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1908

18 aug

Last previous Paper.

(Subject.)

Case of Charles Grant

States history of proceedings between himself on the one part & Mr A. T. Smart & Ld Delamere on the other. Requests impartial inquiry & expedn of completion of civil action

(Minutes.)

Mr Read

This man has no case. But I promised him we wd send it to the Govt for a report.

Do so, return him his file of papers, tell him that we will ask the Govt for a report & say that he is mistaken in his assertion that I said that the report wd possibly be made by Mr Smith the principal Judge at Zanzibar. Send Govt a copy of your letter to applicant.

A. Br
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H. J. R.

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Next subsequent Paper.

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TO THE RIGHT HONOURABLE THE EARL OF CREWE, K.G.

HIS MAJESTY'S PRINCIPAL SECRETARY OF STATE

FOR THE COLONIES.

30246
18 AUG 08
Aug 18/08

THE CASE OF CHARLES GRANT.

My Lord

Early in the year 1904 Mr. A.T. Smart of Nairobi applied to the Government of British East Africa for the purchase of 500 acres freehold land on the Dagoretti road near Nairobi. These 500 acres freehold were granted to him, but he could not obtain the conveyance till 1906.

In February 1905 Smart was in need of money, and obtained a loan of 1500 rupees from Lord Delamere, and gave him a receipt for the amount.

This receipt describes the amount paid as a loan and as an advance payment on various pieces of land sold to Lord De- mere, but no land is specified in the said receipt.

Nothing further seems to have been done till February 1906, when I approached Mr. A.T. Smart with a view to purchase of the said 500 acres of land. Smart informed me that he had made a verbal sale to Lord Delamere two years previous, that Lord Delamere had not completed the purchase that he "Smart" had cancelled the sale and could accept an offer from me and I agreed to purchase the land from Smart for Rupees 26250/.

An agreement to this effect was entered into between myself and Smart dated February 1906. I informed Mr. Allen, "Lord Delamere's Solicitor" of the transaction and Mr. Allen wrote to me and also to Smart, informing us that Lord Delamere had already purchased the land from Smart.

On February 17th Lord Delamere brought an action against Smart for specific performance of a contract to sell the land.

This action was fixed for hearing on the 12th of April, but on that day Mr. Allen, Lord Delamere's Solicitor approached Smart with a view to a settlement. A settlement was effected, and a memorandum of agreement was entered into on the 12th of April 1906

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Clause 3 of this agreement is important and reads as follows:-

"The said Lord Delamere agrees to indemnify the said A.T. "Smart against any cost and damage he may bona fide incur "and be compelled to pay in regard to any action which may "be brought against him by the said C. Grant in respect of "the said recited agreement between him and the said C. "Grant of 3rd. February 1906. The said A.T. Smart undertakes "to bona fide defend any such case and resist any such "claim for damages to the best of his abilities."

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This Case was called on the 12th April, when the settlement came to light and I applied to be made a co-defendant, but my application was refused.

I immediately commenced proceeding against Smart, with the result that I obtained judgment in my favour for Rs. 34945/. and Costs on the 21st. August 1906.

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On the 10th September an application for execution of this decree was made by my Solicitor under Section 235 of the Indian Civil Procedure Code and notices were issued under section 248.

On the 13th September Mr. Allen appeared on behalf of Mr. Smart, and when asked what he intended to do, replied that he was also acting for Lord Delamere, who he understood intended to appeal against the judgment of the 21st. August 1906. Mr. Allen asked for an adjournment, for Lord Delamere to decide on his course of action: The case was accordingly adjourned to the 20th September 1906.

Between the 13th and 17th. September Smart released Lord Delamere from the indemnity given by Lord Delamere in the

agreement of the 12th April 1906, in consideration of a payment of £50. No formal deed of release was executed, but a receipt for £50 was given by Smart to Lord Delamere.

Upon hearing the above I at once filed an affidavit to this effect, and applied for the arrest of Smart, and on the 18th September Smart was summoned to attend in person at the Court. He stated that he could get no satisfaction from Lord Delamere, and that Lord Delamere would not find the money for an appeal, and so he had done the best thing he could do for himself, and had taken Lord Delamere's £50, and released him from the indemnity. He stated that all this was arranged in Mr. Allen's office. He was then examined as to whether he had carried out his part of the agreement of the 12th April 1906 by bona fide defending the suit to the best of his ability, and admitted that he had fought the case of Grant v. Smart bona fide and to the best of his ability.

