(1881) 02 CAL CK 0002

Calcutta High Court

Case No: None

In Re: Morgan and Another
 E.S. Gubboy — APPELLANT

Vs

RESPONDENT

Date of Decision: Feb. 7, 1881

Acts Referred:

- Provincial Insolvency Act, 1920 - Section 23

Citation: (1881) ILR (Cal) 633

Hon'ble Judges: Richard Garth, C.J; Pontifex, J

Bench: Division Bench

Judgement

Phillips, J.

Section 23 of the Insolvent Act does not affect the mortgagee. This case comes within the principle laid down in Reynolds v. Bowley (L. R. 2 Q. B. 474; in the Court below, Id., 41), which decides, that where one partner allows the other, bond fide, to carry on the business ostensibly as his own, on the bankruptcy of the latter, the share of the dormant partner in the partnership stock-in-trade cannot be dealt with as in the possession, order, or disposition of the bankrupt as reputed owner with the consent of the true owner. Here Smith was not insolvent at the time of the insolvency of the other partners. In Ex parte Dorman (L. R. 8 Ch. 51), the Lords Justices held, that the clause relating to goods in the possession, order, or disposition of a bankrupt is confined to cases where the bankrupt is in the sole possession of goods as the sole reputed owner; and they say,-"It is obvious that if the clause was held to apply to every case where goods, with the permission of the true owner, are left in the possession of a bankrupt, jointly with others as reputed owners, great injustice would be done in every case in which goods are left in the possession of a firm, one of whose members becomes bankrupt. It surely never could have been intended that if goods are left by the true owner in the possession

of the firm of A and B, of whom A becomes bankrupt, but B remains solvent, the goods should become the property of A divisible among his creditors." That case was approved of in In re Bainbridge (L. R. 8 Ch. Div. 218), where it was pointed out that Ryall v. Rowles (1 Ves. Sen. 375; S.C. 1 Atk. 164) is no longer law.

2. Mr. Kennedy for the Official Assignee.-At the time when the petition was filed, so far as the mortgaged property was the property of Gubboy, the insolvents had, by the consent and permission of the true owner, in their possession, order or disposition, goods and chattels, of which they were the reputed owners, and of which they had taken upon themselves the sale, alteration, or disposition as owners. Such goods and chattels, therefore, became their property, so as to become vested in the Official Assignee. There was nothing to interfere with the management, sale, order, or disposition of the insolvents; and they did in fact deal with the property as owners. The insolvents, therefore, had in themselves the management of the property. The cases of Reynolds v. Bowley (L. R. 2 Q. B. 474; in the Court below, Id., 41) and Ex parte Dorman (L. R. 8 Ch. 51) are distinguishable. This case comes within the principles laid down in Ryall v. Rowles (1 Ves. Sen. 375; S. C. 1 Atk. 164). It has been said on the other side that Ryall v. Rowles (1 Ves. Sen. 375; S. C. 1 Atk. 164) has been overruled. But in In re Bainbridge (L. R. 8 Ch. Div. 218), which is cited as an authority for that proposition, it was merely, said, that the law had been altered by statute, not that Ryall v. Rowles (1 Ves. Sen. 375; s. c. 1 Atk. 164) had been overruled. The law laid down in Ryall v. Rowles (1 Ves. Sen. 375; S.C. 1 Atk. 164) isuntouched. In In re Hill In re Hill. Ex parte Lepage. In this case one Lepage sold his business, which was carried on under the name of "C. Lepage & Co.," to three persons named Barham, Hill, and Seymour. The name of the firm was immediately changed to "Barham, Hill, & Co." Part of the purchase-money remained outstanding, and the good-will, stock-in-trade, shop-fixtures, and book-debts of the business were mortgaged to Lepage by his, vendees, subject to a proviso for redemption on payment within seven years of the principal sum secured and interest. In 1870, Seymour, with the consent of Lepage, sold his share in the business to one Thomson, who agreed to become liable to Lepage for all claims which Lepage might have against Seymour. In 1871, the share of Barham (who was dead) was sold by his executor to Hill and Thomson, who agreed to become liable to Lepage in respect of such share. In 1871, Hill and Thomson executed a bond in favour of Lepage, for the purpose of securing the sum of Rs. 24,936 then due to him on the mortgage; and to secure certain other sums due by them to him, gave him their joint and several promissory note for Rs. 27,648. In December 1871, Thomson left India owing to ill-health, and shortly afterwards sold his share to one Hogan, remaining however liable to Lepage. Thomson was never advertised out of the firm in consequence of a private arrangement between himself and Hogan, who was admitted as a dormant partner. In 1873 Hill became insolvent, and filed his petition. Lepage filed a petition claiming priority. Mr. Phillips for Lepage. Mr. Kennedy and Mr. Evans for the Official Assignee. Mr. Watson for Hill. Pontifex, J.-Lepage claims to be not only a creditor of

