Privy Council Appeal No. 92 *of* 1932.

Hiram Walker and Sons, Limited - - - - - *Appellants*

v.

Christie and Company and another - - - - *Respondents*

FROM

THE SUPREME COURT OF THE BAHAMA ISLANDS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH JULY, 1933.

Present at the Hearing:

LORD TOMLIN.
LORD MACMILLAN.
LORD WRIGHT.

[*Delivered by* LORD TOMLIN.]

This is an appeal from a judgment of the Supreme Court of the Bahama Islands given on the 23rd February, 1932, by the acting Chief Justice in an action tried before him with a special jury. The appellants here were the plaintiffs in the action and the respondents the defendants.

The action was upon a promissory note dated the 1st July, 1930, for 7,330·61 dollars and interest. The note was drawn by the first respondents, Christie & Company, and was endorsed by the second respondent, Charles F. Christie. The respondents, Christie & Company, are a partnership firm, the respondent, Charles F. Christie and his brother, F. H. Christie, being the partners in the firm. The appellants are a limited company, the business of which is dealing in spirituous liquors. The respondents, Christie & Company, acted as the appellants' selling agents in the Bahamas, the appellants' headquarters being in Canada. Another company called Gooderham & Worts, Limited, was

associated with the appellants, as was also a third company (called Hiram Walker, Gooderham & Worts, Limited). Counsel for the appellants dealt with the case upon the footing that these three companies for the purposes of this ligitation were one and the same.

The circumstances in which the action arose are these. In the summer of 1930 money was owing from the respondents Christie and Company to the appellants and to Gooderham & Worts, Ltd., and there was a difficulty on the part of such respondents in discharging their liabilities. Negotiations took place which resulted in the making in favour of the appellants of the promissory note sued upon. A second promissory note for some 19,000 dollars in favour of Gooderham & Worts, Limited, was at the same time made by the respondents Christie & Company.

By a letter dated the 26th November, 1930, a proposal was made by the respondents Christie & Company to the appellants and Gooderham & Worts, Limited, with a view to discharging the liability of the respondents under the two promissory notes in the following way. It was proposed that the respondent C. F. Christie should transfer to the creditor companies a bonded warehouse in the Bahamas, which was said to belong to him and which was to be treated as of the value of 15,000 dollars, and that a sum of 5,000 dollars cash should be paid making, with the 15,000 dollars, 20,000 dollars, and that the balance of the indebtedness on the two notes should be liquidated by allowing to the respondent company one dollar per case on their future business with the two companies. The letter provided, in clause 1, that the note should be retired after transfer of the warehouse and payment of the 5,000 dollars cash.

That letter was answered on the same day by a letter signed by Gooderham & Worts, Limited, which, in form, does not appear to be an unqualified acceptance. It was so far as material in these terms

> "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 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. The cash payment of 5,000 dollars 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."

It is said, first of all, that these letters constituted an absolute agreement which entitled the respondents, Christie & Company, to treat the promissory note as satisfied. It seems impossible to come to that conclusion because it is clear that the note was only to be retired after the transfer of the warehouse and the payment of the 5,000 dollars cash, so that, at the best, it could only discharge the note when those two terms had been fulfilled,

and as will hereafter appear neither the transfer nor the payment was ever made. Moreover it is contended by the appellants that there were conditions in the second letter which prevented it from being an absolute acceptance. It appears to their Lordships that, whatever might be said with reference to the provision about the debt not being considered liquidated until the products sold cleared the balance, it is plain that the acceptance was conditional upon the 15,000 dollars being a fair estimate of the value of the warehouse and that failing this there was to be no binding contract at all.

In December, 1930, a difficulty arose, because it was then found that the respondent C. F. Christie's title to the warehouse was defective, that the warehouse was really vested in some company which was in liquidation, and that the only way in which a title could be made to the warehouse was by securing a private Act of Parliament to vest the property in the respondent C. F. Christie. That led to difficulties, not unnaturally, and in January, 1931, a representative of the creditor companies visited Nassau and inspected the warehouse, and thereupon two further documents were prepared. One of these documents was expressed to be an agreement made between Hiram Walker, Gooderham & Worts, Limited, of the first part, a company called the United Traders, Limited, of the second part, and the respondent C. F. Christie of the third part. The other of these documents was expressed to be an agreement made between Hiram Walker, Gooderham & Worts, Limited, of the first part, and the respondent C. F. Christie of the second part. The respondents, Christie & Company, were not expressed to be parties to either document. Without stating the terms of those documents in full, it may be said that, though they embodied some of the proposals which had been contained in the letters of November, they certainly contained additional terms, for example, the second document contained a provision that the Royal Bank of Canada should guarantee to Hiram Walker, Gooderham & Worts, Limited, that, in the event of the respondent C. F. Christie being unable to make a good title to the warehouse on or before the 1st July, 1931, the Bank would pay to Hiram Walker, Gooderham & Worts, Limited, 15,000 dollars, that is, the amount at which the warehouse was to be valued for the purpose of the arrangement. Those two documents were signed by the respondent C. F. Christie. It is not clear what then took place, whether the documents after signature by Mr. Christie were sent to Canada for approval and signature by the creditor Companies or not; at any rate they did come into the custody of the creditor Companies, and neither the appellants nor either of the two other associated companies ever in fact signed them. There is no evidence that those documents ever became concluded agreements. No part of the 5,000 dollars cash was ever paid, the difficulty with regard to the title of the warehouse was not cleared up until, at any

rate, after the date of the issue of the writ, to which reference will be made in a moment, and the evidence of Mr. F. H. Christie was that the whole negotiation was postponed until July, 1931.