On the 19th September Smart was ordered to pay the amount of the decree or go to jail.

The £50 belonging to Smart was also attached. And a notice was issued against Lord Delamere to show cause why money due to Smart under the indemnity clause in the agreement of 12th April 1906 should not be attached. To this notice Lord Delamere appeared by Counsel, and stated that when he entered into the contract of release he was advised that Smart could not sue him on the indemnity, and further stated that in his opinion Smart had not made a bona fide defence in the action with Grant.

As Lord Delamere disputed the debt an order was made on the 27th September 1906 appointing Mr. Wood a Receiver under section 503 of the Indian Civil Procedure Code to test the liability of Lord Delamere by an action. Smart filed an appeal against this order, on the ground that the property, i.e. the debt due by Lord Delamere under the indemnity bond, of which the Receiver was ordered to be appointed, was neither the subject of the suit, nor under attachment, and he succeeded in getting the order reversed.

Failing to recover my claim by way of execution of the decree I next filed a Petition in bankruptcy No.1. of 1906 for a receiving order to be made in respect of the estate of Smart.

On the 27th November Smart filed an answer to this petition, pleading that the High Court at Mombasa had no jurisdiction in bankruptcy, and that the procedure in the case of insolvent judgment debtors should be taken under Chapter 20 of the Indian Civil Procedure Code.

Judgment was delivered November 29th 1906 by Judge A.F. Bonham Carter and the petition was dismissed on the ground that by Section 11 of the East Africa Order in Council of 1897 the Indian Civil Procedure Code ousted all Common and Statute law of England with regard to bankruptcy.

In his judgment the Judge says "It is possible under the "Code of Civil Procedure for a creditor to get a decree "and afterwards proceed to make the debtor an insolvent, "this is not the same as in English bankruptcy law, but "it appears to be in substitution for it and therefore "as the law stands now, I hold that the Code of Civil "Procedure ousts all Common and Statute Law of England "with regard to Bankruptcy."

I then appealed against the judgment of Judge Bonham Carter, and the appeal was heard at Mombasa by Judges Hamilton, Barth and Murison and judgment was delivered on the 22nd. April 1907, dismissing the Appeal.

I then applied to the Court at Zanzibar, for leave to appeal to the Privy Council. This application was heard on the September by Judges Smith, Murison and Buzzard. At this application Mr. Osmond Tonks my Counsel, on being asked for his reasons for the application stated that he did so on the ground that Chapter 20 of the Indian Civil Procedure Code was inapplicable as fraud was distinctly alleged in respect to the release by Smart of Lord Delamere from the indemnity, and section 351 of the Code states that when the Court is not satisfied that

the debtor has acted fairly it shall dismiss the petition. The judges then told Mr. Tonks that no note was made by the Judges of the Appeal Court as to this point having been raised in the Appeal, and that it was not mentioned in the Judgment. The Court then suggested that they should adjourn the application to the 3 judges who heard the appeal, viz. Judges Hamilton, Barth and Murison, so that they might review their judgment.

This came on in September 1907, and Judgment was delivered on September 16th 1907.

The Judges in their Judgment stated that as no allegation of fraud appeared on the memorandum of Appeal, they had not been able to deal with it, at the Hearing of the Appeal. Yet they admitted that Fraud was alleged in the Original Petition in Bankruptcy. They go on to say that on account of this omission of allegation of fraud in the Memorandum of Appeal they had in the first Appeal been precluded from resting their decision upon the allegation of fraud contained in the original Petition, but based their decision ent[illegible]ly on the fact that the applicant was a decree-holder for money.

They therefore dismissed my application for leave to appeal to the Privy Council, and at the same time say "Inasmuch "as this Court has never entertained the question of fraud in "relation to these proceedings, but has considered the application "of the Law to the position of the Appellant as a decree-holder "only, he is not thereby precluded from presenting his petition "under the English Bankruptcy Law. It only remains for him to "satisfy the Court in which he files his petition that by reason "of an allegation of fraud by the respondent section 361 would "prevent him from succeeding in a petition under Chapter XX of the "Code."

To put it in plain English, they dismiss my application for leave to appeal to the Privy Council with costs against me, but reverse their Judgment of April 22nd. 1907 and grant my appeal of that date.

