Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Standard Bank of British South Africa (Limited) v. Smith and others, from the Supreme Court of the Colony of the Cape of Good Hope, delivered 1st July, 1870.

Present:—

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

A CONSIDERABLE part of the argument in this case has related to the motives by which the bank, who are the Appellants, may be supposed to have been influenced in refusing to give to the Respondents the bills for the composition which was stipulated for in the agreement of the 6th of May, 1865. Upon this part of the case their Lordships do not think it necessary to say more than that they are not satisfied that the bank is open to censure with regard to their conduct in refusing to fulfil that agreement.

It is evident from the testimony in the case, that from the first, when the manager of the bank became aware of the agreement made by the sub-manager, he disapproved of it, and doubted the authority of the sub-manager to enter into it; and he was prepared to find any legal means of escaping from the stringency of that agreement. Of course, if the bank, or its executive, resorted to any improper and illegal means for defeating the agreement, they would be answerable for their conduct; but so long as they did nothing more than confine themselves to their legal rights, and insist upon whatever may be, or might be, their legal rights with reference to that agreement, their Lordships are not prepared to say that blame is to be cast upon the bank, if by reason of those legal rights

they are able to avoid the performance of an agreement which in its origin was, or its subsequent circumstances has become, an irksome agreement for them to perform.

The question, therefore, really comes to what was the legal obligation cast upon the bank, and whether they had failed in the performance of that legal obligation.

Now that question has to be determined mainly, if not wholly, by the proper construction of the document of the 6th of May, 1865.

Before considering the words of that document it is necessary to bear in mind what were the circumstances under which it was executed. The firm of Kirkwood, Holland, and Company were in pecuniary difficulties; and in danger, if those difficulties were not surmounted, of being made insolvent. Their largest creditors were the bank. Their assets presented the appearance upon paper of being sufficient to meet their liabilities, and, if all securities pledged for some of those liabilities were taken into account, of leaving something of a margin over and above the amount of their liabilities; but, of course, whether the assets would or would not produce this result would mainly depend upon the manner in which they were realized. If they should be realized by a forced sale, and through the medium of the Insolvent Court, experience in such matters would show plainly to mercantile men that there was an imminent danger of the assets being greatly depreciated, and of there being a serious deficiency to meet the liabilities.

Now, that the assets should be realized in the most judicious way, and produce as nearly as possible the amount of their liabilities, was the interest of this bank more than of any other person, for they were the largest creditors; and if, therefore, any arrangement could be made by which a forced insolvency might be prevented, by which the bank might become the holders and proprietors of the whole of the assets of Kirkwood, Holland, and Company, and by which Kirkwood, Holland, and Company might be released from all their obligations to their creditors, there would be an obvious advantage in such an arrangement to the bank, because the forced sale of the assets would be avoided, and there might be a good hope that

the property would produce, by careful management, such a sum as would satisfy either the whole or the greater part of the bank's demands, and the whole or the greater part of the demands which, at that time, were due to other creditors.

On the other hand, if insolvency was not perfectly prevented by the arrangement to be made, if the bank were to become merely the purchaser of a certain number, more or less, of the debts due from Kirkwood, Holland, and Company, paying for those debts a sum of fifteen shillings, or any other sum, in the pound; and if after all this were done, insolvency might supervene, and a forced sale of the assets take place, it is equally clear that under an arrangement of that kind, none of the advantages which have been pointed out would have accrued to the bank, but they would be simply speculators in buying up a number of debts which, in the event of a forced sale, were certainly not likely to produce so much as fifteen shillings in the pound.

