

INSOLVENCY.

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Before Mr. Justice Broughton.

IN THE MATTER OF T. H. MARSHALL, AN INSOLVENT.

1881
July 26.

Order and Disposition of Insolvent—Indian Insolvent Act (11 and 12 Vict., c. 21), s. 23.

Where goods are in the order and disposition of any person under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods, who has permitted him to obtain false credit, must suffer the penalty of losing such goods for the benefit of those who have given the credit.

In the month of February 1881, Mr. T. H. Marshall and Mr. Stevenson, who carried on business together as contractors and builders, agreed to dissolve partnership. At this time it appeared from the accounts that a sum of Rs. 5,500 was due from the firm to Stevenson. In order to pay off this debt, Marshall applied to one Theodore Boileau for a loan, and in consequence of such application, on the 10th March 1881, Boileau paid to Stevenson's attorney a sum of Rs. 5,000, which Stevenson agreed to accept as payment in full of the debt due to him; and on the 19th March 1881, a deed was executed by Boileau and Marshall, under which the latter, in consideration of an advance of Rs. 10,000 (Rs. 5,000 of which had already, on the 10th March, been advanced) assigned to Boileau, his executors, administrators, and assigns, as security for the loan, "all and singular the outstanding and book debts due to T. H. Marshall, and all and singular the securities for the said debts, and the benefit and advantage of all and singular the stock-in-trade, goods, wares, plant, machinery, and implements of his business, and all other goods, wares, machinery, and implements which did or might thereafter constitute the stock-in-trade of such business;" and it was further agreed between the parties, that Boileau should, until repayment, remain in possession of the stock-in-trade, wares, goods, machinery, and implements belonging to the business; and that nothing should be

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removed from the premises without the consent of Boileau. Under this deed, Boileau was to be employed as superintendent and manager of the office of the business for one year at a monthly salary of Rs. 200.

This deed was duly executed on the 19th March 1881, and registered on the 24th, and the balance of the sum of Rs. 10,000 was paid to various creditors of the firm at Marshall's request. Boileau at this time was resident in Calcutta, and continued to be so until the 10th April 1881, when he removed to Barrackpore, placing two of his own durwans in possession, and himself attending to the business during office hours.

Marshall left Calcutta on the 23rd May, leaving Boileau in sole possession of the stock; and on the 26th May, a seizure of a portion of the stock-in-trade was made by the Small Cause Court on three decrees obtained against Marshall. On the 31st May, Marshall filed his petition in insolvency; Boileau meanwhile interpleaded in the Small Cause Court, but his claim was disallowed.

The Official Assignee, thereupon, took possession of the property, undertaking to sell and hold the proceeds to a separate account, subject to the order of the Court.

Certain creditors applied for and obtained an order for the examination of Boileau and Marshall, and the case came on for hearing, on the 12th July 1881, before Mr. Justice Broughton.

It appeared from the examination of Boileau and Marshall, that Marshall did all the outside work, whilst Boileau took the office work, making contracts and purchases in the name of Marshall Brothers, signing Marshall Brothers per T. Boileau. Marshall also purchased bricks, timber, and chunam, and gave other orders in the name of Marshall Brothers. It did not appear clearly that the creditors had notice of the assignment.

Mr. Trevelyan, for the creditors, admitted the *bond fides* of the assignment; but contended that the goods were in the possession, order, and disposition of Marshall at the time he became insolvent within the meaning of the 23rd section of the Insolvent Act.

Mr. *Piffard* for Marshall.

Mr. *Allen* for T. Boileau.

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BROUGHTON, J.—The insolvent in this case had assigned his goods to Mr. Boileau prior to his insolvency, and the question is, whether they were in his own possession, order, or disposition when he became insolvent, within the meaning of the 23rd section of the Insolvent Act, 11 and 12 Vict., c. 21. The petition of the insolvent was filed on the 31st May 1881. There is no question in this case as to the validity of the assignment, which was dated the 19th March, in favor of Mr. Boileau. It is shown to have been made more than two months before the filing of the petition, and for good consideration; and it is shown, that the money he advanced—Rs. 9,500—was applied partly in buying out a partner, who was paid Rs. 5,000, and the balance in paying the debts of the more pressing creditors of the insolvent. It was not an assignment in contemplation of insolvency, for the insolvent swears he did not know he was in difficulties. Mr. Boileau had no idea of it, or, as he says, he would not have paid Rs. 5,000 to a partner just retiring from an insolvent firm. Mr. Trevelyan does not seek to impeach this testimony, nor does he suggest that either the insolvent or Mr. Boileau did not fairly state the case.

