Register

18 Nov 1895

LAW REFORM.

EXPOSITION OF THE NEW BILL.

The Premier, in the House of Assembly, at 9.48 on Wednesday evening moved the second reading of the Law Reform Bill. He was received with cheers, and said although he could have desired a more favourable opportunity than that time in the evening of moving the second reading, when the House and the Ministry were tired, they ought to lose no time in placing the measure before the House and the public. He was particularly anxious to do this, because there were all sorts of suggestions made as regarks the sincerity of the Ministry, and particularly as regards the sincerity of a humble public servant, the Attorney-General. Whenever a lawyer began to talk about law reform others commenced to sneer. History proved that all great law reformers—of course, the Government did not pose as that—had been lawyers, and had done what they could to improve the condition of the law. (Mr. Archibald—They would put every other fellow in gaol, wouldn't they? Laughter.) That would clear the atmosphere. It was said that the Government did not intend to bring in their Law Reform Bill when they announced it, but now that they had brought it in it was said that they did not intend to press it on. But they did intend to press it on, and to let the public see who were on the side of law reform and who were not. He would not engage in any elaborate or academic discussion, but would avoid as far as possible useless historical references. They intended as far as possible to make law more synonymous with justice—(Hear, hear)—to do what they could to make it more simple and less costly—(Hear, hear)—and to that end they desired in some degree to attack the monopoly of the avenues or approaches to the Law Courts which existed at present. They believed in trades unionism. Lawyers had the most powerful trades union in the world practically. (Hear, hear.) They had a close corporation. They had special privileges, and whilst the Government believed in the continuance of the Corporation and the maintenance of some of its privileges they did undoubtedly believe in the increase of reasonable facilities for admission to this corporation and for the abolition or curtailment of some of the privileges which were enjoyed to the advantage of the members of the corporation and to the disadvantage of the general public. (Hear, hear.) So first of all they intended to provide means whereby men might become lawyers without subjecting them to unnecessary delay or unnecessary cost. (Hear, hear.) They desired to give an opportunity for fair competition amongst those who in a proper way proved they were qualified for admission to the law. They thought the present mode of admission too lengthy, too costly, and too elaborate, with the result that there was a scale of charges for recouping a man's original outlay, which would not be necessary under other circumstances. At present no man could become a lawyer unless, prior to articling, he passed the Senior Public Examination, and either served for five years, and got a University certificate of having passed a

certain examination, or served for three years, and took the degree of LL.B. When he went to be articled he had to pass no Senior Public Examination, and he expected the practice which then prevailed was similar to that which prevailed when the other legal members of the House, except Mr. Ash, took up the profession. They simply obtained a certificate from a Judge of the Supreme Court that they were not less than sixteen years of age, and he thought some certificate was granted readily enough in those times as to moral character. (Laughter. Mr. Ash—When a Judge did not know much about it, perhaps. Laughter.) There were advantages no doubt from being articled at an early age. (Laughter.) At any rate they served five years, and had not to bother about attendance at University lectures. They made themselves useful to their employers in their respective offices, and at the end of the term went before the Board of Examiners, who put certain questions to them and satisfied themselves of the candidate's general knowledge of law and admitted them. Considering that that was the plan adopted with reference to every Judge of the Supreme Court and every Queen's Counsel of the present day, and all the leading and senior members of the Bar, there was no doubt whatever that that practice gave satisfaction, and no evil results followed. As regards the Chief Justice the examination in his case did not comprise, he believed, more than a couple of questions. And who had been injured by it in the slightest? (Hear, hear.) The public had been able in the natural course of things to discriminate between the good lawyers and the bad, and, without a test of knowledge in Latin, or the taking of a degree, or passing a University examination, admission had been procured, and the best results had been secured. He did not wish to reflect on University graduates and others, but some of those who had gone home and taken the highest degrees at the Universities had by no means taken the highest positions in their profession in this land. What was the good of passing a Senior Public Examination? He confessed he spoke somewhat slightingly of it, for he never professed to have any considerable acquaintance with the classics. He believed he once won a prize at school for classics, not on account of his own superiority though, but on account of the inferiority of the other boys. (Mr. Brooker—Are they all dead now? Laughter.) Many of his schoolfellows, he was glad to say, were still living and prosperous. (Mr. Brooker — I thought after what you said some of them might meet you in the morning. Laughter.) At present he noticed an examination had to be passed in Latin—time, three hours. Before a man could be articled he would have to prepare himself for that examination. Though he would be sorry to reflect upon the capacity of Judge or Bar, he guaranteed that the Judges on the bench could not pass that examination at the present moment. Nor could leading members of the Bar, and why? Because they never tried, and they did not try because it was not necessary. It was arrant absurdity to burden the mind of the student with the acquisition of the knowledge of Latin when it was of precious little use to him in his profession, and when the time could be better spent in acquainting himself with the practice of his work. He had had experience of most capable and industrious University students, and believed in their own interests as well as in the interests of those who