Bearing these considerations in mind, it is necessary to advert to the words of the document of the 6th of May, 1865:—"On behalf of the "Standard Bank, the manager appeared and in- "formed the creditors of Messrs. Kirkwood, Hol- "land, and Company, that on condition that they "cede over to him the whole of their claims, and "release Messrs. Kirkwood, Holland, and Company "from all liability to them, he was prepared to "guarantee the sum of fifteen shillings in the pound, "payable in four equal instalments, at six, twelve, "eighteen, and twenty-four months; that all pay- "ments now the liability of Kirkwood, Holland, "and Company be reduced to a cash basis on the "first current by the rebate of bills, etc., and the "bank's acceptances given for the amount of com- "position, the bank releasing Messrs. Kirkwood, "Holland, and Company from further liability on "their handing over their present estate."

The first question which arises on this document is, who are intended to be denoted by the word "Creditors," which is used more than once in the document? It has been suggested that that word here is intended to apply to those who were present at the meeting at which this document was presented. Their Lordships are unable to take that

view of the meaning of the word. It is necessary to bear in mind that the meeting was itself a meeting adjourned from a previous one on the 4th of May, and that both of the meetings were meetings not of particular individuals, but meetings summoned of all the creditors of the estate of Kirkwood, Holland, and Company. It was, of course, impossible to know beforehand what creditors would attend. All the creditors were at liberty to attend, and as many as possible were expected to attend. It would be a strange consequence, indeed, if a resolution which was contemplated at the previous meeting as one that was to be presented to a subsequent meeting called of all the creditors, should turn out to be a resolution limited in its application to whoever might happen to be the chance creditors who should attend at the second meeting. It is clear that was not the intention of the parties. The intention was that whatever might be the offer, it was an offer to be presented to all the creditors of Kirkwood, Holland, and Company, but to be presented to all of them through the medium of that section of the whole, whatever it might be, who might happen to attend the meeting. Their Lordships, therefore, consider that before passing to ascertain the meaning of the other terms in this resolution, the resolution itself must be read as one addressed to all the creditors of Kirkwood, Holland, and Company, and that the term "creditors" there may be interpreted just as if the agreement itself had contained the words "all the creditors."

Bearing this in mind, it appears that there are three main stipulations in this offer. The first is that the creditors, which word, as has been said, means all the creditors, shall cede to the bank the whole of their claims, and release Kirkwood, Holland, and Company from all liability to them. The second is that Kirkwood, Holland, and Company shall hand over to the bank their present estate; and the third is, the consequence from the two former, that the bank shall guarantee to all the creditors a sum of fifteen shillings in the pound, payable in four instalments running over two years.

It is important here to observe that the stipula-

tion that the creditors shall release Kirkwood, Holland, and Company from all liability to their claims, is a stipulation which is made, not by Kirkwood, Holland, and Company, but by the bank through its Manager; and that appears to their Lordships to throw a very strong light upon the object of the whole arrangement. What could be the motive of the bank stipulating that Kirkwood, Holland, and Company should be released from all liability by all the creditors but this,—that by means of that release by all the creditors, Kirkwood, Holland, and Company should become possessed of that power which otherwise they would not possess, of assigning by a valid title the whole of their estate to the bank? It is clear that if any one creditor, with a debt of sufficient amount to take proceedings in insolvency, should remain out of the obligation of this agreement, that one creditor would be able to go before the Bankruptcy Court, and point, under the 4th clause of the Local Insolvency Act, to the deed following upon this resolution, as a deed which beyond all doubt would have the effect of interfering with him in the recovery of his debt, because it would be a deed passing over to the Standard Bank the whole of the property of Kirkwood, Holland, and Company, out of which alone that debt could be paid.

It has been suggested that the stipulation in this offer, whatever it might be, was a stipulation enuring to, and made with each individual creditor. In one point of view no doubt that is so. It is a stipulation made, like any other agreement, with every creditor who might assent to it; but the question still remains, what is the stipulation which is made with that particular creditor, and is it a stipulation with that particular creditor irrespective of whether other creditors might or might not accept the offer which was made to them? Their Lordships are of opinion that upon the proper construction of this offer, it must be looked upon as an offer made no doubt to every creditor who might accept it, and thus to all the creditors, but still an offer with this condition attached to it, that it was not to become binding on the bank as regards the payment of their composition until all those creditors whose dissent or whose with-

holding assent might destroy the effect of the agreement, should come in and concur in it, and thereby power be given to Kirkwood, Holland, and Company to complete their part of the further condition by assigning to the bank the whole of their property.

