

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Rolfe and Bailey v. Flower, Salting and Co., and of the Bank of Australasia v. Flower, Salting and Co. (in re the Estate of the Firm of Rutledge and Co.), from the Supreme Court of Victoria; delivered 1st February, 1866.

Present :

LORD CHELMSFORD.

SIR JOHN TAYLOR COLERIDGE.

SIR JAMES W. COLVILE.

SIR EDWARD VAUGHAN WILLIAMS.

THESE are Appeals from two Judgments of the Supreme Court of Victoria in a matter of insolvency of a firm of William Rutledge and Co., merchants, carrying on business at Belfast, in that Colony, by which the Respondents, Messrs. Flower, Salting and Co., were admitted to prove against the estate of the insolvents for a debt of 53,587*l.* 10*s.* 10*d.*

The questions raised in the two cases were different, but as the facts in each were the same, and both related to the same debt, they were argued together. They must now, however, receive a separate consideration.

To begin with the Appeal of Messrs. Rolfe and Bailey. The Judgment appealed from in their case was pronounced, on an application by them to expunge the proof of the debt of Messrs. Flower, Salting and Co., on the ground that it was not a joint debt of all the partners in the existing firm of William Rutledge and Co., but a separate debt of a former partnership, carried on under the same name,

but of which two only of the present partners, William Rutledge and Horace Flower, were members.

Their opposition involved the consideration of two questions :—

1. Whether the insolvent firm of William Rutledge and Co. had assumed the liability to pay this debt; and

2. Whether Flower, Salting and Co. had agreed to accept the insolvent firm as their debtors, and to discharge the old partnership from its liability.

The firm of William Rutledge and Co., which had been for some years established in Victoria, originally consisted of William Rutledge and Horace Flower; Lloyd Rutledge afterwards became a partner, and so continued till his death in December 1858. After his death the business of the firm was carried on by the two original members of it down to April 1859, when the new partnership was formed.

The firm of William Rutledge and Co. had for many years large transactions with the Respondents, who carried on business as merchants in London, Sydney, and Melbourne; in London under the firm of P. W. Flower and Co.; in Sydney, of Flower, Salting and Co.; and in Melbourne, of Flower, Macdonald and Co. At the time of the formation of the new partnership in April 1859, the firm of William Rutledge and Co. were indebted to the Respondents' three firms in sums amounting in the whole to 113,710*l.* 10*s.* 7*d.*

The new firm of William Rutledge and Co. was formed by admitting two new partners, David Talbot and Francis Forster. Talbot and Forster were both of them clerks to William Rutledge and Co. Forster had been in the employment of the firm for four years, and was admitted to the partnership in pursuance of an agreement with William Rutledge, when he became his clerk, that at the expiration of the then existing partnership (which had about four years to run) he should be taken in as a partner. Before the partnership deed was executed, a balance-sheet was drawn up principally by Talbot and Forster, showing the liabilities and assets of the firm on the 30th June, 1858. Amongst the liabilities the before-mentioned debts to the Respondents' firms were inserted. In an affidavit made by William Rutledge, in the insol-

veny proceedings, he stated that this balance-sheet was the one on the basis of which Talbot and Forster entered the firm.

On the 7th of April, 1859, the deed of partnership was executed between William Rutledge, Horace Flower, David Talbot, and Francis Forster, by which they agreed to become and continue partners from the day of the date thereof, until the 1st of July then next, and thenceforth for the term of three years. By the 4th Article of the deed, it was provided "that neither the said David Talbot nor Francis Forster should be entitled to any share of the profits, or be subject to any losses connected with the partnership from the day of the date thereof until the 1st day of July next." The object of thus postponing the complete admission of Talbot and Forster to the partnership was, apparently, to allow stock to be taken, and a balance-sheet to be prepared to show the position of the firm at the expiration of the then existing partnership of Wm. Rutledge and Co. Accordingly a balance-sheet for the year ending the 30th of June, 1859, was drawn up. In this balance-sheet the debts due to the Respondents' firms are stated at 83,525*l.* 16*s.* 2*d.*, and the excess of the assets over the liabilities, amounting to 16,384*l.* 15*s.* 6*d.*, is treated as capital belonging to Rutledge and Flower respectively, 6,024*l.* 0*s.* 7*d.* being placed under that heading to the credit of Rutledge, and 10,360*l.* 14*s.* 11*d.* to the credit of Flower. Neither Talbot nor Forster brought any capital into the partnership.

