

Saturday, January 8, 1859

**LEGISLATIVE COUNCIL
OF
INDIA**

VOL. 5

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PROCEEDINGS

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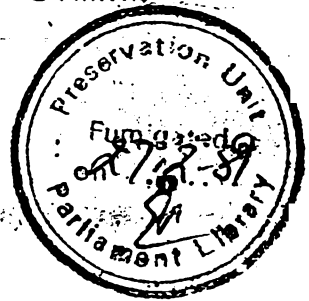
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ERRATA.

- Column 288, last line. For "*Hackery*" read "*Hackney*."
- " 807, line 13. For "*ccommission*" read "*communication*."
- " 828, line 25. For "*tend*" read "*lead*."
- " 851, line 13 from the bottom. For "*give*" read "*gave*."

PROCEEDINGS

OF THE

LEGISLATIVE COUNCIL OF INDIA.

Saturday, January 8, 1859.

PRESENT :

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

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

THE VICE-PRESIDENT read a message, informing the Legislative Council that the Governor-General had assented to the Bill "to amend Regulation X. 1829 of the Bengal Code (for the collection of Stamp Duties)."

CIVIL PROCEDURE.

THE CLERK reported to the Council that he had received a communication from the Home Department, forwarding for consideration, in connection with the Civil Procedure Code, an extract of a Despatch from the Secretary of State for India, regarding attachments on public Treasuries in execution of decrees passed against Collectors.

MR. PEACOCK moved that the above communication be printed.

Agreed to.

RECOVERY OF RENTS (BENGAL).

THE CLERK also reported that he had received from the Home Department an extract of a Despatch from the Court of Directors, together with a copy of a letter from the Bengal Government, respecting the proposed repeal of Section X Regulation XIX. 1793 of the

Bengal Code, which empowers Zemindars, without previous application to a Court of Judicature, and without notice to any Officer of Government, to dispossess Lakhirajdars from grants made after the 1st of December 1790.

MR. CURRIE said, there was a Section in the Bill "to amend the law relating to the recovery of Rent in the Presidency of Fort William in Bengal," in which it was proposed to amend the Section referred to; he therefore begged to move that the communication be referred to the Select Committee on that Bill.

Agreed to.

OATHS AND AFFIRMATIONS.

THE CLERK also reported that he had received a communication from the Secretary to the Chief Commissioner of the Punjab, regarding the Bill "concerning Oaths and Affirmations."

MR. FORBES moved that the above communication be printed.

Agreed to.

PRESCRIPTION AND LIMITATION.

MR. HARINGTON presented the Report of the Select Committee on the Bill "to provide for the acquirement and extinction of rights by Prescription, and for the Limitation of Suits."

FRAUDULENT TRANSFERS AND
SECRET TRUSTS.

MR. LEGEYT said that Sir Arthur Buller, whom all must regret not seeing in his usual place in the Council, which he had so long and ably filled, had placed in his hands a Bill "for the prevention of Fraudulent Transfers of Property and of Secret Trusts."

It was much to be regretted that the pressing duties of the Honorable and learned Member had prevented him from bringing the Bill before the Council himself, as it must necessarily lose in his (Mr. LeGeyt's) hands that weight which he would have given it on its introduction.

Sir Arthur had transmitted to him a Statement of the objects and reasons of the Bill, which he felt, to do it justice, must be read.

Sir Arthur observed as follows :—

“I fear that many persons will think that the title of this Bill promises a rather Quixotic enterprise : and I am free to admit that the soil of this country is so charged with fraud, that, even if we succeed in preventing its escape at one place, the chances are great that it will find its way out at some other.

“I still however dare to hope that some good may be done by the provisions which I propose to enact, and that, though they may not have the success of a Statute of Frauds in England, they will even here render the perpetration of frauds more troublesome, more dangerous, and therefore, possibly, more rare.

“The Council is aware that, except in the Presidency Towns, and even there as regards Hindoos and Mahomedans, real property may be alienated, and all sorts of property be willed away by word of mouth ; that a verbal authority to a wife to adopt a son is sufficient ; and that no writing is required to evidence any contract.

“The result of this system naturally is, that persons are daily sworn to have given or willed away property when they never did so, to have authorized adoptions which they never did authorize, and to have entered into contracts of which in truth they never dreamed.

“The remedy I propose is the simple and well known one of requiring all these transactions to be evidenced by writing.

“The first Section provides that no transfer of any interest in immoveable property shall be valid, and the second that no agreement for any such transfer shall be enforced, unless they shall be in writing. I have purposely left these provisions quite general, but I dare say that, if the Bill has the fortune to find its way to a Committee, exceptions may with propriety be there introduced. I confess that I am myself not without my fears that the necessity of a resort to writing in all the petty transactions of the poor, for instance, in their short leases or in their arrangements with Mahajuns, may be more likely to facilitate than to defeat fraud. The poor lessee or borrower cannot read the writing by which he is to be bound, whereas the opposite party can ; and though of course there will always be somebody to swear that the writing was duly explained to the poor man, I fear that in many instances he will be made to sign something very different from what he intended, and that, having done so, it will be extremely difficult

for him to do away with the effect of his own signature.

