Judgment of the Lords of the Judicial Committee of the Privy Council in the Appeal of the National Bank of Australasia v. *Cherry, from South Australia, delivered the* 30*th June*, 1870.

Present:—

LORD CAIRNS.
SIR JAMES W. COLVILE.
THE JUDGE OF THE HIGH COURT OF ADMIRALTY.
SIR JOSEPH NAPIER.

IN this case the Primary Judge in Equity in South Australia, and afterwards the Court of Appeal in that colony, have allowed a general demurrer to the Bill filed by the Appellant for want of equity; and the question which their Lordships have to decide is, whether the allowance of that demurrer was proper?

The ground of the demurrer was this,—the Bill was a Bill filed to realize a security of the bank as equitable mortgagees. The Defendants to the Bill, who were the assignees of White, the mortgagor, contended that the mortgage transaction was invalid, and that, therefore, a Bill to realize the mortgage could not be sustained; and the ground of the alleged invalidity was this, a public Act of Parliament of the colony, incorporating and regulating the bank in question, which, as the assignees contended, prevented the bank making a valid contract for a mortgage under the circumstances described in present Bill.

The circumstances alleged in the Bill in substance are these:—that White was a customer of the bank, and that he was allowed a cash credit, and to overdraw his account, upon an agreement to deposit, and upon a deposit of the title-deeds of landed property; that this state of things continued for some years, at the end of which time a large sum, upwards of £10,000, was due from

White to the bank; that an action was brought by the bank against White to recover this sum; that this action was proceeding to judgment, and that an agreement was then come to between White and the bank, by virtue of which the bank were to sign judgment; but it was stipulated that if they would forbear taking proceedings under the judgment, and allow the property of White to remain undisturbed for a certain length of time, the title-deeds should remain and continue with the bank as a security for the whole of their demand. That, in a few words, is the result of the more elaborate statements in the Bill.

Now upon that the Defendants in the colony, who were assignees of White, contended that a transaction of this kind was struck at by the Act of Parliament of the colony, the Act of 1859, which is termed in the print which is before us a private Act, but which is made by the last clause a public Act, and to be judicially taken notice of as such, and is entitled "An Act to regulate and provide for the Management of the South Australian Branch of the National Bank of Australasia, and for other Purposes." The clause of that Act which is relied upon is the 7th. The previous clauses incorporate the bank in the usual way, and authorize it to carry on the ordinary business of bankers in words which need not be referred to. The 7th clause provides "That it shall be "lawful for the corporation, notwithstanding any "statute or law, and notwithstanding any clause or "provision herein contained, to purchase, take, "hold, and enjoy to them and their successors in "fee simple, or for any estate, term of years, or "interest, any houses, etc., necessary or proper for "the purpose of managing, conducting, or carrying "on the affairs, concerns, or business of the said "corporation." That clause seems to deal with purchases out and out of property for the purposes of offices or premises to carry on the business of the bank. Then follows this sentence, "And also to "take and hold, but only until the same can be "advantageously disposed of for reimbursement "only, and not for profit, any freehold or leasehold "lands and hereditaments, and any real estate, and "any merchandise in ships which may be taken "by the said corporation in satisfaction, liquida-

"tion, or discharge of any debt due to the said "corporation, or in security for any debt or liability "*bonâ fide* incurred or come under previously, and "not in anticipation or expectation of such security." Then there is the further proviso: "Provided always that save and except as hereinbefore "specially authorized, it shall not be lawful for the "said corporation to advance or lend any money "on the security of lands or houses or ships, or on "pledges of merchandise, nor to own ships."

Now, in the first place, it was contended that the enactments contained in this clause were not founded upon any considerations of public policy, but were simply regulations for the internal management of the bank as between itself and its shareholders, and that they were to be considered as rules merely for the conduct of the Directors, and altogether unaffected by those considerations of public policy which might lead to a wider construction of the statute.

Their Lordships are unable to adopt that argument. Their Lordships cannot but see in this clause that there was some object on the part of the Legislature to regulate, indeed, the internal management of the affairs of the bank, but to regulate those affairs not merely, if at all, with reference to the interests of the shareholders, for it is difficult to see how the interests of the shareholders could be prejudiced by taking securities of this kind, but rather to regulate those affairs with some regard to the interests of the public who, for some reason or other, which it is not for their Lordships to speculate upon, are by this statute supposed to have an interest in confining the bank to making advances of money without these solid items of security which are specified in this clause.

It appears, therefore, to their Lordships that there are considerations of public policy involved in this clause, but it is also true to say that those considerations of public policy look to and deal with the management of the bank, and have for their object the limitation of the powers and authorities of the bank.

That being so, and without for the present turning to the facts of this particular case, it would seem to have been the object of the Legislature in this clause, not to make void the contracts for such advances as between the bank

and their customers, in the same way that in former times contracts open to the objections of the usury laws were made void, but rather to make it something *ultra vires* the bank to take upon the occasion of contracts for those advances securities of the kind mentioned in this action. And this construction of the section would harmonize with what was very properly, as their Lordships think, admitted at the bar on behalf of the Respondents —that upon a transaction of the kind described in this Bill, the contract for the loan of money would be perfectly valid, and the question would be confined to a question as to whether the bank had the power to take the security which it took for the advance.

