1880. Jan. 12.

Queen *vs.* William September.

resident magistrate, or special justice of the peace, to adjudge any person convicted under the second and fourth sections of this Act, to a term of service on the public works of this Colony, or to employment under any divisional council, or municipality, or private person, other than the said resident magistrate or special justice by whom such person shall have been convicted, or the person at whose instance such prosecution shall have taken place, who may be willing to employ such person for any term not exceeding that for which he is liable to imprisonment under this Act on that behalf provided, and at such rate of wages as shall in the judgment of the resident magistrate or justice of the peace be sufficient for his maintenance," &c. I do not think that it was ever intended by the legislature that the magistrate should have the power of giving an alternative sentence. The magistrate may either give three months' imprisonment, or else he may try to discover whether there is any person ready to take the prisoner as a servant; and having discovered such a person, he may adjudge the prisoner to a certain term of service. I think the name of the person by whom the prisoner is employed should be specified, as I believe it was intended that the Court should have control over that matter. The sentence of the Magistrate must be upheld, except as to the words "unless other employment shall be sooner obtained," &c.

STOCKENSTRÖM, J., concurred.

Conviction sustained.

TRUSTEES OF STELLENBOSCH BANK *vs.* HEROLD.

Contribution.—Liquidation.—Final Liquidation.

An unlimited bank became unable to meet its liabilities. It was alleged that this was partly owing to the misconduct of H. the cashier, who was also a shareholder. Those interested subscribed a sum of money to be devoted to the satisfaction of the bank's liabilities. By the terms of a second subscription, the directors bound themselves to pay one half, and certain shareholders the other half, of the running

deficiency. H. knew of these subscriptions, but was not a party to them. Subsequently H. agreed with the directors that in consideration of the bank giving up all its claims against him, he would, besides paying large sums of money on his shares, if in liquidating the bank there should be any deficiency in the final liquidation thereof, pay his share pro rata *according to his share in the bank jointly with the directors. On the bank being liquidated without judicial interference, certain of the directors were unable to pay the shares due from them under the second subscription agreement, and there was still a deficiency. Though by the trust deed the shareholders agreed to indemnify directors against all losses, some shareholders had contributed nothing. Without calling on them to contribute, the trustees now sued H. for his proportionate share of the deficiency.* Held, *that H. could not be rendered liable on his undertaking until after all the available assets of the bank had been collected, and all legal remedies for such collections had been exhausted.*

1879. Dec. 2. „ 3. 1880. Feb. 2.

Trustees of Stellenbosch Bank *vs.* Herold.

In 1876 the Stellenbosch bank (unlimited) was unable to meet its liabilities. The defendant was a shareholder and the cashier, and part of the bank's losses was attributed to his breach of duty. A subscription by those interested in the bank was got up and a large sum was subscribed. The defendant knew of this subscription, but was not a party to it. A second subscription was then got up, to which the defendant was no party, by which the directors were to pay one half, and fourteen shareholders the other half of the running deficiency. It was then agreed between the directors and the defendant that in consideration of the bank giving up all its claims against the defendant, he, besides paying large sums of money on his shares, would, if in liquidating the bank there should be any deficiency in the final liquidation thereof, pay his share, *pro rata*, according to his share in the bank jointly with the directors. The bank was then liquidated without judicial interference. Certain of the directors whose names appeared on the second subscription list could not pay their shares, so that there still remained a deficiency. By the trust deed the shareholders agreed to indemnify directors against all losses. There were some shareholders who had contributed nothing. Without calling

1879. Dec. 2. „ 3. 1880. Feb. 2.

Trustees of Stellenbosch Bank *vs.* Herold.

on them to contribute, the trustees now sued the defendant for his proportionate share of the deficiency. The defence was that the bank had not been finally liquidated in terms of the agreement. The defendant filed certain claims in reconvention, but these were not pressed at the trial.

Upington, A.G. (*Cole, Q.C.* with him), contended that as the defendant was all along cognizant of what had taken place, he must be taken to have entered into the agreement upon the understanding that the deficiency would be met by subscription and not by calls upon the shareholders. The liquidation was voluntary, and the defendant, as shareholder, consented to it. He cannot now insist on excussion.

Buchanan (*Leonard* with him), for defendant, contended that the defendant having paid large sums as shareholder—as principal debtor—was not bound to pay on his guarantee until all the shareholders had been excussed.

Cur. adv. vult.