“I am in hopes that before long the genuineness of such transfers will be further assured by that most effectual of all securities—immediate, compulsory, and notorious registration, a Bill for which is, I believe, likely very soon to make its appearance under the auspices of the Honorable Member for Madras.

“Then follow provisions requiring that no testamentary dispositions of any kind, and no revocations or alterations of such instruments, and no authority to adopt, shall be valid unless reduced to writing and duly signed and attested.

“The 9th Clause, which is taken almost verbatim from the Statute of Frauds, provides that no contract for the sale of immoveable property of the value of one hundred Rupees or upwards, shall be enforced unless evidenced by some writing or memorandum with the usual exceptions.

“The remaining and the more novel provisions of this Bill are directed to the discouragement of the mischievous practice of Benamie transfers of land. To gentlemen so conversant as the Members of this Council with the nature and the evils of this system, there is no necessity for any preliminary explanation. We all know that there is hardly a Native family of note, which has not at one time or another suffered severely from the treachery to which Benamieism opens the door ; and that there is no counting the number of unlucky creditors who have to thank it for having been for years kept out of their just rights or altogether defrauded ; and perhaps the most mischievous result of the practice is, that, even where it is originally resorted to in the purest innocence, it is almost as likely to lead to injustice as where it is all along employed for the purposes of deliberate fraud. It is with this former class of cases that we have the greatest difficulty to deal. No one would hesitate to deter by severe penalties fraudulent attempts to conceal property from creditors ; and no one would wish to assist a land-holder in evading the legitimate responsibilities attached to the ownership of land. If those responsibilities are unfairly onerous at present, let them be removed or modified. If they might as well be performed by substitutes, let the law say so. But whatever sound policy requires, let us declare clearly and insist upon ; for the reproach to us is equally great if we permit resort to Benamieism either as a protection against an oppressive law or as a means of evading a just one. But it is a natural enough question to ask, why may not a father buy property in the name of his son, intending that son eventually to succeed to it after his death, and trusting to him in the mean time to allow him the enjoyment of the rents ? Or, what more harmless than that a Native Gentleman of exalted rank who fears the trouble, or, as he may perhaps consider it, the disgrace of personally enforcing his rights at law, or that a numerous joint family for convenience sake should make their purchases in the name of a trusted manager ? Or again, why may not a purchase, intended for the benefit of

many brothers, be made in the name of the eldest or of the one who was born under the luckiest star? Assuredly no one would wish wantonly to interfere with the freest exercise of rights such as these. But just see to what mischiefs their exercise, although perfectly innocent in its inception, so often leads. The son and the manager, and the brother of the lucky star, although they never dreamed of fraud at the time they accepted the transfer in their name, as years roll and necessities press hard, or sudden temptations allure, are unable to resist the opportunities of fraud which these Benamee arrangements afford, and boldly assert that the purchase was clothed with no trust, but was made *bonâ fide* with their own money and for their own use. Surrounding circumstances naturally enough fit into the ostensible transaction, and its true character becomes most difficult of proof.

“The too common result, therefore, is the success of the fraud and the ruin of many simple people; and I really think I am very slightly exaggerating when I say that I hardly recollect any great Native equity suit in our Supreme Court in which Benamee transactions have not played a conspicuous part, and been taken advantage of for some fraudulent purpose.

“Well then! in this state of things we must weigh the mischief of tolerating such a system against the hardship of prohibiting it; for I see no middle course by which we can permit its harmless use, and, at the same time, secure ourselves against its abuse; and I confess that in my belief the aggregated hardships of a hundred cases of interference with mere convenience or with fancies, will not be equal to the hardships of a single case of successful fraud. Accordingly this Bill proposes to declare the Benamee system a *malum prohibitum*, and the mode of prohibition by which it hopes to discourage it is by repudiating altogether all secret trusts, and leaving the Benamee dealer entirely at the mercy of the person whose name he chooses to use.

“In this view the third Clause proposes to enact—

“Whenever any interest in immoveable property is transferred to any person by any written instrument, and no declaration of trust in relation thereto shall be expressed in the body of the same instrument, or in some memorandum endorsed or written thereon at the time of the execution thereof, such person, and every other person claiming under him, shall be entitled to hold and absolutely dispose of such interest for his own use and benefit free from all trust—as against the party transferring the same—and against every person (capable of entering into a lawful contract) who shall claim that the property, though transferred to the name of another, was by agreement purchased in reality for his use and benefit—and as against every person claiming under such party or person: saving nevertheless to every person who shall prove that he was at the time of the transfer and continues to be a *bonâ fide* creditor of the transferrer or of any person for whose use and benefit the transfer was really intended, every

such right and remedy whether by suit or otherwise as he would have had if this Act had not been passed: and saving also all such right, title, and interest in the property transferred of any other person other than the transferrer or person for whose use and benefit the transfer was really intended or persons claiming under them as he would have had if this Act had not been passed.’

“I cannot help thinking that, when it becomes generally known that this forfeiture, as it were, may at any time be the consequence of a Benamee transaction, and that, however great the baseness of the transferee, no wilful actor in the transaction will have any remedy against him—I cannot help thinking, I say, that the risk will be considered too great for many to incur it, merely for the sake of indulging their confidence in managers or their partiality for lucky stars.

