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MADRAS RECORD OFFICE.

Government of Madras.

Judicial **DEPARTMENT.**

G.O. No. 1157 Press ~~Mis.~~

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Dated 30-7-~~19~~1866

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Not to be folded or roughly handled

JUDICIAL DEPARTMENT.

No. 1157.

FROM

A. J. ARBUTHNOT, ESQ.,
Chief Secretary to the Government of Fort Saint George,

To

THE SECRETARY TO THE GOVERNMENT OF INDIA,
HOME DEPARTMENT,
SIMLA.

SIR,

With reference to your letter of the 1st ultimo, No. 1424, relative to the contemplated amendment of the present Indian Insolvency Act, I am directed by the Governor in Council to forward, for submission to His Excellency the Governor General in Council, the annexed copy of a letter containing the opinions of the Chief Justice, and Sir Adam Bittleston, Judge of the High Court of Judicature at Madras, on the subject.

I have the honor to be,
Sir,
Your most obedient Servant,

FORT SAINT GEORGE,
30*th July* 1866.

Chief Secretary.

From the Honorable Sir A. BITTLESTON, KT., Judge of the High Court of Judicature, Madras, to His Excellency the Right Honorable the Governor in Council, Fort Saint George; dated Madras, 11th July 1866.

In compliance with your Lordship's request, conveyed to me in the letter of the Acting Chief Secretary, under date 21st June, I have the honor to submit the following observations for the consideration of the Government.

2. The present Insolvent Act for India (11 Vict., C. 21) is a rather curious combination of the Bankrupt and Insolvent Laws as they existed in England at that time, preserving the main distinctions between Insolvency for non-traders and Bankruptcy for traders, which was long observed in England but has now disappeared, and which certainly, as it seems to me, should not be continued in India.

3. The whole subject has lately undergone, and is still undergoing, so much discussion in England, that it may be assumed that no legislation for India will take place there until the English Law has been settled, and that the legislation for India will then, as a matter of course, be governed by the same general principles at all events as shall have been adopted for England. The intimate commercial relations between England and India render it very desirable that the Insolvent Law in both should be substantially the same.

4. In this view, and with reference to the changes which have already been adopted, or are contemplated, in England, I confine myself to a brief statement of the alterations in the existing law which appear desirable and practicable.

5. It may, however, be useful, in the first place, to say a word as to the special circumstances of Madras. The business of the Madras Insolvent Court is seldom of an important character. The petitions are almost invariably presented by the

insolvents themselves, and the creditors general exhibit very little interest in the matter. During my eight years of service, I cannot remember a single instance of a petition by a creditor, and only two or three instances at the outside in which estates of any magnitude have been brought into the Court. The petitioners are generally clerks in Government or Mercantile Offices, or small Native traders, and sometimes unsuccessful suitors in the High Court, who seek in the Insolvent Court to avoid the effect of the adverse decision of the High Court. The principal creditors of the most numerous class of petitioners, viz., the clerks and writers in Government and Mercantile Offices are the Sowcars, who lend readily upon Promissory Notes at large interest, such notes being generally signed by two or three fellow clerks for mutual accommodation, and the Sowcars being very well acquainted with the small means of payment possessed by any of them. Considerable dividends are, however, often declared in these cases, by reason of orders made under Section 27 of the present Act. This is the general character of the business of the Madras Insolvent Court; and for business of this kind, the machinery of the Court is suitable and quite sufficient. I have no doubt, indeed, that the business of getting in and distributing these small estates is better done by a regular Officer, such as the Official Assignee is, than it would be by any Trustees selected by the creditors. There is, therefore, at Madras no present necessity, nor is there any probability of a future necessity, for such a measure as the Act which has been found necessary at Bombay (Act XXVIII of 1865). At the same time, I see no objection to the introduction of Trustee Clauses, such as are contained in that enactment, in any general measure which may be framed. But there are three main points on which I think the present law capable of improvement, and they relate to each of the three interests which must be affected by any Bankrupt or Insolvent legislation:—

First, as to the debtor, the object of such legislation is upon certain conditions to release him from liability to be imprisoned for debt. The present disposition in England seems to go yet further, and to favor the abolition of imprisonment for debt altogether, for although it is proposed to continue the power of the County Courts to order imprisonment on a judgment summons, that is more in the nature of imprisonment for contempt in disobeying an order of the Court, which the Court is satisfied that the party has the means of obeying, than of imprisonment for debt simply. Having regard, however, to the circumstances of Madras (I may probably say of India generally) I am not prepared to advocate the total abolition of imprisonment for debt here. It seems to me that the provisions of the Procedure Code (Act VIII of 1859) in this respect are based upon a sound principle, and do justice to the debtor, by enabling him to procure his release upon a full disclosure and surrender of his property. To this statement, there are two exceptions, or qualifications,—1st, that those provisions of the Code do not at present apply to debtors imprisoned under judgments of the Small Cause Courts; and 2ndly, that they require the debtor to produce a written statement of his property, which, of course, he can never do immediately upon his arrest; and the consequence is that the Judge must commit him to prison, where he must remain until his statement can be prepared. My suggestion is that these Clauses of the Code should be extended to the Small Cause Court, and that the Clauses should be amended so as to authorize the Judge, before whom the debtor is brought upon his arrest, to examine him *viva voce* as to his property and means of payment, and then to release him on bail, or allow him to remain in the custody of the Officer, instead of committing him to prison, until notice has been given to the detaining creditor and the written statement of the debtor has been produced and inquired into. With these amendments, the Procedure Code would adequately provide for the case of the debtor; and in the new Insolvent Act, I think that no power should be given to him to petition the Court, or, if at all, certainly not unless he could satisfy the Court that his available estate would realize 50 per cent. for the whole body of creditors.

