[HIGH COURT OF AUSTRALIA.]

SAVAGE . . . . . APPELLANT;
RESPONDENT,

AND

THE UNION BANK OF AUSTRALIA LIMITED . . . . . } RESPONDENTS.
PETITIONERS,

WHITELAW . . . . . APPELLANT;
RESPONDENT,

AND

THE UNION BANK OF AUSTRALIA LIMITED . . . . . } RESPONDENTS.
PETITIONERS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *June* 11, 12, 13, 14, 18.

Griffith C.J., Barton and O'Connor JJ.

Insolvency—Partners—Sequestration of estate of one—Security over joint estate—Petition—Offer to give up or valuation of security—Partnership—Executors carrying on business under terms of will—Right to indemnity out of assets—Lien over assets—Insolvency Act 1890 (*Vict.*) (*No.* 1102), *secs.* 37, 41—*Insolvency Act* 1897 (*Vict.*) (*No.* 1513), *sec.* 109—*Registration of Firms Act* 1892 (*Vict.*) (*No.* 1256), *sec.* 4—*Partnership Act* 1891 (*Vict.*) (*No.* 1222), *sec.* 5.

A creditor petitioning for the sequestration of the estate of one of several partners must, under sec. 37 of the *Insolvency Act* 1890, in his petition offer to give up or value any security held by him (the creditor) upon the joint estate; the rule that a creditor need not give up his security over the joint estate only applying after sequestration in the administration of the joint and separate estates.

In re Stevenson, 19 V.L.R., 660; 15 A.L.T., 119, over-ruled.

Several executors carrying on the business of their testator pursuant to the terms of the will in the firm name used by him are not necessarily partners, notwithstanding sec. 5* of the *Partnership Act* 1891 (Vict.), even although the executors have registered themselves as a firm under the *Registration of Firms Act* 1892.

Each of several executors carrying on business as above mentioned has a right of indemnity against the assets of the testator, including a lien over those assets, for liabilities properly incurred, and any security held by a creditor which interferes with that right is a security the giving up of which will go to augment the estate of each executor, and therefore the creditor must offer to give up or value that security when petitioning to sequestrate the estate of one of the executors.

Decision of the Supreme Court (*Hood* J.), (*In re Whitelaw*, (1906) V.L.R., 265; 27 A.L.T., 187) reversed.

APPEAL from the Supreme Court of Victoria.

Thomas Whitelaw, who carried on business as an oil and colour merchant in Melbourne under the style of "Thomas Whitelaw & Co.," died on 15th February 1890, having by his will and codicil appointed his wife, Cordelia Whitelaw, his son, Henry Albert Whitelaw, and James Palmer Savage to be his executrix and executors respectively, whom he authorized to carry on the business theretofore carried on by him. The executrix and executors carried on the business under the firm name of "Thomas Whitelaw & Co.," and under the *Registration of Firms Act* 1892, on 14th February 1893, they registered the firm under that name as consisting of themselves, and describing themselves as executors of the will of the late Thomas Whitelaw deceased. For the purpose of carrying on this business the executrix and executors had a banking account with the Union Bank of Australia Ltd., which knew that their customers were the executrix and executors of Thomas Whitelaw and were authorized to carry on the business. This account became overdrawn, and the bank held as security for the overdraft various bond warrants, free store warrants, and bills of lading, in respect of goods the property of the firm of Thomas Whitelaw & Co. About the end of 1899 the bank refused to allow an increase of the overdraft unless some further security was given. The

*Sec. 5 of the *Partnership Act* 1891 provides that:—"(1) Partnership is the relation which subsists between persons carrying on a business in common with a view to profit. . . . ."

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executor H. A. Whitelaw then procured the beneficiaries under the will to guarantee the advances made and to be made not exceeding in all £4,000. In September 1905 the overdraft amounted to over £4,000 and the bank issued a writ against Thomas Whitelaw & Co., as principals, and the beneficiaries, as sureties, in respect of the indebtedness amounting to £4,037 10s. 7d. In that action Cordelia Whitelaw entered an appearance as a partner of the firm, and Savage did not enter an appearance at all. Pursuant to liberty given, final judgment was signed against the firm of Thomas Whitelaw & Co. and H. A. Whitelaw, the other beneficiaries having been given leave to defend the action. Upon the judgment against Thomas Whitelaw & Co. execution was issued against Cordelia Whitelaw and Savage respectively, and the Sheriff returned the writ of *fieri facias* unsatisfied as to the whole of the debt in each case.

Orders *nisi* were then taken out by the bank for the sequestration of the estates of Cordelia Whitelaw and Savage respectively.

The petition in each case, after alleging the judgment against the firm and that the respondent was liable to pay it, stated that the bank's debt was wholly unsecured. The act of insolvency alleged in the petition in respect of Cordelia Whitelaw was:— "That execution issued against the said Cordelia Whitelaw upon the said judgment obtained in the Supreme Court in favour of your petitioner in a proceeding instituted by your petitioner was returned wholly unsatisfied the said Cordelia Whitelaw having been previously to such return called upon to satisfy the said judgment by the officer charged with the execution thereof and the said Cordelia Whitelaw having when called upon failed to do so." A similar act of insolvency was alleged in Savage's case.

On the return of the orders *nisi* Cordelia Whitelaw lodged objections those which are material being as follow:—

"1. That I dispute the debt as alleged in the said order *nisi*.

"2. That I dispute the act of insolvency alleged in the said order *nisi*.

"4. That the said petitioner's debt is not unsecured.

"5. That the judgment in the order *nisi* does not constitute a valid petitioning creditor's debt inasmuch as at its date there were

no persons carrying on business in partnership under the style of Thomas Whitelaw & Co. . . . .

"6. That the petitioning creditor is not under the circumstances entitled to make the separate estate of the said Cordelia Whitelaw insolvent in respect of the judgment against the alleged partnership of Thomas Whitelaw & Co. in the said order *nisi* mentioned."

The following objections were by leave lodged on behalf of Savage:—

"1. That the respondent was not at any time material to these proceedings liable as a partner of the alleged firm against which judgment was recovered.

"2. That the plaintiff held security which he ought to have offered to give up or ought to have valued."

On the return of the orders *nisi*, evidence was tendered on behalf of each respondent that at the date of the order *nisi* the bank held security over the property of the firm, but *Hood* J. rejected the evidence on the authority of *In re Stevenson* (1). The learned Judge at the close of the arguments made the order absolute with costs in each case: *In re Whitelaw* (2).

From these decisions the respondents appealed to the High Court.

