(1868) 07 CAL CK 0038

Calcutta High Court

Case No: None

Barlow		APPELLANT
	Vs	
Cochrane		RESPONDENT

Date of Decision: July 3, 1868

Judgement

Sir Barnes Peacock, Kt., C.J.

This is a suit brought by Thomas Barlow of Manchester, a merchant trading under the style of Thomas Barlow and Brother, against Mr. Cochrane, the Official Assignee, as assignee of the estates of Lewis Balfour, senior, and James Hamilton Robinson, partners in the late firm of Lewis Balfour and Co. of Calcutta. The firm of Balfour and Co. consisted of Lewis Balfour, senior, James Hamilton Robinson, and Lewis Balfour the younger. It stopped payment on the 27th December 1866. Mr. Lewis Balfour the elder was at that time in England, and so also was Mr. Lewis Balfour the younger. Mr. James Hamilton Robinson filed his petition for relief under the Insolvent Debtors'' Act, on the 7th February 1867. The money, which is the subject-matter of this suit, and the twelve bales of goods were handed over by Messrs. Barton, Baynes and Co. to the defendant, Mr. Cochrane, under an order of Mr. Justice Phear, dated the 16th of March 1867 (2 Ind. Jnr., N.S., 273). At that time Mr. Lewis Balfour the elder had not petitioned for relief under his insolvency. Mr. Cochrane, therefore, at that time represented the estate and effects of James Hamilton Robinson alone. Mr. Lewis Balfour the elder did not petition fox relief until the 18th of May 1867. The suit was commenced on the 29th June 1867, after Mr. Lewis Balfour the elder had petitioned for relief.

2. The order of Mr. Justice Phear was made under the 26th Section of the Indian Insolvent Act, the 11 Vict., c. 21; and the first question which I will consider is whether that order prevents the plaintiff from suing Mr. Cochrane provided it be made out that the property was the property of the plaintiff, and not the property of the insolvents, or of either of them. Mr. Justice Phear did not in his judgment decide that the property actually belonged to Mr. James Hamilton Robinson the insolvent, or to the defendant, as the assignee of his estate. He expressly stated that his

decision would in no way affect the ultimate rights of the parties. The order does not in any way adjudicate upon the subject of the property in the goods. It does not even state that the insolvent had any interest in the goods. It is merely an order that Barton, Baynes and Co. should re-endorse and deliver over to Mr. Cochrane, as such Official Assignee, and as assignee of the estate and effects of James Hamilton Robinson, all goods, bills of lading, and other documents connected with such goods belonging to the estate and effects of the said insolvent as are said to be in their possession and control; and that they were to account for such goods, bills of lading and other documents belonging to the estate of the insolvent. But even if the order had adjudicated as to the property in the specific goods so shipped or the proceeds thereof, I apprehend it would not deprive the plaintiff of his right to sue in this Court to establish his right to the goods, if he can prove that they actually belonged to him, or that he had such an interest in the goods or the proceeds thereof, as prevented them from passing to the assignee of the insolvent.

3. The section [4] does not authorize an order for the delivery to the assignee of any property, except property of the insolvent or to which he is entitled under some trust, or property held for his use and benefit. In short, it extends only to property which "can be applied for the general benefit of the creditors of the insolvent," for that is the purpose for which, by the express words of the section, the property is to be delivered over to the assignee.

4. If Messrs. Barton, Baynes and Co. had been ordered to deliver over this specific property to Mr. Cochrane as assignee, they might have been discharged u/s 26 of the Act as against Mr. Barlow for having acted under the orders of the Court; but I apprehend that an order made under this section to deliver over property to the assignee for the creditors of the insolvent does not prevent the real owner of the property from suing the assignee to establish his right and to recover back that property. Such an order is no more conclusive than an adjudication of bankruptcy or of insolvency. As to which, see cases referred to in Skinner''s Insolvent Act, pages 36 and 37, notes. If an order were made u/s 26, upon an alleged debtor, to pay a debt, alleged to be due from him to the insolvent, it surely would not be conclusive that he owed the money, and prevent him from showing that no debt was due from him.

5. On these two grounds therefore, first, that the order contained no adjudication with regard to the specific property, which is now the subject of the suit: and, secondly, that such order would not oust the Court of its general jurisdiction, it appears to me that the plaintiff is not precluded from maintaining this suit, if he can make out his right to the property. The Official Assignee is no more protected than any other assignee would have been. The Court acted upon his application, and the order was obtained and acted upon by the Official Assignee at his own peril. See Perkin v. Proctor (2 Wilson, 382).

6. The plaintiff prays that, under the circumstances set out in the plaint, his right to the goods, which were handed over by Messrs. Barton, Baynes and Co. to Mr.

Cochrane, may be declared; and that the defendant may be directed to make over to the plaintiff the same, or such part thereof, as to this Court may seem fit, with interest, and that the defendant may be restrained from parting with the property.

7. It appears that, in or about the year 1862, an agreement was entered into between John S. Bolton and Barlow, of Manchester, Messrs. Small and Co., of London, and Messrs. Balfour and Co., of Calcutta, for the shipment of goods to Balfour and Co., for sale and returns to Overend, Gurney and Co. The goods were to be bought by John S. Bolton and Barlow.

8. It is important to remark that the goods were to be purchased, not by the three firms, but by the firm of Messrs. Bolton and Barlow; that they were to be shipped to Balfour and Co., of Calcutta, not to be held or treated as their property, or to be dealt with by them as their own property, but for sale and returns to Messrs. Overend, Gurney and Co., of London, according to the terms of the agreement. One of the terms of the agreement was that such goods as Small and Co. and John S. Bolton and Barlow should deem advisable, should be bought by John S. Bolton and Barlow; John S. Bolton and Barlow to charge no commission for buying and examining the goods, and to charge only usual charges for packing and making up the goods. Messrs. Small and Co. were to effect marine insurance, charging no commission, and John S. Bolton and Barlow were to draw at sis months on Small and Co. for cost of goods, including packing charges; said bills to be discounted (and domiciled) at Overend, Gurney and Co. "at 1½ per cent., in excess of Bank minimum rate."

9. The goods were to be sent to Balfour and Co. for sale and returns. Balfour and Co. were to charge no commission for selling or guaranteeing sales (that is, for acting as agents in the matter), but merely to charge for actual disbursements incurred; and Balfour and Co., on sale of the goods, were specially to remit the proceeds to Overend, Gurney and Co., in first class bills, to be drawn in favour of Overend, Gurney and Co. They were also to remit their three or six months'' bills as might be most desirable, on Small and Co., in favor of John S. Bolton and Barlow, which Overend, Gurney and Co. agreed to take at 1½ per cent. above bank minimum rate. Balfour''s bills were intended to enable Small and Co. to make provision for the six months'' Bills of Bolton and Barlow on Small and Co., in case the latter should fall due before the arrival of the proceeds. Each of the three firms was to take one-third share of the profits and loss. Bolton and Barlow having to purchase the goods, would, no doubt, be the persons responsible to the vendors for the price. They were to raise funds by drawing bills at six months on Small and Co. for the cost of the goods, and to discount them with Overend, Gurney and Co., and Balfour and Co. were to draw bills for three or six months on Small and Co., in favor of Bolton and Bartow, to meet the six months'' bills on Small and Co., if they should fall due before the arrival of the proceeds; Overend, Gurney and Co. having undertaken to discount the bills of Balfour and Co. at 1½ per cent. below the Bank of England''s minimum

rates, and to give up such bills, under rebate, on receipt of the proceeds.

10. It is clear, then, that, according to the terms of the agreement, Balfour and Co. were not to retain the proceeds of the goods sent to them for sale, but were to remit them for the purpose of discharging the bills to be drawn for the cost of the goods.

11. In pursuance of that agreement, several shipments were made. In the year 1863, Thomas Bolton retired from the firm of Bolton and Barlow, and the business was continued by the plaintiff, under the firm of Thomas Barlow and Brother. After the retirement of Mr. Bolton, the same agreement was adopted and continued to be acted upon in all respects by Thomas Barlow and Brother, Messrs. Small and Co., and Messrs. Balfour and Co., and several shipments were made to Balfour and Co. on triplicate account, upon the terms of that agreement. Amongst the shipments, goods were purchased and sent out by Thomas Barlow and Brother in September, October, November 1866, and were shipped on board the Warwick Castle, Tantallon Castle, Kenilworth Castle, and the Riversdale respectively, and it is in respect of those goods that this suit has been instituted.

12. It scarcely requires authorities to show that, by the terms of the agreements under which the goods were shipped, the goods were sent to Balfour and Co. upon a special trust, and that the proceeds of the goods sent out to Balfour and Co. were specifically appropriated, and were to be remitted by them to take up the bills drawn, to provide for the cost of the goods; and that it would have been an act of dishonesty on the part of Messrs. Balfour and Co. if they had remained solvent, and had appropriated such proceeds, to their own use, or had made them over to a creditor of their firm, instead of remitting them. They had no authority to appropriate the proceeds, and to convert them into a general debt. Ex parte Sayers (5 Ves., 172). The agreement and the shipments which form the subject of this suit, were made long before Small and Co. or Balfour and Co. stopped payment, or petitioned for relief under the Insolvent Act.

