

Wednesday, September 5, 1866

**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 Wednesday, the 5th September 1866.

P R E S E N T :

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

His Excellency the Commander-in-Chief.

The Hon'ble H. S. Maine.

The Hon'ble W. Grey

The Hon'ble G. N. Taylor.

The Right Hon'ble W. N. Massey.

The Hon'ble Colonel H. M. Durand, C. B.

The Hon'ble W. Muir.

The Hon'ble H. P. A. B. Riddell.

MORTGAGEES AND TRUSTEES' PROPERTY BILL.

The Hon'ble MR. MAINE introduced the Bill to consolidate and amend the Law relating to the conveyance and transfer of property in British India vested in Mortgagees and Trustees, in cases to which English law is applicable, and moved that it be referred to a Select Committee. He said that this Bill, as well as the other which he proposed to introduce to-day, had been prepared some time ago. But as there had been so much other work before the Council, and as on enquiry he had been informed to his surprise that the Bills were not urgently wanted, they had been allowed to stand over. Lately, however, he had received letters on the subject from certain Judges of the High Courts at Calcutta and Agra; and from these it appeared that the two Bills were much needed, and that suitors in some instances were suffering hardship in consequence of the non-existence as law of the provisions which they contained. The learned Judges of the High Courts at Madras and Bombay had also expressed a favourable opinion of the Bills, and a desire that they should be enacted.

The object of the first Bill was to introduce into the English Law of Trusts, as applied in India, most of the improvements which had been introduced into the corresponding province of Law in England. The Bill consolidated a variety of provisions taken from English Acts, and applied them to the circumstances of India.

As Europeans, holding property in India under English Law, were displaying an increasing tendency to hold it as a permanent investment, certain technical difficulties occasioned by the English Law of Trust and Mortgage, were likely to occur with corresponding frequency. These difficulties the Bill was intended either to mitigate, or to remove. The Statutes upon which it was based had been found of the utmost practical utility in England.

The Bill was of a technical nature, but its general object might be thus stated. Trusts were usually created under English Law for two reasons,—one, to enable certain persons to enjoy the income of property without having control over the capital; the other, to give to the beneficial interest in property greater plasticity, that was, a greater power of moulding itself to the circumstances of a family or class of persons, than the rules of law admitted of in property which was not subject to a Trust. The first class of Trusts was usually (though not universally) created in personal property, and for the benefit of married women or minors; the second was for the purpose of carrying out the provisions of wills or marriage-settlements, and was commonly (though not always) confined to real property. In both classes of Trusts, the fiduciary interest (that of the Trustee) was separated from the beneficial interest, and the two frequently devolved in different lines of descent. Hence a Trustee might sometimes be a lunatic, or a minor, or a married woman, and would therefore be incapable of acting; or he might have ceased to be within the jurisdiction of the only Court competent to enforce the Trust; or he might be undiscoverable; or he might wilfully refuse to discharge his duties. In all such cases, whether the Trustee were a sole Trustee or one of a number, the greatest possible inconvenience would probably result to the persons beneficially interested. The Bill took in almost all conceivable contingencies in which a Trustee could not or would not fulfil the duties of a Trust, and enabled the High Court to act, or to provide others with the means of acting, in his absence.

Under the English Law of Mortgage, a somewhat similar description of inconvenience occasionally arose. The representative of a Mortgagee might have a merely formal interest in the property mortgaged, and yet it might be impossible to deal with it effectually without his concurrence. The Bill provided the means of obtaining or dispensing with this concurrence in cases where the Mortgagee was unable or unwilling to give it.

A former Trustee Act, 11 Geo. IV. and 1 Will. IV., cap. 60, was in force in this country, having been extended to India by Act XXIV of 1841, and to the Straits' Settlement by Act XIV of 1852. As the English Statute had been

practically superseded in England by 13 & 14 Vic., cap. 60, and by 15 & 16 Vic., cap. 55, upon which the present Bill was mainly founded, it was proposed to repeal Section 3 of Act XXIV of 1841 (which was the part of that Act having application to Trustees), and so much of Act XIV of 1852 as extended that Section to the Straits. Permission was, however, given to continue proceedings under the old law if the persons interested thought fit to do so.

Some difficulty had been experienced in framing Section 3, which described the persons entitled to have the benefit of the present Bill. It was necessary to describe Europeans in India by reference to their relation to the jurisdiction of the High Court.

MR. MAINE concluded by observing that, as the Bill was almost wholly of a technical nature, as the learned Judges of the High Courts were anxious for it to become law, and as it had been for the most part transcribed from English Statutes, he saw no reason for reserving it for consideration at Calcutta.

The Motion was put and agreed to.

TRUSTEES AND MORTGAGEES' POWERS BILL.