Irvine, for the appellant Savage. A judgment against a firm cannot be the basis of an application for the sequestration of the estate of one of the partners under sec. 37 of the *Insolvency Act* 1890. The petitioning creditor's debt in that case must be a debt provable on the insolvent estate of the partner. The debt of a firm to a creditor is a joint debt, and the creditor has no right to prove in respect of it on the insolvent estate of a partner, even if the firm's estate is insolvent. If a creditor has no right to prove in respect of a debt, he has no right to petition for sequestration of the estate in respect of that debt. If the debt to the firm was joint and several it merged in the judgment which was joint, and the creditor could not prove on the insolvent estate of a partner in respect of it: *Ex parte Christie, In re Barrow* (3); *In re Davisson, Ex parte Chandler* (4); *Lindley on Partnership*, 7th

(1) 19 V.L.R., 660; 15 A.L.T., 119.
(2) (1906) V.L.R., 265; 27 A.L.T., 187.
(3) Mont. & Bli., 352, at p. 358.
(4) 13 Q.B.D., 50.

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ed., p. 772; *Ex parte Elton* (1); *Ex parte Detastet* (2). If the judgment in *In re Stevenson* (3) decided that a creditor of a firm could obtain the sequestration of the separate estate of a partner in respect of a joint debt of the firm, it was wrongly decided. The respondents either cannot petition for the sequestration of the partner's estate in respect of this debt at all, or they can petition on valuing their security as provided by sec. 37 of the *Insolvency Act* 1890. There is no authority to support the decision in *In re Stevenson* (3), that a creditor of a firm having a security over the estate of the firm may petition for the sequestration of a partner's estate in respect of that firm debt without valuing that security. *Rolfe* v. *Flower, Salting & Co.* (4), which was relied on in that case, was decided before the legislation, which was the basis of the present law of insolvency in Victoria, and it contains nothing to support such a proposition. If the debt of the firm can be considered to be a debt as against the partner, being a secured debt in respect of the former, it is a secured debt in respect of the latter. Even if partners are, by reason of sec. 109 of the *Insolvency Act* 1897, in a different position from other joint debtors as to petitioning for the sequestration of the separate estate of one of the joint debtors, there was no partnership in this case. Executors carrying on their testator's business under the terms of the will are not partners. There was no holding out as partners. The respondent bank knew the facts. There is no contract between such executors to form a basis for a partnership. See *Partnership Act* 1891, sec. 5; *Lindley on Partnership*, 7th ed., p. 11; *Farhall* v. *Farhall* (5).

Isaacs A.G. and *Davis* (with them *Lowe*), for the appellant Cordelia Whitelaw. As to the question whether the respondents are bound to value their security, it does not matter whether the executors are partners or any other kind of joint debtors. The only limit on the word "security" in sec. 37 of the *Insolvency Act* 1890 is that if it is relinquished by the creditor it will be of value to the estate. It does not, however, mean a security given by some third person. The fallacy in *In re Stevenson* (3) is that

(1) 3 Ves. Jun., 238.
(2) 17 Ves., 247.
(3) 19 V.L.R., 660; 15 A.L.T., 119.
(4) L.R. 1 P.C., 27.
(5) L.R. 7 Ch., 123.

it assumes that the rules of the administration of insolvent estates can be used to make persons insolvent. The rule that a joint creditor, having security over the joint estate, can prove against the separate estate without valuing his security has never been applied to applications for the sequestration of the separate estate. *Rolfe* v. *Flower, Salting & Co.* (1) only deals with the rule of administration. Even though there be a rule that a joint creditor can sequestrate the estate of one of the joint debtors, that does alter the nature of the debt. If it is secured the creditor must value it.

[GRIFFITH C.J.—The rule is that the creditor must value everything which if given up will augment the estate of the debtor: *Ex parte West Riding Union Banking Co., In re Turner* (2). In this case each of the executors has a right to indemnity out of the assets of the testator: *In re Johnson, Shearman* v. *Robinson* (3). Over those assets the respondents hold security. So that if that security ceased to exist the estates of the executors would be augmented.]

A trustee has a lien on goods of his testator out of which he has a right of indemnity: *Jennings* v. *Mather* (4). See also *Cracknall* v. *Janson* (5); *In re Baynes, Ex parte Queensland Trustees Ltd.* (6).

The act of insolvency alleged is that the writ of execution was returned unsatisfied. No reasonable opportunity was given to this appellant to satisfy the demand: *In re Johnson* (7). See also *In re Field* (8).

[They also referred to *Robson on Bankruptcy*, 3rd ed., p. 618; *Ex parte Chambers, In re Chambers* (9); *Williams on Bankruptcy*, 8th ed., pp. 159, 164; *Ex parte Dickin, In re Foster* (10).]

Weigall, for the respondents. For the purposes of the judgment in respect of which these insolvency proceedings have been brought there must be deemed to have been a partnership of Thomas Whitelaw & Co., and the two appellants must be deemed

(1) L.R. 1 P.C., 27.
(2) 19 Ch. D., 105, at p. 112, *per Jessel*, M.R.
(3) 15 Ch. D., 548.
(4) (1902) 1 K.B., 1.
(5) 6 Ch. D., 735.
(6) 9 Q.L.J., 214.
(7) 18 V.L.R., 788; 14 A.L.T., 121.
(8) 17 A.L.T., 30.
(9) 2 Mont. & Ayr., 440.
(10) L.R. 20 Eq., 767.

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to be members of it, Savage by his non-appearance, and Cordelia Whitelaw by her appearance as a partner: Rules of Supreme Court 1884, Order XII., r. 15; Order XLII., r. 10. The three executors must be deemed to be liable on the basis of a legal partnership existing between them, and to have made an agreement between themselves which in law amounts to a partnership. If persons agree to carry on a merchants' business under a firm name, they are partners, and if persons carry on business for profit they are in law partners although there may be an agreement between them that they shall not be partners. If co-owners put their property to a common use and it is controlled as much by one as by another, they are partners: *Lindley on Partnership*, 7th ed., p. 10; see also *Wightman* v. *Townroe* (1); *Williams on Executors*, 10th ed., p. 1430. The use of the word "firm" and its registration under the *Registration of Firms Act* 1892 connote a partnership. Even if the appellants are not estopped from denying that there was a partnership, the facts are such that the learned Judge was justified in finding that there was a partnership. To hold now that there was no partnership would be virtually to set aside that judgment. Having obtained judgment against the partnership, the creditor can enforce it against the partners separately: *In re Wenham, Ex parte Battams* (2); *Davis & Son* v. *Morris* (3). So also a creditor who has a judgment against several joint debtors, may enforce it against them separately: *In re Low, Ex parte Gibson* (4). It has been considered law for the past one hundred years that a creditor may make individual partners insolvent on a judgment against a partnership: *Lindley on Partnership*, 7th ed., p. 703; *Wace on Bankruptcy*, p. 45. The same rule applies to joint debtors. The decision in *In re Stevenson* (5) that the security over the partnership property need not be valued is correct. For the purposes of insolvency the estate of a firm is regarded as entirely distinct from the estates of the partners: *Re Plummer* (6). To give up the security to the firm would be for the benefit of the creditors of the firm in priority to those of the partners. The security could not be given up to the trustee of