13. The case of Inman v. Clare (1 Johnson''s ch., 769) shows that the proceeds were specifically appropriated, and there can be no doubt that that specific appropriation was binding in the case either of bankruptcy or insolvency. I entertain no doubt whatever that, whether Balfour and Co. drew bills for the purpose of taking up Small and Co.''s acceptances, according to the terms of the agreement, or not, they were bound to remit the proceeds of the goods shipped, in order to meet the bills drawn on account of the transaction, which might remain unpaid in the hands of Overend, Gurney and Co. Whether, when the goods were purchased by the plaintiff, they became his property, or the property of the three firms, who joined in the speculation, there is no doubt that equity would not have allowed Messrs. Balfour and Co. to appropriate the proceeds of those goods to their own purposes, and to leave the plaintiff, who purchased the goods, and Small and Co., who accepted the six months'' bills, to take up the bills, without having the proceeds remitted

according to the terms of the agreement. If Balfour and Co. were bound, before their insolvency, specifically to remit the proceeds, their creditors acquired no right to have them applied in payment of their debts, and to have Barlow and Brother to take up the bills, and come in as creditors under the insolvency. Balfour and Co., as regards the goods which were sent to them for sale, were merely factors, whose duty it was to sell the goods; and they were bound, by the express terms of the agreement, specifically to remit the proceeds, although they were to have an interest merely to the extent of one-third of the profits, if any, after the payment of all expenses, and to bear one-third of all losses. Even if the three firms had a joint interest in the goods before the plaintiff had been repaid the purchase-money, or had been relieved from the obligations under which he had come, in order to raise the amount of the purchase-money, Messrs. Balfour and Co. had no right to hold the goods or the proceeds as their own property. To hold that Mr. James Hamilton Robinson, who was only one member of a firm, who had an interest in the speculation to the extent of one-third, had such interest in the goods or the proceeds, as entitled his assignee to stop the remittance of the proceeds, appears to me to be at variance not only with the principles of equity, but with those of common honesty. It would be clearly at variance with decided cases, even if the plaintiff''s case rested upon the agreement alone, and the goods had remained in the possession of Messrs. Balfour and Co., up to the time when Mr. Robinson petitioned for relief.

14. In Burn v. Carvalho (4 M. and Cr., 690, to which I shall have to refer for another point, Lord Chancellor Bottenham, quoting Lord Eldon, remarked:--"It has been decided in bankruptcy that, if a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, it binds him." Again, he says:--"Sir John Leach thus defines an equitable assignment: ''In order to constitute an equitable assignment, there must be an engagement to pay out of a specific fund. Upon this principle it is that assignments of future freight, and of non-existing but expected funds, have been enforced in equity.''

15. The present case is a much stronger one, for the three firms expressly agreed that the particular fund, viz., the proceeds which should arise from the sale of the goods consigned to Messrs. Balfour and Co. for sale, should be remitted for a particular purpose. The fund was thereby charged in equity, unless there was anything in the conduct of the parties by which their rights were put an end to upon the petition of Mr. Robinson, for relief.

16. In Lindley on Partnership, 2nd edition, 681, it is said: "The lien of a partner exists, not only as against the other partners, but also as against all persons claiming through them or any of them. It is, therefore, available against their executors'' execution-creditors, and assignees in case of bankruptcy."

17. It is clear that if Balfour and Co. had sold the goods, and on the eve of insolvency had remitted the proceeds, according to the terms of the agreement entered into

before their insolvency, the remittance would have been binding on their assignee. In the case of Thayer v. Lister (30 L.J. Ch., 427) E.T., carrying on business on his own account in America, and being also a partner in the firm of T. and Co., in England, drew bills on T. and Co., which he employed T. and B., another American firm, to sell for him, undertaking to provide T. and Co. with remittances to meet them at maturity. T. and B., in accordance with their usual course of dealing with E.T., endorsed the bills and sold them, giving to E.T. bills on their agent in England for the amount. E.T. being on the eve of insolvency, sent the bills so received from T. and B. to the English firm of T. and Co., with instructions to accept the bills drawn by himself, and to hold the remittance for the purpose of meeting the payment thereof. On receipt of the remittance, T. and Co. accepted the bills drawn by E.T., and, disregarding the instructions, handed the bills of T. and B. to L., in accordance with a previous promise made to him, in order to enable him to meet some liabilities incurred by him on behalf of T. and Co. It was held that these bills were specifically appropriated by E.T. to meet the bills drawn by him; that T. and Co. had received the remittances as agents of E.T., who had remitted them in a character distinct from his partnership in the firm of T. and Co.: consequently, T. and Co. had no authority to apply the remittances to any other purpose than that directed, and L., who was held on the evidence to have had notice of the specific appropriation, was bound to account to T. and B. for the proceeds. It was also held, that the above transaction did not amount to a voluntary preference by E.T. in favour of T. and B.

18. After laying down the law to the effect above stated, the Vice-Chancellor, Sir W. Page Wood, remarked: "Now, in all this part of the case, I have put aside the question of Enoch Train''s insolvency. It is said that by the laws of America, which are analogous to our own, this was a voluntary preference of Thayer and Brother, as creditors of the firm of Enoch Train, at the moment when he contemplated insolvency; that he did contemplate insolvency, I think must be conceded on the correspondence. There is every probability that it was staring him in the face; but in the first place, I do not think it by any means clear, if it were necessary to determine the point, that this would fall within the doctrine of voluntary preference, regard being had to the circumstances proved in the case, that there was an engagement in the mode of conducting their business between the firm of Enoch Train and Co. and the firm of Thayer and Brother, that each should take up its own bills, and looking especially at the case of Ex parte Imbert (1 De Gex. and J., 152), which has a very considerable bearing in many respects on this case, although there was no specific engagement to hand over these specific bills for which the Thayers were responsible, yet there being a general engagement that each was to honour his own bills, I think that might raise some considerable question whether, after specific appropriation had been made in this manner, the antecedent contract to provide for the bills would not fasten upon these bills so appropriated by the person who had entered into that engagement." The plaintiff, Mr. Barlow, was examined under a commission.

19. He swore that all the goods were bought and paid for by himself and that neither Small and Co. nor Balfour and Co. had any interest in them except under the terms of the agreement of 1862. In another Part of his evidence he said: "I have paid all the expenses in respect of the shipments, such as the insurance, freight and other charges. I produce a copy of a letter dated 18th December, which I wrote to Balfour and Co., marked with the letter N." Again he says: "On the 2nd January 1867, I wrote another letter to Balfour and Co., which was signed by Small and Co. and Mr. Lewis Balfour. I produce a copy marked No. 1. I had drawn bills on Small and Co. for the cost of those four shipments, to the amount of £ 9,312-2-5, and Small and Co. accepted those bills, and they were, together with our own cheque for £ 217-1-10, being Small and Co.''s charges for the freight and insurance, deposited by me with Williams Deacon and Co., who are Small and Co.''s London Bankers''."

20. In has been said that the terms of the agreement of 1862 were departed from, and that Small and Co. had never agreed to the alteration; but the whole of the correspondence between Barlow and Co. and Small and Co. shows that the only point of difference between them was as to the place where, and the terms upon which, the six months bills drawn by the plaintiff upon Small and Co., were to be discounted and domiciled. It appears that Overend, Gurney and Co. became bankrupt, and it was, therefore, impossible to proceed upon the strict terms of the agreement of 1862, by discounting and domiciling with them the bills which Barlow and Brother drew upon Small and Co., for the purpose of raising and recouping himself the amount which he had paid, or become liable to pay for the goods. Barlow and Brother did not wish to stipulate for the renewal of the six months bills in the event of the proceeds of the goods not being sent home in time to meet them at maturity. They say, in their letter of the 9th November: "We should not like to mention the subject of renewals in any shape or form to Messrs. Alexander, Cunliffe and Co., as we have no such business with them." Small and Co., probably being on the eve of bankruptcy, did not wish to be called upon to advance any cash; and when the firm of Barlow and Brother proposed that the six months'' bills to be drawn by them on Small and Co. should be domiciled with Alexander, Cunliffe and Co. Small and Co. objected, unless Alexander, Cunliffe and Co. would stipulate, as Overend, Gurney and Co., had done, to discount the pro forma bills to be drawn by Balfour and Co. for the purpose of providing funds to meet them in case of necessity. Small and Co. would not accede to Barlow''s proposal, that if the six months'' bills should fall due before the proceeds of the goods should arrive, each of the three firms should provide one-third of the necessary cash. But no one ever supposed for a moment that Balfour and Co. were to be exonerated from the obligation under which they had come by the agreement to remit the proceeds of the goods which were specially appropriated to payment of the bills. The letters of the 7th of November 1866 and of the 17th of May 1866 (which is referred to in it), those of the 9th, 12th and 16th of November 1866 and those of the 1st 4th 5th and 6th of December 1866, make this point clear. In one of the early letters namely in

that of the 17th May 1866, Small and Co. says: "Should any difficulty arise in the above respect with Messrs. Alexander, Cunliffe and Co. it may be mutually satisfactory to us both not, to proceed further in these operations;" but they did not act upon that suggestion. They still went on shipping goods for sale and returns and they accepted Barlow and Brother''s bills for the shipments in question. Whatever difficulty existed between Barlow and Brother and Small and Co. as to the renewal of the six months'' bills, it is perfectly clear that neither Barlow and Brother, nor Small and Co., nor Balfour and Co. ever intended that Balfour and Co. should be relieved from the obligation of remitting the proceeds. Messrs. Balfour and Co. never contended that the difference of circumstances, which had arisen in consequence of Overend Gurney and Co.''s bankruptcy had exonerated them from the obligation of specially remitting the proceeds and had converted a shipment for sale and returns into a shipment to Balfour and Co. with liberty to apply the proceeds to their own use, and convert themselves into general debtors for the amount.

