INSOLVENT JURISDICTION.

1892.
August 29, 31.

Before Mr. Justice Bayley (Acting Chief Justice) and Mr. Justice Candy.

IN THE MATTER OF HORMARJI ARDESIR HORMARJI, AN INSOLVENT.

Insolvency—Insolvent convicted and sentenced to imprisonment under Section 50 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21)—Appeal by insolvent under Section 73—Bail—No power in High Court to admit insolvent to bail pending appeal.

An insolvent was convicted by the Insolvent Court of an offence under section 50 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21) and sentenced to imprisonment. Under section 73 of the Act he appealed against the decision and sentence of the Insolvent Court, and applied to be admitted to bail pending the hearing of his appeal.

Held, refusing the application, that the High Court had no power to admit him to bail.

APPLICATION to admit to bail.

On the 24th August the insolvent was sentenced[1] by Farran, J., (sitting as Commissioner in Insolvency) to suffer imprisonment for three months under section 50 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21). From this decision and sentence the insolvent lodged an appeal under section 73 of the Act. He was in custody, and he now applied to the Appellate Court to be released on bail pending the hearing and determination of his appeal.

Jardine for the insolvent:—There is no section or provision of the Insolvent Act which deals with such an application as the present, nor have we been able to find any precedent in the records of the Court either for or against such an application. But we contend that the Appellate Court must have power to admit to bail. Otherwise the right of appeal given to insolvents by section 73 would be nugatory. The appeal has been accepted and filed; but, if the insolvent is not admitted to bail, he will have suffered the whole or the greater part of his sentence before his appeal from it can be heard and determined. The right of appeal would thus be a mere mockery.

[BAYLEY, C. J. (Acting):—The first question to be determined is whether this Court has power to grant such an application as this. By English law a person convicted, and under sentence,

(1) See *supra*, pp. 313—333.

cannot be admitted to bail. Even where a true bill has been found by a grand jury against a person, he cannot be bailed.]

The rules of the English law are against me, but I submit that the Indian criminal law is more nearly analogous. At common law, no doubt, there is no appeal from a conviction of an offence. But in India such an appeal is given. The Criminal Procedure Code (X of 1882) does not directly apply to proceedings such as these, but its provisions support the argument that the power to admit to bail must exist in this case where a right to appeal is given.

Scott, for the opposing creditors, opposed the application:—This Court is not an Insolvent Court, and can only interfere with proceedings of the Insolvent Court where it is expressly authorized to do so. It has not been given a power to admit to bail.

Cur. adv. vult.

BAYLEY, C. J. (Acting):—This is a motion on behalf of the insolvent, H. A. Hormarji, that he may be liberated on bail unti the hearing and final adjudication of the appeal filed by him from the decision of Farran, J.

On the 24th of August, 1892, Farran, J., sitting as Commissioner of the Insolvent Court, made an order in the following terms:—

"This Court doth order and adjudge that the said insolvent Hormarji Ardesir Hormarji be forthwith taken into custody of the Jailor of Her Majesty's Common Jail of Bombay on its Criminal Side by virtue of a warrant under the seal of this Honourable Court, to be detained there for a period of three calendar months to be computed from the date of his arrest under this order. And this Honourable Court doth further order and adjudge that the said insolvent Hormarji Ardesir Hormarji shall be declared entitled to the benefit of the said Act as to the several debts and sums of money due or claimed to be due at the time of making the order vesting the property, estate, and effects of the said insolvent pursuant to the said Act in that behalf in Charles Agnew Turner, Esq., the Official Assignee of this Honourable Court and the Assignee of the estate and effects of the said insolvent, on behalf of several

