Privy Council Appeal No. 26 of 1924.

James Towesland Allen - - - - - - - *Appellant*

v.

The Royal Bank of Canada - - - - - - - *Respondents*

FROM

THE WEST INDIAN COURT OF APPEAL (LEEWARD ISLANDS).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH JULY, 1925.

Present at the Hearing:
LORD ATKINSON.
LORD SHAW.
LORD PARMOOR.

[*Delivered by* LORD ATKINSON.]

This is an appeal from the judgment dated the 20th August, 1923, of the West Indian Court of Appeal, by which the appeal of the present appellant from a judgment of the Supreme Court of the Leeward Islands Montserrat Circuit dated the 28th March, 1923, was dismissed. By this latter adjudication it was adjudged that the Royal Bank of Canada, the present respondents, should recover from the present appellant the sum of £2,014 16*s.* 9*d.*, and costs, when taxed.

The litigation out of which the appeal has sprung was commenced by the issue by the Royal Bank of Canada of a specially endorsed writ dated the 10th October, 1922, against James Towesland Allen, the appellant, claiming to recover from him the sum of £2,248 8*s.* 1*d.*, made up of the three following sums—first the sum of £2,000 alleged to have been lent at various dates in the year 1920 by the Bank to the appellant, who was one of their customers; second, a sum of £227 13*s.* 8*d.* claimed to be interest at the rate of £8 per cent. per annum on the sums so lent; and the insignificant third sum of £20 14*s.* 5*d.*, alleged to have been paid by the Bank for the appellant at the latter's request for freight insurance, porterage,

export duty, etc., on nine bales of cotton alleged to have been shipped to London at the appellant's request. To this claim the appellant, on the 27th October, 1922, filed a defence and counter-claim, in which, after traversing the making of any loan by the Bank to the appellant, and denying that he was indebted to the Bank for the sum claimed, he set forth in the three paragraphs following what was presumably his defence to the Bank's claim against him. The paragraphs run as follows:

> "(*a*) Alleged 'certain monetary transactions' between himself and the plaintiffs which were contained in certain promissory notes made by him payable to one Penchoen and one Howes respectively at the plaintiffs' offices, in Plymouth, Montserrat, indorsed by the said Penchoen and Howes to the plaintiffs who discounted and purchased the same.
>
> "(*b*) Alleged that the said promissory notes had never been presented for payment and submitted that such presentment was a condition precedent to proceedings thereon.
>
> "(*c*) Alleged that subsequently to the aforesaid indorsement and before the commencement of proceedings herein the said Penchoen and the said Howes had made and delivered to the plaintiffs other promissory notes which the plaintiffs had accepted in full discharge of the original promissory notes and of all damages and causes of action in respect thereof as against all parties thereto.

The Bank on the 6th November, 1922, delivered a reply and a defence to this counter-claim, taking issue on the defence and alleging that the "monetary transactions" referred to in the defence were one and the same as the transactions set out in the particulars of the statement of claim, that the promissory notes mentioned in the defence were insufficiently stamped, and were presented by the appellant to the Bank when the aforesaid sums of money were lent by the latter to him. Secondly, the Bank denied that they had accepted from Penchoen or Howes or either of them any promissory notes or notes in discharge of the original promissory notes referred to in the defence, or in discharge of all damages and causes of action in respect thereof, but admitted that the said Penchoen and Howes had given the Bank certain promissory notes and letters whereby they guaranteed the Bank the repayment of the amount set out in the claim.

The trial of the issues thus raised was very irregularly conducted. For instance, the manager of the Bank who was examined as a witness was only appointed manager on the 4th January, 1922. His predecessor was a gentleman named Bynoe, and the witness was allowed to prove the items contained in the appellant's account, the state of his account with the Bank, and the amount of his indebtedness, though he knew nothing whatever of any of these things personally, but only derived his knowledge of them from reading the bank books. None of these books was produced; nor was the appellant's pass-book, nor was any certified copy of his account produced. The appellant himself was not examined.

On the 2nd December, 1920, the appellant wrote and sent to the Bank the following letter :—

" The Royal Bank of Canada,
" Plymouth, Montserrat, B.W.I.

" Herewith I hand you Title Deeds and covering : Lookout & Blakes Estates in the Parish of St. Peter Monserrat, B.W. Indies.