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In February 1907, Smart, Lord Delamere, and Allen were prosecuted by the Crown, Smart under Section 424 of the Indian Penal Code for defrauding creditors and Lord Delamere, and Allen, his Solicitor were prosecuted for abetting Smart; the grounds of the prosecution being that Smart by releasing Lord Delamere from the Indemnity Bond of 12th. April 1906 had acted dishonestly and even guilty of fraud against a creditor, i.e. myself and that Lord Delamere and Allen had abetted him in this fraud. For the defence it was argued that under sections 124 and 125 of the Indian Contract Act an indemnity holder in order to have any claim on the giver of the indemnity must have paid the amount which he demands, and that so long as Smart had not paid anything out of pocket he had no claim or demand against Lord Delamere.

The Judge upheld this argument and directed the Jury to bring in a verdict of not guilty, which was duly done. This in spite of the fact that in the agreement of April 12th. 1906 the indemnity was expressly given for the damage I might be entitled to receive from Smart by a decree of the Court.

This briefly is the history of the proceedings between myself on the one part and Mr. A. T. Smart, and Lord Delamere on the other; and I contend that they show positive evidence of a Conspiracy to defraud me of my just rights, and that some of the judges of British East Africa have assisted in shielding Lord Delamere Mr. Allen and Mr. Smart from the proper consequences of their behaviour.

[I contend that ~~our~~ one judge knowingly and deliberately tried to deprive me of the only method open to me of recovering the damages awarded me.]

The three main points that I rely on to support ~~this ascer~~ their ascertions are (1) the proceedings in connection with the application to make a receiving order in bankruptcy against Smart, (2) the criminal proceedings against Smart, Lord Delamere and Allen. (3) The hearing of my application for protection from Mr. Allen. and further evidence that can only be produced in B.E.A

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No. 1. THE BANKRUPTCY PROCEEDINGS.

I was driven to file the Petition in Bankruptcy because all other methods of obtaining the amount of the judgment from Smart had failed, and there was no other means by which the debt due to Smart by Lord Delamere under the indemnity Bond of the 12th April 1908 could be made available to satisfy his creditors.

I could not myself proceed against Lord Delamere, and the only thing I could do to get at Lord Delamere was to make Smart a Bankrupt, and have a receiver appointed of his estate, who could take steps to recover the debt from Lord Delamere.

I was informed by my legal advisers and could plainly see for myself that there was no possibility of my succeeding in obtaining the appointment of a receiver under Chapter 20 of the Indian Civil Procedure Code, or under any other law except English Bankruptcy Law.

The Law in force in British East Africa is that laid down by section 11 of the British East Africa Order in Council of 1897. Section 11 says

"Subject to the provision of this order, and to any
"treaties for the time being in force relating to the
"Protectorate, her Majesty's Criminal and Civil Jurisdic-
"tion in the Protectorate shall so far as circumstances
"admit, be exercised on the principal of, and in con-
"formity with the enactments, for the time applicable,
"as hereinafter mentioned, of the Governor-General of
"India in Council and of the Governor of Bombay in Council
"and according to the course of procedure and practice
"observed by, and before, the Courts in the Presidency of
"Bombay beyond the limits of the ordinary original juris-
"diction of the High Court of Judicature at Bombay,
"according to their respective jurisdiction and authority;
"and so far as such enactments procedure and practice are
"inapplicable, shall be exercised under, and in accordance
"with the Common and Statute Law of England in force at the
" commencement of this Order."

Lower down are given the various enactments "as hereinafter mentioned", incorporated.

Among these appear the Indian Civil Procedure Code; but not the Indian Bankruptcy Act.

Chapter 20 of the Indian Civil Procedure Code, which is the Chapter dealing with insolvents, contains nothing more than an elementary code of bankruptcy, and is only applicable under certain circumstances. The Indian Insolvents Act is the substantial Bankruptcy Law of India, but this is not incorporated under section 11 of the Order in Council of 1897.

Section 344 of Chapter 20 undoubtedly provides a means whereby a decree holder can have the judgment debtor declared a bankrupt, and a receiver appointed of his estate, But section 351 goes on as follows.

"If the court is satisfied

"(a) That the statement in the application is substan-
"tially correct.

"(b) that the judgment debtor has not, with intent to de-
"fraud his creditors, concealed transferred, or removed
"any of his property since the institution of the suit
"in which was passed the decree in execution of which he
"was arrested or imprisoned, or the order of attachment
"was made, or at any subsequent time.

"(c) that he has not, knowing himself to be unable to pay
"his debts in full, recklessly contracted debts, or given
"an unfair preference to any of his creditors by any pay-
"ment or disposition of his property.