the estate, but a secured creditor. He claims under a deed which provided that he was not to be paid for seven years. The property was left in the possession of Hill. Mr. Phillips says, that the property was not in his possession with the consent of the true owner. The proviso in the deed does not affect his possession-Reynolds v. Bowley (L. R. 2 Q. B. 474; in the Court below, Id., 41); Spackman v. Miller (12 C. B. N. S. 659). The claimant has consented to Barham, Hill & Co. being in possession of the property mortgaged to him, and if it remained so, he could not take. Mr. Phillips has cited Ex parte Dorman (L. R. 8 Ch. 51) and Reynolds v. Bowley (L. R. 2 Q. B. 474; in the Court below, Id., 41). In both these cases the possession of the property was the possession of both partners, and therefore was not such a sole possession, order, or disposition as required by Section 23 of the Insolvent Act. This case is different. Hogan was out of the jurisdiction, and was a dormant partner. Neither of the authorities cited would operate to enable the Official Assignee to succeed in any action against Hogan, and I do not see why Lepage is to be in a better position. The only person in whose possession, order, or disposition the goods were was Hill. Proof allowed subject to adjustment of the amount with the Official Assignee. In case of difference, to be referred to the Court. Preferential right disallowed, and the petitioning creditor to take rateably with the other creditors.) decided by Pontipex, J., [637] August 14th 1874, one Lepage, the original owner of a business, sold it to three persons, taking from them a mortgage of the stock-in-trade, &#65533;etc., and leaving them in possession. Ultimately, the partners consisted of Hill, the insolvent, and oneHogan, who was a dormant partner and lived out of the jurisdiction. The whole of the property remained in the possession of the insolvent, with the consent of Hogan. Ex parte Dorman (L. R. 8 Ch. 51) and Reynolds v. Botvley (L. R. 2 Q. B. 474; in the Court below, Id., 41) were cited, and it was argued that the principle of those cases prevented the property from being in the [638] order and disposition of Hill. But Pontifex, J., held, that the goods were in the order and disposition of Hill only, and that Lepage had no preferential right. Reynolds v. Boiuley (L. R. 2 Q. B. 474; in the Court below, Id., 41) is the case of a dormant partner, but what was there held was, that the dormant partner was,actually in possession. He was not a mortgagee, the whole of the property belonged to him, that is to say, was in the order and disposition of the insolvent partner. Here the person who claims leaves the property in the disposition of persons who are insolvent. Gubboy was the true owner, and the property was in the order and disposition of the insolvents. Gubboy had the power to resume his rights, to take the property out of the possession of the persons to whom he had entrusted it, and therefore he was the true owner. In Ex parte Dorman (L. R. 8 Ch. 51), the property was in the possession of the solvent partner as well as in that of the insolvent partner. But the case is different here. The property was in the possession of the insolvent partners alone. Here the horses were kept for the purpose of being hired out, and the fact that the insolvents did let them out would strengthen the belief of the creditor that the insolvents were the actual owners. The interest of the partners in the partnership property was such as to be within their, order and disposition, and they did deal with and dispose of it; Hornsby

v. Miller (1 E. & E., 192). With respect to the rights of the mortgagee in substituted property, the mortgage-deed provides, that the'' mortgagors shall make over the live and dead stock, etc., to the mortgagee on demand in writing. That might include substituted and additional stock. But the right does not arise until demand in writing has been made, and there is no evidence of any such demand.

3. Mr. Allen for an opposing creditor.-This case is within the mischief which the Insolvent Act endeavours to prevent. Credit was acquired by the insolvents having possession of and dealing with the, property. My clients dealt with the insolvents upon the faith that the property in the possession of the insolvents was their own property. It was in their visible possession, and was actually dealt with by them as owners, at least, so far as regarded the public : Ex parte The Union Bank of Manchester, In re Jackson (L. R. 12 Eq. 354). Smith was neither in possession, nor exercising any rights of ownership. The mortgagee was the true owner. The three partners executed the mortgage, conferring the ownership on Gubboy. He allowed the property to remain in the possession of the insolvents; therefore, on the plain construction of Section 23, the property was in the possession of the insolvents with the consent and permission of the true owner. The case is clear, unless it is to be considered as affected by the English authorities. Reynolds v. Bowley (L. R. 2 Q. B. 474; in the Court below, Id., 41) is distinguishable. The real reason of the decision in that case was, that, on the facts, the Court could not say that it came within Section 123 of 12 & 13 Vict., c. 106. The person in whose possession the property was, was both real and reputed owner. His sister was also real owner jointly in possession with him. She had-transferred none of her rights. See the judgment of Phear, J., in In re Agabeg (2 Ind. Jur. N. S. 240). Ex parte Dorman (L. R. 8 Ch. 51) is also distinguishable. There the property was in the reputed ownership of the infant. Here Smith is out of possession, and out of the jurisdiction. He is really insolvent. Had he been here, there would have been no difficulty. Does the fact of his absence improve the mortgagee''s position? He has parted with his right as owner.

