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be treated in the same way as the corpus, and I think they should be so treated now in the absence of any distinct authority to the contrary."

These authorities, however, were dealt with in the case of *Gobindmani Dasi v. Sham Lal Bysak* (1), and were held to be insufficient to prevent the widow making an alienation, which should be valid during her own life.

It appears to me that the question before us is one which is not to be determined in a suit for a declaratory decree, that it is by no means clearly established by the authorities whether the widow had or had not power to alienate for a period extending beyond her own life property which she had purchased from savings of income derived from her late husband's estate made after his death, and while she was entitled to a Hindu widow's interest in it. I am inclined to think that the authorities in favor of her power to do so must prevail; if so, no declaration could of course be made against their validity. If we were bound to make a decree, the matter should, I think, be referred to a Full Bench, as there seems to be a direct conflict between the cases of *Grose v. Amirtamayi Dasi* (2) and of *Sreemutty Puddo Monee Dasse v. Dwarika Nath Biswas* (3). But as we have a discretion in the matter, it would be better to abstain from making any declaration.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice Wilson

IN THE MATTER OF TOKEE BIBEE v. ABDOOL KHAN.

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 Nov. 27, &
 Dec. 18.

*Insolvent Act (11 and 12 Vict., Cap. 11), s. 12—Arrears of Maintenance—
 "Debt or Liability"—Protection Order—Arrest of Insolvent—Presidency
 Magistrate's Act (Act IV of 1877), s. 294.*

Arrears of maintenance, included in the schedule filed by an insolvent, are a debt or liability within the meaning of s. 13 of the Insolvent Act (11 and 12 Vict., Cap. 21); and an insolvent, who has obtained a protection order, is not liable for arrest or imprisonment in respect of such.

(1) B. L. R., Sup. Vol., 48.

(2) 4 B. L. R., O. J., 42.

(3) 25 W. R., 335.

Quere—Whether the protection order protects the insolvent from proceedings in respect of any maintenance accruing subsequently to the filing of the schedule?

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IN 1878, Tokee Bibe, the wife of Abdool Khan, instituted proceedings against him for maintenance under the Presidency Magistrate's Act (IV of 1877), and by an order of the 5th June 1878 he was ordered to pay her Rs. 15 a month. On the 10th May 1879, Abdool Khan filed his petition in insolvency, and the usual vesting order was made. On the 10th June, he filed his schedule. At that time there were arrears of maintenance due, including the amounts payable in April and May, and these arrears were inserted in the schedule. On the 1st July, the insolvent applied for *ad interim* protection, and the hearing was adjourned till the 12th August, with protection in the meantime. On the 12th August, he applied for his personal discharge, and the hearing was adjourned for six months with protection in the meantime. On the 3rd July, the wife commenced proceedings before the Magistrate, under s. 234 of the Presidency Magistrate's Act, to enforce payment of the April and May arrears of maintenance. The insolvency proceedings were brought before the Magistrate. He was of opinion that they were not a bar to his making an order under the section just mentioned, and, on the 27th August, he made an order that Abdool Khan should deposit in Court the April and May arrears or undergo rigorous imprisonment for a fortnight in default. This was the order complained of. A rule was obtained by the insolvent calling upon the Magistrate to show cause why the proceedings should not be removed into the High Court and the order complained of quashed.

The *Advocate-General* (the Hon'ble G. C. Paul) with him Mr. J. D. Bell showed cause.

Mr. Trevelyan in support of the rule.

The *Advocate-General*.—It is contended that, under the Insolvent Act, the prisoner is precluded from arrest in respect of this debt. Section 13 gives the Court power to grant an *ad interim* order for protection of an insolvent from arrest, and any such

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interim order may apply, either to all the debts or liabilities mentioned in his schedule, or to any of them, and it protects the person to whom it is given from being arrested or detained in prison for any debt or liability to which such order applies. In order to determine what is meant by the words "debt or liability" in the section, it is necessary to consider ss. 47, 61, and 62. Section 47 enables the Court to give an insolvent his personal discharge, and he is then protected from arrest in respect of all "demands" inserted in his schedule. It also enables the Court to remand the insolvent to prison for any "debt or demand." Section 61 gives the Court power to stay proceedings in respect of any "debt, claim, or demand" from which the insolvent shall have been discharged; and s. 62 excepts debts due to the sovereign, fines, penalties or forfeitures from the operation of the Act. Sections 13, 47, and 61 refer only to what may be called "civil liabilities," and the order of the Magistrate is not one in respect of a "debt or liability" within the meaning of those sections. This is such a default in the payment of money as would render a person liable to imprisonment in England. By the English Debtors' Act, 32 and 33 Vict., Cap. 62, s. 4, any person may be imprisoned for making default in payment of any sum recoverable summarily before a Justice or Justices of the Peace. The prisoner has disobeyed the order of a competent Court, and is liable to imprisonment—*Harvey v. Hall* (1). That was a case under the English Debtors' Act. In *Hewetson v. Sherwin* (2) James, L. J., said: "It seems to me that where a Court of competent jurisdiction has ordered a man to pay a sum of money, whether in the shape of costs, or anything else, that is a debt due from him in pursuance of an order or judgment of the Court which is a competent Court to make the order. It seems to me to be a play upon words to say that a debt arising *ex contractu*, and a debt arising in respect of costs, differ in any way from one another. There is an order of the Court directing a sum of money to be paid, and that is a debt under the order. I was first struck by Mr. Fry's suggestion, that 'default in payment' was put in contradistinction to 'debt' in the Act; but that suggestion seems excluded by the language I find in the very same section in auo-

(1) L. R., 11 Eq., 31.