"(d) that he has not committed any other act of bad faith
"regarding the matter of the application.

"The Court may declare him insolvent, and may also, if it
"thinks fit, make an order appointing a receiver of his
"property, or if it does not appoint such receiver, may
"discharge the insolvent.

"If the Court is not so satisfied it shall make an order
"rejecting the application."

This section of the Code would make it impossible for me to get a receiver appointed under section 344 and this was admitted by Judges Smith, Murison and Buzzard on the hearing of my application on the   September 1907 for leave to appeal to the Privy Council. In India it would have been possible to get a receiver appointed under the Indian Insolvents Act, but this Act was not applied to British East Africa under section 11 of the Order in Council of 1897.

As it was impossible to have a receiver appointed under the Indian Civil Procedure Code, and as the Indian Insolvents Act did not apply, my only remedy was to make my application under the English Bankruptcy Laws, for as I have pointed out section 11 of the Order in Council of 1897 says "so far as such enactment "procedure and practice are inapplicable the Civil jurisdiction "shall be exercised under and in accordance with the Common and "Statute Law of England in force at the commencement of this order."

The Indian Civil Procedure Code was in this Case plainly inapplicable, so the English Bankruptcy Laws became applicable. And there are some precedents on this point in the Court law of the British East African Protectorate, as was admitted by Judge.

For this reason I made my application for a receiving order against Smart, and here is where I contend that the judge showed a spirit of partisanship.

On the original hearing of the bankruptcy petition on the 29th November 1906 by Judge A.F. Bonham Carter he dismissed the petition on the ground that "where part of an applied Indian Act

"deals with any matter it must be held to deal wholly "with that matter, and a larger English Statute cannot "be brought in. It is possible under the Code of Civil "Procedure for a creditor to get a decree and afterwards "proceed to make the debtor an insolvent."

That this was ~~bat~~ bad law is shown by the judgment of Judges Hamilton and Barth on the appeal. Moreover, here, as was pointed out by my

solicitor to the Judge, it was impossible to make the debtor an insolvent under section 344 of the Code; as he had been guilty of the unfair practices specified in section 351 and consequently no Judge could have declared him an insolvent or appointed a receiver under section 344. Yet Judge Bonham-Carter stated in his judgment, that under these circumstances it was possible for me to make the debtor an insolvent.

Had nothing further occurred it could be said that Judge Bonham Carter was merely guilty of an error of judgment in his interpretation of the Law. But shortly after an event occurred which throws light on this point. The day after this judgment I saw Judge Bonham Carter in his chamber and in the course of a discussion of my case with him I asked him if it were possible for him to enlarge on his judgment to the extent of saying under which Chapter of the Indian Civil Procedure Code I could proceed. He replied that he had gone into the case thoroughly and that in his opinion I had no remedy under the Civil Procedure Code. I am prepared to make an affidavit as to the truth of this conversation.

An hour afterwards I met Mr. Anderson, editor and proprietor of the Mombasa "Standard", and repeated this conversation to him. He thereupon went to Judge Bonham-Carter, and told him what I had said and asked him whether it was true that in his opinion I had no remedy. The Judge replied that it was perfectly true. Mr. Anderson is also ready to make an affidavi as to the correctness of this conversation and I have a letter from him giving to that effect.

It is on these conversations, taken in connection with his Judgment in my Bankruptcy Petition, that I rely to support my charge of unfairness in his judicial capacity against Judge Bonham-Carter. In his Judgment he distinctly states that it was possible to make the debtor an insolvent. Yet the day after he admits in conversation to me and to Mr. Anderson that it was impossible, and that I had no remedy.

The Judgment as I saw would have very serious results for me. Though Smart was indebted to me in the sum of 34945 rupees and costs on the judgment of the 21st. August 1906 and though Lord Delamere had agreed to indemnify him against any costs and damages he might incur in any action brought by me; yet I had no means of obtaining this sum from either Smart or Lord Delamere, for Smart was insolvent, and it was impossible to recover the sum from Lord Delamere until a receiver had been appointed of Smart's estate and the Judge had refused to appoint a receiver. I accordingly proceeded to appeal against the judgment of Judge Bonham Carter, and the appeal was duly heard at Mombasa, by Judges Hamilton, Barth and Murison on the 26th April 1907, and not at Zanzibar. I wish to point out that the appeal Court for this session was for the first time removed from Zanzibar to Mombasa, and that only one Zanzibar Judge sat on the case, and that Judges Hamilton and Barth had sat on the original case.

