

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Miller (Official Assignee) v. Barlow, from the High Court of Judicature at Fort William, in Bengal; delivered 20th July, 1871.

Present :

SIR JAMES W. COLVILE.

JUDGE OF THE HIGH COURT OF ADMIRALTY.

SIR JOSEPH NAPIER.

LORD JUSTICE JAMES.

LORD JUSTICE MELLISH.

SIR LAWRENCE PEEL.

THIS was a suit brought in the High Court at Calcutta by Thomas Barlow, who traded under the style of Thomas Barlow and Brother against the Defendant, who is the Official Assignee of the Court for the Relief of Insolvent Debtors at Calcutta.

The plaint set out the terms of an agreement made in 1862 by the Plaintiff's firm, the firm of Small and Co., of London, and the firm of Balfour and Co., of Calcutta, consisting of Lewis Balfour the elder, James Hamilton Robinson, and Lewis Balfour the younger, respecting goods to be bought by the Plaintiff's firm at Manchester, and shipped by Small and Co. to Balfour and Co. at Calcutta, by which each of the three firms was to take one-third share of profit or loss, the Plaintiff's firm to draw bills at six months on Small and Co. for the cost of the goods, the bills to be discounted by Overend, Gurney, and Co., Balfour and Co. to remit bills on Small and Co. as a provision for the six months' bills, and Balfour and Co., on the sale of the goods, specially to remit the proceeds to Overend, Gurney,

and Co., and Overend, Gurney, and Co. thereupon to give up Balfour and Co.'s drafts on Small and Co. under rebate. The plaint states that the Plaintiff, under that agreement, in September and October 1866, purchased and shipped goods to Balfour and Co. in Calcutta, and that after the goods were shipped, another agreement was come to between the Plaintiff, Small and Co., and Balfour and Co., whereby, in consideration of the Plaintiff taking upon himself all risk attaching to the shipments, and discharging the firms of Small and Co. and Balfour and Co. from all liability to pay any losses, these firms made over to the Plaintiff all their respective right, title, and interest in the shipments; that shortly after the Plaintiff directed Balfour and Co. to hand over the shipments and documents relating to the same to Barton, Baynes, and Co., and that the bills of lading were accordingly handed over by Balfour and Co. to the firm of Barton, Baynes, and Co. That the shipments arrived in Calcutta and were taken possession of by Barton, Baynes, and Co., and the larger portion thereof sold on account of the Plaintiff, that the said James Hamilton Robinson filed his Petition in the Court for the Relief of Insolvent Debtors at Calcutta on the 7th of February, 1867, and Lewis Balfour the elder on the 18th of May, 1867; that the Defendant, as such assignee, on the 1st of March, 1867, demanded possession of the goods from Barton, Baynes, and Co., and on their refusal to comply with the demand, he procured an order from the Insolvent Court requiring them to reindorse and redeliver to the Defendant all the documents and goods belonging to the estate of the insolvent as were then in their possession, and to account to him for all they had parted with; that in consequence of the said order, Barton, Baynes, and Co. handed over twelve bales of goods to the Defendant, and paid to him the net proceeds of those which had been sold, 90,563 rupees 63 annas 1 pie.

The plaint concluded with a prayer that the Plaintiff's rights in respect of the goods, or the net proceeds thereof, and money might be declared, and that the Defendant might be directed to pay the same, with interest, to the Plaintiff.

The Defendant, in his answer, denied the alleged

agreement by which the firm of Small and Co., and Balfour and Co., assigned their interest in the shipments to the Plaintiff; and also alleged that such agreement, if made, and the delivery of the bills of lading and goods to Barton, Baynes, and Co., under it was a fraud upon the laws relating to bankruptcy and insolvency, that it was void from having been made within two months of the insolvency of James Hamilton Robinson; and that the goods at the time of James Hamilton Robinson filing his Petition, were in his possession, order, and disposition, with the consent of the true owner.

The case came on to be tried before Mr. Justice Norman; and it was proved at the trial that the original agreement for the consignment of goods to Calcutta, was acted upon by the three firms, up to the failure of Overend and Gurney, in May 1866; that after that time the parties never obtained any firm to take the place of Overend, Gurney, and Co.; that the Plaintiff, nevertheless, bought the goods in question at Manchester, and shipped them through Small and Co., in four ships, to Balfour and Co., in Calcutta; that the Plaintiff drew bills on Small and Co., who accepted them for the price of the goods, and discounted the bills with Messrs. Cunliffe. A correspondence was given in evidence between the Plaintiff and Small and Co., and Lewis Balfour, senior, who was then in London, during the autumn of 1866, with reference to procuring a firm to supply the place of Overend, Gurney, and Co.; but no agreement was come to on that subject; that early in December 1866 Small and Co. stopped payment, and dishonoured bills drawn by Balfour and Co. That it was known to all the parties in London, that the stoppage and insolvency of Small and Co. would necessarily involve the stoppage and insolvency of Balfour and Co. That on the 15th December, Small and Co. wrote to the Plaintiff:—"Pending the completion of arrangements, we have sent out a telegram, jointly with Messrs. Balfour, directing all funds and goods then in their hands, to be handed over to Jardine, Skinner and Co." And on the 18th December, the Plaintiff wrote to Balfour and Co. at Calcutta:—"In consequence of correspondence with Messrs. Small and Co., you will please hand over the goods as per annexed list, to Messrs. Barton,