The new firm of Wm. Rutledge and Co. consisting of the four partners, and after the death of Talbot, of the three others, continued to trade down to the time of the sequestration, in June 1862. On the establishment of the new partnership, no alteration was made in the mode of carrying on the business; the accounts were continued in the old books as if no change had taken place, and the existing liabilities were discharged or diminished, either from the assets of the old firm, or from the funds of the new indiscriminately. No provision is expressly made in the partnership deed for the new firm assuming the debts of the old, nor for the assets of the old firm becoming the property of the new. Mr. Justice Molesworth, who reversed the

decision of the Commissioner of Insolvent Estates, admitting the debt of Flower, Salting, and Co. to proof said, "The deed being silent on the subject, we cannot on ordinary principles vary the expressed agreement by parol evidence, and say that an assumption of old debts and liabilities was part of the contract." This is not strictly accurate. Such an arrangement would be something in addition to the other terms, not inconsistent with them, and might be established either by parol evidence or by conduct.

In arguing the question as to the assumption of the liabilities of the old firm by the new, some reliance was placed upon probabilities. On one side it was said to be most improbable that Talbot and Forster should have agreed to undertake liabilities to the large amount of 162,000*l.*, which at any moment might occasion their ruin. On the other, it was argued that nothing was more likely than that two persons who had been clerks in the house, and who were to contribute no capital, should eagerly avail themselves of the opportunity of becoming partners upon any terms, however hazardous, in a concern which the state of the accounts showed to be on the whole a flourishing one. The question, however, is not to be decided upon probabilities, but upon evidence, although much evidence is not required to establish the assumption by the new firm of the debts of the old. Lord Thurlow in *ex parte Jackson*, 1 Ves. Jun., 132, said, "If one man having debts takes another into partnership with him, a very little matter respecting these debts will make both liable." And Lord Eldon, in *ex parte Peele*, 6 Ves. 604, thought that "slight circumstances" might be sufficient to prove an agreement to undertake such a liability. The evidence in this case, however, appears not to be slight, but cogent, to fix the liabilities of the old firm upon the new. Not only was there a continuance of the former dealings of the old firm upon precisely the same footing and with the same books as before, but the liabilities of the old firm were regularly inserted in the balance-sheets of the new, and the assets of the old firm credited as belonging to the new, without any distinction between them. Large sums of money also were paid out of the

general assets of the firm in reduction of the debt of Flower, Salting, and Co.; and the interest upon their debt was regularly charged in the annual balance-sheets of the partnership.

It was said by the Appellants that all that was done in payment of the debts of the old firm was in the discharge of a duty assumed by the new firm as the agents of the old to receive their assets and discharge their liabilities. But the course of the partnership transactions scarcely admits of this argument, for if it were merely a case of agency it might have been expected that these assets and liabilities would have been kept separate and distinct from the partnership business, instead of being blended and intermingled with it.

Independently, however, of the dealings and conduct of the partnership generally, there is evidence of acts, and admissions of Forster (the only one of the insolvents who attempted to defeat the claim of Flower, Salting, and Co., to prove under the insolvency), which is of great importance. In an affidavit made by him on the 2nd December, 1862, he deposes as follows: "In or about the months of February or March 1859, before the execution of the deed of partnership between the said William Rutledge, Horace Flower, David Talbot, and myself, I had a conversation with the said William Rutledge, relative to the debt due to Flower, Salting, and Co., when he told me that it was secured to that firm on his (the said William Rutledge's) own private property, and that I was not to be liable for it, nor for the debt of 19,000*l.* then due to the Bank of Australasia." And again, "I never directly or indirectly agreed with the said firms of Flower, Salting, and Co., and Flower, McDonald, and Co., or with either of them, or any member thereof, to take upon myself the liability of the said debts so due by the said firm of William Rutledge and Co. to the said firms of Flower, Salting, and Co., and Flower, McDonald, and Co. respectively, nor did I ever, directly or indirectly, authorize any or either of my partners to enter into any such agreement on my behalf."

The alleged conversation before the execution of the deed of partnership is positively denied by Rutledge in his affidavit of the 9th February, 1863, in these terms: "I never on any occasion, either before or after the deed of partnership

was drawn up, told the said Francis Forster that he was not, upon entering my firm, to be liable to the debt due by my then firm to Messrs. Flower, Salting, and Co., but I say that in conversing with them upon the terms of entering my firm, I explained to both the said Francis Forster and the said David Talbot that, as the new firm were to take over the whole of the assets of the old firm, they must also take *all* the liabilities."