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persons named in the schedule as creditors or claimed to be creditors for the sums respectively therein mentioned, and for which such persons gave credit to the said insolvent before the time of making such vesting order, and which were then not payable, and as to the claims of all other persons not known to the said insolvent who may be endorsees or holders of any negotiable security set forth in the schedule of the said insolvent as aforesaid at the expiration of the said three months, except as to the debts due to the said opposing creditors, and that as to such last mentioned debts the insolvent shall be entitled to his discharge so soon as the said insolvent Hormarji Ardesir Hormarji shall have been in custody for the period of twelve calendar months in Her Majesty's Common Jail of Bombay on the Civil Side of the said Jail at the suit of any one or more of the said opposing creditors, the Chartered Mercantile Bank of India, London and China, the Agra Bank, the New Oriental Banking Corporation, the Hongkong and Shanghai Banking Corporation, the National Bank of India, Limited, and the Chartered Mercantile Bank of India, Australia and China, such term of twelve calendar months to commence after expiration of the aforesaid term of imprisonment for three calendar months."

This Court is sitting under the provisions of section 73 (1) of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21) which

(1) Section 73 of the Insolvent Act is as follows :—And be it enacted that it shall be lawful for any person who shall think himself aggrieved by any adjudication, order or proceeding of any such Court for the relief of Insolvent Debtors to present, within one calendar month thereafter, a petition to the Supreme Court of Judicature of the Presidency ; and it shall be lawful for such Court to order that the whole of the evidence, if any, which shall have been so taken down in writing as aforesaid and the minutes and records of the proceedings, of which complaint shall have been made, shall be brought before it ; and the said last mentioned Court shall enquire into the matter of the petition, and of such proceedings and evidence, and shall make such order thereon as to the same Court shall seem meet and just, and shall thereby direct by whom and in what manner the costs of such petition, and of the proceedings which shall have been had thereon, and of the taking down of any such evidence in writing, and of the proceedings of which complaint shall have been made, shall be paid : and such order shall be final and conclusive as to all parties and shall be compulsory and binding upon the Court in which such proceedings so complained of shall have been had.

is as follows. (His Lordship read the section and continued):— It is admitted that no similar application to the present has ever been made in this Court, or, so far as has been ascertained, in the High Courts at Calcutta or Madras. It is, therefore, desirable to see what the state of English law was at the time of the passing of the Indian Insolvent Act, 11 and 12 Vic., c. 21, especially as for the power of the Court of the King's Bench to admit persons to bail.

Now I would premise that it has been held to be a clear principle of English law, that a person charged with a misdemeanour is entitled to be admitted to bail on producing sufficient sureties —*Reg.* v. *Badger*[1]. As to persons convicted, however, the law is different. A man cannot be bailed "if he be convicted by verdict or confession"—Comyn's Digest, Bail, F (2). "It is to be observed that neither this Court (the Court of King's Bench) nor any other Court can bail persons in execution, or punished under any statute with imprisonment for their offence. And this is one reason why they cannot interfere where a party is committed for a contempt"—Bacon's Abridgment, Tit. Bail (D.), Vol. I, p. 356; see also Chitty's Criminal Law, Vol. I, p. 98. In the well-known case of John Wilkes[2], who was tried and convicted on a charge of printing and publishing a seditious and scandalous libel, &c., an attempt was made, pending the hearing of a writ of error lodged by the accused, to have him admitted to bail. The matter came before the Court of King's Bench, and was heard by Lord Mansfield, C. J., and Yates, Aston and Willes, JJ. It was urged for the prosecution that he was bailable under the provisions of Stat. 4 and 5 W. and M., c. 18. In delivering his judgment on this point, Lord Mansfield says (p. 2540): "Now whatever doubts there may be about what is within the Act of Parliament of the 4 and 5 W. and M., c. 18, it is most certain that a person convicted of a misdemeanour is not within it; because his case is not a bailable case. Nothing, therefore, can be clearer than that his case is not within an Act of Parliament that relates only to bailable cases." So, too, Aston, J., (p. 2542). This Act "cannot extend to cases of criminal misdemeanour, after conviction; because in such cases a defendant is not entitled to be bailed at all;" and

(1) 4 Q. B., 468. (2) 2 Burr, 2528.

