ORIGINAL CIVIL.

Before Mr. Justice Wilson and Mr. Justice Norris.

IN THE MATTER OF WILLIAM HASTIE, AN INSOLVENT. 1885 April 8.

Insolvent judgment-debtor—Civil Procedure Code—Act XIV of 1882, *ss.* 336, 339, 344, 345, 349, 350, 351, 359—*Arrest, imprisonment, Meaning of*—11 & 12 *Vic.* c. 21, s. 24—*Undue Preference—Procedure where two methods of protection are open to the debtor.*

A judgment-debtor arrested in execution of a decree for money, who has not, on his committal to jail, expressed his intention of applying to be declared an insolvent under Chapter XX of the Code of Civil Procedure, is nevertheless entitled during his imprisonment to make an application for that purpose; and the Court may, under s. 349, pending the hearing of such application, release him on his finding security to appear when called upon.

The word "arrest" in s. 349 should be read as meaning "under detention" or "detained in custody."

In deciding whether or no a payment made to a particular creditor amounts to an unfair preference within the meaning of s. 351 of the Code, the Courts may fairly (where there is no other reason for impeaching the transaction as an unfair preference apart from the provisions of the Insolvent Act), refer to, and be guided by, the provisions of the Insolvent Act, which treats a transaction as an unfair preference only when it has occurred within a limited time before the insolvency proceedings.

Where the Legislature has provided two methods by which a debtor can obtain protection from arrest or other serious consequences, and if one of the methods, in any particular case, turns out to be more favorable to the debtor than the other, the Courts will not deprive him of that advantage.

ON the 12th February 1885, William Hastie was arrested in satisfaction of a decree, obtained against him on appeal by Mary Pigot, for damages and costs in a suit for libel, and on the same day (not having expressed any intention of applying under Chapter XX of the Code of Civil Procedure to be declared an insolvent) was committed to the Presidency Jail in Calcutta. On the 9th March 1885, Hastie applied under the provisions of Chapter XX of Act XIV of 1882 (1) to be declared an insolvent; (2) that he might be released and discharged from custody; and (3) for a day to be fixed for the hearing of his application; and that pending such hearing he might be released on his furnishing sufficient security to appear when called upon.

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The amount for which he was arrested was Rs. 3,000 damages and Rs. 12,000 costs; and at the time of the above application he set out in his petition that he was possessed of a sum of Rs. 2,254 then in the hands of his agents in Scotland, and a sum of Rs. 500 in the possession of a friend in Calcutta; and certain manuscripts and theological books; and stated that according to an arrangement come to with certain members of his family he had, before coming out to India in 1878, arranged to contribute to the support of his mother and sisters, and had left instructions with his agents to make certain payments in accordance with this arrangement; that these payments were never made; and that on his return to Scotland in 1884, finding that nothing had been paid on his behalf, he had entered into a formal deed (after consultation with his legal advisers) making over £300 to his mother and sisters. He further stated that his mother and sisters were willing to refund this money if required.

Besides Mary Pigot, there were four other creditors whose claims amounted in all to about Rs. 3,850.

On this application, Mr. Justice *Wilson*, on the 11th March, acting under s. 349 of the Code, directed Hastie to be released from custody (so far as regarded the commitment issued on the 12th February 1885) on his finding security for his appearance on the 18th March 1885 before the Judge presiding in Insolvency.

On the 18th March 1885, Mr. *Pugh* on behalf of Mary Pigot, applied before Mr. Justice *Norris*, sitting as Insolvent Commissioner, for an order adjudicating Hastie to have committed an act of insolvency according to the provisions of 11 & 12 Vic. c. 21. Mr. *Hill* thereupon mentioned to the Court the order of Mr. Justice *Wilson*, dated the 11th March, which directed Hastie's application under Chapter XX of the Code to be heard before the Judge presiding in the Insolvent Court, and contended that this application ought to be disposed of before that made by Mr. *Pugh*. Mr. Justice *Norris*, however, considered that it would be better that both the application under the Insolvent Act made by Mr. *Pugh*, and the application under Chapter XX of the Code, should be heard together before Mr. Justice *Wilson* and himself on the 25th March, and passed an order to that effect.

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On the 20th March Mr. *Pugh* obtained a rule in the Ordinary Original Civil side of the Court, calling upon Hastie to show cause why the order of the 11th March (so far as it directed his release on his giving security to the satisfaction of the Registrar of the Court) should not be set aside. This rule, and the two other matters ordered on the 18th March to be heard together, came up before Mr. Justice *Wilson* and Mr. Justice *Norris* on the 25th March; and after some discussion as to the order in which these several matters should be taken, it was decided that the application under Chapter XX of the Code should be first heard.