I may add that although the words of the proviso which I have read in the latter part of the section would appear somewhat stronger in their negative form than the affirmative part of the clause, yet, in the opinion of their Lordships, the affirmative part of the clause and the negative part are meant to be correlative and co-extensive, and the negative part of the clause to be intended to express nothing more than this, that it should not be lawful for the bank to take landed or mercantile security for their advances, except under the conditions mentioned in the affirmative part of the clause.

Now those conditions appear to be these:—At the time of the advance, and as part of the contract of advance, the bank was not to be at liberty to stipulate for, or to obtain landed or mercantile security. That is the construction contended for by the Respondents, and their Lordships, at all events, for the purpose of argument will assume that it is the proper construction. On the other hand, if there should be an advance made, and a debt incurred and due from a customer to the bank, the bank was to be at liberty to take security for that overdue advance either in the shape of land or in the shape of merchandise as described in the Act; and the question is whether the transactions narrated in this Bill, the statements as to which must be assumed for the purposes of this Appeal to be in all respects true, expose the transaction to the prohibition contained in this Act of Parliament.

Their Lordships will assume, for this purpose, that in the original inception of this transaction, and in the history of it up to the month of August, 1866, the bank would have been unable to have enforced the security which was given to them at the time of the first making of the advance to White. Their Lordships will assume that the taking of a deposit on the occasion of that advance would be *ultra vires* the bank, in consequence of the enactments of the seventh clause of the Act of Parliament. But then the advance was made, and that, as I have already said in the opinion of their Lordships constituted a valid debt as between the bank and their customer. That debt in the month of August, 1866, amounted to the sum of £13,718; and then this statement is made as to what then took place between the bank and the customer. "The plaintiffs commenced an "action on the Common Law side of the Court for "this sum on or about the 12th July, 1866, and the "said Samuel White entered an appearance to the "said action; but it was subsequently on or about "the second day of August, 1866, agreed between "the said Samuel White and the Plaintiffs that the "Plaintiffs should sign judgment in the said action, "and that the Plaintiffs should not take any steps "to enforce the said judgment, or to realize the "said securities, until after the harvest then ensu-"ing; and in consideration thereof, and of the said "pre-existing debt it was agreed that the said deeds "should remain as security for payment of the "monies so as aforesaid due to the said Plaintiffs, "and for which they were to sign judgment as "aforesaid, and the said lands comprised in such "deed should be sold with all speed for the liqui-"dation of the amount due to the Plaintiffs on the "said account under the joint direction of"—certain persons therein mentioned.

Now it is to be observed that, supposing the construction of the Act of Parliament to be that which their Lordships have assumed, the position of Mr. White at this time was this:—He might have said to the bank, "You may proceed "against me and recover your debt; you may sign "judgment, and you may take such steps under "that judgment as the law allows, but the deposit "of my deeds is invalid. It was *ultra vires* the bank

" to obtain such a security. I demur, therefore, to " your interfering with my estates, and I require " you to deliver up these deeds, which you had no " right under your statute to take from me." That, I say, Mr. White might have done. He did not think fit to do so, and, on the contrary, for considerations which are tangible and valuable, and which are described in this section, he preferred to make a fresh agreement of a different kind with the bank, by which he authorized the bank to retain these deeds, and promised that the deeds should be a security for the sum for which judgment was about to be signed.

Now, it appears to their Lordships that that is a transaction which falls within the enabling part of the 7th Section. It is a transaction in which security is taken by the bank for a debt or liability *bonâ fide* incurred and come under previously, and as such would be warranted by that Section.

But then it is said that the words following those which I have read interfere with this result, —the words, namely, " not in anticipation or expec- " tation of such security;" that is to say, a debt or liability *bonâ fide* incurred or come under previously, and not in anticipation or expectation of such security. But their Lordships are of opinion that it cannot be said in this case the security which their Lordships fasten upon being that of August, 1866, that it was in anticipation or expectation of that security that the advance was made by the bank. The advance was originally made by the bank, if upon any security, clearly upon the security attempted to be created in the year 1861. It is true that that was a security affecting the same property, but the security itself was a different security. That security so effected or professed to be effected in the year 1861, their Lordships have assumed to be invalid; and their Lordships think that the advance, not having been accompanied by any promise to give any further or other security at a future time, was an advance which cannot be said to have been made in anticipation or expectation of that security which came to be given in the month of August, 1866, as to which, as I have already said, Mr. White was entirely free either to give it or to refuse it, as he thought best. He gave it, but he gave it not in fulfilment of any

previous promise or anticipation or expectation, but because he found it convenient for himself to give it at that time.

Their Lordships, therefore, are unable to take the view of the Primary Judge in the colony that this dealing between the bank and the customer at the time to which I have referred in the month of August, 1866, was in any way struck at or interfered with by the Act of Parliament, and finding that there was a good and valid debt between the bank and the customer, their Lordships are of opinion that the bank had the right to stipulate for and take the security which they took in the month of August, 1866.

Their Lordships, therefore, will humbly advise Her Majesty that this Appeal should be allowed, and the demurrer overruled with costs; in addition to which the Appellants must have the costs of this Appeal. If the Respondents desire to answer the Bill, there may be liberty given to apply to the Court in the Colony for time to answer.