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statement, and its sustainability is not obvious. For we know that the public or a portion of it sometimes prescribes or attempts to prescribe against Government. The lower Appellate Court has given no particular reasons for this part of its decision, and at the re-hearing we must ask it to consider the matter more fully, if its other findings at the re-hearing render it necessary.

The lower Appellate Court has misconceived the law at every point. We set aside its decision and remand the appeal for re-admission and re-hearing in the light of the foregoing. Costs to date here and in the lower Appellate Court will be costs in the cause and will be provided for in its decree.

Stamp value on the appeal memorandum in this Court will be refunded on application.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Venkatasubba Rao.

1923, March 6.

SIVASUBRAMANIA PILLAI (FIRST RESPONDENT), APPELLANT,

v.

THEETHIAPPA PILLAI AND TWO OTHERS (PETITIONERS AND RESPONDENTS 2 AND 3), RESPONDENTS.*

Sections 24, 28, 39 *and* 44 *of Provincial Insolvency Act (III of* 1907)—*Adjudication in insolvency and conditional discharge—Decree debt, not barred on date of adjudication—Application to Insolvency Court for recognition of decree debt after conditional discharge—Execution of decree barred on date of application—Admissibility of decree debt.*

Under the Provincial Insolvency Act (III of 1907) any debt whose recovery was not barred by limitation on the date of the adjudication of the debtor as an insolvent can be proved in

* Civil Miscellaneous Appeal No. 106 of 1920.

insolvency at any time even after a conditional order of discharge and until a final discharge is ordered. The facts that the debt is merged in a decree and more than 12 years had elapsed before the application to prove the same was made are immaterial if the decree debt was capable of execution on the date of the adjudication.

Held further that an adjudicated insolvent was entitled as a "person aggrieved" within section 46, clause (2) of Act III of 1907 to appeal against an order admitting a person as a creditor.

APPEAL against the order of E. PAKENHAM WALSH, District Judge of Tinnevelly, in I.A. No. 488 of 1919 in I.P. No. 6 of 1909.

The following judgment of the Lower Court gives the facts of the case. Further facts appear from the judgment of OLDFIELD, J.

"The petitioner in this case is the creditor who obtained the decree in O.S. No. 181 of 1905 on the file of the District Munsif, Tinnevelly. He had the judgment-debtor arrested in execution of the said decree and the latter thereupon put in I.P. No. 6 of 1909, mentioning in the schedule thereto, the applicant as the first creditor. The insolvent was given a conditional discharge by the order of this Court, dated 20th September 1918, the condition being that he should place at the disposal of the Court all the surplus of any property which he might subsequently acquire after taking Rs. 25 per mensem for the maintenance of himself and his family. The petitioner did not appear during these proceedings and prove his debt. The insolvent and one of the creditors now oppose on the grounds, (1) that the petition is barred by limitation being made after discharge, (2) that the debt is barred by limitation. I agree with the petitioner's contention that a conditional discharge of the sort passed in this case, is not an absolute discharge so as to make this application out of time under section 24 (3). In the present case, the insolvent's estate does not appear to have paid 8 annas in the rupee so that, a complete discharge could not have been granted. Moreover, there would have been no use in the Court ordering future assets to be put at its disposal if the discharge were absolute. There does not appear to have been any final dividend paid or notice of final dividend sent to the creditors. I hold that the application is not barred under section 24 (3). The debt itself also is clearly not time-barred as

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there is insolvent's written acknowledgment of it in 1910 at the time of his insolvency petition. *Ramaswami Pillai* v. *Govindasami Naicker*(1) is quoted by the respondents. The petitioner says that he has kept the decree alive by periodical application but the matter seems to me to be irrelevant. A debt which is valid and not time-barred at the date of adjudication is a debt provable under section 28 (1) of the Act and the only limitation to proving it, is an order of discharge. I have not to consider whether this debt would be time-barred or not in ordinary proceedings before a Court. Proof of the debt is allowed and as it is clearly proved, it is admitted. Petitioner will recover costs from both respondents (Rs. 5 in each case)."

The order of the lower Court making a conditional discharge on 28th day of September 1918 was as follows :

"A conditional discharge is granted subject to the condition that the petitioner places at the disposal of the Court all the surplus of any property which he may subsequently acquire after taking Rs. 25 a month for the maintenance of himself and his family."