“The forfeiture, however, it is to be borne in mind, in no way affects the rights of others. The offending party himself is liable to lose for ever the right he transfers or causes to be transferred to another; but all rights which the law for the time being gives to creditors over the property transferred, or to other persons not claiming under the offender, are expressly saved.

“But I think we should not stop here, and leave the transferee in the inviting position of having every thing to gain and nothing to lose by the use of his name.

“I fear that the temptation of so easy an acquisition of property would be so great to managers and influential relations and friends, that they would devise every stratagem to induce their simple protégés to resort to Benamee transactions, and, by contriving to keep up the appearance of being equally ignorant and unconcerned themselves, evade the chance of having their fraud brought home.

“The fourth Section of this Bill has, therefore, been introduced to show the transferee that his participation in the transaction is not to be pure gain, for it provides that he shall be liable to a fine, which may amount to one-half more than the value of the interest transferred.

“I feel somewhat confident that this double penalty, by which the party originating the Benamee manœuvre forfeits all right to recover again what he allows ostensibly to pass to others, and by which the transferee loses so much more than he gains, will be sufficient to deter parties from engaging with their eyes open in any such transactions. And where the transaction is fraudulent in its inception, I apprehend that few persons will object to the additional penalty which is provided by the fifth Section, namely, imprisonment with or without hard labor, which may extend to two years. This Section I have taken from the proposed new Penal Code, and it may possibly be that the Council may hereafter think proper to omit it in this Bill, and to leave the offence to be provided for in the Code. My object will be sufficiently gained if it becomes notorious by the publication of this Bill and of the discussions upon it that such a penalty is in store.

"These, then, are the provisions by which this Bill, relying always, be it borne in mind, upon the contemporaneous assistance of a Registration Act, attempts the prevention of fraudulent transfers and of secret trusts.

"Short and simple as they appear to be, I can assure the Council that I have turned and twisted them into an infinite variety of shapes before bringing them to that in which I now venture to present them; and the experience of the many oversights which I have made in the course of my labors does not much encourage the hope that many do not still remain. I have received many valuable suggestions from many well-informed persons— from none more so than from the Clerk of this Council, for whose assistance on this, as on many a previous occasion, I am much indebted, and readily avail myself of this opportunity to tender my thanks.

"I have no doubt that it will be made apparent hereafter that the Bill goes too far in this particular and not far enough in that, and that it will be greatly improved in its passage through the Council: but I confidently hope that there will be no difference of opinion as to the wholesomeness of the principle of the Bill, and that it will at all events be admitted to a second reading."

He (Mr. LeGeyt) having performed his task, begged leave to move the first reading of the Bill.

The Bill was read a first time.

CANTONMENT JOINT MAGISTRATES.

MR. HARRINGTON moved that the Bill "for conferring Civil Jurisdiction in certain cases upon Cantonment Joint Magistrates, and for constituting those Officers Registers of Deeds" be read a third time and passed.

The motion was carried, and the Bill read a third time.

MERCHANT SEAMEN.

On the Order of the Day being read for the third reading of the Bill "for the amendment of the law relating to Merchant Seamen"—

MR. CURRIE said that, before moving the third reading, he would propose that the Bill be recommitted, to enable him to make an amendment which he had proposed when the Bill passed through Committee, but which had then been postponed.

Agreed to.

MR. CURRIE said, the Section which he proposed to amend was No.

Mr. LeGeyt.

XXXI, the third Clause of which provided as follows:—

"The Master of every Foreign-going ship shall, before going to sea, produce the certificate so to be given to him by the Shipping Master as aforesaid to the Collector of Customs, and no Officer of Customs shall clear any such ship outwards without such production."

The alteration which he had proposed, in accordance with a suggestion of the Governor of the Straits, was that, where there was no Collector of Customs, the Officer authorized to grant Port-clearance should be substituted. Some Honorable Members expressed a doubt whether Port-clearances were given in the Ports of the Straits Settlement, and he had undertaken to make enquiries. He had, consequently, written to the Superintendent of Marine, from whom he had received a reply to the effect that all vessels which discharged or took in cargo at Singapore received a Port-clearance signed by the Master Attendant.

He (Mr. Currie) would therefore move that the word "and" in the 33rd line be omitted, and that the following words be substituted for it—

"or if there be no Collector of Customs, to the Officer whose duty it is to grant a Port-clearance."

The remainder of the Clause would then stand as a separate sentence.

Agreed to.

MR. CURRIE moved that the words "or other Officer" be added in lines 34 and 48.

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

A like amendment was made in the 35th line of Section XXXII.

The Council having resumed its sitting, the Bill was reported.

MR. CURRIE moved that the Bill be read a third time and passed.

The motion was carried, and the Bill read a third time.

CANTONMENT JOINT MAGISTRATES.

MR. HARRINGTON moved that Mr. Ricketts be requested to take the Bill "for conferring Civil Jurisdiction in certain cases upon Cantonment Joint Ma-

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.