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In the Privy Council.

No. 92 of 1932.

ON APPEAL FROM THE SUPREME COURT OF THE BAHAMA ISLANDS.

BETWEEN

HIRAM WALKER & SONS LIMITED ... (*Plaintiffs*) *Appellants*,

AND

CHRISTIE & COMPANY AND CHARLES F. CHRISTIE ... ... (*Defendants*) *Respondents*.

CASE FOR THE APPELLANTS.

Record.

1. This is an appeal from a judgment of the Supreme Court of the Bahama Islands given on the 23rd of February, 1932, by acting Chief Justice Guy Tracey Watts in an action tried before him and a special Jury. p. 14.

2. The Appellants who were Plaintiffs in the said action sued the first Respondents as the makers and the second Respondent as the endorser of a promissory note dated 1st July, 1930, for $7,330.61 and interest at 6 per cent. per annum, payable on demand at the Royal Bank of Canada, Nassau Branch, which had been dishonoured on being presented for payment at the said Bank. The Respondents who jointly defended the action, apart from formal pleas which were not insisted on at the trial, alleged by way of defence that a contract between themselves and the Appellants had been made in substitution for their liability to the Appellants on the said promissory note and that the latter had thereby been cancelled. p. 3. 10 p. 4.

3. This contract was alleged to be contained in two letters between the parties dated 26th November, 1930, or alternatively in a written agreement dated January, 1931.

4. The Appellants by their Reply denied the existence of the alleged agreement, and further pleaded that the documents relied on by the Respondents as constituting an agreement, stipulated for the performance by them of certain conditions and that as these had not been fulfilled they did not in any case afford a defence to the action. p. 6. 20

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5. At the trial the following facts were proved or admitted. In 1930 the Respondents who were indebted to the Appellants for goods supplied and unable to pay the sum due, gave them the promissory note sued on and in November of that year the Respondents desiring to be relieved of their liability on the said note wrote the following letter to the Appellants :—

p. 8, l. 6.
p. 18.

"Nov. 26th, 1930.

"Dear Sirs,

"With regard to our conversation on the 25th instant *re* the settle-"ment of our debt to you amounting to approximately $26,000.00, "we beg to make the following proposals for your consideration :— 10

"1. The Bonded Warehouse of Christie & Company, owned "by Mr. Charles F. Christie, be transferred in fee simple for the "sum of Fifteen Thousand ($15,000.00) Dollars. The Deeds to "be accompanied by necessary letters giving your Companies "control of Bonded Licence and Wholesale Liquor Licence (these "Licences are in connection with the aforementioned Warehouse), "it being also agreed that the holders of the Licences are obliged "to renew them for your benefit as and when necessary ; Christie "& Company to pay your firms a further sum of $5,000.00 in "cash, and you in turn agree to retire the notes which you hold 20 "for the debt.

"2. The balance of this debt to be liquidated by allowing us "One Dollar per case on our future business with your firm. This "arrangement will be subject to suspension during any period "when the prices of your goods are $7.50 for quarts and $8.00 for "pints or lower, but to resume the allowance when these prices "are increased. When our debt has been paid this arrangement, "of course, ceases.

"3. Christie & Company agree to devote full energies to the "sale of your products and other agency lines of Gooderham & 30 "Worts, Limited, and Hiram Walker & Sons, Limited, and "Christie & Company are to continue their present trading "arrangements with The Trading Company, Limited, of Nassau, "as long as possible, with the purpose in view of enabling The "Trading Company, Limited, to pay its indebtedness to your firms.

"All goods that you may allow us on consignment shall be "subject to the terms of payment and security, as stated in paragraph "Number 2 of your letter to your Agent, Mr. A. C. Hunter, dated "October 25th, 1930.

"Trusting you will give this matter your earnest and prompt 40 "attention, we remain,

"Yours faithfully,

"CHRISTIE & COMPANY.
"Per F. H. C."

to which the Appellants sent the following reply :— Record.

