Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of James Douglas v. *Joseph Baynes, from the Supreme Court of the Transvaal; delivered the 27th July* 1908.

Present at the Hearing:

LORD ROBERTSON.
LORD ATKINSON.
LORD COLLINS.
SIR ARTHUR WILSON.

[*Delivered by Lord Atkinson.*]

This is an Appeal from a judgment of the Supreme Court of the Transvaal pronounced on the 19th June 1907 dismissing the Appellant's (Plaintiff's) action.

The suit was instituted, in effect, to enforce specific performance of a certain agreement bearing date the 3rd July 1906, entered into between the Appellant and the Respondent (Defendant) whereby the latter agreed to transfer to the former a farm called "Solomon's Temple," situate in the district of Waterberg in the Transvaal, on which deposits of tin ore had been found, in consideration of 3,700 shares of 5*l.* each in a syndicate to be formed for the "purpose of developing" the said farm as a mining property.

The relief prayed for was (1) a transfer by the Defendant of the said farm to the Plaintiff against the delivery of the said 3,700 shares which had been previously tendered to him by the latter; (2) payment to the Plaintiff of 50,000*l.* damages for breach of contract in the event of his failing so to do; and (3) alternative relief.

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The agreement is contained in the Plaintiff's letter of the 3rd July 1906, duly accepted by the letter of the Defendant of the following day, on the precise wording of which nothing turns. The letter of the 3rd July 1906 is in the terms following:—

"Nel's Rust,
"3rd July 1906.

"Dear Mr. Douglas,

"Your letter of the 30th ult. reached me "yesterday and I have considered your offer of 3,700 "(three thousand seven hundred) shares in a syndi- "cate to develop 'Solomon's Temple,' these 3,700 "shares (three thousand seven hundred shares) to be "in lieu of any payment for my farm 'Solomon's "Temple' and to represent my holding in a syndicate "of 12,000 (twelve thousand) shares.

"I have decided to, and hereby, accept the offer, "and the previous arrangement under which you "were to have the option on the farm from last May "—for six months—starting at 15,000*l.* and rising a "thousand pounds per month up to December, is "now cancelled.

"Having accepted the offer, and now being a "large shareholder in the syndicate, I expect the "fullest confidence and that all information as to "what is being done, the result of the prospecting, "and what it is proposed to do, will be communi- "cated to me.

"I cannot close without expressing disappoint- "ment that you have not given me a full third "share in the syndicate as I consider that under "the circumstances I am entitled to a third share "—with which I would have been fully satisfied.

"Kindly acknowledge receipt of this letter.

"I remain,
"Yours faithfully,
"(Signed) JOSEPH BAYNES."

By a memorandum of agreement dated the 8th October 1906, between the Plaintiff and one Duncan McCalman as trustee for a syndicate

called " The Solomon's Temple Developing Syndicate, Limited," intended to be immediately registered in the Colony of Natal with limited liability, reciting the agreement so entered into between the Plaintiff and the Defendant, the Plaintiff agreed to sell the farm of Solomon's Temple to the syndicate for £59,000, represented by 11,800 shares of £5 each, 200 shares being reserved to provide working capital.

The syndicate was on the following day duly registered with limited liability under the limited liability laws of the Colony.

By the Articles of Association it was provided that the capital of the syndicate should be £60,000, divided into 12,000 shares of £5, of which 11,800 should be delivered to the vendors and promoters, and 200 should be offered for subscription to raise a working capital of £1,000; that the directors should have power to increase the capital by a sum not exceeding £60,000; and that the syndicate should have the borrowing powers therein specified.

Neither the Plaintiff nor the Defendant suggests that no agreement was in fact entered into between them. The dispute is as to its meaning. The Defendant contended that as the syndicate, the shares of which he was to obtain in exchange for his farm, was to be a syndicate to " develop Solomon's Temple," such a syndicate meant, by necessary implication, a syndicate equipped with the means reasonably adequate for that purpose, that is, with reasonably sufficient working capital; that the sum provided as working capital was entirely inadequate; and that, therefore, the shares tendered to him were not the kind of shares he bargained for; that

he was, accordingly, justified in refusing to accept them or to transfer his farm to the Plaintiff in exchange for them.