It is proper to advert to another element in the agreement, namely, the question whether it touches the securities which might be held by creditors willing to accede to the agreement? In the opinion of their Lordships, the stipulation being that the creditors should cede to the bank the whole of their claims, and release Kirkwood, Holland, and Company from all liability to them, the effect of that stipulation must be to carry along with that cession all the securities held by the creditors for those debts in respect of which they were to give this release to Kirkwood, Holland, and Company. It is unnecessary to look to the evidence of what passed at the time of the offer, because their Lordships prefer to rest rather upon the construction of the document itself; but if that evidence were to be looked to, it is clear that these securities, so held by the creditors and their value, were a main element leading the bank to make the offer which they did.

That being the construction of the agreement, what happened afterwards was this:—A number of creditors, in the months of May and June, came in and assented. By far the greater proportion of the creditors did so. Some of those who came in and assented, one of those who signed the particular document of the 6th of May, 1865, and several who afterwards signed the deed that was prepared to give effect to that document, signed both of those documents, with a reservation of the collateral securities which they might possess with regard to their debts; and whatever ambiguity there might exist as to the terms used, "subject to "collateral securities, and without prejudice to col- "lateral securities," it seems to have been perfectly well understood by all parties that that reservation was intended by the creditors to reserve to themselves the benefits of their securities in addition to the composition which they were to receive from the bank; and Mr. Pearson, who was one of these persons making the reservation, says very fairly in

his evidence that if he had been asked to give up his securities he undoubtedly would have refused to do so.

It might, therefore, if it stood upon this alone, be well doubted whether creditors who, by the construction which their Lordships have placed upon the document of the 6th of May, 1865, were bound upon assenting to release Kirkwood, Holland, and Company, and to cede all their securities along with their debts, assented according to the terms and exigency of the document of the 6th of May, when they assented with that reservation to which I have referred. But without doing more than expressing a grave doubt whether this was a proper assent, their Lordships find that there was what in their opinion was a sufficient dissent from this proposition to prevent the terms of it being carried out, and carried out within a reasonable time. They will refer, as the simplest case (and if one case be found, further cases need not be looked to), to the case of a creditor, Locke. It appears that so early as the 29th of July a letter was written by the attorneys of the bank to Kirkwood, Holland, and Company. Some previous conversation had taken place in the month of June, in which Mr. Stewart, as Manager of the bank, intimated his intention of repudiation; but it is better not to rely on those conversations, but to look at the written evidence. On the 29th of July, 1865, the attorneys for the bank wrote to Kirkwood, Holland, and Company in these terms:—"We "are instructed by Robert Stewart, Esq., general "manager of the Standard Bank of British South "Africa (Limited), to intimate to you that it was "the intention of the bank, in making the offer at "the meeting of your creditors held on the 6th of "May last, that all the creditors of your firm "should concur in the assignment, and that those "holding collateral securities should surrender "them; and inasmuch as our client has had dis-"tinct notice from some of the creditors that they "will not yield up the collateral securities held by "them, he declines to execute the deed of assign-"ment submitted to him. We are further to "request that you will be good enough to con-"vene a meeting of your creditors at an early date, "and communicate the contents of this letter to

"them." This, therefore, was a letter taking notice that it was necessary that all the creditors should, in the opinion of the bank, concur, and that some had refused to give up their collateral securities. It does not appear that there was any reply to that before the letter of the 17th of August; but on the 17th of August, 1865, the solicitor for Messrs. Kirkwood, Holland, and Company, Mr. Chaband, writes to the solicitors of the bank this letter:—"I "am instructed by Messrs. Kirkwood, Holland, and "Company, in reply to your letter informing them "that certain creditors refuse to sign the deed of "composition, to request you to be good enough to "name them, as my clients are not aware of any "other creditors than those who have already "signed."