The insolvent preferred this appeal to the High Court, against the order of the Lower Court including the petitioner as a creditor.

S. T. Srinivasagopala Acharya (with *Chidambaram* and *Marthandam Pillai*) took a preliminary objection that the insolvent had no right of appeal as an "aggrieved person" within section 46 (2) of Act III of 1907 as all his assets are vested in the Official Receiver for distribution to his creditors and he had no title or interest in the same.

K. V. Krishnaswami Ayyar (with *T. L. Venkatarama Ayyar* and *T. A. Ananta Ayyar*) for Appellants.—There is right of appeal for the insolvent as an "aggrieved person" as he will be eventually entitled to any surplus under section 41 of the Act.

On the merits:—The order of the lower Court is wrong in admitting proof of the petitioner's debt after

(1) (1919) I.L.R., 42 Mad., 319.

the order of discharge; section 24 (3). A conditional discharge is a discharge under the Act. See Rule 233 framed under the English Bankruptcy Act and quoted in Williams on Bankruptcy, 11th Edition, page 531; see also section 28 (2), and section 26 of the English Bankruptcy Act of 1914.

Secondly, this is not a "debt provable" under section 28 (1), of the Act. The debt has merged in the decree and the decree is more than 12 years old on the date of the application to prove it and the 12 years cannot, even if there be an acknowledgment, be extended; see section 48, Civil Procedure Code, and *Subbarayan* v. *Natarajan* (1); and when once limitation begins to run it cannot be suspended; *Muthu Korakkai Chetty* v. *Madar Ammal*(2). The form of proof required is that "the debt was and is due" on the date of application. Hence a barred debt or decree cannot be proved; *Rokhia Bi* v. *Official Assignee, Madras*(3). The sections of the Limitation Act which in some cases extend or suspend the limitation, do not apply to proceedings under special Acts; *Ramaswami Pillai* v. *Govindasami Naicker*(4), *Benzon In re*; *Bower* v. *Chetwynd*(5) and this application in insolvency is not a suit or other proceeding within section 16 (2) of the Act for which the Court could have given leave. A finding is necessary whether a final dividend has been declared or not as required by section 39, clause (4).

S. T. Srinivasagopala Acharya for first respondent.—It must be taken that there has been no final dividend yet. A debt is provable in insolvency so long as the insolvency Court holds assets and until a final dividend is declared and a final discharge is made; see sections 24 (3) and 39 (3 and 4). The only limitations are that a

(1) (1922) I.L.R., 45 Mad., 785. (2) (1920) I.L.R., 43 Mad., 185 (F.B.).
(3) (1917) 37 I.C., 505. (4) (1919) I.L.R., 42 Mad., 319.
(5) [1914] 2 Ch., 68.

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late applicant will not be entitled to disturb dividends already declared and that the debt must be subsisting on the date of adjudication. *Ex-parte Boddam*(1), *McMurdo, in re*; *Penfield* v. *McMurdo*(2), *Ex-parte Lancaster Banking Corporation, In re Westby*(3), and *In re Crosley, Munns* v. *Burn*(4). Vol. II, Halsbury, paragraphs 380 and 394. The word "may" in section 24 (3) means "in a proper case." The debt in this case is one provable under section 28. This debt must be taken as one already proved, because it was in execution of this decree debt that the insolvent was arrested and because the insolvent included this decree debt in his schedule of debts; see section 25 of the Act. A conditional discharge is different from an absolute discharge; see section 44. Moreover in this case the insolvent has not complied with the conditions on which alone he obtained his conditional discharge. Limitation is suspended during the pendency of bankruptcy proceedings; see section 16 (2) of the Indian Act, and section 7 (i) of the English Act of 1914. If necessary, leave could be given under section 16 (2); *In re General Rolling Stock Company*(5). Section 48 of the Civil Procedure Code applies only to proceedings in execution and does not govern proceedings taken in insolvency Courts for payment of decree debts; see *Ex-parte Ross*(6) and other English cases above quoted. He distinguished *Benzon In re*; *Bower* v. *Chetwynd*(7) and other cases quoted by the appellant.

JUDGMENT.

OLDFIELD, J.