Mr. *Hill* for the applicant.—The words "a decree for money" in s. 344 of the Code covers a decree for damages for libel; s. 254 refers to decrees for "compensation"; and the marginal note to that section is "decree for money." In this country where the marginal notes to the sections of an Act are considered and framed by the member who has charge of the Bill, such marginal notes form part of the Act, and may be looked at for the purpose of interpreting it—*Venour* v. *Sellon* (1); *Attorney-General* v. *The Great Eastern Railway Company* (2). [WILSON, J.—A suit for compensation for trespass is shown by illustration (*e*) of s. 111 of the Code to be considered as a suit for the recovery of money, and therefore the words "a decree for money" will cover one for compensation for libel.] In making Chapter XX of the Civil Procedure Code applicable to the High Court, notwithstanding a special insolvency jurisdiction was already vested in that Court, the Legislature evidently intended to afford further relief to insolvent debtors subject to the special jurisdiction, and the possibility of a conflict of jurisdiction can afford no ground for refusing an insolvent his discharge under the Code provided he has complied with its requirements. So far as the Code and the Insolvent Act are *in pari materiâ*, an insolvent is entitled to relief under that Act which gives him the easiest terms, on the general principle that the interpretation of all statutes should be favourable to personal liberty—*Henderson* v. *Sherborne* (3). The distinction between bankrupt-traders and non-trading insolvents has never been abolished, and argu-

(1) L. R. 2 Ch. D., 522. (2) L. R. 11 Ch. D., 449.
(3) 2 M. & W., 236 (239).

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ments based on the construction of the bankruptcy laws have no application to statutes for the relief of insolvent debtors. The former were passed for the protection of trade, and were therefore construed for the benefit of creditors and to suppress fraud, the bankrupt being regarded in the light of a criminal. Insolvent Acts on the contrary were for the relief of the individual who was considered to be the victim of misfortune, and they have always been liberally construed in favour of insolvents.

The Acts for relief of insolvent debtors were of three descriptions: the Lords' Act, 32 Geo. 2, c. 28, and its amendments; the Small Debtors' Act, 48 Geo. 3, c. 123; and the General Insolvent Act. Under the Lords' Act, s. 13, a creditor might insist upon a prisoner's detention on agreeing by note under his signature to allow the debtor two shillings and six pence per week, but any irregularity in the agreement entitled the debtor to his discharge—*Rex* v. *Wilkinson* (1); *Constantine* v. *Pugh* (2). The Small Debtors' Act, 48 Geo. 3, c. 123, provides for the discharge of debtors from imprisonment for small debts on compliance with specified conditions. As to the discharge being compulsory on the Court, notwithstanding that the creditor has on the same day duly brought up the defendant under the compulsory clause of the Lords' Act, see *ex-parte Cusac* (unrep.) cited in Chitty's Statutes, 1st edition, 589, note (*b*); *Langdon* v. *Rossiter* (3); *Wood* v. *Kelmerdine* (4). Under 1 & 2 Vic. c. 110 (an Act for abolishing arrest on mesne process), the Court had power to refuse to discharge prisoners in certain cases for a specific time. It was no ground for refusing a discharge that a vesting order had been obtained under 1 & 2 Vic. c. 110, s. 36, with which the prisoner had refused to comply, and had in consequence been committed for contempt—*Fuge* v. *Rogers* (5); *Chew* v. *Lye* (6); *Hopkins* v. *Pledger* (7); this last is a strong case as showing the construction the Court places on these Acts. It is no objection to a prisoner's discharge under 48 Geo. 3, c. 123, that he has been remanded

(1) 7 T. R., 156.
(2) 3 B. & P., 184.
(3) 13 Price, 186.
(4) 2 Y. & J., 10.
(5) 1 D. & L., 713.
(6) 5 M. & W., 388.
(7) 1 D. & L., 119.

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by the Insolvent Court—*Clapperton* v. *Monteith* (1); *Davis* v. *Curtis* (2). The superior Courts will not regulate their proceedings as to discharge of insolvents by what has passed in the Insolvent Debtor's Court, and therefore it is no ground for opposing his discharge that he had been remanded in that Court for fraud.—*Nicholls* v. *Neilson* (3). Our application is prior in point of time to the application under the Insolvent Act. The Court is bound to grant a prisoner his discharge unless he is guilty of one of the acts of misconduct specified in s. 351 of the Code—see *Salamat Ali* v. *Minahan* (4).

