ABSTRACT OF THE PROCEEDINGS

COUNCIL OF THE GOVERNOR GENERAL OF INDIA

LAWS AND REGULATIONS.

VOL 14

Jan to Dec

1875

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ABSTRACT OF THE PROCEEDINGS

OF THE

Council of the Governor General of India,

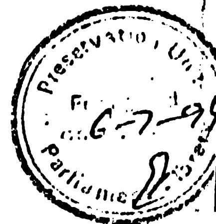
ASSEMBLED FOR THE PURPOSE OF MAKING

LAWS AND REGULATIONS.

1875.

WITH INDEX.

VOL. XIV.



Published by the Authority of the Governor General.

Gazettes & Debates Section
Parliament Library Building
Room No. FB-025
Block 'B'

CALCUTTA:
OFFICE OF THE SUPERINTENDENT OF GOVERNMENT PRINTING.
1876.

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

The Council met at Government House on Tuesday, the 7th December 1875.

PRESENT:

Major-General the Hon'ble Sir H. W. Norman, K. C. B., *Senior Member of the Council, presiding.*

His Honour the Lieutenant-Governor of Bengal.

The Hon'ble A. Hobhouse, Q. C.

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

The Hon'ble Sir W. Muir, K. C. S. I.

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

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

The Hon'ble J. R. Bullen Smith.

The Hon'ble John Inglis, C. S. I.

The Hon'ble Sir Douglas Forsyth, C. B., K. C. S. I.

The Hon'ble Ashley Eden, C. S. I.

The Hon'ble T. C. Hope.

The Hon'ble D. Cowie.

The Hon'ble Rájá Narendra Krishna, Bahádur.

SPECIFIC RELIEF BILL.

The Hon'ble MR. HOBHOUSE introduced the Bill to define and amend the law relating to certain kinds of Specific Relief, and moved that it be referred to a Select Committee with instructions to report in three months.

When he asked for leave to introduce the Bill, he had explained its general objects, and he now had to show the mode in which the Bill carried those objects into effect. The Council knew that the Bill was designed to occupy a middle place between the Civil Procedure Code on the one hand, and the Indian Contract Act on the other hand. All rules relating to the validity or invalidity of contracts, and the legal relations of parties to contracts, were dealt with by the Contract Act; and the technical processes by which parties were to obtain their remedies were provided for in the Civil Procedure Code. What it was proposed to do in the Bill before the Council was to point out the nature of the remedy to be obtained. Therefore, this Bill was not intended to cover any

part of the ground which was already covered by the Contract Act, any more than it covered the ground already covered by the Civil Procedure Code; and if it did trespass on either ground it was by mistake, which ought to be corrected when the Bill was before the Select Committee.

Now MR. HOBHOUSE had mentioned on the last occasion, that the main subjects of the Bill were the remedies by way of specific performance of contracts, and by way of injunction for the prevention of wrong. Any one who looked at the Bill would see that the bulk of it was taken up with these two subjects. There were, however, one or two other subjects of considerably narrower range, with which the Bill attempted to deal, and to which he would first call attention very briefly.

Chapter III dealt with the subject of the rectification of instruments. That, no doubt, was in itself a kind of specific performance, because if there was no contract between parties, there would be nothing to rectify. But it was specific performance of a very peculiar nature, because it involved the alteration of that which the parties to the contract had already settled in a formal way. Therefore it was a subject which needed more strict rules than the other kinds of specific performance.

Chapter IV dealt with the rescission of contracts, a proceeding exactly the opposite of the specific performance of contracts.

Chapter V dealt with the cancellation of instruments, occasions for which arose when one of the parties had got possession of a document, on which he might not indeed be able to found a legal claim in a Court of justice, but which might give him such *primâ facie* right against the other as would expose him to vexatious claims and litigation. In these cases it was just that the aggrieved party should apply to a Court of justice in order to have the instrument destroyed.

Chapter VI dealt with the subject of declaratory decrees, and that was a matter of jurisdiction of some delicacy, as to which some direction should be given. MR. HOBHOUSE had previously mentioned that the subject was dealt with in the Civil Procedure Code. That Code embodied the English law on the subject, and merely said that a decree should not be invalid, on the ground only that it was a declaratory decree, but it did not show in what cases a declaratory decree should be made.

Chapter VII dealt with matters which seldom arose, but when they did arise, they were usually of great importance. These were now the subject of

the writ of *mandamus*. It was called a chapter for the enforcement of public duties; and the rules here laid down were intended to take the place of the procedure for a *mandamus*, to supply a procedure more simple than the rather intricate and technical procedure which was now in force.

