Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Hoare and others trading as John Fraser and Company v. *The Oriental Bank Corporation, from the Supreme Court of New South Wales; delivered 9th May* 1877.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR R. P. COLLIER.

THE question raised by this Appeal is whether the Respondents, the Oriental Bank Corporation, were properly admitted to prove a debt of 20,668*l.* against the joint partnership estate of Walter Marshall Church and Robert Hills. The debt arose under the bond of the 31st July 1872, which is set forth at page 23 of the record. The obligatory part of it is in these words: "Know all "men by these presents that we Walter Scott, "gentleman, William Price, Robert Hills, Walter "Marshall Church, and Edwin Thomas Beilby, "gentlemen, all of Sydney in the colony of New "South Wales, are jointly and severally held and "firmly bound unto the Oriental Bank Corpora- "tion (being a banking company duly incor- "porated by royal charter) in the sum of "forty thousand pounds of lawful money of "Great Britain, to be paid to the said corpor- "ation or to the manager or other officer of the "said corporation, &c.;" then it goes on, and it is upon this latter part of the clause that the question arises, "for which payment to be well and truly "made we bind ourselves and each of us, and "any two, three, or four of us jointly, severally,

41948. 100.—6/77. Wt. 6305.

" and respectively, firmly by these presents." The instrument then, after reciting that Walter Scott was desirous of obtaining certain advances from the Oriental Bank, and that it had been agreed that the debts thence to arise should be secured by the written bond of the said Walter Scott and of the four other persons as his sureties, sets forth the condition, which is, in effect, that if any of them repay the advances to be made to Scott the bond should become null and void; and this is followed by a proviso in these words: " Provided nevertheless, that so far as respects " the liability of the said sureties under the above " written bond, the same shall not extend to " more than the sum of twenty thousand pounds." The bond therefore upon the face of it was a mere surety bond in order to secure to the bank the advances to be made to Walter Scott. Mr. Mackeson indeed, in opening the case, gave us to understand that this was not the true nature of the transaction, but that the five obligors of the bond were engaged in a joint adventure in respect of some mine, and that the object of the bond was to obtain credit and advances from the bank for the purpose of carrying out that adventure. It seems, however, to their Lordships that they ought to treat the bond as it has been treated in the Courts below, and as upon its face it appears to be, as a mere ordinary surety bond by which the four sureties became responsible in a certain way in order to secure advances to be made to Walter Scott. Nor is it material to consider whether the other view of the case could or could not be supported, inasmuch as Mr. Mackeson concedes that with respect to the points which he has argued it makes no difference which view of the transaction is taken, inasmuch as upon either the obligation contracted was unconnected with the business of wine merchants which was carried on by Hills and Church in partnership

together. After the execution of the bond the bank made large advances under it; a considerable debt was admittedly incurred; and on the 8th June 1875 the bank brought an action against Church, Hill, and Beilby, three of the sureties, jointly. Nothing, however, as has been fairly admitted by Mr. Mackeson, arises upon that action, which was afterwards abandoned. He does not contend that it constituted an election on the part of the bank by which they were bound with respect to the subsequent question of proof. On the 23rd June 1875 the insolvency of Hills and Church took place. The adjudication of insolvency against them, both in respect of their separate estates and their joint estate, was issued under the Insolvency Statute of the Colony and upon their own application. It may be necessary hereafter to refer to the particular provisions of the Statute, but in the meantime their Lordships assume that the adjudications were properly made against the insolvents jointly as partners, and also against them in their separate capacities and in respect of their separate estates.

At the time of their insolvency the insolvents filed their schedules; and in the schedule of his separate estate each has entered this debt to the bank as a debt of 20,000*l.* On the 10th of September 1875 an advertisement was issued by the Chief Commissioner of Insolvency calling upon persons to come in and prove their debts against the joint estate, and upon that notice the bank came in to prove, and on the 27th of October 1875 was admitted to prove against the joint estate as due to them on the bond a debt of 20,668*l.* 0*s.* 3*d.* The propriety of that proof was afterwards contested in the Supreme Court, where it was affirmed by two of the Judges, the Chief Justice dissenting from that conclusion.

The sole objection that has been taken before us is that the bank was not properly admitted

to prove *pari passu* with the joint creditors of the insolvents, who were creditors in respect of liabilities incurred in the strict partnership business. It has been argued, first that such a proof would have been improper under the bankruptcy law of England as it existed in 1841, which it was admitted has been introduced into the colony concurrently with the Insolvent Act; and further that it is also repugnant to the particular provisions of the statute. Their Lordships will dispose of the first of these objections in the first instance.

