Queensland

Parliamentary Debates
[Hansard]

Legislative Council

WEDNESDAY, 27 SEPTEMBER 1876

THE

PARLIAMENTARY DEBATES

DURING THE

THIRD SESSION OF THE SEVENTH PARLIAMENT OF THE COLONY OF QUEENSLAND, AUSTRALIA,

APPOINTED TO MEET

AT BRISBANE, ON THE TWENTY-THIRD DAY OF MAY, IN THE THIRTY-NINTH YEAR OF THE REIGN OF HER MAJESTY QUEEN VICTORIA, IN THE YEAR OF OUR LORD 1876.

[VOLUME 2 OF 1876.]

LEGISLATIVE COUNCIL.

Wednesday, 27 September, 1876.

Assent to Bills.—Drawing in Primary Schools.—Real Property Bill.—Judicature Bill.—Absence of the Chairman of Committees.—Navigation Bill.

ASSENT TO BILLS.

Messages were received from the Governor acquainting the House that His Excellency had assented to the following Bills:—

Appropriation Act of 1876-7, No. 2.
Customs Duties Act.

DRAWING IN PRIMARY SCHOOLS.

The Hon. J. C. HEUSSLER asked—

Whether the Government intend to take steps, and, if so, what steps, to re-introduce the teaching of freehand drawing, which was discontinued as a branch of teaching in the National Schools?

The POSTMASTER-GENERAL answered—

Drawing was never a general subject of instruction in the Primary State Schools under the late Board of Education, but was taught in the Brisbane schools. It is not included in the subjects for instruction prescribed by the State Education Act of 1875, and the Government are therefore unable to make provision for including it in the subjects of free instruction in State Schools. Drawing is, however, taught at the Normal School by one of the masters, on payment of a small fee, and pupil-teachers receive instruction in drawing whenever practicable, so as to render them competent to teach it hereafter.

The Hon. J. C. HEUSSLER moved the adjournment of the House, to enable him to make a few remarks on the answer just given by the honorable gentleman representing the Government. That answer was an extraordinary one. He was well aware that the Council were, last session, instrumental in preventing a proposition being made for introducing drawing as a branch of primary education. Before the State Education Act came into force, drawing used to be taught in the schools under the Board, and, in his humble opinion, that was quite right. He regretted very much that the Government were not able, at the present time, to continue it. True enough, a teacher at the Normal School gave lessons in drawing; but it struck him very forcibly that those children to whom it was most advisable and important to be taught drawing, were not in a position to pay for it. He alluded especially to the children of the working classes. To them, it was no doubt a very important thing to possess a knowledge of the rudiments of drawing; whilst it was most necessary for those who would be mechanics or artisans. Persons in a better social position than they, would, no doubt, find it an easy thing to pay a few pounds a-year to ensure that drawing was taught to their children. He should be glad to take the sense of the House on the question raised; at any rate, he desired to hear from honorable members whether, in their opinion, it would not be advisable to introduce

a little Bill in order to enable the Government to bring into operation again, as soon as possible, the teaching of drawing free in the schools. If every honorable member expressed his opinion, there would be no great difficulty in the way of the Government introducing a short Bill for the purpose, to rectify that part of the Act of last year which was defective. If his memory served him, a number of subjects of education were specified in the list, with a continuing paragraph to the effect that other branches might be included in the course of instruction given to the children.

Question put and negatived.

REAL PROPERTY BILL.

On the Order of the Day being called for the consideration in committee of the report of the Select Committee to whom the Real Property Bill had been referred,

The POSTMASTER-GENERAL rose and said that he had the consent of the Honorable Mr. Gregory, who had placed the order on the paper, to his moving that the order be discharged. There was some uncertainty in the minds of honorable members as to what was the proper course to adopt in dealing with the report of the Select Committee in connection with the position in which the Bill was at present. Instead of dealing with the report in the same way as the reports of other select committees were dealt with, upon reflection it was discovered that it would be premature to consider the report at the present time. As the matter stood, when the Real Property Bill came up for second reading, that question was not decided; but the Bill was referred to a select committee for inquiry and report. The report of the Select Committee had been brought up and was before the House; but the proper time of considering that report would seem to be when the House was in Committee of the Whole on the Bill. He therefore proposed that the Bill should be read the second time, and, in the usual way, be referred to committee of the whole; and, at the same time, the Select Committee's report would be taken into consideration.