21. [Peacock, C.J. here read the correspondence to which he had referred, and proceeded]:--Whether the bills were to be discounted and domiciled with, and the proceeds of the goods remitted to, Williams Deacon and Co., or Alexander, Cunliffe and Co., is immaterial. It is clear that the proceeds were to be specially remitted by Balfour and Co., in order to provide for the six months'' bills, or for the bills, if any, which might be discounted to provide funds for taking them up.

22. Sitting here as a Court of Equity, it appears to me that I should be doing injustice if I were to hold that, in consequence of the difference between Small and Co. and Barlow and Co., the specific appropriation of, and lien on, the proceeds had been abandoned; and that the proceeds which all parties, long before any of them stopped payment or petitioned under the Insolvent Act had agreed to appropriate to redeeming the bills, should be retained, or appropriated by Messrs. Balfour and Co., leaving those who had paid for the goods to be mere creditors of Balfour and Co. without the security of the proceeds I therefore, hold that whether the remittances were to go to Alexander, Cunliffe and Co., or to Williams Deacon and Co., is wholly immaterial, and that no to the 2nd of January 1867, Balfour and Co. were bound by the terms of the contract to remit the proceeds according to the terms of the agreement.

23. Another point was made on behalf of the defendant. It was contended that the goods were in the reputed ownership of the insolvents at the time of their Petition for relief.

24. On the 16th of January 1867, before the arrival of the goods in Calcutta, Mr. James Hamilton Robinson, the only partner of Balfour and Co. then in Calcutta having received a telegram from his partner in England, handed over the bills of lading for the goods to Messrs. Barton, Baynes and Co., the agents of the plaintiff Barton Baynes and Co. giving a receipt for the same, stating that the proceeds were

to be remitted to Messrs. Alexander, Cunliffe and Co., for special appropriation.

25. By the 23rd Section of the Insolvent Act, it is enacted "That if any insolvent shall, at the time of filing his petition, or at the time of filing the petition on which an adjudication of insolvency shall be made by the consent and permission 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 sole 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 this Act."

26. The time mentioned is the time of filing the petition. It is perfectly clear that Mr. Robinson did not petition for relief until the 17th February, and that, after the 16th of January, when he made over the bills of lading to Barton, Baynes and Co., he had not the possession, order, or disposition of the goods. The ship-owners would not have delivered the goods to him so long as Barton, Baynes and Co. held the bills of lading; Mr. Robinson could not have touched the goods or disposed of them in any way; nor could he have gained any credit upon the faith of the goods, when he had neither the goods themselves, nor the bills of lading, which represented them, in his possession. They, certainly, were not in the order and disposition of Mr. Balfour the elder when he petitioned, for at that time they were in the hands of Mr. Cochrane, as assignee of Mr. James Hamilton Robinson. Mr. Robinson in his evidence spoke very candidly no doubt, when he said that if the goods had got into his possession (which they never did), he would have sold them as the sole property of the firm. He says: "Shipments were made on the triplicate account. I dealt with them as the property of the firm of Balfour and Co. as far as our cash accounts were concerned, and the goods were sold as if they were our goods. Goods were sold in triplicate account, not these particular goods. If we had not stopped payment, and these goods had remained in our possession, we should have sold them as the sole property of the firm, and would have dealt with the bills of lading as the sole property of the firm."

27. No doubt, if the goods had remained in the possession of Mr. Robinson, he would have done so. But they did not remain in his possession. But even if they had remained in his possession, he could not, by his own act alone, have became the reputed owner of these goods, within the meaning of Section 23. He must have had the possession, order, and disposition, or he must have taken upon himself the sale, alteration, or disposition thereof as owner, with the consent of the true owners. The goods were not sent out to Balfour and Co. to be dealt with by Balfour and Co. as their own property, but they were sent in order that they might be sold by them as factors in the Calcutta market, and the proceeds remitted to England.

28. Mr. Balfour in his evidence stated: "It is the invariable custom when goods are consigned to a factor for him to pay the duty and to enter them in his own name." But yet it could not be successfully contended, that goods consigned to a factor for

sale would pass to his assignee on insolvency as being in his reputed ownership.

29. The case of Burn v. Carvalho (4 Mylne and Cr., 690) is a very strong case upon this point. In the present case, Mr. Robinson had actually handed over the bills of lading which represented the goods long before he petitioned. The letter of Messrs. Barlow, and the telegram of his own partner, Mr. Lewis Balfour, senior, had reached him, directing him to hand over those goods, and he very properly acted upon those letters. After those letters had been acted upon, the goods no longer remained in Mr. Robinson''s possession; and even if he had refused to deliver them up, and had continued to act as the reputed owner, he would not have been the reputed owner with the consent of the true owner.

30. In Burn v. Carvalho (4 Mylne and Cr., 690) the owner of goods in the hands of an agent abroad, by an equitable assignment, transferred the goods to a third person for value, and wrote to his agent, directing him to hand over the goods to the assignee. The assignor became bankrupt before the letter reached the agent. Yet it was held by Lord Cottenham, that the letter, although it had not reached the agent, prevented the proceeds of those goods from being in the reputed ownership of the assignor with the consent of the assignee. The Lord Chancellor said: "I think the letters of the 4th and 9th of April 1829 "amounted to an equitable assignment of the funds in the hands of Rego" (that is the agent), "and if so, how can the subsequent bankruptcy in June, upon an act of bankruptcy in May, destroy the effect of such equitable assignment? The property in the hands of the assignees was certainly liable to this equity, unless some provision in the Bankruptcy Acts interferes to prevent it. Indeed, in most of the cases I have referred to, the question arose between the party claiming the equitable assignment, and the assignees of the debtor who gave it. It was argued that the goods in the hands of Rego (the agent) were in the order and disposition of Fortunate (the assignor) at the time of his bankruptcy, and that they, therefore, passed to his assignees; but this argument appears to be excluded by the fifty-fourth and fifty-fifth admissions, as I must take it as a fact that there was no possibility of informing Rego of the equitable assignment before the act of bankruptcy. There is, therefore, the absence of the consent of the owner. The attempt to prove a case of fraudulent preference, I think, wholly fails."

31. The clauses in the Bankrupt and Insolvent laws relating to reputed ownership were intended to prevent bankrupts and insolvents from obtaining credit upon the faith of goods which do not belong to them; and, therefore, if the true owner allows his goods to be in the reputed ownership of an insolvent up to the time of his petitioning, the goods, though not really the property of the insolvent, pass to his assignees, and are made available for paying his debts. But those provisions of the Insolvent Act do not prevent the real owner from withdrawing his consent at any time before the petition is presented. There is no fraud on the part of an owner who, anticipating the bankruptcy or insolvency of his agent, takes his own goods out of the agent''s possession; nor is there any fraud on the part of a man who expects to

become insolvent, in returning the goods to the real owner, when the latter demands them. It would be fraudulent and dishonest if he were to refuse to do so. Mr. Robinson would have had no right to say to Messrs. Barton, Baynes and Co.--"I will keep the goods in my own possession. I won''t give them up, I will continue to deal with them as the true owner, so that my creditors may be paid with the proceeds of the goods which do not belong to me." There was no fraudulent preference in his handing over the goods. The Legislature never intended to compel or enable an insolvent to commit such an iniquity as to retain the goods of a third person, without his consent, up to the time of bankruptcy or insolvency, in order that his own creditors might be paid with the proceeds of another man''s goods. Mr. Robinson was bound in honesty, as he was bound by law, to give up the goods and not to retain them in order that they might pass to his assignees. Even if he had retained the possession against the consent, and without the permission, of the true owner, they would not have passed. Mr. Robinson acted only as one would expect every merchant of honour and honesty to act under similar circumstances. He gave up the goods which did not belong to him to the agent who had been appointed to receive them, in order that the proceeds might be applied according to the terms of the agreements which had been entered into before his insolvency.