It would appear that there had been an intermediate letter between this and the former one which has been read. To this letter of the 17th of August this answer is written on the 18th of August:—"In reply to yours of yesterday's date, "we are instructed by our client to state that the "following are the creditors who have given him "distinct notice that they will not concur in the "assignment of Messrs. Kirkwood, Holland, and "Company's estate, viz., Mr. J. F. Hitzeroth, Mr. "J. H. Tennant, and Mr. R. Pinchin; and besides "these our client believes there is also a creditor "in Graham's Town, and another in Cape Town, "who refuse to enter into the arrangement." Now therefore, Kirkwood, Holland, and Company, and their solicitor, had distinct notice that the Standard Bank was standing on whatever might be their legal rights under the document of the 6th of May, that they were requiring those who had collateral securities to hand them over, and that they were insisting that the refusal of some creditors to execute the deed entitled them to refuse on their part to execute it.

In that state of things Kirkwood, Holland, and Company, to whom this communication had been made, telegraphed on the 18th of August to Locke, a creditor for a substantial sum, living at Graham's Town:—"Do you or do you not agree to the com-"position with Standard Bank for fifteen shillings? "Please reply finally, will you sign or no? If you "won't, it will fall through." Nothing could be

more distinct than this. If the creditor had not been communicated with, a question might have arisen whether a reasonable time to make the communication had elapsed; but here he is communicated with. The time has been sufficient for the purpose, and he is told that the crisis has arrived, and that his refusal of consent may, or will, lead to the whole thing falling through. In that state of things he replies, on the following day, "I do "not accept the offer of fifteen shillings."

That being so, the next occurrence is this,—on the 20th of August, 1865, a meeting of the creditors of Kirkwood, Holland, and Company is called. It seems to have been called by advertisement; and it is scarcely possible not to infer that it is called in consequence of these difficulties that were arising, and of which distinct notice had thus been given by the bank, because, when we find the meeting assemble, this is the communication made to them:—"Minutes of adjourned meeting of "Kirkwood, Holland, and Company's creditors, "held 6th of May, read." It is, therefore, an adjourned meeting, taking up the thread of arrangement at the point where it had left off on the 6th of May, for the purpose of communicating to the creditors what had been done in the interval. "Mr. Kirkwood further explained to the meeting "that, in consequence of several creditors not "agreeing to accept fifteen shillings in the pound, "the Standard Bank distinctly refuse to carry out "their offer." Therefore, we have it beyond all doubt that there was the distinct refusal; and that this distinct refusal was communicated to this meeting of the creditors. Then it is "moved "by Mr. Rutherford, seconded by Mr. H. B. Deare, "that the estate of Kirkwood, Holland, and Com- "pany be at once placed in liquidation, under the "management of Mr. Kirkwood and Mr. Duncan, "subject to the inspection of any large creditor "the meeting may appoint." There is then a provision as to the charges, after which this passage follows:—"That the amount now at the credit of "the firm in the several banks be at once distri- "buted, and that further quarterly distributions "shall be made; and that, as a body, the creditors "decline to authorize the expenditure of the funds "of the estate in any lawsuit with the Standard

"Bank." Carried, without a dissentient voice. It was further proposed by A. J. Macdonald, and seconded by Mr. Vardy; "that Mr. Rutherford and "Mr. Stewart, of the Standard Bank, be appointed "joint inspectors in above estate. Carried; no dis- "sentient. It was also further agreed, that should "any of the creditors refuse to sign the deed of as- "signment within fourteen days, the estate be at "once surrendered." These minutes are important merely as showing, if further evidence were wanted, that the bank had distinctly at this time repudiated the agreement which, up to that point, remained in suspense; that that refusal was communicated to the creditors, and that the creditors, who were present at this meeting, accepted the refusal, and prepared to act upon a different footing. If the question, therefore, stopped there, their Lordships would have been prepared to hold that there was an end of that offer which was made on the 6th of May, 1865, the terms of the offer not having been complied with.

