Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Torva Exploring Syndicate, Limited, v. *Kelly, from the Supreme Court of the Cape of Good Hope ; delivered 7th July* 1900.

Present at the Hearing :

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.

[*Delivered by Lord Macnaghten.*]

The question in this case is—What is the meaning of the word "flotation" as used in an agreement between a mining prospector and his employers who were a syndicate or joint stock company limited by shares and formed apparently for the purpose of acquiring and dealing in mining claims and other property within the territories of the British South Africa Company.

The agreement in question is dated the 17th of July 1894. It was made between a Mr. Creswell the then manager of the Torva Exploring Syndicate Limited acting on behalf of the Syndicate of the one part and the Respondent (who was Plaintiff in the action) of the other part. The Syndicate thereby hired the prospector for two months certain and one month more if required. He was to devote all his time and attention to the interests of his employers and to use his best endeavours to peg off payable mining properties in Matabeleland or Mashonaland for their benefit. He was to be paid a

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monthly salary of 15*l.* and to be furnished with all necessary prospecting gear and provisions. The development or abandonment of all properties pegged off was to be at the discretion of the Syndicate's representative and all claims pegged off were to be transferred to the Syndicate. Then follows this clause on which the question turns:—

> 7. The prospector shall receive from the Syndicate the sum of 250*l.* (two hundred and fifty pounds) on flotation by the Syndicate of every block of 10 claims pegged by the prospector.

In the course of his service under this agreement the Plaintiff pegged off 330 claims or 33 blocks of 10 claims each. They were pegged off under licenses procured by the Syndicate. No transfer was therefore necessary. They were all registered in the name of the Syndicate or its nominees.

By an agreement dated the 13th of March 1895 the Syndicate agreed to sell the whole of these 330 claims together with certain other property to the Charterland Goldfields Limited for the sum of 50,000*l.* payable in fully paid shares of the purchasing company who were besides to undertake the contracts and obligations of the Syndicate including their obligations to their prospectors. The sale was afterwards carried into effect. The purchase money was paid, and the transfer was duly entered on the register of the British South Africa Company.

The objects for which the Charterland Goldfields Limited was established were among others "(*a*) to purchase . . . mines and "mineral properties . . . to carry into effect ". . . an agreement with the Torva Syndicate" (being the agreement above stated) "(*b*) to "prospect for open work develop and explore ". . . gold . . . and other mines . . .

"and to carry on and conduct the business of "raising crushing washing smelting reducing "and amalgamating ores metals and minerals "and to render the same merchantable and fit "for use." The capital of the Company was 500,000*l.* divided into 500,000 shares of 1*l.* each.

It was stated at the trial by the manager of the Charterland Goldfields that his Company did not apply to the public for capital. But it was admitted that at the time of the trial there were probably about 2,000 shareholders and it was not denied that the shares were or had been at a premium.

Stopping at this point and putting aside for the moment the Mining Regulations of the British South Africa Company the result seems to be that the Torva Syndicate did in fact dispose of these mining claims at a good profit to a substantial company having for its main purpose or at any rate for one of its principal objects the developing and working of gold mines. Is not that a flotation of these gold mining claims? The Appellants say no. They say that it is not flotation at all—at any rate not the flotation contemplated by the agreement. "Flotation" they say for the purposes of the agreement means the disposing of mining claims to a joint stock company with the consent of the British South Africa Company after doing the necessary work and obtaining a certificate called the Inspection Certificate prescribed by the Mining Regulations of the British South Africa Company.

In order to show the meaning of the term "flotation" reference was made to the Mining Regulations of the British South Africa Company and to the oral evidence given at the trial.

Turning first to the Regulations of the British South Africa Company we find the word "flotation"

occurring in the Regulations of 1890 in a Notice of the 17th of May 1892 amending one of those Regulations and in the Mines and Minerals Ordinance of 1895. No definition of the word is given. The interpretation clause of the Ordinance of 1895 declares that in the interpretation of that Ordinance all words shall be understood in the sense which they bear in ordinary use and then it proceeds to define a great many expressions which are referred to as "special terms" amongst which the word "flotation" is not to be found. It is however clear from Section 28 of the Mining Regulations of 1890 that "the flotation of a block" may be "into either a joint stock company or into a "syndicate to further test the mine" that is as was conceded in the argument either into a mining company or into a developing company and it is equally clear that the consideration for a flotation may be scrip or shares of the company or syndicate into which the mining claims are floated.