32. For the benefit of trade, it has been held that "the possession of goods by a bankrupt as a factor, though he has the power of immediately selling, or pledging them, and taking the money, is not such a possession as will constitute a case of reputed ownership, for his possession of the property is only under a bare authority to sell it for the principal, and to account to him for the proceeds. A factor indeed stands in the situation of a trustee with his principal, and whatever property he has in his possession in that character at the time of his bankruptcy, and which can be distinguished from his own, belongs to his principal, and does not pass by the assignment." (1 Deacon on Bankruptcy, 475).

33. If Mr. Robinson had retained these goods up to the time of filing his petition, they would not have passed to his assignee under the 23rd Section of the Insolvent Act first, because Messrs. Balfour and Co. were merely agents or factors for Barlow and Co., or for the three firms, and the consent of the true owners under which they were acting had been withdrawn.

34. But something further took place between the parties after the letter under which Mr. Barnes received the bills of lading was written and sent to him. At the time when Messrs. Barton, Baynes and Co. received the bills of lading, they received them upon the terms that they should remit the proceeds to Alexander, Cunliffe and Co. for special appropriation. On the 2nd of January 1867, however, the three firms of Small and Co., Barton and Brothers, and Balfour and Co. came to an agreement, by which Barlow was to take upon himself the whole loss upon the shipments, in consideration of each of the two ether firms giving up its share of the profits, if there should be any profits. This was more than three months before Mr. Lewis

Balfour petitioned, and more than one month before Mr. Robinson petitioned; and I have no doubt whatever that the parties were at that time competent by law to enter into that arrangement, and that it was binding upon the assignee both of Mr. Balfour and of Mr. Robinson, if it was not merely a colorable transaction.

35. At that time the goods had not arrived in Calcutta. No one in London knew whether there would be a profit or loss upon the speculation. If they had received any intelligence by telegram, they would have found that the market was a falling one, for that is the effect of Mr. Bayne''s evidence. It was perfectly legitimate for Small and Co. and Balfour and Co. to dispose of their interest in the speculation to Barlow and Brother, if Barlow and Brother were willing to take it. The transfer was not a mere voluntary one, for the agreement of Messrs. Barlow and Brother to take upon themselves the whole loss was a sufficient consideration for Small and Co. and Balfour and Co. giving up their respective interest in the profits.

36. The learned Judge who tried the case has held that this was a voluntary transfer, fraudulent within the meaning of Section 24 of the 11 and 12 Vict., c. 21, the Indian Insolvent Act. He says: "We have a firm hopelessly insolvent, knowing that they must immediately either wind up under inspection, or petition the Court, handing over shipments of very great value, with all the profits which might be expected to result from them, to a person who at most had only a joint interest with themselves in the profits of the adventure."

37. This would have been so if the goods had been paid for, and each of the three firms had contributed its share of the purchase-money. But Barlow and Brother had bought and paid for the goods; bills had been drawn by them upon, and accepted by, Small and Co. for the amount, and those bills had been discounted. By express agreement, the proceeds of the goods were to be remitted, and had been specially appropriated. All that Small and Co. or Balfour and Co. were entitled to was a share of the profits after the proceeds of the goods should have been applied in discharge of the purchase-money and expenses. Whether there would be a profit or loss, was then unknown. Small and Co. and Balfour and Co. would have been at liberty to sell their interests in the joint speculation to a stranger, in consideration of the purchasers undertaking to bear their share of any loss; and there was no reason why Barlow and Brother, should not purchase the interests which might have been sold to a stranger. If Balfour and Co. had sold the goods, and had remitted the proceeds according to the agreement, even upon the eve of insolvency, they would have been perfectly justified in so doing. Insolvents are not to give voluntary preferences to particular creditors; but they are not bound to violate all the engagements which they entered into whilst they were solvent, and to misappropriate the property of others in order that their creditors may receive a larger dividend.

38. It was said that Balfour and Co. might have drawn pro forma bills upon the account of the goods. If they had done so, it would not have altered the case. It does

not appear that Balfour and Co. ever drew any pro forma bills in respect of the shipments under consideration. If they did, the bills were never used. Mr. Robertson, of the firm of Small and Co., says: "Balfour never drew any bills on us at all in respect of these shipments." He afterwards corrected himself and said: "I cannot speak positively as to this. They may have drawn upon us; but if they did, the bills were never accepted." Unless Messrs. Barlow and Co. had been guilty of a gross fraud, those bills if they ever were drawn, could not have been negotiated. They were to be drawn for the purpose of taking up Small and Co.''s sis months'' bills. Small and Co.''s six months'' bills never became due. They were taken up by Barlow and Co. from the hands of Cunliffe and Co., and placed in the hands of Williams Deacon and Co., before they became due. There was no necessity to use Balfour and Co.''s bills for the purpose of meeting them. Before the six months'' bills became due, the agreement of the 2nd of January was come to, and Barlow and Co. were entitled to the goods and the proceeds, and were bound to take up the sis months'' bills accepted by Small and Co.

39. In a subsequent part of his evidence, probably after having refreshed his memory, he says: "I find that four bills were drawn by Balfour and Co. on us in respect of the above four shipments, but we never accepted any of them."

40. Mr. Balfour, who was in England, representing his firm there, must also, when he signed the letter of the 2nd January, have known whether any pro forma bills had been drawn by Balfour and Co., or negotiated. He says: "No bills were drawn from Calcutta on these shipments. I can''t say that I remember, at the end of 1866, any bills of ours being sent home against these shipments. I can''t remember one way or the other. It would have been in ordinary course, if it had been done. I believe I saw the whole correspondence between Small and Co. and Barlow and Co. I was aware of a proposal in regard to these shipments. Ultimately I signed "D" (that is, the agreement of the 2nd January) at Mr. Robertson''s request, with a view of reducing the liabilities of the two firms."

41. Mr. Robinson in his evidence says: "I believe there were pro forma bills drawn against these shipments, which were sent home to Small and Co. I can''t say that there were bills drawn against all the shipments. I can''t say for certain, but I believe there must have been pro forma bills drawn. I call all the bills, which were sent home like the present, pro forma. It does not make much difference whether they are called pro forma or not; they were bills drawn against these shipments, but they were not used. They were bills which might have been used. They were sent home to meet Small and Co.''s acceptance to Barlow and Co., if necessary."

42. Then, was the agreement of the 2nd January a fraudulent or voluntary transfer by Small and Co. and Balfour and Co., to Barlow and Co.? Barlow had paid for the goods. He says: that he paid for the goods himself; that he had drawn on Small and Co. bills which had been accepted; and that these were lodged with Alexander, Cunliffe and Co. He says "In the original agreement, drafts were to be drawn by

Balfour and Co. on Small and Co. This was the usual course, and those drafts were called pro forma, and were lodged with the bankers until Balfour and Co. sent home the proceeds of goods by bank bills. These bills were not deposited at the bankers at all; they were discounted by the bill brokers--I mean Overend, Gurney and Co. It was afterwards Alexander, Cunliffe and Co. To my knowledge they were not discounted, and none were in currency, I am now referring to the shipment of the goods in September, October, and November. None of the pro forma bills against those shipments were dealt with in any way. Those drafts were in fact accommodation to Small and Co., and were to be given up under rebate."

43. Well then, what was there to prevent this arrangement from being come to? No one knew whether there would be a profit or a loss in respect of the goods. Mr. Baynes says that the market was then a falling one. A falling market would not induce the parties to believe that a profit would result. If they really could have foreseen what would happen, and the actual result of the speculation, they would have known that there would be a loss, and not a profit. The speculation actually resulted in a loss of somewhere about £ 150, or Rs. 1,500. The proceeds realized by Mr. Baynes, and handed over to Mr. Cochrane, amounted to

44. See letters of the 1st, 3rd, 4th and 5th January 1867. The cost and charges altogether amounted to £ 9,752-1-2, which, at the rate of two shillings a rupee, left a loss of about £ 150, besides the loss which would have been incurred on account of exchange on remitting the proceeds.

45. I fail to see that there was any fraud or delinquency on the part of Messrs. Small and Co., Balfour and Co., and Barlow and Brother, in entering into the arrangement of the 2nd January. Barlow and Brother having paid for the goods, agree to take upon themselves the whole risk of the speculation, and to bear all the loss if the other parties would give them up their share of the profits. If Small and Co. and Balfour and Co. had the slightest hope of pulling through, the arrangement was the best that they could have come to, for they must have known that if the remittances should not arrive before Small and Co."s bills should become due, those bills, amounting to £ 9,000 odd would have to be provided for.

