Privy Council Appeal No. 48 *of* 1928.

Charles Hubert Kinch - - - - - - - *Appellant*

v.

Edward Keith Walcott and others - - - - *Respondents*

FROM

THE COURT OF COMMON PLEAS, BARBADOS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH MARCH, 1929.

Present at the Hearing:
VISCOUNT SUMNER.
LORD CARSON.
LORD BLANESBURGH.

[*Delivered by* LORD BLANESBURGH.]

Before proceeding to define with particularity the issue which on this appeal their Lordships must determine, it may be well for clearness sake to set forth, as succinctly as possible, the somewhat involved story which leads up to it. All the parties live in Barbados. The appellant is a merchant there; the respondent Walcott a barrister at law, and the respondent Hutchinson a solicitor, both practising in the Island. The respondent Taylor is a commercial agent who was for some time in the employment of the appellant.

For many years prior to 1925 the appellant had acted as agent on commission for a Newfoundland firm of Monroe & Company, and in later years for that firm's successors in business the Monroe Export Company, Ltd. The appellant's agency was concerned mainly with the sale on commission of fish consigned by the Monroes to him in Barbados, and with the purchase in the island, also on commission, of molasses on their account.

In 1925 disputes arose between the Monroe Company and the appellant with reference to his transactions, and in March,

1925, the Company instituted against him in the Barbados Chancery Court a suit claiming full accounts on allegations, *inter alia*, that profits had been improperly withheld from the Company in connection with his purchases of molasses, and that the appellant was suppressing his books in which his transactions on behalf of the Company were recorded. In that suit, to be referred to as the suit for accounts, the respondent Walcott acted as Counsel, and the respondent Hutchinson as solicitor for the Company, the appellant being duly represented by Counsel and solicitors of his own. In the result on the 5th June, 1925, after a long trial, a decree in the suit adverse to the appellant was pronounced by the Acting Vice-Chancellor, who directed the accounts of the appellant's transactions to be reopened and ordered him to make payment together with the costs of suit of the amount found due on these reopened accounts when taken. A stay of execution was, however, upon terms granted to enable the appellant, if so advised, to appeal.

Thereupon, indeed, within a few days, negotiations were on foot for a settlement. These were conducted by the respondents Walcott and Hutchinson on behalf of the Company with the appellant direct, that is to say, without the intervention of any legal advisers on his behalf. As a result of them a deed prepared by the respondent Hutchinson was on the 18th June, 1925, executed by the appellant. It bore that he had settled the Company's claims against him on all accounts by a payment in British currency of $15,000 thereby acknowledged to have been received, and by a mortgage thereby made of specified properties of his own to secure an additional sum the equivalent of $25,000 with interest. All further proceedings in the suit for accounts were to be discontinued.

This deed contained recitals which apparently the respondent Hutchinson now agrees were not in complete accord even with his own intent at the time and were less favourable to the appellant than they should have been. But the complaints of the appellant with reference to the transaction went far beyond any such matters of detail and as ventilated by him in correspondence and in legal proceedings to which reference must later be made were that he was left to act in the matter without legal advice; that so far as the deed was a mortgage deed he executed it without understanding and indeed being misinformed as to its nature and that his execution of a deed at all was in effect the result of the pressure of the respondents Walcott and Hutchinson who threatened that, if he did not pay the $15,000 and execute the deed as presented to him, criminal proceedings would be taken for alleged misdeeds in relation to his purchases of molasses as agent for the Company.

Nor did the appellant keep to himself these charges of his against these respondents. In two letters, one of 2nd August, 1925, and the other of 19th August, 1925, addressed to Mr. Monroe, the Managing Director of the Monroe Company, he

asserted in substance that it was as a result of blackmail on their part that he had been coerced to put up what he described as the guarantee.

These letters with their grave charges against them of personal and professional misconduct having come to the knowledge of Mr. Walcott and Mr. Hutchinson they, on the 8th June, 1926, joined as plaintiffs in an action for libel against the appellant. In it they each claimed $5,000 damages. On the 29th June, 1926, the appellant put in his defence. He pleaded justification in terms which included his allegations already referred to, and on the next day, the 30th June, he followed this up by commencing in the Chancery Court of the Island a suit against the Monroe Company—to be referred to as the rescission suit—claiming that the settlement and mortgage deed of the 18th June, 1925, should be set aside by reason, *inter alia*, of the matters pleaded by him in his plea of justification. On the same day he made an affidavit in the rescission suit in support apparently of an application to restrain a threatened sale of his property mortgaged to the Monroe Company by the deed he was therein seeking to impeach. In that affidavit he repeated in effect in relation to the settlement his allegations against the two respondents to which reference has already been made.