OLDFIELD, J.—This insolvency originated in the arrest by first respondent of the insolvent, here appellant. On

(1) (1860) 2 De. G.F. & J., 625; 45 E.R., 763.
(2) [1902] 2 Ch., 684.
(3) (1879) 10 Ch.D., 776.
(4) (1887) 35 Ch.D., 266.
(5) (1872) 7 Ch. App., 646.
(6) (1825) 2 G. & J., 46 and 330.
(7) [1914] 2 Ch., 68.

the latter's adjudication, however, only two creditors, now represented by other respondents, proved debts, the first respondent refraining from proving his, until after a dividend of less than half an anna had been distributed and about nine years had elapsed. Evidently what has led him now to tender proof of his debt under section 24 (3) of the Provincial Insolvency Act III of 1907 is that on the 20th September 1918 the lower Court granted the insolvent what is described as a conditional discharge, the condition being that he should, subject to his right to an allowance of Rs. 25 per month for maintenance of himself and his family, place at the disposal of the Court all property he might afterwards acquire. This discharge was granted on the application of the insolvent, based on the expectation that in case of his discharge his mother would relinquish a life estate, to which he was entitled in reversion, in his favour, and the appellant evidently thought it worth while to prove in order to obtain a share in these new assets. The lower Court held that he was entitled to do so notwithstanding that, the two points urged before it and here, his claim was made after the order of discharge of 20th September 1918 and that recovery of his debt would in proceedings other than insolvency be barred by limitation.

A preliminary objection has been taken to this Appeal by the respondent on the ground that he is not a "person aggrieved" within the meaning of section 46 (2) of the Act, because he has no interest in the distribution of assets, which have vested in the Official Receiver for his creditors, whoever they may be. But that is unsustainable. For under section 41 he will eventually be entitled to any surplus remaining, after the creditors, who have proved, have been satisfied, and will be deprived of such surplus if the proof of another creditor,

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whose claim may diminish or exhaust it, is wrongly admitted. Another formal objection to the proceedings is that the Official Receiver has not, so far as appears, been a party to them at any stage. But, as all the creditors concerned have had notice of them, we simply note this irregularity and proceed.

First as regards the order of 20th September 1918, it is, we may observe, defective, because it contains no definite provision for or directions to the Official Receiver regarding the manner in which it is to be given effect; and it should probably have been framed with reference to section 44 (5), explicitly as imposing a condition and also suspending the discharge, until that condition had been fulfilled by the execution of the anticipated release in favour of the Official Receiver or otherwise for the benefit of the creditors. But its terms have already been stated and its meaning is clear. First, a point referred to by the lower Court, although in doubtful language, this order is consistent with the future declaration of a final dividend, since it contemplates the realization of further assets for distribution in one; and, it may be added, it is clear from the text of the order by which the insignificant dividend already distributed was declared, that it was not final. Next, the order of 20th September 1918 was not one of absolute discharge, for it was in terms conditional and expressly contemplated the continuance of the insolvent's disability to acquire property except for the benefit of his creditors and subject only to the reservation of a monthly income for himself and his family. Those terms are, as already stated, anomalous and it is doubtful what exact change in the insolvent's position they were intended to effect and whether they were intended to do or did more than release him from liability for his scheduled debts, those debts being made payable only from the property

which he was expected to acquire. Certainly, however, and this is the material point, there is nothing to indicate an intention on the part of the Court or other parties to the order to release such property from provable debts or to make any charge in respect of them except as regarded the liability of the insolvent himself. It is then impossible to accept the first argument for the insolvent (appellant) that this order constituted such a discharge, as is referred to in section 24 (3) as fixing the stage in the insolvency after which no more proofs, such as the respondent's, could be received.

That argument is moreover open to objection on the further ground that the reference to discharge in that section does not fix that stage. No doubt the section is at first sight explicit.

"Any creditor may at any time before the discharge of the insolvent tender proof of his debt."