The motion for the discharge of the order from the paper was agreed to, and the second reading of the Bill referred to was made an order for next day.

JUDICATURE BILL.

The POSTMASTER-GENERAL said, that in 1872, Mr. Justice Lilley, who was then a member of the Legislative Assembly, introduced a Bill into Parliament to provide for the appointment of a Commission to inquire into and report upon and prepare a code or codes for the reform of the procedure in all the courts of civil jurisdiction in the colony; and, further, that the primary objects of the Commission should be seven in number:—1st, Uniformity of process, procedure, and practice; 2nd, The disposal in one action, suit, or proceeding, of all matters and questions of law and equity involved in the controversy between the parties thereto; 3rd, Uniformity of judgment, or relief, or of judgment and relief combined; 4th, A system of written pleadings, whenever required; 5th, A code of evidence; 6th, A scale of remuneration for professional services and costs and fees in the courts; and 7th, The preparation of such codes, rules, or reports as might assist to render as simple, effectual, and inexpensive as possible the administration of the law and the determination of the very right of the controversy according to legal and equitable principles, without technical defeats or miscarriage of justice between litigants in the courts of civil jurisdiction of the colony. And the proposal for the appointment of the Commission, as set forth in the preamble of the Bill, was based on the ground, that the present system of pleading, procedure, and practice in the several civil courts of the colony was unnecessarily and vexatiously intricate, cumbrous, dilatory, costly, and oppressive, and led to the waste of the moneys of suitors and the consumption of estates in course of administration, to the discouragement of enterprise and to the practical denial or failure of justice in many instances. Now, those statements where strong; and although, at the time, doubts were expressed whether all the epithets were justified by the facts of the case, yet it could not be denied that the anomalies arising out of our conflicting system of law and equity, and the separate jurisdictions attached to each, caused frequent embarrassments and delays to suitors, desides great costs—hardships which ultimately resulted in a practical denial of justice; and persons could not help themselves by means of the present machinery of the courts. It was, at the same time, admitted thot the pleadings and the modes of procedure, which had their origin in the middle ages, were totally unsuited to our modern requirements. Mr. Lilley, accordingly, without difficulty, procured the unanimous assent of Parliament to his Bill; and it now remained on the Statute Book as a permanent record of the earnest efforts of that gentleman to procure for the people of the colony simplified law, and simplified judicial administration. Shortly after the Bill became law the Commission were appointed, consisting of Mr. Bramston, then Attorney-General, Mr. Lilley, then a practising barrister, and himself (the Postmaster-General). They had several meetings, taking into consideration the civil codes of India and New York; and they decided upon a general scheme which they considered it would be desirable to carry out, embodying a uniform system of procedure in all the courts of law and equity. No immediate steps were, however, taken to draft a measure in accordance with the unanimous views of the Commission;—and owing to circumstances and reasons which he was unable to explain, the matter