The credit of Rutledge is sought to be impeached by the affidavit of Edward Klingender, of the 25th February, 1863, in which he states that William Rutledge was examined as a witness at the second meeting under the insolvency, upon the subject of the debt due to the Bank of Australasia, and that he then distinctly and positively swore that the firm of William Rutledge and Co., consisting of the above-named insolvents, and the said David Talbot deceased, did not take over *all* the liabilities of the old firm of Rutledge and Co., and that they did not take over the debt due to the Bank."

There can be no doubt that for that portion of the debt due to the Australasian Bank for which they held security the new firm was not liable, and Rutledge must have been inaccurate (to say the least) in swearing that he told Forster and Talbot that the new firm would have to take *all* the liabilities. On the other hand, as the new firm was not to be liable for a part of the debt of the Australasian Bank, it seems likely that some such conversation as that stated by Forster should have taken place. Whether he has not extended to the debt due to Flower, Salting, and Co. expressions which were meant to be confined to the Bank, may in some degree be judged of by his subsequent conduct. According to the affidavit of Horace Flower, of the 16th of February, 1863, before Forster joined the firm, he "pointed out to him the heavy liabilities of the firm, and recommended him not to join in the partnership." Flower's affidavit further states, "The principal debts due by the said firm at the time I recommended the said Francis Forster not to join in the partnership, were those due to Messrs. Flower, Salting, and Co., Messrs. Flower, McDonald, and Co., Messrs. P. W. Flower, and the Bank of Australasia, with which debts the said Francis Forster was, as I believe, perfectly conversant; but the said Francis Forster

said that he was satisfied to join the said partnership, and did so join." Forster made an affidavit on the 25th February, 1863, in which he answers passages in the affidavits of other persons, but takes no notice of the above statement made by Flower, which is wholly uncontradicted.

In addition to this evidence there are affidavits of admissions made by Foster, and also proof of acts done by him, which strongly confirm the case of the Respondents.

A statement by Rutledge of one of these admissions is contradicted by Forster, and therefore may be disregarded. But Mr. Salting, one of the Respondents, in an affidavit dated the 13th February, 1863, deposes to a conversation which he had with Forster in 1861, upon the subject of his debt, and says, "Upon all these occasions the said Francis Forster invariably spoke of the said debt as due by his firm, and never in the remotest manner denied or expressed the slightest doubt of his firm's liability in respect thereof. Upon one of these occasions, in answer to my inquiries as to his opinion of the security of our position (meaning our position as creditors of his firm), he remarked that he considered the funds of the firm sufficient to discharge their liabilities, and that in all likelihood no necessity would arise for us ever to have recourse to the security which we held upon Mr. Rutledge's private estate."

This is not denied by Forster in the affidavit of the 25th February, 1863, to which reference has been already made, but it is almost impliedly admitted by his statement that "any expressions he may have used respecting the said debt were not intended by him to induce the said Severin Kanute Salting to believe that he had taken upon him that debt."

There is, however, one act of Forster's which seems decisive of his opinion that the firm of which he was a partner were liable to pay the debt of Flower, Salting, and Co. In the insolvents' schedule, to which Forster and his partners Rutledge and Flower were sworn, the names of Flower and Co., London, and of Flower, Salting and Co., Sydney, are inserted in the list of creditors, and under the column headed "whether any security given," is inserted, "no security on insolvents' joint property,

but secured on the private estate of W. Rutledge." Now Forster's case is not that a sudden light broke in upon him as to his legal position after the filing of the schedule, but that from the first and continually down to the time of the insolvency he considered himself not to be liable for these debts. Forster says indeed, that at the time of the preparation of the schedule he had no separate legal adviser, that instructions were given for it by Rutledge, and that he signed and swore to it, as prepared by the solicitor, without having taken advice as to the way in which the debts due to Flower, Salting, and Co., and the Bank of Australasia, should be inserted. But this explanation can hardly be accepted, for Forster upon his examination at the first meeting under the insolvency, said, "I believe Flower, Salting, and Co., are correctly entered in the schedule. I believe they hold security. I never saw the deed, but heard of it from Mr. Flower, our partner." Besides, if it be true that Forster, as a partner in the new firm, was not liable for these debts, the existing partnership of W. Rutledge and Co. was not insolvent, as the debts of Flower, Salting, and Co., and of the Bank of Australasia, amounted together to 63,000*l.*, and the deficiency of assets stated in the schedule is only 53,118*l.* 17*s.* 1*d.* There seems to be no reasonable doubt upon the above facts that the insolvent partnership, at the time of its formation, assumed the debts and liabilities of the former firm of W. Rutledge and Co., including the debt due to Flower, Salting, and Co., and the only remaining question to be considered is whether Flower, Salting, and Co., being aware of this arrangement, consented to accept the liability of the new firm, and to discharge their original debtors. Upon this question, as upon that of the agreement of the partners *inter se*, it was said by Lord Eldon, in *ex parte Williams* (Buck, p. 16), "A very little will do to make out an assent by the creditors to the agreement."

