Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Smith v. Harrison and others from the Supreme Court of the Colony of Victoria; delivered 20th March 1872.

PRESENT:

LORD JUSTICE JAMES.
LORD JUSTICE MELLISH.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

IN this case their Lordships are of opinion that the decree of the Supreme Court ought to be affirmed.

The material facts of the case are few, and there is not much conflict in the evidence. There was a company called the Golden Gate Gold Mining Company, a company registered apparently under the Limited Liability Act in the colony of Victoria, which was in possession of a gold mine or a claim of some considerable value. At the beginning of the transaction which led to this suit the company were in a difficulty in this way: one of their principal shareholders, apparently the largest of their shareholders, a person holding 650 shares, was in great pecuniary difficulties, so much so, that having deposited 550 shares with the Bank of Victoria, and 100 shares with another person, as security for his debts, he had been obliged to make an assignment of all his property to trustees for the benefit of his creditors. The shares being deposited in this way, Mr. Smith, the Appellant, who seems to have had a great interest himself personally in the company, was embarrassed—it appears that he was really *bonâ fide* embarrassed —as to what was to be done. He was acting as director, and he found, according to his own version of it, not that there were calls which had been made which the bank refused to pay, but

that the bank would probably not pay calls, having merely a lien upon the shares, and that it was useless making calls upon a gentleman who was a bankrupt. That being so, there was this difficulty, that the other shareholders were not obliged to find all the money for carrying on the mine, and were not likely of course to do so, undertaking all the risk themselves, and, if it turned out very profitable, making profit for those shareholders who were not contributing. Their Lordships do not think that when he conceived the plan he afterwards acted on, there was anything in his mind morally wrong, or that any wrong was intended by him towards the company or towards any of the shareholders, but that he apparently formed a scheme for compelling the company to be resuscitated with effective shareholders in respect to those shares which belonged to the bankrupt, and were then pledged to the bank. Accordingly, having resisted an application which had been made by some of the shareholders for a lease which, if granted, would probably have precluded forfeiture, he himself takes out a summons for the possession of the claim as a forfeited claim. Under the Mining Act the man who first of all obtains the declaration of forfeiture is entitled to the possession of the claim. He must have contemplated doing that while he was a director, because he resigns his directorship only two or three days before he begins the proceeding. That might have required serious consideration if, for the purposes of this case, it were necessary to consider it, as to how far in the case of a man who is standing by, and who is a director or a person in any fiduciary position, while there is a forfeiture committed from non-working or any other cause, it would be open to him to resign that office and immediately take proceedings for the purpose of availing himself of that forfeiture which occurred during the time that he was in office, and obtaining the property for his own benefit, to the exclusion of his

cestuique trusts. It appears in this case that there were some disputes or some differences of opinion as to what was best to be done; and possibly, if it were necessary to consider it very carefully, the evidence might not be sufficient to make out that the Appellant was a person who, by commission or omission to perform his duties as director, had occasioned the forfeiture of which he was seeking to avail himself. If that were made out, beyond all question, no Court of Equity would allow a person in such a position to acquire the property. In fact, however, the Appellant was a director during the time when the forfeiture was occasioned, whether through his fault or not, and that is not an unimportant circumstance in the consideration of what the subsequent conduct of the parties was. There was, at all events, that case capable of being made against him, and he evidently himself felt that he was under some honourable or moral obligation towards his brother shareholders. Then he proceeds with his summons. The summons is heard in the first instance by the warden, who decides against him. He gives notice of appeal or expresses his intention to appeal. It does not clearly appear whether the notice was actually given. Thereupon there is a meeting of the Appellant, of the manager of the mine, of a person who was a director both in this company and in an adjoining company (with reference to which apparently there had been previous discussions or negotiations for an amalgamation), and of the manager of the Bank of Victoria or one of its officers. All these persons met together on the day on which that judgment was given by the warden, and thereupon, as the result of the conference between them all, a document is signed by the Appellant in these words:—"I "hereby undertake to withdraw my application "for the possession of the Crown land in the late "occupation of the Golden Gate Mining Com-"pany, registered, situate at Raspberry Creek, "and also to agree to an amalgamation with the