46. Both Small and Co. and Balfour and Co. wished to reduce their liabilities. Barlow was willing to take their share of the speculation off their hands; and even if he did so in the expectation that he might acquire a greater control over the goods and the proceeds, by having the goods handed over to his own agent, or from a fear that the goods, if left in the hands of Balfour and Co., might, in the event of their insolvency, be considered in their reputed ownership, there was nothing fraudulent in the transaction. All that Balfour and Co., actually gave up was one-third of a loss of £ 150.

47. Mr. Balfour swears that the arrangement was come to, and I find nothing to induce me to think that it was a mere colourable transaction not intended to take

effect in reality.

48. Mr. Robertson says: "I remember in January 1867 an arrangement being made between my firm, Lewis Balfour, and Barlow Brothers, that the whole interest in those shipments should be transferred to Barlow Brother. I was here when Mr. Barlow gave his evidence. He correctly described the mode in which the assignment of these cargoes to Messrs. Barlow Brother was carried out."

49. Mr. Balfour says: "Ultimately I signed D. (that is the agreement of the 2nd January 1867) at Mr. Robertson''s request, with a view of reducing the liabilities of the two firms. The proper date of D. must be 2nd January 1867. To reduce liabilities in respect of those shipments. These were the last shipments that were made." Again he says: "I wrote with a view to reducing the liabilities of the two firms. Balfour and Co. were interested in the goods; and if relieved, there would be no liability. It was removing a liability or an eventual liability. I don''t remember the prospects. Small and Co. were anxious to get rid of the liability. I assented to do so. That was my only reason." Again he says: "The proposal was made to me by Mr. Robertson to enter into the arrangement by letter of 2nd January. It was his suggestion to get rid of the liability of Small and Co. as well as of Balfour and Co." Barlow wished, on some occasions, instead of discounting the Calcutta bills, to pay one-third, and for Small and Co. to pay two-thirds.

50. In answer to Mr. Woodroffe, he said: "When Robertson asked me, I think I objected at first, as I thought there would be some profit; but when he urged it would get rid of liability, I agreed."

51. Messrs. Balfour and Co. were not precluded from entering into a bona fide contract, even if they contemplated taking the benefit of the Insolvent Act, provided the contract was bona fide and fair. A man who stops payment, or contemplates stopping, is not immediately prevented from entering into any dealing or transaction. He must act honestly. If he does so, his contracts are binding on his assignees. I think that there was ample consideration for the contract of the 2nd of January 1867, and that it caused no loss whatever to the creditors of Balfour and Co., but rather a benefit. Mr. Cochrane has nothing to do with Small and Co.''s transfer of their interest in the speculation.

52. The transfer was not a secret transaction. An order had been sent out by Small and Co. to Jardine, Skinner and Co., to take possession of the goods from Balfour and Co. The letter was signed by Messrs. Jardine, Mathewson and Co., who were the agents of Jardine, Skinner and Co., authorizing them to hand over the goods to Barton, Baynes and Co. if they should have taken possession. It is not likely that, if the contract was a secret and fraudulent one, not intended to operate, Messrs. Jardine, Mathewson would have been asked to sign the letter.

53. Mr. Balfour the elder did not sign the name of his firm, but he swears that what he did, he had authority to do on behalf of Balfour and Co. Not only was Mr. Balfour

authorized to act for the firm, but Mr. Robinson adopted and ratified his act, and acted under his directions, when be handed over the goods to Barton, Baynes and Co.

54. If Messrs. Balfour and Co. made a fraudulent assignment within the meaning of Section 23 of the Insolvent Act, they rendered themselves liable u/s 50 of that Act to two years'' imprisonment. But could it be contended that they did so by merely transferring their interest or profits in consideration of limiting their liability in case of loss?

55. It appears to me that this transaction of the 2nd of January was intended by the parties to be carried out; that it was honest and bona fide; and that the property in the goods passed by it to Messrs. Barlow Brother. Further I hold that, if the property did not pass to Barlow Brother, the proceeds were specifically appropriated for taking up the bills of Balfour and Co. on Small and Co. and until those bills are paid Mr. Robinson has no interest in the goods which could justify his assignee in stopping the remittance of the proceeds, or of taking the property out of the actual possession of the plaintiff''s agents, Messrs. Barton, Baynes and Co. If the transfer of the 2nd January 1867 did not transfer the property, and Mr. Robinson''s interest under it, it is clear that Mr. Robinson was not entitled to the proceeds, but merely to one-ninth of the profits, if any, after all the costs and expenses should have been paid out of the proceeds. The speculation, however, as already shown resulted in a loss.

56. It has been urged that Small and Co. were in insolvent circumstances, when the letter of January 2nd was signed, but Small and Co.''s assignees have not interfered. In that respect the case resembles Thayer v. Lister (30 L.J. Ch., 427) to which I have already referred. The assignee of Robinson and Balfour has nothing to do with Messrs. Small and Co.''s insolvency or bankruptcy.

57. After the arrangement of the 2nd of January had been entered into, Barlow and Co. took up the six months'' bills, which were in the hands of Alexander, Cunliffe and Co., and placed them in the hands of Williams Deacon and Co., who were the bankers of Small and Co., to be handed over to the latter firm, as soon as Barlow and Co. should be satisfied that the goods had been transferred to their own agents in Calcutta. Small and Co. on the 14th of February wrote (reads the letter of that date).

58. Barlow and Co. wrote on the 20th February (reads the letter of that date).

59. The fact is, that when the bills of lading were handed over to Barton, Baynes and Co., neither they nor Mr. Robinson were aware of the letter of the 2nd January 1867, and Messrs. Barton, Baynes and Co. received the goods upon terms that the proceeds were to be remitted to Messrs. Alexander, Cunliffe and Co. for special appropriation.

60. On the 11th March 1867, Barlow and Co. wrote to Williams Deacon and Co. (reads the letter of that date).

61. On the 12th March, Small and Co. wrote to Barlow and Co. (reads the letter of that date).

62. The two cheques for insurance, aggregating ? 222-16-11, were sent by Barlow to Small and Co., in a letter of 4th January 1867, and the receipt was acknowledged by them on the 5th of the same month.

63. The question then is, whether the assignee of Robinson, who would have been entitled to only one-third of one-third or one-ninth of the profits, if any, would have been entitled to stop the remittances if the goods had not been delivered over to the plaintiff''s agent, or was justified in taking the goods or the proceeds out of the hands of the plaintiff''s agent, and to administer them for the benefit of the general body of creditors of James Hamilton Robinson and Lewis Balfour the elder. It appears to me that he is not, and that it ought to be declared that the goods and the proceeds are the property of the plaintiff, and that he is entitled to recover from the defendant such proceeds amounting to Rupees 96,027-10-1, with interest thereon, in the nature of damages at 6 per cent. per annum, from the time when the proceeds and goods were handed over to the Official Assignee. It must be referred to the officer of the Court to ascertain what is the amount of interest, and to report thereon. The parties will, I dare say, have no difficulty in agreeing upon the amount.

64. It is said that the assignee made no interest of the money, but whether he did so or not, the plaintiff lost the use of his money through the claim of the defendant, which was unwarranted. In the old form of action of trover, interest would have been recoverable by Act XXVI of 1841, Section 7 [5] and Act XXIII of 1861, Section 10 [6] Section 15 [7] of the Rules and Orders'' merely relates to the place in which the Official Assignee shall keep the assets of insolvent estates; the assets are still under his control. See also Rule 23[8].

65. I asked for the affidavit of Mr. Baynes, upon which the order of Mr. Justice Phear was drawn up for the purpose of ascertaining whether the defendant was made acquainted with all the facts in answer to his application. It appears that it was not put in evidence in the cause. But as the order was made upon the application of Mr. Cochrane, and he has set up a case of reputed ownership and of fraud, which has failed, I see no reason for withholding from the plaintiff the costs of the suit and of the appeal. They will, therefore, be awarded to him to be taxed according to Scale No. 2.

66. I regret very much that it should have devolved upon me to give a decree at variance with the opinion of two of my learned colleagues. It was not my wish to do so. I proposed to my honourable colleague, Mr. Justice Markby, that, as in consequence of the difference of opinion, this appeal would be determined according to my opinion, u/s 36 of the Letters Patent, we should abstain from

expressing any opinion, or delivering judgment, in order that a Court composed of ourselves and some additional Judges might be appointed to hear the case. My learned colleague, however, considered that it was not competent for us to do so.

67. I confess I entertain no doubt on the point. I think that two Judges have a right, in case they disagree, to abstain from delivering judgment, in order that the case may be referred for decision to a Court composed of a larger number of Judges, and it certainly would have been more satisfactory in this case.

68. By Section 36 of the Letters Patent of the High Court, it is ordained, that if the Judges should be equally divided, the opinion of the senior Judge shall prevail, that is, if the Judges deliver judgment. But the Judges are competent, as it appears to me, to abstain from delivering judgment in order that the case shall be heard before a Bench composed of a larger number of Judges of the Court. If this could not be done without consent, the parties might at least have been asked whether they would consent to such a course being adopted.