(1) 1 M. & S., 412.
(2) (1900) 2 Q.B., 698, at p. 704.
(3) 10 Q.B.D., 436, at p. 448.
(4) (1895) 1 Q.B., 734.
(5) 19 V.L.R., 660; 15 A.L.T., 119.
(6) 1 Phil., 56.

one of the partners. The security which a secured creditor is required under sec. 37 of the *Insolvency Act* 1890 to value or give up is a security over the property of the debtor: Sec. 67 (v.); *Robson on Bankruptcy*, 2nd ed., pp. 226, 243. Even if there is no partnership here the security is over the property not of the debtors but of the beneficiaries. The fact that the appellants have a right of indemnity against their testator's estate does not alter the position, and cannot put the creditors in a worse position than that in which they would otherwise be. What the creditor is required to give up is a security, but for the existence of which, the property which is the subject matter of the security would pass to the trustee of the debtor: *Ex parte West Riding Union Banking Co.*; *In re Turner* (1): See also *In re Whittles* (2). Any right of indemnity the appellants have is subject to the rights of creditors. Admitting all the equities of the appellants, the result of wiping out the security would not be to vest anything in their trustees in insolvency. If this security were given up the property would vest in the trustees subject to the rights of the creditors to be paid, then to the right of the trustees to indemnity, and then for the benefit of the beneficiaries. If the Court holds that the security should have been valued, the respondents should be allowed to amend: *Lewis on Insolvency*, p. 45; *Ex parte Vanderlinden, In re Pogose* (3).

[He also referred to *Ex parte English and American Bank*; *In re Fraser, Trenholm & Co.* (4); *Yate-Lee and Wace on Bankruptcy*, 3rd ed., p. 588; *Lewis on Insolvency*, p. 128; *In re Merry* (5); *Main* v. *Duerdin* (6).]

Irvine in reply. The appellant Savage not being a partner, and he not being named personally in the judgment, there is no valid execution against him. Whether the trustees were partners or not is a question of fact. The *Registration of Firms Act* 1892 does not show that they were partners. If proceedings could be taken to set aside the execution, the act of insolvency would not be complete. The whole of the issues raised by the petition have to be proved and the burden of proof is upon the petitioner:

(1) 19 Ch. D., 105.
(2) 14 A.L.T., 62.
(3) 20 Ch. D., 289.
(4) L.R. 4 Ch., 49.
(5) 13 V.L.R., 193; 8 A.L.T., 186.
(6) 7 A.L.T., 139.

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Insolvency Act 1890, sec. 47. See *Davis & Co.* v. *Andrée & Co.* (1). The non-appearance of Savage is not an admission that he is a partner. If it be taken as an admission it might be that he would not have the right to set aside the execution, but he could set up that he was not a partner when it was sought to make him insolvent in respect of a judgment against the partnership. The rule in *Re Plummer* (2) only applies where there is an insolvency, and the question is one of the administration of the insolvent estate.

Isaacs A.G. in reply. The Court should not apply the artificial doctrine, established after much struggle for the purpose of making creditors marshal their debts, so as to enable a creditor to make his debtor insolvent without valuing his security. The security which must be valued or given up is a security over the property of the debtor, but it may be over his separate property or over property of which he is one of the joint owners. To "give up" the security means to relinquish the security so far as the particular debtor is concerned, and does not imply the physical act of handing over the document evidencing the security. There is no doubt that executors carrying on the business of their testator have a right of indemnity: *In re Frith*; *Newton* v. *Rolfe* (3); *Jennings* v. *Mather* (4); *Dowse* v. *Gorton* (5). In this case the right of indemnity is secured by a lien over the goods used in the business.

[He also referred to *In re Curtain and Healey* (6); *Ex parte Philps*; *In re Moore* (7); *Holden* v. *Black* (8); *Johnston* v. *Salvage Association* (9); *Holderness* v. *Shackels* (10).]

Cur. adv. vult.

GRIFFITH C.J. The appellant Savage is one of the executors and trustees of Thomas Whitelaw, who died in 1879, and who had previously carried on business under the style of Thomas Whitelaw & Co. The appellant Cordelia Whitelaw is executrix and trustee of Thomas Whitelaw, and there was a third executor

(1) 24 Q.B.D., 598, at p. 606.
(2) 1 Phil., 56.
(3) (1902) 1 Ch., 342.
(4) (1901) 1 K.B., 108.
(5) (1891) A.C., 190.
(6) 5 V.L.R. (I.P. & M.), 109.
(7) L.R. 19 Eq., 256.
(8) 2 C.L.R., 768.
(9) 19 Q.B.D., 458.
(10) 8 B. & C., 612.

and trustee. On the death of Thomas Whitelaw his executors and executrix, under a power contained in the will, carried on business under the same firm-name for several years, and, complying with the provisions of the *Registration of Firms Act* 1892, registered their firm-name and described themselves as the executors of the will of the late Thomas Whitelaw deceased. By that Act every firm carrying on business under a firm-name other than the names of the persons carrying on the business is bound to register the firm-name, whether those persons are partners or not. For the purposes of the business the firm had dealings with the respondent bank and obtained an overdraft, to secure which they gave the respondents security over property which was used in the trade. The form of the security is not material. Subsequently the respondents brought an action against the firm of Thomas Whitelaw & Co. and several other persons, who were guarantors of the overdraft, taking advantage, as they contended they might, of the *Rules of the Supreme Court* 1884 allowing actions to be brought against a firm. The rule relied upon is Order XVI., r. 14, which provides that any two or more persons being liable as co-partners may be sued in the name of their respective firms. Order XLII., r. 10, provides that where a judgment is against a firm execution may issue against any person who has appeared in his own name, or who has admitted on the pleadings that he is or has been adjudged to be a partner, and against any person who has been served as a partner with a writ of summons and has failed to appear. The respondents having issued their writ, served both the appellants. The appellant Savage took no notice of the writ, and the appellant Cordelia Whitelaw entered an appearance as a member of the firm. The respondents proceeded with the action and obtained judgment against the firm, and thereupon issued execution against each of the appellants individually, seeking to take advantage of Order XLII., r. 10. In each case, the execution not having been satisfied, a petition was presented for the sequestration of the estate of the respective appellant. In Savage's case the petition alleged that judgment had been recovered against a firm of which Savage was a partner. The petition against Cordelia Whitelaw alleged that she had entered an appearance in