But those words must be read in the light of section 39 (4) under which debts, if notified, as was the respondent's in the present case, can be proved until a final dividend is declared and the fact that it will in many cases be harsh and useless to postpone the grant of discharge until its declaration. For, although it may be impossible for the purpose of section 44 (3) (*a*) to ascertain the proportion between assets and liabilities at an early stage in the insolvency, it may be clear that the insufficiency of the former has arisen from causes, for which the insolvent is not responsible; and there will then be no reason for postponing his discharge, if he asks for it, as he can do under section 44 (1), at any time after the order of adjudication. We have not, it is worth observing, been shown that this reference to the right to prove before discharge corresponds with anything in the Presidency Towns Insolvency Act or English Law; and it is possible that it was worded

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with reference to the description of debts provable under the Act in section 28 (1) as including those, to which the debtor becomes subject before his discharge by reason of obligations incurred before his adjudication. See section 46 (3), Presidency Towns Insolvency Act III of 1909 and section 30, 4 and 5 Geo. V, 59. In any case the general law of insolvency contemplates proof of debts at any time, so long as there are assets to be distributed and no injustice is done to other parties. *Ex parte Boddam*(1) and *McMurdo, In re, Penfield* v. *McMurdo*(2). We accordingly hold, as a fair construction and one which will reconcile the policy of the Act and section 39 (4) with section 24 (3) that the words we are concerned with in the latter are not restrictive, but, as VAUGHAN WILLIAMS, J., said, in the second of those decisions, of similar words, "as soon as may be after the making of a receiving order" in the Bankruptcy Act of 1883, Schedule II, rule 1, merely directory and

> "non-compliance with them does not in any way deprive any creditor of his right or limit his right."

That contention failing, it is argued next that the respondent's debt is not provable, because it would be time-barred in other proceedings, or more definitely, because the decree, in which it is merged, would be unexecutable after the twelve years, which have elapsed since its date, under section 48, Civil Procedure Code. That twelve years elapsed between the respondent's decree and the presentation of his proof is no doubt true. But we are still of opinion that his debt is provable under section 28 (1) of the Act. The definition in that section of a provable debt contains no reference to the date, at which the proof is presented or to any date except that of the adjudication, when respondent's debt, embodied in the decree

(1) (1860) 2 De. G.F. & J., 625; 45 E.R., 763. (2) [1902] 2 Ch., 684.

which he had lately been executing, was certainly recoverable; and the view that the existence of the debt at the date of adjudication alone is material is in accordance with English authority on the similar provision of the English Law. The matter is dealt with generally in *Ex parte Ross, In the matter of Coles*(1), that decision, it may be observed, being unaffected by the facts that the debts in question had not, like respondent's debt, been merged in a decree and that they represented obligations which became enforceable only after the date of the adjudication, but before that of the discharge, the Indian and English definitions of provable debts alike including such liabilities. On the other side reliance has been placed on *Benzon, In re*; *Bower* v. *Cheturynd*(2) and no doubt there reference was made to the principle that, if the statute begins to run, it continues, whatever happens, to do so; and that principle would be applicable in the case before us, because the twelve years' period available to respondent for execution of his decree had opened before appellant's petition was filed. But the principle was applied in the case then under disposal, only because that case was, what the case before us is not, one of an administration suit and not of insolvency. If the question had been of insolvency, *Ex parte Ross*(1) would, as the earlier part of the judgment shows, have been followed and it would have been held that a debt not barred at the commencement of the insolvency does not in and for the purpose of the insolvency become barred by lapse of time. Appellant has then relied on the decision in *Subbarayan* v. *Natarajan*(3) that section 48 contains an unqualified prohibition of execution of decrees over twelve years old. But the answer is that, when (as we hold) the respondent can prove for his decree debt in the insolvency, no

(1) (1825) 2 G. & J., 146 and 330. (2) [1914] 2 Ch., 68.
(3) (1922) I.L.R., 45 Mad., 785.

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question of his right to execute is raised. In these circumstances we must, following *Ex parte Ross*(1) hold that his debt is provable within the meaning of section 28 (1).

The result is that the Appeal fails and is dismissed with costs of legal representatives of first respondent.

VENKATASUBBA RAO, J.

VENKATASUBBA RAO, J.—I agree and I would like to state my reason for the conclusion at which we have arrived.

