Friday,
15th March, 1907

ABSTRACT OF THE PROCEEDINGS

OF THE

Council of the Governor General of India,

LAWS AND REGULATIONS

Vol. XLV

April 1906 - March 1907

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ASSEMBLED FOR THE PURPOSE OF MAKING

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Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Indian Councils Acts, 1861 and 1892 (24 & 25 Vict., c. 67, and 55 & 56 Vict., c. 14).

The Council met at Government House, Calcutta, on Friday, the 15th March, 1907.

PRESENT:

His Excellency the Earl of Minto, P.C., G.C.M.G., G.M.S.I., G.M.I.E., Viceroy and Governor General of India, *presiding.*

His Honour Sir A. H. L. Fraser, K.C.S.I., Lieutenant-Governor of Bengal.

His Excellency General Viscount Kitchener of Khartoum, G.C.B., O.M., G.C.M.G., Commander-in-Chief in India.

The Hon'ble Mr. H. Erle Richards, K.C.

The Hon'ble Mr. E. N. Baker, C.S.I.

The Hon'ble Major-General C. H. Scott, C.B., R.A.

The Hon'ble Sir Harvey Adamson, KT., C.S.I.

The Hon'ble Mr. J. F. Finlay, C.S.I.

The Hon'ble Mr. J. O. Miller, C.S.I.

The Hon'ble Mr. Gopal Krishna Gokhale, C.I.E.

The Hon'ble Mr. A. A. Apcar, C.S.I.

The Hon'ble Mr. S. Ismay, C.S.I.

The Hon'ble Mr. W. T. Hall, C.S.I.

The Hon'ble Nawab Bahadur Khwaja Salimulla of Dacca, C.S.I.

The Hon'ble Nawab Saiyid Muhammad Sahib Bahadur.

The Hon'ble Sir Rameshwara Singh, K.C.S.I., Maharaja Bahadur of Darbhanga.

The Hon'ble Munshi Madho Lal.

The Hon'ble Mr. Gangadhar Rao Madhav Chitnavis, C.I.E.

The Hon'ble Sir S. W. Edgerley, K.C.V.O., C.I.E.

The Hon'ble Mr. H. W. W. Reynolds.

The Hon'ble Mr. F. A. Slacke.

The Hon'ble Mr. H. A. Sim, C.I.E.

The Hon'ble Tikka Sahib Ripudaman Singh of Nabha.

The Hon'ble Dr. Rashbehary Ghose, C.I.E., D.L.

PROVINCIAL INSOLVENCY BILL.

The Hon'ble MR. ERLE RICHARDS moved that the Report of the Select Committee on the Bill to consolidate and amend the Law relating to Insolvency

in British India, as administered by Courts having jurisdiction outside the Presidency-towns and the town of Rangoon, be taken into consideration. He said :—"My Lord, the alterations in the Insolvency Bill which are recommended for adoption are shown in distinctive type in the copy of the Bill which is before this Council, and they are fully dealt with in the Report of the Select Committee which I had the honour of laying on the table at the last meeting; but I think it may be of assistance to the Council if I explain the more important of the changes which are suggested. The subject is a very technical one, but I shall endeavour to make my explanations as clear and as brief as possible.

"Speaking generally of the amendments, I think it is fair to say that they do much to simplify and abbreviate the Bill. The clauses of the Bill as introduced were taken by the Select Committee on the Code of Civil Procedure Bill from the English Bankruptcy Act of 1883, and they were justified in taking them from that Act, because the clauses in that form have been found to work well enough in England. But to people accustomed only to an elementary system of insolvency, such as that at present in force in the mufassal, they have appeared involved, and the Committee have, therefore, endeavoured to simplify the language of the Bill throughout and to dispense with the use of technical terms which are not yet familiar to Indian lawyers. Several of the more lengthy clauses have been shortened: in particular I would refer to the clauses regarding secured creditors and discharge which have been greatly reduced in length and the order of the clauses has been rearranged in order to present the procedure in its natural sequence.