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her own name under Order XII., r. 15, and was liable to satisfy the judgment. The petition in Savage's case also alleged that the petitioners' debt was wholly unsecured, inasmuch as the petitioners held no security the value of which they were required by law to estimate for the purpose of petitioning, the only security being a security over portion of the estate of the firm of Thomas Whitelaw & Co., or over assets belonging to Savage jointly with other persons, and a certain guarantee. In Cordelia Whitelaw's case the petition alleged that the petitioners' debt was wholly unsecured, but it appeared by the affidavit in support that the petitioners held the security to which I have already referred. Objections to the orders *nisi* for sequestration were duly lodged according to the practice of the Court. In each case it was objected that the respondent to the insolvency proceedings was not liable as a partner of the alleged firm against which judgment had been recovered, and that the petitioners held security which they ought to have stated that they were willing to give up for the benefit of the creditors, or to give an estimate of its value. The second objection is founded upon sec. 37 of the *Insolvency Act* 1890, which provides that the debt of the petitioning creditor "must not be a secured debt unless the petitioner state in his petition that he will be ready and willing to give up for the benefit of the creditors after adjudication of sequestration or unless the petitioner is willing to give an estimate of the value of his security, in which latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated." The petitioner is required in that case to give up his security to the trustee in insolvency upon payment of the estimated value. Both petitions came on for hearing before *Hood* J. With regard to the second objection, that the debt was a secured debt, the learned Judge considered himself bound by *In re Stevenson* (1), in which the Full Court reversed the judgment of *Hodges* J., and held that when, on a judgment against a firm, there is a petition for the sequestration of the estate of one of the members of the firm, the petitioner need not offer to give up or value a security which he holds over the property of the

(1) 19 V.L.R., 660; 15 A.L.T., 119.

firm. No doubt *Hood* J. was bound to follow that judgment. With respect to the objection that the appellants were not partners of the firm, the learned Judge was of opinion that they were partners, and that they were bound by the judgment against the firm. I shall have occasion later on to refer more fully to the actual relations between the parties. So far as I can see at present, the members of the firm were not partners, although the doctrine of implied agency applicable to partners may have applied to them. They were three executors carrying on the business which had been carried on by the testator but not as partners. They had no common assets. The bank knew they were not partners, and knew the actual facts. Whether under those circumstances either of the appellants can object that the judgment obtained against the firm was not operative against them under the Rules appears to me a question of some difficulty—of more difficulty with respect to Savage who took no notice of the writ, than in respect to Cordelia Whitelaw, who entered an appearance as a member of the firm, although in my opinion she was not a member of the firm. Whether she was bound by that admission or not it is not for my present purpose necessary to determine.

I proceed to deal with the case on the assumption (1) that there was a partnership, and (2) that the goods mortgaged to the respondents were partnership assets, and to consider whether the petitioning creditors were bound to value their security. The judgment debt was clearly a joint debt. The *Insolvency Act* 1890 provides by sec. 41 that a creditor of a firm may petition against all or any one or more of the partners of such firm to have the estate of such firm placed under sequestration, provided that any such partner has committed an act of insolvency whereby the creditors of the firm may be defeated or delayed, "provided always that nothing herein contained shall extend or be construed to prevent the creditor of any firm from proceeding against any partner or the separate estate of any partner thereof in respect of debts due by such firm in the same way in which it is herein provided that the creditor of any person may proceed against him and his estate in respect of debts due by such person in his individual capacity." That recognizes the rule, said to have been laid down a long time

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ago, that a creditor of a firm might petition for the sequestration of the estate of a single member of the firm. In sec. 109 of the *Insolvency Act* 1897, it is provided that:—"Any creditor whose debt is sufficient to entitle him to present an insolvency petition against all the partners of a firm may present a petition against any one or more partners of the firm without including the others." In such a case, then, is it necessary for the creditor to value the security he holds over the assets of the firm? It is a settled rule that in the administration of joint and separate assets, that is, upon an adjudication of sequestration of a partnership, the joint and separate estates are treated as different properties, and that creditors of the separate estate of a partner need not value the securities which they hold over the joint estate, and, conversely, that creditors of the joint estate need not value the securities which they hold over the separate estate. That is a rule of administration, and was laid down for the convenience of administration, and is, I think, a rule of fairness. At any rate, it is a rule of administration, but it has never, so far as I know, been applied in considering the amount of a petitioning creditor's debt. In my opinion, the conclusion to which the Full Court came in *In re Stevenson* (1) was erroneous for two reasons. First of all, the right of a creditor of a partnership to make one of the partners insolvent depends upon his claim against the firm, and it would be a very extraordinary thing if a petitioning creditor had a greater right against the individual members of the firm than he has against them in the aggregate, so that, although the debt of the partnership was not such that he could petition against the partnership, he could nevertheless petition against each of the members of the partnership and make them severally insolvent without valuing the security held over the assets of the partnership. The result would be that a creditor of a firm, though fully secured, would be entitled to make every member of the firm insolvent if the debt amounted to £50. Such a result would be extraordinary and, I think, extremely unjust. I do not think, upon the construction of sec. 37 of the *Insolvency Act* 1890 alone, that such a result can follow.

(1) 19 V.L.R., 660; 15 A.L.T., 119.

Reliance is placed upon the rule introduced originally by Lord *Eldon*, which was finally developed by Lord *Lyndhurst*, and which is stated clearly by *Jessel* M.R., in a case to which I will afterwards refer, but which has never been applied to the case of a petitioning creditor. The conditions in sec. 37 are that the debt must not be a secured debt "unless the petitioner state in his petition that he will be ready to give up such security for the benefit of the creditors . . . or unless the petitioner is willing to give an estimate of the value of his security." Now, what is the debt in respect of which the respondent bank in this case was a creditor? On the assumption upon which we are proceeding, it is a joint debt of the firm. For that joint debt the respondents have a security which they must either value or offer to give up for the benefit of the creditors. Upon the mere words of the Act I think that is the inevitable conclusion, and it is supported by the words of sec. 41 and by the words of sec. 109 of the *Insolvency Act* 1897, which both assume that that is the case.

But there is another objection which I think is equally fatal. I will refer briefly to the rule which is more fully stated in *Ex parte West Riding Union Banking Co.; In re Turner* (1). In that case Chief Judge *Bacon*, a judge of very large experience in bankruptcy matters, said (2):—"The settled rule is that a creditor cannot come and take a share of the bankrupt's property and also retain a part of it as appropriated. I never heard that called in question. What does it signify whether it is separate property of the bankrupt or joint property of the bankrupt and another person? . . . . The question is whether, claiming to prove their debt in the bankruptcy of one of the two persons, they must realize the security which they hold on that man's property before they take a dividend from his estate with the other creditors? Can any instance be referred to in which a man has been allowed to retain his interest in the subject-matter of a mortgage, and yet to prove regardless of the mortgage? The rule is that if you have a security you must realize it, you must get as much out of it as you can. *Ex parte English and American Bank* (3) has no kind of application to the present case." On appeal to

(1) 19 Ch. D., 105.

