

THE
LAW JOURNAL REPORTS

FOR
THE YEAR 1841 :

COMPRISING
REPORTS OF CASES

IN THE COURTS OF
**Equity, and Bankruptcy, Queen's Bench, Common Pleas,
Exchequer of Pleas,
Exchequer Chamber, and the Hall Court,**
And NOTES of JUDGMENTS in the House of Lords,

FROM
MICHAELMAS TERM, 1840, TO TRINITY TERM, 1841,
BOTH INCLUSIVE.

EDITED BY MONTAGU CHAMBERS, OF LINCOLN'S INN, ESQ.
BARRISTER-AT-LAW.

VOL. XIX.

NEW SERIES—VOL. X.
PART I. EQUITY AND BANKRUPTCY.

LONDON :

Printed by James Holmes, 4, Took's Court, Chancery Lane.

PUBLISHED BY E. B. INCE, 5, QUALITY COURT, CHANCERY LANE.

MDCCCXLI.

1841 Jan. 12, 14, 16, 20 / *Ex parte* BUDD *re* BUDD.

Act of Bankruptcy — 1 & 2 *Vict. c. 110. s. 8* — *Affidavit of Debt*.

Where from various arrangements to which a creditor is privy, the twenty-one days allowed for securing a debt under 1 & 2 Vict, c. 110. s. 8, has been allowed to expire, he will not be allowed to found an act of bankruptcy upon such default, especially where the Court believes that the affidavit of debt was originally filed for other purposes than that of proceeding to bankruptcy.

This was the petition of the bankrupt, a commission agent for the sale of metals, at Liverpool, who had formed a partnership with a Mr. Cooper Ewbank, the terms of which had been negotiated by his uncle, Mr. Henry Ewbank, who appeared to have supplied the capital of £2,000 for his nephew. About the end of the year 1836, the partnership extended their business to the manufacturing of zinc, and took premises at Acton for carrying on the manufacture, which, during the absence of the petitioner, H. and G. Ewbank purchased for the sum of £1,200 and paid the vendor £1,200, which they borrowed from Dr. Christopher Cooper, another uncle of Cooper Ewbank, his partner. The petitioner at first objected to the purchase, but ultimately confirmed it, and the partners gave their joint bond to Dr. C. Cooper. The firm of Budd & Ewbank occasionally required a larger capital than the one advanced, and occasionally drew upon the firm of Ewbank & Cordes. It appeared that several negotiations were entered into between H. Ewbank and the petitioner, which ended in Cooper Ewbank being admitted into a half share of the profits of the partnership, H. Ewbank, the uncle, advancing £4,000 to make up his nephew's share of the capital. In 1840, various disputes arose between H. and C. Ewbank and the petitioner, and it was agreed that a dissolution of partnership should take place, but the terms were not agreed upon; and the petition alleged that H. Ewbank, for the purpose of enabling him to command a dissolution of partnership, made a demand for a sum of £5,000 advanced, without considering the £4,000 advanced to Cooper Ewbank, his nephew, as a separate debt of his. This the petitioner resisted, but, under a threat of bankruptcy, was induced to sign an undertaking, not to make any payments except those stipulated, and for the necessary expenses of the business. Several letters were sent by Henry Ewbank, urging a dissolution of the partnership, and threatening to make the petitioner a bankrupt, in case of non-compliance, and the affidavit of debt was filed and served upon the petitioner, and on the same day Henry Ewbank renewed his proposals for a dissolution; and an agreement was entered into between the parties, which went off, and the fiat was issued the 11th of September. The affidavits were very long, and are referred to in the judgment of Sir J. Cross. The petition prayed a supersedeas and assignment of the bond.