"The main difficulty in framing a satisfactory law on this subject is the difficulty to which I have referred on a former occasion. It is the difficulty of framing any one law which is equally suited to the different parts of the country. A law adapted for the towns is too complicated for the country districts; a law suited for the country districts is altogether insufficient for the great centres of trade. This is no new difficulty. I find that Lord Hobhouse, when introducing into this Council just 30 years ago the rudimentary system of insolvency which is to be found in the Code of Civil Procedure, said of the criticisms made on those provisions :—'One gentleman tells us that we ought to enact a complete Insolvency Bill for the mufassal, another that the sections we have inserted into the Bill are such as the mufassal Courts are not strong enough to work, another says that the provisions are too cumbersome, and another, they are too meagre.' The same criticisms have been made on the

present Bill. Some of our critics have told us that the Bill is altogether insufficient because it does not provide for many cases which must arise in insolvency; others have said that the Bill is altogether too complicated and that the cases we have provided for can never arise. The difficulty arises, not from the form of this particular Bill but is inherent in the subject with which it deals. The Select Committee have given careful consideration to this question. They feel that legal reform cannot be postponed until the requirements of the whole country become uniform; they feel that trading centres cannot be left without an adequate system of insolvency merely because other parts of the country are as yet less developed. On the other hand, they feel that it is desirable to avoid forcing on backward districts a law which is too complicated for their requirements. In the result they suggest for the consideration of this Council that a power should be inserted—it will be found in clause 54 of the amended Bill a power corresponding to section 1 of the Transfer of Property Act, 1882—to enable Local Governments to exempt any specified districts within their territories from the operation of certain sections of the Bill. There was a power in the Bill as introduced to enable Local Governments to refrain from investing Courts in certain districts with insolvency jurisdiction: but the Committee think it preferable to have the power of exemption made clear and express. They have, therefore, given this express power of exemption to Local Governments subject to the control of the Government of India. The effect will be that if Local Governments exercise this power to its full extent the law in the backward districts will remain substantially the same as it is at the present time, while the law in other districts will be the law as enacted in the whole Bill. I do not myself anticipate that when the legal advisers of Local Governments become more fully acquainted with the provisions of this Bill they will advise those Governments to exercise their powers to its full extent. But be that as it may, it will be in the power of Local Governments at any future time to apply the excepted sections gradually to the backward districts as they think fit.

"The next point to which I desire to call attention is that of the Courts which are to administer insolvency. In the Bill as introduced the Local Governments were given power to invest any Courts with insolvency jurisdiction; but it has been pointed out to us—and the Select Committee accept the view—that it is desirable that only the higher Courts should have insolvency jurisdiction. They have, therefore, inserted a clause—it is numbered 3, sub-section (1)—enacting that District Courts are to be the Courts to administer this Act, with a proviso enabling Local Governments to invest subordinate Courts with jurisdiction in any particular classes of cases. The intention is that District

Courts are *primâ facie* to be the Courts to administer the Act and that subordinate Courts are only to be invested with jurisdiction in special classes of cases.

"Another important matter connected with Insolvency Courts is the subject of appeals. In the Bill as introduced there was no appeal at all from any Court subordinate to the District Court except to the District Court: there was no appeal from a subordinate Court to the High Court. And from a District Court there was no appeal to the High Court except in certain specified cases. The result was that the right of appeal to the High Court was much restricted. There can, my Lord, be no doubt that a multiplicity of appeals is in itself an evil, but it is equally beyond doubt that there is in this country a strong feeling that litigants should have a right of appeal to the High Courts in cases of importance. I trust myself that that feeling may diminish or disappear as the inferior Courts grow stronger, but at present it is a factor which has to be recognised. The Select Committee have, therefore, amended these provisions, and their amendments will be found in clauses 46 and 47. They propose in the first instance to give in regard to proceedings in subordinate Courts a power to High Court to call up cases from those Courts. This is a power analogous to the power which High Courts already have in regard to proceedings in Provincial Small Cause Courts under the Act of 1887, which regulates the procedure of those Courts. The effect of this amendment is to give power to a High Court to hear an appeal from a subordinate Court in any case in which it thinks proper to take action.