It was, moreover, contended in argument before their Lordships on the Defendant's behalf that it would not be legitimate for the syndicate to provide additional working capital by increasing their capital, or by exercising their borrowing powers, inasmuch as by either of such methods the value of the 3,700 shares he was to receive would be depreciated; but that the necessary working capital should be raised out of the 11,800 shares which were divided amongst the vendors and promoters, and that, in effect, the agreement of the 3rd July 1906 should be construed as if the words, "an adequate number of which shall be " offered for subscription to provide a reasonably " sufficient sum for working capital," or some equivalent words, had been written into the contract immediately after the words "twelve thousand shares" used therein.

The first question for decision on this Appeal, therefore, is whether the contract can be read as if these, or equivalent words, were by implication imported into it. The principle on which terms are to be implied in a contract is stated by Kay, L.J., in *Hamlyn & Co.* v. *Wood & Co.* (1891), 2 Q.B. 488, at p. 494, in the following words :—

> "The Court ought not to imply a term in a contract " unless there arises from the language of the " contract itself, and the circumstances under which " it is entered into, such an inference that the " parties must have intended the stipulation in " question that the Court is necessarily driven to " the conclusion that it must be implied."

In their Lordships' opinion there is nothing in the language of this contract, or the circumstances under which it was entered into, to drive

them to the conclusion that the parties to it ever intended to stipulate that a portion of the 12,000 shares, sufficient to raise a reasonably adequate working capital, should be reserved for that purpose.

In the first place, the parties are not at all agreed as to what sum would amount to reasonably sufficient working capital. The Plaintiff insists that, owing to the geological formation of the farm, lead ore being found in pockets in considerable quantities, prospecting would, to the knowledge of the Defendant, be a paying enterprise, and that, therefore, the provision expressly made for raising working capital is ample. The Defendant, on the other hand, insists that a sum of from 10,000*l.* to 4,000*l.* in cash is absolutely necessary properly to "develop" the property. A great body of evidence was given at the trial on this point on behalf of the Defendants, but while most of the witnesses admitted that ore would be won in the process of development, none of them put a value on the ore. It was, however, admitted by Jennings, one of these witnesses, that in development operations on the adjoining farm of Groenfontein (which closely resembled Solomon's Temple in mineral formation), costing from 800*l.* to 900*l.* a month, from 80 to 90 tons per month of rich ore had been won. This would work out at close on 3,000*l.* at least. It further appeared that the Plaintiff had before the 6th August 1906 expended in developing operations on Solomon's Temple about 2,000*l.* and won ore of the value of 800*l.*

In face of this conflict of evidence it is impossible, in their Lordships' opinion, to come to the conclusion that the parties ever arrived at a common understanding as to what sum

in cash would be approximately reasonably necessary to " develop " the farm, or ever had a common intention that shares sufficient to realize that sum should be reserved out of the 12,000 of which the capital was to consist and set apart for that purpose.

Again, the amount in cash which a given number of shares would realize must depend on the state of the market. It might be more or much less than 5*l*. a share, so that a provision in the contract that a specified number of the 12,000 shares should be reserved to provide working capital would afford no security that the sum in cash thereby obtainable would be reasonably sufficient for the purpose. Again, a provision that a sufficient, but unspecified, number of these 12,000 shares should be reserved to this end, would, unless the reserved shares were at once subscribed for or put upon the market and sold, leave the remuneration of the vendors and promoters unascertained and indefinite, a result which it may, in their Lordships' opinion, be fairly assumed the Plaintiff, at all events, never contemplated.

The conclusion at which their Lordships have arrived on this point, however, by no means disposes of this Appeal. Two matters not raised in the pleadings, or dealt with at any length in the argument, remain to be considered, viz. :— (1) Is the contract as it stands, without any words being by implication imported into it, so ambiguous as to one material matter, that specific performance of it cannot, on any principle of equity, or natural justice, be decreed? and (2) if not, can damages be awarded instead?

The answer to the first of these questions depends on the meaning to be given to the word " develop " as applied to this farm. Does it

mean *prospecting* simply, or prospecting and something more, and if the latter how much more, and what operations does the word "prospecting" cover as applied to mineralized land? According to the evidence of the above-mentioned witness Jennings, in prospecting mining would be involved, because out of the hole made for the purpose of prospecting tin ore in the shape of sausages would be won.

