[HIGH COURT OF AUSTRALIA.]

MIDLANE BROS. (AUST.) LIMITED . . APPELLANT;

AND

REID AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF BANKRUPTCY, DISTRICT OF SOUTH AUSTRALIA.

H. C. OF A. 1930.

ADELAIDE, *Sept.* 18, 22.

Gavan Duffy, Rich and Dixon JJ.

Bankruptcy—Money lent to debtor by wife—Partnership—Novation—Agreement between partners for wife to receive share of profits—Statutory deed of assignment by firm—No postponement of wife's claim—Bankruptcy Act 1924-1928 (*No.* 37 *of* 1924—*No.* 39 *of* 1928), *secs.* 85-86.*

A wife lent to her husband several sums of money for the purpose of his business, and it was agreed between them that the husband should pay six per cent interest. The husband subsequently took three of his sons into partnership in the business. The circumstances showed that the father and sons intended that they should be responsible to the wife for the amount of her debt, and the wife realized, and consented to, the fact that the firm had taken over this responsibility. The articles of partnership, to which the wife was not a party, provided that she should receive a share of the net profits of the business but only during the time of and in consideration of her leaving her fixed deposit in the business. The partners executed a deed of assignment pursuant to Part XI. of the *Bankruptcy Act* 1924-1928, and the wife

* The *Bankruptcy Act* 1924-1928 provides, by sec. 85 (1), that "any money . . . of the wife of a bankrupt lent . . . by her to him shall be treated as assets of his estate, and the wife shall not be entitled to claim any dividend as a creditor in respect of any such money . . . until all claims of his other creditors for valuable consideration in money or money's-worth have been satisfied." Sec. 86 provides that "where money has been advanced, by way of loan, to a bankrupt, who was engaged or about to engage in any business, on a contract with the bankrupt that the lender . . . shall receive a share of the profits arising from carrying on the business, . . . the lender of the loan shall not be entitled to claim any dividend as a creditor in respect of his loan . . . until the claims of the other creditors of the bankrupt (other than the wife or husband of the bankrupt) for valuable consideration in money or money's-worth have been satisfied."

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claimed to be entitled to prove for the full amount of her claim and to share in any dividend *pro rata* with the other unsecured creditors.

Held, that there was a novation by which the wife became a creditor of the firm, and that sec. 85 did not operate to postpone the proof of debt of the wife against the joint estate of a partnership of which her husband was a member.

In re Tuff; *Ex parte Nottingham*, (1887) 19 Q.B.D. 88, followed.

Held, also, that as there was no contract with the wife to give her a share of the profits of the firm, her proof was not postponed by reason of sec. 86.

Decision of the Court of Bankruptcy, District of South Australia (Judge *Paine*) affirmed.

APPEAL from the Court of Bankruptcy District of South Australia.

Clara Louise Reid lent to her husband, Thomas Burns Reid, various sums of money for the purpose of his business as a furniture dealer. It was agreed between them that the husband should pay six per cent interest. On 31st December 1921 the balance due to Mrs. Reid was £5,682 0s. 1d. During that year the husband took into partnership three of his sons, and this firm was registered as Tom Reid & Sons. The new firm took over the old firm's business as from 1st January 1922. The articles of partnership implied that the partners were to take over the existing liabilities of the business, and various other circumstances showed the intention of the members of the firm to assume the liability to Mrs. Reid. Mrs. Reid realized, and consented to, the fact that the firm had taken over the responsibility for the loan. The articles of partnership contained the following provision:—"6. The net profits of the said business shall be divided as follows:—The said Thomas Burns Reid shall receive eight-fifteenths Clara Louise Reid the wife of the said Thomas Burns Reid shall receive four-fifteenths the said Walter Gliddon Reid shall receive one-fifteenth the said George Robbins Reid shall receive one-fifteenth and the said Clarence Cecil Reid shall receive one-fifteenth Provided however that the said Clara Louisa Reid shall receive her share of net profits as aforesaid only during the time of and in consideration of her leaving her fixed deposit in the said business But the receipt by the said Clara Louise Reid of a share of profits shall not be deemed to constitute her a partner in the said firm And in the event of the said Clara