69. I have known cases in which, when four Judges of the Court of Queen''s Bench or Common Pleas have been equally divided in opinion, one of the Judges has withdrawn, and left the decision of the case to the other three.

70. In Laugher v. Pointer (5 B. and C., 547) the Court of Queen''s Bench was placed in this predicament. The Judges disagreed, and they abstained from delivering judgment, and referred the case for the opinion of the twelve Judges.

71. I pointed out that Mr. Justice Phear had already had the case before him, and passed the order under which Mr. Baynes had made over the goods and the proceeds to the defendant; that Mr. Justice Norman had already decided in conformity with the view of my learned colleague; and that if we should proceed to deliver judgment, my opinion would prevail against the opinions of two Judges. My judgment will be appealable to another Bench of the High Court, if the parties wish it. Mr. Justice Macpherson is the only remaining Barrister-Judge; and if an appeal be preferred, it will have to be determined by a Bench composed almost exclusively of Civilian Judges, who cannot be expected to be so well versed with the rules of English Equity as the Barrister-Judges. It, therefore, appeared to me that the best course to be adopted, and the one which would be most satisfactory to the parties, would be that which I proposed. I regret that that course has not been followed, and that my learned colleague should think that he has not the power to consent. I had, therefore, no alternative, but to decide the case according to my own opinion, notwithstanding it has the effect of reversing a judgment of Mr. Justice Norman''s, which my learned colleague, Mr. Justice Markby, considers correct.
Markby, J.

72. I do not consider the reasons which the Chief Justice has assigned for referring this case to another Bench, however cogent they may be, are such as we are at

liberty to consider. The Charter has provided by Section 36 that, if the Judges of the Court are equally divided, then the opinion of the senior Judge shall prevail; and Section 15 provides that, where Judges of a Division Court are equally divided in opinion, there shall be an appeal to the Court at large. I understand the Chief Justice to say that he considers both these results, which would or might follow, from our delivering judgments now, to be undesirable. I agree that they are. But in my opinion whether they are so or not, is not a consideration upon which we are at liberty to enter. When the Charter provides that certain consequences are to follow, if two Judges compos-rag a Division Court differ in opinion, I do not think we can avoid those consequences by an arrangement amongst ourselves for changing the tribunal which is to decide upon the case. I think the plaintiff has a right to the full advantage of the Chief Justice''s opinion in his favour, and that the defendant has a right to appeal, if he is so minded, to the Court at large. We have, there is no doubt, if we cannot come to a conclusion, a right to order the case to be reargued; but as I conceive, we can order this to be done before ourselves only.

73. I think, when once a Division Court has been appointed to hear a case, that Court is bound to deliver judgment, unless prevented from doing so by unavoidable accident, or discharged from that duty by the consent of the litigant parties. This is always done, when questions of law are referred to the Full Bench, where, according to my view, the decision of the Full Bench is an opinion given for the guidance of the Judges of the Division Court, but the judgment in the case remains that of the Division Court, and the Division Court only.

74. There is a rule numbered 23, at page 358 of Mr. Broughton''s edition of the Code of Civil Procedure, and numbered 26 at p. 29 of Mr. Belchambers'' collection of Rules, which provides that "appeals from the decision of one Judge in the exercise of ordinary original civil jurisdiction, shall be heard and determined by at least two other Judges; and in case the two Judges who exercise the appellate jurisdiction, differ in opinion, they may direct that the case shall be reheard before a Division Court consisting of themselves and Borne other Judge or Judges; and if no such order be made, the decision shall be affirmed."

75. That rule appears to have been passed before the present Charter, and for one year only, but Mr. Belchambers seems to consider it to be in force by the operation of Rule 83 in his collection, which was passed after the Charter, and provides generally for the continuance of all rules which were in force before the Charter. Had the Court collectively and expressly re-enacted the old rule on this subject, I should probably not have felt at liberty to question its validity, however much I dissented from it. But I do not consider a sweeping and general rule, such as Rule 83, a sufficiently clear and explicit statement of the opinion of the Court, to justify me in violating what in my view are the plain words of the Charter and plain principles of law.

76. The learned Judge, after briefly stating the nature of the case and reciting the agreement of 1866, proceeded:--For some time goods continued to be shipped under this arrangement, and in the months of September, October, and November 1866, goods to the value of about £ 9,000 were purchased by Barlow, in consultation with Small and Co. and Balfour and Co., and despatched to Balfour and Co. in Calcutta, in pursuance of the above agreement. Some discussion seems to have taken place as to the form of the invoices which were to accompany the goods, nor has it clearly been shown in what form the invoices were ultimately drawn; but the point under discussion was to whom the proceeds should be remitted. I infer that Barlow had drawn on Small and Co., for the price of these goods, and Small and Co. had accepted the bills, which it seems have been deposited, not with Overend, Gurney and Co. as arranged but with Alexander, Cunliffe and Co. Why the agreement had been thus departed from, is not explained, though from the letter of Small and Co. to Barlow, of 7th November, it seems to have been under contemplation for some months prior to this. From the date last mentioned, to the 6th December, this matter was discussed; the main point of difference (which was never settled) being the mode in which the bills were to be provided for at maturity. On the 8th of December, Small and Co. stopped payment, and on the 16th of December, Small and Co. informed Barlow that, jointly with Balfour senior, who was then in England, they had telegraphed to Balfour and Co. in Calcutta, to place the goods in question in the hands of Jardine, Skinner and Co., "pending completion of arrangements." What the object of this change of possession was, or what the arrangements then pending were, we do not know. On the 20th December, however, Barlow being apparently dissatisfied with this telegram, sent a letter to Balfour and Co. at Calcutta, containing different instructions. (Beads the letter of that date).

77. It is evident also that some letter was also addressed by Barlow to Small and Co. on the same date, upon the subject of these goods, and making some proposition with respect to them. But Barlow seems to have concealed from Small and Co. the letter written by him on the 18th December to Balfour and Co., in Calcutta, for on the 19th December, Small and Co. wrote to Barlow as follows. (Reads the letter of that date).

78. To this Small and Co. reply on the 22nd. In that they hope shortly to carry out the arrangement proposed, and they wrote again on the 26th to the same effect. But on the 27th, Small and Co., who were evidently acting under the direction of their creditors, proposed a totally different arrangement. (Reads letter of 27th). This new proposal was discussed for some days, and ultimately the letter of 2nd January 1867 was written. (Reads the letter of that date). Immediately afterwards, Balfour senior telegraphed to Balfour and Co., at Calcutta, as follows: "Barlow''s triplicate goods deliver to Barton, Baynes and Co." This message, by a curious coincidence, reached Robinson at Calcutta on the same day that Barlow''s letter of 18th December reached him; and though, of course there was no real connection whatever between

the two, would appear to Robinson to confirm it. Robinson, accordingly, handed over the Invoices and Bills of Lading of the goods to Barton, Baynes and Co., taking the following receipt:

Calcutta, January 16th, 1867.

79. Received from Messrs. Balfour and Co. the under mentioned Invoices and Bills of Lading as instructed by Messrs. Thomas Balfour and Brothers, Manchester.

80. Warwick Castle, 178 B., Tantallon Castle, 17 B.; Riversdale, 30 C.; Kenilworth Castle, 143 B., &c.

Barton, Baynes and Co.

81. Proceeds to be remitted to Messrs. Alexander, Cunliffe and Co. for special appropriation.

Barton, Baynes and Co.

82. Barton, Baynes and Co. received the goods on arrival, and sold the greater portion of them. Early in February, Robinson petitioned the Insolvent Court, and subsequently an order was made by the Commissioner, directing Messrs. Barton, Baynes and Co. to deliver up to the Official Assignee the proceeds of so much of the goods as they had sold, and the unsold portion remaining in their hands; which they, under that order, accordingly did.

83. The position which I understand the plaintiff to take up in his plaint is that, prior to the agreement of the 2nd January 1867, the goods in question were the property of himself exclusively; and that Small and Co. and Balfour and Co. were only interested in the profits of the adventure; that subsequent to the agreement of the 2nd January, the interest of those two firms had ceased altogether.

84. It appears to me that the plaintiff''s first position is wholly untenable. He supports it by asserting that he was the person who bought and paid for these goods; but for this, I can discover no foundation. It is clear that, by the arrangement, that none of these three parties were, if it could possibly be avoided, to find any cash at all, but funds were to be raised by discounting and re-discounting, till the proceeds arrived from India. If cash advances were ultimately found unavoidable, Barlow was to find one-third only. There is no evidence whatever that the goods now under consideration were bought on any other terms, or that Barlow at the outset was solely responsible for the price of them. On the contrary, it is clear that the usual course of "financing," as it is called, was followed in respect of these goods, as in previous consignments. In my opinion, in this case, as in all others between the same parties, each of the two firms and Barlow were in the outset part owners of these goods, and each became liable to the others to contribute his share towards the cost price of the goods.