The oral evidence as to the meaning of the term "flotation" does not help one much. No two of the witnesses agreed in their definitions. The Plaintiff explained his view of the meaning of the word. He said that he discussed its meaning with Mr. Cresswell. He alleged that Mr. Cresswell who acted for the Syndicate told him that there would be no difficulty in disposing of claims as soon as a sufficient number was obtained and assured him that he would receive his share when the Syndicate disposed of the claims whether they were transferred to a Company or to an individual. That was all that "flotation" meant according to his view. Mr. Cresswell was not called by the Defendants to contradict the Plaintiff or to explain the part he took in the transaction. There is this to be said for the Plaintiff's view that no doubt the

primary object of making the prospector's remuneration depend on flotation was that the Syndicate might not have to put their hands in their own pockets. It is difficult to suppose that the parties to the agreement concerned themselves about the protection of the British South Africa Company who were quite able to take care of their own interests.

Besides calling a Mr. Heyman who was managing director of "Willoughby's Consolidated" and formerly Civil Commissioner at Bulawayo the Defendants called Mr. Holland the manager of the Charterland Goldfields and Mr. Sauer who was manager of the Rhodesian Exploration Company chairman of the Chamber of Mines and manager of other Companies. Mr. Holland's view was that "flotation" according to the Stock Exchange use of the term meant "inviting subscriptions from the public "for the purpose of launching a company." "Flotation" he said "is complete when the "public have responded and the capital is pro-"vided." "There is no flotation of a company" he added "if the shares are not publicly offered." Mr. Heyman said that "flotation" meant "the "grouping of a certain number of claims to be "formed in a gold mining company to be worked "at a profit." But he rather disappointed expectations by saying he was not in a position to give an opinion as to Mr. Holland's definition; he was not an expert on mining; he was manager of his company purely for financial purposes. Mr. Sauer thought that "flotation of claims" was "the flotation of claims to work at a profit "into a company ordinarily called a gold mining "company." There were different kinds of flotation of claims, he said, "either into a developing "company a mining company or other companies." In practice he would call the Charterland Goldfields a development company. But on

being referred by the Court to the Memorandum of the Charterlands Goldfields he added "I "would say Charterland Goldfields is a gold "mining company." In further answer to the Court he said that in applying the term "flotation "of claims" a gold mining company actually working claims at a profit is meant. That he said is the intention though it is very often badly expressed in the agreement.

Discarding some of the suggested conditions of "flotation" on which the learned Counsel for the Appellants no longer insist such as Mr. Holland's view that there could be no flotation unless the shares were publicly offered and Mr. Sauer's notion that the company must be actually working at a profit the fair result of the oral evidence seems to be that the disposition made by the Syndicate of these mining claims was "flotation" according to the ordinary acceptation of that term. The learned Chief Justice who presided in the Court of Appeal corroborates this view by saying "Quite inde- "pendently of the evidence given in this case "I am of opinion that there has been a flotation "of claims in the sense universally understood "in South Africa."

Having expressed this opinion the learned Chief Justice proceeds to consider whether the mining laws in force in the territories of the British South Africa Company at the date of the contract require a different construction. The Court of Appeal concurring with Vintcent J. who tried the case determine the question in the negative. Their Lordships agree in that conclusion but as this was the principal point in the argument before this Board it will be proper to add a few words on the subject. It may be observed in passing that apparently the point was not made by any witness at the trial or relied on in the argument before the Judge of

First Instance. Its importance seems only to have been discovered in the argument before the Court of Appeal. It is probably owing to this circumstance that there is so little evidence about the actual practice of the British South Africa Company in regard to mining claims while so much stress is now laid on regulations which appear to have been habitually disregarded.