"Then in regard to appeals from the District Courts to the High Courts. The Select Committee have left standing the clause which gives an appeal as of right in certain specified cases, but they have added a clause that in all other cases there shall be an appeal with the leave of the District Court or High Court. The result is to give an appeal in any case which is considered either by the Court which tries it or by the High Court to be of sufficient importance to warrant further proceedings. Further, they have added a clause to enable the High Court to deal with insolvency proceedings in the subordinate Courts in the same way as they now deal with proceedings in civil suits in those Courts. The result is that section 25 of the Code of Civil Procedure will apply to insolvency proceedings and that the High Courts will have a power to transfer those proceedings similar to that which they have in regard to civil proceedings.

"One point more is of principal importance, and that is in regard to the effect of the discharge of an insolvent. Under the Bill as introduced a discharge operated to free an insolvent from all debt provable in insolvency, that is to

say, when once an insolvent was discharged he would have been free from the claims of any creditor in respect of any debt proveable under the Act, and that whether the creditor had in fact had notice of the insolvency proceedings or not. That, my Lord, is the English system and it works well in England. There the area is comparatively small; and there are commercial newspapers which circulate among trading classes, so that it is perfectly easy for any creditor to ascertain the fact of insolvency proceedings having been instituted against his debtor. But in India the conditions are very different. This is a vast country, and there are no means of communicating with the trading classes such as exist in England. Insolvency proceedings might well be started at Dacca and a creditor at Peshawar might not hear of them until the proceedings were over. The local Provincial Gazettes travel no further than the territories of the Local Government which issues them, and even the official Gazette of India has obtained no circulation sufficient for present purposes. The Select Committee have therefore proposed to restore the system of scheduling creditors and to make a discharge operate only to free a debtor from debts entered in the schedule; creditors whose names are entered in the schedule must have had distinct notice of the insolvency. That change is the notice of effected in clauses 24 and 25.

"These, my Lord, are the main points to which criticisms have been directed, and I think the Council will agree that those criticisms have been largely met by the amendments which have been introduced in the Bill. There are, however, a few other points which I think it proper to bring to the notice of the Council.

"One is in regard to receivers. It has been brought to the attention of the Committee by our Hon'ble Colleague Munshi Madho Lal, and it has also been mentioned by the High Court of Calcutta. We are told—and we accept that view—that there will be difficulty in many cases in finding suitable persons to act as receivers. We are also told—and we accept that view also—that it may be advisable in some cases and in some circumstances to have officials to act as receivers in order that insolvency matters may be thoroughly investigated. We have therefore inserted a clause in the Bill to give power to Local Governments to appoint Official Receivers for specified districts. It is an optional power which can be exercised by Local Governments if they find from practical experience of the working of the Bill that it is expedient. We have added clauses to provide for the payment of these officials and for the delegation to them of certain powers.

"A further point is in regard to agriculturists. Under the Bill as introduced—clause 6, sub-clause (2) (*a*)—agriculturists were put in a special position in regard to insolvency. They were allowed to institute insolvency proceedings if their debts amounted to the small sum of fifty rupees. Other debtors, as you are aware, can only institute proceedings under this Bill if their debts amount to Rs. 500. The provision was originally taken by the Select Committee on the Code of Civil Procedure Bill from the Dekkhan Agriculturists' Relief Act. My Lord, this provision has been a good deal criticised, and the Select Committee are of opinion that there is no sufficient reason for giving special treatment to agriculturists. If special treatment is to be given to them as a part of the general treatment of agricultural indebtedness, it should be done in a special measure and not in a general law of insolvency. The Select Committee therefore recommend that this provision should be struck out of the Bill, but in lieu of it they have inserted provisions to preserve any special enactments in regard to agriculturists which are now in force and in particular to expressly preserve the operation of the insolvency sections of the Dekkhan Agriculturists' Relief Act.

"The clauses in regard to penalties have been amalgamated and have been made of wider scope.

"The Select Committee recommend that the Bill should come into operation on the 1st January next year. They suggest to this Council that it is desirable the Courts and practitioners and the public should have an opportunity of making themselves acquainted with the Bill before it comes into operation. They do not think it could in any case be brought into operation before the long vacation of the Courts commences, and that on the whole it is better to postpone it until the new year opens.