Postea (Feb. 2),—

De Villiers, C.J. :—The plaintiffs in this case are the trustees of the Stellenbosch bank, who seek to recover from the defendant the sum of £601 5*s.*, under an agreement entered into between him and the directors of the bank on the 13th of March, 1877. In the latter part of 1876 the bank became unable, owing to heavy losses which it had sustained, to meet its liabilities. Part of the losses was ascribed by the directors to the defendant's breach of duty as the cashier of the bank. On the 9th of March, 1877, a meeting of directors and ex-directors was held, at which, after reciting the defendant's breach of duty, the following resolutions were passed :—"1. That directors will be willing to settle the matter if Mr. Herold will undertake to comply with the following agreement, namely, that all moneys which Mr. Herold considers to have in the Stellenbosch bank, fixed as well as floating, with the interest due thereon, as also any other claim which he may consider to have against the bank, will be given up as the property of the bank. 2. That Mr. Herold undertakes to pay the cashier of the Stellenbosch bank the sum of £50 with interest from the 10th of January,

1877, for every Stellenbosch bank share of which he is proprietor. 3. That if in liquidating the bank, there should be any deficiency in the final liquidation thereof, Mr. Herold undertakes to pay his share *pro rata*, according to his share in the bank, jointly with directors. 4. That, notwithstanding agreement, Mr. Herold will be responsible for all losses which the bank has sustained, or may still suffer, in consequence of his not having given proper notice to parties who have endorsed bills. 5. That Mr. Herold undertakes to assist directors in cases which may come before any Court, as witness, and to appear (without any charge) as witness or otherwise, and that he will make affidavits which may be required, and for liquidating the bank, give his helping hand as much as is in his power. 6. This meeting adjourned until 2 o'clock P.M., in order to give Mr. Berrangé an opportunity to consult with Mr. Herold." In the afternoon the adjourned meeting took place, at which the defendant appeared with his attorney, Mr. Berrangé, and the conditions upon which the directors were willing to settle the matter with the defendant were read and approved of, and accepted by the defendant. And on the 13th of March, the defendant signed a certificate, endorsed at the foot of the resolutions in the following terms:—"I do hereby certify that I am perfectly satisfied with the resolutions passed by the directors at the meeting of the directors held on the 9th of March, 1877, relative to the arrangements made by directors concerning myself, and I undertake to fully carry out above resolutions." The plaintiffs admit that under the first resolution the defendant has not only given up to them the sum of £1700 standing in his name as a floating deposit, but has also relinquished on his own behalf, and on behalf of his son-in-law Beyers, the sum of £4000 deposited by the defendant as a fixed deposit in the name of Beyers. They also admit that, under the second resolution, the defendant has paid to the bank the sum of £2000, being his contribution as the holder of 40 shares, at the rate of £50 per share. There is no question as to the remaining resolutions, except the third. In regard to this part of the agreement, the plaintiffs say that at the date of the summons, viz., the 28th of July, 1879, the affairs of the bank had been finally liquidated, and that the final deficiency of the assets fixed and determined up to the 20th of March,

1879. Dec. 2. „ 3. 1880. Feb. 2.

Trustees of Stellenbosch Bank *vs.* Herold.

1879, and payable by the directors jointly with the defendant, amounted to the sum of £4810. Strangely enough, the amount of £601 5*s.* now sought to be recovered from the defendant is not his proportionate share with the seven directors, who held office at the time of the agreement, according to the number of their respective shares, but one-eighth of the deficiency, the remaining seven-eighths being paid by seven directors and ex-directors, to the exclusion of two directors. But it appears that if the defendant had been called upon to pay in proportion to the number of his shares, as required by the agreement, the amount would have been slightly in excess of the present claim; and as to the two directors who have not paid their share under the agreement, one of them (De Waal) paid a large sum (*i.e.* about £50 per share) as shareholder, and was therefore excused as director, and the other (H. L. Neethling) is stated by the plaintiffs to have been unable to pay his share as director. These details would affect the amount in dispute rather than the principles involved in the case, and they are therefore of little importance, except as showing the loose manner in which the amount of the claim has been arrived at. The real question is whether a case for contribution has been made out against the defendant under the third resolution. The main defence is that according to the true intent and meaning of the agreement the plaintiffs are not entitled to demand from the defendant payment of any share of any alleged deficiency until the bank shall have been finally liquidated, and that such final liquidation had not taken place at the time when the summons was issued. The plaintiffs contend that the agreement of March 1877 must be read in connection with a previous voluntary undertaking on the part of several of the shareholders to contribute certain specified sums towards the liquidation of the bank, and that the deficiency contemplated by the agreement of March 1877 was the deficiency which would remain after these voluntary subscriptions had been collected. Unfortunately for this argument, the agreement is wholly silent as to the subscription list of the shareholders, and there is no evidence that the subscription list was referred to at the meeting between the directors and the defendant on the 9th of March. Moreover it is quite clear that the directors themselves did not consider that subscription list