(2) 19 Ch. D., 105, at p. 110.

(3) L.R., 4 Ch., 49.

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the Court of Appeal, *Jessel* M.R. said (1):—"The principles of the bankruptcy law are plain enough. A man is not allowed to prove against a bankrupt's estate and to retain a security which, if given up, would go to augment the estate against which he proves. That is the principle of the whole thing. The only question is whether, if the security were given up, it would augment the estate? Of course, if the security was given by a stranger and you were to cancel it, you would not augment the bankrupt's estate to the extent of one farthing, and consequently such a security need not be given up. Then the question arose, in consequence of the very peculiar rules of bankruptcy in this country as regards the administration of partnership estates, by which a distinction is made between the partnership as a community and each individual partner as a separate entity, viz., whether the rules which applied to a security upon the assets of strangers would apply as between the separate estate of a partner and the joint estate as it is called, that is, the estate of the partnership firm. Now our bankruptcy law (it is peculiar, but it is well established,) treats the partnership estate as an entirely separate thing from the individual partner's estate, so that you have a separate estate of each individual partner, and a joint estate or a partnership estate of the firm. The one is distributed among what are called joint creditors, that is, the partnership creditors; the other among the separate creditors of the partners. The case soon arose where a man who had a joint debt had a security on the separate estate of a partner, and the question was whether that was within the rule which enabled a man to prove for the full amount of his debt, without giving up his security, when the property pledged was that of a stranger. It was held that it was, and for this very simple reason, that his giving up his security would not augment the joint estate. The giving up his security not augmenting the estate against which he proved, it was held that he need not give up his security. The converse case afterwards came to be argued, and it was decided in the same way." He then referred to *In re Plummer* (2), in which the principle was stated by Lord *Lyndhurst*. He then continued: "Now, that being the principle, has it ever been extended beyond the case of joint and separate estate? So far as I am aware never."

(1) 19 Ch. D., 105, at p. 112. (2) 1 Phil., 56.

Towards the end of the judgment, in reference to the suggestion that there had been a renewed partnership, he said (1):—"If it were necessary to consider it, I must say I should not think it made any difference, because the dissolution of the partnership would follow on the adjudication, and then the share of the partnership property would still be a part of the bankrupt's estate."

The only apparent authority I know of to the contrary is the dictum of *Sir W. Page Wood* L.J. in *Ex parte English and American Bank*; *In re Fraser, Trenholm & Co.* (2), which Chief Judge *Bacon*, in the case to which I have just referred, brushed aside, saying that it had no kind of application, and which the members of the Court of Appeal did not think it necessary to mention. In *Ex parte English and American Bank*; *In re Fraser, Trenholm & Co.* (3), *Sir W. Page Wood* L.J. said:—"The question is, who are the persons interested in this cotton? If it is not the bankrupts alone, the bankrupts being jointly interested with one or more other persons, it is agreed that the creditors would be entitled to prove without giving up the value of the security." He then examined the facts and concluded:—"That brings the case within those where the thing pledged is not the property of the bankrupt alone, but the property of the bankrupt and some other person, and in such circumstances the creditor may make his proof without deducting the value of his security." Those dicta are not supported by any of the cases referred to in argument, nor has any case been brought to our notice which supports them. It appears that the point was not argued in that case, but as *Jessel* M.R. said in *Ex parte West Riding Union Banking Co.*; *In re Turner* (4), there is no instance in which that rule has been applied except in the administration of joint and separate estates. The reason of the thing is that given by *Jessel* M.R. that on the adjudication of bankruptcy of one of the partners, the partnership is dissolved, and the trustee in bankruptcy becomes co-owner with the other partners in the partnership estate, and clearly the bankrupt's share is separate estate over which the creditor has security. For both the reasons I have given I am of opinion

(1) 19 Ch. D., 105, at p. 116.
(2) L.R. 4 Ch., 49.
(3) L.R. 4 Ch., 49, at p. 56.
(4) 19 Ch. D., 105.

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that the decision in *In re Stevenson* (1), is erroneous, and that the judgment of *Hodges* J. was correct.

So far I have dealt with the matter on the assumption that this was a partnership, and that the property mortgaged was partnership property. But, in truth, it was nothing of the kind. The real facts are quite different. In my opinion, the executors were not partners, and if they were, the property was not partnership property. It was the trust estate of the testator, and the security was a security over the estate of some other persons, viz., the beneficiaries. If that was all that appeared in the case it would not be necessary to value the security. But this is not all that there is in the case. I have pointed out that the executors were carrying on the business under the provisions of the will. In the case of *Dowse* v. *Gorton* (2), Lord *Herschell* said: "I think it is clear that where a business has been carried on under such an authority as was conferred upon the executors by the will of this testator, they would be entitled to a general indemnity out of the estate as against all persons claiming under the will." Lord *Macnaghten* said (3):—"If the business has been properly continued as between the executors and the creditors, or if the creditors choose to treat it so, which comes to the same thing, the executors are entitled to be indemnified against all liabilities properly incurred in carrying it on."

It is also clear that the property could not be taken in execution under the judgment against the executors. That was determined in *Jennings* v. *Mather* (4). In that case one Mather had been appointed trustee under a deed of assignment for the benefit of creditors, and in that capacity had carried on business, in the course of which he had contracted debts for which he was personally liable. Jennings, a creditor, sued Mather, recovered judgment and issued execution against the goods which Mather held as trustee, and they were seized by the sheriff. Mather having been made bankrupt, his trustee in bankruptcy claimed the goods and the sheriff interpleaded. The ground on which the trustee in bankruptcy claimed was that, although the goods were not Mather's and did not pass to his trustee in

(1) 19 V.L.R., 660; 15 A.L.T., 119.
(2) (1891) A.C. 190, at p. 199.
(3) (1891) A.C., 190, at p. 203.
(4) (1901) 1 K.B., 108.