It was first contended by Mr. K. V. Krishnaswami Ayyar for the insolvent-appellant that under section 24(3) of the Provincial Insolvency Act, 1907,a creditor would be bound to tender proof of his debt before the discharge of the insolvent and that, as in the present case, proof was submitted after the insolvent's discharge the creditor's application should not have been entertained. In the view I am taking, it is immaterial that the discharge in the present case was conditional. The relevant portion of section 24 (3) is as follows:

> "any creditor of the insolvent may at any time before the discharge of the insolvent tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule as a creditor in respect of any debt provable under this Act and not entered in the schedule."

I am unable to interpret this provision as rendering it obligatory upon a creditor to submit proof before the discharge of the insolvent. Under section 44 a debtor may at any time after the order of adjudication apply for an order of discharge. There is nothing in the Act to prevent an order of discharge being passed at a very early date after the order of adjudication, and it seems to be inconsistant with the scheme of the Act to hold that a creditor who does not prove his debt before an order of discharge is deprived altogether of his remedy. I need only refer to section 39. Clauses 3 and 4 of that

(1) (1825) 2 G. & J., 46 and 330.

section set forth the disabilities of the creditor guilty of laches in the matter of proving his debt. Clause 3 while giving him a certain right provides that he shall not be entitled to disturb any dividend declared previous to the proof of his debts. Clause 4 refers to a declaration for final dividend. It must be first observed that no inflexible rule is laid down as regards the point of time when a final dividend is to be declared. The clause only provides that when the receiver has realized all the property of the insolvent or so much thereof as can be realized without needlessly protracting the receivership, he shall declare a final dividend. The matter is largely one of discretion to be exercised by the Court. When a final dividend is to be declared in a particular case, will depend upon the circumstances of that case. It is next material to observe that the penalty prescribed for neglect or omission to prove a debt before making a final dividend is, that that dividend shall be declared without regard to the claim of the creditor who has failed to prove the debt. These are the provisions which limit or affect the right of a creditor who fails to tender proof of his debt before a specified point of time.

Mr. K. V. Krishnaswami Ayyar's second contention was, that if a creditor omits to prove his debt before the declaration of a final dividend he is barred from doing so. There is no warrant for this position in the sections to which I have referred. It is unnecessary to deal with this contention further than to say that this argument is entirely destructive of the first argument to which I have referred. According to the first contention based on section 24 (3), the discharge of the insolvent is the furthest point of time beyond which no debt can be proved, whereas the second contention fixes the declaration of a final dividend under sections 39 (4) as an event subsequent to which a proof of a debt cannot be tendered.

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In my opinion, neither of these arguments is sound. No limitation is fixed for the creditors to come in and prove their claims. This is the English rule, and we have been shown nothing to induce me to hold that under the Provincial Insolvency Act a different rule is intended.

Rule 1 of the second schedule to the English Bankruptcy Act, 1883, runs thus: "Every creditor shall prove his debt as soon as may be after the making of a receiving order." It will be noted that the word used is "shall." But in *McMurdo, In re*; *Penfield* v. *McMurdo*(1) VAUGHAN WILLIAMS, L.J., held at page 700 that the rule was

> "merely a directory clause, a clause non-compliance with which does not in any way deprive any creditor of a right or limit his right."

He observed that in his experience of bankruptcy practice there never was any doubt as to the right of a creditor to come in and prove at any time during the administration. This rule was stated to be subject to certain conditions which are not material for the present purpose. See also Halsbury, Vol. 2, paragraphs 380 and 394.

No Indian cases were cited to us. But I find that in *Lakshmanan* v. *Muttia*(2) a Bench of this Court observed that it is open to a creditor at any time while the assets are undistributed to prove his debt and added

> "this is the course in all bankruptcy and insolvency proceedings."

I am not quite clear how the statement in the judgment that even if a schedule had been framed it was still open to the creditor so long as assets were available to apply to be admitted on the schedule under section 352 of the Civil Procedure Code of 1882, is reconcilable with article 174 of the Limitation Act of 1877, which

(1) [1902] 2 Ch., 684.

(2) (1888) I.L.R., 11 Mad., 1.

prescribed for an application under section 353 of the said Code a period of 90 days from the date of the publication of the schedule. But I am referring to the case only for the purpose of showing that it was regarded as a settled doctrine that apart from any particular statute in bankruptcy proceedings no limitation was fixed for creditors to prove their debts. I may state that the Provincial Insolvency Act, III of 1907, repeals not only the provisions of the Civil Procedure Code relating to insolvency but also article 174 of the Limitation Act of 1877.