The Judges delivered a long judgment, much of which seems irrelevant, for the subject matter of the case lay in the Protectorate, and had nothing to do with the Sultan of Zanzibar's territories, and dismissed the appeal on the ground that I could have proceeded under section 344 of the Indian Code. They took no notice of my original petition which alleged fraud so that section 351 absolutely prevented this.

At the same time two of the Judges, Hamilton and Barth absolutely quashed Judge Bonham Carter's contention that the Indian Code ousted all English Bankruptcy Law and laid down the law that English Bankruptcy Law is the substantive law of the country, and that the procedure laid down by Chapter 20 of the Indian Code is only good so far as it is applicable and does not conflict with the English Bankruptcy Law.

If the Judgment of Judges Hamilton and Barth be carefully considered it will be seen that they admit my contention that under certain circumstances it is possible to proceed under English Bankruptcy Law; but, by ignoring my original petition and

my Counsel's arguments as to the impossibility in my case of my getting a receiver appointed of Smart's estate, they find it possible to dismiss my appeal.

The two Judges say in their Judgment

"Having arrived therefore at the conclusion that "the substantive law of bankruptcy in the Protectorate "is the English law, is there anything which would prevent "the concurrent application of chapter 20 of the Civil Pro- "cedure Code? We do not think there is.

"There are in fact two procedures existing. In so "far as the procedure provided by chapter 20 of the Code is "applicable and is not in conflict with the English law "of bankruptcy it is good, but where Chapter XX is inappli- "cable or there is a conflict the English law, being the "substantive law of the country must prevail.

"In matters which are not covered by chapter XX "of the Procedure Code such for instance as a man against "whose person or goods there is no attachment existing "petitioning to be made a bankrupt he would necessarily "have to proceed under the English bankruptcy law."

The two Judges ask "Is there anything which would prevent "the concurrent application of Chapter 20 of the Civil Procedure "Code? We do not think there is."

Yet there obviously was something to prevent me proceeding under Chapter 20 of the Indian Code. That was that Smart had been guilty of the grossest bad faith and consequently section 351 came in and prevented my obtaining the appointment of a receiver. The judges law was excellent yet by ignoring facts, they found it possible to dismiss my appeal, and so were the means of inflicting a gross injustice on me. And I contend they were guilty of unfairness in refusing to take note of my original petition.

As I could not obtain justice in the British East African

Court I determined to carry an appeal to His Majesty's Privy Council, and accordingly made an application for leave to appeal. This application was heard on the September 1907 by Judges Smith, Murison and Buzzard. On the hearing my counsel Mr. Osmond Tonks was asked by the Judges his grounds for the application, he replied that his grounds were that section 351 made it impossible for his client to proceed under the Indian Code, and that consequently English Bankruptcy Law became applicable. The Judges replied that there was no note made by the Judges that my Counsel had ever raised this point in the appeal, and that it was not mentioned in the judgment.

The judges then suggested to Mr. Tonks that they should adjourn the application to the three judges who had heard the appeal, to give them an opportunity of reviewing their judgment. This was done, and the application was heard on the 13th September 1907.

On the 16th September 1908 the Judges delivered their Judgment. This judgment I have already commented upon, in my brief history of this Case. The three judges apparently tried to justify their former decision on the ground that Fraud was not mentioned in the Memorandum of Appeal. That was certainly the case and was due to t wilful carelessness of my legal adviser Mr. Tonks, but that does not excuse the three judges. Fraud was distinctly alleged in the original petition; and the whole point of my Case was that I could not apply under Chapter 20 because fraud was alleged. And such being the case I of necessity filed a petition for a receiver-ship under English Bankruptcy Law. The Judges were well aware of this, and yet they refused my appeal.

In their Judgment of September 16th the three Judges refuse my leave to appeal to the Privy Council, but say (in substance) that I am perfectly right as to the fact that I cannot proceed under Chapter 20 of the Code, but must proceed under English Bankruptcy Law, and then go on to say that while they refuse to grant my leave to appeal to the Privy Council, yet it only remains for me to satisfy the Court in which I filed my petition that by reason of an allegation of fraud by Smart, section 351 would prevent me from succeeding in a petition under Chapter 20 of the Code.

No. 2. The Criminal proceedings against Smart Lord Delamere and Allen.