Louise Reid (or her executors administrators or assigns) withdrawing her fixed deposit the net profits of the said business shall be divided as follows: The said Thomas Burns Reid shall receive nine-fifteenths the said Walter Gliddon Reid shall receive two-fifteenths the said George Robbins Reid shall receive two-fifteenths and the said Clarence Cecil Reid shall receive two-fifteenths And in any event all losses if the partnership earnings are insufficient for the purpose shall be borne by the said Thomas Burns Reid." Mrs. Reid was not a party to the articles of partnership, and did not know of the provisions of such articles; nor did these provisions show any intention to contract with her to give her a share of the profits of the firm. The firm assigned its joint estate to trustees for the benefit of its creditors by a deed of assignment pursuant to Part XI. of the *Bankruptcy Act* 1924-1928. Mrs. Reid claimed to be entitled to prove against the joint estate for the full amount of her claim, and to share in any dividend *pro rata* with the other unsecured creditors. Other material facts sufficiently appear from the judgment hereunder.

In the Court of Bankruptcy, District of South Australia, his Honor Judge *Paine* determined and ordered that the proof of debt of Mrs. Reid should be admitted against the joint estate for such amount as might be found to be due to her upon an account of all moneys on deposit with the firm at the date of the deed of assignment, with accrued interest thereon at the rate of six per cent per annum to that date, less any amounts then due by her to the firm but excluding thereout any amount or amounts credited to her in the books of the firm as representing a share in the profits of the firm and interest credited thereon; and that she was entitled to participate equally *pro rata* with the other unsecured creditors in any dividend payable by the joint estate.

From this decision the appellant, representing the unsecured creditors of the firm, appealed to the High Court. The respondents were Stanley McGregor Reid and Frank Alick Thomas (the trustees of the deed of assignment), Clara Louise Reid and the Bank of Adelaide (an unsecured creditor of the joint estate which claimed to be an assignee of the claim of Mrs. Reid against the joint estate).

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Travers, for the appellant. Mrs. Reid's claim is postponed either under sec. 85 or under sec. 86. Her loan was to her husband, not to the firm. There was no novation, because the husband's liability was never discharged and no fresh liability was incurred by the firm (*In re Tuff*; *Ex parte Nottingham* (1)). Any new liability on the part of the firm could arise by contract only. The wife made no express contract with the firm. The only possible contract would be by the husband as her agent, and, if he made a contract for her, she is postponed under sec. 86, for the money was lodged with the partnership on a profit-sharing basis. Sec. 86 applies where only part of the consideration is a share of the profits (*In re Stone* (2)). Judge *Paine* has misread *Matthews* v. *Ruggles-Brise* (3). If the husband remained the debtor, there was no novation. If there were novation, she is bound by the agreement made on her behalf. If the husband entered into a contract without her authority, her remedy is to apply for rescission.

Ligertwood K.C. (with him *S. H. Lewis*), for the respondents. The question whether or not there was novation is a question of fact already determined by the lower Court. For the principles applicable with regard to novation, see *British Homes Assurance Corporation Ltd.* v. *Paterson* (4). But the new contract was simply that the firm would take over the liability with interest at six per cent. The wife was not a party to any agreement by which she was to receive payment out of the profits. The husband was not an agent of the wife; the evidence does not warrant such a finding, and actually the Judge has found to the contrary.

Cur. adv. vult.

Sept. 22.

THE COURT delivered the following written judgment:—

This is an appeal from an order of Judge *Paine*, sitting in Bankruptcy, by which it was determined and ordered that a proof of debt of the respondent Clara Louise Reid should be admitted against the joint estate which a firm, styled Tom Reid & Sons,

(1) (1887) 19 Q.B.D. 88.
(2) (1886) 33 Ch. D. 541.
(3) (1911) 1 Ch. 194.
(4) (1902) 2 Ch. 404, per *Farwell* J.

had assigned to trustees for the benefit of its creditors by a deed of assignment pursuant to Part XI. of the *Bankruptcy Act* 1924-1928. The order appears to have been made as under sec. 206 of the Act.

The firm of Tom Reid & Sons, which was formed as from 1st January 1922, consisted of the husband and three sons of the respondent Clara Louise Reid. The claim which she sought to prove was for money lent and for interest thereon at six per cent. But originally the principal had been lent to the husband by the wife before the husband took their sons into partnership and while he carried on business alone. The first question upon which the wife's claim depended therefore was whether the partnership had become indebted to her at all, or whether the debt remained that of the husband alone.