" You may hold these documents until all advances made by you to me and now current and all advances which may be made to me in the future are repaid in full."

It was not disputed that on the day upon which these deeds were deposited, the appellant by arrangement with Mr. Bynoe, the then manager of the Bank, drew two promissory notes, one in favour of a Mr. K. P. Penchoen, and the other in favour of a Mr. Henry Randolf Howes, and that each of the payees endorsed the note he received, and gave it to the Bank, presumably as additional security for the debt due by the appellant to the Bank. These notes were never produced at the trial. It is not quite clear for what amounts they were respectively given or the dates at which they respectively became due.

It was subsequently discovered that they were insufficiently stamped, and upon that discovery, or some time after it, Mr. Bynoe, the former manager of the Bank, wrote to the appellant a letter containing the following passage :—

" Dear Sir,

" We informed you some time ago that the promissory notes which we hold for your account at this Branch were insufficiently stamped, and had your promise that the matter would be attended to within a very short while."

On the 25th March, 1922, the appellant wrote to the manager of the bank the following letter :—

" The Manager,
" The Royal Bank of Canada,
" Plymouth, Montserrat.

March 25th, 1922.

" Dear Sir,

" In connection with the 9 bales of cotton lint which you hold stored in Plymouth to your order, as there is no local offer for same, please ship to your London Office for disposal, using the proceeds first in payment of all overdue interest and any balance against my present advances of $9,600. I am sending you in addition one bale of ' stained ' cotton, which please treat in the same manner.

" Yours truly,

" (Sd.) J. T. ALLEN."

That is a distinct and explicit acknowledgment of his debt to the Bank to the amount of $9,600, etc. The following are the applicable provisions of the Stamp Act, 1887 of the Leeward Islands :

" 39 (1) Where a bill of exchange or promissory note has been written on material bearing an impressed stamp of sufficient amount but of improper denomination, it may be stamped with the proper stamps on payment of the duty and a penalty of 40s. if the bill or note be not then payable according to its tenor and of £10 if the same be so payable.

"(2) Except as aforesaid no bill of exchange or promissory note shall be stamped except within three days after the execution thereof.

"40 (1) Every person who issues, endorses, transfers, negotiates, presents for payment or pays any bill of exchange or promissory note liable to duty and not being duly stamped shall forfeit the sum of £10 and the person who takes or receives from any other person any such bill or note not being duly stamped either in payment or as a security or by purchase or otherwise shall not be entitled to recover thereon or to make the same available for any purpose whatever."

Owing to the difficulty of getting the original promissory notes stamped so that they might be sued on, application was, in August, 1922, apparently, made by the Bank to Messrs. Penchoen and Howes touching the appellant's indebtedness to the Bank, whereupon they respectively wrote to the bank manager two letters identical in terms save that the sum mentioned in Mr. Penchoen's letter is $9,100·00 and that mentioned in Mr. Howes is $500·00.

Mr. Penchoen's letter runs thus:

"The Manager, Montserrat,
"The Royal Bank of Canada, August, 1922.
"Plymouth,
"Montserrat.

"Dear Sir,

"With reference to my interview with you on the subject of Mr. J. T. Allen's indebtedness to the Bank, the payment of $9,100.00 of which has been guaranteed by me, and to the demand made by the Bank that Mr. Allen should either pay his debt or give some further security I now hand you herewith a Demand Note of even date for $9,100.00 (nine thousand and one hundred dollars).

"It is understood and acknowledged that this Note is Handed to the Bank as further security for the amount of $9,100.00 advanced to Mr. Allen, the repayment of which together with all interest, costs and the usual charges I hereby guarantee to the Bank.

"It is also agreed that this guarantee shall not be discharged by the variation or compromise of any rights of the Bank against Mr. J. T. Allen or his property or any other surety or security for the balance of his account with the Bank by way of indulgence or granting of time to him or any other surety or by release of any property for the time being forming a security for the said balance or otherwise.

"Yours faithfully,
"(Sd.) K. P. PENCHOEN."

The note signed by Mr. Penchoen runs as follows:

"$9,100.00.

"Due Plymouth, Montserrat, B.W.I.
"Aug. 21, 1922.