4. Mr. Phillips in reply.

5. Broughton, J. (after Stating the facts of the case, continued).-The Official Assignee contends, that the property was in the possession, order, and disposition of the insolvents within the meaning of the 23rd section of the Insolvent Act, and must be deemed to be the property of the insolvents, Morgan and Forbes.

6. If the Official Assignee is wrong in this contention, it follows that the substantial partner of a business in Calcutta may leave the country, mortgage the whole of his share in the business for its full value, and leave his partners, who may be men without any or with very little capital, to carry on the business on the same scale as before, while the mortgagee, who is the real owner, may lie by; and if he only steps in after the partners here have filed their petitions, but before the partner who is absent has time to come out and do the same, may sweep away the whole of the assets of the partnership, and leave the other creditors, who may have dealt with

the firm on the credit of its apparent wealth, with nothing. It seems to me that this is a state of things directly in conflict with the spirit of the 23rd section of the Insolvent Act, which is intended to prevent traders trading on fictitious credit. Nevertheless, if the law is so, it must be obeyed; and Mr. Phillips, on behalf of the mortgagee, contends, upon the authority of certain cases decided in the English Courts upon similar sections of the Bankruptcy Acts, that so it is.

7. The words of Section 23, upon which the question turns, are these:-"If any such insolvent shall, at the time of filing the petition, by the consent of the true owner thereof, have in his possession, order, or disposition any goods or chattels, whereof such insolvent is reputed owner, or whereof he has taken upon him the sale, alteration, or disposition as owner, the same shall be deemed to be the property of such insolvent so as to become vested in the Official Assignee of the Court by the order made in pursuance of the Act."

8. The first case upon which Mr. Phillips relies, in order of date, is the case of Reynolds v. Bowley (L. R. 2 Q. B. 474; in the Court below, Id., 41).

9. In that case the plaintiff was the sister of Mr. T. H. Reynolds, a cowkeeper, who was adjudged bankrupt on the 9th December 1864. The defendants were the creditor''s assignees.

10. The plaintiff and her brother owned a number of cows and the stock of a dairy farm, in equal shares; and they entered into a written agreement to carry out the business with an equal share in the profits. They agreed to take the farm on a 14-years'' lease, and in the case of the death of Mr. T. H. Reynolds, the plaintiff was to retain her interest or share in the lease. The plaintiff also agreed to be a sleeping partner, the business to be conducted and carried in the name of T. H. Reynolds. The lease .was granted to T. H. Reynolds alone. They both resided at the farm-house. The plaintiff did not interfere in any way with the management of the business, but devoted her whole time and labour to assisting her brother. It was not generally known that the plaintiff was a partner, although it was known to their relatives and friends, and to some of the tradesmen in the neighbouring town, Swindon. The plaintiff and her brother drew equally on account of their shares in the profits.

11. On November 16th the brother being embarrassed on account of a bill accepted by him for a brother, absconded, and then committed an act of bankruptcy, of which the plaintiff had notice; but she remained on the farm selling the milk, &c, until the property was seized by the messenger of the Court.

12. On the 9th of December, T. H. Reynolds was adjudicated a bankrupt, and the defendants were appointed creditors-assignees, and the messenger seized the stock on the same day under the usual warrant. On the 10th of December, notice was given to the defendants that the plaintiff claimed an interest in the stock. In January 1865 the defendants, under an order of the Court, sold the stock. Under

these circumstances, the Court of Queen''s Bench held, on the authority of the decided cases, but with some doubt, that the stock was in the possession and order and disposition of the bankrupt with the consent of the true owner, and might be dealt with u/s 125 of 12 and 13 Vict., c. 106, a section similar in its terms to the 23rd section of the Indian Insolvent Act. But this decision was reversed by the Court of Exchequer Chamber; The Chief Baron adopted the words of Baron Parke in Load v. Green (15 M. and W. 216, see p. 223), viz., that the true owner must be one person, and the apparent owner another person, in order that the property might pass to the creditors-assignees; and that, as the brother, who was bankrupt, and the sister were equally entitled to possession and equally owners, the section did not apply. Mr. Justice Willes and Baron Bramwell came to the same conclusion as the Chief Baron, but put it on the ground that the bankrupt was not in fact in sole possession of the property; his sister was as much in possession as he was.