85. I also think it clear that there had ceased to be in November 1866 any binding agreement between these parties as to where the proceeds were to be remitted. It was agreed that they should no longer be remitted to Overend, Gurney and Co., and no one had then been or afterwards was substituted for that firm.

86. Further, Small and Co. had, as I have said, stopped payment on the 9th December. Balfour and Co. had been insolvent for tome years, and it was quite understood that the two firms were so involved, that the stoppage of one was the stoppage of both; this was also in my opinion known to Barlow.

87. Now, in considering the effect of the arrangement of January 2nd, I will assume that, it operative, it passes the whole interest of Balfour and Co. in these goods to Barlow, notwithstanding that it is signed by Balfour senior in his own name only, and not in that of the firm. The evidence is, however, so imperfect, that it is not very easy to ascertain, with precision, what the exact situation of the parties then was. I do not think any cash advances had then been made by any one; but Barlow, as drawer of the bills on Small and Co. for the price of these goods, had incurred a liability, which made him a creditor on Small and Co. and Balfour and Co.''s estates. He had parted with the goods, and had no lien on them, there being, as I have shown at that time, no special appropriation of the proceeds of these goods. The provision for special remittance to Overend, Gurney and Co. had been abandoned, and to remit them to Alexander, Cunliffe and Co. would have been utterly contradictory not only to the original agreement, but to the then expressed desire of Small and Co. and Lewis Balfour, who refused to allow this, unless Alexander, Cunliffe and Co. would do the needful, that is, as I understand it, take them upon the same terms as Overend, Gurney and Co. had done. These parties, therefore, stood, as far as I can see, in the ordinary relation of partners, jointly interested in goods not in their possession, and upon which a joint liability had accrued. Under these circumstances, all the parties but one being insolvent, the partnership is broken up, and all the property of the firm is assigned to the insolvent partner. This is done under no pressure whatever; and for the express object, as it seems to me, of preventing any part of these goods being distributed, as they would otherwise have certainly been to the extent of one-third amongst the general creditors of Balfour and Co., I can see no difference between the preference of a partner, and the preference of any other creditor. A partner may hold the property of the partnership in his possession against his co-partner''s Creditors. He has also a right of having an account taken, before partnership property in the hands of his insolvent co-partner is distributed amongst the same creditors but I do not consider that, in order to avoid the consequences of an insolvency, a solvent partner has a right to take from the insolvent an assignment of all the latter''s interest in the partnership property, and so prevent that account being taken. This is a transaction between the parties, not as partners and in pursuance of the partnership, but as strangers, and in direct contravention of the terms of the partnership, and must be looked at in the same light as a transaction between an insolvent and any other

creditor.

88. If this be the right view of that transaction, I must say I can come to no other conclusion, than that it was a fraudulent preference, so far as Balfour and Co. are concerned. In the case of Small and Co., it may possibly have been different; but in the conduct of Balfour senior, lean see nothing, but the most reckless disregard of the interests of his general creditors, and a readiness to do any thing which might favour the interests of Small and Co. and Barlow, under whose immediate influence he was acting. It is said that there was a good consideration for the assignment in this, that Barlow took upon himself the risk of any loss upon this consignment. But it appears to me that the investigation of the facts not only negatives this contention, but shows the conduct of the parties in a still stronger light. There was not a word of evidence to show that the adventure was at that time likely to be a losing one. There is not an allusion to this topic in any one of the letters. Even under the circumstances which have occurred, and which in all probability would be adverse to a sale, it has not turned out to be so. Nor do I understand the parties themselves so to place the transaction. When they say the object of this arrangement was to reduce the liabilities of the two firms, I do not think they mean the liability to loss, but the liability on the bills drawn on Small and Co. for the price of the goods, and supposed to be drawn by Balfour and Co. in favour of Barlow. Moreover) great pains are taken to secure Small and Co. from any further responsibility in respect of these goods, but none whatever beyond a bare recital to secure Balfour and Co. The parties had every reason to believe, and according to their own evidence, did believe, that drafts of Balfour and Co., in favour of Barlow, were then on their way to England yet no provision is made for disposing of these on arrival. Moreover under the agreement, as originally made, the accounts of each shipment were not to be kept separate, and for aught I know now Balfour and Co.''s estate may be liable for a large amount on account of bills drawn in respect of former consignments. No one, not even Balfour himself, seems to have thought any matters in which his firm was interested worthy of a moment''s inquiry or consideration. I, therefore, think that the transaction of January 2nd was a fraudulent preference, and void so far as Balfour and Co., were concerned, and that Balfour and Co. remained, notwithstanding, owners of one-third share in these goods. I regret that there should be difference of opinion on this question, but in my opinion it is one rather of fact than of law.

89. This is the only point decided in the Court below. And I have great doubt whether it was ever part of the plaintiff''s case that, if the agreement of the 2nd January was held to be void, the plaintiff could fall back on the original agreement of 1862, and contend that under that there was a special appropriation of the proceeds of these goods which was binding; and that the transfer to Barton, Baynes and Co. was in furtherance of this agreement, so that Barlow had, through his agent, a lien on these proceeds, which was good against the Official Assignee. I find nothing at all of this sort, in the plaint or written statement of the plaintiff. I find no issue raising

such a point amongst the list of issues handed in by Mr. Newmarch. I find no allusion to it whatever in the judgment of Mr. Justice Norman, and there is no complaint that the Judge has raised the wrong issues.

90. But even if the plaintiff could now raise such a contention, where is the evidence in support of it? As a matter of fact, Robinson handed over the goods on the letter of 28th December confirmed, as he supposed, by the telegram from Balfour. At that time he knew nothing of the arrangement of January 2nd. But supposing his intention in the matter to be immaterial, there was not at that time, as I have already pointed out, any existing agreement binding him, as representing Balfour and Co., to remit the proceeds to any particular person. The right which once did exist, was to have these proceeds remitted to Overend, Gurney and Co., who had agreed to accept them on certain conditions. That right was gone, and no other right of the same kind had ever been substituted. The agreement of 2nd January did not renew the right to have the proceeds remitted for special appropriation.

91. It was an arrangement of a totally different character, and I do not think we should be justified in going out of our way to give that agreement an operation which was never intended by the parties. We have no right to make a contract for the parties. If they had met and agreed to substitute some other firms for Overend, Gurney and Co., to whom the proceeds should be remitted for special appropriation; and the goods had been handed over by Robinson to Barton, Baynes and Co., for that special purpose, that might possibly have been good. We should still have had to consider several important questions, such as whether a right to demand a special appropriation of the proceeds creates a (so-called) lien on the goods; whether a transfer of possession, in order to carry out such lien on the eve of a petition to the Insolvent Court, is a fraudulent preference; whether it would be void u/s 24 of the Indian Insolvent Act, and so forth. But it is wholly unnecessary to consider any of these questions, because, in my opinion, there was, on the 16th of January, no lien, and nothing in the nature of a lien over these goods in favour of Barlow; and if no lien then existed, Robinson could not create one. A lien cannot be created without consideration, and the only consideration which I can find is the claim which Barlow had against Balfour and Co. in respect of any payment which he may at that time have made, or any liability which he may at that time have incurred on account of these goods, that is, his claim as a creditor. But if he was a creditor, then the creation of a lien in his favour can in no way be maintained. Section 24 of the Insolvent Act makes every transfer or delivery of property by the insolvent for the benefit of a creditor, within two months of his insolvency, absolutely void. No question of fraud arises under this section; the difference between some of the Colonial Statutes and the English Law of Bankruptcy in this respect is pointed out by Lord West-bury in a case of Nunes v. Garter (1 L.B. P.C., 342). He there shows that the Insolvency Law of Jamaica has retained features which did formerly, but now no longer, exist in England; and this is also the case with the Insolvency Law here. Moreover, Barlow cannot say that this was partnership property in his possession

through his separate agent, for even supposing for a moment that Barlow could now in this suit fall back on his rights as a partner, yet he had no power, as partner, to appoint a separate agent at Calcutta empowered to demand and hold partnership property adversely to the other partners. Of course, there is not the slightest pretence for saying that Barton, Baynes and Co. held this property as partnership property at all; but if they did, they held it under the orders and at the disposal of Balfour and Co., and possession of it could have been removed at any moment by Balfour and Co.

92. In no way, as it appears to me, can the plaintiff defeat the interest of the defendant, as Official Assignee of the only partner in India, to take possession of these goods or their proceeds, which were the joint property of the firm. This is the right of the Official Assignee upon general principles, and has been recognized as part of the law of insolvency in India, both in practice here, and also by the Court of Common Pleas in England, in Brown v. Carbery (16 C.B., N.S., 2).

