is most desirable, and indeed absolutely necessary, that the Acts of the Legislature should be expressed in the simplest and plainest language. All technical phraseology, more particularly that of the English law, should be, as far as possible, avoided, so as to make the Act easy of translation into a language intelligible both to those who have to administer the law, and to the people whose interests it most materially affects. In this respect too, therefore, the Court consider the present draft to admit of great improvement.

Having committed himself to the opinion expressed in the paragraph which he had just read, at a time when he had little (if any) expectation of ever having the honor of a seat in this Council, it became his special duty, when that honor was conferred upon him, and when, moreover, he was nominated a Member of the Select Committee, appointed to consider and report upon the Bill, to give his best attention to the language of its several provisions, and to do what in him lay to divest the Bill, as far as possible, of the technical phraseology with which it was considered by some unnecessarily to abound, and which was regarded by many as constituting the chief, if not the sole, objection to the Bill. The desire to simplify the phraseology of the Bill, and to remove all objections on this score, was not confined to himself. It was most fully shared in by the other Members of the Select Committee, and by none more so than the Honorable and learned Mover of the Bill, to whom, for the great

care and labor bestowed by him in its preparation, he considered this Council and the public at large were under very great obligations. Having had the honor of being associated with the Honorable and learned Mover of the Bill in its revision, he could testify to the extreme anxiety and earnest desire evinced by him, to render the Bill as simple in its language, and as complete and perfect in its provisions, as its character would admit of, and should the Bill pass into law, as he hoped it would, notwithstanding the opposition which it had met with from the Honorable Member of Council opposite, he believed that it would confer a lasting benefit upon the people of this country, and that in that season of *otium cum dignitate* which shortly awaited the Honorable and learned Mover of the Bill, after a long official career, in which he had won for himself the esteem and respect of all classes by the able and impartial manner in which he had discharged the arduous and responsible duties of his high office, he would have every right to look back with the utmost satisfaction upon this part of his labors.

The Select Committee, as noticed by the Honorable and learned Vice President, had struck out the Section of the Bill which defined when possession was to be deemed adverse, and had substituted for it a Section which they hoped would be intelligible to all persons. They had understood that it was the language of this Section, as it was originally framed, which was principally objected to. Even with this alteration the Select Committee were prepared to admit that the phraseology of parts of the Bill was still in some respects technical, but they did not see how this could be avoided. To quote the words of the report presented by the Select Committee to the Council, it must be obvious to all acquainted with the subject that it was quite impossible to frame a law of this nature without having recourse to terms which were used only in law papers or legal proceedings, and were, therefore, more or less technical. In writing a treatise upon chemistry or any other science, terms of art, or peculiar phrases, were necessarily introduced, which were properly understood only by those who were acquainted with the particular

science treated of, and in framing a law of limitation, the use of such words as "prescription," "adverse possession," "mediate and immediate," could scarcely be avoided. If, however, the Honorable Member of Council would propose the substitution of other words more intelligible, and conveying precisely the same meaning, he (Mr. Harington) would gladly give the Honorable Member his support.

The Honorable Member of Council had stated that the Bill, as at present worded, could not be translated, but it had already been translated into the languages of this Presidency, and, he presumed, into the languages in use in the other two Presidencies. The Honorable Member had also referred to some objections made by the Government translator at Bombay, but those objections applied not to this Bill only, but to almost all the Acts passed by this Legislature. If those objections were valid, and the difficulty of translating the Acts of the Council was to be a ground for not passing them, it was useless to proceed further with the Penal Code, which would prove much more difficult of translation than the Bill now under discussion.

MR. PEACOCK said that he was quite aware that it was hardly possible to prepare such a Bill as that at present before the Council without the use of technical terms; but with all deference to the Law Commissioners and the Honorable and learned Chief Justice, he thought this Bill difficult to be understood, and he feared it would be scarcely intelligible to many of the Judges who would have to administer it, whilst, in his opinion, it might be considerably simplified. The first Clause of the Bill ran thus—

"Subject to the exceptions and with the qualifications hereinafter mentioned, whoever has been in possession, mediate or immediate, as proprietor of any moveable property for the space of six years without interruption, shall acquire a title by prescription both at law and in equity."

He thought that it would be better to omit the first three lines referring to exceptions and qualifications, and to state the rule only in this Section, leaving exceptions to be provided for by the following Sections.