Mr. Swanton and Mr. Rolt, for the petitioner. — There is no act of bankruptcy to support this fiat. Both debtor and creditor entered into an agreement for the satisfaction of this debt. Both parties gave instructions to the solicitor to prepare the deed. Then an agreement having been once entered into, and being terminated, the matter cannot be left as if there had been no agreement. After the expiration of the twenty-one days, the creditors treated the agreement as one still to be carried out by the deed. This agreement, therefore, must be looked upon as a satisfaction of the

debt. For it is not necessary that in every case there should be a legal security for the debt. An *agreement* to give a security may be a *security* to the satisfaction of the debtor. But supposing the debt not to have been secured as the statute requires, still the creditor, who has acquiesced in the arrangement, and been privy to the delay, cannot take advantage of it, as an act of bankruptcy. In *Ex parte Brown (1)*, this Court was of opinion that the party could not take advantage of the statute, he having acquiesced in an arrangement. That case is, in every essential point, identical with this. See also *Attwood v. Banks (2)*, for the remarks of the Master of the Rolls. It is perfectly clear that this affidavit was filed for no other purpose than compelling the petitioner to dissolve partnership, and relinquish the zinc trade to the petitioning creditor's nephew.

Mr. Bethell and Mr. Anderdon, for the respondents.—Three points arise in this case. First, is there an act of bankruptcy? Secondly, has the petitioning creditor done anything to prevent him taking advantage of the statute? Thirdly, was the fiat sued out for any other than a proper object? Now, as to the first point, the 8th section of 1 & 2 Vict. c. 110. directs that the debtor shall give security for his debt to the satisfaction of the creditor; and that if he fail to do so within the twenty-one days, that will be an act of bankruptcy. Can it be said then that this debt was satisfied, or that security was given, within the meaning of the statute? as it is perfectly clear that it was not until the 14th of August that James Ewbank knew anything of the matter. If the Court think there was a valid agreement, it is conceded there will be no act of bankruptcy. But an agreement must be mutual. Now, would Mr. Budd, at the expiration of the twenty-one days, have been in such a situation as to have been able to have filed a bill in equity on the 18th of August, to have compelled Mr. Ewbank to have signed the deed? The contract on the part of Mr. Budd was, that he was to obtain his brother's consent. He must have alleged that his brother had assented to the deed; also, that the other party had assented: and this allegation he could not have made, for the agreement on the part of the brother was not completed until after the twenty-first day. What would have been the answer? 'You have let all the time pass, and you have not obtained the consent which you have undertaken to do, and which we could never have any other means of ascertaining than from the bankrupt, whether the terms had been complied with'. Can it be said that, this was such an agreement as secured the debt according to the meaning of the statute? This state of things will shew the Court how very necessary it is to draw the distinction between the meaning of treaty negotiation and agreement; for if every negotiation is to be considered an agreement, it will defeat entirely the intention of the legislature, on the score of humanity, of allowing the debtor and creditor time for coming to an arrangement within the twenty-one days; for if these things were held to be an agreement, who would even venture to hold any intercourse with a debtor against whom he had filed an affidavit?

[Sir J. Cross.—Put it this way, 'I expect a cargo to arrive in the course of a few weeks; I will assign you my interest in that', will not that be satisfaction, although not executed ?]

Yes, that would be, but here there is no such agreement. In the case of *Ex parte Brown*, there was a withdrawal of the demand; but here there is no withdrawal of the demand during any period of the time. Suppose a creditor files his affidavit, and meets his debtor, who says, 'I will give you a mortgage on my property worth

£10,000' and the creditor agrees to accept it, but does not get the mortgage, surely the agreement is not a security. Suppose, if instead of offering a mortgage upon his own estate, he offered one upon the estate of A B, what situation would the creditor be in at the end of twenty-one days? The legal remedy by fiat is lost, and he is driven to a suit in equity. In this case, the bankrupt pretended to be authorized to act for parties for whom he was not authorized, and it was not until after the expiration of the time, that it was ascertained he was not authorized by the parties. Mr. Watson's letter demands the completion of the deed, &c. within the twenty-one days, and what is his admission after the time is expired, 'Your notice, which you have refused to withdraw, has deprived me of the opportunity of raising the money'. Here is an acknowledgment of refusing to withdraw the notice. It may be confidently anticipated, that the Court will hold that there was nothing during the twenty-one days, which rendered Mr. Ewbank inequity disqualified to prosecute his fiat. There are two letters of the 6th and 7th of September, where he expresses in the most frank manner that an act of bankruptcy had been committed, and where no shadow of complaint is made. But there is another circumstance, which evidently shews fraud on the part of the bankrupt, and which opened Mr. Ewbank's eyes, and made him suspicious. By the deed, the mill and all the fixtures were to have been assigned to Ewbank, but Budd had wished to keep the rollers, which were stated to be worth only about £150, whereas, afterwards, Mr. Budd proposed to assign these pillars and rollers for £500. Here was certainly a misrepresentation as respected the value of the machinery. It is therefore contended, that the petitioning creditor has only done that which he had a perfect right to do, issued a fiat against a firm which was notoriously insolvent; and no possible good can arise from a supersedeas of this fiat.