"Several new clauses are suggested, but they are really matters of machinery and not of substance. They relate to the withdrawal of petitions, the consolidation of petitions, the power to change the carriage of proceedings, the continuance of proceedings on the death of an insolvent, mutual dealings and set-off. These are all small matters and are dealt with shortly in the Bill. The result is that the Bill as amended consist of 56 clauses as against the 46 clauses of which the Bill as introduced was composed; but this advance is apparent and not real, for owing to the simplifications introduced by the Committee the Bill is some three pages shorter than it was when introduced.

"The Select Committee are well aware that this is not a complete Bill although it is a distinct advance on the present law of insolvency. There

are many matters not dealt with in this Bill which should find a place in any measure which purported to be a complete Bill, such for instance as the question of the administration of the estates of debtors who are found after their death to have been insolvent. But we have had in our minds the fact that this is the first real law of insolvency for the mufassal which has ever reached this stage in legislation. The elementary provisions in the Code of Civil Procedure, confined as they are to judgment-creditors and judgment-debtors, can hardly be called a real law of insolvency. It has seemed wise, therefore, to avoid the temptation of passing a more ambitious law in the first instance, and to confine ourselves to dealing with the points that occurred to us as being essential. When the law becomes familiar to the public and to practitioners it will be easy to amend; it will be easy then to introduce clauses dealing with such matters as those I have mentioned, and it may perhaps be thought right to introduce a clause similar to that which is to be found in the English Act—a clause to disqualify insolvents from holding public office for a certain time.

"My Lord, these are the chief alterations which the Select Committee purpose for the consideration of this Council, but I cannot close these observations without expressing thanks to two of our hon'ble colleagues who have rendered very special assistance in the consideration of this difficult matter. The Hon'ble Mr. Ismay and the Hon'ble Dr. Rashbehary Ghose, both lawyers of wide practical experience, have been good enough to devote much time to the investigation of the questions arising in connection with this Bill, and the improvements in the Bill are largely due to their suggestions."

The motion was put and agreed to.

The Hon'ble MR. ERLE RICHARDS moved that the Bill as amended be passed. He said:—"I recommend this Bill as a measure that is much needed and as one that will effect a beneficial change in the law in the interests of honest traders."

The Hon'ble DR. RASHBEHARY GHOSE said:—"Your Excellency, I have no hesitation in saying that the Bill we are going to pass into law to-day will be a very welcome addition to our Statute Book, and I have much pleasure in giving it my most cordial support. It has been framed on a modest and not on too ambitious a scale. No attempt has been made to stereotype details, and the leading provisions are simple and readily intelligible. Definitions also have been very sparingly used, because, as every lawyer knows, it is sometimes dangerous to imprison a definition in the iron framework of a

Statute. The profession, however, may find consolation in the reflection that even the best constructed code will not dispense lawyers from being learned.

"The principles underlying the law of insolvency in England and in the Presidency-towns have been carefully recast and not only expressed in a much simpler form but modified in many cases. My learned and honourable friend the Law Member, whom I may congratulate on the termination of his labours, has also tried to meet the rather moderate requirements of the more backward parts in the provinces halfway so to speak by providing for a simpler procedure.

"I do not desire to occupy the time of the Council with discussing dry technical points and will only remark that the fullest advantage has been taken of the criticisms which have been made and some objectionable provisions in the original Bill have been weeded out. The Select Committee were, however, unable to accept the suggestion made by a very eminent Judge that an order of adjudication should relate back, as in England, to the act of insolvency. No one, I need hardly say, can differ from Sir Lawrence Jenkins without the greatest hesitation and misgiving; but I may venture to point out that the English doctrine, though it may have the effect of avoiding certain questionable transactions, is a departure from the general rule that a decree or order relates back only to the commencement of the *lis* and has not, I may add, been adopted in America, where an order of adjudication takes effect only from the date on which the petition of insolvency, whether voluntary or involuntary, is presented to the Court."

The Hon'ble MUNSHI MADHO LAL said:—"My Lord, the Bill has now reached a stage in which it passes into an Act and we hope it will become an Act to-day.

