Suffering the Mass of Your
and Suffering
that among

have a prospect of success.

Sheriff Th. Gore for the recovery which he gives is unwilling to furnish a general report on the matter; and therefore Mr Hill our legal advisers must be asked to report on the matter after being furnished with copies of the whole proceedings. This prima facie Mr Grant appears to have suffered most badly; & it is desirable that we should know whether this is due

(a) to a defect in the law

(b) to a defect in the administration of the law

(c) To his own tactics ~~[illegible]~~ or that of his solicitor in prosecuting his case

MR 16/12

What we wanted (though I am not sure that this was made clear to the Govr) was an official report upon the legal history of the case and not a report upon the charges of corruption which brought Mr Grant against the Judges.

The report promised on p. 7 is not enough — we want a report upon the whole case and on the procedure, he must be sent with this draft

Governor's Office.

[illegible]

17th [illegible]

EAST AFRICA PROTECTORATE.

Confidential (124)

My Lord,

I have the honour to acknowledge the receipt of Your Lordship's despatches, marginally noted, [illegible] cover to correspondence with Mr. C. Grant in [illegible] to certain proceedings taken by him in East A[illegible]

.0. 419. 30246
.0. 429. 31157
.0. 464. 32105

2. Mr. Grant has laid before Your Lordship [illegible] history of the proceedings between himself [illegible] one part and Mr. A. T. Smart and [illegible] other, and contends that there [illegible] of a conspiracy to deprive him of his just [illegible] and that some of the Judges of this Protectorate have assisted in shielding Lord Delamere [illegible] and Mr. Smart from the consequences of their behaviour.

3. He further contends that one [illegible] and deliberately, tried to deprive [illegible]

H.M. PRINCIPAL SECRETARY OF STATE
FOR THE COLONIES
DOWNING [illegible]

[illegible] had been

[illegible] with

[illegible] proceedings,

[illegible] conspiracy to

prove [illegible]

[illegible] Lordship does not [illegible]

investig[illegible] into the [illegible]

[illegible] together to be [illegible] without round[illegible]

which my Executive [illegible] made [illegible]

characterise in [illegible] terms.

As regards Mr. [illegible] stated that [illegible]

unable to recover, under [illegible] Protector[illegible]

[illegible] due to high Mr [illegible] which the whole

[illegible] of complaint [illegible] two copies of the

[illegible] of [illegible] to proceedings

[illegible] the appeals [illegible]

[illegible]

From

5th Jan

DRAFT

MINUTE

Mr. Just.

Mr. Introduced

Mr. Dunn

Sir F. Hopwood

Sir Scely.

The Earl of Crewe.

the Reader

I have the honour

of your

Sir

the Secretary

Sir

I have the honour to

acknowledge the receipt

of your letter of the 18th of

August, with copies of

all the proceedings

in my former out that

the judgment of the Court

the Bench proceeding

adjudication

were

Sir

I have the honour to

acknowledge the receipt of your letter

of the 18th August, with copies of

all the proceedings in my former out that

the judgment of the Court

the Bench proceeding

adjudication

were

IN H. M. COURT

IN H. B. M. COURT OF APPEAL FOR EASTERN AFRICA

AT MOMBASA.

Civil Appeal No. 1 of 1907

Charles Grant versus A. T. Smart.

J U D G M E N T:-

This is an appeal against [illegible] Judgment of Judge Bonham Carter dismissing a petition filed in the District Registry of the High Court at Nairobi by one Charles Grant a decree holder [illegible] make his judgment debtor A. [illegible] under the English law.

The petition was [illegible] Judge in the Court below on [illegible] applied Act (in this case the Civil [illegible] deals with any matter it [illegible] with that matter and a [illegible] cannot be brought in, and [illegible] Chapter 20 of the Civil Procedure Code which deals with matters of insolvency [illegible] common and statute law of England [illegible] Bankruptcy which under article [illegible] East Africa Order in Council 1897 would [illegible] the law of the Protectorate.

[illegible] East Africa Order in Council 1897 [illegible] to the other [illegible] Treaties for [illegible] the Protectorate, [illegible] Civil And Criminal Jurisdiction in [illegible] Protectorate shall, as far [illegible]

[illegible], be exercised on the principles of, and in [illegible] with, the enactments for the time being [illegible] as hereinafter mentioned of the Governor-[illegible] in Council, and of the Governor of [illegible] and relating to the course of [illegible] practice observed by, and before, the [illegible] at Bombay beyond the [illegible] ordinary original jurisdiction of the [illegible] at Bombay according to their [illegible] jurisdiction and authority and so far as such enactments, procedure and practice are inapplicable shall [illegible] applied under and in accordance [illegible] the common and statute law of England in force [illegible].

The same Order applies certain Indian Acts amongst which is the Civil Procedure Code, and in order to ascertain whether the learned Judge was correct in [illegible] that Chapter 20 [illegible] statute law of [illegible] the whole [illegible]

[illegible] of Zanzibar [illegible] the remaining [illegible] the [illegible] included in the foregoing.