Jan. 20.—SIR J. CROSS.—In this case an affidavit of a debt of £5,500 has been filed, and a demand made of immediate payment, pursuant to the late act for abolishing arrest; and the petitioner has been declared bankrupt, for not paying the debt within twenty-one days, as the act requires. On the part of the petitioner it is contended, first, that the debt in question was greatly overcharged; secondly, that the debt was secured to the satisfaction of the creditor, as the act directs, within twenty-one days; thirdly, that the creditor consented to postpone the payment beyond the twenty-one days; fourthly, that the fiat was sued out for other purposes than those by law intended. I find the first two of these objections involved in a mass of conflicting testimony, and I shall therefore confine my observations to the two latter, about which there is no contradictory evidence : all the facts relating to them being distinctly admitted on both sides, they lie in a narrow compass. I have therefore only to consider, whether the payment was postponed with the consent of the creditor, and whether the fiat was sued out for purposes for which the law does not intend it. The debt in question was a joint debt, owing by the petitioner Budd and his partner Cooper Ewbank to Henry Ewbank and his partner Cordes; and the same notice and demand was served upon both joint debtors, on the 28th of July, and the twenty-one days expired on the 18th of August. As soon as their demand of prompt payment was made, the parties proceeded to negotiate for a compromise of the debt, and for other purposes; and it appears, that about the same time, and in furtherance of such negotiation, the respondents Henry Ewbank and John Budd delivered their mutual proposals, in writing, to Mr. Watson the solicitor, with instructions from Henry Ewbank to prepare a deed in conformity thereto; and the latter, in his affidavit, states, 'that in pursuance of these arrangements the draft of a deed was prepared by Mr. Watson, as the solicitor for Ewbank and Cordes, and also