The respondent Hutchinson deeply resented these sworn imputations upon his personal and professional conduct, and it is now his own avowal that he thereupon resolved and remained determined to institute against the appellant, at the earliest convenient opportunity, a prosecution for perjury for having made them. His intentions in that matter however he, it is asserted, kept to himself, more particularly during the negotiations for the settlement of the libel action and the rescission suit which was reached by consent orders made in each on the 16th November, 1926, and the provisions of which are, on this appeal, all important.

The terms of the consent order in the libel action were that upon the appellant by his Counsel withdrawing all allegations of fraud and duress pleaded in his defence and upon his expressing regret at having pleaded justification and withdrawing the plea, and upon the respondents' Walcott and Hutchinson undertaking not to bring any fresh action in respect of the subject matter of that action it was by consent ordered that the respondents should be at liberty to discontinue the action and that the appellant should pay them the sum agreed on by Counsel for their costs of suit. In the consent order in the rescission suit the appellant by his Counsel unreservedly withdrew all charges of fraud, malpractice and duress against the respondents Hutchinson and Walcott contained in the bill of complaint and affidavits therein, the Company, on the other hand, stating that it made no charge in that suit against the appellant of having suppressed the books of account in the pleadings mentioned. For the rest,

the settlement of the 18th June, 1925, was in effect set aside; the properties thereby mortgaged to the Company were to be reconveyed to the appellant at his expense; the accounts were to be taken as directed by the judgment of the 5th June, 1925, these accounts being extended so far as molasses were concerned, the appellant was to pay the Company's taxed costs of the suit for accounts, but each party was to bear his own costs of the rescission suit.

As will appear presently, these consent orders lie at the root of the questions at issue upon this appeal, and it is convenient now to state with reference to them that there is, in their Lordships' view, no room for doubt that an underlying condition of the negotiations for the settlement of the libel action and of the rescission suit, as also of the final arrangement for the settlement of both, was that the action and suit should be settled at the same time. The settlement of one was dependent upon the settlement of the other and the consent orders, although separate, must stand or fall together. The consent order in the rescission suit has, it appears, been acted upon by the Monroe Company, and the appellant has obtained advantages under it which so far as their Lordships have been informed, he has never disaffirmed. The importance of all this in its relation to the ultimate question before the Board will presently become apparent.

The third respondent Taylor now takes and thereafter retains a prominent place in the narrative. That respondent, as has already been said, was at one time in the employment of the appellant. There had been grave differences between them. Taylor had been prosecuted by the appellant for embezzling his moneys. He was a witness for the Monroe Company in the suit for accounts, and it has been an allegation of the appellant that Taylor was paid $1,200 for so giving evidence against him, and that so far from the appellant having suppressed or concealed his books of account as there alleged, these books were at all material times in the possession or under the control of the respondents Hutchinson and Taylor themselves. Imputations upon Taylor were clearly not accepted by the learned Vice-Chancellor in the suit for accounts, and the adverse decree against the appellant in that suit must have encouraged Taylor to proceed against the appellant in respect of a letter of the 29th October, 1924, addressed by him to the same Mr. Monroe above referred to, in which he alluded to Taylor as the vagabond who had stolen his cash books to save himself before the Courts. Taylor, it seems, had even during the pendency of the suit for accounts instructed the respondents Walcott and Hutchinson to commence on his behalf at some suitable time an action against the appellant for libel in respect of that statement, and the appellant's complaint against all three is—and it is the complaint on which the present action is based—that the respondents Walcott and Hutchinson when negotiating with him

for the settlement of the suit for accounts on the 18th June, 1925, intimated that no such settlement was possible unless the appellant would also agree to pay to the respondents Walcott and Hutchinson on the respondent Taylor's behalf the sum of £1,200 by way of compromise of Taylor's cause of action in respect of the appellant's defamatory letter to Mr. Monroe. That sum the appellant did pay, and the present action, which was commenced on the 31st March, 1927, has been brought to recover damages from the three respondents in respect of the obtaining from him of that £1,200, the appellant setting up against the three the allegations which he had already made and withdrawn against the respondents Walcott and Hutchinson separately in relation to the settlement of the suit for accounts, namely that they had all wrongfully conspired to extort that money from him by means of threats to institute against him the criminal proceedings already mentioned.

The pleadings in the action are voluminous. It suffices, however, in the events which have happened, to set forth only the following paragraphs of the statement of claim :—

"3. Some time between the 5th and 19th days of June 1925 the defendants wrongfully and unlawfully conspired together to extort money from the plaintiff.