This case came on before Judge Hamilton the Crown Prosecutor appearing for the Crown, while Mr. Burn assisted the Crown as my Counsel. The charge against the prisoners was for defrauding creditors; Smart was charged under section 424 of the Indian Penal Code, and Lord Delamere and Mr. Allen were charged with abetting him. The grounds being that Smart had dishonestly released Lord Delamere from a claim to which he was entitled, viz: the indemnity clause in the agreement of the 12th. April 1906, with the intent to defraud a creditor, i.e. myself.

At the trial the defendants did not attempt to deny the charge; it is obvious that it was impossible for them to deny it, they based their whole defence on a technical point, Mr. Dalal, who with Mr. Byron appea[illegible] for Lord Delamere, found his defence on the fact that by sections 124 and 125 of the Indian Contract Act an indemnity holder in order to have any claim on the giver of an indemnity must have paid the amount which he demands, and that so long as Smart had not paid anything out of pocket, he had no claim or demand against Lord Delamere.

The Judge in summing up said "Gentlemen the law quoted "by Mr. Dalal is right. There is therefore no "cause of action between Smart and Lord Delamere. "That being the case Smart has no claim or demand " to which he was legally entitled. I shall there- "fore instruct you to acquit Smart on the main "offence and Lord Delamere and Mr. Allen."

A verdict of not guilty was accordingly brought in.

I then quote section 124 and 125 of the Indian Contract Act.

Section 124. "A Contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a contract of Indemnity.

125. The Promisee in a Contract of indemnity acting within the scope of his authority is entitled to recover from the promisor.

1. All damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies.

2. all costs which he may be compelled to pay in any such suit if in bringing or defending it he did not contravene the orders of the promisor and acted as if it would have been prudent for him to act in the absence of any contract of indemnity or if the promisor authorized him to bring or or if the promisor authorized him to bring or defend the suit.

3. All sums of money which he may have paid under the terms of any compromise in any such suit if the compromise was not contrary to the order of the promisor and was one to which it would have been prudent for the promisee to make in the absence of any contract of indemnity or if the promisor authorized him to compromise the suit.

Now if these two sections be carefully read it will be seen very clearly that it is impossible to put such a construction on them as Mr. Dalal put on them, and which the Judge endorsed by his summing up.

Subsections 1 & 2, of section 125, say the promisee is entitled to recover from the promisor all damages and all costs which he may be compelled to pay in any suit.

Mr. Dalal's argument was that the words "may be compelled to pay" mean "may have actually been paid under compulsion of law" and the judge indorsed this view. But it is quite clear that this is not the right construction to put on the words. Had this been the Legislature's intention, they would have used the words "may have been compelled to pay". That this is the right view can be seen from subsection 3 of section 125. Here the words used are "all money which he has paid under the terms of any compromise." Here the words "may have paid" clearly show that the money must actually have been paid and that until it is paid the indemnity does not come into force. But it is equally clear that subsections 1 & 2 bear a different meaning: the words "may be compelled to pay" do not imply that the compulsion does not arise till the money has actually been paid, but implies that the compulsion arises the moment the machinery of the law is set to work, i.e from the moment judgment is given, and that the real meaning of the words is "may be under compulsion of law to pay" and that the construction Mr. Dalal tried to put on them is quite wrong. The fact that in subsections 1 & 2 the words used are "may be compelled to pay" and in subsection 3 "may have paid", show that a distinction is drawn by the Legislature. In the first case the indemnity comes into force as soon as the promisee is under compulsion to pay and the compulsion arises at the moment judgment is given, for from that moment a judgment creditor is entitled to set all the machinery of the law, its executions, judgment, summons and proceedings in bankruptcy, to work to compel the judgment debtor to pay, and the fact that the promisee has not the means to pay does not absolve the promisor from the indemnity he has given. In the second case the promisor need not indemnify the promisee until the money has actually been paid.

Therefore in this case the indemnity given by Lord Delamere came into force from the moment I obtained my decree against Smart, and not, as Mr. Dalal tried to argue, from the time that

Smart actually paid me. If we turn from the Indian Contract Act and look to the wording of the indemnity my case appears even stronger, for in the indemnity the words used are "any costs or "damages he may bona fide incur or be compelled to pay". It would be obviously impossible to say that the words "may incur or be compelled to pay" mean "may actually have paid". I quote this as it tends to still further confute Mr. Dalal's argument. This being so Smart in releasing Lord Delamere plainly brought himself within section 424, of the Indian Penal Code, which reads as follows, viz.,

"Whosoever dishonestly or fraudulently conceals or "removes any property of himself or any other person or dis- "honestly or fraudulently assists in the concealment thereof "or dishonestly releases any demand or claim to which he is "entitled shall be punished with imprisonment of either "description for a term which may extend to two years or "with fine or with both."

