MOORE COLLEGE: BROUGHTON LETTERS

Broughton to Coleridge, 21/5/1849

By the Mail arrived from London this day I received your Letter of 18 Decr/48 which afforded me, as your Letters always do, materials for thought. There is I believe a Ship preparing for a homeward voyage which may be detained till the day after tomorrow: and in the hope of being in time I will not suffer the temples of my head to take any rest this night till I have written to you: for I have much to say.

My former letters will have apprized you of the fearful predicament in which I was placed through my connection with Moore's Trust Estate; and I have been, and still am, oppressed with care very naturally to be accounted for, inasmuch as total and irretrievable ruin seemed to be opening its jaws to swallow me up. Every body and every thing seemed against me. The Bishop of Newcastle, on whose penetration and really legal mind, and, as the lawyers here admit, well-informed legal mind, saw the case desperate. So did I for many weeks; and my sufferings were very severe. The only persons from whom I could obtain any comfort among the few to whom I communicated the matter (not more than 3 or 4) were they who spoke of it as "a very hard case". But though I knew too little of the law to be able to grapple with it, I was sufficiently alive to the nature and consequences of men's actions in a legal point of view, to be aware that this would avail nothing. The opinions of counsel were decidedly adverse. Mr Lowe concluded by saying "Under these unfortunate circumstances, the best advice I can give to the Bishop of Sydney is not to increase his loss by fruitless litigation but to make the best terms with the Bank who possibly may be induced to take in part payment of their demand those dividends which have been conditionally paid to the account of the Executors." The Bank, I believe, would have compromised for a sum of £1500: and really I believe (nay am sure) had I possessed such a sum I should at once have paid it down; to be free from a consuming apprehension that it might soon be said of me "let the extortioner consume all that he hath." Thus affairs continued until the 20th or 21st

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April. The Bank not pressing for an answer I had leisure to apply my mind to the entire case; and I could now do so with more effect from having picked up in the course of the discussions which I had heard, some idea of what the legal view was, as contradistinguished from the mere superficial view of what was abstractedly just with which I commenced. This led me to suspect that my lawyers had slurred over some points, which if it were so would lead me to suspect they had talked at random. I was led in a way which still seems to me extraordinary to take up a point which they, if I were not mistaken, had overlooked: and on the 23rd April I drew up and sent to them the "Case" afresh in the following terms:

"Mr Thomas Moore died 24 December 1840 possessed of Bank of Australia shares. His Executors proved his Will and Cod: on 2nd Feb 1841: previously to which (viz on 31st January) the Dirs of the B. of Australia had included the "Representatives of the late Thos Moore" in a list of Proprietors recorded in the Supr. Court as required by Act of Council IV Vict: No. 13. Your opinion is requested whether, so far as concerned the Executors, this list were not a mere nullity: they not being then "existing proprietors" as required by the Act. Sec. 7 (2) On the 13th Jany 1842 the Directors placed to the credit of the Executors in their Acct with the Bank a sum of money which was afterwards explained to be the Dividend on Mr Moore's Bank Shares from 1st Jany 1841 to 30 June 1841: assuming in accordance with their own erroneous List aforesaid that the Executors had been partners in the Bank during that interval. Your opinion is requested whether that sum must necessarily be regarded as a Dividend, or portion of the net and clear surplus profits divisible among the several members of the said Banking Company (See Deed of Settlement Sec 34) or whether it ought not to be considered as a payment made in error, constituting a simple debt on the part of the receivers? (3) On the 31st Janry 1842 the Cashier of the Bank

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intimated "His (Mr Moore's Executors) are required to sign the Deed of Settlement, and which must be done previous to the present Dividend being handed over:" (that is to say the half-year's Dividend from 1st July 1841 to 31st Decr 1841): and this and all subsequent Dividends were kept back. Your opinion is requested whether the Directors did hereby only place the right of partnership in abeyance or in an imperfect or dormant state; or whether they did actually put an end to or destroy it from the date of their withholding the Dividend (1st July 1841) so that at the utmost such right (if ever existing) did not in law continue except the six months (from 1st Jany to 30 June/41) for which the Dividend was professedly paid. (4) On the 29th of January 1841, and also on 31st Jany 1842 and on 27th Jany 1843 respectively, the Directors filed lists of proprietors: in all of which occurs the following entry:

Name	Description	Residence
Moore Thomas	Representatives of the late	

Your opinion is requested (1) whether such entry is a sufficient compliance with the terms of the Act of Countil which requires that "a true and correct List of the names of all the persons who shall be then existing proprietors or members of such company with their respective places of abode and descriptions shall be recorded in the Office of the Supr. Court. (2) Whether the words of Sect 8 (viz) "every person whose name shall be so recorded as aforesaid" do not mean recorded with with (sic) his place of abode and description: (3) whether any person can be held "liable to be sued as such", that is to say as a proprietor or member of the Banking company, unless his name be explicitly set forth in the list with the addition of residence and description. (5th) By 4 Will IV 28 Aug 1833 Sec V "Execution upon any judgment obtained against the Chairman of the Bank of Australia for the time being may be levied upon the goods of any member of the Bank for the time being. Your opinion is requested whether the criterion of who is a member

of the Bank for the time being, must not be sought in the subsequent Act 4 Vict No. 13 and whether a suit upon any judgment against the Chairman can be maintained against any person as a member or proprietor unless his name etc shall have been recorded in strict and literal compliance with the Act last mentioned."

Such was my Case: and I have waited for the Opinions upon it till this day. Without removing my anxiety altogether, they have certainly returned the almost extinguished taper of Hope: which as the sweet minstrel Oliver Goldsmith sings "as darker grows the night Emits a brighter ray." If by close (?) writing I can bring them within a moderate compass I will send them to you verbatim.

"1st. Iam clearly of opinion that this List was not a mere nullity as regards the Executors for tho' Secn 7 requires the names to be truly and correctly recorded, I do not think that the words "so recorded" in Sec. 8 incorporate with it by reference the words "truly and correctly" in the 7th. If they did, the enactment would be nugatory; since the effect of the List would be only to make those liable who would be liable without it. Two constructions may be put on the 8th Sec. First that the List shall be conclusive evidence of Partnership against any person whose name is contained in it: Second that it shall be prima facie evidence, liable to be rebutted. The first construction is more in accordance with the doctrine of nominal partnership, with the literal wording, and I think with the intent of the Act: the second is more equitable and just. I still continue to think upon the best reconsideration I can give the point, that the Court will hold the List to be conclusive evidence.

2nd. I cannot doubt that this sum was meant to be paid under Section 34 and I think that the parties who received it would be estopped to say it was not so paid. This is however quite immaterial as regards the Bank of Australasia;

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for whether the receipt of the money made the Executors partners with the Bank of Australia inter se, at that time I have no doubt that it did so as regards third persons.

3rd. I am of opinion that the Executors ceased to be dormant partners in the Bank as regards third persons, as soon as they ceased to be in a condition to receive a dividend: that is as soon as they received notice that their signing of the Deed was the condition precedent.

4th. I think there is much force in the points which are here suggested for my consideration. I apprehend the words "so recorded" in the 8th Secn must at least mean that the names of the parties sought to be made liable shall be recorded on oath in the Supr Ct and may mean that the List must contain the names of the persons who shall be then, that is at the time of the filing of the List, and not on the first of January, liable; and their respective descriptions and places of abode. Now it appears that not one of these requisites has been complied with: the name given is not that of the Executors but of Mr Moore: and the Executors are only introduced by some curious confusion of ideas as a description of the deceased partner. I think that what a person would gather from such an entry would be that Mr Moore had been a member and was now dead; but not that the Executors were partners. Then the descriptions, by which I understand the addition and places of abode, are not given. The List of 1843 neither gives a list of shareholders of the 1st of January nor on the 27th when it was filed; one of the other of which must certainly be necessary. Neither does the list appear to be recorded "on oath": for Mr McKenzie only swears to the best of his knowledge and belief; and it is also very doubtful whether a Commissioner of the Supreme Court hath jurisdiction to administer the oath required by this Act. For these reasons I am of opinion that the 7th Sec. of the Act has not been complied with and consequently that the 8th Secn does not apply. I have some doubt as to how much of the 7th Secn is

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incorporated with the 8th by the words "so recorded". I think that the Act ought to be construed strictly: and in that case every requisite must be exactly performed. (3) of course if the Section does not apply it will have no effect upon the liability of the Executors.