Mr. Boileau was, under the assignment, to become the manager of the insolvent's business at a salary of Rs. 200 a month, and he immediately entered upon his functions as manager, and brought an assistant, named Mr. Depenny, to help him with the accounts. The business was that of a builder and contractor, and the insolvent attended to the outside work, coming only occasionally to the office, where Mr. Boileau saw the customers.

Mr. Boileau states—and this is an accepted statement—that, in taking over the management, he had in view the protection of his own interest in the property, which consisted of the stock-in-trade, at the same time assisting the insolvent, his brother-in-law, who, he says, would have lost credit had the business been carried on in another name. The deed itself provided that Mr. Boileau should remain in possession; that the property

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should not be removed without his consent; and that any property sold should be replaced. Accordingly, the old name was used; the contracts, purchases, letters, and so on were signed by Mr. Boileau—"Marshall and Company, per T. B.," or "per T. Boileau." Mr. Boileau's *durwan* was, however, placed at the door, and the goods were not allowed to leave the premises for the purpose of the business without the order of Mr. Boileau given to the persons in charge of them and to the *durwan*, except that, on some occasions—the latest of which occurred some time before the filing of the petition—the insolvent himself was allowed to take goods when Mr. Boileau was not at the office. This happened for the most part in the early morning, before Mr. Boileau had arrived from Barrackpore, where he resided. When goods were so taken, the fact was reported to Mr. Boileau on his arrival, and he gave his sanction on this report. So the work went on for over two months, Mr. Marshall, being a practical builder, doing the outside work, and Mr. Boileau, with his staff of employés, doing the work at the office, making contracts and purchases, but in the name of "Marshall Brothers;" and all the money passing through his hands. He opened an account in his own name, and made payments by his own cheques to various persons connected with the business. Mr. Allen points out that, among the payments made by Mr. Boileau on the making of the assignment, and with part of the money he advanced, was a payment to Hurrish Chandra Mitter, of Rs. 1,000 on the 19th of March, by a cheque signed "T. Boileau," in payment of a debt due by the insolvent to Hurrish Chandra for bricks and soorkie supplied to the business. Hurrish Chandra had, prior to the assignment, spoken to Mr. Boileau about the business, which he described as a profitable one, and advised him that he might make the advance: yet Hurrish Chandra now comes forward and claims that the stock-in-trade, which he knew was assigned to Mr. Boileau, was in the apparent ownership of the insolvent. But notice to one creditor is not notice to all.

A great many cases have been cited in argument, but questions arising upon this clause and the similar clauses contained in the English Bankruptcy Act depend so much upon their own

actual circumstances, that it is necessary to be very careful in applying these precedents. Among the cases which have been quoted, the case of *Agabeg* (1), decided by Mr. Justice Phear in 1867 upon the same Statute, bears perhaps the closest resemblance to this. There, Messrs. Mackenzie, Lyall, and Co., having an assignment of Mr. Agabeg's furniture, put a *durwan* at the gate, and sent a man to make a catalogue, with a view to the disposal of the furniture by public auction; and it was held, that the furniture, which Mr. Agabeg was allowed to use as before up to the date of his insolvency, was in his exclusive possession, and further that it was in his order and disposition.

But Mr. Boileau in the present instance, by the action I have already described, did a great deal more than Messrs. Mackenzie, Lyall, & Co. did in the case of Mr. Agabeg's furniture.