for his nephew Cooper Ewbank, and by Mr. Bevan, as solicitor for John Budd'. The nephew took no part in the arrangements, but left everything to his uncle, who had originally placed him in the partnership, and lent money thereto for carrying it on, and the avowed object of his uncle then was, not to enforce the prompt payment of the debt, which would have entirely defeated his intent, but to withdraw his nephew from the partnership, to liberate him from the partnership debts, and to enable him to continue alone in the zinc trade, then carried on in partnership with John Budd. After having so given Mr. Watson full authority to conclude the negotiation in due form of law, Henry Ewbank left Liverpool and returned to London, and Mr. Watson says, that about the end of July, or early in August, he accordingly prepared the draft of a deed, the terms of which were finally settled between him and Mr. Bevan; and that on the 18th of August he, Watson, caused the deed to be engrossed. So that it is clear that the terms on which the debt in question was to be satisfied, were completely agreed upon nearly a whole week before the expiration of the twenty-one days, and nothing then remained but the formal execution of the deed by the several parties thereto, being seven in number. That deed provides for the conveyance of the mill, machinery, utensils, and dwelling house and premises at Acton, where the zinc trade was carried on, to Henry Ewbank, 'in full satisfaction' of the debt in question. And the deed further provides for the dissolution of the partnership, and for giving the nephew the exclusive right of possession of those premises from the 3rd of August, and certain creditors of the partnership thereby agree to release the nephew, and to accept in his place the brother of John Budd, as a guarantee for the payment of their debts, and the brother covenants for the payment of them. When the deed was engrossed, the parties being so numerous, and dispersed in various places, it was not found practicable to obtain their signatures within the few days that remained of the twenty-one: nevertheless it was shortly afterwards duly executed by John Budd and his brother, and the several creditors parties thereto; and then Watson, on the 27th of August, transmitted the deed to Henry Ewbank for his signature, but he, however, instead of executing it, sent, on the next day, a letter to Mr. Watson, saying, 'I received yours, with the deed, but before I sign it, I must have my requisition complied with'; and he then goes on to insist on the previous delivery of various articles conveyed to him by the deed, and further insisting, that 'the zinc trade should be entirely relinquished to his nephew'. The meaning of which last expression he more fully explains by his affidavit in these terms :— 'It formed a very material consideration in the view of this deponent, *in acceding to an arrangement whereby he gave up a very large debt*, that he should thereby secure to Cooper, his nephew, the exclusive benefit of the zinc trade free from the future competition of John Budd'. So that far from then repudiating the deed as executed after an act of bankruptcy, and therefore void, he signifies an intention to sign it, and he insists upon the entire performance of its stipulations, and also upon a new concession in restraint of the future trading of the petitioner, not included in the deed, nor in the written proposals handed to Mr. Watson before the deed was drawn. Afterwards various discussions took place between the parties, which do not appear to me at all material to the questions under consideration; and on the 11th of September, the fiat against the petitioner alone was sued out by Henry Ewbank, who seems to have thought that it was entirely in his option whether or not the petitioner and his partner, or either of them, was to be deemed bankrupt on the twenty-second day, according to the statute, and also whether the fiat should be prosecuted at all; and the petitioner himself seems to have thought so too, until he was better advised, insomuch that several days after the fiat was issued, the solicitor for Henry Ewbank,

as it is alleged in the petition, and not denied, called upon John Budd to make another, and what he called a final proposition, and produced a letter from the petitioning creditor, to the effect that the proposal the solicitor was then instructed to make, was the only alternative to keep the petitioner from the Gazette, and that was, that his brother should pay Henry Ewbank £400, and that the petitioner should undertake not to enter into the zinc trade again, and should submit to other terms therein mentioned, which he refused, but without questioning the right of the petitioning creditor to carry his menace into execution. Under these circumstances, it appears to me that the affidavit of debt was filed, and the demand of immediate payment made, without any intent of enforcing it, for that would have been equally injurious to both the parties; but it was done for the purpose of effecting a dissolution of the partnership, upon terms more advantageous to the one than to the other, and which was, indeed, the effect of the subsequent negotiations. Be that, however, as it may, I find that as a party to the treaty, the petitioning creditor was privy and consenting to the suspension of the payment beyond twenty-one days, which he has since set up as an act of bankruptcy, an act of which, I think, he has no right to complain, and of which he cannot legally avail himself; and I consider that, for this reason alone, the fiat cannot be supported. And I moreover find, from the facts I have mentioned, and other undisputed facts before me, that this fiat was ultimately sued out by the petitioning creditor, in order to evade the execution of the deed, to effect an unconditional dissolution of the partnership, and to disable the petitioner from carrying on the zinc trade in future, in competition with his partner, which he could never do as long as the petitioning creditor should think fit to withhold his certificate. Besides, I think this course of proceeding was unjust, and contrary to good faith towards all the other parties who have executed the deed, and has involved their rights and interests in great uncertainty and confusion while the fiat remains in force. If the petitioner was to be deemed a bankrupt for not paying the debt within twenty-one days, so also was his partner; and I conceive it was the duty of the petitioning creditor, in that case, to sue out a joint fiat, and not a separate one, which by law entitles him alone to take any benefit from the separate estate of the petitioner, to the exclusion of the other joint creditor, until his own debt is paid in full. I consider therefore that the petitioner has clearly established two at least of his objections to the fiat, and that it is my duty to declare that it must be superseded, with costs against the petitioning creditor, as prayed by this petition.