Baynes, and Co. They are bought, you are aware, under special agreement, in triplicate account." On the 2nd January, 1867, the agreement for the transfer of Small and Co.'s, and Balfour and Co.'s interests in the shipments was made, and is contained in a letter of that date from the plaintiff to Balfour and Co., and was also signed in the corner by Small and Co., and Lewis Balfour.

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"Manchester, 2nd January, 1866.

"Messieurs Balfour and Co., Calcutta.

"Dear Sirs,—

"Referring to the goods shipped on triplicate a/c under special agreement, against which Messieurs Small and Company have given their acceptances, you will please hand over all such goods (particulars of which we enclose) to Messieurs Barton, Baynes, and Company, Calcutta. We agree to take said goods on our own risk and responsibility. We have agreed to return to Messrs. Small and Company the following acceptances:—

£2,943 8 2	due 13 March, 1867,	a/c 'Warwick Castle.'
589 3 0	„ 1 April,	'Tantallon Castle.'
4,707 5 2	„ 9 May,	'Kenilworth Castle.'
268 0 11	„ „	Do.
804 5 2	„ 22 „	'Riversdale.'

"In the meantime, until we hear that you have handed over the goods, we have made Williams, Deacon, and Company custodians for said acceptances, also of £217 1/10, paid by Messrs. Small and Company for charges on account of said goods. We refer you, at foot, to Messrs. Small and Co.'s signature, and also to Mr. Balfour and Messrs. Matheson and Co.'s signatures in confirmation of this. Messrs. Matheson and Co., of course, sign this in case any goods have arrived in Calcutta, and are delivered to Jardine, Skinner, and Co., of Calcutta, and this letter is sufficient authority, in such case, for Messrs. Jardine, Skinner, and Co., to hand over the goods to Barton, Baynes, and Co.

"We are, dear Sirs,

"Yours truly,

"THOMAS BARLOW and Bro.

"We confirm the above.

"MATHESON and Co.

"SMALL and Co.

"LEWIS BALFOUR."

The subsequent facts were proved to have taken place as alleged in the plaint. Upon this evidence Mr. Justice Norman held that the transfer of the interest of Balfour and Co. to the Plaintiff by the agreement of the 2nd January, 1867, was fraudulent and void as against the Defendant, and on that ground dismissed the suit with costs. From that Judgment

an Appeal was heard before two of the Judges of the High Court, the Chief Justice Sir Barnes Peacock and Mr. Justice Markby. Mr. Justice Markby was of the same opinion as Mr. Justice Norman, and thought his Judgment ought to be affirmed, but the Chief Justice was of a contrary opinion, and, in accordance with his opinion and under Section 36 of the Letters Patent of the High Court the Judgment of Mr. Justice Norman was reversed, and a Decree was made in favour of the Plaintiff, and the Defendant was ordered to pay to the Plaintiff 95,279 rupees 10 annas 1 pie, together with damages in the nature of interest at 6 per cent. from the days when the cause of action as to each part of the principal arose up to realization with the Plaintiff's costs of the original suit and of the Appeal.

From this Decree an Appeal has been brought before their Lordships, and a preliminary objection to the Decree was raised, that the 36th clause of the Letters Patent of the High Court was not applicable; and that under the rules made by the Judges of the High Court, the Judges who heard the Appeal, being equally divided in opinion, Judgment of Affirmance of the Decree of the Court below ought to have been entered. Their Lordships do not think it necessary to give any opinion on this question. They are of opinion that it is their duty to hear and decide the case on the merits, and that it is quite immaterial how the Judgment in the High Court ought to have been entered in consequence of the difference of opinion between the Judges, because the Judgment of the High Court as entered cannot be reversed, if it was right upon the merits.

With respect to the case on the merits, it is clear that the goods were not in the order and disposition of James Hamilton Robinson at the time he petitioned the Insolvent Court, because he had previously indorsed and handed over the bills of lading relating to all the goods to Barton, Baynes, and Co., and the principal question to be determined is, was the transfer of the interest of Balfour and Co. in the shipments to the Plaintiff, by the Agreement of the 2nd January, 1867, binding on the Defendant. Their Lordships are of opinion that Lewis Balfour the elder, had, under the circumstances of this

case, authority as a partner in the firm of Balfour and Co. to bind his firm to that Agreement by attaching his signature to the letter of the 2nd of January, 1867, and that, therefore, the Agreement was binding upon the Defendant unless the Defendant can make out that the Agreement was rendered void by the provisions of the 11 Vict., c. 21, or was a fraud upon the creditors of Balfour and Co.