The Mining Regulations No. 1, 1890 were nominally in force when the agreement of July 1894 was made. Section 1 declares that the right of mining for and disposing of all minerals belongs to the British South Africa Company. Any person might take out a license to prospect paying stamp duty and signing a declaration of obedience to the Company (Section 3 and 4). Every holder of a license had the right to peg off ten quartz reefs claims in block. Then his title to these claims was to be inscribed in the Mining Commissioner's register and he was to receive a certificate and thereupon his license as a prospector ceased (Section 9). Every quartz reef claim registered by any prospector was held on joint account in equal shares with the Company and every transfer of the claimholder's interest in such claim was subject to the right of the Com pany (Section 11). Every claimholder desirous of transferring his interest might effect such transfer at the office of the registrar of claims. The transfer was to be duly entered in a book to be kept for that purpose and a certificate of transfer was to be granted (Section 17). No transfer was to be made until the same had been duly registered and no registration was to be made until all dues were paid (Section 19). Every digger had to do a certain amount of work upon his block within a certain limited time under penalty of forfeiture but the Mining Commissioner might extend the time at his discretion (Section 26). When the required amount of work was done the claimholder was bound to

apply for an Inspection Certificate and on giving evidence of having opened up a payable reef and having done the required amount of work he was to receive an Inspection Certificate certifying that the required work had been done (Section 27).

Then comes Section 28 on which the main argument of the Appellants was founded. It provides that "when the claimholder shall have "received his Inspection Certificate he shall "request the Company to make a proposal for "the flotation of his block into either a joint "stock Company or into a syndicate to further "test the mine. The Company shall within a "reasonable time either make a proposal or "decline to do so." The Section then proceeds to deal with each alternative. On any flotation the vendor's scrip was to be divided between the Company and the claimholder. It is not very easy to see how that clause was to be worked. One of the Defendants' witnesses calls it "pure "nonsense." In May 1892 the British South Africa Company issued a notice stating that the Company waived its present option of flotation of mineral companies as laid down in its mining regulations but retained the right of veto on any particular flotation and required application for formal consent before any mineral companies could be floated. That notice does not seem to make the matter very much clearer. On being referred to Sections 27 and 28 Mr. Sauer the chairman of the Chamber of Mines said that the Chartered Company had not enforced their rights under this old law "that is to say" he added "they "have never demanded their rights from claim-"holders."

Now the argument on the part of the Appellants was this: They said that the parties to the agreement—the prospector and the Syndicate—must have been familiar with the mining laws in force in the territories of the British

South Africa Company; they must therefore have contracted on the basis of those regulations and consequently "flotation" in the agreement must be confined to the particular kind of flotation referred to in Section 28 that is flotation by the British South Africa Company or by the claim holder with their consent and in either case after the grant of an Inspection Certificate. But that consequence does not necessarily follow. The word flotation in the agreement seems to be used generally. There is no limitation attached to it nor any qualification of any sort. Why should it be confined to the particular flotation referred to in Clause 28 which does not seem to have been a workable clause nor one insisted upon in practice? The British South Africa Company are not prejudiced by a transfer of mining claims in accordance with their own Regulations. All dues up to the time of transfer must be paid. They know what the consideration is. That must be set forth in the declaration made for the purpose of transfer duty. They may if they please demand one half of the shares payable on the transfer. If they prefer to wait or think it better not to insist on their rights why should the prospector lie out of the remuneration which he has earned and which his employers without taxing themselves are in a position to pay?

In the result their Lordships are of opinion that the fulfilment of the requirements of Sections 26 27 and 28 does not enter into the definition of flotation, and is not a condition precedent to the flotation contemplated by the agreement of July 1894.

Their Lordships were pressed by the learned Counsel for the Appellants to follow the decision of the Court of Appeal in England in an unreported case of *Gifford* v. *Willoughby's Mashonaland Exhibition Company*. The Court there rejected a similar claim by a prospector founded

on an agreement expressed in the same terms as the agreement of the 17th of July 1894. Unfortunately the circumstances of that case are not such as to make it of much assistance. The case came from the Commercial Court. There was no evidence given there. The place of evidence was supplied by statements of Counsel. It does not however appear what those statements were. Some evidence seems to have been given before the Court of Appeal. But that evidence whatever it was is left in equal obscurity. Nor has the decision itself the weight of a united judgment. Each of the learned Judges seems to have taken a separate line not always coinciding with the views of his colleagues nor always pointing in the same direction.

Their Lordships will humbly advise Her Majesty that the Appeal must be dismissed. The Appellants will pay the costs of the Appeal.