Mr. *Pugh* (*contra*)—Under the Small Debtors' Act it was incumbent on the Court to discharge the debtor; but the question here is, whether the administration of Hastie's estate is to be taken under the Insolvent Act or the Code. I submit that the last paragraph of s. 638 of the Code shows that the jurisdiction of the Insolvent Commissioner is intended to remain unimpaired. Supposing even the two Courts had concurrent jurisdiction, I submit that the Judge in the Insolvent Court has no discretion to decline to exercise his powers. [WILSON, J.—The words of the other Act are equally obligatory on the Court to act]. Yes; but it is impossible for the two procedures to go on together.

As to whether marginal notes are to be considered part of an Act, see *Sutton* v. *Sutton* (5), which questions *Venour* v. *Sellon* (6). [WILSON, J.—I don't think it can be argued that in England anything but the Act itself can be considered; the marginal notes and headings to chapters are not to be referred to as part of an Act except where the Act expressly states that the Act is to be divided into heads, then by such enacting words they may be read]. The Legislature had no power to make the provision for insolvent debtors in the Code of Civil Procedure. [WILSON, J.—The *Queen* v. *Burah* (7) decided that the Government of India had power to alter the jurisdiction granted by the English Legislature.]

(1) 6 M. & G., 909.
(2) 3 Bing. (N. C.) 259.
(3) 6 Taun., 493.
(4) I. L. R., 4 All., 337.
(5) L. R., 22 Ch. D., 511 (513.)
(6) L. R., 2 Ch. D., 522.
(7) I. L. R., 4 Calc., 172.

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Mr. *Hill* then showed cause against the rule of the 20th March. Under the order of the 11th of March the debtor was released on a condition; and, if the order was beyond the power of the Court, the condition fails, but the fact of his release remains; and has the Court any power, after having once released the debtor, to recommit him? [WILSON, J.—He has never been discharged; it would be analogous to an escape. Section 344 of the Code refers to two matters: (1), a judgment-debtor in arrest; (2), a judgment-debtor imprisoned. Section 349 refers only to the first portion of s. 344.] Any judgment-debtor who is "in custody" is entitled to relief under Chapter XX of the Code, whether such custody be that of a gaoler or of a sheriff's officer; no reason can be assigned for limiting the relief under s. 349 to cases in which the custody is of the latter description.

Mr. *Pugh* in support of the rule.—Arrest and imprisonment are two separate matters. Arrest is preliminary to the imprisonment; the words are not interchangeable. The words used in ss. 273 and 274 of Act VIII of 1859 are very similar to the words of the present Act; but those sections confine the right to obtain a discharge to a judgment-debtor who has been arrested; the word imprisoned is not used. [WILSON, J.—Under s. 336 of Act X of 1882, a judgment-debtor may be arrested and brought up for committal, and if at that stage he elects to give security and undertakes to apply to become an insolvent, he is entitled to his release; therefore if he does so at that stage, s. 349 would be wholly unnecessary.] I submit that s. 349 does not relate to the time when the judgment-debtor has been committed to jail. Section 349 provides for the only three courses which the Court can adopt: the first two of these are not provided for by s. 336, and can only apply when he is under arrest.

The construction which I wish to place upon the section is favored by a case under the Procedure Code of 1859, *viz.*, in *Smith* v. *Boggs* (1).

Even supposing the order made to be a valid one, the debtor is not entitled to his discharge, as the payment of £300 to his family under the circumstance in which it was made, amounts to an unfair preference to some of his creditors under s. 351 of the Code.

(1) 5 B. L. R., App. 21.

On the 8th April the following judgments were delivered:— 1885

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NORRIS, J.—The facts of this case are as follows: On the 12th February 1885, the defendant was arrested under a warrant to satisfy the plaintiff in the sum of Rs. 3,000 as damages, and Rs. 12,000 costs under a decree dated 16th April 1884.

The defendant was brought before a Judge on his arrest when, in compliance with the provisions of s. 336 of the Code of Civil Procedure, he was informed that he might apply under Chapter XX of the Civil Procedure Code to be declared an insolvent; he did not express his intention so to do, and was therefore committed to prison.