93. The only remaining question is, as to the prayer, that the order of Mr. Justice Phear in the Insolvent Court should be set aside, and the Official Assignee restricted from distributing these moneys amongst the general body of Balfour and Co.''s creditors. I think this order of Mr. Justice Phear has been misunderstood. It is not founded on the right of the Official Assignee to take possession of these goods, under what is called the reputed ownership clause; but on his right as representing the only partner in India, to take possession of joint property of the partnership. It is the usual form of order u/s 26. There is no declaration that the entire property in these goods passed to the assignee, and no reason to suppose that it will be so acted on. The Official Assignee can only act under the orders of the Commissioner of the Insolvent Court; and we are not left in doubt as to what the intention of that Court was in making this order. Mr. Justice Phear expressly says, in giving judgment, that his decision in no way affects the ultimate rights of the parties. If any such intention were manifested, and it were shown to us that such intention were wrong, I do not say this Court, in its ordinary original civil jurisdiction, could not interfere; nor do I doubt that a suit might be filed for the purpose of ascertaining the right of the parties, not withstanding that proceedings were going on in the Insolvent Court. But no investigation of the rights of the parties has taken place, or could take place, in the suit before us, to which neither Small and Co. nor Balfour junior are parties. Nor is there any ground, in my opinion, for an injunction to issue, restraining the Official Assignee from doing that which there is not the slightest ground for supposing that he will be permitted to do. I, therefore, think that the decree was right, and that it should be affirmed. I only wish further to add what I inadvertently omitted to say before, that I do not place my judgment in this case in any way on what is called the reputed ownership clause of the Insolvent Act. In my view, it is not necessary to express any opinion on that point, because we cannot, as I think, decide in this suit upon the ultimate rights of the parties; but I wish to say, to prevent any misconception, that so bur as I have formed an opinion, I entirely

concur with the Chief Justice upon that point. The decree of the Appellate Court was as follows:--

And it is declared that twelve bales of the said goods and also the net proceeds of the remainder of the said goods, amounting to ninety thousand, five hundred, and fifteen rupees, and one pie, were handed over and delivered to the said defendant, as such assignee as aforesaid, by the said Messrs. Barton, Baynes and Co.; and that the said twelve bales of goods, and also the said net proceeds were, at the time of the said delivery thereof, to the defendant, the money and goods of the above-named plaintiff. And it is hereby ordered and decreed that the said defendant do pay to the said plaintiff the said sum of ninety thousand, five hundred, and fifteen rupees, and one pie, and also the sum of five thousand, four hundred, and sixty-four rupees, and ten annas, being the net proceeds of the said twelve bales of goods, amounting together to ninety-five thousand, nine hundred, and seventy-nine, ten annas, and one pie, with damages in the nature of interest in respect of the said ninety-five thousand, nine hundred, and seventy-nine rupees, ten annas, and one pie as follows, that is to say, on the sum of rupees thirty-one thousand, eight hundred, and fifty-one, six annas, and nine pies, or portion of the said sum of rupees ninety-five thousand, nine hundred, and seventy-nine, ten annas and one pie, at the rate of six per cent, per annum, from the 25th day of March 1867 to the date of realization; and on the sum of rupees fifty-five thousand, further portion of the said sum of rupees ninety-five thousand, nine hundred, and seventy-nine, ten annas, and one pie, at the rate aforesaid, from the 29th day of March 1867 to the date of realization; and on the sum of rupees three thousand, further portion of the said sum of rupees ninety-five thousand, nine hundred, and seventy-nine, ten annas, and one pie, at the rate aforesaid, from the 26th day of April 1867 to the date of realization; and on the sum of rupees five thousand, four hundred, and sixty-four, and ten annas, further portion of the said sum of rupees ninety-five thousand, nine hundred, and seventy-nine, ten annas, and one pie at the rate aforesaid, from the 6th day of May 1867 to the date of realization; and on the sum of rupees six hundred and sixty-three, nine annas, and four pies, further portion of the said sum of rupees ninety-five thousand, nine hundred, and seventy-nine, ten annas, and one pie, at the rate aforesaid, from the 26th day of May 1867 to the date of realization; and do also pay unto the plaintiff his costs of the original suit and of this appeal (to be taxed by the Taxing Officer, under the heading Class 2, ordinary causes), with interest thereon, at the rate aforesaid, from the date of taxation to the date of realization.

11 and 12 Vict., c. 21 Section 24.--"And it is enacted, that if any insolvent who shall file his petition for his discharge under this Act, cr who shall be adjudged to have committed an act of insolvency, shall voluntarily convey, assign, transfer, charge, deliver, or make over any estate real or personal, security for money, bond, bill, note, money, property goods or effects whatsoever, to any creditor, or to any other person in trust for or to, or for the use, benefit and advantage of any creditor, every such conveyance, assignment, transfer charge, delivery and mating over, if made when in insolvent circumstances and with in two months before the date of the petition of such insolvent, or of the petition on which an adjudication of insolvency may have proceeded, as the case may be, or if made with the view or intention, by party so conveying, assigning, transferring, charging, delivering of making over, cr petitioning the said Court for his discharge from custody under this Act or of committing an act of insolvency, shall be deemed, and is hereby declared to be fraudulent and void as against the assignees of such insolvent."

2

13 Eliz, c. 5, s. 2 enacts "that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods, and chattels, or of any of them, or of any lease, rent, common, or other profit or charge out of the game lands, tenements, hereditaments, goods, and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution at any time had or made since the beginning of the Queen''s Majesty''s reign that now is or at any time hereafter to he had or made to or for any intent or purpose, before declared and expressed (i.e., to hinder or defraud creditors) shall be from henceforth, deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them, whoso actions, suits debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, by such guileful covinous or fraudulent devices or practices as is aforesaid are, shall or might be in any ways disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate, and of non-effect, any pretence, colour, feigned consideration expressing of use, or any other matter or thing to the contrary notwithstanding."

3

See Sterling v. Cochrane, 1 B.L.R. (O.C.), 114; and Collie v. Cochrane, (ib, 131.)

4

Vict., c. 25, Section 26.--"In case any person shall, after any such insolvent shall have petitioned for his discharge under this Act or have been adjudged to have committed an act of insolvency, and before the said insolvent shall have obtained his discharge in the nature of a certificate, as hereinafter mentioned, be possessed of, or have under his power " or control, any property whatsoever, of such insolvent, or to which such insolvent may be in any way entitled, either under any trust, express or implied, or otherwise held for his use and benefit, or in case any such person shall be at any such period indebted to such insolvent it shall be lawful for the said Court, upon the application of any assignee, or any creditor of such insolvent whose debt or demand shall have been admitted or established in the matter of the said insolvent, to cause notice to be given to such person, directing him to hold and retain the said property till the said Court shall make further order concerning the same, and thereupon it shall be lawful for the said Court further to order such person to deliver over such property, and to pay such debts as aforesaid, or any part thereof, to the assignee or assignees of the estate and effects of such insolvent, for the general benefit of the creditors of such insolvent, and such delivery and payment shall be made accordingly in obedience to such order, and such person shall, by such payment and delivery so made, in pursuance of such order of the said Court, be discharged in respect of such property and debts against all persons whatsoever to all intents and purposes."

5

Act XXVI of 1841. Section 7, is as follows:--"And it is hereby enacted that every such Court as aforesaid, on the trial of any issue, or on any inquisition of damages, may, if the think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure in all actions of trover or trespass de bonis asportatis, and over and above the money recoverable in all actions on policies of assurance made after the passing of this Act."

6

Act XXIII of 1861, Section 10, is as follows:--"When the suit is for a sum of money due to the plaintiff, the Court may, in the decree, order interest at such rate as the Court may think proper to be paid on the principal sum, adjudged from the date of suit to the date of decree, in addition to any interest adjudged, on such principal sum, for any period prior to the date of suit, with further interest on the aggregate sum so adjudged, and on the costs of the suit, from the date of the decree to the date of payment."

7

The Rules and Orders of the Insolvent Court Section 15, provides that, "unless the Court shall otherwise specially order, the assets of insolvent estates shall be paid into the Bank of Bengal, in the name of the Official Assignee, and, when practicable, to the credit of the particular estate to which they belong, and that gums set apart on account of dividends, shall be distinguished by the heading "dividends account," and that no investment other than in Government Paper shall be made of any assets, without the sanction of the Court."

8

Section 23:--"That all officers of the Court shall follow the instructions of the Court according to the exigencies of each particular case, subject to such directions as shall, from time to time, be prescribed by the Court; that when on the death, removal, sickness, or unavoidable absence of the Official Assignee, any other shall be appointed to act in his stead, the Official Assignee so appointed shall have at the Bank of Bengal and at the treasury a certificate of his appointment, under the seal of the Court, and shall at the same time sign his name in the proper books of the Bank of Bengal and the Treasury, and thereupon all drafts drawn and signed by such Official Assignee, shall be payable and paid as if they had been signed by the Official Assignee, in whose stead he shall have been appointed."