This case is different from many of the cases mentioned in the course of the argument, where there had been a change in a firm of which a person trading with it had notice, and went on dealing with the new firm, and afterwards sought to make the old firm liable, and a question arose whether by his conduct he had not discharged the

old firm, and adopted the liability of the new. Here the creditors of the old firm, knowing of the change of partnership, and that the new partners had taken over all the assets, and had agreed to be subject to all the liabilities of the former firm, not only continued their dealings with the new firm upon the same footing as with the old, and received payment of a portion of their debt out of the blended assets of the old and new firms, but themselves proved that from the time when they understood that the new partners took over all the assets, and became subject to all the liabilities of the preceding firm, they "thenceforth treated the partners in that firm as their debtors in respect of the debt owing to them at the time of the creation of that firm, or of so much thereof as for the time being remained due."

If Flower, Salting, and Co. had, under these circumstances, endeavoured to enforce the payment of their debt from the partners in the old firm of W. Rutledge and Co., there would have been ample evidence to satisfy a jury that they had discharged the old firm, and had accepted the new one as their debtor.

Their Lordships, therefore, are of opinion that the Judgment of the Supreme Court was right, and that the Respondents were entitled to prove against the estate of the insolvent firm of William Rutledge and Co. for the amount still owing to them of the debt originally due from the former firm.

The Appeal of the Australasian Bank relates to the proof under the insolvency of William Rutledge and Co., of the same debt of Flower, Salting, and Co., as in the case just considered, but raises an entirely different question.

At the time of the insolvency of William Rutledge and Co., the Australasian Bank were creditors, and proved against the estate for the sum of 30,249*l.* 18*s.* 6*d.*, the amount of their debt, after deducting 9,500*l.*, the estimated value of a security held by them over the separate estates of William Rutledge and Horace Flower.

At the same meeting Flower, Salting, and Co., tendered a proof for their debt of 53,587*l.* 10*s.* 10*d.* This was opposed by the Bank on the ground that Flower, Salting, and Co. were first bound to deduct from the amount for which they sought to prove, the

value of certain securities which they held on the estate of William Rutledge. The Commissioner of Insolvent Estates decided that Flower and Co. were bound to make this deduction, and rejected the proof.

From this decision Flower, Salting, and Co. appealed to the Supreme Court of the Colony. The Appeal was heard by Mr. Justice Chapman, one of the Judges of that Court, who overruled the decision of the Commissioner, and ordered that the proof tendered by Flower, Salting, and Co., should be admitted for the full amount. The Appellants appealed from this Judgment to the full Court, when, after argument, an order was made dismissing the Appeal without costs. From this order the present Appeal is brought.

The question to be determined is, whether Flower, Salting, and Co., being creditors of an insolvent partnership, before they could be allowed to prove against the joint estate of the insolvents were bound to value a security which they held upon the separate estate of one of the partners. If the question had arisen in this country, there would have been no difficulty in answering it. It was asserted, indeed, in argument, that the rule that the security to be deducted must be upon the same estate as that against which the proof is directed, was not laid down as a general rule by Lord Eldon in *ex parte Peacock*, 2 Glyn and Jam., 27. This, however, was not the opinion of Lord Lyndhurst, who in the case *in re Plummer*, 1 Phill. 56, said :—
 “In administration under bankruptcy, the joint and separate estate are considered as distinct estates, and accordingly it has been held that a joint creditor having a security upon the separate estate is entitled to prove against the joint estate without giving up his security, on the ground that it is a different estate. That was the principle upon which *ex parte Peacock* proceeded, and that case was decided, first by Sir J. Leach, and afterwards by Lord Eldon, and has since been followed in *ex parte Bowden*.”

Whatever may have been the origin of the rule, it must now be considered to be the established law in this country.

It was said by Mr. Hobhouse, for the Appellants, that the rule was laid down without any consideration of its justice or expediency, and that it was most

unjust that a creditor should secure himself *aliunde*, and yet come in *pari passu* with the other creditors. That the Colony of Victoria, in introducing the new code of Insolvent Law, which is applicable to the present question, had been careful to prevent such injustice in the distribution of an insolvent's estate. And he contended that this was effectually done by the provisions of the Colonial Act 5 Vict., No. 17, and especially by the 39th section. That section enacts "that any creditor who shall have or hold any security or lien upon any part of the insolvent estate shall, when he is the petitioning creditor, be obliged upon oath in the affidavit accompanying the petition, and when he is not the petitioning creditor in the affidavit produced by him at the time of proving his debt, to put a value upon such security, so far as his debt may be thereby covered, and to deduct such value from the debt proved by him, and to give his vote in all matters respecting the insolvent estate as creditor only for the balance. And in case any creditor shall hold any security or lien for payment of his debt, &c., upon any part of the said estate, the amount or value of such security or lien shall be deducted from his debt, and he shall only be ranked for, or receive payment of, or a dividend for, the balance after such deduction."