"An agreement by an incoming partner to make himself liable to creditors for debts owing to them before he joined the firm may be, and in practice generally is, established by indirect evidence. The Courts, it has been said, lean in favour of such an agreement, and are ready to infer it from slight circumstances (*Ex parte Jackson* (1); *Ex parte Peele* (2). See, also, *Rolfe* v. *Flower, Salting & Co.* (3)); and they seem formerly to have inferred it whenever the incoming partner agreed with the other partners to treat such debts as those of the new firm (see *Cooke's Bankruptcy Law*, (8th ed.), p. 534, citing *Ex parte Bingham* and *Re Staples, Ex parte Clowes* (4)). But this certainly is not enough, for the agreement to be proved is an agreement with the creditor; and of such an agreement an arrangement between the partners is of itself no evidence (*Ex parte Peele*; *Ex parte Parker* (5). See, also, *Ex parte Freeman* (6); *Ex parte Fry* (7); *Ex parte Williams* (8))" (*Lindley* on *Partnership* (9th ed.), p. 276). In *Rolfe* v. *Flower, Salting & Co.* (9) Lord *Chelmsford*, in delivering the judgment of the Privy Council, after saying that there seemed no reasonable doubt that the insolvent partnership in that case, at the time of its formation, assumed the debts and liabilities of the former firm

(1) (1790) 1 Ves. Jun. 131; 1 R.R. 91; 30 E.R. 265.
(2) (1802) 6 Ves. 602; 31 E.R. 1216.
(3) (1865) L.R. 1 P.C. 27.
(4) (1789) 2 Bro. C.C. 595; 29 E.R. 327.
(5) (1842) 2 M. D. & DeG. 511.
(6) (1819) Buck 471.
(7) (1817) 1 G. & J. 96.
(8) (1817) Buck 13.
(9) (1865) L.R. 1 P.C., at p. 44.

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from which it took over the business, including a debt due to the proving creditor, went on to say :—" The only remaining question to be considered is whether " the proving creditor, " 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* (1), 'A very little will do to make out an assent by the creditors to the agreement.' " (See, too, *Hart* v. *Alexander* (2).)

In this case there are many circumstances to show that when the partnership was formed, and throughout its duration, the father and his sons intended that they should all be responsible to his wife for the amount in which the husband was indebted at the time the partnership was formed together with interest at six per cent, the rate which had been agreed upon between husband and wife. The articles of partnership were not very full, but they imply that the sons were to take over the liabilities of the business theretofore conducted by the father, and clause 6 contained the following stipulations :—" The net profits of the said business shall be divided as follows :—The said Thomas Burns Reid shall receive eight-fifteenths Clara Louise Reid the wife of the said Thomas Burns Reid shall receive four-fifteenths the said Walter Gliddon Reid shall receive one-fifteenth the said George Robbins Reid shall receive one-fifteenth and the said Clarence Cecil Reid shall receive one-fifteenth Provided however that the said Clara Louise Reid shall receive her share of net profits as aforesaid only during the time of and in consideration of her leaving her fixed deposit in the said business But the receipt by the said Clara Louise Reid of a share of the profits shall not be deemed to constitute her a partner of the said firm. And in the event of the said Clara Louise Reid (or her executors administrators or assigns) withdrawing her fixed deposit the net profits of the said business shall be divided " in another manner therein set out. The wife is not a party to these articles, and, according to the evidence and the findings of the learned Judge, she did not know and never learnt that she was o be credited with a share of the profits. In the firm's books of

(1) (1817) Buck, at p. 16.

(2) (1837) 2 M. & W. 484 ; 150 E.R. 848.

account a deposit account was opened in which the wife was credited with the balance of her husband's indebtedness to her as at 1st January 1922, and to this account interest was regularly credited throughout the partnership, as also was a share of the profits. In July 1925 one of the members of the firm, a son, in negotiating with a bank for an overdraft for the firm, produced to the chief clerk of the bank a balance-sheet which upon the liability side showed an item described as "family interests." In answer to the chief clerk's question what this item represented, he said it was a debt to his mother. The chief clerk in his presence noted opposite the item "Mrs. C. L. Reid deposit at 6 per cent." The bank asked for a guarantee from the wife, and this she gave. This evidence can leave no doubt of the intention of the members of the firm to assume a liability to the wife, and of their belief that such a liability to her had been incurred by them as partners. But the question whether this intention was communicated to the wife and assented to by her is by no means so clear. She was not a business woman, and plainly she dealt with her husband and sons more on a footing of relationship than of ordinary business. She had inherited the money which she lent to her husband. When she lent it she appears to have understood clearly enough that it was a loan to him for the purpose of his business, bearing six per cent interest. Actual payments of interest were not made to her, but her husband told her that it was accumulating. Later she was told that her sons had been taken into partnership in the business, and for five years afterwards the business was conducted without any material incident. No accounts were furnished to her. One of the sons made up her income tax returns and usually signed it on her behalf. On one occasion she signed it herself, but on no occasion did she read or understand the contents of the return. In July 1925 she signed a guarantee of the firm's account with its bank. In December 1927 the bank requested the firm to obtain from her a letter to it undertaking not to withdraw or accept payment of the firm's debt to her. A letter was typed, the material part of which expressed an undertaking by her not "to withdraw or accept payment of any debt or portion of any debt due or becoming due to her by the firm without" the bank's consent.