" A 1 Company of the same place, in considera-
" tion of receiving 80 shares in the amalgamated
" company, and also in consideration of the Bank
" of Victoria giving an undertaking to meet the
" liabilities on Mr. D. Eisenstadter's shares in the
" said company so long as the said bank shall
" hold the said shares as security, and have the
" right to draw the dividends (if any) therefrom."
Then there is a note or memorandum stating what the 80 shares were :—"Memo.—80 shares in amal-
" gamated company, as here described, are the
" same as represented by 160 shares in the
" Golden Gate Company, that is, the 100 origi-
" nally held by Smith, and the 60 to be given by
" Hogarth ;" and that is signed by W. Scott, the manager of the company ; the only persons whose names appear as signers of the document being Smith, the Appellant, and Scott, the manager of the Golden Gate Mining Company. The High Court were of opinion that this was one contract, one undertaking, one engagement, on the Appellant's part to do certain things for two considerations ; that it cannot be divided, as was contended in the Court below (to some extent the contention has been repeated here), into two contracts, one with Hogarth and one with the Bank Company, but was, as their Lordships are of opinion, a contract in substance and effect with the company itself, that he would withdraw the application for possession of the company's land if the considerations therein mentioned were given. It was contended, however, that these considerations were not given him before he had in some way or other expressed his withdrawal of his undertaking at a time when he was in a position so to withdraw. Upon the evidence their Lordships are satisfied that he did, on the faith of that one contract, one agreement, receive and retain the shares which he was to receive as a bonus. They are also of opinion that before there was anything in the nature of a withdrawal, of which any trustworthy evidence has been presented to their Lordships, the com-

pany received from the bank an undertaking substantially the same as the stipulated undertaking, and that the Appellant had notice of that undertaking having been so given by the bank to the company before he had in any way expressed, either to the bank or to the company, his withdrawal or attempted withdrawal from the undertaking. If anything in confirmation of that were required, it would be the language of his own letter of the 13th July, when he had received the copy of that undertaking, in which he does not say, "I refuse to carry out this "undertaking, because I have already withdrawn "from it; the whole thing is at an end, and I "have already withdrawn from my offer in con- "sequence of the neglect and delay on the part "of the bank," but he says, "It is not the thing "which I am entitled to have," evidently taking the objection that it was not under the seal of the company, but only an undertaking under the hand of the manager of the company, and that that was not a sufficient compliance with it, and also he says that the bank had in the meantime sold their shares. Now the sale of the shares seems really to have been the origin of the subsequent conduct on the part of the Appellant, who appears to their Lordships to have been labouring under a very considerable misapprehension. He seems to have thought that making the arrangements which they did for the sale of the shares was in some way a violation of or a fraud upon their undertaking. Now, it is quite manifest that what he was from the first wishing to obtain and seeking to obtain was the rescue of the shares from the position in which they were; that is to say, shares held by a bankrupt, but held by the bank as a security, under circumstances under which the bankrupt could not pay and the bank would not pay anything upon them in common with the shareholders. The intention was to get those shares made effective, so as to be effectual and substantial contributories of whatever might be required for carrying on the company. The sale

of the shares appears to be quite consistent with that. They were under no obligation to retain them as security for any length of time. It was open to them to make the arrangement which they did make with the trustees of the debtor to ascertain their real value, and, in concert with those trustees, to get the shares transferred into the names of real shareholders. That they were transferred into the name of officers of the bank really makes no difference. Officers of the bank in all probability were persons quite as capable of paying the calls upon those shares as any other persons would be, and, of course, there was this additional security, that the officers would not have been allowed by the bank to have been made personally liable for the calls, and the officers, if sued, would have called upon the bank to pay.

That being so, it appears to their Lordships, as it appeared to the Court below, that the conditions of the Appellant's contract were fulfilled; that he ought thereupon not to have gone on with his action for the recovery of the forfeited ground, or that he should have used the proceedings in that action for the benefit of the company, with a view to the amalgamation afterwards to be made of the two companies, and for the purpose, in fact, of getting the company established in the possession of their claim. He does proceed with it, and there is an appeal, in the course of which appeal there is a special case stated for the opinion of the Chief Judge of the Mining Court, who decided that it was open to a director or a shareholder in a mining company which has incurred a forfeiture to apply for the claim in his own name. That was a mere decision upon that legal question, and the Appeal itself had on all other grounds still to be disposed of, and no equitable right of the company was affected thereby. That being the state of things, there being only that decision upon that special case, the Appellant enters