It is desirable, in the first instance, to consider what was the position and the legal rights of the parties at the time the agreement of the 2nd of January, 1867, was entered into. Mr. Justice Markby, in his Judgment, states his opinion to be that, if the assignment of the 2nd of January, 1867, had not been made, the general creditors of Balfour and Co. would have been entitled to one-third of the goods. Their Lordships cannot agree with this opinion. It is obvious that even if Mr. Justice Markby was right in thinking that the property in the goods whilst on board ship was vested in the three firms; still, that the creditors of Balfour and Co. could have no right to any part of the proceeds of the goods until all the liabilities of the three firms, with reference to the adventure, were first satisfied; and one of these liabilities was an obligation to satisfy the bills drawn by the Plaintiff on Small and Co. Their Lordships also agree with the Chief Justice, and for the reasons stated by him, that neither the circumstance that the parties had not procured any firm to supply the place of Overend, Gurney, and Co., nor the insolvency of Small and Co., and of Balfour and Co., interfered with the right of the Plaintiff to have the agreement between the three firms carried out: that is to say, his right to have the goods sold in Calcutta, and the proceeds returned to England in good bills, for the purpose of satisfying the bills drawn by the Plaintiff on Small and Co.

Their Lordships are also of opinion that the insolvency of Balfour and Co. deprived them of the right of acting as factors for the three firms in the sale of the goods at Calcutta, and the remission of the proceeds to England, and that therefore the orders to transfer the goods first to Jardine, Skinner, and Co., and afterwards to Barton, Baynes, and Co., which were sent out to Calcutta in December 1866, were proper orders, and their Lordships think that James

Hamilton Robinson would have been perfectly justified in handing over the bills of lading to Barton, Baynes, and Co., even if the agreement of the 2nd January, 1867, had never been made, and the telegram which was sent out in consequence of it never sent out. Such, then, being the position of the parties, was the agreement of the 2nd January, 1867, a fraudulent agreement as respects the creditors of the firm of Balfour and Co. When this agreement was entered into it was quite uncertain whether the consignment of these goods to Calcutta would turn out a profitable or an unprofitable adventure, and their Lordships are of opinion that there is nothing fraudulent or improper in an insolvent firm parting with or putting an end to a current speculation, the result of which is still uncertain, on the best terms they are able. On the contrary, such a course is an honest one to follow. If an honest man discovers he cannot pay a bet if he loses, he will be ready to rescind the bet before the event happens, and he is not bound to take the chance of winning for the benefit of his creditors. The rescission and abandonment of a speculation, whilst the result is still uncertain, is a totally different thing from preferring one creditor to others after a debt has been incurred. In the present case it seems to their Lordships clear that, on the 2nd January, 1867, the Plaintiff was not a creditor of Balfour and Co., and could not have proved against the estate of Balfour and Co. in respect of these transactions, and this alone conclusively proves that the agreement was not a fraudulent preference.

It remains to be considered whether the agreement of the 2nd January, 1867, and the transfer of the bills of lading under it was rendered void by the 11th and 12th Vict., cap. 21, sec. 24, and their Lordships are clearly of opinion that the case does not come within that section. The fact that the Plaintiff was not at the time a creditor of the firm of Balfour and Co., takes the case out of the section, and moreover the agreement was not a voluntary assignment by Balfour and Co., and still less by James Hamilton Robinson of any defined interest in the goods, but was an agreement whereby, in consideration of being freed from all liability to loss, Balfour and Co. sold to the Plaintiff their interest in any profit that

might be made in the speculation. A further objection was taken that, even assuming the Judgment of the Chief Justice to be correct on the general merits of the case, the Plaintiff was not entitled to interest. On this point it is material to observe that, in the account which was drawn up between Barton, Baynes, and Co. and the Defendant as official assignee, interest is charged, and it therefore appears that by the wrongful act of the Defendant the Plaintiff has been deprived of money which was actually making interest, and their Lordships are of opinion that, under these circumstances, a Court of Equity would clearly be entitled to give interest; and it is by no means clear that even in a court of law, although the ordinary rule is that in actions for money had and received interest is not given, the fact of the Defendant having received interest would not be a sufficient ground for making the Defendant liable to pay interest; and as the High Court have the powers both of a Court of Equity and a Court of Law, their Lordships are of opinion that interest has been properly given.

On the whole, their Lordships will recommend to Her Majesty that the Decree of the High Court be affirmed, and this Appeal dismissed with costs.