The question, as has already been said, arises upon that portion of the bond which gives to the obligee, the Respondent bank, the power of suing any two of the obligors, their heirs, executors, and administrators, and binds them, or any two of them, jointly and severally.

According to the rule indicated by Lord Justice James in *Ex parte Honey*, such an obligation is to be treated as if it arose upon a separate bond by which the two partners Hills and Church were so bound jointly and severally. It follows that on the insolvency of the two obligors, unless the particular objection taken by Mr. Mackeson can be supported, the bank (being the obligee) would have a right to elect whether it should prove against the separate estates of the partners or whether it should prove against their joint partnership estate; but it could not prove against both the joint and the separate estates. At first sight it would seem that the true test whether the creditor can prove against the joint estate is whether before the insolvency he could have sued the two debtors jointly upon the bond, and upon recovering judgment have taken out execution against the partnership assets. That this could have been done in the present case seems unquestionable. It may be remarked, moreover, that if such a judgment had been recovered and the

insolvency had taken place afterwards but before execution, the rights of the judgment creditors would have been affected, because they would have lost their right to elect between the joint and the separate estates, and would have been obliged, the joint and separate debt having merged in the joint judgment debt, to prove in the first instance against the joint estate. Mr. Mackeson, however, insists that upon the authorities it must be taken that the rule, which has prevailed in bankruptcy with slight exceptions ever since the time of Lord Cowper, must be taken with this qualification, namely, that creditors who cannot show that their joint debt has been incurred, in the strict sense of the term, as a partnership transaction, and as arising out of the partnership business, cannot be admitted *pari passu* with the creditors, properly so-called, of the partnership.

It appears to their Lordships that if this distinction really obtains, it is for the Appellants to show a case in which upon argument its existence has been affirmed by decision. It is not enough to accumulate authorities in which learned judges, dealing with cases where there were probably only partnership debts, speak generally of a joint estate as a partnership estate, or of joint creditors as partnership creditors. Their Lordships can find no authority which really establishes the supposed distinction, and on the other hand they think that there is authority the other way.

In the early case before Lord Hardwick, reported in the first volume of Atkins, page 98, the case of *Ex parte Bond and Hill*, all that appears is that the creditor was a creditor upon a joint and several bond; and the question was raised whether he was entitled to prove under both petitions at the same time, and the Lord Chancellor said: "I had some doubt

" the last day of petitions, but upon searching I " find it has been determined where there is a " creditor on bond against two persons jointly " and severally, and both become bankrupt, he " is entitled to receive a satisfaction out of the " joint estate, and if the joint estate falls short, " he is for the residue entitled to a satisfaction " out of the separate estate, but then the Court " will put him to his election, and if he elects " to come under the joint estate he will, with " respect to a satisfaction for the residue, be " postponed to all the creditors of the separate " estate." No distinction is there made as to the nature of the transaction out of which the obligation arose. The rule is stated broadly, that wherever the obligation is joint and several the creditor is put to his election.

It seems to their Lordships, however, that in the case of *Ex parte Field* the question has been more directly decided. That was not exactly a case of competition between the joint and separate estates of the insolvent partners, but arose upon the rule that a joint creditor cannot prove against one of his debtors if another be solvent. The decision was that the rule was not confined to cases of partnership, but applied generally to co-contractors. In the argument in support of the petition it was stated that the rule which excludes a proof against the separate estate of one debtor where there is a solvent partner was only adopted as a consequence of and a corollary from the rule which excluded such a proof where there were joint assets, and therefore the principle upon which the two rules rest is identical. This case was deliberately decided by a Judge of very great experience in bankruptcy, the late Lord Justice Knight Bruce. When it was first argued before him he directed the earlier authorities on the point

to be looked into; it was afterwards re-argued; and in giving judgment the learned Judge said: "This is a case of a joint debt "due from the bankrupt and two other persons, "one of whom is solvent and living in England, "and the question is whether the joint debt "is to be proved under the fiat against one of "three debtors in competition with his separate "creditors. I conceive that a long course of "practice founded on decisions of great autho-"rity has settled the point against the right "of proof before the Bankruptcy Court Act "passed. Such was the law I apprehend clearly "when the Act passed, and I am not aware that "either that or any other statute has varied the "law in this respect, or any subsequent decision "of the Lord Chancellor or the House of Lords "at variance with the rule has taken place. "I must, therefore, act upon the rule, and upon "that ground dismiss the petition. It has been "ingeniously argued that the rule does not "apply where the joint debtors were not all "traders subject to the bankruptcy laws or "where there was no partnership between them "in the common, which is a restricted sense of "that term, or where from the nature of the "connexion between the joint debtors there "would be no joint property incident to the "connexion. I am not aware of any such "limitation of the rule, and, therefore, I do "not pronounce any opinion whether if the rule "were so limited, that would help the peti-"tioner's case." It seems to their Lordships that if that case is in conflict with the earlier cases of *Ex parte Crossfield* and *Ex parte Buckingham*, it must be taken to have overruled them. It is cited in the last edition in a note of Mr. Justice Lindley's work upon Partnership, where having said broadly "Except in the cases hereafter "mentioned the joint creditors of partners are