employed them that their time would be better spent in learning the practice of what would be useful to them when they were admitted than in fostering an acquaintance with dead languages and kindred subjects, which were of no use to them when they had learnt them, and of no use to them in connection with the Bar. It was absolute nonsense to make it essential to have this University certificate or degree. The present law was that although a student had to serve five years as long as he got a University certificate only, if he got an LL.B. degree he served three years only. Practically the difference between a University certificate and an LL.B. degree was that he had to pass an examination in Roman law. (Mr. Ash—Much more than that.) He had sympathized with Mr. Ash, and had felt warm indeed when he had noticed that hon. member working as he did, stewing and sweating in the pursuit of his studies for the purpose of obtaining his degree, which would secure him earlier admission to the profession which he was calculated to adorn. The hon. member was a glutton for work. There were times, indeed, when he (Premier) was afraid that the strain would be more than his constitution could bear. Which of them would like to make themselves acquainted with Roman law? Here was one question in the examination papers. He had a lot outside, but would take one at a time. He put it to Mr. Homburg, whose sympathies he knew were with the Bill. What did he know about Roman law? About as much as he (Premier) did, he supposed. (Laughter.) Still, they got on very well without it. Not a Judge on the Bench knew much about it, he ventured to think. (Mr. Archibald—They will be on you for this. An hon. member—You will get a wigging for it.) He did not think so. Here was a question. "Explain the importance of Adoption in Roman Law?" Could Mr. Homburg explain it? (Laughter. Mr. Homburg—Yes.) Did Mr. Glynn know anything about it? (Laughter. Mr. Glynn—I know nothing about adoption. Laughter.) The question went on—

Describe the modes of adoption in the times of Gaius and Justiuian respectively (1) when the person adopted was *sui juris* and (2) when he was *alieni juris*. Account for the difference of procedure in two cases. What were the provisions of the following Statutes:—

Lex Furia Caninia, Lex Julia de ambitia.
Lex Julia Norbana, Lex Cornelia de falsis.

Then they had to translate and comment on a passage. He could not translate it, but he could comment on it and say it was rubbish. If any one had that knowledge in his mind the quicker he got rid of it the better. To say that a man who knew that should be able to get in in three years, and that a man who did not should have to wait five years, was absurd. Our best men had not acquired that knowledge, and it was intolerable that dear old University provisions of this sort should be inserted and the general public told "You have to pass this as the only portal to legal practice before you can defend a man for debt, or prosecute a man in the Police Court for assault, or file a claim, or draw a conveyance." Some suggested that in spite of all these things there were still men coming into the law. If they were so much the worse for the public and the profession.

Mr. Glynn—The greatest lawyers learned it.

The Premier—It was ridiculous. If there was a great influx into the profession probably it was easier to acquire knowledge of these things than of laws which would be useful.

Mr. Brooker—There is a great influx into other professions.

The Premier supposed there was. Education was spreading, and people liked to bring their sons up to professions, when perhaps in the past they were less ambitious, and brought up their sons to callings more useful to the State and to themselves.

Mr. Handyside—In those times we got the work done for half-price.

Mr. Glynn—The very opposite was the case.

The Premier said the cost of litigation taken to the Supreme Court was heavier now than it was years ago.

Mr. Ash—Everything has been reduced twice.

Mr. Handyside—You ought to know something about the charges.

The Premier did. That was why he was speaking, and if he was speaking against his own interests more credit to him. (Hear, hear.) He was not consulting his own interests, nor had he any slavish regard for the interests of the profession, but he was doing his duty to the public by treating the question on reasonable lines. Dealing with the examination of solicitors, the Bill provided that no candidate for admission as a solicitor should be required to pass any examinations before being articled. That was fair enough. Then they provided that he should not be bound to take any degree or attend any lecture at any University. That was the condition under which leading men had been admitted. Then the candidate should not submit to any examination in dead or foreign language. He was not to be worried about Latin, Greek, Spanish, French, or German.

Mr. Glynn—Is German dead?