In all of the various matters embraced by the Bill, it was intended almost entirely to follow the present rules of English law; and by English law, he meant that portion of English law which had been imported into India, and which he might also call Indian law. There were some material variances between the law as administered here, and as administered in England, a discrepancy mainly owing to the different conditions which existed in India. The principal one of these differences MR. HOBHOUSE had already mentioned to the Council, namely, that we had not the double jurisdiction which existed in England. We had not to commit our law to a judicial system worked upon the principle of having one set of Courts to do injustice in order that another set might interfere to do justice by way of injunction or in some other way. Owing to that circumstance the process of choosing and seeking a remedy was very much more simple in this country than in England. If a contract was not performed, a plaintiff in India might apply to one tribunal and ask for the whole of the remedies to which he was entitled, instead of being obliged to go backwards and forwards to the two sides of Westminster Hall, perhaps after all obtaining no justice in either.

If the Council would examine section 18, they would see that the Bill contemplated an entire settlement of all disputes arising from the non-performance of a contract.

It ran as follows :—

"Any person suing for the specific performance of an agreement, may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

If in any such suit the Court decides that specific performance ought not to be granted, but that there is a valid agreement between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the agreement should also be made to the plaintiff, it shall award him such compensation accordingly."

So again, in section 28 it was provided that the dismissal of a suit for specific performance of an agreement should bar the plaintiff's right to sue for

the breach of such agreement. In England that was not so—or rather, MR. HOBHOUSE was speaking of what was the law in England until a few days ago; for it was possible that the alterations which had just come into effect would make a great difference in the state of the law and bring it nearer to what was expressed in this Bill. But certainly before these alterations were made a man might sue in the Court of Chancery for the specific performance of a contract; after the whole case was gone through, it might be discovered that the appropriate remedy was not specific performance, and the case might accordingly be brought before a Court of law, where the whole subject of dispute would have to be tried over again. Here we had the advantage of a single tribunal, and as was clearly right, the plaintiff might come to it and ask for the whole of the remedies to which he was entitled. He must make up his mind to what remedy he is entitled, whether to specific performance, or to compensation, or to both. And as he could get in one suit all he was entitled to, it was but just that the whole dispute should be concluded in one suit, and that no second suit should be brought.

Another ground of difference was this, that in India the very artificial law known as the Statute of Frauds no longer affected contracts. It had been said by a very great authority that every line of the Statute of Frauds was worth a subsidy. It might however be affirmed with equal truth that every line had cost a subsidy, for there was probably no Statute on the books which had given rise to so much litigation as the Statute of Frauds. The reason was this, that it had introduced an artificial system, and enjoined strict formalities in transactions of every day occurrence between simple people, who were accustomed to use no formalities in them. People went on in their old natural informal way, and then, when a dispute arose, one party would prevent the other from getting justice by insisting on the want of the requisite formality. The Courts, as usually happens in such cases, refined on the Statute to prevent glaring injustice, and thus the points of dispute were largely multiplied. There was no part of the subject of specific performance of contracts which was more subtle or refined than those parts in which the provisions of the Statute of Frauds came under the handling of the Court of Chancery. But the Statute had been repealed in India by the Contract Act, and with it we got rid of a large and troublesome portion of the subject of the measure before the Council.

There was another subject of considerable practical difficulty on which it was almost impossible to lay down rules. That subject was the delay occurring before the institution of a suit. There was no express law limiting the time within which a suit for specific performance should be instituted in the

Court of Chancery. But the Court of Chancery laid down the rule that suitors should come quickly to obtain such a remedy, and it was frequently a very difficult question to decide whether a plaintiff had or had not come into Court in time. Here in India, the Limitation Act provided a period of three years in which a suit for the specific performance of a contract should be brought, and as it was not proposed to alter the law upon this point, we were able to avoid treating the difficult question what was or was not delay.

The foregoing were the points on which the conditions of Indian law brought about a variance between the provisions of this Bill, and what would be necessary if a similar Bill were introduced in England. Besides that there were in this branch of law as in others, matters on which authorities differed. Some of these the Bill attempted to settle one way or the other, and in that sense it might be said that it altered the law, by ascertaining what was doubtful, or ruling one way what might possibly be ruled another way in a Court of law. He had followed what he conceived to be the balance of authority, or what appeared to be the clearer and more intelligible rulings in each matter. He would mention the principal of these points.