13. The case of Reynolds v. Bowley (L. R. 2 Q. B. 474; in the Court below Id., 41), differs from the present case in this particular, namely, that the property was in the possession of the bankrupt. In the present case, the third partner, Thomas Smith, acting by his attorney, had mortgaged the property to the present claimant, who was the true owner-Ex parte Union Bank of Manchester, in re Jackson (L. R. 12 Eq. 354).

14. But then it is said that the property was not in the order and disposition of Morgan and Forbes, but of the three partners-Smith, Morgan, and Forbes; and at the date of the insolvency of the two latter, Smith was not insolvent, so that the mortgagee had a right to come in and claim the property on the 12th of May, and the case of Ex parte Dorman (L. R. 8 Ch. 51) is relied on.

15. In that case Dorman, the landlord, let his house to a partnership, consisting of two partners-Lake and Clench. Clench was a minor. There were certain trade fixtures, and there was some machinery in the house used in the business of the partnership, the two partners being in possession.

16. On the 29th September 1871, both Lake and Clench committed an act of bankruptcy. On the 23rd November Lake was adjudicated bankrupt, but no petition in bankruptcy was presented against Clench on account of his infancy. Dorman claimed the machinery, plant, and type comprised in the lease; but it was ordered by the Registrar in Bankruptcy, sitting as Chief Judge, to be made over to the Trustee in Bankruptcy. From this order Dorman appealed. The words of the section of the Act upon which this decision rested (32 and 33 Vict., c. 11, Section 15, Clause 5) are similar to those of Section 23 of the Indian Insolvent Act, and the Lords Justices held, that the clause was confined to cases where the bankrupt is in the sole possession of goods as the sole reputed owner. The judgment was delivered by Sir George Mellish, who gave his reasons for the decision very fully. He said:-"It is obvious that if the claim was held to apply to every case where goods with the permission of the true owner, are left in the possession of a bankrupt, great injustice would be done in

every case in which goods are left in the possession of a firm, one of whose members becomes bankrupt. It surely never could have been intended that if goods are left by the true owner in possession of the firm of A and B, of whom A becomes bankrupt, but B remains solvent, that the goods should become the property of A, divisible among his creditors. Cases have happened in which one member of a most wealthy and solvent firm has, from his private extravagance, become bankrupt, and surely it would be absurd that all persons who had trusted the firm with the possession of their goods should be deprived of their property. Then does it make any difference that in this particular case the person who was in possession of goods with the bankrupts as reputed owners was an infant? We think it makes no difference. The fact of Clench being an infant did not prevent him from being in possession of the goods jointly with Lake, nor from being one of the reputed owners of the goods. The lease to him was not void, but only voidable, and Lake having knowingly entered into a contract of partnership with an infant, could not deprive him of his rights as a partner. It was argued, indeed, that the case came within the mischief against which the order and disposition clause was intended to provide, and we think it must be admitted that it does; but still a consistent construction must be put upon the clause, and we think it must be construed either as confined to cases in which the bankrupt is solely ''in possession, or as extending to all cases in which the bankrupt is in possession jointly with others. There are no words in the clause which enable us to distinguish between cases which we might think within the mischief intended to be prevented, and cases to which the clause was plainly not intended to apply. We cannot, for instance, make a distinction between cases in which the partner of the bankrupt is solvent, and cases where he is insolvent, though for some cause he is not made bankrupt; or between cases in which the partner of the bankrupt is an infant and cases in which he is of full age."

17. This decision was followed by the Chief Judge in Bankruptcy, Vice-Chancellor Bacon, who said:-"The Act of Parliament is perfectly clear, and even if I had not the assistance of Ex parte Dorman (L. R. 8 Ch. 51), and if I was not bound by that case, I should act upon it. It is as clear as anything can possibly be."-In re Bainbridge (L. R. 8 Ch. Div. 218).

18. The Lord Chief Justice of England, in deciding the case of Reynolds v. Bowley (L. R. 2 Q. B. 474; in the Court below Id. 41), in the first instance pointed out that there might be cases of hardship on either side; and from the. judgment in Ex parte Dorman (L. R. 8 Ch. 51) it must be taken as decided in England, that the section must receive a consistent construction, independent of the circumstances of the particular case; and as the Indian enactment is an Act of Parliament identical in its terms, and having the same object, these decisions are, I conceive, binding upon me; and the reasons upon which they proceed must also be admitted, as Mr. Phillips contends, to be unanswerable.