The Premier—No, Germans were very much alive. The candidate had not to serve under articles of clerkship for more than two years, and he would only be required to pass examinations in the law of property (real and personal), the law of contracts, the law of wrongs (civil and criminal), the principles of common law and of equity, the law of evidence, the practice and procedure of Courts, and the Statute law of South Australia. As long as a man could pass in those subjects he was pretty well fitted to be a lawyer, and he would lay emphasis on the requirement that he should pass in the Statute law of South Australia. The more they learnt about that the more when they took their places in Parliament would they be able to advise their fellow-members as to the meaning of the law. As regards the nature of the examination candidates would be considered to have passed who satisfied the examiners that they were possessed of knowledge reasonably sufficient to enable them to satisfactorily discharge the ordinary duties of a solicitor. What more was wanted? It was quite enough. Then they said it would not be necessary for any person already articled to pass an examination in any additional subject. There was another provision which might have been expected from the present Government. Women might be admitted to practise as solicitors. They had women doctors, and he did not see why they should not have women lawyers. Although he did not expect that the provision would be largely availed of, their sisters were entitled to the privilege. They provided in clause 9 that counsels' fees should be recoverable in the same manner as other costs, and counsel should be liable for negligence in the degree for which other solicitors were liable for negligence. There

had been some doubt as to the law in South Australia, and the opinion had been expressed that what was declared in the Bill was the existing law, but it was as well to have it made clear. In Part 2 of the Bill they dealt with the question of procedure. The public recognised that the rules and regulations of the Supreme Court were not as simple and convenient as they might be, and that the Local Court procedure answered practically every requirement in a similar class of cases. The Bill as plainly as possible proposed to apply the Local Court procedure to the Supreme Court practice. Clause 10 provided that—

The practice and procedure of Local Courts shall hereafter be applied to and shall be the practice and procedure of the Supreme Court in all cases in the Supreme Court which are removed from a Local Court, or which might or, but for the amount involved, could be tried in a Local Court.

If this amendment was carried they would not stay their hands, but be prepared to extend their amendments to other Courts—to criminal and other proceedings. Clause 11 said—

No appeal from any Court shall hereafter be allowed on the grounds of the improper admission of evidence unless the Court of Appeal shall be satisfied that the result of the case in the Court below would have been different except for such admission.

What was desired was finality, and these constant appeals being sent back without absolute necessity was not satisfactory.

Mr. Ash—What is the percentage of appeals?

The Premier—I don't know exactly.

Mr. Ash—Is it 1 per cent?

The Premier—Oh, yes.

Mr. Ash—Certainly not.

The Premier—Section 12 provided—

No case in which an appeal shall lie to the Supreme Court shall hereafter be removed by *certiorari* from any Local Court into the Supreme Court on the ground that difficult points of law were involved therein unless by consent or on terms that the party applying to remove the same, if unsuccessful, pays costs on the Supreme Court scale, and if successful receives costs only on the Local Court scale.

It was not fair that an original litigant unwilling to risk paying the Supreme Court costs should be forced to go there unless there was some penalty for the other man. The Judges of the Supreme Court had frequently scribed that the removal of a case should not be granted except under the conditions presented in the clause. There was a limit as regards the time in which the application for the removal should be made. Then they came to a clause which would commend itself to Mr. Caldwell. Clause 14 read—

Every Court in every case shall endeavour to expeditiously ascertain all matters really in difference between the parties, and to hear all material evidence affecting the same, and to pronounce judgment thereon without unnecessary delay and according to the substantial merits of the case without regard to technicalities or questions of form, practice, or procedure.

Mr. Caldwell—A very good clause.

The Premier—The Government had put the thing as plainly as it could be, so that there would be no getting away from it. He wanted the Judges not to trouble their heads about the question of form, practice, or procedure, but to get at the real issue between the parties as fast as they could, to hear all the evidence, and pronounce a judgment expeditiously according to the merits of the case. He did not think hon. members would find upon the Statute-book of any of the Australian colonies any provision which attempted to deal with that question other than those

within the provisions of the Bill. Then to emphasize the matter they put in section 15 :—

Every Court in every case shall immediately make every amendment necessary or proper for the purpose of giving effect to the last preceding section without imposing any term as a condition to such amendment, except as mentioned in the next section.