[illegible] the law of the Protectorate [illegible] of the Order in [illegible] and criminal jurisdiction

jurisdiction referred to [illegible]
is shall, so far as circum[illegible]
in conformity with the [illegible] Criminal Procedure
and Penal Codes of India [illegible] Acts [illegible]
which are in force in East Africa [illegible]
" this Order [illegible]
provided by law. "

Article [illegible] of [illegible]
in Council 1897 [illegible]
provides [illegible] "There [illegible] 1905 [illegible]
"Ordinance and law practice [illegible] established
"by or under the [illegible] and all [illegible]
"of any legislature in East [illegible] force [illegible]
"Africa shall remain in [illegible]
"sion is made that [illegible] proved [illegible]
having been made by Ordinance in [illegible] we are
thrown back upon article 11 of the Order in Council
[illegible] ascertain what the law actually in force at
the proclamation [illegible]

Now article 11 sub section (a) of the Order in
Council 1897 expressly states that the law whether
derived from [illegible] or from the common
and statute law [illegible]
Treaties [illegible] the
Protectorate [illegible]

This article states that "So far as Indian Enactments and the procedure and practice of the Court in the Presidency of Bombay are applicable Her Majesty's Civil Jurisdiction shall be exercised in accordance with the common and statute law of England in force at the commencement of this Order."

At the time this article was framed the Rules of the English law of bankruptcy relating to the realization and distribution of a bankrupt's assets had already been applied to the dominions of His Highness the Sultan by the Treaty of 1861, and neither at that time of the framing of the Order in Council of 1897 nor at any time subsequently has any definite law as to bankruptcy been applied to the rest of the Protectorate. That being the case we do not think we are justified in assuming that the framers of the Order intended by the application of the Code of Civil Procedure, which contains a Chapter dealing with certain matters of insolvency, thereby to alter the law of bankruptcy which undoubtedly at that time existed as regards the coast strip of the Protectorate; but we believe that it is more correct to assume that article 11 sub section (a) was inserted in the way in which it was stated in order that the law of bankruptcy applicable to the rest of the Protectorate should be similar to that already applied to the coast strip and should be applied in view of the last clause of the article

i.e.

[illegible] where the applied Indian enactments [illegible]
[illegible], Elliott [illegible] the matter before [illegible]
[illegible] is to be [illegible] to the common law statute law
of England in force at the time of commencement of
the [illegible]. This being so we do not feel at liberty
to [illegible] that a Chapter in a Code dealing with [illegible]
[illegible], although treating of certain matters of
[illegible] may be held to oust the substantive law of
[illegible]. In this respect we would refer to the
[illegible] Irrawaddy Flotilla Co. vs Bugwandass
[illegible] Law Reports Indian Appeals [illegible]
[illegible] Lordships of the Privy Council held that [illegible]
[illegible] being in force in India [illegible]
[illegible] the contract Act dealing with the
[illegible] could not be construed as [illegible]
[illegible] law as it is scarcely [illegible]

had been expressly referred to in
and which became equally applicabl
the Protectorate under the conclud
article 11 (a) of the Order in Cou
opinion we differ from the learned
below who stated that "where an appl
deals with any matter it must be co
with that matter and a larger ma
be brought in".

The true position is, we consid
the English Bankruptcy Law was as in
applied to the whole of the Protector
of the Order in Council 1897 was
registration and distribution of a ban
to the dominions of His Highness the
either by the Treaty of 1886, and th
Chapter 20 of the Civil Procedure Co
been superimposed upon the main sub
the country.

The Appellant's pleader has bro
notice the fact that certain cases ha
been taken in the past in the Old pro
under the Procedure applicable to Eng
and also the fact that the schedule
cable to the whole Protectorate is dra
way as to admit of the application
English Bankruptcy Law. Though we
great importance to either of them,
that they are deserving of mention, the
that procedure under English Bankruptcy has been

(p)

[illegible] the Courts of East Africa in the past, [illegible] showing that legislative authorities [illegible] scale of fees framed under [illegible] Council law certain [illegible] English Bankruptcy [illegible] other [illegible] the procedure [illegible] of the Code [illegible] has since [illegible] in the shape [illegible] Code [illegible] by the Ordinance Council [illegible] arrived therefore [illegible] that [illegible] of bankruptcy [illegible] English law, is there [illegible] applicants [illegible] Civil Procedure Code? We [illegible] There are in fact two [illegible] under [illegible] the procedure provided [illegible] is applicable and is not [illegible] English Law of Bankruptcy it is [illegible] Chapter XX [illegible] the English [illegible] country [illegible]

In [illegible] of the [illegible] bankrupt he would [illegible] under the English Bankruptcy Law.