*Mr. Harington*

He would also omit the proviso in which it appeared to him that there was considerable ambiguity.

It was true that, by the 7th Section, it was explained when and to what persons possession should be deemed to be adverse; and the term "mediate," when applied to possession, was interpreted by the 35th Section of the Bill. But taking these Sections together, and applying them to a simple case, like the one which had been put of the hire of a horse, it was not easy to construe them.

Suppose a man hired a horse for two years, and at the expiration of that time refused to give it up, and kept it for four years longer; if at the expiration of that time the horse-dealer brought an action against him, would he be barred, according to the first Section?

No doubt the answer would be, after due consideration of the expressions "mediate or immediate" and "possession as proprietor," with the explanation given in Section VII of what was adverse possession, and the period from which it was to be calculated—that he was not barred. He (Mr. Peacock) apprehended, however, that considerable difficulty would be felt by the class of Judges who would necessarily have to deal with such questions in arriving at this conclusion.

He would propose to omit Sections I and II of the Bill, and to enact first a simple law of limitation of suits; provision might then be made for the protection of a possessor who had held possession so long that all remedy by suit against him was barred. If such a person were forcibly dispossessed, he ought to have the same remedies as the real owner for the recovery of possession, if he brought his suit within two years; and the defendant in the action should not be allowed to set up the title of the real owner as a defence.

MR. GRANT said that the question before the Council was, whether to proceed with the Bill, or to throw it out altogether? No amendment to the motion for going into Committee had been moved, and as he understood the Standing Orders, the Bill would be thrown out if the Honorable Member's (Mr. Ricketts') opposition were successful.

He (Mr. Grant) hoped very much that the Council would not object to go

on with the Bill. His Honorable friend opposite (Mr. Ricketts) had objected to its phraseology, but he must say that, although he had not had the advantage of a legal education like the Honorable and learned framer of the Bill, and his learned friend on his right (Mr. Peacock), or, as was the case with the Honorable Member for the North-Western Provinces, of having sat as an Indian Judge, and although he could only bring a plain understanding to the consideration of the Bill, he believed that he had a clear perception of the meaning of the first Clause, the obscurity of which had been so much objected to. He had found no difficulty in arriving at the meaning of "adverse possession," and he did not think that any one performing the functions of a Judge, if fit for the Bench at all, would fail to understand it. How, he would ask, could a case of prescription be decided at all, if the meaning of "adverse possession" was not understood? The Bill had been well considered by some very able Members of the Council, and no one denied that it would be, as the Honorable Member for the North-Western Provinces had pronounced it, a very great improvement on the existing law. As such, he (Mr. Grant) for one was ready to accept it; but at the same time, if the Honorable Member opposite, or any other Honorable Member of the Council, would devote himself to the subject, and hereafter bring in a better Bill, he (Mr. Grant) should be happy to support it. He trusted that the Council would not perpetuate what he had always found to be the great evil in India, the stoppage of practicable reform, because the measures proposed were not perfect. He would instance the case of the Penal Code, which had been prepared many years ago; and all improvement in that important matter had been stopped, because the Code was not considered to be quite perfect. There was no such thing as perfection to be found in human nature, and because such was the case, was that to be considered a reason why nothing should be done? He (Mr. Grant) would say, improve this Bill now before the Council as much as possible, and pass it, and then if, subsequently, another and a better Bill was introduced, by all means let it supersede the present. It was

from what he had seen of the Penal Code that he had felt so strongly on this subject. He was almost afraid to say for how many years that important subject had been under consideration, [Mr. Harington—"a quarter of a century,"] yes, a quarter of a century, and during that long period, it did not seem to him to have advanced one single step nearer completion, because it was not considered perfect.

He would urge the Council to go into Committee on the Bill, and he felt that great obligations were due to the Honorable the Vice-President and the Select Committee for the care and attention which had been bestowed upon the measure.