(2) L. R., 10 Eq., 63.

ther subdivision of it. The words there, are, 'may direct any debt due from any person in pursuance of any order or judgment of that or any other competent Court to be paid by instalments, and may from time to time vary or rescind such order.' In that case, it is clear that debt is spoken of as a debt which becomes due from a person by reason of an order or judgment of the Court. It seems to me to be clearly within the Act, and I see no good reason why it should not be." Taking s. 13 of the Insolvent Act by itself, the words "debt or liability" are wide enough to include such an order as this, but the other sections clearly refer to civil liabilities only. An order to pay money in a criminal case is in the nature of a penalty, not of a debt, and non-payment of the money is a contempt of Court—*Martin v. Lawrence* (1). It is against the policy of the insolvent law to allow the prisoner to be discharged in such a case as this, and the Court should uphold the Magistrate's order.

Mr. *Trevelyan*.—The cases in England respecting alimony, when the husband is an uncertificated bankrupt, or an insolvent debtor, are analogous to this—*Browne on Divorce*, 134. A bankrupt, who has obtained an order of discharge under the bankruptcy Act, 1861 (2), is thereby protected from any proceeding to enforce the payment of alimony, for the non-payment of which he has been attached before the order of discharge; and a sequestration against his estate for such alimony will not, therefore, be granted—*Dickens v. Dickens* (3). This is merely a civil process for compelling the payment of money, exercised by the Police Court for the sake of convenience. No offence has been committed. This is not the case of a fine due to the Crown so as to be excepted under s. 62 of the Insolvent Act—*Egginton's case* (4), the question in which arose under the Lord's Day Act. 29 Car. II, Cap. 7, s. 6, shows the difference between a civil and a criminal process. The process for recovering arrears of maintenance under the Presidency Magistrate's Act is really an action. The wife cannot sue in this Court or in the Small Cause Court, but the legislature provides a special means for recovering arrears due

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(1) I. L. R., 4 Calc., 655.

(3) 31 L. J., P. and M., 183.

(2) 24 & 25 Vict., c. 134.

(4) 2 E. and B., 717.

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to her. The question is, whether the non-payment is a criminal offence. No fine is inflicted. The Act provides that a certain sum ordered to be paid shall be levied in a particular way. The Magistrate merely orders the payment of a sum already ordered to be paid. The case is like that of proceedings for non-payment of poor-rates in England. There it has been held that the liability to pay poor-rates is a civil and not a criminal liability—*Reg. v. The Governor of Whitecross Street Prison* (1); see also Archibald on Bankruptcy, Edn. 1860, Vol. II, p. 207. [WILSON, J.—It has been decided in England that bastardy proceedings are civil, not criminal, proceedings—*Reg. v. Fletcher* (2).] The case of *Bancroft v. Mitchell* (3) is apparently an authority against me; but there the Court had a power to inflict a penalty for non-payment; here there is no such power.

WILSON, J.—This was an application under s. 147 of the High Courts' Criminal Procedure Act (4) to transfer to this Court a proceeding before a Presidency Magistrate for the purpose of quashing an order made therein. (His Lordship then stated the facts of the case as above, and proceeded as follows):—The section under which maintenance may be ordered (s. 234 of the Presidency Magistrate's Act) is as follows:—

“ If any person, having sufficient means, neglects or refuses to maintain his wife, or legitimate or illegitimate child unable to maintain itself, a Presidency Magistrate may, upon due proof thereof by evidence, order such person to make a monthly allowance for the maintenance of his said wife, or child, or both, at such monthly rate not exceeding fifty rupees in the whole as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

“ Such allowance shall be payable from the date of the order.

“ If any person so ordered wilfully neglects to comply with the order, a Presidency Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines; and may sentence such

(1) 6 B. and S., 376, 391.

(3) L. R., 2 Q. B., 549.

(2) L. R., 1 C. C. R., 320.

(4) Act X of 1875.

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person, for each month's allowance remaining unpaid, to imprisonment for any term not exceeding one month.

" Provided that, if such person offers to maintain his wife on condition of her being with him, and his wife refuses to live with him, such Magistrate may consider any grounds of refusal stated by such wife, and may make the order allowed by the section notwithstanding such offer, if he is satisfied that such person is living in adultery or that he has habitually treated his wife with cruelty.