"4. In pursuance of the said conspiracy the defendants said and did the following acts and things :—

"(*a*) The defendants Hutchinson and Walcott threatened to cause the plaintiff to be prosecuted for a criminal offence or offences alleged by them to have been committed by him arising out of the purchase of molasses by the plaintiff as agent for the Monroe Export Co., Ltd., of St. John's Newfoundland, and the shipments by him of such molasses to the said company unless he the plaintiff paid to them the said Hutchinson and the said Walcott, the legal advisers of the defendant Taylor, the sum of one thousand five hundred pounds sterling in compromise of an alleged cause of action which the defendant Taylor had against the plaintiff for libel in respect of a letter written by the plaintiff to the said Monroe Export Co., Ltd., and/or W. S. Monroe a director of the said Company and/or slander.

"PARTICULARS.

"*For some time prior to the 18th day of June* 1925 *the defendants Walcott and Hutchinson had threatened to prosecute the plaintiff for the alleged criminal offence or offences mentioned unless he compromised a then pending suit of the said Monroe Export Co., Limited, against himself.*

"*On the said 18th day of June,* 1925, *it was definitely agreed between the plaintiff and the defendants Walcott and Hutchinson that the defendants Walcott and Hutchinson would abstain from prosecuting the plaintiff on certain terms then agreed between them, which included the payment by the plaintiff to the defendant Hutchinson of* $15,000 *on the 19th day of June* 1925."

By their defences the respondents denied the allegations of conspiracy and asserted—and so much is now admitted—that the matters referred to in the above italicised paragraphs of particulars were included among the allegations expressed to be withdrawn in the two consent orders already mentioned. Accordingly the respondents Walcott and Hutchinson pleaded and contended that by reason of these consent orders the

appellant is in this action precluded as against them from raising the matters so withdrawn; and all the effective proceedings in the action have so far been concerned with this plea alone.

On the 6th July, 1927, the cause came on for trial before the Chief Justice of Barbados, and a special jury. The point just mentioned was at once taken by Counsel on behalf of the respondents Walcott and Hutchinson, and after full argument was on the 8th July, 1927, upheld as a preliminary finding by the learned Chief Justice. Against his order to that effect the appellant appealed to the West Indian Court of Appeal, and on the 8th September by consent the appeal was remitted to the Chief Justice to determine whether the appellant was or was not on any grounds estopped or precluded from alleging or proving the allegations withdrawn by him in the consent order in the libel action, the appellant being at liberty to apply to amend his reply so as to raise to the plea of estoppel an answer of fraud and non disclosure. By the same order the appellant undertook to discontinue his action against all the respondents and not to bring any fresh action against any of them in respect of the matters alleged therein should any appeal by him from the decision on the matter thereby remitted be unsuccessful in the West Indian Court of Appeal and/or before the Judicial Committee of the Privy Council. This undertaking is now invested with a decisive significance. Its effect is that the appellant's whole action now depends upon the result of this appeal although that appeal has direct reference only to a preliminary finding in the cause.

In pursuance of leave reserved by the order of the West Indian Court of Appeal the appellant in an amended reply pleaded that the consent orders were obtained by the respondents Walcott and Hutchinson by their fraudulent concealment from or omission to disclose to him the fixed and unalterable determination of the respondent Hutchinson to prosecute the appellant for perjury committed in his affidavit already mentioned. In a rejoinder these two respondents asserted that neither of them was under a legal obligation to disclose such determination to the appellant and further that the appellant or his agent Mr. Hamel Wells, barrister at law, was at all material times aware of it.

On these amended pleadings the case as so remitted by the Appeal Court came before the Chief Justice of Barbados on the 28th November, 1927. He then ordered that the question of estoppel raised by the respondents Walcott and Hutchinson should be tried and determined prior to the evidence being heard on the merits of the case. This is the first order now appealed against. The argument on estoppel then proceeded and in the result the learned Chief Justice held that the respondents Walcott and Hutchinson were under no duty to communicate to the appellant the determination which had been

arrived at that he should be prosecuted for perjury, and on the main question whether the appellant was precluded from alleging or proving the allegations withdrawn in the consent order in the libel action, the learned Judge adhered to his previous decision of the 8th July, 1927. By his order of the 2nd December, 1927, he declared accordingly. This is the second order against which the appellant now appeals to His Majesty in Council.

As to the first of these orders appealed from their Lordships entertain no doubt that the learned Chief Justice was well warranted in directing that the question of estoppel raised by the respondents Walcott and Hutchinson should be tried and determined prior to evidence being heard on the merits of the case—should be tried, that is to say, as a preliminary issue. So soon as the terms of the order of the Appeal Court of the 8th September, 1927, are looked at, no other course, as it seems to the Board, was open to the learned Judge. That order was a consent order. The question of estoppel had been brought before the Court on an appeal from an order made on a preliminary issue. It is the same preliminary issue albeit on an extended basis that is referred back to the Court of Common Pleas for further consideration. So much clearly appears from the terms of the undertaking embodied in the order and already referred to. It is true that no evidence was heard by the learned Chief Justice on the new allegations of fact made by the respondents Walcott and Hutchinson in their new rejoinder, and directly relevant to their plea of estoppel. But it is not to the appellant's disadvantage that in the absence of evidence in support of these allegations, his assertion that he remained in ignorance of the respondent Hutchinson's determination to prosecute him for perjury was, by the learned Chief Justice, and must now on this appeal, be accepted as correct. In short, no ground whatever has in their Lordships' judgment been shown for interfering with the order of the 28th November, 1927.