stood in abeyance until a few months ago, when the present Attorney-General revived it. The Commission were then reconstituted, and included the Judges of the Supreme Court resident in Brisbane; Mr. Griffith, the Attorney-General for the time being; Mr. Harding, a barrister having a considerable practice in his profession; the Honorable E. I. C. Browne; and himself (the Postmaster-General). The Council would admit, he thought, that this Commission combined men of sufficient intelligence to enable them, at all events, to investigate the matter referred to them with some probability of a successful issue. In the meantime, the long agitation that had been going on in England for a reform in the law, and in the judicial administration had been to a great extent successful, and had borne fruit. A Royal Commission, consisting of some of the most eminent judges, and of distinguished laymen, were appointed in 1867, to inquire into and report upon the question of law reform; and they brought up their first report in 1869. Legislation was attempted upon the basis of that report in 1870 and 1871; but it appeared that the Parliament was not yet satisfied with regard to the advisability of some of the reforms proposed, and no Bill finally passed until 1873, when the first Judicature Act became law. The object, the main principle, of that statute was to abolish the separate jurisdictions of law and equity, and to provide for perfect law and perfect equity being administered in every suit, in all the courts. It also dealt with the question of appellate courts, with which this colony had not much interest. But, although the Act passed in 1873, it was considered necessary to remodel it and suspend the final operation of it until 1875, when a further Judicature Act was passed. Since November of that year, the Judicature Acts had been in force, and suitors had found great benefit from them. For the first time for many years, arrears had been cleared up by the courts; and suitors got speedy justice; and it had been found that the anticipations of the promoters of the reform had been fully realised. The Commission recently appointed here had had the benefit of the matured wisdom of the English legislation, and they had made the English Judicature Acts the foundation on which they had based their labors. They investigated the whole subject very carefully and continuously over a large number of sittings; and, at last they embodied their ideas in the Bill that was contained in their report which was submitted to Parliament at the opening of the present session. That Bill was adopted by the Attorney-General, and, after passing through the Assembly, it was brought now before the Council for the consideration of honorable gentlemen. The Bill might be regarded as dealing with two subjects:—first, reform of the law itself; second, reform of the procedure by which the law was administered;—and both were fully dealt with. The reform of the law itself was contained chiefly in the fifth clause of the Bill; and he might briefly refer to the leading points:—The first provision was, that the estates of deceased persons and of companies that were in insolvent circumstances should be administered in the same way as if they were the estates of insolvent debtors. The reason for that was apparent. There should be no distinction between a dead man's insolvent estate and a living man's insolvent estate, as there was at present. The estate of a deceased person, insolvent, must now be administered by the complicated and expensive machinery of the court of equity. The Bill abolished that. The next provision was that claims for breach of trust should not be barred by the Statute of Limitations. He did not know that he need dilate upon the provision;—it was in effect, that no *cestui que* trust having a claim for breach of trust should be barred by limitation of time from prosecuting his claim against a defaulting trustee. Next, the Bill proposed to abolish the distinction between legal and equitable waste. Further, merger by law was not to be allowed where any equitable interest continued. It was next provided that a mortgagor in possession might sue in his own name. That might require a little explanation, to enable non-professional gentlemen to understand it. According to law, the mortgagee was the holder of the legal estate—the law recognised him as the owner;—but, in equity, he had only a security over the property. The result was, that at law, a mortgagor, though paying his interest regularly and not in default at all, was unable to recover rents or profits in his own name; he must sue in the name of his mortgagee, although the latter was really no party to the transaction. The provision of the Bill was, that a mortgagor should sue in his own name so long as he was not in default, and did not hold adversely to his mortgagee. The next provision was a very important one; that a chose in action should be assignable at law as well as in equity, and that a person to whom it was assigned should be at liberty to sue in his own name. Great inconvenience was, at times, felt by persons who took assignments of judgment debts or securities, through their being unable to sue in their own names after the debts or securities had been assigned. In the first instance, they were compelled to sue in the name of the assignor; and, secondly, to give him indemnity against all costs or damage that might possibly ensue in consequence of the use of his name. The assignee was the real holder of the property, or right, and he would be able, under the Bill, to sue in his own name;—the real owner of property would be able to sue for what he was entitled to. The seventh and eighth provisions were questions of detail, to which reference was needless. The ninth provision gave, in causes arising out of collisions between ships, preference to Admiralty rules

