MOORE COLLEGE: BROUGHTON LETTERS

Broughton to Coleridge, 1/5/1849

My dear Coleridge: The Letters forwarded by the "Penyard Park" and "Thomas Arbuthnot", explaining to you the alarming position in which I have been placed by the threatened suit against me by the Bank of Australasia for the sum of £219182-5-1, with interest going on at the rate of 10%, will have awakened in you I am sure so much sympathy and anxiety for me as to make you wish to hear again. As yet I have nothing definite to say. No decision whatever has yet been come to. But I will endeavour to give a succinct account of the legal question, which perhaps, although not drawn up by a lawyer may enable those eminent professional persons to whom you may have an opportunity of mentioning it, to form some judgment as to the probable issue. There are two points. First that the Exors of Mr Moore (who was a shareholder in the Bank of Australia) had one-half years Dividend accruing after his death placed to their credit, and used it: whereby they were rendered partners and liable. Secondly that the Executors are liable under an Act of the Colonial Legislature (4 Vict No 13 Secs 7, 8) as having been enrolled in the List of proprietors recorded in the Supr Court. As to the first point it is indisputable that without any communication with the Trustees, or any application from them, the Bank did on 13 Janry 1842 place to their credit a sum of £123.4 which was afterwards explained to be 6 mos Dividend on Mr Moore's Shares but after his death. Our error was in not understanding the legal consequences of allowing this sum to remain with us. We regarded it as a mere error of account, which we gave notice of to the Bank, and expected they would notify the mistake in the ordinary way and pay themselves out of other funds belonging to the Estate which were in their charge. But they did not: nor did we pay the money back, as we ought to have done; and should have done if we had known as much as we know now. On the 31st of January 1842 the Bank, learning that we had not signed the Deed of Settlement, notified that no more would be paid to us. They withheld the subsequent Dividends (until the stoppage took place in 1843) and

Broughton to Coleridge, 1/5/1849 (cont 2)

placed them in another Bank to the account of the Executors with a prohibition against their taking them unless they consented to sign the Deed. We have had the opinion of two Counsel Messrs Michie and Lowe. The latter says "I am of the opinion that the Executors of the late Mr Moore are personally liable to the Bank of Australasia as partners in the Bank of Australia. I do not found this opinion on the fact of the Executors having received a dividend accruing after the death of Mr Moore, because it appears to me that, though the receipt of such Dividend would be strong evidence that the Executors were dormant partners, at the time of such receipt, that partnership had been put an end to by the refusal of the Bank to pay nay more Dividends until the Executors should execute the Deed." Mr Michie takes no notice of this, but goes upon a reverse view of the subject: viz not the refusal of the Bank to pay, but the refusal of the Executors to sign: "this refusal" he says "I think did not opso facto put an end to the interest of the Trustees, or work a forfeiture". Both these opinions therefore might be true, and yet not decide the case: because they regard two totally different questions. It does certainly strike me as an inconsistency that the Directors of the Bank should seek to involve me as a partner, upon the ground that although I had not signed the Deed I had done that which in law is held equivalent in taking the Dividend: and yet should withhold the subsequent Dividends unless I would sign. If the former act made me a partner, then they ought to have gone on paying to me as they did to all other existing partners. But whether this act of the Bank put an end to the partnership and so released me, as Mr Lowe thinks. I must leave to others wiser than myself to determine. On the second point viz the enrolment of the Executors as members of the Bank under the Colonial Act, I will copy out the sections, as much seems to turn upon the wording. The Act is intituled "An Act to provide for the periodical publication of the liabilities and assets of Banks in New S.W. and the registration of the names of the proprietors thereof."

Broughton to Coleridge, 1/5/1849 (cont 3)

By Section 7 "it is enacted that the managing director of each such banking company or firm, shall within 30 days from and after the first day of January in every year, cause a true and correct List of the names of all the persons who shall be then existing proprietors or members of such companies or firms respectively, with their respective places of abode and descriptions, to be recorded on oath in the Office of the Registrar of the Supr. Court: and the same shall be open to inspection by any person on payment of a fee of 1s etc." The next Section proceeds, "And be it enacted that every person whose name shall be so recorded as aforesaid shall be considered taken and held to be a member or proprietor of the banking company or firm in which his name shall be recorded as aforesaid; and shall be liable to be sued as such until a new list of the names of the members or proprietors of such banking company or firm shall be recorded as aforesaid, or until he shall have given notice in the New S.W. Government Gazette of his retirement from such banking company or firm." On the 29th January 1841 the list of Proprietors was filed on oath in the office of the Supreme Ct. after the following form

Name	Description Residence
Thomas Moore	(Representatives of the late)