"There is one thing to which I have the honour of inviting your Excellency's attention. It is this:—

"The provision regarding the appointment of Official Receivers, of which mention has been made in our Report in paragraph 4, and enacted in clauses 19 and 52, may be put into force as soon as possible, so that schemes may be ready on the date when this Act comes into operation. This will save from ruin the large landed properties that are in the hands of the judgment-debtors at present. It need hardly be said that judgment-debtors in cases of the kind become apathetic and do not care to keep the properties attached in execution or to be sold under mortgage-decrees in the condition in which they ought to be, and the properties are possibly ruined in litigation between judg-

ment-debtors and the decree-holders, which take a number of years, sometimes 12 to 20 years.

"The appointment of Official Receivers is a necessity. Receivers would be of great use not only to the judgment-debtor himself but to the creditor also. In this connection I may further suggest that there is a large and well educated class of vakils and pleaders in every district in this country whose services may be safely utilized for the purpose. In conclusion I may mention that it is a good Act and will be useful to debtors and creditors."

The Hon'ble MR. ISMAY said:—"My Lord, the Hon'ble Member in charge of the Bill now before the Council has dealt with its incidents in considerable detail, but I am unwilling to give an altogether silent vote in favour of its passing into law. It has been objected in some quarters that the Bill is in advance of the times, that the law as at present existing is sufficient for the wants of the mufassal, and reference is made to the undisputed fact that creditors very rarely invoke the assistance of that law. It is not, however, I venture to think, sufficiently realized that outside the Presidency-towns a creditor has at present practically no remedy against a dishonest debtor. The law as contained in Chapter XX of the Code of Civil Procedure was, as it seems to me, enacted almost entirely in the interests of debtors. Under that law no creditor can apply to have his debtor declared an insolvent unless and until he has obtained a decree against him, so that a trader who unexpectedly gets into difficulties has ample facilities for concealing or making away with the whole of his property before his creditors can take any action. Even when the holder of a decree does apply under the Code, the only practical result is that the insolvent is discharged as a matter of course, that he is exempted from liability to arrest on account of any of the scheduled debts, and that those debts to the extent of two-thirds are at once remitted. The law provides no doubt that such property as the insolvent is willing to disgorge shall vest in a receiver, but there is no machinery enabling the Court summarily to annul transfers made in anticipation of insolvency, and in actual practice the only property which ever finds its way into the hands of the receiver is such property as the insolvent has not contrived to conceal or otherwise dispose of. Under these circumstances it is no matter for surprise to find that creditors studiously ignore the insolvency provisions of the Code and prefer to take their chance of getting fraudent transfers annulled by regular suits.

"Under the provisions of the Bill now before the Council any creditor whose debt amounts to Rs. 500 may present an insolvency petition against his

debtor and on sufficient cause shown may cause his property to be at once attached. Ample power is reserved to the Courts to compel the production of his property by the debtor and to deal effectively with any case in which a debtor is guilty of any act of bad faith in the performance of the duties imposed on him. Fraudulent transfers made in anticipation of insolvency may be summarily annulled, and when once an order of adjudication has been made an insolvent is debarred from making any payment or entering into any contract. Discharges will no longer be granted as a matter of course and the insolvent who fails to get his discharge will be unable to incur fresh liabilities.

"My Lord, I can recall to my mind many cases in which debtors have succeeded in getting rid of the whole of their property, leaving their creditors with absolutely no remedy. The Bill now before the Council is designed to meet cases of this kind. It is in the main an adaptation in as simple and untechnical language as the nature of the subject permits of those provisions of the English law of bankruptcy which appear to be best suited to the requirements of the mufassal. It would be too much to hope that the measure is a measure of perfection, but I believe that the Bill will be found to supply a real want, and it is in this belief that it has my full support."

The motion was put and agreed to.

The Council adjourned to Wednesday, the 20th March, 1907.

J. M. MACPHERSON,

Secretary to the Government of India,
Legislative Department.

CALCUTTA;
The 15th March, 1907.

S. G. P. I.—No. 71 L. D.—50—12-8-15.—P. O. G.