over rules of law. According to the common rules, if each of two parties was in fault, neither could recover anything. The Admiralty rules were different, and he would instance a case. If two vessels came into collision, each being in fault, one being worth, say £5,000, and the other £25,000, according to rules of Admiralty, the two values were added together, and divided, and each party was entitled to one-half. The tenth and eleventh provisions were of great importance. Where there was a conflict between law and equity, the rules of equity should prevail. Those were chiefly the alterations with regard to the law itself. The results of the labor of the Commission with regard to the reform of the administration of the law were chiefly contained in clause four, and clauses six to thirteen of the Bill. The objects of the alterations made were, as stated in the report of the Commission, to secure the abolition of the conflict now existing between the systems of Equity Jurisprudence and Common Law Jurisprudence, so that there should hereafter be one uniform system of law prevailing in all courts of justice in the colony, and the substitution of one uniform and simple method of procedure for the various and distinct methods now in use in the Supreme Court. It was provided, first, that the court, in every case, should give effect to equitable right and remedies claimed by any plaintiff, and not force them, as at present, to resort to equity to obtain redress by a separate suit. Secondly, the court would do the same with regard to the equitable relief of any defendant. Thirdly, provision was made for the court to give effect to counter-claims of defendants. This was to avoid the necessity for cross-actions. Fourthly, the court would recognise all equitable states, rights, and liabilities of any person, appearing incidentally in the course of any proceedings before it. Fifthly, it would not restrain proceedings by injunction, but it would allow every matter of equity on which, according to the present practice it might be granted, to be pleaded by way of defence. Sixthly, it would, when necessary, direct the stay of proceedings upon motion, in a summary way, without compelling suitors to make separate and expensive applications for injunctions. Seventhly, it would give effect, subject to all equities, to all legal rights and remedies. Eighthly, it would deal, as far as possible, with all questions of controversy, in one and the same suit, so as to do complete justice between the parties thereto, and avoid multiplicity of proceedings. This provision should be read in connection with the rules contained in the schedule of the Bill, which made ample provision for all sorts of actions to be joined into one statement of claim. If a plantiff had three or four distinct causes of action, he could have them all set forth in one action; and if a defendant had several causes of defence, they could all be raised, and he could plead them in one action. Moreover, if a defendant had a counter claim, he could also plead that; so that on the balance of the two claims, if the defendant was entitled to a surplus, the court would award him that surplus in one action, instead of his being obliged to institute a multiplicity of suits as was necessary under the existing law. There was also provision made as to the modes of trials. He (the Postmaster-General) might mention that that was a point on which there had been considerable discussion amongst the commissioners, and on which a diversity of opinion existed. Some of the commissioners held that all questions, whether of law or fact, should be tried by a single judge, in the first instance. The majority thought otherwise. They thought that if a suitor desired that a question of law arising in any action should be decided by the full court, in the first instance, he should be entitled to claim that the question should be so decided, so that he should not be compelled to incur the expenses of two trials, as it were. It might be desirable to have causes tried by one judge alone, the full court being for appeals; but in matters of great importance, a suitor would, if a judgment were against him, carry his cause from one judge to get the benefit of the opinion of the full court. Therefore it was considered not desirable that the suitor should be forced to go through that routine, but that he should be enabled to have the opinion of the full court, in the first instance, if he should think fit. The provision for that was contained in the sixth clause of the Bill. He thought it desirable to bring the provision pointedly under the notice of the House, because the question had been very keenly debated by the commissioners, and it was one about which a good deal might be said on both sides. For his own part, he thought the terms of the Bill were preferable to the other course suggested. There were numerous other questions of detail which, he thought, need not be forced upon the notice of the House; but he should just refer to another novelty which was introduced in the eleventh and subsequent clauses down to the thirteenth. Those clauses, in short, contained provisions enabling the court at any point in a trial, when it should appear to the court or judge that any matter required a prolonged examination of accounts or documents, or any scientific or professional examination, which could not, in their opinion, be conveniently conducted before a jury or the court or judge, to refer the matter to a special referee, who would investigate it and bring up a report, and his report, if not set aside by a judge or the court, would be of the same force as the verdict of a jury would be on a question of fact. That, he (the Postmaster-General) might state, was a novelty in the practice of the courts here, which had been adopted from the Imperial legislation. He might state, further, that he understood the provision had been

found to work very satisfactorily. It would naturally suggest itself to honorable gentlemen that a question of account or fact which would occupy the court or a jury many days, if referred to a skilled person or a professional accountant, would be got through in a very satisfactory manner and in a very short space of time, at a great saving to the court and to suitors, and at the same time with a more satisfactory result. In addition to the points already referred to, the Bill provided in the schedule a complete scheme of procedure, including all necessary forms. The scheme was founded to a great extent upon the scheme of the Judicature Acts of England; but it was not by any means a slavish copy of it. The circumstances of this colony were not in all respects similar to those of England. He thought the commissioners had gone a step in advance of the Imperial commissioners, by doing away with several forms of pleadings which were still retained in England. The schedule practically confined the number of forms in pleadings to two. The first was a plain statement of plaintiff's claim, to be restricted to a short detail of facts, as far as possible, and no unnecessary verbiage. That was followed by the defence. The defendant set up his defence by a short statement of facts upon which he relied. The parties joined issue, and the matter was then set down for hearing by the court. If the defendant had a counter claim or set-off to the plaintiff's claim, he raised that in his statement of defence. The only approach to a third form in the pleadings was where the plaintiff was, himself, put as it were on his defence to that counter claim. He (the Postmaster-General) thought he had stated briefly all the salient points of the Bill. It would be a waste of time, he was sure, and it would be uninteresting to honorable members, if he should go into its details. The purport of the measure was this:—It abolished the different jurisdictions of law and equity; it provided for one complete and uniform system of law and equity to be administered in one suit, so that the litigant should get the full benefit of his legal and equitable rights in one suit; it abolished multiplicity of suits and forms of procedure, and simplified the forms of procedure. The commissioners would not contend, nor did he contend, that it was a perfect measure, or that it would supersede any future legislation; but he thought it might be regarded as an important instalment of reform both in law and judicial procedure; and he had, therefore, much pleasure in moving—