bankruptcy, yet Mather had a right to the possession of the goods in order to give effect to his lien or charge over them for expenses incurred in carrying on the business, and that right passed to the trustee in bankruptcy. *Kennedy* J., whose judgment was referred to with approval by *Stirling* L.J. in the Court of Appeal (1), after stating that the goods were assets of the trust estate, said (2):—"If that is so, something follows in equity which, it seems to me, the county court judge has overlooked. While there can be no right of a creditor created in the course of the trading to treat as goods of the trustee goods which form part of the trust estate, still it is equally clear that the trustee has a right and interest in those goods, because he has a right to an indemnity in the nature of a lien over those goods. It necessarily follows, as it seems to me, that the trustee has a right to prevent any person from carrying away those goods, and to say to everybody, including the *cestui que trust*, 'I am entitled to an indemnity out of those goods, and have, therefore, a pecuniary interest in them.'" In the same case, in the Court of Appeal (3), *Collins* M.R. said:—"Mather was the trustee under a deed of assignment, made by Smales Brothers & Co., for the benefit of their creditors. As such trustee he had, in dealing with the trust estate, incurred personal liabilities, among which was the debt due to the execution creditor. Having incurred these debts as a trustee in dealing with the trust estate, he would have a right as against the trust estate to indemnity in respect of the personal liabilities so incurred by him . . . The claimant, no doubt, as Mather's trustee in bankruptcy, is not entitled to claim that the goods taken in execution passed to him as property of the bankrupt; but he claims to stand in the bankrupt's shoes with regard to any lien he may have on the trust estate, and says that, as against the execution creditor, he is entitled to have the goods remain available for the purposes of the indemnity to which the bankrupt was *primâ facie* entitled. It is clear, as I have pointed out, that the execution creditor has in truth no title whatever to these goods; but it is in effect contended that we are bound under the circumstances to consider, for the purposes of the

(1) (1902) 1 K.B., 1.
(2) (1901) 1 K.B., 108, at p. 113.
(3) (1902) 1 K.B., 1, at p. 5.

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interpleader issue, that he had a right to have these goods taken in execution. I do not, however, see how the wrongful seizure of the goods in execution can displace the equitable right, which Mather, as trustee, *primâ facie*, had with regard to the trust estate by way of indemnity against the personal liabilities incurred by him in fulfilling his trust." He then dealt with an incidental point taken at the hearing that there might have been a breach of trust which took away Mather's right to indemnity; and he said that that should have been proved by the party alleging it, and that it had not been done. In the same case *Mathew* J. said (1):—"The position originally taken up by the execution creditor left out of sight altogether the right of Mather as a trustee to indemnity out of the trust property, and to hold the goods seized as part of such property until his rights in respect of them are ascertained. That right appears to me clearly to exist, and to form a part of Mather's estate which passed to the claimant as his trustee in bankruptcy." That case is exactly in point here. It follows that each of the executors was entitled to indemnity out of the trust estate for all liabilities properly incurred by him in carrying on the business, and that that was a right which would pass to his trustee in insolvency, and any security held by the petitioning creditor, which would interfere with the enjoyment of that right, would clearly be a security the giving up of which would, in the words of *Jessel* M.R. "go to augment the estate" of the insolvent. That would be so even if the three trustees could be considered partners. But, in truth, the right of indemnity possessed by each of them was an individual right, so that each of these appellants was entitled to it, and it was assets which would pass to his or her trustee. That which would pass would be a lien over the estate of Thomas Whitelaw, that is, over the goods the subject of the security. The goods themselves did not pass because they are trust assets, but the right of indemnity was a right which would pass, and could only become available to the trustee in insolvency if the security were given up.

Some confusion was caused by assuming that "to give up" means "to hand over in specie to the trustee in insolvency." But it does not mean that. It means "to get the security out of the

(1) (1902) 1 K.B., 1, at p. 8.

way" so that the property would go to augment the estate of the insolvent. I am of opinion, therefore, that, when the matter is considered upon the true ground, as well as upon the false assumption, the petitioning creditors had a security which they were bound to value. That is a fatal objection, unless the petition is amended. We need not say anything about amendment, because Mr. Weigall conceded that, if we held that *In re Stevenson* (1) was wrongly decided, he could not ask for an amendment. I am of opinion, therefore, that both the appeals should be allowed.

BARTON J. I am of the same opinion. On the facts it is not made clear at what time the executors began to overdraw at the bank, though a witness, who had been accountant to the Whitelaw business for many years up to 1903, said that he thought the overdraft commenced in 1894, which would be after the registration of "Thomas Whitelaw & Co." as a firm. As to the security for the overdraft, apart from the guarantee, the evidence is somewhat meagre, as the learned Judge, having decided that at that stage *In re Stevenson* (1) concluded the case in respect of the second objection, rejected evidence on that head: but it was sworn by the securities clerk that the bank held security from the estate for the overdraft in the shape of "bond warrants, free store warrants, bills of lading, wall papers, oils, colours" &c., none of which had been realized up to the date of the writ, 9th September 1905, when their value was, according to the estimate of the executors, £3,039 17s. 5d. In the argument before us the fact of security was not disputed.

Savage's case and a similar application against the several estate of Cordelia Whitelaw were heard together. In making the orders *nisi* absolute, His Honor as to the first of Savage's objections, namely, that he was not a partner of the alleged firm against which judgment was recovered, held that, as the executors were persons carrying on a business in common with a view to profit, the relation between them was that of partners, having regard to sec. 5 of the *Partnership Act* 1891, and the facts in evidence.

As I am of opinion that, even if Savage was a partner, the

(1) 19 V.L.R., 660; 15 A.L.T., 119.

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security which the bank held over the estate should have been given up or valued, I do not feel called on to consider whether he was a partner or not; but I wish to make it clear that, by passing to the other questions, I must not be taken to concur in the view that the relation of partnership existed, or in the view which Mr. Weigall pressed us to adopt, viz., that, in the absence of such a relationship, the appellant Savage had so conducted himself as to be estopped from denying its existence.

In support of the view that a creditor of a partnership, petitioning for the sequestration of the separate estate of one of the partners, must give up or value a security held by him over the firm's estate, the learned Chief Justice has cited several authorities which seem to me to establish the position, and it is unnecessary for me to refer to them again. But it may be well to turn to the judgment of *Kennedy* J. in *Jennings* v. *Mather* (1) when that case was before the Court of Queen's Bench, for in the Court of Appeal that judgment was adopted by *Stirling* L.J. as a correct statement of the law, and it is most carefully prepared. The facts were these:—"In June 1898, Messrs. Smales Brothers & Co., who were carrying on business at Bradford, executed a deed of assignment by which they assigned all their trade assets to one Mather as a trustee for the benefit of their creditors. By this deed Mather was to carry on the business, and to apply the profits partly to paying the creditors 15s. in the pound, and subject to this in trust for Smales Brothers. Mather carried on the business in accordance with the trust, and in so doing ordered goods from one Jennings. Jennings, being unable to obtain payment, sued Mather, and got judgment against him, on which execution was issued, and the sheriff seized under the execution certain of the trade assets. In the meantime Mather had absconded and had been adjudicated bankrupt, one Gray being appointed his trustee in bankruptcy. Gray then claimed the goods seized by the sheriff, and the sheriff interpleaded. By consent the goods were sold, and the proceeds, amounting to £120, were paid into Court. Gray, the trustee in bankruptcy, was the claimant, and Jennings, the execution creditor, the defendant in the interpleader issue. The County Court judge gave judgment for the defendant, holding that the goods

(1) (1901) 1 K.B., 108; (1902) 1 K.B., 1.