Though we have arrived at this conclusion, we feel that the position is not entirely satisfactory

and

In this view the learned Judge of the lower Court was [illegible] a judgment in an effective bankruptcy [illegible] the East Africa Protectorate. It behoves me [illegible] (from [illegible] (the appeal here [illegible]) to consider the [illegible] Protectorate [illegible] of the [illegible]

The Order [illegible] the Coast [illegible]

Article [illegible] of the [illegible] that only part of the English law of bankruptcy [illegible] Writing subjects within the Coast area. [illegible] Order in Council 1897, (kept alive by Article [illegible] the 1902 Order) in applying the Civil Procedure Code [illegible] (as well as the Inland area) expressly [illegible] Order is made subject to the Treaty. I consider [illegible] that the English law is in the Coast area [illegible] law of the country. The Code is merely [illegible] so far therefore as the Insolvency provisions of the [illegible] law I am of opinion that the [illegible] prevail. As far as the Coast area is concerned [illegible] I find myself unable to agree with the [illegible] of the learned Judge of the lower Court in [illegible] the bankruptcy law of the Protectorate.

With regard to the Inland area the [illegible] Article 11 of the East Africa Order in Council [illegible] Article 22 (1) of the 1902 Order) applies [illegible] Indian area the Civil Procedure Code, and where the Code was inapplicable, the Statute and Common law of [illegible]. I take that to mean that the substantive bankruptcy law of the Inland area is the Civil Procedure Code and that the English law is merely supplementary. I think it is impossible, on a strict construction of the facts and especially in view of the [illegible] Sisay Matilla Co. vs. Bugwandas [illegible] in Calcutta

[illegible] judge of the lower [illegible] entirely sustn the [illegible] can be said is that where [illegible] conflict [illegible]

[illegible] The [illegible] conflicting [illegible] The question is [illegible] he [illegible] bound to adopt the [illegible] area in which he happens to [illegible] his option, and adopt the [illegible]

I see [illegible] principle to the co-existence of two or more remedies [illegible]. An English [illegible] or his choice sue on the [illegible] or sell or foreclose [illegible] into possession and eject his mortgagor. If he likes [illegible] can do all four together. A person who is assaulted [illegible] the assault as a crime or a tort: he can prosecute [illegible] imprisonment or he can sue for civil damages. The [illegible] remedies of a secured creditor in equity are well known. These examples might be multiplied very considerably in both English and Indian law. In all of such cases the party [illegible] considerations before he begins and [illegible] his action, will have [illegible]

serves in my opinion to exclude the Code only in the points in which there is an actual clashing between the English law and the Code.

The Legislature in effect says that the treaty applies. Where there is no clashing the procedure under both treaty and Code seems to me to be equally well established. Apart from [illegible] which they clash I see nothing to [illegible] the operation of [illegible] of the operation to the other. I therefore [illegible] the Coast [illegible] right of choice exists.

With [illegible] Inland area the matter is again different. By [illegible] 11 of the East Africa Order in Council 1897 the Code is to be applied so far as applicable, while the Statute in Common law of England comes in only to the extent to which the Code is not applicable. (I read the word "Applicable" as "capable of being applied".)

The Legislature are, I think, much more definite and mandatory in their method of applying the Code, and the English law of the Inland area than they are in their method of applying the Treaty and the Code to the Coast area. In the Inland area the Code is distinctly first and the England law second. In the Coast area the Treaty and the Code (except where they clash) seems to me to be applicable co ordinately. In the Inland area the Legislature especially name one procedure (the Code) and postpone the other (the law) to its operation. I think that must be construed as working an definite exclusion of the English law so far as the Code applies. In my opinion, until [illegible] the Code gives no remedy, [illegible], in the Inland area, at the English Bankruptcy law at all.

Shortly the conclusions [illegible] it are these. Coast [illegible] defer [illegible] the [illegible] of the [illegible]

must go by the code if the case [illegible]
does not fit his case he [illegible] fall back on [illegible]
But where there is a conflict the [illegible]
[illegible] the conclusion, are [illegible]
[illegible] case [illegible]
[illegible]
[illegible] tried under the [illegible]
[illegible] with the appeal [illegible]

IN H.B.M.COURT OF [illegible]

[illegible] the Privy

[illegible] the

[illegible] against the present

[illegible] Registry at

[illegible] made a bankrupt

[illegible] law. One of

[illegible] on the part of the

[illegible] of the application

[illegible] was to oust

[illegible] dismissed

[illegible] this inter-

[illegible] obtained

[illegible] respondent.

[illegible] propositions

[illegible] bankruptcy law of the part of the Protectors

[illegible] the ten miles [illegible] First, that

[illegible] provisions of

[illegible] in so far as [illegible] and

[illegible] they are [illegible] be may proceed

[illegible] therefore a bar

[illegible] the applicant [illegible]

[illegible] proceed under [illegible]

[illegible] the matter

[illegible] but has considered the application of the law to the position of the applicant 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 [illegible] he files his petition [illegible] fraud by the [illegible] in a petition under [illegible]