THE VICE-PRESIDENT in reply begged to offer a few observations on the remarks made by the Honorable and learned Member (Mr. Peacock). With respect to his criticism on the first Clause, he could only repeat that the object was to give a title by prescription founded on a certain term of possession. That title might be asserted either by a person who had lost the actual possession and was claiming the thing as plaintiff; or by one who was defending his possession against a claim under another title. In either case the question would arise, whether there had been a six years' possession adverse to the title of the opposite party? In the case of the horse put by his Honorable and learned friend, there was not six years' adverse possession, because such possession was not adverse during the time in which the contract subsisted. This Bill, founded on that of the Law Commissioners, sought to establish the principle of a title by prescription, which might be asserted by persons either in or out of possession. He believed that the Honorable Member for Bengal intended to resist the introduction of this principle, and to oppose the first fifteen Sections. The effect of that would be, that, as at present, only the parties in possession could derive any benefit from that possession. As far as he could follow his Honorable and learned friend, he collected that the amendments which he intended to move would afford a sort of *via media*; that they would materially control the right of a defendant in an ejectment to set up the "*jus tertii*," and

give to a former possessor the right of recovering on mere proof of possession against a forcible or fraudulent disposition. His (the Vice-President's) present opinion was that such a measure would not be so complete or direct as that proposed by the Law Commissioners. He thought, however, that the Council ought to go into Committee: the Honorable Member for Bengal might then take the sense of the Council as to expunging the first fifteen Clauses of the Bill. If he were successful, the Honorable and learned Member might then move the substitution of his Clauses; or if the Honorable Member for Bengal were unsuccessful, those Clauses might be moved by way of amendment on the existing Clauses. But he (the Vice-President) was not sure that the better course would not be to postpone the consideration of the earlier Sections of the Bill until the amendments to be proposed on them were printed. There was always danger in adopting amendments in such a Bill as this without due deliberation. If this course were followed, the Council might confine itself today to the consideration of the Clauses of limitation.

MR. RICKETTS said, he had no wish to throw out the Bill altogether, and as it appeared that his opposition to the motion, that the Council should resolve itself into a Committee of the whole upon it, if successful, would have that effect, he would withdraw his opposition.

The Council then resolved itself into a Committee upon the Bill.

Section I provided for the acquirement of a title by prescription to moveable property.

MR. PEACOCK proposed the omission of this Section in order to substitute for it a Section for the limitation of suits to recover moveable property.

The VICE-PRESIDENT thought it would be better to postpone the first portion of the Bill, which related to title by prescription, and proceed with that which referred to limitations: if such a course was followed, the Committee would commence with Section XVI, which was the first relating to limitations.

MR. CURRIE said that amendments, such as those indicated by the Honor-

able and learned Member in his previous remarks, could not be satisfactorily dealt with, unless notice were given of them. He had himself intended, on the first Section being put from the Chair, to raise the general question, whether the principle of positive prescription, provided for in the first fifteen Sections of the Bill, should not be altogether abandoned?

The question was one upon which much doubt had all along existed. The Honorable Mover in his Statement of objects and reasons observed:—

“The Bill now introduced differs somewhat in the arrangement of its Clauses from the Draft Act of the Law Commissioners. One reason for this difference is, that I wished to keep all the Clauses which related to positive prescription distinct from those which related to the limitation of suits; so that, if the Council should ultimately determine not to admit the principle of positive prescription, there should be no difficulty in striking out that part of the Bill.”

He (Mr. Currie) was not prepared to maintain that the doctrine, that where the remedy has ceased the right also should be extinguished, might not, abstractedly considered, be correct; but there seemed to him to be considerable practical objections to its adoption.

Not the least of these was the extreme difficulty of providing for the application of the principle in language generally intelligible; almost the whole of the technicalities, to which objection had been taken both in the Council and elsewhere, occurred in the first part of the Bill; and were it got rid of, little ground of objection on that score would remain. He did not question that the language used in these Sections was as plain as the nature of the subject admitted, but it was still more or less obscure, and it could not be doubted that many of those who would have to administer the law would have great difficulty in understanding it, and then the question forced itself upon us—What are the practical inconveniences which are to be remedied by these fifteen difficult and, to the mass of readers, unintelligible Sections?

The testimony of those best informed on the subject seemed to show that no such inconveniences existed. The Calcutta and Madras Sudder Courts had

stated that the principle of the present law was sufficient, and they deprecated the introduction of this new principle of positive prescription.

Mr. Sconce said—

“Practically what is called our law of limitation operates in creating a prescriptive title in favor of the party whose seeming title has not been interrupted, and, by a civil suit questioned throughout the period of twelve years; and, practically, so far as my experience extends, the operation of this law, in itself, sufficiently guarantees that cessation of doubt and of litigation, which quiet, long, and honest possession is justly entitled to expect.”