19. There is, however, a marked difference between the present case and the two cases of Reynolds v. Bowley (L. R. 2 Q. B. 474; in the Court below Id., 41) and Ex parte Dorman (L. R. 8 Ch. 51). In both these cases the partners were actually in possession and on the premises. Here one partner was absent from the country, and the only persons who were in actual manual possession of the property were the two insolvents. This, it seems to me, must be the possession contemplated by the Statute, the object of which is to prevent a trader acquring a false credit by having in his visible possession another person''s property.

20. In the present case there is a clause in Mr. Gubboy''s mortgage to the effect, that as long as there is any money due to him upon it, the stock-in-trade upon the premises in the occupation of the insolvents shall be treated and considered as the property and in the order of Mr. Gubboy, the mortgagee. Mr. Phillips has drawn my attention to this clause, but he does not to any extent rely upon it; he rather puts his argument on the decisions of the English Courts in the cases I have quoted. I should hold that the clause itself cannot override the Act of Parliament, and that the parties cannot make a contract, the effect of which would be, if it were upheld, to deprive the public of the benefit of a law enacted for their protection.

21. Mr. Gubboy did, however, himself rely upon this proviso and abstained from taking actual possession of the premises until after the 10th May, when Messrs. Morgan and Forbes filed their petition, and when the vesting order on that petition was made.

22. It is said that the fact that the firm was carried on in the name of T. H. Smith, and not in that of the other partners, supports the contention of Mr. Gubboy. That argument is, I think, answered by observing that it is a matter of notoriety that partnerships are often carried on in the names of persons who have long ceased to have any connexion with the business. The question seems to me to be-"To whom was credit given?" and the answer is-"To the ostensible partners, Messrs. Morgan and Forbes." And the further question is-" Why was that credit given to them?" The answer is-" Because they appeared to be the owners of a large stock of horses and carriages of their own, dealing with them as their own on the premises in which they were in visible occupation." It cannot be supposed that Mr. Allen''s client, a native dealer in hay and straw, would have allowed Messrs. Morgan and Forbes to run up a bill to the amount of Rs. 10,000 if he had known that the real owner of the property was Mr. Gubboy, with whom he made no contract, or that Mr. T. Smith, who resided in England, was in possession of the property. On this ground, I am of opinion that this case can be clearly distinguished from the cases relied on for the mortgagee. I do not come to this conclusion in the absence of authority. I refer to the observation of Mr. Justice Willes in the case of Reynolds v. Bowley (L. R. 2 Q. B. 474; see p. 481), who says:-" I am clearly of opinion in accordance with the conclusion of the Lord Chief Baron, that the fact of a business being carried on in the name of an ostensible partner does not necessarily make a reputed ownership in the partner

whose name is used. Such a partner may or may not be-I think in this case he was not-a reputed owner."

23. I have said that, in my view, the use of the name Thomas Smith" is not material. Messrs. Morgan and Forbes might call themselves Thomas Smith and Co., if they wished to do so, and did not infringe the rights of others in so doing; and I think this is one of those cases to which Mr. Justice Willes refers, and that I have his authority for holding that Messrs. Morgan and Forbes were the reputed owners, and that the property was in their order and disposition.

24. There was also a case (ante p. 636, note), decided in August 1874 by Mr. Justice Pontifex, in which the circumstances were somewhat similar, and in which both the English cases quoted by Mr. Phillips were discussed. The case was that of the insolvency of Mr. Hill, of the firm of Barham and Hill, the booksellers. Mr. Lepage who originally owned the business, had sold it to Messrs. Hill and Seymour and to the excutors of Mr. Barham, taking a mortgage to secure his purchase-money, and leaving the new firm in possession. There were subsequently some changes among the partners; and at the time of Hill''s insolvency, the firm consisted of Messrs. Hill and Hogan. The latter was a Government servant, and on that account stipulated that he would not take any active part in the management, but was to be a sleeping partner; and he left the whole of the property in the possession of his partner, Hill, who was then in sole actual possession with the consent of his partner Hogan, and of Lepage the mortgagee. It was held, that the property vested in the Official Assignee. So here, I think, that the property was in the order and disposition of the insolvents, Morgan and Forbes, and upon their insolvency vested in the Official Assignee; and that the petition of Mr. Gubboy to be paid in Full must be refused.

25. The Official Assignee informs me that this question has been argued by arrangement on this petition to avoid the expense of a suit, and agrees that the (sic)osts of all parties be paid out of the estate.