The charge against Smart arises from the words "whosoever .... "...dishonestly releases any claim or demand to which he is [illegible]tled" I think I have clearly shown that Smart actually had a "claim or demand" against Lord Delamere, i.e. the claim to be indemnified against the cost and damages in the suit brought by me, and this claim Smart released Lord Delamere from, and it is impossible to look on the release as other than a dishonest release; given as it was to save Lord Delamere from the effect of the indemnity he had given, in return for a cash payment of £50. As a matter of fact the prisoners never attempted to dispute the fact, they never denied the charge, nor did any of them go into the witness box to be cross-examined, and they must accordingly be held to admit this part of the charge. They based their defence solely on a legal quibble, a twisting of words into a meaning that they were never intended to bear, and as I have shown the meaning put on those words was erroneous.

Yet the Judge at Nairobi endorsed this argument, and stated that the law, as laid down by Mr. Dalal, was right, and directed

the jury to acquit the prisoners.

Had this case stood alone it might have been possible to hold that the Judge was merely mistaken in his law. But taken in conjunction with the Proceedings in Bankruptcy it is impossible to avoid the conclusion that it was not a case of bad law, but that here again was an attempt to shield Lord Delamere from the consequences of his own act. As it was impossible to acquit Lord Delamere, and convict Smart, the law was so twisted as to enable them both to go free, instead of suffering the punishment they undoubtedly deserved.

Previous to this trial another incident had occurred in October 1906 which I contend again shows the impossibility of getting justice in British East Africa and to this incident I beg to call your Lordship's attention.

In October 1906 my legal adviser Mr. H.W. Buckland informed me that Mr. Allen Solicitor for Smart and Lord Delamere, and one of the defendants in the police court proceedings had on the 9th October proposed to him that they (Allen and Buckland) should go in and work together, and that if they did so the action (Grant and Smart) would be as good as an annuity to them, as they could keep it going for a year and get all there was in it.

I at once went to the Town Magistrate's office and filed an affidavit to this effect. And I also wrote to his Honour Judge Barth enclosing copy of my affidavit, and asking for the protection of the Court, and I ask your Lordship to read this letter carefully. In it besides referring to the affidavit I called his Honour's attention to the fact that on the 13th September, when I applied for execution against Smart Mr. Allen had obtained a stay of execution on the ground that Lord Delamere would either pay or appeal, and that Mr. Allen took advantage of that week's stay to get the fraudulent release executed and that a few days later Lord Delamere on oath told the Magistrate (1) that he had not instructed Mr. Allen to appeal (2) that it was on Mr. Allen's advice that he had entered into the release and paid Smart £50 for same.

And I pointed out to his Honour that Mr. Allen had distinctly misled the Court in obtaining the stay of execution.

And I accordingly asked for the protection of the Court.

My application was heard by Judge Barth in his chamber at Nairobi on the [illegible]th. October. At this hearing I was not present, and I was not even informed that it was being held and no opportunity given me of appearing at it.

The result of the hearing was that on October 29th. Judge Barth wrote me, dismissing my complaint saying that "however "unwise the expressions used by Mr. Allen may be, there was "no attempt at dishonest Collusion with Mr. Buckland, and "that there was nothing said which would warrant me taking "any action on the ground of improper conduct."

The next thing to happen was that Mr. Allen took criminal proceedings against me in the Nairobi police Court under Section 500 of the Indian Penal Code for defacing Mr. Allen by using the words in paragraph 6 of the affidavit sworn by me before the Town Magistrate on October 13th. The summons was issued on November 7th, and was heard on November 26th. and 27th. and as a result I was committed for trial.

The trial came on in January: and the Jury brought in a verdict of not guilty.

Now with regard to this I will point out to your Lordship that at the hearing I was not allowed to be present, I think this fact alone is sufficient to show how unfairly the proceedings were conducted.

In this case I was bringing very grave charge against Mr. Allen (as a result of it when my application was dismissed he prosecuted me criminally for defamation) yet the Judge gave me no opportunity of appearing at the hearing or

of conducting my own case.

I put it to your Lordship that this was a most flagrant case of injustice, I had appealed to his Honour for protection and yet I was not allowed to speak a word for myself or produce evidence in support of my charges or even to be present at the hearing.