The next clause stated that if the Court found that the amendment would raise a question which a party coming prepared to fight out the matter at issue ought not to be prepared to meet, or was not ready to do so, the Court might adjourn the case upon such terms of costs as it liked ; otherwise the case was to go on as if the plaint had been in its original form. They went further, and said that if at the trial of any case before judgment was given it was apparent that material evidence was available which had been inadvertently omitted, the Court could permit the evidence to be given. That meant that up to the last moment the Court could endeavour to inform its mind as to the facts. It ought not to be a question with the Court as to who was the most astute lawyer in getting out or suppressing facts, but the Court should provide itself with all the facts before pronouncing judgment. Section 18 declared that notice of appeal should not be required to state the grounds. Just as their object was to get the parties into Court, and the Court to find what was the trouble and decide, so if there was an appeal the Court would find upon the facts and not whether a man had put certain objections in a document when he should have put in others. In section 19 they went further, and endeavoured to extend the principles which the House had already given effect to in the last Pastoral Bill in connection with the constitution of the Tenants' Relief Board. They thought that in matters of assessment under the Land Clauses Consolidation Act or the Succession Duties or on merely a question of value it would be better, instead of having a Judge, Jury, and lawyers upon each side, to have a tribunal consisting of a Judge and two assessors, one appointed by each side—not to be lawyers. The Judge was to pronounce the decision, and be assisted in his conclusions by the assessors. No solicitors would be allowed to appear, and no rules of evidence or particular course of procedure should be necessarily observed, but the Court in each case should inform its mind and regulate its proceedings in such manner as it thought fit. If those proceedings had been in force in connection with the railway, the Happy Valley works, and the Price-Maurice cases equally satisfactory decisions would have been obtained at a tithe of the expense and in a tithe of the time. In the matter of procedure they had not exhibited a want of courage. They had not hesitated to cut deep where they thought it was required. Part 3, "Judicial reference," was to a great extent an innovation.

Mr. Glynn—It was a failure in England.

Mr. Ash—We have it in the Supreme Court rules.

The Premier—It would not be a failure here. There were a lot of Supreme Court rules, and he was not surprised that it had not been availed of, because it must have been buried under others. He provided in this section, as they had Courts constituted of the best Judges, men who had been leaders in their profession, and men in whose integrity the public believed, that people could send a statement of their disputes to a Judge or Magistrate and get them settled, without lawyers.

Mr. Ash—They would go to a lawyer after the first time to have it put in writing.

The Premier—If they had it put in writing that would be an end of it. If Mr. Caldwell and he had a grievance and wanted a settlement without going to law, under the Bill they could agree upon a statement, pay a fee, and have it filed. It would be considered and a decision made without further evidence or argument. If it was filed in the Supreme Court the decision would be made by a Judge; if in the Local Court by a Magistrate. The decision should be the judgment of the Court, and enforceable accordingly, and there would be no appeal.

Mr. Ash—If they could agree upon a statement of the case there would be no dispute.

The Premier—It often happened that while there was no dispute as regards the facts there was a dispute as to the law, and he believed the course laid down in the Bill would be largely followed by commercial men for their benefit and that of the community.

Mr. Caldwell—You will have to have careful Judges.

The Premier—They had good Judges. It had been suggested that there was not enough for them to do, but he anticipated from the passing of the measure that more work would result to them. There was a provision that where the statement did not contain material for the Judge to pronounce a decision upon he could ask for further proof.

Mr. Glynn—It will not work.

The Premier—Let them try it. The present position was not such that they should refuse to try any amendment. He was sanguine it would work well. Part 4 dealt with costs. At the present time people could get their costs taxed, but the process was troublesome and the expense great. It was useless to tax costs if they were saddled with additional expense. As soon as the present Government took office he considered that as the Attorney-General was a political office the occupant should not be saddled with the taxing of costs. He excepted the drafting of Parliamentary Bills because he claimed to have had some experience of drafting Bills, and all Attorney-Generals knew what the work should cost. The Government adopted an audit regulation that no costs should be paid unless taxed, and that drafting of Bills would have to be settled by the Attorney-General. Most of the profession willingly submitted, but there were others who took a different position. He sent one bill for conveyancing of some £70 to £80 to be taxed, but the result was that the Government was saddled with about £70 or £80 for taxing. That was ridiculous, so that they put in a clause stating that no costs should hereafter be recoverable unless taxed beforeaction brought for the recovery thereof. They also provided that if one-tenth of the amount of costs was knocked off the solicitor had to pay the costs of taxing, and that no costs whatever except those taxed would be recoverable. The Government did not suggest that the Bill was complete in every respect. They did not contend that it dealt with all matters of pressing importance, but the Bill dealt boldly with the large questions mentioned. He asked the House to assist the Government to place the measure upon the Statute-book in such a form as might be a credit to the Parliament and of benefit to the community. (Cheers.)

Mr. Glynn secured the adjournment of the debate until the next day.