5th. I do not think that the 4 Vict No 13 affords the only criterion of membership. A person's name may be so imperfectly entered in the List that he may not be liable under that Act: and yet there may exist evidence aliunde to shew that he is a member within the meaning of the 5th clause of 4 Will. IV. As I understand the Act, a judgment against the Chairman is effectual against any person who is a member at the time of such Judgment. Before the passing of the 4th Vict. evidence of membership of every kind was admissible; and I find nothing in that Act to narrow open to a Plff. Under the altered view with which this case is now presented to me, I think the Bishop may resist the claim of the Bank with a fair prospect of success. The way to try the question would be to plead that he was not a member: the burden of proof will lie upon them. As I apprehend there will be no dispute upon the facts - perhaps the parties might agree to state a special case for the opinion of the Court: which might be the means of saving some expense to the parties.

Sydney 16 May 1849. (signed) Robert Lowe.

1. Although the receipt of profits must generally fix the Recipient with a Partnership liability, I do not think (having regard to Secn 34 of the Deed of Settlement) that the Representatives of Thomas Moore became actually a partner in consequence of the Dividend placed to the Trustees' credit under the circs stated in the Case.
2. I think the intimation by the Bank to the Trustees, and the subsequent withholding of Dividends, as set forth in the Case amounts to a repudiation by the Bank of any claim the Trustees might have been previously supposed to have been liable to, to be esteemed partners.

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3. A partnership inclusive of the Trustees did not I think last more than six months, if it existed at all. And granting that the Bank might waive the application of the 34th Section of the Deed of Settlement, and permit persons who had not executed the deed to enjoy the rights of Partners, yet here, it is manifest from the correspondence, that the Bank never intended anything of the kind towards the Trustees: and that the Dividend placed to the(ir) credit was a mistake, and in effect acknowledged by Mr Mackenzie to be such afterwards.
4. I do not think such entry is at all a compliance with the Act of Council; and I am further of opinion upon much consideration given to the subject (with reference especially to the fearful effect given to a proper list) that the entry would not be admitted as evidence at all to go to a Jury. (2) Clearly yes (3) No, if not actually a partner.
5. The List required to be made out must be of "existing members of such company": and I therefore strongly doubt whether any party (not actually a Partner) whose name was inserted in the List, can be conclusively bound, even if the List were perfectly correct. But the List, so far as it refers to Mr Moore's Trustees, being no List at all under the Act, cannot I think be evidence against them for any purpose." Archd Michie; Henderson's Bldgs, Elizabeth St North, 19/5/1849.

It is perfectly clear that in giving their opinions upon the Case first submitted the counsel advised hastily; having taken for granted the very point upon which with submission I think the case will turn: viz whether or not the record of the names etc of the Representatives of Mr Moore was sufficiently explicit to satisfy the terms of the Act of Council. As the liability to which I am afraid of falling a sacrifice, although it be in its operation personal, is yet in its origin attributable only to my connection with Trust property of the Church, I feel assured that you and others will take an interest in the question. It will

be too late for any advice you could obtain for me to be of any service: yet I shall feel satisfaction in knowing that the facts may be duly exhibited to persons who are best qualified to form a correct legal judgment upon them: and therefore I will venture to set down the Clauses of the Acts of Council which have been referred to; and are necessary to furnish a clue to the foregoing Case and opinions.

"4 Will IV Sec v: Be it enacted that execution upon any decree of judgment in any action suit or other proceeding, obtained against the chairman for the time being of the said bank, may be issued against and levied upon the goods and chattels etc of any member of the said bank for the time being in like manner and not otherwise than if such decree or judgment had been obtained against such member personally."

"4 Victor: No 13 Sec VLL. Be it enacted that the cashier or clerk of every such banking company or firm shall within 30 days from and after 1 Jany 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 company, with their respective places of abode and descriptions, to be recorded on oath in the offices of the Registrar of the Supreme Court, and then same shall be open for inspection by any person requiring the same on payment of fee of one shilling etc etc."