" Nov. 26th, 1930.

" Dear Sirs,

" We are in receipt of your letter of to-day's date. p. 8, l. 8.

" The proposal you made regarding the settlement of your debt " to us and Hiram Walker & Sons, Limited, is acceptable to us, with " the understanding, however, that your debt will not be considered " liquidated until you have sold enough of the products of this firm " and Hiram Walker & Sons, Limited, on the basis you propose, to clear 10 " the balance of the whole debt. We are further assuming that the " amount paid for Mr. Charles F. Christie's Bonded Warehouse is a " fair price. p. 9, l. 25. p. 19, l. 30.

" The cash payment of $5,000.00 is to be paid and the title deeds " of the Bonded Warehouse delivered, on the Bank in Nassau handing " you the note given for your debt.

" You will, of course, exercise every effort to enable us to collect " the debt owing us by The Trading Company.

" This arrangement is a private one between us, and is not to be " divulged to other parties.

20 " Yours faithfully,

" GOODERHAM & WORTS, LIMITED.

"Per W. S. Rainer, Vice-President."

Gooderham & Worts Limited is a company associated in business with the Appellants, and it is common ground between the parties that references to this firm may be read as references to the Appellants.

6. In December, the Respondents discovered that they were unable to give the Appellants a good title to the warehouse mentioned in the letters of 26th November, 1930, and further negotiations appear to have taken place the Respondents offering to obtain an undertaking from the 30 Royal Bank of Canada to pay to the Appellants $15,000 if they should fail to make a good title to the said warehouse, but according to the evidence of the Respondents' own witness Frank Holmes Christie a partner and manager of the Respondent firm no definite agreement was come to, his evidence being to the effect that in January, 1931, " The whole negotiation was postponed till July, 1931." p. 8, l. 14. p. 8, l. 31.

7. In the meantime the Appellants had discovered that $15,000 was very much in excess of the real value of the said warehouse, the Government appraiser who was called at the trial valuing it at £1,250 only, and they consequently did not proceed with the transaction and commenced their 40 action on the said promissory note. p. 11, l. 26.

8. A copy of a document, dated January, 1931, was produced in evidence by the Respondents setting out certain terms on which the Appellants were to forgo their rights to enforce the promissory note sued on, this document had been executed on behalf of the Respondents but it was p. 8, l. 17. p. 10, l. 6. p. 23, l. 23.

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p. 13, l. 29.

admitted that the Appellants had not done so, nor was it indicated in what manner other than by the execution of the document they had become bound by its terms. The learned Judge left certain questions to the Jury as to the readiness and willingness of the Respondents to perform what it was stipulated they should do in this document and the Jury answered these questions in the sense that the Respondents were ready and willing to perform them.

p. 15, l. 42.

9. The learned Judge in giving judgment for the Respondents says as follows :—

"The Plaintiffs' last contention is that there was no novation of 10
"the original agreement because there was nothing in the evidence
"to show whether the Plaintiffs had ever executed the documents
"which, if I remember rightly, were referred to at the trial for the sake
"of convenience, as the principal and the subsidiary agreements. There
"was not. But to my mind, it is a somewhat astonishing contention,
"for the Plaintiffs to come forward and assert that by reason of their
"failure, neglect or refusal, to execute the documents which embodied
"the terms of the substituted agreement—therefore the substituted
"agreement becomes *ipso facto* voidable or void (I am not quite clear,
"and I did not gather that the Plaintiffs' learned Counsel was quite 20
"clear as to which), and that they are consequently entitled to sue upon
"the original agreement. In my judgment, however, the question
"whether these documents, which are dated January, 1931, were ever
"executed by the Plaintiffs or not is immaterial. As I have said, these
"documents were intended simply to embody the terms of the sub-
"stituted agreement; but the actual novation—and I am satisfied
"upon the evidence that there was an actual novation—took place
"in the preceding November, at an interview between the Defendants'
"and the Plaintiffs' representatives, and is evidenced by the letter of
"the 26th November from Messrs. Gooderham & Worts to the 30
"Defendants' Company in the course of which they state 'The proposal
"you made regarding the settlement of your debt to us and Hiram
"Walker & Sons, Ltd., is acceptable to us.' To my mind this
"constitutes an unqualified acceptance and a novation of the original
"agreement.