According to the judgment of the Chief Justice the word "development," in its ordinary meaning as applied to mines—

> "denotes that stage of work on mineralized ground "which intervenes between prospecting and mining "proper. First the ground is prospected in order to "ascertain whether there are minerals in paying "quantities. Then it is developed in order to test "whether the minerals which have been found are "such as to warrant the working of the property as a "mining proposition. When that has been established, "the property is actually worked and the minerals are "extracted."

He then proceeds to show that the word "develop" cannot, as applied to this farm, be held to have been used in this contract in its ordinary sense, but must be taken to cover the work of examination and exploration such as is described by the witness Mitchell, according to whose evidence the operation consists in exposing and testing shoots, and sinking shafts each 150 feet deep for that purpose.

The other witnesses examined substantially agree with this witness as to the operations necessary to be carried out before mining proper could be commenced, though they differ widely as to the estimated cost.

It is impossible, therefore, on the evidence to determine whether the work of development in the wide sense indicated by the Chief Justice

would or would not, in itself, be a paying operation. That, however, is not all, for it is, in their Lordships' opinion, by no means clear that the word "develop" was not used in this contract to cover, to some extent, mining properly so called. It is difficult to suppose that the Defendant ever intended to sell the farm for which he had been practically offered over £15,000 in cash for 3,700 5*l*. shares in a syndicate which was not under any obligation to mine, in the proper sense—sufficiently, at all events, to ascertain if work of that kind could be carried on at a reasonable profit. The Defendant's witness Stevens states in his evidence that—

> "The shoots, as a rule, get poorer as you go down.
> "The object is to find what shoots there are and then
> "work them out. The only practical way of testing
> "is mining. The work would be paid for by the tin
> "found."

The witness Oliffe says:—

> "No development required in Solomon's Temple.
> "Thorough prospecting would cost 3,500*l*. to 4,000*l*.
> "Only prospecting and then mining required."

On the evidence it is therefore clear that it is very uncertain what the word "develop" as used in this contract really means, or what are the precise operations it covers. Neither of the parties to the contract has been examined to prove in what sense they understood it. And there can be little doubt that, if the position of the parties were reversed, and the present Defendant, having transferred his farm to the Plaintiff, were to seek the aid of any tribunal administering equitable principles to compel the latter to carry out his side of the contract, alleging that the operations had been stopped at too early a stage—such as the termination of "prospecting" in its ordinary sense—no relief would be given

owing to the ambiguity of the words of the contract, and the consequent impossibility of determining what precisely the present Plaintiff should be required to do.

The case is, in truth, a case of the purchase and sale of land, where the price to be paid for the land—the thing to be given in exchange for it—is uncertain, not only in value, but in nature and character, namely, a given number of shares in a syndicate the nature of whose objects, the extent and character of whose operations, and the adequacy of whose working capital is not defined, or ascertainable with precision, so that, if the construction of the contract contended for by the Plaintiff be adopted, it may reasonably be supposed to have an effect which the Defendant did not contemplate. In such a case the Court will not enforce the agreement, though the Defendant may, himself, be responsible for the ambiguity, on the ground that "it is against conscience for a man "to take advantage of the plain mistake of "another, or, at least, that a Court of Equity "will not assist him in doing so"—*Manser* v. *Back*, 6 Hare, 443, at p. 448. In *Calverley* v. *Williams*, 1 Ves. Jun. 210, Lord Thurlow goes the length of holding that, in such cases, there is no contract, the parties misunderstanding one another, the one proposing to buy one thing, the other to sell another; *see Clowes* v. *Higginson*, 1 Ves. and B. 524.

In *Stocker* v. *Wedderburn* (3 K. and J. 393) it was decided that one party to a contract cannot obtain specific performance of it against the other party where, from the nature of the things to be done by him under it, specific performance of it would not be decreed against him.

It was not suggested during the argument that the equitable principles thus made applicable to suits for specific performance are not in harmony with the principles of the Roman-Dutch law, based as that law is on the Roman law.

Their Lordships are accordingly of opinion that for these reasons specific performance of this contract should not be decreed.

As damages are only claimed in the event of the Defendant refusing to assign the farm within the time to be fixed by the Court, of course they cannot be awarded.

Their Lordships will therefore humbly advise His Majesty that the Appeal ought to be dismissed, but that, in the circumstances, the parties ought to bear their own costs in the Supreme Court.

The parties must also bear their own costs of this Appeal.