

1915. September 23, 29. WARD, J.

*Insolvency.—Civil imprisonment.—Deed of composition.—Law 13 of 1895, section 170, sections 106-110.*

An insolvent who has entered into a deed of composition with a statutory majority of his creditors is nevertheless liable to proceedings for civil imprisonment under sec. 170 of Law 13 of 1895 at suit of any creditor not a party to the deed. Cape and Transvaal law compared.

Application for civil imprisonment under section 170 of Law 13 of 1895. The facts appear from the judgment.

*S. S. Taylor*, with him *J. Brink*, for applicants: There are assets, see the offer of composition. Applicants were dissenting parties.

*J. P. van Hoytema*, for respondent: Firstly, the summons is bad in form; no specific sum is claimed, and no deficiency alleged; see *Van Zijl's Jud. Pract.*, pp. 247, 249, 264 and section 124 of Ordinance (Cape), 6 of 1843. Secondly, the application is premature; applicants proved under section 56, and there has been no confirmation of a subsequent distribution account. Thirdly, the only account relied on is a contribution account which has not the effect of a final sentence; see sections 114 and 119 of Law 13 of 1895; *Bell v. Bell's Trustee* (1909, T.S. at p. 55). Lastly, applicants are bound by the composition; see sections 106 and 107. *De Smidt v. Blanckenberg* (2 M. 248), was decided on Ordinance (Cape) 64 of 1829, the wording of which differs from Law 13 of 1895. And see also, section 139.

*Taylor*, in reply: The account is in accordance with section 114, and is entitled on confirmation to the benefits of section 119. If a liquidation account shows no assets, it suffices, and there is no question of a distribution account. An accepted proof of debt is sufficient to entitle a creditor to proceed under section 170; see *Van der Walt's Trustees v. Van Coller* (1911, T.P. 1173). As to whether we are bound by the composition; see section 106 of Ordinance (Cape), 6 of 1843, and *Meeser v. Muller* (3 M 222).

*Cur. adv. vult.*

*Postea* (September 29.)

WARD, J.: The plaintiffs have summoned the defendant to show cause why the process of civil imprisonment shall not be granted under section 170 of Law 13 of 1895 against him.

The summons alleges that plaintiffs are creditors in the defendant's insolvent estate for £48 10s.; that the estate has been fully administered and liquidated, and that the account for liquidation and plan for contribution of the estate by the trustee has been confirmed according to law, from which it will be seen that the estate is not sufficient to discharge the debts proved against the estate.

It appears that upon the 31st December, 1914, the trustee filed a first and final liquidation account showing a debit of disbursements in the estate of £55 5s. 11d. With this account was filed a first and final contribution account. It was admitted that these accounts were confirmed, but the date of such confirmation nowhere appears, but it was before July, 1915.

On the 1st July, 1915, the defendant made an offer of a composition of five shillings in the pound, which was accepted by the statutory majority of creditors.

The plaintiffs objected to this composition and thereafter proved their claim.

The trustee has made out a supplementary distribution account of two shillings and sixpence per pound to be paid to twenty-three creditors whose claims amount in all to £841 17s. 11d. This has not yet been confirmed by the Master, and another distribution account has yet to be filed showing a distribution of another two shillings and sixpence in the pound.

Several objections were raised to the summons. I also heard the defendant cross-examined as to means.

I am quite satisfied that at present he has no means, and consequently it is unnecessary for me to determine objections to the summons which are purely technical. One objection raised, however, goes to the root of the matter and that is that the deed of composition binds the plaintiff and that he cannot claim any further remedy against the defendant.

The defendant was entitled to have this determined before being heard as to means, and if his contention is correct he is free from a claim of this kind which may be made directly he has means. I think it is therefore my duty to give a pronouncement on the point.

Under section 106 of the Insolvency Law at the third meeting of creditors, or at any subsequent meeting duly assembled for the

purpose, an offer for composition may be made. If three-quarters in number and value of the whole of the creditors present agree to accept the offer the trustee shall call another meeting.

Section 107 says: Whenever at such meeting three-quarters in number and value of the creditors shall agree to accept such offer the Master shall certify to the High Court the acceptance of such offer.

Section 108 says: If the number present at the above meeting do not amount in number and value to two-thirds in number and value of the whole of the creditors who have proved the Master shall state such fact in his report of the meeting to the High Court.

Section 109 says: The right of any creditor entitled in law to be paid in preference shall in no way be effected unless such creditor shall expressly consent to give up his preference.

Section 110 provides against acceptance by creditors of inducements to obtain their acceptance of the offer of composition.

This appears all that is said about a composition in the law except that under section 132 the insolvent may apply to Court for his rehabilitation. The provisions in sections 106, 107, 109 and 110 are taken from the Cape Law, Ordinance 6 of 1843, section 106. But that section lays down precisely the effect of and the reasons for the provisions in sections 107 and 108 of the Transvaal Law.

In the Cape Law if there are nine-tenths in value and the number of creditors at the meetings agreeing to the composition and the acceptance is notified to the Court by the Master then, on an oath from the insolvent of a fair surrender the Court may pronounce if it so think fit a decree discharging the insolvent from all debts due by him at the time of his insolvency reserving the composition claims.

Instead of this provision in the Cape Law we have section 132 in our law which gives the debtor, whose offer of composition is accepted, certain rights with regard to rehabilitation.

This being so it seems to me that that is the only right he gets. And if that is so, section 170 is clear on the point as to the effect of the composition in this case.

From the date of the confirmation of the plan of distribution to the time of his rehabilitation he is liable to have an order of civil imprisonment made against him.

A further point was raised by Mr. *van Hoytema*, namely, that the plan of distribution has not yet been confirmed. I do not think it necessary to enter into a discussion of this matter. Even if such plan has not now been confirmed, it may be, in the near future, consequently the point is more of a dilatory nature than one affecting the rights of the parties.

As the defendant has no assets, the order must be refused, with costs.

Applicant's Attorneys: *Kessel and Susser*; Respondent's Attorneys: *Marks, Saltman and Gluckmann*.

[G. H.]

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