The second order appealed from is that of the 2nd December, 1927, against the decision of the Chief Justice that the respondents Walcott and Hutchinson had effectively raised an estoppel against the appellant. Their Lordships heard from learned Counsel for him an elaborate and able argument which canvassed, in its course, many difficult questions of general interest and importance. Their Lordships, however, do not find it necessary on the present occasion to go into these questions. In the last analysis of the real position the appeal from this second order of the learned Chief Justice can, as they think, be determined by reference to considerations of great simplicity.

First of all their Lordships are clear that in relation to this plea of estoppel it is of no advantage to the appellant that the order in the libel action which is said to raise it was a consent order. For such a purpose an order by consent, not discharged by mutual agreement, and remaining unreduced, is as effective as an order

of the Court made otherwise than by consent and not discharged on appeal. A party bound by a consent order, as was tersely observed by Byrne, J., in *Wilding* v. *Sanderson* [1897] 2 Ch. 534, 544, "must when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose." In other words the only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the Court; the second stands unless and until it is discharged on appeal. And this simple consideration supplies at once the answer to this appeal. The consent order in the libel action has neither been abandoned nor set aside. Accordingly it stands at this moment as an order effective to prevent the appellant from setting up against the two respondents parties to it the charges against them thereby withdrawn. Nor is it any answer for the appellant to say that by his amended reply he has alleged, and he asks to be allowed to prove that the consent order was and is a nullity. It is, first of all, in no sense true that the order is a nullity. At the best, so far as the appellant is concerned, the order embodies an agreement which possibly may still remain voidable at his instance. But that means that the order stands until it has been effectively set aside. And such an order, where the objection taken to it is of the character here set up by the appellant can only be so set aside in an action or proceeding directed to that special end. The decision of Romer J. in *Ainsworth* v. *Wilding* [1896] 1 Ch. 673 in that sense seems to their Lordships to be not only in accordance with principle but alone consistent with convenient practice, and their Lordships note that it has been accepted and followed by this Board in *Firm of R.M.K.R.M. v. Firm of M.R.M.U.L.* [1926] A.C. 761, 771. But there is a further and special reason why in the present case the requirements of that decision should be insisted upon. As has already been pointed out the consent orders in the rescission suit and libel action were intended to stand or fall together. Even if it were possible for the appellant to stand by the order in the suit while repudiating the order in the action it is clear that he cannot take that course except in some proceeding to which the Monroe Company is either party or privy, and that company is in no sense at all either party or privy to these proceedings.

On this short ground therefore their Lordships are of opinion that the order of the 2nd December, 1927, should be upheld. In the view they take of the position it is not open to them in these proceedings and in any case it is unnecessary for them to decide and they withhold any opinion upon the question whether the respondent Hutchinson during the negotiations for the consent orders was entitled to keep to himself his fixed determination to prosecute the appellant for perjury. And if they refrain from going further into that question their action is in no way attributable to any failure on their part to appreciate its importance. The slightest hint that such a prosecution was in

reserve might well have deterred the appellant, ignorant of the fact, from making even a formal withdrawal of his sworn charges, and that danger cannot well have been absent from Mr. Hutchinson's mind, seeing that the withdrawal made is only consequential on the undertaking not to bring any fresh action in respect of these charges. When to all that is added the fact that this withdrawal must seriously and might fatally embarrass the appellant in his answer to a charge of perjury when brought, this question of concealment, it is seen, involves considerations of wide importance to the legal profession as a whole It is, however, a question which, owing to the high standard of honour prevailing in the profession, rarely arises in practice. Moreover, in the present case the consequences for the appellant have not been so serious as they might have been. For, when the prosecution was at length launched by Mr. Hutchinson, the Grand Jury, after hearing the evidence both of himself and Mr. Walcott, threw out the Bill. Accordingly, while in no way intimating disagreement with the Chief Justice in the conclusion which he reached on this subject, their Lordships prefer, so far as any observations of theirs might affect it, to leave this question as applied to a case so extreme as the present, entirely open.

For the reasons already given, they are of opinion that this appeal fails. They will accordingly humbly advise His Majesty that it be dismissed and with costs.

In the Privy Council.

CHARLES HUBERT KINCH

v.

EDWARD KEITH WALCOTT AND OTHERS.

DELIVERED BY LORD BLANESBURGH.

Printed by
Harrison & Sons, Ltd. St. Martin's Lane, W.C.2.

1929.