At some date in May, 1931, the writ was issued by the appellants against the respondents Christie & Company, and the respondent C. F. Christie claiming payment of the 7,330·61 dollar note. A statement of claim was delivered, and in the statement of claim the note is alleged to be payable. In their defence the respondents denied the making of the note, and the respondent C. F. Christie denied that he endorsed it. Then the respondents alleged the letters of the 26th November, and relied upon them as being in the nature of accord and satisfaction of the note, and they alleged that it was agreed that the documents of January, 1931 (to which they referred as agreements by the appellants and Gooderham & Worts, Limited) should be accepted in discharge of the cause of action under the note.

The matter came for trial in due course with a special jury. The promissory note was admitted and non-payment was admitted. Their Lordships are of opinion that the admission as to non-payment meant that there was default in payment after presentation for payment, and that upon that basis the action was tried. Evidence was given by the two brothers Christie, and some evidence of the value of the warehouse was given by an appraiser called by the appellants and certain questions were left to the jury. It is remarkable that the question whether there was any concluded agreement in accord and satisfaction of the note does not seem to have been put to the jury at all. The first question put was whether the respondents had been ready and willing at all times since January, 1931, to perform their part of the agreement, exhibit D. (being the second of the two documents prepared in January, 1931, and never executed by any of the companies concerned) in respect of (*a*) the payment to the appellants of the sum of 5,000 dollars, (*b*) the sale to the appellants of the bonded warehouse referred to in the same agreement, (*c*) the transfer to the appellants of the wholesale liquor licence, then standing in the name of the late Frederick James Christie, and (*d*) the undertaking to hold in trust for the appellants the bonding licence. To each part of this question the jury answered yes. Then the second question was: Did the respondents, or either of them, take all necessary action to vest the bonded warehouse in the appellants on or before the 1st July, 1931? The answer was "Yes." The third question was Did the respondents, or either of them, arrange for the Royal Bank of Canada to guarantee to the appellants that in the event of the respondent, Charles F. Christie, being unable to supply good title to the bonded warehouse, on or before July, 1931, the bank would pay to the appellants the sum of 15,000 dollars? The answer was "Yes." The fourth question was

Did the appellants at any time before action brought intimate to the respondents, or either of them, that the valuation of 15,000 dollars for the bonded warehouse was not a fair valuation ? The answer was " No."

It may be observed that the answers to some of those questions, whatever be the relevancy of the questions, seem to be unsupported by or contrary to the evidence. For example, it is plain that the respondents were never in a position to transfer the warehouse and there is no evidence that they ever tendered the 5,000 dollar payment in cash. What the second question means may be doubtful. The respondents had taken steps to secure the necessary Act of Parliament in the Parliament of the Islands, and, in fact, an Act was passed and received due Assent towards the end of May, although it did not become operative until the following August, 1931. The answer to the question about the bank's guarantee cannot be reconciled with the evidence, because the evidence is all to the contrary effect. The bank never did arrange for any guarantee at all ; in fact, the bank manager himself said " I was never asked for the guarantee." How the jury came to give the answer they did it is difficult to see.

After an adjournment, there were arguments by counsel and ultimately, in February, 1932, the learned judge gave judgment. The substance of his judgment is to be found in the concluding part of it where he says :—

> " 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 substituted agreement " (presumably he is referring to the letters of the 26th November, 1930), " 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 evidence by the letter of the 26th November from Messrs. Gooderham & Worts to the 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, Limited, 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."

Now it is to be observed that, so far as the record shows, there is no evidence at all of any interview preceding the letters of the 26th November except the fact that, in the first letter there is a reference to a conversation on the previous day, but there was no evidence of what took place on the previous day or that any agreement was reached at any interview, or that the letters were only a formal embodiment of some agreement which had been previously reached. The learned judge refers to the passage : " The proposal you made regarding the settlement of your debt is acceptable to us," and says that constitutes an

unqualified acceptance. He omits, it seems to their Lordships, to notice two things: First of all that the acceptance is certainly qualified by the condition as to the value of the warehouse, and that it is one of the terms of the original offer and also of the acceptance that the note shall not be retired until the warehouse has been transferred and the 5,000 dollars in cash paid. Their Lordships are of opinion that the letters of the 26th November, 1930, did not constitute an agreement discharging the note. There was no concluded agreement in January, 1931, nor did there happen any other event which discharged the note.

In those circumstances their Lordships are of opinion that the appeal must succeed, no contract or other event displacing the liability on the note having been proved. The appeal should therefore be allowed, the judgment of the Supreme Court set aside with costs and in lieu thereof judgment should be entered for the appellants for the amount of their claim *videlicet*, £1,608 17*s.* 5*d.*

Their Lordships will humbly advise His Majesty accordingly. The respondents will pay the costs of the appeal.

In the Privy Council.

HIRAM WALKER AND SONS, LTD.

v.

CHRISTIE AND COMPANY AND ANOTHER.

DELIVERED BY LORD TOMLIN.

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1933.