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Willes, J., also says (p. 2542) "after actual conviction of a misdemeanour the defendant is not entitled to bail; whether he be or be not outlawed." An application was then made to admit the defendant to bail under the general discretionary power of the Court, but Lord Mansfield said he knew of no case in which this had been done. In *Rex* v. *Brooke and others*(1) the defendants were magistrates who had discharged out on bail, pending the decision of their appeal, certain persons who had been convicted by a justice of the peace under the Vagrant Act and committed to the House of Correction. They now appeared, on a rule coming on them, to show cause why information should not be filed against them for misdemeanour in discharging on bail the convicted persons. It was argued by counsel on behalf of the defendants (p. 193) that although no express power was given by the statute, under which the accused persons had been convicted, to bail a person convicted, "yet as he is permitted to appeal to the next sessions, it follows of course that he may be bailed in the meantime, otherwise the appeal is nugatory: for the party may suffer his punishment before the appeal can be heard." On the other side it was stated in argument that "the law is clear that where a man is committed in execution, he is not bailable," and that it made no difference that an appeal was given by the statute. "Though an appeal is given in this case," counsel argued, "the ordinary course of punishment adjudged by the conviction is to take place in the same manner as in case of a judgment in a court of law upon a criminal proceeding, where the punishment may be inflicted before the writ of *error* can be determined." In delivering his judgment on the point, Ashhurst, J., said, (pp. 194, 195): "If this matter had rested merely on the charge of the defendants having admitted the parties to bail after they had appealed against the convictions, I should have been very unwilling to have granted an information against them on that ground; because as the Act of Parliament gives a summary jurisdiction to a magistrate to convict persons coming within the description of vagrants, and in the same breath gives the party convicted a right of appeal from such conviction, a magistrate, not very

(1) 2 T. R., 190.

conversant in the law, might naturally enough have conceived that the meaning of the Legislature was, that the party should not undergo the punishment till the appeal was determined; and, therefore, if the justices had acted *bonâ fide*, I should have not been inclined on this ground alone to have granted the information." Buller, J., observed, as to the construction of the Vagrant Act, "that he had no doubt upon the subject, that the commitments of the justice in this case were in execution, consequently the parties could not be bailed, notwithstanding that the statutes had given a right of appeal against the conviction to the next sessions." "It is said," says Buller, J., "that it is strange that the party should suffer the punishment while the appeal is pending, but we are to consider it like the case put at the bar of a writ of error, which does not suspend the execution of a judgment, which it is brought to reverse." And Grose, J., was of the same opinion. He says: "I am now clearly of opinion that it is a commitment in execution: but, whether so or not, I am clearly of opinion that the party is not bailable." See also to the same effect *Rex* v. *Flower*(1); *Reg.* v. *Gutteridge*(2); *Reg.* v. *Scaife*(3). The last English case I shall refer to is that of *Ex parte Hinton*(4), where it was held that the mere fact of an appeal having been lodged was no ground for staying execution of an order of the Bankruptcy Court.

Such was the state of the law in England when the Indian Insolvency Acts of 1828 and 1848 were passed by the British Parliament. It is perfectly clear that, in England, at that time a person was not entitled to bail after conviction, except at least with the consent of the prosecution. Here the opposing creditors oppose the application, and are perfectly justified in so doing. Mr. Jardine argued that an insolvent was like a person awaiting his trial, his appeal having been accepted, and pending the final order of the Court of appeal. That argument, however, appears to me to be untenable. The adjudication that has been made is a final adjudication subject only to appeal, if the insolvent thinks it advisable to appeal. In the vast majority of cases that are decided by the Insolvent Court, no appeal is, as a matter of

(1) 8 T. R., 314.
(2) 9 C. and P., 228.
(3) 9 Dowl., 553.
(4) 2 Deac. and Ch., 407.

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fact, ever filed. Such an appeal is, to use the language of Buller, J., above quoted, "like a writ of error which does not suspend the execution of a writ of error which it is brought to reverse."