That the Bill be now read a second time.

The Hon. A. H. BROWN said he could hardly allow the motion to pass without making a few observations upon the subject of it; because it might be supposed that the Council felt indifferent on the subject. He was himself far from indifferent to it. The manner in which the Postmaster-General introduced the Bill was calculated to make the House feel an interest in it. The Bill was the outcome of the deliberations of some of the highest legal authorities in the colony; and followed closely, though it was not a transcript of, the law now in force at home. Therefore, in those two circumstances, the House should feel a great degree of confidence in accepting the Bill as introduced. Honorable gentlemen would certainly hail with pleasure any measure that would relieve the community of some of the frightful expenses, as he might term them, that were entailed on legal proceedings. Owing thereto, law was, in fact, a kind of luxury that few indulged in, unless compelled to do so. The Attorney-General and the honorable gentlemen associated with him had shown a laudable wish to give relief where it was required; and men would now look upon the legal fraternity with some confidence and with more pleasure than they used to do. Lawyers had, to some extent, been regarded as promoters of injustice; but this would be so no longer. The great feature of the Bill, which the Postmaster-General had frequently pointed out, was the union of the legal and equitable jurisdictions of the courts. It had often struck him (Mr. Brown) that they should not be different in affording remedies or enforcing rights, and that causes should not be tried in different courts, involving varied procedure and great expense. He regretted that the Honorable E. I. C. Browne was not present, because he felt himself unable to express himself in such a way as the subject deserved, and that the House would be benefited by the legal opinion of that honorable gentleman. The House could not hope that the Bill would be perfect, but he felt that it would very probably be of great benefit to the colony at large. Experience only would show what were the merits and the defects of the measure. He hoped heartily that it would be passed and become law this session. Another reason for confidence in the Bill was, that it had passed through the other Chamber, where there were several legal gentlemen and other members able to criticise it, and they had let it go as introduced.

Question put and passed.

ABSENCE OF THE CHAIRMAN OF COMMITTEES.

The PRESIDENT informed the House that he had received a communication informing him that the Chairman of Committees, the Honorable D. F. Roberts, was so unwell that he was not able to attend in his place to-day.

The POSTMASTER-GENERAL said honorable members must feel regret that the Chairman of Committees was not well. In his absence, he had to propose that the Honorable A. H.

Brown do take the chair for this day. He had great pleasure in stating that the honorable gentleman had consented to a request made to him to perform the duties of Chairman of Committees.

Agreed to.

At a subsequent stage of the sitting,

The PRESIDENT stated, with reference to Bills set down for third reading, that in the absence of the Chairman, he was unable to obtain the necessary certificate that the Bills were the same as had passed through Committee of the Whole; and he would not, therefore, put them to the House for third reading.

NAVIGATION BILL.

The House resolved into Committee of the Whole for the consideration of this Bill.

Certain amendments were made in matters of detail, without objection—amongst them being the reduction, from "fifty" to "fifteen" tons, of the minimum capacity of coasters, the mastership of which would qualify for a certificate of competency or service (24 and subsequent dependent clauses); the omission (51) of the provision respecting other recognised authority than the Marine Board of this colony, and the Board of Trade, England, to issue certificates to vessels trading in Queensland waters; and insisting on payment of dues for berthing or removing vessels in port (119) on every occasion of shifting; making the master of the ship, instead of the importer or owner (166), liable for cost of moving powder; and reducing the quantity of powder to be carted at one time within town boundaries (176) to "five" hundredweight.

The Bill was reported with amendments.