There was one point of considerable difficulty in the Bill, and that related to the part which made provision for the specific performance of contracts so far as they could be performed, and for compensation so far as it was not possible to perform them. This jurisdiction was a very delicate one, for it amounted to something like making a new contract between the parties, when the person seeking performance was the person in default. Yet it often happened that there was some quite insignificant part of the contract which the party seeking performance was bound to perform but could not. In such a case it was wrong that, because some little thing remained undone, the whole contract should fail.

Among the rules to choose from, the Bill had followed that which was the most restrictive of the jurisdiction. It was expressed in section 14, which ran as follows :—

"Where a party to an agreement is unable to perform the whole of the agreement, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the agreement as can be performed, and award compensation in money for the deficiency."

Then section 15 exhibited the different positions held by the party in default and his opponent, when the default is of greater magnitude. It ran as follows :—

"Where a party to an agreement is unable to perform the whole of the agreement and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, the party in default is not entitled to obtain a decree for specific performance, but the Court may, at the suit of the other party, direct the party in default to perform specifically so much of the agreement as he can perform, provided that the party seeking specific performance relinquishes all claim to further performance, and all right to compensation, either for the deficiency, or for the loss or damage sustained by him through the default of the other party."

For both these sections the Bill gave some illustrations to show the more clearly what was meant. MR. HOBHOUSE believed that they were framed in accordance with the most careful decisions. At all events, there was no intention on his part to alter any recognized rule of law.

Another subject of difficulty was connected with the performance of agreements consisting of a number of minute acts, the doing of which the Court could not attend to, as it might attend to the doing of a single act, such as the execution of a lease, giving possession of a house, and so forth. He meant, for example, such a contract as one to repair a house or to cultivate land in a given way. The Bill dealt with such cases in section 20, which set forth certain agreements that could not be specifically enforced. Sub-section (*c*) included among these—

"an agreement which runs into such minute or numerous details, or which from its nature is such, that the Court cannot enforce specific performance of all its material terms."

Then there were some illustrations given of this class of contract. He believed that the sub-section (*c*) and the illustrations represented with fidelity the law administered in England and in India too. If it did not, it was from the difficulty of specifying in concise terms a rule drawn from many decisions.

Another point occurred in the same section, where sub-section (*g*) included among the agreements not capable of specific performance,

"an agreement the performance of which involves the performance of a continuous duty extending over a longer period than five years from its date."

There the Bill endeavoured to fix a term which by the present law was not fixed. The Courts now would not decree the performance of a contract involving

the performance of a continuous duty for a number of years; but the number was indefinite. Whether it was wise to define it, MR. HOBHOUSE had his doubts; and if it was, the length of the term might be a subject of doubt. It was a question which might well be settled in Select Committee. The proposal was put on the face of the Bill in order that it might receive comment, a course often pursued with advantage.

MR. HOBHOUSE was much obliged to the learned Secretary, Mr. Stokes, for reminding him of that which for the moment he had forgotten, namely, that this term of five years was inserted in the draft of the Civil Procedure Code which was settled and published in the year 1865. It was so settled by Sir Henry Maine and Sir Henry Harington, so that it had the authority of two eminent men, one a great jurist, the other the first authority of his day on the subject of Indian procedure.

The foregoing were the only points which occurred to MR. HOBHOUSE to mention on which the Bill attempted to ascertain doubtful or indefinite law. Distinct and conscious alterations of the law he had made none, except one that he would mention immediately.

In section 23, sub-section (*c*), it was provided that a contract for the sale of property should not be enforced by any one who had made a previous voluntary settlement of the same property. And in section 24, sub-section (*d*), a corresponding provision was made with respect to a purchaser who had notice of such a voluntary settlement. By a 'voluntary settlement' the Council must understand a settlement for which no money was paid, or for which no other valuable consideration, such as marriage, was given; as when a man from affection or prudence settled property on his wife or his children. Well, most people would ask what necessity there was of passing a law to this effect; for that, if a man had settled his property, he had parted with it, and how could he sell it? It resulted, however, from some very remarkable decisions on a Statute of Queen Elizabeth's reign passed for the prevention of frauds upon purchasers, that if a man made a voluntary settlement of his property, he might subsequently sell that very property for money, and the purchaser might take it away from the true owners, or, as they were called, the volunteers. He thought most people would say that a Statute of that kind, instead of being one for the prevention of fraud, was one for the commission of injustice; and so it frequently operated. Courts of Equity, however, would not allow the settlor himself to enforce specific performance of his contract in a case where his hands were so very far from clean. But inasmuch as his sale

of the property vacated the prior settlement as against the purchaser, the purchaser was allowed to maintain a suit for enforcing the sale, even though he had notice of the settlement before paying his money. The Bill, however, proposed that in such a case the purchaser should not be entitled to specific performance. He might take whatever other remedy he could get on his contract, but he should not take away the property which he knew that the vendor had no moral right to sell to him. On that point the law was altered, and Mr. Hobhouse thought that the alteration would commend itself to all unsophisticated minds.