The result of this was that my application was dismissed, and I had to face a criminal charge, the criminal charge I admit, did not trouble me much, as the jury brought in a verdict of not guilty at once. I think this verdict of not guilty shows what a jury thought of Mr. Allen's behaviour. It was not given on a technical point. I raised the technical point that under the 8th. and 9th. exception of section 499 of the Indian Penal code my affidavit was absolutely privileged. But Judge Hamilton before whom I was tried overruled this point and left the case to the Jury. They as I say showed what they thought of it by at once bringing in a verdict of not guilty.

I do not think there is any need for me to say more than this.

This My Lord is the case I want to put before you, and I feel sure your Lordship will see there is sufficient cause for instituting a thorough investigation into the administration of justice in British East Africa.

As your Lordship will see I have used every possible means to recover my rights under Indian Civil Procedure Code and Criminal Code and also under English Bankruptcy Law. Yet in spite of all my efforts I seem to be as far off getting Justice as when I first commenced.

Moreover I have suffered from what I must call the professional misconduct of Mr. Allen a solicitor and officer of the Court and have been unable to get the protection of that Court.

Since then I have also suffered from the actions of my own solicitor, and it is impossible to get redress in the East African Courts.

Before concluding I would like to state that my legal advisers have described decisions of Mr. Logan, Town Magistrate, as extraordinary. I have suffered severely from Mr. Logan's decisions but I am positive that he is a very conscientious man and that his errors were only errors of judgment..

Mr. Coombe the Crown advocate in the Criminal actions for and against me, was always fair and just.

In regard to Judge Murison's "of the Zanzibar Court" decision of April 22/07, I am informed and believe that my original petition alleging fraud was never placed before him, I know that my solicitor Mr. Tonk at that hearing deliberately avoided making any reference to the fact that fraud had been alleged and committed, and he deliberately avoided making any reference to that fact in my petition appealing against Judge Carter's decision although he assured me that he had done so.

So that Judge Murison gave his decision in utter ignorance of the main issue in the case, ignorance of that fact would of course make him decide against me.

My complaints are against the East African Judges, and Mr. Allen Solicitor for Mr. Smart and Lord Delamere, and Mr. Tonks my own Solicitor.

I have no hesitation in saying, "if these complaints are investigated or reported upon by an East African Judge", that the possibility of having justice done is so remote that it would be useless for me to appear.

I might also state any report would be uncomplete, and would not be a fair statement of my case, without I am given an opportunity to call witnesses and give evidence.

Mr. Cox stated that the report would possibly be made by Judge Smith, the Principal Judge of Zanzibar.

An investigation before Judge Smith would assure me an impartial inquiry, and I respectfully request that one be made and that I am given an opportunity to call and examine any witness at the preliminary enquiry.

And further I respectfully ask that something be done to expedite the completion of the Civil Action, it has now been before the Court for over two years, still there is no prospect of ending it, and the position is a positive danger to me.

Trusting that my applications will receive favorable consideration,

I have the honor to remain

My Lords,

Your obedient servant

Chas Grant

address
Care National Bank
of India
17 Bishopsgate St
London E C

30246/08 E.A.P. 314

Sgd 16 Aug 08

Sir

I am &c. to ack. the recd. of your letter of the 18th inst with enclosures relating to certain legal proceedings in the E. Afr. Protectorate, & to inform you that the Governor will be asked to furnish a report on the matter.

2. I am to add that you are mistaken in your assertion that Mr. Cox said that the report would possibly be made by Mr Smith, the principal Judge at Zanzibar.

The documents forwarded with your letter are returned herewith.

&c. H.W.J.

DRAFT

C. Grant Esq.

MINUTE.

Mr. Hatcher 21/8
Mr. Ellis 21/8
Mr. Just.
Mr. Antrobus.
Mr. Cox. 21/8
Sir C. Lucas.
Sir F. Hopwood.
Col. Seely.
The Earl of Crewe.

Encls in 30246

Copy for W.C. 22 Aug

27 Aug 01

[illegible]

E Afr. Prot. No. 419

To Sir J H Sadler

Sir,

I have the honour to transmit to you the acc. copies of corres. with Mr C. Grant rel. to certain legal proceedings taken by him in the E Afr Prot. & to request that you will furnish me with a report on the matter.

[illegible]

Rec'd. 45614

Cntd. 21/8
Mr Ellis [illegible] 22/8/01

Mr. Grant. 18 Aug.
To Mr Grant 26 Aug