[IN THE INSOLVENT COURT].

Before Mr. Justice Phear.

1871
Aug. 21.

IN THE MATTER OF SHIBCHANDRA MULLICK, AN INSOLVENT.

Insolvent Court—Proof of Claim—Security, giving up of—Realization of Security.

See also 13 B. L. R. App. 4.

In 1870 the firm of S. M. and Co., of Calcutta, authorized A., of the firm of C. N. and Co., also of Calcutta, to indent for them for iron from England. In pursuance of such authority, C. N. and Co. ordered, through their London agents,, P. P. and Co. a shipment of iron. which was duly shipped by P. P. and Co.,who drew against the said shipment two bills of exchange for Rs. 10,000, and Rs. 1,484-10 respectively on the firm of S. M. and Co., in favor of C. N. and Co. The bills, on presentation, were duly accepted by S. M. and Co., and afterwards discounted by C. N. and Co. with the Chartered Mercantile Bank, C, N. and Co. at the same time depositing with the bank as collateral security for the payment of the bills, the bill of lading for the iron shipped from England by P. P. and Co. Subsequently both S. M. and Co. and C. N. and Co. filed their petitions in the Insolvent Court, and were adjudicated insolvents. In the schedule of S. M. and Co the bank was inserted as a creditor in respect of this transaction for Rs. 11,484-10. When the bills of exchange became due, they were duly presented for payment to the acceptors, but were dishonoured, and protested by the bank for non-payment, and on such non-payment the bank sold the shipment of iron for which it held the bills of lading, and realized the sum of Rs. 10,073-12-6. The bank claimed to prove for the whole amount in the schedule against the estate of S. M. and Co.

Held, that the bank was only entitled to prove for so much as was due to it on the bills of exchange after deducting the amount realized by the sale of the iron.

In the circumstances of the case, C. N. and Co. were interested in the shipment of iron as well as S. M. and Co., and therefore there was no obligation on the bank to give up the security before proving its claim, but it might have proved for the whole amount of the debt, and retained the security.

THE Chartered Mercantile Bank had been inserted in the insolvent's schedule as creditors for Rs. 52,484-10, the debt being admitted by the insolvent. A portion of the claim, amounting to Rs. 11,484-10, arose as appeared in the affidavit of the

insolvent which stated as follows :—" That sometime in 1870, the insolvent's firm, Shibchandra Mullick and Co., authorized Mr. Alcock, of the firm of Messrs. Charles Nephew and Co., to indent for them for Swedish iron from England ; that in pursuance of such authority Messrs. Park Pittar and Co., the London Agents of Messrs. Charles Nephew and Co., shipped on board the *Poonah* 100 tons and 2 cwt. of iron on account of the insolvent's firm ; that Park Pittar and Co. drew against the said iron two bills of exchange, one for Rs. 10,000, and the other for Rs. 1,484-10, on the insolvents firm, in favor of Charles Nephew and Co., payable sixty days after sight ; that on 15th September Charles Nephew and Co. presented the two bills of exchange for payment to the insolvent's firm by whom they were duly accepted; it being at that time agreed that as the *Poonah* was not expected to arrive at Calcutta within two months from the date of such acceptance, an extention of 30 days further time should be allowed for the payment of the bills of exchange ; that on 14th November the *Poonah* not having arrived, Charles Nephew and Co. drew two bills of exchange for the same amounts as before and payable 30 days after date to their order in lieu of the two previous bills of exchange, and they were puly accepted by the insolvent's firm ; that the bills after such acceptance were discounted by Charles Nephew and Co. with the Chartered Mercantile Bank, they at the same time depos iting with the said bank, as collateral security for the payment of the bills of exchange, the bill of lading for the iron shipped on board the *Poonah* ; and that after Shibchandra Mullick had been adjudicated an insolvent, the bank wrote to him for the invoice for the said iron, and such invoice was handed over by him to the bank."

The affidavit of Mr. Finlayson, agent of the Chartered Mercantile Bank, further stated, "that the two bills of exchange were dishonored at their due date and duly protested ; and that upon the non-payment of the bills at due date the bank sold the said iron which realized the sum of Rs. 10,073-12-6." On the hearing of the claim of the Chartered Mercantile Bank, the question arose whether the bank could be admitted as a creditor for the full amount set down in the schedule, or whether

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the claim should be reduced by the amount realized by the sale of the iron.

Mr. *Marindin* for the Bank.

Mr. *Ingram* and Mr. *Evans* for the Official Assignee.

Mr. *Marindin* contended that the bank was entitled to prove for the whole amount of the bills, without deducting the amount of the security or giving it up—*Ex parte English and American Bank, In re Fraser Trenholm and* Co. (1). By section 40 of the Indian Insolvent Act, the Court is to be guided by the rules of the English Bankruptcy Act. In that case as here the amount of the security had been actually realized; but this, it is submitted, makes no difference—*Midland Banking Company* v. *Chambers* (2). It is immaterial whether the security is retained in cash or in documents for which cash can be at once obtained. [PHEAR, J.—That seems contrary to the old rule. Mr. *Ingram*.—That case is one of proof against a single estate]. This is not a question of whether the bank can prove against Charles Nephew and Co., it is not a question of double proof. The question is can the bank prove for the whole debt against the estate of Shibchandra without giving up the security. If Charles Nephew and Co. had taken up the bills, they could have proved against the insolvent's estate. [PHEAR, J., refers to *In re Barned's Banking Company, Kellcok's case* (3).]