"On demand I promise to pay to the order of myself nine thousand one hundred dollars at the Royal Bank of Canada, Plymouth, Montserrat, B.W.I., value received with interest at the rate of eight per cent. per annum from date until paid.

"No. (Sd.) K. P. PENCHOEN."

That signed by Mr. Howes is identical in form save that the amount is 500·00 instead of nine thousand one hundred.

These two gentlemen were examined at the trial. Their evidence is quite consistent with the contents of these letters. Mr. Barrington Ward, who opened the appeal, frankly stated that he only relied upon one point, which was, as their Lordships understood him, this, that when a negotiable instrument is given by a debtor to a creditor and accepted by the latter, while the question as to on what terms it is given is one of fact depending on the intention of the parties, yet if nothing be said as to these terms the presumption is that it was given and accepted by way of actual payment of the debt due, and not as collateral security for its payment. In their Lordships' view this contention is, as will be presently shown, unsound, but even if it were sound there is, they think, abundant evidence in this case to refute the suggested *prima facie* presumption, and, indeed, to show conclusively that the parties to the transaction never intended that the two promissory notes endorsed by Messrs. Penchoen and Howes, respectively, should be given to, and accepted by the Bank on the terms that they should be taken as payment of Allen's debt, a thing fluctuating in amount (as that debt apparently did), and the debt thereby discharged. As Mr. Barrington Ward, however, pressed his point so confidently their Lordships think it might be desirable, in the interests of the inhabitants of the Leeward Islands, if not of others, if they set forth with some detail the grounds upon which they think the contention so put forward by Mr. Barrington Ward is unsound.

In the last edition of Byles on Bills, *i.e.* the edition of 1923, at p. 232 the rule of law is stated in these terms :—If a bill or note be taken on account and nothing be said, the legal effect of the transaction is that the original debt remains, but the remedy is suspended till the maturity of the instrument in the hands of the creditor. And the remedy is equally suspended if the bill or note be given not by the debtor but by a stranger. It was at one time apparently supposed that the cases *Re Boys Eedes* v. *Boys ex parte Hop Planters Co.* (1870) L.R. 10 Equity 467 ; *Baker* v. *Walker* (1845) 14 M and W 465, and *Palmer* v. *Bramley* (1895) 2 Q.B. 405 established that when a negotiable security is given by a debtor to his creditor the presumption is that it is given and accepted by way of payment, and not as a collateral security. The more recent authorities, however, are in conflict with this proposition and support the statement of the law given at the above-mentioned page of Byles on Bills. In *Gun* v. *Bolckow and Co.* 10 Ch. A. 491, Lord Justice Mellish, on delivering judgment, lays down the law touching such transactions as these at pages 500 and 501 of the report thus. He said :—

> " Mr. Kay contends that it will be a question of fact to be tried at the hearing whether those acceptances were taken by the vendors (*Bolckow, Vaughan & Co.*) in absolute satisfaction of the debt due from the purchaser for the iron (*i.e.* the goods sold), so that the vendor's lien would not revive upon the purchasers becoming insolvent, and giving public notice that they were insolvent."

Then at p. 501 he said :

> " Whoever heard of such a thing in a mercantile contract when it is said that payment is to be made by buyers' acceptance of sellers' drafts, that if the acceptance was dishonoured, the right to sue under the original contract did not revive."

In *Henderson* v. *Arthur* [1907] 1 K.B. 10, a lessor sued for a quarter's rent upon a covenant in a lease for the payment of the rent quarterly in advance. The defendant set up a defence, that by an agreement made between the plaintiff and the defendant before the lease, the plaintiff agreed to take a bill payable at three months in discharge of the rent as it became due, and that the defendant tendered such a bill to the plaintiff in respect of the rent sued on, which the latter refused to accept.

Lord Alverstone, C.J., held that the evidence of the alleged agreement was admissible, and finding that the agreement was proved gave judgment for the defendant. The Court of Appeal held that the evidence was inadmissible and allowed the appeal. Farwell, L.J., in the course of a judgment, approved of subsequently by Warrington, J., in the case of in *Re Defries and Sons, Limited, Eichholz*, v. *J. Defries and Sons, Limited* [1909] 2 Ch. 423, said :

> " The Chief Justice appears to have held that ' pay ' in the covenant to pay rent was an ambiguous expression and might mean either payment in cash or by bill, and he appears to have admitted parol evidence on this footing."