There was another point on which the Bill adopted a provision taken from the New York Code which Mr. Hobhouse did not remember to have observed in any judgment or text-book. Section 12, sub-section (*a*), provided that an agreement might be specifically enforced

"when it has been expressly agreed in writing between the parties to the agreement that specific performance thereof may be required by either party, or that compensation in money shall not be considered adequate relief for its non-performance."

Mr. Hobhouse had never seen a contract of this kind, but was told that it was one not unlikely to be made in India. No doubt such a provision would have its effect on the discretion of the Court without any specific rule of law on the subject. He hardly knew whether it was an addition to the existing law, but he mentioned it as being something not yet expressed in English or Indian law.

He had now shown how far the Bill was intended to be a mere expression of existing rules, and how far he had consciously altered those rules, or ascertained them when indefinite. As for codifying law without unconsciously producing some alterations, it was a matter of extreme difficulty, if not an impossibility. By codifying law, he meant the reduction to writing of that which was before unwritten. And partly because the lawmakers might err in their conception of what they ought to set down as law, partly because, having a right conception, they might use inappropriate language to express it, partly because their expressions were construed by other minds who might give to them quite a different turn from what they were intended to take, it would be a very wonderful thing if after codification the law remained precisely the same as before. That consideration, however, applied to all attempts at codification; all he could do now was to mention the variations of which he was conscious, and he had done his best to explain to the Council the relations which the Bill bore to existing laws.

Only one other point he had to mention in connection with the chapter on injunctions. The Council would see that the Bill did not meddle with interlocutory injunctions at all, by which term he meant those processes of the Court which were simply intended to preserve the *status quo* pending the decision of the dispute. They were treated as of the nature of procedure, and were dealt with by the Civil Procedure Code. In giving rules about perpetual injunctions it was laid down that the Court should be able to grant mandatory injunctions. The term "injunction" was rather deceptive, for it looked as if designed to enjoin the performance of something, whereas its technical meaning was the prevention of something, and the Courts used to hold that they could not by injunction command an act to be done. That, however, was found inconvenient, and indirectly they assumed the power of commanding a positive act under a negative form; for instance, a man might be restrained from keeping up a wall, thereby being in effect compelled to pull it down. All those circuitous modes of action had their points of weakness, and this Bill went more directly to the required object. In section 52 it was provided that by injunction the Court might not only prevent the breach of an obligation, but compel performance of the requisite acts.

The Motion was put and agreed to.

The Hon'ble Mr. Hobhouse also moved that the Bill be published in English in the *Gazette of India*, and in the respective Gazettes of the Local Governments in English and such other languages as the Local Governments might think fit.

The Motion was put and agreed to.

PRESIDENCY BANKS BILL.

The Hon'ble Sir W. Muir moved for leave to introduce a Bill for constituting and regulating the Banks of Bengal, Madras and Bombay. Hon'ble members were doubtless aware that it had been resolved to alter the relations which existed between the Government and the Banks at the presidencies, and to sever the connection between them and the Government. It was accordingly necessary to introduce a new law for the purpose, and that was what Sir W. Muir proposed to do if the Council gave him leave, and he would, on the Bill being introduced, explain the subject in detail.

The Motion was put and agreed to.

The following Select Committee was named :—

On the Bill to define and amend the law relating to certain kinds of Specific Relief.—The Hon'ble Messrs. Bullen Smith and Inglis, the Hon'ble Sir Douglas Forsyth, the Hon'ble Messrs. Eden and Hope, the Hon'ble Rájá Narendra Krishna and the mover.

The Council then adjourned to Tuesday, the 14th December 1875.

WHITLEY STOKES,

Secretary to the Government of India,
Legislative Department.

CALCUTTA;
The 7th December 1875.

Office Supd. Govt. Printing.—No. 101 L. D.—15-12-75.—230.