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None of the debtors was called as a witness. The wife herself, however, gave evidence and was cross-examined. In evidence-in-chief she was allowed to say :—" I knew afterwards that my husband did take two or three of his sons into partnership. I agreed to allow my money to remain in the business on the same terms." In cross-examination she assented to questions directed to show that she was passive and left the whole matter in her husband's hands. The learned Judge thought she was willing and endeavoured to give the Court all the information she possibly could, but that her mind at the time she gave her evidence was not by any means clear, and he did not accept in their entirety the literal answers she gave to counsel's questions, and he concluded that "she realized and consented to the fact that the firm had taken over the responsibility for the loan." In our opinion, this inference was open to the learned Judge upon the circumstances proved, and we ought not to disturb it. In substance it means that she understood that her husband and her sons intended to become her debtors in substitution for the husband alone, and that she intended to accept them. This amounts to a novation by which she became a creditor of the firm.

Sec. 85 of the *Bankruptcy Act* does not operate to postpone the proof of debt of the wife against the joint estate of a partnership of which her husband is a member (*In re Tuff*; *Ex parte Nottingham* (1)). But the question remains whether the proof of the wife is to be postponed to the unsecured creditors by reason of the provisions of sec. 86 of the *Bankruptcy Act*. If the contract of loan with her husband and sons resulting from the novation contained a term by which she became entitled to a share of the profits, her proof must be so postponed. But on her side, she did not know of the provisions of the partnership deed and, on the side of the firm, no intention appears from those provisions to contract with her to give her such a share. The provisions are expressed in a form which suggests rather that the partners, father and sons, agreed between themselves that they should allocate to her a share of profit with a proviso that they should cease to do so, when, and if, she withdrew her deposit. In any case, on the facts

(1) (1887) 19 Q.B.D. 88.

found by the learned Judge, they did not communicate to her any intention of conferring upon her a right to the profits, nor of admitting her to participate in profits in consideration of the loan. There was no suggestion that the deposit should not remain payable on demand and, if for any reason it became desirable for her to call it up, it would have been immediately payable. In these circumstances, we think the learned Judge was entitled to infer, as he did, that she did not contract for a share in the profits.

The appeal must be dismissed with costs.

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Appeal dismissed with costs.

Solicitors for the appellant, *Villeneuve Smith, Kelly, Hague & Travers.*

Solicitors for the respondents, *Joyner, Phillips & Joyner*; *Varley, Evan & Thomson*; *Baker, McEwin, Ligertwood & Millhouse.*

C. C. B.

Appr *Fermanis* v *Cheshire Holdings Pty Ltd* (1990) 1 VAR 373

Appl *Fermanis* v *Cheshire Holdings Pty Ltd* 20 ATR 1862

Dist *Taxation, Federal Commissioner of* v *Everett* (1980) 143 CLR 440

[HIGH COURT OF AUSTRALIA.]

HOWEY . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

H. C. OF A. 1930. MELBOURNE, *Oct.* 29, 30. SYDNEY, *Dec.* 8. Isaacs C.J., Rich, Starke and Dixon JJ

Income Tax (Cth.)—Trustee—Separate assessments—Direction to trustee to remit proportion of income to settlor to be expended on maintenance and education of children — Assessment on total amount so received by settlor — Claim for separate assessment on amount expended on each child and on amount remaining unexpended—Income Tax Assessment Act 1922-1928 (*No.* 37 *of* 1922—*No.* 46 *of* 1928), *secs.* 4, 31 (2), 89.

The appellant, being entitled to an equitable life estate in certain land and buildings in Melbourne, executed a settlement vesting his interest in a trustee in trust for the settlor's two children, and the settlor directed that