There has been, moreover, a recent decision of the Lords Justices upon the construction of the like section of the English Bankrupt Act (32 and 33 Vict., c. 71, s. 16), which seems to me to throw some doubt upon the decision in *Agabeg's case* (1). In the case of *Ex parte National Guardian Assurance Company, In re Francis* (2), a man was in friendly possession of a house and furniture which the bankrupt was allowed to enjoy; he was put there to get the goods out of the defendant's order and disposition, so as to avoid the effects of his bankruptcy. "The only question," said Lord Justice James, "is, whether possession was taken by the true owner of the goods with the intention of asserting his rights;" and Lord Justice Thesiger added, "the debtor had, as in *Vicarino v. Hollingsworth* (3), the use of goods, but it was subject to the control of the man who was put in possession, and who was there to see that the use was in accordance with the rights of the bill-of-sale holder."

These cases, however, are very different from a case like the present, in which the property consists not of furniture which remains the same, but of goods to be used in the business, and daily altered in quantity and character.

(1) 2 Ind. Jur., 340.

(2) L. R., 10 Ch. Div., 408.

(3) 20 L. T., N. S., 362.

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It appears to me that the goods were in the possession of Mr. Boileau, and are *prima facie*, his, unless it can be shown that they were in the order and disposition of the insolvent, for the Insolvent Act, like the more recent Bankruptcy Acts, uses the expression possession, order *or* disposition, unlike the Act of James the 1st, which uses the words possession, order, *and* disposition.

The principle upon which this section ought to be applied is very clearly stated in another recent case, *Ex parte Wingfield, In re Florence* (1), by Lord Justice James:—"This section (32 and 33 Vict., c. 71, s. 15) must be read however, as the similar provision in the Bankruptcy Statutes from the time of James the 1st has always been read, with some attention to common sense. It has always been construed as meaning this:—that if goods are in a man's possession, order or disposition, under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods who has permitted him to obtain that false credit is to suffer the penalty of losing his goods for the benefit of those who have given the credit. But if no such credit has been given, then the maxim applies *cessante ratione cessat ipsa lex*."

Applying this principle to the case before me, I find that Mr. Boileau stated in the course of his examination: "I sent notice to the debtors, I believe, on the 30th of May. The notice was written in the solicitor's office, &c." But this subject was not pursued, and it is not shown that the notices were ever issued. Mr. Boileau continued: "Mr. Leslie (his solicitor) suggested that I should give notice. I said it would be tantamount to shutting him up, as he depended upon the debtors for work—they were his customers. It was not to keep his customers from this knowledge, but simply that it might harm him individually. I expected his customers would withdraw their custom from him, because it would evidence that he was obliged to borrow money; besides people are generally very touchy about their bills being handed over to others. I did not wish to injure his credit."

Accordingly, when a debt due from one of the large cus-

(1) L. R., 10 Ch. Div., 591.

tomers—Mr. Ezra—had to be realized, it was realized by the insolvent personally, and the money was handed over to Mr. Boileau by him. This was on the very eve of the insolvency. The assignment was equally kept secret from the dealers in materials which had to be bought to carry on the works. Mr. Marshall himself says: “I purchased timber, bricks, and chunam for the business in the name of ‘Marshall Brothers,’ and any orders sent for materials were signed either by me as ‘Marshall Brothers,’ or by Mr. Boileau as ‘Marshall Brothers per T. Boileau or per T. B.’ This went on in the usual course of business up to the time of my insolvency.”

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These persons, therefore, from whom goods were bought, were led to believe that their goods were bought by Marshall Brothers—not by Mr. Boileau or for his benefit, and Mr. Boileau's statement regarding the mode of dealing with the goods, shows that they were allowed to leave the premises from time to time, as the insolvent directed, with the consent of Mr. Boileau.

Fresh goods were thus brought in from time to time for the purpose of the business, that is to say, that they might be used in the business, to earn funds for the business, which could be applied in payment for them, on the faith of the credit of Mr. Marshall, and not of Mr. Boileau.

It appears to me that the property was in the order and disposition of the insolvent, and that it would be unjust to apply the proceeds of these goods to satisfy the assignment to Mr. Boileau, which he himself says was kept secret.

It is agreed that the costs of both parties shall be paid out of the proceeds of the goods.

Attorneys for the insolvent: Messrs. *Barrow and Orr.*

Attorney for Boileau: Mr. *S. J. Leslie.*

Attorneys for the creditors: Messrs. *Swinhoe, Law, & Co.*