seized were trust property, and therefore, by virtue of sec. 44 of the *Bankruptcy Act*, 1883, did not pass to the trustee in bankruptcy of Mather." *Kennedy* J., in his judgment, a portion of which has already been read, said (1):—"There is a further case, which was before the County Court judge, of *In re Evans*; *Evans* v. *Evans* (2). In that case an attempt was made in a court of equity, by a creditor who had a claim against the administratrix of an estate, who was carrying on the business of the estate, to get a sort of charge upon goods which were in her possession in the course of her business, and which had been supplied by the creditor, and had not been paid for. *Cotton* L.J., in the course of his judgment, says (3):—'The creditor cannot have any direct claim against the intestate's estate. He cannot have anything higher than a right to be substituted to the right of the administratrix to indemnity. Where a business is carried on by a trustee with proper authority, and he buys for the business goods for the price of which he is personally liable, the *cestuis que trust* cannot say to the trustee:—"These goods belong to us, and we will take them, without regard to your right to indemnity." But have the creditors any claim against the goods on that ground? The goods now in question were acquired for the purposes of the business, and went into the business. The infant child of the intestate claims them as belonging to the estate, and in my opinion he has a right so to claim them, subject to the right of the widow to be indemnified out of them against all claims in respect of them so far as she has not lost such right by being a debtor to the estate, and whether she has lost that right is a question depending on the result of the general account.' It seems to me clear that, on the undisputed facts in the present case, the goods in question come within these decisions, and, so far as common law is concerned, they became as they came in assets of the assignor—that is to say, assets of the trust estate. This is plain both from *Abbott* v. *Parfitt* (4), which was cited by Lord *Herschell* in *Dowse* v. *Gorton* (5) and from *Moseley* v. *Readell* (6). If that is so, something follows in equity which, it seems to me, the county court judge has overlooked. While there

(1) (1901) 1 K.B., 108, at p. 112.
(2) 34 Ch. D., 597.
(3) 34 Ch. D., 597, at p. 601.
(4) L.R. 6 Q.B., 346.
(5) (1891) A.C., 190.
(6) L.R. 6 Q.B., 338.

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can be no right of a creditor created in the course of the trading to treat as goods of the trustee goods which form part of the trust estate, still it is equally clear that the trustee has a right and interest in the goods, because he has a right to an indemnity in the nature of a lien over those goods. It necessarily follows, as it seems to me, that the trustee has a right to prevent any person from carrying away those goods, and to say to everybody, including the *cestuis que trust*, 'I am entitled to an indemnity out of those goods, and have, therefore, a pecuniary interest in them.' Of course, when the accounts come to be made up, if it should appear that nothing is due to the trustee on the trading, there is nothing in respect of which he needs to be indemnified, and his lien over the goods is gone; but until the accounts are made up, he is entitled to a lien over all the assets of the estate. A lien (putting aside the question of bankruptcy, with which I will deal directly) has always been held to be sufficient title as against the world to hold the goods until that lien is satisfied, or is proved not to exist." Further on *Kennedy* J. cites the passage from the speech of Lord *Macnaghten* in *Dowse* v. *Gorton* (1), which the learned Chief Justice has already read, and which is of significance for the purpose of the present case. He further says (2):—"Assuming then, as I do, that the execution creditor had a perfectly good judgment against Mather, and that as against him he had no right to seize the goods of the trust estate in Mather's hands, what is the position of Mather's trustee in bankruptcy—Gray? Gray simply represents Mather's estate, and holds his goods in trust for his creditors. Sec. 44 of the *Bankruptcy Act* 1883 is perfectly plain and explicit that Mather's trust property did not pass to his trustee in bankruptcy. It is not divisible among his creditors. That is clear. But, on the other hand, it is equally clear that Mather had a lien or right of indemnity over the assets of the trust estate which will be absolutely defeated if judgment is given in favour of the defendant, the execution creditor. Now, it seems to me settled law that if a person is in possession of goods of which in one sense he is merely a trustee, but over which he has a lien—*e.g.*, as a factor—his trustee in bankruptcy has never been obliged to part with those goods until it has been shown that that

(1) (1891) A.C., 190, at p. 203. (2) (1901) 1 K.B., 108, at p. 116.

lien has been satisfied. In other words, the trustee in bankruptcy of a factor has a right to maintain the factor's lien in the interest of the creditors of the estate. I will quote from the last edition of *Williams on Bankruptcy*, 7th ed. (by E. W. Hansell, 1898), p. 177, as to trusts arising in the course of the business of a bankrupt. 'Thirdly, there is the class of trusts where the bankrupt trustee has not the absolute or general property, but only a special property—*e.g.*, where the property is vested in the bankrupt as an agent, such as a factor, entrusted with goods to sell for his principal, or a banker entrusted with bills for collection. Such property, if distinguishable from the mass of the bankrupt's property, does not pass to the trustee in bankruptcy, but the trustee has a right to enforce any lien or other right on the goods or other property in his possession which the bankrupt factor would have had against his principal had he remained solvent.' Now, it seems to me that the carrying on of a business of this kind gave an equitable lien, and I cannot see why that lien should not have passed to the trustee in bankruptcy of the person carrying on such a business. No doubt the property of the trust estate cannot be said to be property divisible among the creditors, yet it is property over which the bankrupt had a lien. Every trade creditor who has a personal right in this case against Mather, and has the right to prove against Mather's estate in the bankruptcy in respect of debts incurred by Mather in the course of carrying on this business, has also a right through Mather to a satisfaction of that lien which Mather had over what is in one sense, no doubt, trust property. It seems to me that that lien has passed to the trustee in bankruptcy, and I think that judgment should be given in his favour." In my opinion *Kennedy* J. there shows that reason and authority are conclusive in favour of a position entirely parallel to that set up on behalf of Savage in this case.

No tangible reason was given us to show that the giving up of this security would not increase the estate against which the bank proposed to prove, nor, in my judgment, was it possible to set up such a contention with any show of argument. The case for this appeal answers to the test put by *Jessel* M.R. in *Ex parte West Riding Union Banking Co.*; *In re Turner* (1), as cited by

(1) 19 Ch. D., 105.

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the learned Chief Justice, with whom I agree as to the extreme injustice which would be involved if the doctrine set up by the respondent bank, and sanctioned in *In re Stevenson* (1) were finally adopted. The reasons however on which we allow the appeal are quite irreconcilable with those given for the decision in *In re Stevenson* (1), and it must therefore be considered as now overruled.

The circumstances in the appeal by Cordelia Whitelaw being the same, so far as they affect the fact of security and the question of its surrender or valuation, the appeal in that case also must be allowed.