" No wife shall be entitled to receive an allowance from her husband under the section, if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent."

The section under which *ad interim* protection is granted is s. 13 of the Insolvent Act (11 and 12 Vict., Cap. 21.) It is as follows :—

" And be it enacted that in any case when a petition shall have been presented by an insolvent debtor as aforesaid, or an act of insolvency shall have been adjudged to have been committed as aforesaid, it shall be lawful for the said Court, after the filing of the schedule required by this Act, if under the circumstances it shall appear proper, to make an *interim* order for the protection of the insolvent from arrest, and any such *interim* order may apply either to all the debts or liabilities mentioned in the schedule, or to any of them, as the Court may think proper, and may commence and take effect at such time as the Court shall direct; and any such order may be recalled and may be renewed as to the Court may appear proper; and any such order, when so made, shall protect the person to whom it shall be given from being arrested or detained in prison for any debt or liability to which such order shall apply within the limits of the Town of Calcutta, Madras, and Bombay respectively, or any other place within the territories under the Government of the East India Company; and any person arrested or detained, contrary to the tenor and effect of any such order, shall be entitled to his discharge out of custody upon application to any Court or Judge which or who shall

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have power to set at large any person illegally detained in custody under the process by virtue of which such person shall have been arrested or be so detained: Provided always, that no such order shall operate as a release or satisfaction of the debt or demand of any creditor, nor prejudice the right of any such creditor to arrest the insolvent, whether he shall or not have been previously arrested for the same debt or demand, in case the order shall be recalled or shall fall by reason of the petition of the insolvent being dismissed or the adjudication being reversed."

The Advocate-General argued that, in determining what is a "debt or liability" under this section, we must look forward to the later sections dealing with final discharge, namely:—s. 47, which, instead of "debt or liability," uses the words "demand" and "debt or demand;" s. 61, which again changes that phrase to "debt, claim or demand;" and s. 62, which excepts certain matters from the operation of the Act.

It could hardly be seriously contended that s. 62 applies; maintenance ordered to be paid is not a fine, penalty, or forfeiture.

But it was said the language of ss. 13, 47, and 61 points to matters purely civil, not to anything of a criminal character, and the liability now in question is a criminal liability. Two grounds were given for saying that the liability is a Criminal one:—*first*, because the whole proceedings are before a Criminal Court; *secondly*, because non-payment of maintenance may be punished with rigorous imprisonment. Now the precise liability in question is the liability to pay sums of money which have become payable under an order for maintenance. That is *prima facie* a purely civil liability, and a debt or liability or claim or demand within the meaning of the Insolvent Act. The fact that the debt is created and may be enforced by a Criminal Court cannot affect the matter. Many purely civil rights are, for convenience' sake, made enforceable in Criminal Courts. Nor, in my opinion, does the fact that penal consequences have been attached to the non-payment of a debt make it less a debt.

Bastardy proceedings before Justices have been held in

England to be civil, not criminal, proceedings—*Reg. v. Barry* (1); *Reg. v. Fletcher* (2). And this case is very similar.

I think that arrears of maintenance included in the schedule are a debt or liability within the meaning of s. 13 of the Insolvent Act; that the protection order protected the insolvent from arrest or imprisonment in respect of it. The proceedings will, therefore, be removed into this Court, and the Magistrate's order quashed.

I say nothing as to the effect of the insolvency proceedings upon any maintenance accruing subsequently to that in the schedule. And of course there is nothing in this decision to interfere with the Magistrate's discretion under s. 235 of the Presidency Magistrate's Act.

Rule absolute.

Attorneys for the Government: Messrs. Sanderson & Co.

Attorney for the Insolvent: Baboo G. C. Ghose.

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Prinsep.

SHEO PERSHAD SINGH (PLAINTIFF) *v.* KALLY DASS SINGH AND OTHERS (DEFENDANTS).*

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Aug. 30.

Mokurari Ijara—Words of Inheritance—Lease for Life—Hereditary Tenure—Reg. XLIV of 1793—Reg. V of 1812—Reg. VIII of 1819.

In 1798 a mokurari potta of a portion of a zemindari was granted to A at a consolidated jumma of Rs. 6 for the term of four years, and at a uniform rent of Rs. 25 from the expiration of that period, to be paid year after year. The potta provided that the mokuravidar should make improvements; that profits arising therefrom should belong to him, and not to the grantor; and that he should not dispose of any portion of the land granted without the permission of the grantor. No words of inheritance were used in the grant. The grantee died in 1876, when the heirs of the grantor sued to recover possession of the estate from the heirs and assigns of A. The

* Regular Appeal, No. 227 of 1877, against the decree of Hafez Abdul Karim Khan Bahadur, First Subordinate Judge of Zilla Bhargulpore, dated the 23rd of June 1877.

(1) 28 L. J., M. C., 86.

(2) L. R., 1 C. C. R., 320.