On the 11th of March, the defendant, being still in prison, presented a petition to be declared an insolvent under Chapter XX. The petition complied with all the requirements of ss. 344, 345, and 346, and, at the conclusion thereof, the defendant prayed that, pending the hearing of the petition, he might be released from custody on his furnishing proper and sufficient security to the satisfaction of the Registrar to appear when called upon. Upon this petition an order was made for the defendant's release from custody upon his giving security, in a sum equal to the amount of the debt and costs payable under the decree, to the satisfaction of the Registrar for his appearance before the Judge presiding in the Insolvency Court on the 18th March, and on any other day when called upon. A rule was subsequently obtained, calling upon the defendant to show cause why the order of the 11th March, so far as it directed his release on his giving security to the satisfaction of the Registrar, should not be set aside.

The rule was argued on 25th March before *Wilson*, J., and myself; Mr. *Hill* showing cause, and Mr. *Pugh* supporting it; and at the conclusion of the arguments we took time to consider our judgment. Upon the best consideration I have been able to give to the case, I am of opinion that the rule should be discharged. The order of 11th March purported to be made under s. 349 of the Civil Procedure Code, which says: "Where the judgment-debtor is under arrest, the Court may, pending the hearing under s. 350, order him to be immediately committed to Jail, or leave him in the custody of the officer to whom the

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service of the warrant was entrusted, or release him on his furnishing sufficient security that he will appear when called upon."

The question to be determined is, was the defendant under arrest within the meaning of s. 349 when the order was made. I am of opinion that he was.

It is very difficult to define with any exactness the distinction between arrest and imprisonment.

Arrest is defined in Wharton's Law Lexicon as "the restraining of the liberty of a man's person in order to compel obedience to the order of a Court of Justice, or to prevent the commission of a crime, or to ensure that a person charged or suspected of a crime, may be forthcoming to answer it."

"Imprisonment" is defined as "the restraint of man's liberty under the custody of another."

No doubt the words "arrest" and "imprisonment" are not used as interchangeable in the Code. Chapter XIX is headed "of the execution of decrees," and consists of eight parts or divisions, the last of which is (I), and is headed "of arrest and imprisonment." Section 336 says: "A judgment-debtor may be arrested in execution of a decree at any hour and upon any day, and shall as soon as practicable be brought before the Court, and his imprisonment," which I take to mean is imprisonment under s. 342, "may be," in a certain jail. Sub-section (*a*) of s. 336 lays certain limitations on the officer making the "arrest." Sub-section (*b*) directs the officer making the "arrest" to release the judgment-debtor if he pays the amount of the decree and the costs of the arrest, and directs that the Court before whom the judgment-debtor is brought shall release him from arrest if he expresses his intention to apply under Chapter XX to be declared an insolvent, and furnishes sufficient security to appear when called upon, and to make such application within one month.

Section 337 says: "Any warrant for the arrest of the judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed." In s. 339 the distinction between arrest and imprisonment is very clearly recognized. It provides that "no judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such a sum, as having regard to the

scale so fixed, the Judge thinks sufficient for the subsistence of the judgment-debtor from his arrest until he can be brought before the Court; when a judgment-debtor is committed to jail in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he *may* be entitled to." In these sections the arrest is treated as preliminary to the imprisonment, the imprisonment as the result of the arrest.

I do not think, however, that we ought to place so limited a construction upon the word "arrest" in s. 349. I think the words "under arrest" should be read as meaning "under detention," or "detained in custody."

The consequences of not so reading them would be most extraordinary. It would follow that, whilst a judgment-debtor who, upon being brought before a Judge, expresses his intention to apply to be declared an insolvent under Chapter XX, and furnishes the necessary security, shall be entitled to his release as a matter of right under s. 336; and, whilst a judgment-debtor who, in the interval between his arrest and his being brought before the Court, has prepared an application as provided by ss. 344, 345 and 346, may be released upon his furnishing sufficient security to appear when called upon, a judgment-debtor once committed to prison must remain there until discharged upon the happening of one of the cases provided for under s. 341. I cannot believe that it was the intention of the Legislature to say to a judgment-debtor: "If you do not express your intention to apply to be made an insolvent under Chapter XX when you are first brought up, or if you do not make your application in the prescribed manner when you are so brought up, and if you afterwards change your mind, and are desirous of taking the benefit of the Act, you shall pay as penalty for your obstinacy a residence in jail until you are declared an insolvent."

WILSON, J.—I am of the same opinion, and I have very little to add.

The question is as to the meaning of the words "under arrest" in s. 349.