"Sec VIII. 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 so recorded as aforesaid; and shall be liable to be sued as such, until a new list of the names shall be recorded as aforesaid, or until he shall have given notice in the New S. Wales Government Gazette of his retirement from such company or firm."

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Thus the matter stands at this moment: and thus I stand exposed to the risk of a penalty quite terrible to think of; and seeing no prospect of deliverance from it unless the point which I have suggested as to the true intent of the VIIIth Secn above written bring on a decision that I am not liable to be sued.

And now to turn to other matters from which this has detained me too long. Be assured my dear Coleridge that much as I delight in the arrival of your Letters it never enters my thoughts that I have a right to complain, or that you are required to make apologies, on account of their not arriving oftener. Your hours I am well aware must be all too few for the discharge of the innumerable occupations which every day brings with it. That you can fulfil them without injury to your own health is (sic) matter of satisfaction enough for me; and as to a letter, I learn to say to myself Quan ---- dierum cumque dabit, luero Appone: and on such again I have sincerely congratulated myself this very 21st May 1849.

With respect also to funds: I mentioned long ago, did I not, that the munificence of your contributions in times past by no means led me to expect or claim a continuance of them. Gratitude for what has been done is my ruling sentiment, unmixed with the least alloy of discontent at being now case upon our ? + ? own resources. Will you only be so good as to understand that those resources (if so they may be called) are unequal, in a degree which it is painful to contemplate, to the exigiencies of our situation; insomuch that whenever you do fall in with the possessor of the world's good(s?) who has a disposition to lay up treasure in heaven, you will not forget our need. Indeed I cannot get on without some little pecuniary help from England: and if by representations to the two Societies you and other friends can influence each of them to allow for General purposes about £150 or £200 yearly to this Diocese it will do incredible good. My ground for asking it is that I think England as a nation is bound to

supply some aid towards the support of the Church, in a territory to which she is now promoting so very extensive an emigration of Church men. I have written to the Earl of Harrowby (Chairman of the Colonization Socy) representing that if these people are to be encouraged to leave their natata solum in order that they who can remain may dwell at ease, the latter are under an unquestionable obligation to make some provision for the eternal welfare of those who are to settle among us: and to endeavour at least that their descendants if not themselves may not lapse into heathenism. If you still support this view of the case (which is surely reasonable) it may have the effect of increasing the resources of the Societies, and enabling them to render very effectual service to the cause.

I liked every part of your Letter except the beginning "my Ld Bp". This was unusual, and rather prepared me for those observations (conceived I am sure in the purest spirit of love and kindness) which you have offered on my disposal of Makinson, and my intercourse with the clergy generally. I do assure you that in neither instance am I conscious of the justice of the charge but I am not displeased that it should have been brought to my notice; because it is good for a man to have occasionally such calls and opportunities to examine and try himself. But my space not allowing me to enter upon such questions now, I will reserve what may be said till my next Letter: which will be forwarded next month by the Midlothian. I am pressed AND WEARIED WITH TRIALS of every kind. By that ship goes to England a very valuable labourer, Revd T.B. Naylor, whom I had at length established at St Andrew's in (sic) room of Mr Sconce. He now has broken down in constitution under some inscrutable disease: and a voyage to England is the only resource giving him a chance of life, if it even secure that. Had it not been for the transit of a clergyman from Swan River purposing to go on to New Zealand, whom I intercepted and detained 3 months here, I must have again been left with the charge of that Church and parish upon

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me: and if he go on his way so I shall be left. If Mr Naylor live, you will see him and hear much from him, which will interest you. But alas! this is not my only or heaviest affliction.

I have been compelled to suspend another clergyman, a deacon whom I admitted last Christmas, a student too of St Jas' Coll. He is I fear a weak and wavering young man, who allowed himself to be inveigled by Sconce and acknowledges himself to have been with him and a priest on his knees before an altar in the R.C. Monastery chapel. And yet, at the very instant that his perversion seemed certain, he draws back, throws himself upon me, makes a humble and hearty confession of all; and voluntarily submits to the sentence of suspension. But what it will be best to do with him I know not. All these things are against me. I forwarded your Note to Mr Salting: and promising to write again as soon as I can, remain with sincere and grateful affection my dear Coleridge, Yours ever, W.G. Sydney.