

1879
 THE
 ORIENTAL
 BANK
 CORPORATION
 AND OTHERS
 v.
 JOHN
 FLEMING
 AND OTHERS.

and for the reasons I have already indicated, I think this deed must be declared to be void as against the plaintiffs, so far as it purports to operate as a release.

Note.—The following was the form of the decree:—

This Court doth declare that the said deed, dated the 14th October 1873, in the pleadings mentioned, is not the deed of the plaintiffs so far as it purports to operate as a release by the plaintiffs to the defendants John Fleming, Robert McIlwraith, William Nicol the younger, Hamilton Maxwell and William Gilmour Hall; and that the same is void *ab initio* so far as it purports to operate as aforesaid; and this Court doth decree that the first five defendants above named be and they are hereby perpetually restrained from pleading the said deed as a release or as a bar to any action or suit brought against them by the plaintiffs or any of them.

Attorneys for the plaintiffs.—Messrs. *Craigie, Lynch and Owen.*

Attorneys for the defendants.—Messrs. *Rimington, Hore and Conroy.*

INSOLVENCY.

(63)

Before Sir C. Sargent, Justice, and Mr. Justice Melvill.

IN THE MATTER OF THE PETITION OF NURSEY KESTOWJI,
 AN INSOLVENT.

Practice—Indian Insolvent Act (11th & 12th Vic., c. 21), Section 36—Right of witness summoned under Section 36 to appear by counsel.

A witness summoned for examination under section 36 of the Indian Insolvent Act is not entitled, as of right, to be represented by counsel. The attendance of counsel, on his behalf, is a matter of practice to be settled by the Judge at his discretion.

On the 15th February 1879 the Official Assignee obtained an order, under section 36 of the Indian Insolvent Act (11th & 12th Vic., c. 21), for the examination of Kessowji Náik (the father of the insolvent), and for the production, by him, of all books and documents relating to the business carried on by the said insolvent in the *Samvat* year 1934.

In pursuance of this order, Kessowji Náik presented himself on the 3rd March, for examination as a witness in the case.

Lang stated that he appeared as counsel for the witness.

Macpherson, for the Official Assignee, objected that the witness was not entitled to appear by counsel, and referred to a decision of Mr. Justice Norman's upon this point, cited in the notes to section 36 of the Indian Insolvent Act (*Millett and Charke*).

Lang relied on the decision of Pontifex, J., in the case of *Nolitmohan Dass, an Insolvent*.(1)

BAYLEY, J., held that the witness should not be allowed to appeal by counsel.

Kessowji Naik appealed from his Lordship's decision, and the appeal was heard by Sargent and Melvill, JJ.

March 28.—The *Advocate General* (Hon. J. Marriott) and *Lang* for the appellant.—*Prima facie*, a witness is not allowed to appear by counsel, but in this case the interests of the witness may be materially affected by the proceedings. The Official Assignee contends, first, that the witness was a partner of the insolvent; secondly, that if witness is not a partner, he is largely a debtor to the insolvent's estate. As a matter of fairness the witness should be represented (*In matter of the petition of Nolitmohan Dass*)(2), in order that objectionable questions may be prevented, and that the witness may be re-examined if it should be necessary. Section 36 of the Indian Insolvent Act and section 115 of the English Companies Act, 1862, are analogous, and were a witness is examined by virtue of an order made under the latter section, he is entitled to be attended by his counsel and solicitor: *In re Breach-loading Armoury Co.*(3) The practice in bankruptcy is stated in Shelford on Bankruptcy (3rd ed.) p. 308; *Ex parte Parsons*,(4) *Ex parte Weddell*.(5) Counsel also referred to *In re Towsey*.(6)

Macpherson and *Jardine* for the Official Assignee.—There is a difference between the Indian Insolvent Act and the English Act cited. Section 36 of the former Act provides that the witness is to be placed on the same footing as other witnesses. He is to be examined "in the same way as other witnesses." In ordinary civil proceedings no witness would be allowed to be

(1) 11 Beng. L. Appx. 33.

(4) 1 Atk. 204; see also Digest of the Bankrupt Law by Lord Henley (1832), p. 90.

(2) 11 Beng. L. Rep. Appx. 33.

(3) L. R. Eq., 453.

(5) L. R., 6 Ch. D. 328.

(6) 6 L. T. N. S. 613.

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represented by counsel. *Ex parte Schofield*(1) shows that the witness here is in the same position as witness in any other civil proceeding. (Counsel referred to Bombay Rules and Orders in Insolvency No. 40.) In India a witness is sufficiently protected by the provisions of the Evidence Act, I of 1872, sec. 132. Counsel was allowed to the witness in the case of the *Breach-loading Armoury Co.*,(2) because the examination took place before a subordinate official, and not before a Judge. The matter rests in the discretion of the Judge. Here the Judge has exercised his discretion.

SARGENT, J.—We think that section 36 of the Indian Insolvent Act contemplates that a witness appearing for examination by virtue of an order made under that section, shall be in precisely the same position as a witness in any civil proceeding, and that only the insolvent and the opposing creditors are entitled, as of right, to appear by counsel. A practice, however, in similar cases in bankruptcy appears to have grown up in England, based apparently on courtesy, of allowing counsel to appear on behalf of a witness in such cases as the present, and to take part in the proceedings in a modified way ; but there is no such practice in this Court, and the witness cannot (even if he could in England, which may well be doubted) claim the assistance of counsel as a right. We must, therefore dismiss the appeal. We think, however, that counsel might properly be allowed to attend under special circumstances, and that they exist in the present case.

Appeal dismissed.

Attorney's for appellant.—*Hearn, Cleveland and Little.*

Attorney's for Official Assignee.—*Jefferson and Payne.*

(1) L. R. 6 Ch. Div. 230.

(2) L. R. 4 Eq. 453.