The Hon'ble MR. MAINE then introduced the Bill to give to Trustees, Mortgagees and others, in cases to which English Law is applicable, certain powers now commonly inserted in Settlements, Mortgages, and Wills, and to amend the Law of Property and relieve Trustees, and moved that it be referred to a Select Committee. He said that much the same considerations applied to this Bill as to that which had just been introduced and referred. This Bill was intended to introduce into the English Law of Property, as applied in India, a number of improvements which had from time to time been effected in that Law by the Statutes known as Lord St. Leonards' Acts. The exact limits of the English Law of Property in India did not seem to have ever been accurately ascertained. But there could be no doubt that, through the purchase of land under the waste-land rules, and through its acquisition by Englishmen in the Mofussil on tenures analogous to fee-simple, those limits must be constantly enlarging themselves. If in cases to which English Law was applicable, the conveyances by which rights were transferred were briefly or hastily framed, some of the provisions of this Bill would probably be found of special utility.

There might not appear to be much obvious connection between many of the subjects affected by the Bill, but this miscellaneous character belonged also to the English Statutes on which the Bill was founded, which were not directed to the general reconstruction of any one department of Law. The object of the learned

author of these Statutes seemed rather to have been to apply remedies to various defects which the practical working of the English Law of Property had disclosed, and to mitigate inconveniences which experience had shewn to be perpetually occasioned by errors and omissions in legal instruments. Lord St. Leonards appeared to have had in his mind a typically perfect deed, and to have taken for granted that such omissions must have been unintentional.

Much of the Bill referred to improvements of a wholly technical character ; but attention must be drawn to one or two points, on which the changes proposed to be effected were of considerable importance.

By Section 6, which corresponded with Section 11 of the Statute 23 & 24 Vic., cap. 145, every Mortgage Deed, unless it contained an express declaration to the contrary, would be liable to be construed as if it conferred on the mortgagee a power to sell the mortgaged property, if the interest secured were in arrear for six months ; or the mortgagee might, if he preferred it, in the like event appoint or obtain the appointment of a Receiver, who would collect the rents and profits of the property and apply them to the payment of overdue interest, paying over the balance to the mortgagor. The insertion in Mortgage Deeds of these powers (of sale and of appointing a Receiver) had become so nearly universal in England, that their omission in any one deed might fairly be presumed to be the result of accident or neglect. Whether the same presumption arose in India was a point open to consideration, and one which would doubtless receive the attention of the Council. His experience of the way in which deeds were prepared in India was, he regretted to say, in favour of the existence of the presumption referred to. As regarded the power of sale, he might observe that ever since the passing of the 15th & 16th Vic., cap. 86, the Court of Chancery had been enabled to direct a sale of mortgaged property instead of a foreclosure of the equity of redemption, and he considered the remedy by a sale, after which the proceeds would be divided among all persons (including the mortgagor in case of a surplus) equitably entitled thereto, as far more just and as likely to cause far less hardship than a foreclosure.

Section 33 embodied a provision which worked most beneficially in England. It enabled Trustees to apply the income of Trust property to the maintenance and education of infants who might be entitled to it, without the necessity of applying to any Court, and even though no power so to apply it had been inserted in the Trust-deed.

The succeeding Sections down to Section 37 further enlarged the powers of acting Trustees, and relieved them from many risks to which they were at present exposed.

The provision in Section 42 had to a very great extent superseded, in England, the necessity of instituting suits in the Court of Chancery for the administration of deceased persons' estates. It enacted in effect that an Executor or Administrator should be at liberty to give, by advertisement in the newspapers or otherwise, the same public notices which, in the case of an administration suit, the High Court would direct to be given. Having done this, and having satisfied the claims which had been preferred within a certain interval after the notices, he would be discharged from further liability. Section 320 of the Indian Succession Act, 1865, was, however, almost identical with this provision; and the Committee to which the Bill would be referred might perhaps come to the conclusion that the Section now under consideration, which was framed (it must be recollected) before the Indian Succession Act passed, might now be dispensed with.

It had been found useful in England to permit Trustees, Executors, and Administrators to apply in a summary way for the advice and guidance of the Court of Chancery. A power to make applications of this nature to the High Court was given by Section 43 of this Bill.

The English Statutes which, in this Bill, were consolidated and adapted to this country, were 22 & 23 Vic., cap. 35 (An Act to further amend the Law of Property and to relieve Trustees), and 23 & 24 Vic., cap. 145, (An Act to give to Trustees, Mortgagees and others, certain powers now commonly inserted in Settlements, Mortgages and Wills). Many of their provisions had been wholly omitted as inapplicable to India.

The Motion was put and agreed to.

The following Select Committees were named:—

On the Bill to consolidate and amend the Law relating to the conveyance and transfer of property in British India vested in Mortgagees and Trustees, in cases to which English Law is applicable—the Right Hon'ble Mr. Massey and the Hon'ble Messrs. Muir, Riddell and the mover.

On the Bill to give to Trustees, Mortgagees and others, in cases to which English Law is applicable, certain powers now commonly inserted in Settlements, Mortgages and Wills, and to amend the Law of Property, and relieve Trustees—the Right Hon'ble Mr. Massey, and the Hon'ble Messrs. Muir, Riddell and the mover.

The Council then adjourned.

SIMLA,
The 5th September 1866. }

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