With regard to the question of the alleged payment, it is submitted it is not a discharge. Payment by the drawer does not discharge the acceptor except in the case of an accommodation bill—*Jones* v. *Broadhurst* (4). Whose was the property in this case? The bills were endorsed to the bank. It is submitted that Charles Nephew and Co. had enough property in the bills to bring the case within the principle of the case of *Ex parte English and American Bank, In re Fraser Trenholm and Co.* (1).

(1) I. R., 4 Ch. App., 49.
(2) *Id.*, 398.
(3) 3 L. R. Ch. App., *per* Lord Justice Wood, 769; see 775.
(4) 9 C. B., 173.

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Mr. *Ingram* contra.—There are two cases in which a creditor may prove without giving up his collateral security : 1st, where the bankrupt is jointly liable with another firm to the creditor ; 2nd, where the security does not from part of the estate alone against which the proof is made ; and it is on this latter principle that the case of *Ex parte English and American Bank, In re* Fraser Trenholm *and Co.* (1) was decided, *viz.*, that the cotton belonged to both firms. Here it is submitted that the iron was the exclusive property of the insolvent. But the rule as to double proof is always subject to another rule. If a creditor has realized his security before proving against the bankrupt's estate, he can only prove for the balance remaining after deducting the amount realized. See Robson on Bankruptcy, pages, 176 and 260, and cases there cited ; *Ex parte Royal Bank of Scotland (2), Ex parte Brook, In re Watson (3), Ex parte Leers (4), Ex parte Rufford, In re Wood (5), Ex parte Tayler, In re Houghton (6). Ex parte Prescott, In re Thompson* (7).

As regards the payment, a bill is only negotiable so long as no payment is made by or on behalf of the acceptor. In this case the payment was on behalf of the acceptor ; the iron belonged to the acceptor—Byles on Bills, page 544, and cases there cited. The case of double proof are against the policy of the Act, which enacts that the property of the insolvent is to be equitably distributed. Here the claim is for more than 20 shillings, in the pound. This case must be governed by the principle that when a creditor has received any part of a debt he must deduct that in proving against the estate of his insolvent debtor.

Mr. *Evans* on the same side.—This case is distinguishable from *Ex parte English and American Bank* (1). for there the property did not belong to Fraser Trenholm and Co., the Liverpool firm. There is a difference where goods are specifically appropriated to meet the bill, although payment by drawer does not discharge the acceptor—*Jones* v. *Broadhurst* (8) Money which has been paid

(1) 4 L. R., Ch. App., 49.
(2) 2 Rose, 197 ; S. C., 19 Vesey 310.
(3) 2 Rose, 334.
(4) 6 Ves., 644.
(5) 1 Glyn & Jameson. 41
(6) 1 De Gex. & Jones, 302 ; S. C., 3 Jur. N. S., 753.
(7) 4 De& & Chit., 23.
(8) 9 C. B., 173 ; see 177.

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in respect of bills must be deducted in proving for the debt. This has been decided by some cases since *Kellock's case* (1), which was decided on *Mason* v. *Bogg* (2), *viz.*, *In re Barned's Banking Company, Forwood's Claim* (3), *Coupland's Claim* (4) *Leech's Claim* (5). *In Ex parte English and American Bank* (6), the security was actually realized, the property was sold because the market was good. Here that was not so, the property was not sold by consent of the parties for any good reason, as because there was a good market.

Mr. *Marindin* in reply.—Is this iron the sole property of the insolvents? There is no distinction as to the justice of the case whether the security has been realized or not. None of the cases cited on the other side apply to the case where the creditor has realized securities which he held. All of them are cases in which a third party has paid the money. They are, moreover, not reconcileable with the case of *Midland Banking Company* v. *Chambers* (7). This case is decided by *Ex parte the English and American Bank* (6), and the bank is entitled to prove for the whole of the debt.

PHEAR, J.—The first question which I have to determine in this case is, whether or not the bills of lading which the bank holds by way of security represent property belonging solely to the bankrupt; for if they do so, if the property covered by them belongs solely to the bankrupt, it is a well established rule that the creditor must give them up to the Official Assignee, or make the most of them, before he can prove against the bankrupt's estate. I am not yet quite free from difficulty with regard to the facts intended to be disclosed in the affidavits; but I gather from them that Charles Nephew and Co. were consignees of the goods or indorsees of the bills of lading, and themselves indorsed these bills of lading to the bank; and besides *indicia* of ownership of this sort, I think enough does appear in the affidavits, to show that there were relations between the insolvent

(1) 3 L. R., Ch. App., 769.
(2) 2 Mylne & Cr., 443.
(3) 5 L. R., Ch. App., 18.
(4) 5 *Id.*, 167.
(5) 6 L. R., Ch. App., 388.
(6) 4 *Id.* 49.
(7) *Id.*, 398.