O'CONNOR J. I am of opinion that in both these cases the appeals should be allowed. Mr. Weigall raised some difficult questions in regard to the *Registration of Firms Act* 1892, the *Partnership Act* 1890, and the view which ought to be taken of the conduct of both these appellants in dealing with the proceedings against them. I do not intend to express any opinion upon these questions. They would involve lengthy consideration, and it is not necessary for the purpose of this decision to adjudicate upon them. The ground upon which, in my opinion, the appeals should be allowed in both cases is that the debt in question was a secured debt within sec. 37 of the *Insolvency Act* 1890, which the respondent bank was bound to fully take into consideration before it could be allowed to make the estate of either Savage or Cordelia Whitelaw insolvent. The judgment of the Court below is founded entirely upon the case of *In re Stevenson* (1) which *Hood* J. no doubt was bound to follow. In my opinion that decision is not law. *Hodges* J. appears to have taken the correct view of the position. But looking at the judgment of the Full Court it is evident that the learned Judges regarded *Rolfe* v. *Flower* (2) as an authority directly in point upon the position they had to consider. That case no doubt was a decision upon sec. 39 of 5 Vict. No. 17, the principal Insolvency Act in Victoria at that time, and that section dealt with very much the same matter as sec. 37 of the *Insolvency Act* 1890, that is to say, it not only dealt with proof when the estate was insolvent, but also

(1) 19 V.L.R., 660; 15 A.L.T., 119. (2) L.R. 1 P.C., 27.

with the form of petition on which the estate was adjudged insolvent. But what the learned judges who decided *In re Stevenson* (1) omitted to notice was that *Rolfe* v. *Flower* (2) dealt only with proof. It was a case in which a question arose as to proof between joint and several estates, after insolvency had taken place. The decision had no reference at all to the position of things with which we have to deal now under sec. 37 of the *Insolvency Act* 1890. At the outset we must apply the principles of insolvency law to the construction of sec. 37, bearing in mind that the proceeding with which we are at present dealing is not a proceeding which affects merely the administration of joint and several estates or proofs as between those estates. Sec. 37 deals with the preliminary steps which must take place before a man's property and his right to control it are taken away from him and handed over to a trustee. It appears to me, looking at the section from that point of view, that one of the first principles of insolvency law applies, that is this, that a person who has assets secured in the hands of his creditor which are greater in value than his debts, is not insolvent. The principles which it was sought to apply to the construction of the Act are those laid down in *In re Plummer* (3), and which were dealt with subsequently by *Jessel* M.R. in *Ex parte West Riding Union Banking Co.*; *In re Turner* (4), which has already been cited. In all the cases the rule was laid down as relating to proof after insolvency had taken place. It appears to me that the rule so laid down as a principle of administration has no necessary application to a case in which we are dealing with the preliminary conditions which must be observed before a petitioning creditor can make his debtor insolvent.

Coming to the section itself, it is plain that the giving up of the security as enacted therein does not mean the giving up of the document with all the rights it conveys. It must be interpreted in the sense of lifting the security so far as it affects in any way the interest of the insolvent. In this case, therefore, it would mean that the interest of the insolvent in the joint property

(1) 19 V.L.R., 660; 15 A.L.T., 119.
(2) L.R. 1 P.C., 27.
(3) 1 Phil., 56.
(4) 19 Ch. D., 105.

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of the firm is so far relieved from the obligations of the security that that interest becomes available for his creditors.

It no doubt is essential in considering whether the security should be valued or not, to inquire if when it is given up it will augment the estate of the insolvent. It becomes, therefore, necessary to consider what the security is. When an order for sequestration of the estate of a partner in a joint estate is made absolute, the *person* is made insolvent, and he is made insolvent in respect of all his property, in respect of his separate estate and in respect of his interest in the joint estate. Sequestration dissolves the partnership, and in the insolvent's trustee is vested not only the insolvent's separate property but also his interest in the joint estate. What interest would pass to the trustee in this case? It is established beyond all question by the authorities, which it is not necessary to repeat after the judgment of the learned Chief Justice, that, where a trustee who has an indemnity out of the trust estate, becomes insolvent, that is an interest which passes to his trustee in insolvency. In *Jennings* v. *Mather* (1), *Mathew* L.J. puts the position in a very few words. He says:— "The position originally taken up by the execution creditor left out of sight altogether the right of Mather as a trustee to indemnity out of the trust property, and to hold the goods seized as part of such property until his rights in respect of them are ascertained. That right appears to me clearly to exist, and to form a part of Mather's estate which passed to the claimant as his trustee in bankruptcy."

Now, what was the right which would pass to the trustee in insolvency in this case in the event of Savage's insolvency? It was a lien over the property secured, to which Savage became entitled by reason of his acting under the trusts of the will and by reason of the indemnity. The indemnity is joint and several, and is apart altogether from the interest of the other trustees. It is the sole and separate right of Savage in the one case and of Cordelia Whitelaw in the other case, which, in the event of the insolvency of either of them, passes to the trustee in insolvency.

It was urged by Mr. Weigall that the lien did not accrue until accounts were settled in such a way as to show that there were

(1) (1902) 1 K.B., 1, at p. 8.

moneys owing to the trustee to which the indemnity could be applied. But, in my opinion, it is not necessary to wait until the accounts are settled. That position is settled by many authorities and, amongst others, by the judgment of *Lindley* L.J. in *Johnston* v. *Salvage Asssociation* (1), where he says:—"In equity a contract to indemnify can be specifically enforced before there has been any such breach of the contract as would sustain an action at law. In equity the plaintiff need not pay and perhaps ruin himself before seeking relief. He is entitled to be relieved from liability." To the same effect was the decision of this Court in *Holden* v. *Black* (2). It was not therefore necessary that any payment should have been actually made by Savage or Cordelia Whitelaw for the benefit of the trust estate before they would be entitled to claim indemnity. They were entitled to claim indemnity under the circumstances then existing, and the lien in respect of that indemnity would pass in the event of the insolvency of the estate of each of them. Under these circumstances, therefore, it is clear that the estates of both Savage and Cordelia Whitelaw if made insolvent would include their respective rights, whatever they were, to a lien and to such an interest in the goods as that lien would render necessary. So long as the security remained fully vested in the bank that lien could not be taken advantage of to full extent by their respective trustees in insolvency. If the security, so far as the lien is concerned, were given up, then the whole value of that lien, whatever it might be, would be free for the benefit and advantage of the creditors of their estates. Under these circumstances, therefore, the giving up of the security would go to augment the estates, and therefore this is a security which is contemplated by sec. 37 of the *Insolvency Act* 1890 as one which must be valued.

In these circumstances I am of opinion that the appeals must be allowed.

Appeals allowed. Orders appealed from discharged. Orders nisi for sequestration discharged with costs. Respondents to pay costs of appeals, and, in the case

(1) 19 Q.B.D. 458, at p. 460. (2) 2 C.L.R., 768.