What happened further? It is said that the dealings by the bank with the property of Kirkwood, Holland, and Company were inconsistent with their right to repudiate their offer at this time; but their Lordships find that the only dealings with the estate were these,—it being, of course, in suspense from the 6th of May, 1865, until a time when it should be known whether the terms of that agreement were complied with, it was absolutely necessary that the property should be collected and stored by some proper hands. The bank appear to have ceased to keep any account with Kirkwood, Holland, and Company as customers, to have opened an account with them in liquidation, and to have passed to that account all the property realized and turned into money, and kept that in suspense until the rights of parties might be known with regard to it. Their Lordships think that was a natural transaction, justified by the state of things resulting out of the offer of the 6th of May, 1865; and it is important to bear in mind that the creditors seem to have taken exactly the same view of it, because, on the 29th of August, 1865, in the resolution which has been read, they resolve "that the amount now at the "credit of the firm in the several banks be at once

"distributed;" treating, therefore, this fund in the Standard Bank as a fund which was there for the benefit of the creditors, subject to their control, and to be distributed under this new arrangement, which they then came to.

But their Lordships must also take notice (although it is not necessary for the decision of the case in the view they have taken of the construction of the document of the 6th of May) of that which occurred subsequently to this time. This is a suit which in substance is a suit for the specific performance of the offer or agreement of the 6th of May, 1865. It is a suit to obtain that composition which was promised or offered by the terms of that agreement. Beyond all doubt, if that agreement ought to be performed, or was to be performed, it was of the essence of the transaction that every part of it should be performed as quickly as possible; but subsequently to the 29th of August, 1865, events occurred which led to the insolvency and sequestration of Kirkwood, Holland, and Company. They were made insolvents on the 1st of December, 1865. Their property then passed under the control of the Insolvent Court; a number of creditors proved, and a large division of the property was made by way of dividend in the month of May, 1867.

The present Respondents gave notice that they made their claim against the bank, and they commenced an action on the 1st of March, 1866. That action is said to have been discontinued because it was found to be improperly framed. No explanation, however, is given of how that came about, or whether any communication was made to the bank of what led to the discontinuance of the action, or of their intention to commence a new action. On the contrary, all their Lordships find is, that in the month of October, 1866, the bank were under the impression that the Respondents found their claim untenable, and were not going on with any proceedings; but from that time, from October, 1866, when we hear for the last time of the first action, until July, 1868, a period of very nearly two years, there is a blank altogether unaccounted for. During this large lapse of time the property under the sequestration was being collected and distributed, and there appears to be no reason to doubt

that the creditors who were holding aloof, and among them the present Respondents, would have a right at any time to go in and prove for their debts. It is not too much to say that the Respondents, and other creditors taking the same course, appear to have been occupying a position which enabled them to play fast and loose,—to proceed against the bank if they could, to recover the composition; or to go into the bankruptcy, if the property seemed likely by a turn of the market to realize more than was at first expected, and prove under the bankruptcy. If it were necessary, their Lordships would require to consider very narrowly whether that amount of delay, that species of standing by, would not disable the Respondents from maintaining the action which they afterwards brought in the Court below.

Without, however, deciding the case on that ground, and resting simply upon the construction of the agreement, and the non-fulfilment of what their Lordships consider to be the conditions precedent existing in that agreement, their Lordships are of opinion that the action in the Court below ought to have been held to have failed, and that in place of Judgment which passed for the Plaintiffs, Judgment should be given for the Defendants, with the costs of the Court below, to which should be added the costs of the Appeal. And their Lordships will humbly report their opinion to her Majesty accordingly.