But if that contention were correct, modern conveyancers are less wise than their fathers in discarding the old familiar form, " well in hand truly pay in lawful money of Great Britain " from covenants to pay rent. But such a contention is not consistent with the decision in *Davis* v. *Gyde* (1835) 2 A. and E. 623, as explained by Maule, J., in *Belshaw* v. *Bush* (1851) 11 C.B. 191. The learned Judge in the latter case, after pointing out that the cases in which a bill given on account of a simple contract debt has been held to operate as a conditional payment, and to suspend the remedy, may be supported on the ground of an agreement, implicit in law, from giving and receiving such a security, proceeds to say :

> " The cases in which the giving of a bill has been held not to suspend the remedy on a demand specially is for rent, or may be accounted for on the ground that the legal implication of an assent that the bill shall operate as a conditional payment does not arise, where if it did the plaintiff would be deprived of a better remedy than an action on a bill, as in *Davis* v. *Gyde*, in which the debt being for rent he would part with a remedy by distress, and as in *Worthington* v. *Wigley*, where the demand being on a bond, the plaintiff might in certain events have recourse to funds that he could not reach in an action of simple contract ; "

so that even if the lessor had received a bill on account of the rent, which he did not, it would not operate even as a conditional payment of the rent. *Re J. Defries and Sons, Limited, Eichholz*, v. *J. Defries and Sons, Limited* (*supra*), was a debenture holder's action. The debentures were registered debentures, and the principal money was payable to the registered holders. Arrears

of interest to the amount of £1,793 15*s*. had accrued due. The Company from time to time drew cheques for the accrued interest, which they sent to a debenture holder entitled, but who refrained from cashing them. Warrington, J., held that the mere giving of a cheque was not a conditional payment of a security debt; but a debenture debt so as to restore the security. He followed the judgment of Farwell, J., in *Henderson* v. *Arthur* (*supra*), that *Bunney* v. *Poyntz* (1883) 4 B. and Ad. 568, was inconsistent with if not expressly over-ruled by *Gunn* v. *Bolckow, Vaughan and Co.* (*supra*), and seemed to think that the decision in *Palmer* v. *Bramley* relied upon by the appellant in this case was an unsatisfactory decision. Of course a creditor may accept from his debtor a negotiable instrument either in absolute satisfaction of the debt due to him, or he may accept it as a conditional payment only. In the first case the creditor takes the instrument at the risk of its being dishonoured; which, if it be, he cannot sue the debtor on the original cause of action (*Smith* v. *Ferrand* 7 B. and C. 19; *Sayer* v. *Wagstaff*, 5 Beavan, 415. 417; *Sibree* v. *Tripp* 15 M. and W. 23; *Caine* v. *Coulton*, 1 H. and C. 7 64).

The result in the latter case is only this, that the remedies of the creditor to recover his original debt are suspended during the currency of the negotiable instrument.

But a much more unfortunate difficulty than this stands in the way of the appellant in this case. There is proved a distinct admission under his own hand that he owes the Bank the debt sued for. He is therefore under a legal obligation to pay it—indeed, at law, a legal obligation to seek out his creditor and pay him. He can only, in this case, get rid completely of that liability either by proving that this debt is paid by the acceptance of these two promissory notes, or by getting rid of it temporarily by proving that the notes to pay it were only given and taken as security for the debt, not payment of it, and that the remedy of the creditors to recover it is thereby suspended during the currency of these negotiable instruments.

But the burden of proving permanent or temporary immunity from the payment of this admitted debt rested upon the appellant. In this case he has admitted the existence of the debt. He must discharge that burden. He never produced the notes. It is not suggested that they have been destroyed or lost. Their contents could only be proved by their production, and as the evidence stands the appellant has given no proof at all that as to how long they were current and the creditors' remedies suspended. It was not suggested that the two promissory notes of Messrs. Penchoen and Howes, given in the month of August, 1922, either satisfied the appellant's debt or suspended the Bank's remedy. The appeal therefore, in their Lordships' view, fails, and must be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

JAMES TOWESLAND ALLEN

v.

THE ROYAL BANK OF CANADA.

DELIVERED BY LORD ATKINSON.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.

1925.