as the basis of the agreement of the 13th of March, 1877, for they subsequently started another subscription list, by which the subscribers undertook to make good the then ascertained deficiency. The subscribers of the second list were eight directors and ex-directors, who undertook to pay one half, and fourteen shareholders, who undertook to pay the other half of the deficiency. Neither to the first nor to the second subscription list was the defendant a party. There is indeed evidence that the first was known to him at the time when he entered into the agreement, but there is no proof that the list was considered by anyone as representing the full amount that would be obtainable from the shareholders. As a matter of fact, the plaintiffs' witnesses admit that there are shareholders who have not contributed, and who have not been called upon to contribute towards the deficiency. Thus Mr. Cosnett, the accountant for the so-called liquidators, states: "There are a few shareholders who have not contributed anything at all. The contributions of the shareholders were purely voluntary. There are shareholders who have not paid, and who have not been called upon to pay." And Mr. de Waal, one of the liquidators, says: "There are shareholders who have not signed the subscription list, of whom I can't say that they are unable to pay." Now the question arises, is this the kind of liquidation which the defendant can fairly be taken to have contemplated at the time when he signed the undertaking? It is impossible not to admire the conduct of those shareholders who voluntarily contributed close upon £40,000 towards extricating the bank out of its difficulties. By this means the poorer shareholders were relieved from contributing anything at all, and a large number of shareholders were saved from impending insolvency and ruin. But this mode of liquidation had its drawbacks, not the least of which was that it left the legal liabilities of all parties concerned in the most vague and undefined condition. The defendant himself probably had the vaguest notion possible of the meaning of the term "liquidation" when he signed the agreement. It is quite possible, as argued on behalf of the plaintiffs, that he did not contemplate an official winding up of the bank, but, on the other hand, it is more than possible that he did contemplate a complete excussion of the remaining shareholders, before he should be called upon to fulfil

1879. Dec. 2. ,, 3. 1880. Feb. 2.

Trustees of Stellenbosch Bank *vs.* Herold.

his guarantee jointly with the directors. Under the second resolution, he undertook to pay (and did actually pay) the sum of £50 for every share held by him; and if the possibility of what he may have contemplated is to form an ingredient in the construction of the agreement, it might fairly be argued that he did not bargain for paying any portion of his guarantee until the remaining shareholders had contributed a like sum in respect of their shares. If they had done so, there would have been more than sufficient to satisfy the liabilities of the bank. But the point really to be decided in this case is the proper legal meaning of the term "final liquidation." In proceedings in insolvency, the term "final liquidation account" is always used to denote the last account which is filed after all the available assets of the insolvent estate have been collected, and all legal remedies for such collections have been exhausted. In the winding up of companies, the term "*liquidator*" is applied to the person appointed by the Court "to do all such things as may be necessary for winding up the affairs of the company and distributing its assets." In the dissolution of ordinary partnerships which are unable to meet their liabilities, the term "*liquidation*" is often applied in this Colony to the process by which, under an agreement between the partners and creditors of the firm, the assets of the firm and of the individual partners are collected and distributed *pro rata* among the creditors. The term is also applicable to those cases in which shareholders in joint stock companies, having allowed their directors to go on and contract debts beyond the nominal capital of such companies, are called upon by the directors to meet those debts by means of a general contribution. In all these instances the "*liquidation*" of the firm or company implies a fair, rateable, and, if need be, compulsory contribution on the part of all those liable to contribute towards payment of the liabilities of the firm or company. Such seems to me to be the proper legal meaning involved in the use of the word. It has, however, been suggested that the word as used in the present case implied no more than a purely voluntary contribution on the part of the shareholders. Now it is a well-known rule of law in the construction of documents that "words must be deemed to have their proper legal meaning unless such a construction would be unmeaning in reference to surrounding

circumstances, in which case they may be interpreted according to their less proper meaning" (*Stephen*, Dig. of the Law of Evidence, 4th edition, p. 97). In the present case the use of the words in dispute in their proper legal sense is quite consistent with all the facts proved, and the words would certainly not be unmeaning in reference to the surrounding circumstances. There is nothing to show that a valuable but compulsory contribution could not be legally or effectually claimed from all the shareholders. On the contrary, one of the clauses of the deed of settlement of the bank (the 53rd) expressly provides "that the proprietors shall at all times save harmless and indemnified the chairman and directors, and the trustees of the said bank, of, from, and against all losses, costs, charges, and expenses, which they or any of them may sustain or be put to, in or about any matter or thing relating to the affairs of the said bank." The liability of the shareholders being unlimited they were liable to the payment of calls for the discharge of the debts to be liquidated, even after the nominal capital had been raised and exhausted. Under all the circumstances of the case, I am of opinion that the plaintiffs must fail in this action. The defendant's liability under the 3rd resolution can only accrue in case of a deficiency in the final liquidation of the bank, and in the absence of proof of such final liquidation in the proper legal sense of the term, he is entitled to be absolved from the instance on the claim in convention. In regard to the defendant's claims in re-convention, he has submitted to absolution from the instance as to the claims for £198 12*s.* 6*d.*, and £7 17*s.* 6*d.*, and has withdrawn his claim for £307 10*s.* The judgment of the Court must therefore be absolution from the instance upon the claim in convention, judgment for the plaintiff upon the claim in re-convention for £307 10*s.*, and absolution from the instance upon the claims in re-convention for £198 12*s.* 6*d.* and £7 17*s.* 6*d.*, respectively; the plaintiffs to pay the costs in convention, and the defendant to pay the costs in re-convention.

DWYER, J. concurred.*

[Plaintiffs' Attorney, I. HORAK DE VILLIERS.
Defendant's Attorneys, J. C. BERRANGÉ & SON.]

* Stockenström, J., did not sit during the hearing of this case.