26. From this decision Mr. Gubboy appealed.

27. The Advocate-General (Mr. G. C. Paul) and Mr. Phillips for the Appellant.

28. Mr. Kennedy and Mr. B. Allen for the Official Assignee.

29. Mr. Phillips.-It is contended that, though Smith was entitled to one-half of the property, it must be considered that Gubboy left the whole of the property in the order and disposition of Morgan and Forbes to the exclusion of Smith. It is not shown that he knew that Smith was absent. It is more probable that Gubboy would prefer to trust Smith than the junior partners. Reynolds v. Bowley (L. R. 2 Q. B. 474; in the Court below, Id., 41) shows that the partner out of the country cannot sweep away the assets of the concern as the learned Judge in the Court below thought he could. It is not shown that Gubboy assented to Morgan and Forbes having exclusive disposition; it can only be inferred from the fact that they were the only partners

here. I only admit that Smith was out of the country when the further charges were made. In Reynolds v. Bowley (L. R. 2 Q. B. 474; in the Court below, Id., 41) the Court considered the case to be that of a secret partner. It is not pretended that Smith was a dormant partner; he was merely out of the country. [Pontifex, J.-In all the English cases the partner was in the country and in possession. Might not the decisions have been different if the partner had been abroad?] There is nothing in Reynolds v. Bowley (L. R. 2 Q. B. 474; in the Court below, Id. 41) which shows that the case turned in any way on the partner being on the spot. Smith, by going to England, did not leave his goods in the sole disposition of the other partners; they held for him and themselves. Suppose that they all went away, would they all be out of possession? If the property had been left in charge of a manager, would it have gone to his assignees? If a man goes away from his house, leaving his servants in charge, he remains in possession of the goods in the house.

30. In. Ex parte Dorman (L. R. 8 Ch. 51) the possession was possession as partners; there was nothing about "actual" possession. Here Smith was carrying on trade; further charges for the purposes of the trade were made by his attorney. Possession in the popular sense is not the possession meant by the Statute. Otherwise possession by a servant would pass the master''s goods to the assignee on the servant''s insolvency. Suppose, after the insolvency of Morgan and Forbes, Gubboy had allowed the goods to remain in Smith''s possession, then they would have been in his order and disposition, and would have passed to his assignee. In In re Bainbridge (L. R. 8 Ch. D. 218), Bacon, C.J., says:-"Can it be said that these two gentlemen carrying on partnership together, any one part of this property remained in the order and disposition of the bankrupt with the consent of the true owner? Not only do I adopt the judicial interpretation in Ex parte Dorman (L. R. 8 Ch. 51) and say, that Section 15 Sub-section 5, relates to sole possession of that kind alone, but I say that it must be necessarily so, for it is impossible to point out anything in the case to show that either of these partners was more a partner than the other. Partners are possessed per mie et per tout; and each of them was lawfully in possession of the whole of the assets, but not exclusively in possession, not solely in possession." [Garth. C.J.-Might not the shares of the partners only pass?] The reason that anyting of Gubboy''s would pass would be because he had left it in the possession, order or disposition, and reputed ownership of the insolvents. It cannot be said that he left it in their possession according to their shares, so that if one became insolvent his share would pass. There are no words in the Act which refer to shares. In re Bainbridge (L. R. 8 Ch. D. 218) was the case of a share, and it was held that it did not pass. This case turns on Gubboy''s having the legal right in the goods and chattels. If the decision is correct, they would pass to the Official Assignee on the insolvency of any person in whose possession they happened to be to the exclusion of both mortgagor and mortgagee. Credit was not obtained by the possession of the mortgaged goods. In Belcher v. Bellamy (2 Exch. 309), Parke, B. says:-"It is evident that, at the present day, a trader does not obtain credit by the possession and

apparent ownership of other persons'' goods, but in consequence of his general estimation as a merchant. In order to bring a case within the provisions of the Bankrupt Act, there must be a real owner distinct from the apparent owner, and the real owner must have consented that the trader should have possession of the goods." Here Thomas Smith & Co., was the name of the firm; it is useless to talk of persons advancing money on the faith of Smith not being a member of the firm: Ex parte Vaux (L. R. 9 Ch. App. 602).