The first Indian Insolvent Act is 9 Geo. IV, c. 73, and sections 3 and 4 of that Act are to the same effect as section 73 of the later Act 11 and 12 Vic., c. 21—the Act now in force. This section 73 has been construed strictly. It has been held that the Commissioner in Insolvency has no power under that section to extend the time for presenting a petition of appeal from an order of the Insolvent Court—*In re Ghulam Rasul Khán*(1); nor in the case of an appeal under that section can the High Court impose on the appellant (an opposing creditor) that he shall give security for the costs of such appeal—*In re Rámsebak Misser*(2). In a case decided in Calcutta in 1886 by Sir R. Garth, C.J., and Wilson, J., it is said: "Orders in insolvency are not orders under the Code of Civil Procedure. They are orders under a special law, but they are under a special law in which different procedure is provided."—*In the matter of R. Brown*(3).

In the Civil Procedure Code (Act XIV of 1882), section 638 enacts that nothing in this code shall extend or apply to any Judge of a High Court in the exercise of jurisdiction as an Insolvent Court. The provisions, therefore, of section 545 of that code, giving the Court power to stay execution in the case of an appeal, have no application to the present case. Indeed it was not contended that they had.

The Criminal Procedure Code (X of 1882) admittedly does not apply to the present application. But that code and the decisions under the previous code (X of 1872) show that where it was intended that sentence was to be suspended pending appeal, and the appellants released on bail, power to release on bail has been expressly given by the Legislature. See section 426 of Act X of 1882, and the corresponding section 281 of Act X of 1872.

(1) 1 Beng. L. R., (O. C.) 130. (2) 5 Beng. L. R., 179.
(3) I. L. R., 12 Calc., at p. 634.

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Under section 390 of the earlier code (X of 1872) it was held by a Full Bench of the Allahabad High Court—*Queen* v. *Thakur Parshad*[1]—that the Court of Sessions had no power under that section to admit a convicted person to bail, a convicted person not being an accused person within the meaning of that section. The High Court at Calcutta had previously in three cases arrived at the same conclusions—*Queen* v. *Mahendranarayan Bangabhushan*[2]; *Aradhun Mundul* v. *Myan Khan Takadgeer*[3]; *Queen* v. *Ram Rutton Mookerjee*[4].

For the reasons that I have given I am of opinion that this Court has no power to admit the insolvent to bail; and that assuming it has such power, this is not a case in which, in the exercise of its discretion, this Court ought to allow the insolvent to be bailed until the hearing and final disposal of the appeal.

The application must, therefore, in my opinion, be refused.

Attorneys for the insolvent:—Messrs. *Chalk, Walker and Smetham.*

Attorneys for the opposing creditors:—Messrs. *Craigie, Lynch and Owen.*

(1) I. L. R., 1 All., 151.
(2) 1 Beng. L. R., (A. C). 7.
(3) 24 W. R. (Cr. Rul.) 7.
(4) *Ibid*, 8.

PRIVY COUNCIL.*

1892.

November 9 *and* 10.

RAHIMBHOY HABIBBHOY, (ORIGINAL DEFENDANT), APPELLANT,
v. CHARLES AGNEW TURNER, (ORIGINAL PLAINTIFF), RESPONDENT.

(On appeal from the High Court at Bombay.)

Limitation—Application of Section 18, *Act XV*, 1877—*Knowledge kept from the Official Assignee, (XI and XII Vic., c.* 21), *of his right to sue for an account of assets fraudulently transferred by an insolvent—Burden of proving when first the plaintiff had clear and definite knowledge—Party for purpose of discovery—Sections* 13 *and* 43, *Civ. Proc. Code* (*XIV of* 1882)—*Account.*

In order to make limitation operate when a fraud has been committed by one who has obtained property thereby, it is for him to show that the injured complainant has had clear and definite knowledge of the facts, constituting the fraud,

Present:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD HANNEN, LORD SHAND and SIR R. COUCH.