" not entitled to payment out of their separate " estates in competition with their separate " creditors. This rule is now so well established " that it is useless to refer particularly to the " cases illustrating it, and it is proposed, there- " fore, to notice at once the exceptions to the " rule;" in a note upon that passage he says, " As to co-debtors not partners, see *Ex parte* " *Field*, 3 M. D., and D. 95; *Ex parte Bucking-* " *ham*, 1 M. D., and D. 235; *Ex parte Crossfield*, " 1 Deac. 405."

Their Lordships, without going at length into the numerous other cases which have been cited, are upon the weight of authority, as well as upon principle of opinion that the Respondent Bank was properly admitted to make proof of its debt against the joint estate of Hills and Church according to the English law of Bankruptcy as it existed in 1841.

Their Lordships have now to consider the argument founded upon particular sections of the local Insolvent Act. Nothing in their opinion can arise on the 17th section, because that relates to adjudications of insolvency which issue *in invitos* on the application of the creditors of the insolvents; and it is perfectly clear that in this case the insolvency was not of that kind, but that the adjudication took place upon the petition of the parties themselves. There are, then, only two sections which bear upon the point. The first of these is the 3rd section, which enacts that " it shall be lawful for any Judge of the Su- " preme Court of the said colony, upon the peti- " tion in writing of any person setting forth " that he is insolvent and desirous of surrendering " his estate for the benefit of his creditors, " either to direct such person to appear before " him to be examined touching his said insol- " vency, or to receive such other proof thereof " by affidavits of the said insolvent and others as

" to the said Judge may seem fit, or to direct " such petitioner to appear before any such " Commissioner as aforesaid, and to direct such " Commissioner to examine the petitioner," and so on ; " and it shall and may be lawful for any " Judge of the said Supreme Court, on consider- " ing the report of any such Commissioner, or " upon proof of the matters aforesaid to his " satisfaction, to accept the surrender of such " estate, and by order under his hand to place " the same under sequestration in the hands " of the Chief Commissioner in and for that " part of the colony in which such insolvent " shall reside." The adjudications of insolvency which took place as to the separate estates of the two partners upon their separate petitions necessarily took place under that section. It is suggested, however, that the adjudications against the joint estate issued under the 4th section, which is to this effect: "It shall in " like manner be lawful for any Judge of " the said Supreme Court, upon the like peti- " tion of any person legally vested with the " administration of the estate of any person " deceased, or with the estate of any other person " situate in the said colony in trust for creditors," that portion of the section does not apply to the present case, "or upon the like petition " stating the insolvency of the estate of any " company trading or having any estate or " effects within the said colony made by the " greater number of the partners of such com- " pany who at the time of presenting the " petition are within the said colony, to examine " the petitioner or petitioners," following very much the provisions of the preceding section, and ending by empowering the Judge, "upon " proof of the matters aforesaid to his satisfac- " tion to accept the surrender of any such estate " and to place the same under sequestration in

" manner aforesaid, and after the order for any " such sequestration is made the like proceedings " shall and may be had and take place concern- " ing such estates and the persons in whom the " administration thereof is legally vested and " the partner or partners of such companies as " are herein provided concerning other estates " and other insolvents." Their Lordships entertain some doubt whether the application with respect to the joint estate of Hills and Church and the proceedings thereon, which are not forthcoming, really took place under that section; whether the provision as to a company does not apply to something in the nature of a joint stock company rather than to an ordinary trading partnership between two partners, and whether in fact the adjudications as to the joint estate did not really issue under the 3rd section. There is no express interpretation clause in this Act; but their Lordships are under the impression that there is a general interpretation Act in the colony which may authorise the word " person " in the 3rd section to be read as " persons." But, however that may be, their Lordships are of opinion that even if the adjudication as to the joint estate took place under the 4th section, that would make no difference in the case; or help to establish the distinction for the existence of which the Appellants have contended They think that all that is provided at the end of the section is that the administration is to go on and take place in the same manner as it would take place concerning other estates and other insolvents.

Their Lordships, therefore, on the whole case, are of opinion that no ground has been made for disturbing the decision of the majority of the Supreme Court in respect of this proof, and they must humbly advise Her Majesty to affirm that decision and to dismiss this appeal with costs.