31. Mr. Kennedy for the Official Assignee.-The case of In re Bain-bridge (L. R. 8 Ch. D. 218) was based on a Statute which is not in force here. Ryall v. Rowles (1 Ves. Sen. 375; S. C. 1 Atk. 164) is still an authority; it has only been impeached to this extent, that, as far as goods and chattles are concerned, the law has been altered by Statute. In In re Bainbridge (L. R. 8 Ch. D. 218) all that passed by virtue of the assignment was purely a chose in action. Choses in action are excluded by the late Bankruptcy Act in England from the operation of the order and disposition clause; they were included under goods and chattels in the old Acts. Taking the whole of this mortgage-deed together, it appears to be framed for the purpose of infringing the insolvent law and sweeping away the property of these persons from their creditors. Such a clause is in direct contravention of Section 23 of the Insolvent Act. Gubboy knew that in case of insolvency he might be treated as having allowed his property to be in the order and disposition of the insolvents, and therefore liable to be applied in paying the other creditors of the firm, and he tried to avoid that. Assuming that the firm was insolvent, the effect of a partner remaining abroad does of itself make him the subject of the insolvent law. The law infers from the natural consequences of a man''s act that his intention was, the consequences should follow-Griffith and Holmes'' Bankruptcy, 98. Mere constructive possession in a person who really has nothing to do with the property is not actual possession of property. In all the cases there was actual manual possession. In Reynolds v. Bowley (L. R. 2 Q. B. 474; in the Court below, Id., 41), Kelly, C.B., says:-"It is not to be denied that there may be cases of a partnership in which goods shall be in the possession, and in the apparently exclusive ownership, of the ostensible partner, so as to enable him to obtain credit by reason of his possession and apparently exclusive ownership by which a body of creditors may be wronged and even defrauded; and in which such a possession may be entrusted to him by another member of the partnership under circumstances in which the property ought to pass to the assignees of the bankrupt." That was the view taken in In re Hill (Ante p. 636) note. That case decides that where a partner is not really in possession, the possession, order, and disposition are with the partner in charge. These goods were in the sole possession and in the sole reputed ownership of Morgan and Forbes-Ex parte Dorman (L. R. 8 Ch. 51). Section 23 only applies to a class of goods the possession of which implies property, not to the case of factors and commission agents. The mortgagee is the true owner; all the cases go upon that. The word "possession'' should have such a meaning as to exclude a person not in actual possession. The words of the Act are

possession, order or disposition, not order and disposition. The insolvents took upon themselves the "sale, alteration or disposition" of the mortgaged property. That is a question of fact-Horn v. Baker 9 East 215 and Ex parte Emerson (41 L. J. Bkcy. 20).

32. Mr. Allen on the same side.-Gubboy endeavoured to contract himself out of his liability u/s 23. The object of that section is to render available for creditors that property which has been held out to the public as a basis for credit. The question is one between the creditors and the true owner. The creditors would not have trusted Morgan and Forbes if they had known the property was Gubboy''s. Morgan and Forbes were exercising rights of ownership. This is precisely the case which the section was meant to provide against, a case where one person is enabled to obtain a false credit by the possession of goods which really belong to some one else. The section refers to actual possession, to the case of a creditor seeing his debtor apparently exercising rights of ownership over property which really belongs to a third party. Such actual possession is distinguishable from constructive possession. Actual possession once fully acquired can only be lost by deliberate intention on the part of the owner to give up possession.-Domat, Bk. III, Tit. 7, Section 1 Smith was not in possession of any of the goods. Morgan and Forbes were in possession. There cannot be a passive acquisition of property. There is a distinction between acquiring a right to possess and acquiring [651] possession.-Domat, Bk. III, Tit. 7, Section 2. The thing possessed must be certain; there must be a present intention in the mind of the possessor to possess a certain and definite thing. The possession of Smith was not actual, it could only have been constructive. He could only have the right to possess things bought during his absence. He was not an active partner. His only acts were the mortgage and further charges. He must be treated as a sleeping partner; there is no evidence of his active interference with the affairs of the firm which was carried on by Morgan and Forbes. The mere use of the words "Thomas Smith & Co.," is not sufficient to show that he was an active partner. In Reynolds v. Bowley (L. R. 2 Q. B. 474; in the Court below, Id., 41) the facts did not show that the real owner was separate from the apparent owner.-In re Agabeg (2 Ind. Jur., N. S., 340). In Reynolds v. Bowley (L. R. 2 Q. B. 474; in the Court below, Id., 41) there was actual possession by the brother and sister; both were actively working in the business. Here there was no active interference on the part of Smith. His possession could only be said to be constructive. There was consent to the reputed ownership of Morgan and Forbes-Load v. Green (15 M. & W. 216).

33. In Exparte, Dorman (L. R. 8 Ch. 51) there was actual possession. The goods possessed were owned by the landlord: the lessees had only the right of user. They could have made no title nor have passed any property in the goods. To make that case an authority, it must be extended to a case of constructive possession.

34. Mr. Phillips was not called upon to reply.

Cur. ad. vult.

35. The following Judgments were delivered:

Pontifex, J.

36. (after stating the facts of the case, continued).-The sole question we have to decide is, whether the absence of Smith in England had the effect of placing the goods and chattels of the firm in the possession, order or disposition of his two partners within the meaning of Section 23 of the Insolvent Act.

37. If it had that effect, it will be impossible for any partner in a Calcutta firm, even when the firm as a flan is solvent, to go to England without incurring considerable risk.

38. If it had not that effect, Section 23 becomes almost inoperative whenever a partner in an insolvent firm is in England.

39. It is, of course, a matter of constant occurrence that some one partner of a Calcutta firm should be in Europe for health or relaxation.