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and Charles Nephew and Co. in respect of these goods, which would prevent me from saying that the property covered by the bills of lading was solely the property of the insolvent. At any rate, the matter is not put beyond doubt, and for the purpose of this application, I think I must infer that Charles Nephew and Co. were to some extent interested in the goods, as well as the insolvent. That being so, the bank was not obliged to give up the security in question before proving its claim. In other words the bank was entitled both to retain the security and to prove for the whole amount of the debt secured. This brings me to the second question.

What is this debt ? Is it the full sum for which the bills of exchange were originally drawn, or is it that sum reduced by such an amonnt as has in fact been realized from the security ?

Mr. Marindin argued that the sum for which the bank was entitled to prove, was the full amount of the acceptances without deduction of the price realized by the sale of the goods. He argued that, inasmuch as, if nothing had been realized at all under the bills of lading, the creditor would be entitle to prove for the whole amount of the acceptances, the fact that he had realized ought not to put him in any worse position. Mr. Marindin also argued that whatever was realized by sale of the goods was in effect *pro tanto* payment by the drawer of the bills of exchange, and that this payment did not discharge the acceptor of the bills. I think both these arguments are disposed of by the cases of *Exparte Tayler, In re Houghton* (1) and *Cook* v. *Lister* (2). In the case of *Ex parte Tayler* (1), Lord Justice Turner said that it was not necessary for him to express an opinion as to whether, under the circumstances of that case, the appellant could recover the full amount of the bill at law, because " the argument for the appellants if followed to its legitimate consequences, would amount to this, that proof must be made for what was due from the bankrupt, and not for what was due to the creditors proving

(1) 1 DeGex & Jones, 302; S. C., 3 Jur. N. S., 53.

(2) 9 Jur. N. S., 823.

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but if that had been the practice and rule of the Court of Bankrupty there would have been no occasion for the statutory provisions as to the rights of sureties. I therefore cannot consent to disturb the general and settled rule of bankruptcy on any of the grounds which have been urged on this occasion." The settled rule of bankruptcy to which Lord Justice Turner refers is that the creditor must prove for the amount due to him, and not for the amount due from the bankrupt. The Court of Bankruptcy does not understand his proving in his own name for one sum, for a part of it on his own account, and for the remainder as *quasi* trustee for some one else. If there is a person other than the proving creditor to whom a portion of the money due from the bank ought to go, proof for that portion can and ought to be made in that person's own name, or specifically on his behalf. Then the case of *Cook* v. *Lister* (1), as I think, entirely displaces the argument which Mr. Marindin raised on the case of *Jones* v. *Broadhurst* (2). Erle, C. J., seems to have gone so far as to say of *Jones* v. *Broadhurst* (2), that more had been laid down in that case than was relevent to the decision given. He entirely repudiates the doctrine that the holder of a bill of exchange is under all circumstances entitled in a Court of Law to recover the whole amount expressed in the bill, notwithstanding that he had received payment, or part-payment from the drawer. With regard to the particular case before him the Chief Justice said: "It seems "to me, however, that it would be monstrous and irrational "that the law should allow the plaintiffs to interfere "between the defendant and Cheesborough and Son, and "between the defendant and Yewdall and Son, and that the "plaintiffs should recover from the defendant money which they "are to hold as trustees for those parties." And he further said, "considering that Courts of Justice are instituted for the "purpose of enabling a creditor to recover his debt, and not a "great deal more than his debt, that case (*Jones* v. *Broad-*"*hurst*) (2) went a very long way. It does not warrant the pro-"position for which it is now cited,—namely, that in every case

(1) 9 Jur. N. S., 823. (2) 9 C.B., 1 73.

"except that of a strict accommodation bill, the holder is entitled "to sue the acceptor for the whole amount due on the bill, not- "withstanding that he has received payment or part-payment "from the drawer." And Mr. Justice Willes in the same case expressed the like views with equal emphasis. I think therefore that these cases, taken together with those of *In re Barned's Banking Company, Coupland's Claim* (1), and *Leech's Claim* (2), make it very clear that the bank is only entitled to prove for so much as is due to themselves on the bills of exchange after deducting the amount realized by the sale of the iron. The affidavits leave it uncertain whether this amount was realized after or before the insolvency, but I think that is here immaterial. No doubt, as was held by Lord Justice Page Wood in *Kellock's case* (3), the Court is only concerned for the moment with the amount which was due at the time of the making of the claim upon which the Court is only concerned for the moment with the proceedings the schedule is from time to time amended after it is filed, according to change of circumstances, so that it may correctly represent the debts at the time when the Official Assignee declares a dividend.

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Attorneys for the Official Assignee: Messrs. *Carruthers* and *Dignam.*

(1) 5 L. R., Ch. App., 167.
(2) 6 *Id.*, 388
(3) 3 L. R., Ch. App., 769.