into a new arrangement,—he makes a bargain with all the other shareholders, in fact, except the bank, saying, "If you will not further "interfere with the prosecution of my claim, if "you will withdraw all your objection to it, and "all your opposition, if you will allow me to go "on, then I will give everybody, except the "bank, exactly their proportion of these shares "which they have now got;" and the transaction assumed the shape which is stated in paragraphs 18, 19, and 20 of the Bill, which are in all substantial respects admitted by the answer, "That the Defendant, who was present "when the said judgment was delivered on "the next day, that is to say, the 3rd day "of March 1868, in order to induce the "shareholders in the Golden Gate Company to "abandon their defence to his complaint, wrote "and sent to Messrs. Smith and Willan, the "solicitors of the company, a letter which, "omitting the formal parts thereof, is as fol-"lows:—'Referring to the Chief Judge's deci-"'sion of yesterday on the two formal questions "'referred to him by the Judge of the Court of "'Mines, I have to request you to inform the "'Golden Gate Company that I still hold myself "'bound to re-convey to each of the share-"'holders named in the document I forwarded "'to you some time since, and the date of which "'is given hereunder, their several interests, as "'specified in that document; but you will "'please inform the gentlemen who assume to "'be present directors, and who wrongfully "'designate 37, Market Street, Melbourne, the "''office' of the company, and are wrongfully "'using the seal of the company, that, if they "'continue to enable the Bank of Victoria "'(against whom alone it is my intention "'hitherto finally to enforce the forfeiture) to "'litigate, as I deem most unjustly, with me "'under the name of the whole company, I will "'from henceforth treat the litigation as abso-"'lutely between myself and the whole of the "'individual shareholders who, either as direc-

" 'tors or as members of any meeting of
" 'shareholders authorising the directors, con-
" 'tinue to support the Bank of Victoria in their
" 'litigation with me.' Then he explains what
" the shares were, and then he says, 'That a
" 'meeting of shareholders in the Golden Gate
" 'Company was called to consider Defendant's
" 'proposition contained in his letter of the
" '3rd March, and at such meeting, held on the
" '11th March, it was resolved, by a majority of
" 'shareholders in the said company, "that the
" 'board of management be and are hereby
" 'authorised to accept Mr. Smith's proposition
" 'on such terms as they may deem expedient;"
" 'but a protest was handed in on behalf of the
" 'Bank of Victoria against the said resolution,
" 'and it was in and by such protest stated that
" 'the Bank of Victoria would take such steps
" 'to protect their interests as they might be
" 'advised. That the Plaintiffs used their best
" 'endeavours to induce the managing body
" 'of the said Golden Gate Company to appear
" 'in the Court of Mines upon the further
" 'hearing of the said Appeal to oppose the
" 'same; but the directors and other share-
" 'holders in the Golden Gate Company col-
" 'luding with the Defendant refused to take
" 'any proceedings adversely to him, or to
" 'permit the Plaintiffs to use the name of the
" 'company in so doing, and the Plaintiffs were
" 'unable to take any steps to oppose the
" 'Defendant in prosecuting his said Appeal,'"
and accordingly the further hearing of the Appeal was continued and the judgment given in the Appellant's favour, without any opposition on the part of the company. The Court below were of opinion that such an arrangement as that with the shareholders of the company by which a person in the position of the Appellant was allowed to proceed with his Appeal to obtain a decree evicting the company by an arrangement with the company itself, for the purpose of excluding from that company one shareholder,

was a proceeding which a Court of Equity could not allow to stand. In the view of the case taken by the Court of Victoria their Lordships entirely concur. They think that that bargaining, that combination with the company and with all the other shareholders, was one which cannot be allowed to stand, and that being so, their Lordships are of opinion that the decision of the Court below was quite right upon those grounds.

There have been one or two points suggested in the course of the discussion. One is that the bank has violated its own charter in dealing with these shares. Their Lordships do not find it necessary for the decision of this case to consider how far a person who appropriates the property of a company of this kind can set up as a defence of his appropriation the fact that they obtained that property in some way or other in violation of their charter. Whether that would be a sufficient defence may perhaps have to be considered on some other occasion; but their Lordships are clearly of opinion that in this case there is no foundation at all for the contention that anything done with respect to these shares by the Bank of Victoria was in any way a violation of their duty to confine themselves strictly to banking business. They apparently obtained the security in the ordinary course, as bankers lending money to a customer and taking those shares as a pledge, and what they did afterwards was an attempt in the best way they possibly could to secure the property for their shareholders and to get the best price for it. That being so, it appears that there was nothing wrong in making the arrangement for the purchase of the shares, and there was nothing out of the ordinary course of banking business in their manager giving the undertaking which was given to pay the calls during the time that they held shares in security.

One other smaller point has been made in the

case, which is, that the decree was wrong in giving too much to the bank. Their Lordships, however, are not satisfied that the decree could have been otherwise drawn. The result of the case is that the Appellant in fact got the property as a trustee for the company, and that being so, of course he was a trustee for the company and all its shareholders, and the bank in respect of their shares were entitled to their proper proportion of that which he received upon the amalgamation. Of course he would be entitled to retain the shares appropriated or to be appropriated to his original shares, and he would be also entitled to receive everything in respect of the shares which under the contract were given to him. Their Lordships see no reason for altering the decree in that respect.

Upon the whole, therefore, their Lordships will humbly recommend to Her Majesty that this Appeal be dismissed, with costs.