Undoubtedly in this part of the Code the words arrest and imprisonment are used several times to express different things, though, in itself, the word arrest is quite wide enough to cover

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all that imprisonment covers. Again, of the three alternatives mentioned in s. 349, some at least are only applicable to the case of a man not yet committed, though effect may perhaps be given to the whole of the section by holding that such of those alternatives as may be applicable under the circumstances of each case should be adopted.

These are the considerations in favour of the narrower construction of the words under arrest; but there are many considerations in favour of the wider construction.

In the first place, according to the narrower construction, the section can apply at one stage only, when a man has been arrested and is brought up for committal, but has not yet been committed. Such was held to be the construction of the former Act in the case of *Smith* v. *Boggs* (1). But that decision was under an Act, which in plain terms declared the law to be as there laid down. In the present Act, that plain language has been abandoned, and only the words "under arrest" substituted.

In the second place, if the narrower construction be adopted, and the section expresses only the power of the Court before which a prisoner is brought up to be committed, then the provision is out of place, it ought to occur in the previous chapter of the Code.

Thirdly, according to this construction, the subject has already been dealt with, and completely dealt with in s. 336.

In the fourth place, if the provision in question applies only where a prisoner has been brought up, but is not yet committed, it can obviously be exercised only by the committing Court.

But the power given by the section is part of the Insolvency Jurisdiction conferred only upon High Courts and District Courts. The section, therefore, applies only in cases of committals by one or other of these latter Courts, so that in the large majority of cases it is inoperative. This is plain, because in every case of a person brought up before any Court other than those mentioned, that Court must either commit him or release him; so that he can never afterwards before the Insolvency Court be under arrest in the narrower sense of the term.

Lastly, no possible reason has been suggested which could have

(1) 5 B. L. R., App. 21.

led the Legislature intentionally to limit the scope of the section in the way contended for.

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The result is, that in my judgment the construction of the section is at least doubtful; and that the arguments in favour of the wider construction are as strong as those in favour of the narrower. That being so, and the section being found in a chapter for the relief of insolvent debtors, I think it clear, in accordance with the settled rules of construction, that we are bound to adopt that interpretation which is in most favour of liberty.

On these grounds I agree in discharging the rule.

There remains the principal matter to be dealt with. This is an application under Chapter XX of the Civil Procedure Code by Mr. Hastie, in which he asks to be declared an insolvent. His petition has complied with all the requirements of the Act, and only one ground has been suggested upon which we could be asked to deny him the privilege he claims.

One of the circumstances mentioned in s. 351, about which the Court must be satisfied, is this: that the debtor has not given unfair preference to any of his creditors. The applicant in his petition shows that during last summer, when in Scotland, he paid certain sums of money, not very considerable in amount, to certain members of his family, who, he states, were his creditors.

It is suggested that that was an unfair preference within the meaning of s. 351. In deciding whether or not it was an unfair preference for the purposes of the present application, we may fairly refer to the provisions of the Insolvent Act, as affording some guide in the present Code. That Act treats a transaction as an undue preference only when it has occurred within a limited time before the insolvency proceedings. The payment in question was made before the time limited by the Insolvent Act, so that there has been no undue preference if we are to follow the Insolvent Act.

Then is there any reason why this transaction should be impeached as an unfair preference apart from the provisions of the Insolvent Act. I think not.

Looking at the place where the insolvent was at the time and the circumstances of the case, I think it would be straining

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matters very much to say that, at the time Mr. Hastie made these payments, he contemplated insolvency.

Therefore I do not think there is in this circumstance any reason why we should deny him the benefit of the Insolvency provisions of the Act.

Then it is said that, even if his case were such as to entitle him *primâ facie* to the benefit of those provisions, we should stay our hand and deny him that benefit, because one of his creditors has applied to the Insolvent Court, and obtained an order of adjudication. I do not think that is so.

If the Legislature has provided two methods by which the debtor can obtain protection from arrest and other serious consequences; and if one of those methods, in any particular case, turns out to be more favourable to the debtor than the other, we have no right to deprive him of that advantage. I think, therefore, that Mr. Hastie is entitled to be declared an insolvent under the provisions of Chapter XX of the Civil Procedure Code, and we accordingly declare him an insolvent and appoint the Official Assignee, the Receiver of his estate. The security given for Mr. Hastie's appearance will, of course, remain in force till the matter is disposed.

NORRIS, J.—I am of the same opinion. I think that if the payments to the ladies really amount to unfair preference, the Official Assignee may bring an action, if so advised, for the £300.

Application allowed and rule discharged.

Attorney for Hastie: Baboo *G. C. Chunder.*

Attorney for Mary Pigot: Baboo *M. Sen & Co.*