There was another objection to the principle that was so strongly insisted on by Mr. Thomason, that it was opposed to the feelings and sense of justice of the people.

The Honorable and learned Member opposite had alluded to the class of cases brought forward by Mr. Thomason in support of his views, and he (Mr. Currie) would not now dwell further on this part of the argument.

For these reasons, then, to which he had only briefly alluded, namely, because the change was not called for by any existing event or acknowledged inconvenience, while, from the obscurity of the terms in which it was propounded, its nature and effect would be ill understood by the mass of the people, and even by many of those who would have to administer the law; because it was opposed to the feelings and sense of justice of the people; and he might add, because an injurious use might, and (as apprehended by Mr. Sconce) in all probability would be made of it, causing an increase of what Mr. Sconce justly called “unwholesome litigation;” for these reasons he (Mr. Currie) thought that it would be better to omit the 1st and following Sections, as far as the 16th Section. This would be a simpler and more practicable course than that adopted by his Honorable and learned friend.

The consideration of Sections I to XV inclusive was then postponed.

Section XVI provided for the limitation of suits.

Clauses 1 to 3 were passed as they stood.

Clauses 4 and 5 were passed after verbal amendments.

Clause 6 was passed as it stood.

Clause 7 provided for the limitation for three years of suits for wages, tavern bills, goods sold by retail, &c.

MR. GRANT moved the omission of the words “the wages of servants, artisans, or laborers,” and of the words “the amount of tavern bills, or bills for board and lodging, or lodging only,” and their insertion in Clause 2, to which they more properly belonged.

The motions were severally agreed to, and the Clauses, as amended, then passed.

Clause 8 provided as follows:—

“To suits upon all debts and obligations of record, and upon specialties in cases governed by English law; to suits for the recovery of any devise or legacy; to suits for the recovery of any interest in immoveable property to which no other provision of this Act applies—the period of twelve years from the time the cause of action arose.”

MR. CURRIE moved the omission of the word “upon” before “specialties.”

Agreed to.

MR. PEACOCK proposed to omit the first part of the Clause as far as the words “by English Law.” He remarked upon the distinction made by the English law between writings under seal and not under seal. It seemed to him that the mere affixing a seal to a document should not alter its legal operation.

THE CHAIRMAN would wish to retain the twelve years’ prescription for English bonds and obligations under seal. The Law Commissioners had yielded to the remonstrances of Sir Lawrence Peel and Sir Henry Seton on this point. They had also put certain Mofussil securities on the same footing. The Select Committee finding that opinions in the Mofussil were generally against the extended period of limitation in the latter case, had struck out that part of the Clause. But without going into the *rationale* of the effect given to a seal, it must be recollected that debts by specialty were now in the Supreme Courts subject only to a limitation of twenty years, that they were in general use, and were ordinarily executed in an attorney’s office, and with that degree of solemnity which made the preservation of the evidence concerning them more easy. He should not like to make

so sudden and violent an alteration in the law, as would be involved in putting such obligations on the same footing as simple contracts.

The Committee then divided on the motion.

*Ayes.* 3  
Mr. Forbes.  
Mr. Peacock.  
The Chairman.

*Noes.* 4  
Mr. Harington.  
Mr. Currie.  
Mr. Ricketts.  
Mr. Grant.

So the motion was negatived.

MR. GRANT moved to transpose the words "in cases governed by English law," so that they should follow immediately after the word "suits" in the first line of the Section.

Agreed to.

MR. PEACOCK moved the omission of the words "devise or" in the sixth line, and the words "to suits for the recovery of any interest in immoveable property to which no other provision of this Act applies" in the latter part of the Section.

The motions were severally carried, and the Clause, as amended, was passed.

Clause 9 was passed as it stood.

The consideration of Clauses 10 and 11 was postponed.

Clause 12 was passed as it stood.

Sections XVII to XXI were passed as they stood.

The consideration of Sections XXII to XXVI was postponed.

Section XXVII was passed after a verbal amendment.

The consideration of Section XXVIII was postponed.

Sections XXIX and XXX were passed as they stood.

Section XXXI was passed after the substitution of two for three years as the period of limitation in respect to suits instituted after the passing of this Act.

Section XXXII was passed after a verbal amendment, and the substitution of three for twelve years as the time for enforcing execution of decrees &c. of a Civil Court.