Second, as regards the interests of the creditors, I think, in the first place, that all distinction between cases of Bankruptcy and cases of Insolvency should be completely got rid of. This will require Sections 8 and 9, Sections 59 and 60, and also Sections 77 to 84 of the existing Act to be altered. In all such cases as are provided for by Sections 8 or 9 of the Statute 11 Vict., C. 21, or by Sections 2 and 3 of Act XXVIII of 1865, any creditor should be authorized to petition the Insolvent Court for a declaration that the estate present and future of the debtor should be vested in the Official Assignee, or in Trustees to be chosen by the creditors, and, upon the filing of such petition, notice should be issued to the creditors. Upon the day appointed in such notice, the Court would decide whether the case came within the Act, and, if so, in what manner the estate should be wound up, being guided therein by the wishes of the majority of creditors. The collection and distribution of the estate should be left to the Assignee or Trustees; and after such collection and distribution, or as soon as sufficient had been collected to pay two-thirds of the debtors, or at any time upon consent of a majority of creditors both in number and value, the Court should be authorized, if it should think right, to give a final order, which should operate to discharge after acquired property of the debtor from all debts which had been, or might have been, proved under the Insolvency—provision being, of course, made for notice to creditors in England, or elsewhere out of British India, but no judgment should be entered up to affect future property, as provided by Sections 86 and 87 of the present Act. As to the declaration of dividends, and the examination of the debtor or other parties touching the debtor's estate, more power, I think, should be given to the Official Assignee than the present Act gives. The declaration of the dividend by the Court itself is a useless and expensive form, and the examination of a witness touching the estate is little better. The principal object of such examination, generally, is to obtain information for the guidance of the Official Assignee, and it seldom happens that any order of the Court is founded thereon, unless it be an order giving the Official Assignee leave to institute some legal proceedings. I think the Official Assignee should be trusted with the exercise of a discretion in that matter, without any application to the Court, and that similar powers (except perhaps as to carrying on the business of the debtor) should be given to him as are conferred upon the Trustees by Act XXVIII of 1865, subject to a like power of appeal to the Court. This will affect Sections 28, 29, 31 and 32 of the existing Act.

Third, as regards the public interest involved in the punishment of commercial frauds, my opinion is that they should be dealt with as other crimes, and that the trial of all offences for which the Insolvent Court is now authorized to inflict punishment should be transferred to the Ordinary Criminal Courts, and be tried as other criminal charges are tried. Sections 50, 51, 52 and 53 of the present Act would require alteration to meet this view. Further, as to Sections 69 and 70, the Penal Code provides for these offences; and as to Sections 65, 66, 67, relating to warrants of Attorney, subsequent legislation has already got rid of them. So all the Sections which relate to Bankruptcy in England will require alteration to

adapt them to the altered state of the English law; and I would further say that, though I have indicated the particular Sections of the present Act which would be directly affected by the changes suggested, it is clear that the Act should be entirely re-modelled, in order properly to carry those changes into effect.

6. The Chief Justice has requested me to add that, having read this letter, he concurs generally in my suggestions, and therefore thinks it unnecessary to write a separate answer to the letter addressed by the Government to him; but he desires to observe that, considering the alteration of the law as to imprisonment, a final order of discharge should not, in his opinion, be granted upon the mere consent of a majority of the creditors, until the estate should have suffice to pay about one-third of the debts.

Ed. J. H. Burns.

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Jud Department.

No. 1157

To

The Secretary to the Government
of India,
Home Department.
Simla

Sir,

With reference to your letter of the 1st ultimo No 1424, relative to the contemplated amendment of the present Indian Insolvency Act, I am directed by the Governor in Council to forward for submission to His Excellency the Governor General in Council, the annexed copy of a letter containing the opinions

Chief Justice.
of the ~~two Barristers~~
Judge Sir Adam Bittleston
Judges of the High
Court of Judicature
at Madras on the
subject of

Fort St. George
30th July 1862

Judicial 1866 Departt.

No. 1154.

To
The Secy. to the Govt
of India

Dated 30th July 1866

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