"In these circumstances the Defendants' original liability became
"merged and extinguished in the subsequent agreement of November,
"1930, and I give judgment for them accordingly together with the
"taxed costs of suit."

10. It is respectfully submitted that the judgment appealed from is 40
erroneous inasmuch as the evidence negatived the finding on which the judgment is based that the letters of 26th November, 1930, constituted a contract between the parties. The letters themselves do not warrant this conclusion inasmuch as the Appellants' reply to the Respondents' offer introduces fresh terms which would require acceptance by the Respondents

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before a contract ensued. Further the Respondents' own evidence makes it clear that these letters in fact represented merely a stage in a negotiation that was never carried to a conclusion and which could not be concluded on the footing contemplated at the time they were written inasmuch as the Respondents could not give a good title to the warehouse in question.

11. With regard to the alternative contention put forward by the Defence that the Appellants were precluded from bringing the action by the document signed on behalf of the Respondents in January, 1931, it is respectfully submitted that there is no foundation in law or fact for this 10 contention. There is no finding by either the learned Judge or the Jury that the Appellants had ever contracted in the terms set out in this document, and no evidence on which such a finding could be based.

12. It is further respectfully submitted that if contrary to the Appellants' contention any contract could be presumed or implied from any facts or circumstances in the negotiation between themselves and the Respondents, the existence of such contract was conditional upon the warehouse in question being of the value of $15,000 and that the Appellants were entitled to repudiate it on discovering that its value was considerably less than this sum and that the learned Judge was wrong in refusing, as he did, to leave 20 the question of its value to the Jury.

13. It is also respectfully submitted that, if, contrary to the Appellants' contention, any contract could be presumed or implied as aforesaid, such contract would form no defence to the action inasmuch as the consideration for the Appellants entering into it was—

(1) the payment of $5,000 by the Respondents on or before the date when the said contract was made, and

(2) the giving of a guarantee to the Appellants by the Royal Bank of Canada that if good title to the said warehouse was not given by the Respondents by 1st July, 1931, that they the Bank would pay 30 $15,000 to the Appellants and the Respondents failed to perform either of the above-mentioned conditions and that the finding of the Jury in answer to Question 3 so far as it asserts that such a guarantee was given is contrary to the evidence.

p. 14, l. 4.

14. It is respectfully submitted that the judgment of the learned trial Judge should be reversed and judgment entered for the Appellants for the amount claimed by them in the action for the following among other

REASONS.

1. Because the facts proved in evidence did not constitute any defence in law to the Appellants' action.

2. Because the letter of the Respondents, dated 26th November, 1930, and the Appellants' reply thereto of the same date did not constitute a contract in substitution for the Respondents' liability on the promissory note sued on.

3. Because no contract having this effect existed between the parties.

4. Because the contract (if any) between the parties was conditional on the value of the warehouse proposed to be transferred to the Appellants in part payment of the Respondents' debt being $15,000 and it was in fact considerably less than this. 10

5. Because the contract (if any) between the parties was conditional on the performance by the Respondents of certain conditions and the Respondents had failed to perform the said conditions.

RONALD SMITH.

In the Privy Council.

No. 92 of 1932.

On Appeal from the Supreme Court of the Bahama Islands.

BETWEEN

HIRAM WALKER & SONS LIMITED
(*Plaintiffs*) *Appellants*,

AND

CHRISTIE & COMPANY AND CHARLES F. CHRISTIE - (*Defendants*) *Respondents*.

CASE FOR THE APPELLANTS.

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