MR. PEACOCK moved the introduction of the following new Section after Section XXXII :—

"Nothing in the preceding Section shall apply to any judgment, decree, or order in force at the time of the passing of this Act,

*The Chairman*

but process of execution may be issued either within the time now limited by law for issuing process of execution thereon, or within three years next after the passing of this Act, whichever shall first expire."

Agreed to.

Section XXXIII was passed after the substitution of one year for two years, as the time for enforcing execution of a summary award of any Civil Court or revenue authority.

MR. PEACOCK moved the introduction of the following new Section after Section XXXIII :—

"Nothing in the preceding Section shall apply to any summary decision or award in force at the time of the passing of this Act, but process of execution may be issued either within the time now limited by law for issuing process of execution thereon, or within two years next after the passing of this Act, whichever shall first expire."

Agreed to.

The further consideration of the Bill was postponed, and the Council resumed its sitting.

#### BREACHES OF CONTRACT.

MR. FORBES moved that a communication received by him from the Madras Government be laid upon the table and referred to the Select Committee on the Bill "to provide for the punishment of Breaches of Contract by Artificers, Workmen, and Laborers in certain cases."

Agreed to.

#### PRESCRIPTION AND LIMITATION.

THE VICE-PRESIDENT moved that the petition of the landholders of Bengal, this day presented to the Council, concerning the Bill "to provide for the acquirement and extinction of rights by Prescription and for the Limitation of Suits," be printed.

Agreed to.

#### THE INDIAN PENAL CODE.

MR. LEGEYT moved that a communication, received by him from the Bombay Government, on the subject of rendering the offer of a bribe to Public Officers generally an offence, be

laid upon the table and referred to the Select Committee on the "Indian Penal Code."

Agreed to.

CIVIL PROCEDURE.

MR. PEACOCK gave notice that he would this-day three weeks move for the re-committal of the Bill "for simplifying the Procedure of the Courts of Civil Judicature not established by Royal Charter."

The Council adjourned.

*Saturday, January 29, 1859.*

PRESENT :

The Hon'ble the Chief Justice, *Vice-President*,  
in the Chair.

Hon. Lieut.-Gen. Sir	E. Currie, Esq.,
J. Outrain,	H. B. Harington, Esq.,
Hon. H. Ricketts,	H. Forbes, Esq.,
Hon. B. Peacock,	and
P. W. LeGeyt, Esq.,	Hon. Sir C. Jackson.

NEW MEMBER.

SIR CHARLES JACKSON was duly sworn, and took his seat as a Legislative Councillor of the Council of India.

MERCHANT SEAMEN.

THE VICE-PRESIDENT read a message informing the Legislative Council that the Governor-General had assented to the Bill "for the amendment of the law relating to Merchant Seamen."

CRIMINAL PROCEDURE.

THE CLERK reported to the Council that he had received, from the Home Department, papers relative to the rules and practice in force in the

Punjab regarding the preparation of the Thannah records in Criminal cases.

MR. PEACOCK moved that the communication be referred to the Select Committees on the Criminal Procedure Bills.

Agreed to.

PRESCRIPTION AND LIMITATION.

THE VICE-PRESIDENT asked the Council to defer the further consideration of the Bill "to provide for the acquirement and extinction of rights by Prescription and for the Limitation of Suits" for a fortnight, as he had not had time and opportunity to consider the proposed amendments, which had only reached him the day before; and as his Honorable and learned friend Sir Charles Jackson and himself had both the Supreme Court and the Insolvent Court to attend to, he feared that he might not be able to attend the next meeting of the Council.

REMOVAL OF PRISONERS.

MR. CURRIE moved that the Council resolve itself into a Committee of the whole Council on the Bill "to make further provision for the removal of Prisoners;" and that the Committee be instructed to consider the Bill in the amended form in which the Select Committee had recommended it to be passed.

Agreed to.

The Bill was passed through Committee without amendment; and the Council having resumed its sitting, it was reported.

FRAUDULENT TRANSFERS AND  
SECRET TRUSTS.

MR. LEGEYT moved that the Bill "for the prevention of Fraudulent Transfers of property and of Secret Trusts" be referred to a Select Committee consisting of Mr. Harington, Mr. Forbes, Sir Charles Jackson, and the Mover.

Agreed to.

The Council adjourned.