40. The construction of the section in the English Bankruptcy Act, corresponding with Section 23 of the Indian Insolvency Act, has lately received considerable attention with reference to partners; and the outcome of the decisions is certainly in accordance with common sense; for the section is a limitation of or derogation from, the rights of the true owner, and accordingly to be construed with strictness. It may be stated thus,-If the possession by one partner of the goods of the firm is justifiable-if the circumstances are such as to show that his possession is for purposes strictly connected with the partnership, then the order and disposition section will not apply. For the goods are not in his sole possession, order or disposition. His actual possession is on behalf of himself and his joint owner.

41. There may perhaps be cases, such as Lepage''s case (see ante, p 636 note) decided by myself, and very briefly reported at p. 33 of Vol. VI Calcutta Reports, where the circumstances may make a material difference.'' In that case there seems to have been a private arrangement, that the fact of Hogan being a partner should be concealed, he being a Government officer; and the name of Thomson, his predecessor in the firm, was continued with that object although his interest in the firm had ceased. Hogan was not simply a dormant partner, but from his position as a Government officer, it was necessary for him to conceal the fact of a partnership.

42. But whether that case was rightly decided or not, it is in my opinion distinguishable from the present case. How can it be said in the present case that the action of Smith in allowing these goods and chattels to remain in the actual possession of his two partners was unjustifiable? He had, according to a very common practice, gone to Europe; there is no evidence to show that he did not intend to return: indeed, during his absence he gave evidence of two emphatic acts of ownership by executing the further charges through his attorney. There is no pretence for saying even that he was a dormant partner, and certainly he did not

court concealment, for he allowed the business to be carried on in his own name.

43. The case of Reynolds v. Bowley (L. R. 2 Q. B. 474) decided that the order and disposition section did not apply to the case of a partner who had agreed to be a dormant partner, but who in fact resided on the premises and devoted his whole time and labour in assisting the acting partner in the management of the business. The majority of the Judges based their judgment on the broad ground that the order and disposition section does not apply to eases where the person in possession is himself a joint owner; and, having as much right to possession as his co-owner, holds possession by virtue of his own ownership. I find that Mr. Justice Lindley, in considering this case says in his valuable book, p. 1162 (4th Edn.):-"If this view should prevail and on principle it appears correct, the clause in question will never be applicable to dormant partners. But until this reasoning has been adopted in bankruptcy some uncertainty on this important point must exist." But there have been two later decisions confirming the principle of Reynolds v. Bowley,-namely, Ex parte Dorman (L. R. 8 Ch. App. 51), and In re Bainbridge (L. R. 8 Ch. D. 218). In Exparte Dorman (L. R. 8 Ch. App. 51), Lord Justice Melish said:-"There are no words in the clause which enable us to distinguish between cases which we might think within the mischief intended to be prevented and cases to which the clause was plainly not intended to apply. We cannot for instance, make a distinction between cases in which the partner of a bankrupt is solvent and cases where he is insolvent, though for some reason he is not made bankrupt."

44. The main difficulty which affected me in considering the case arose from the fact that Smith''s absence in England put it out of the power of his trade creditors to make him an insolvent here. But a similar difficulty occurred in Ex parte Dorman (L. R. 8 Ch. App. 51), where one of the partners was, an infant, and therefore not within the Bankrupt Act.

45. I am of opinion that the goods and chattels of the firm, which were covered by the mortgage and further charges, did not vest in the Official Assignee upon the insolvency of Morgan and Forbes.

46. A question was raised by Mr. Allen, whether, in consequence of the assignee being in de facto possession at the date of Smith''s insolvency, Mr. Gubboy can now claim possession. But, in the first place, it is evident, that such de facto possession was the result of arrangement, and to be treated without prejudice to the rights of the parties on the 12th May; and in the next place, it cannot be said that, after the 12th May, the assignee was in possession with the consent of the true owner so as to allow the section to operate.

47. I am, therefore, of opinion that Mr. Gubboy is entitled to the benefit of his mortgage and further charges. But the effect of those deeds must be enquired into and adjudicated on by the lower Court; and for this purpose the case must be remitted there. Mr. Gubboy must have his costs in both Courts. The assignee will be

entitled to his costs out of the estate.

Richard Garth, C.J.

48. I am quite of the same opinion.

49. The rule laid down in the case of Ex parte Dorman (L. R. 8 Ch. App. 51) appears to me to be founded upon the most manifest justice.

50. It must be quite understood that all questions as to what property of the firm Mr. Gubboy was entitled to under his mortgage-deeds, are left open by our judgment. All we decide is, that he has not been deprived of that property, whatever it was, by force of the provisions of Section 23.