The whole stress of the argument arising out of this section is laid upon the words "any part of the insolvent estate." Mr. Hobhouse went carefully through the different sections of the Act in order to show that throughout one estate only is mentioned; and he contended that in every part of the Act an intention is manifested that there should be only one sequestration extending over every part of an insolvent's estate, applying to all the debts both of joint and separate creditors, and one single indivisible administration of the whole. Of course, if he could prove that the Act intended to annihilate the distinction between joint and separate debts and joint and separate estates, in the distribution of an insolvent's estate, he would establish his point. But it seems to be assuming the whole question thus to argue from the use of the word "estate" (in the singular) in the different sections of the Act. Even if the Act contemplated that both joint and separate estates would have to be administered, the language

is quite capable of application to each estate respectively under administration. Too much reliance was placed upon the notion that the Colonial Legislature were impressed with a sense of the injustice of the rule prevailing in England, and were determined to guard against it in their new Code of Insolvent Law. Indeed, it may be doubted whether a new law on the subject of insolvency was introduced by the Act of 5 Vict., No. 17, for mention is made in it of two former Acts for the relief of debtors in execution for debts which they are unable to pay; one of them as early as the 2 Wm. IV.

But if this were the establishment of a new code of insolvent law, and it was the object of the Colonial Legislature to prevent the operation of a rule which they considered unjust, it is hardly to be imagined that they would have committed their intention to the equivocal meaning of a few words in a single section of the Act. It is just as reasonable to suppose that, knowing the rule established in this country, which is founded not upon any statute, but upon general principles applicable to many other cases, they did not intend to disturb it. The alleged injustice of the rule has been endeavoured to be shown by viewing it on one side only. While the joint creditors are alone regarded, it may be successfully argued to be a hardship upon them that a creditor secured on a separate estate should resort to the joint estate, and so reduce their dividend; but, on the other hand, it may be contended on the part of the separate creditors that it would be great injustice to them to compel the joint creditor, with a separate security, to have recourse, first to the separate estate, which he might exhaust, and thus leave the separate creditors without a fund for the payment of their debts. These conflicting views seem to put the argument of hardship aside so as to allow the operation of the well-established principle, that upon a joint bankruptcy or insolvency, the joint estate is the fund primarily liable, and that the separate estate is only brought in in case of a surplus remaining after the separate creditors have been satisfied out of it. There seems to be no reason, therefore, why the words in the 39th section of the 5 Vict., No. 17, "any security or lien on any part of the insolvent estate" should not receive the construction of

which they are capable, and be applied in each instance to the particular estate which is at the time the subject of administration.

There is one other point which does not bear upon the main question, but which, as it has been introduced as a ground of complaint on the part of the Australasian Bank, ought not to pass unnoticed. The Appellants state in their case, "that acting upon what they believe to be the law and justice of the case, they reduced the proof which they tendered by almost a fourth. The Respondents holding securities of a much larger value, have claimed and established their right to prove for the whole debt without deduction."

If the secured debts of the parties were both due from the insolvent estate, there would of course be no reason for making any distinction between them. But a reference to their respective securities will show that this is not the case. The mortgage from Rutledge and Flower to the Bank of Australasia recites that Rutledge and Flower are indebted to the Bank in the sum of 10,000*l.*, and the proviso is for the payment of the mortgage money by Rutledge and Flower; therefore, the debt was not one which could have been proved against the insolvent firm of Rutledge and Co., being due from two of the partners only. But the mortgage from William Rutledge to Flower, Salting and Co., which is dated on the 30th June, 1859, the day before the new partnership of W. Rutledge and Co. came into complete operation, contains a recital that there is due from the said firm to Flower, Salting, and Co., the sum of 60,000*l.* and upwards, and the proviso is for payment by W. Rutledge or the firm of William Rutledge and Co., of the principal and interest of 60,000*l.* "due and owing from the said firm of William Rutledge and Co." So that this debt was a liability of the insolvent partnership, and not of some of the partners only.

Their Lordships will in both these cases humbly recommend to Her Majesty that the Judgments be affirmed, and the Appeals be dismissed with costs.