?? → S? Counsel's opinion was asked whether this made me liable. The registration was repeated, I may observe, in the same terms, in January 1842 and January 1843. Mr Lowe says "I rest my opinion entirely on the Act by which it is enacted that every person whose name should be so recorded as aforesaid (that is in a list to be verified on oath filed in the S. Court) shall be considered taken and held to be a member of the Banking Company or firm and liable to be sued as such etc. As the names of the Executors appeared in these lists I can not doubt their liability; - and as the debt is contracted by the Bishop in his personal or private capacity, I am of opinion that his personal property will alone be liable to execution. Under these unfortunate circumstances the best advice I can give the Bishop of Sydney is not to increase his loss by fruitless

Broughton to Coleridge, 1/5/1849 (cont 4)

litigation, but to make the best terms with the Bank." The other barrister says "although I cannot agree with Mr Lowe that the mere insertion of the name of any party in the enrolled List of proprietors must render him liable, I am yet disposed to think that under the circumstances of the present case, the fact of the Trustees and Executors of Mr Moore being returned in that list is an important piece of evidence against them in any proceeding brought with the object of making them liable to the B. of Australasia judgment. I am inclined to think there is a slight case to go to a jury against the Trustees upon the question of partnership: and for the reasons stated by Mr Lowe. The case, if successful, can only be against the Trustee personally. But the case intrinsically is one of so much hardship, that I do not think any Jury (with whom the question of partnership must rest) would ever find a verdict for the Plffs. The judgment, whether for damages or costs, could only be satisfied out of the private property of the Defdt." This opinion, that no jury would find a verdict against me on account of the hardship of the case, did not appear to me to suggest sufficient ground of security for me to undertake a defence upon such a critical question, and against such a body as the Bank of Australasia. I had made up my mind therefore that my ruin was inevitable: and during several days had been in communication with my Solicitor that he might ascertain what terms of compromise, if any, the Bank would grant me. But during this interval I was led to consider more attentively the terms of the Act of Council, and to compare them with the legal opinions; and hereupon I was struck with what appeared to me a want of that careful exactness in them which, were I a lawyer, would not satisfy me in advising a client. It appeared to me that the exact import of the Act was not supplied by Mr Lowe's quotation (which his brother barrister seemed to have followed without fresh reference to the original) and that the terms of the Act had not bee complied with in some ← N ? particulars which might be of importance. For example I observed the words were

Broughton to Coleridge, 1/5/1849 (cont 5)

not "A List" as cited; but "a true and correct List"; meaning that it should contain no names but of persons who should be "then existing partners". Now in January 1841 we certainly were not so: inasmuch as at that time we had done no act whatever which could afford a pretext for saying we were partners. The same in January 1842: when we had not used the Dividend though it had been placed to our credit. And in January 1843, if Mr Lowe's opinion were well founded, we had ceased to be partners through the refusal of the Bank to pay more Dividends. If this plea had no other effect, it would at least aggravate the hardship of the case which Mr Michie dwelt upon. Again I could not but notice that instead of the names, residences and descriptions being registered as the Act required, not even so much as "the names of the Executors", as assumed by Mr Lowe, and indeed by both counsel, were specified; but simply "the Representatives of late Thos Moore" and no residence or description even to identidy him. Also the Representatives of Moore were his Executors, and I had understood that Executors could not by law become proprietors: and if so here again the List was incorrect. Indeed the words of the Act are very precise in saying that "every person whose name shall be so recorded as aforesaid, shall be liable": the fair interpretation of which appeared to me to be, that a person to be made liable must be recorded "as aforesaid" that is by name with the addition of residence and description: and I could not but entertain a belief that any one who was liable must be sued under the name and description supplied by that List, or could not be sued at all. Some other minor objections also struck me and therefore I drew up the Case afresh embodying these points, and sent it to the Solicitor, saying I took the liberty of submitting the Case in a somewhat different point of view, and requested Counsel once more to take it into consideration, as with submission to better judgments I thought the effect of these expressions in the Act might not have been sufficiently attended to. This was on the 23rd of April, eight days ago: so that I imaging they have seen at any rate so much reason in my suggestion as to

Broughton to Coleridge, 1/5/1849 (cont 6)

require time to consider whether they may not also turn out to be law. If I as an Executor had knowlingly received a Dividend from the Bank, or had intentionally applied it to the purpose of the Trust, I would not, on any consideration, have had recourse to any technical defence. But the first breach of the Law was on the part of the Bank inserting the Trustees in the list of partners when it is admitted on all hands we were not so: and this original error led them on in mistake to pay the Dividend out of which all this alleged liability has arisen. Besides this, I wrote them a letter explaining the circumstances of the case and shewing the claim which in equity I felt I had to be relieved. Their reply is very brief and dry, merely that "every shareholder of the Bank is suffering under a legal liability, and they cannot see any difference in my particular case." I feel therefore that as they put it so decidedly upon a footing of law I am justified in holding by the law whatever its determination may be. I cannot but await it with intense anxiety, such as at times I feel almost ready to sink under: and yet at other times I feel astonished at my own cheerfulness. I hope I put my trust in One who has ever been my helper and defender: and under a persuasion that you also my dear friend will not withold (sic) your best wishes and prayers in the season of my distress, I am truly and affectionately yours, W.G. Sydney.