I also find that in *Parshadi Lal* v. *Chunni Lal* (1) a distinction was drawn between applications under section 353 of the Civil Procedure Code of 1882 governed in regard to limitation by article 174 prescribing a period of 90 days and application under section 352 to which article 178 prescribing a period of three years was held applicable. An argument based upon *Parshadi Lal* v. *Chunni Lal*(1) that an application by a creditor to prove his debt is governed by article 181 of the present Limitation Act, was not advanced before us, and possibly the omission to advance this argument was due to the fact that article 181 is held applicable only to applications under the Civil Procedure Code and that as at present the insolvency law is contained in the Insolvency Act and not in the Civil Procedure Code, article 181 can have no application.

The object underlying section 24 of the Provincial Insolvency Act is the same as that which underlies rule 1 of the second schedule to the English Bankruptcy Act, 1883, namely, to enjoin upon creditors to tender proof as early as possible, a course tending to convenience in the administration of the insolvent's estate; and the provision clearly does not enact a rule of limitation.

(1) (1884) I.L.R., 6 All., 142.

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I, therefore, hold as my learned brother has done that the creditor's application to prove his debt was not made beyond the time allowed by the law, and this ground of appeal consequently fails.

The next argument of Mr. K. V. Krishnaswami Ayyar was that the debt itself was barred, and as there was no subsisting debt there could be no proof of debt. In my opinion, this argument is also untenable. The creditor's debt was merged in a decree, and it was argued that under section 48, Civil Procedure Code, the decree became extinguished. This argument cannot be accepted, because section 48 deals only with execution and lays down that no order for the execution of the decree shall be made upon an application presented after the expiration of 12 years from certain dates, which however it is immaterial to specify for the present purpose.

Then the general argument remains that a barred debt cannot be proved in insolvency. I shall say nothing in regard to the question as to whether the pendency of insolvency proceedings does or does not save a debt from the bar of limitation. In the present case the debt is sought to be proved in the insolvency itself and no claim is based upon the debt in a separate proceeding. *Ex parte Ross, In the matter of Coles*(1) to which Mr. Srinivasagopalachari referred us, clearly held that in bankruptcy a debt did not become barred by lapse of time if it was not barred at the commencement of the bankruptcy. The same view was taken in *Ex parte Lancaster Banking Corporation, In re Westbu*(2), which was also relied on by the learned counsel. A very clear statement of the principle is contained in the following passage in the judgment of BACON, C.J., in that case:

(1) (1825) 2 G. & J., 46 and 330. (2) (1879) 10 Ch.D., 776.

"When a bankruptcy ensues, there is an end to the operation of that statute, with reference to debtor and creditor. The debtor's rights are established and the creditor's rights are established in the bankruptcy, and the Statute of Limitations has no application at all to such a case, or to the principles by which it is governed."

The authority of these decisions has not in the slightest degree been shaken by *Benzon, In re*; *Bower* v. *Chetwynd*(1). On the contrary the judgment in it while holding that the pendency of bankruptcy proceedings did not save a claim made in the course of an administration suit from being barred by the statute of limitations, carefully distinguished *Ex parte Ross, In the matter of Coles*(2) and other cases similar to it as being cases where the proof was in the bankruptcy itself. I cannot do better than quote the following passage at page 75 from the judgment:

"As to the second point, cases were quoted beginning with *Ex parte Ross*, 2 Gl. and J., 330, which show that in the bankruptcy a debt does not become barred by lapse of time if it was not so barred at the commencement of the bankruptcy, and of this there can be no doubt, but this is only *in the bankruptcy*."

The rule contained in section 28 (1) as regards debts provable under the Act is consistent with the rule deducible from the English cases. All debts to which the debtor is subject when he is adjudged an insolvent (quoting only the material portions) are debts provable under the Act. Under the section therefore it must be a debt to which the debtor was subject on the date of adjudication. If the debt was then subsisting, it is provable in insolvency.

On these grounds the second contention of the appellant also fails.

I, therefore, agree that the appeal should be dismissed with the costs of the legal representatives of the first respondent.

N.R.

(1) [1914] 2 Ch., 68.

(2) (1825) 2 G. & J., 46 and 330.