

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Colonial Bank of Australasia v. Ettershank and another, from the Colony of Victoria ; delivered 11th June, 1875.*

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Present :

SIR JAMES W. COLVILE.

SIR BARNES PEACOCK.

SIR MONTAGUE SMITH.

SIR ROBERT P. COLLIER.

SIR HENRY S. KEATING.

THE Colonial Bank of Australasia sued John Ettershank and William Eaglestone, trading under the style of Ettershank, Eaglestone, and Co., on two promissory notes dated respectively the 12th of February, 1869, and the 6th of May, 1869, each for 2,500*l.*, made by Mr. Ettershank in the name of the firm, payable, the first three months, the second four months after date, to the orders respectively of Donald Ferguson, and Adam Stackpoole, and endorsed by Ferguson and Stackpoole to the Plaintiffs.

The Defendants pleaded that after the making of the notes, and while the Plaintiffs were the holders of them, the Plaintiffs by express renunciation and waiver exonerated and discharged the Defendants from the payment of the notes, and from all liability in respect thereof.

On the trial of the cause the Jury found a verdict for the Defendants. On a motion to enter the verdict for the Plaintiffs, or for a new trial, the Supreme Court of Victoria refused to enter the verdict, but directed a new trial on the ground that the evidence was unsatisfactory.

On the re-trial of the cause the following questions were asked of the Jury :—

Did Burnes (the manager of the Plaintiffs' bank) waive the claim of the bank against Ettershank and Co. as to both or either of the Bills? To which the jury answered, "Yes, both."

Was it within the scope of his authority to waive as a general manager? To which they answered, "Yes."

Did Greenlaw, the assistant manager, waive the claim of the bank as to both or either note? To which they answered, "No."

Whereupon a verdict was entered for the Defendants with leave reserved to enter a verdict for the Plaintiffs.

A rule was afterwards obtained on behalf of the Plaintiffs in the following terms :—

"It is ordered that the Defendants shall, upon the second day of December next, show cause before this Honourable Court why the verdict found for the Defendants herein should not be set aside, and instead thereof a verdict entered for the Plaintiffs on the promissory notes declared on for the sum of six thousand seven hundred and twenty pounds, principal and interest, pursuant to leave reserved on the trial, on the ground that Adam Burnes, the general manager of the Plaintiffs' bank, had no power to waive the claims of the bank or release the debtors of the bank without the authority of the Directors of the Bank.

"And on the further ground that there was no evidence of waiver or release by the said Adam Burnes or by the Directors of the bank, or by any one having authority express or implied to bind the bank.

"And on the further ground that if there were evidence of waiver by the said Adam Burnes, then the same showed fraud on his part as against the said Colonial Bank, and could not, therefore bind the said bank."

The last ground was afterwards abandoned.

The Supreme Court, who seem to have treated this as a rule not merely to enter the verdict, but for a new trial, discharged it, referring to the judgment which they had previously given on a similar motion after the previous trial for their reasons for not entering a verdict for the Plaintiff, and giving it as their opinion that, on the second trial, there was ample evidence to sustain the verdict of the Jury.

From this Judgment the present Appeal has been preferred. The evidence, as far as their Lordships deem it material for the judgment which they are about to deliver, is as follows :—

"In the beginning of the year 1869, one Hugh Glass (since dead), who carried on extensive commercial transactions, was largely indebted to

Ettershank and Co., and much more largely to the Bank in respect of advances,—these advances being stated in the first judgment of the Supreme Court as amounting respectively to 20,000*l.* and 300,000*l.* Glass was in want of money, though, possibly, at that time his credit may have been good. In the July following he stopped payment.

The promissory notes, the subject of the action, were really intended for his accommodation, though he was no party to them, and this was known to the Bank before they came due. How they came to be made is thus stated by Mr. Ettershank, who acted for himself and his partner in the transactions giving rise to this action. With respect to the note of the 6th of May, payable to the order of Stackpoole, which was a renewal of a note of the 4th February, he represents that it was made at the instance of Glass, to be handed by Glass to Stackpoole, who was a squatter, and had business transactions with Glass; that he took from Glass his own acceptance for the same amount, and that on a renewal of the note, he took Stackpoole's cross note of the same amount to hold against it. This note was discounted in the Plaintiffs' name for Stackpoole. Stackpoole was not called as a witness.

Mr. Ettershank further states that he gave the note, payable to the order of Ferguson, also at Glass's instance; that Glass, and Ferguson who was also a squatter having dealings with Glass, called at his office; that Glass said Ferguson wished to get the note as an advance against stock to come to market, and that if the stock did not come in time, it was to be retired without his (Ettershank's) assistance; and that to prevent its being presented at the Bank of Australia, where Ettershank dealt, it was to be made payable at some bank where he did not deal, and that accordingly it was made payable at the Union Bank. Ferguson denies the alleged interview and conversation, but admits having received the note from Ettershank's office, and alleges its sole object to have been the accommodation of Glass. The note was discounted by the Plaintiffs for Ferguson, who paid the proceeds into another Bank to take up an acceptance which Ettershank had given for Glass's accommodation.

This note, which fell due on the 15th of May,

was not presented for payment at the Union Bank ; nor was notice of its dishonour given to Ferguson. Why neither of these things was done Mr. Greenlaw, the Assistant Manager, endeavours to explain in a manner which the jury may not have deemed satisfactory. He represents that on the day before the note became due Glass requested that it might not be presented, and promised that if it were given to him he would get Ettershank to give a cheque for the amount, whereupon he took the note away and returned with it, the signature of Ettershank being cancelled, and with a cheque for the amount from Ettershank, dated May 14, requesting that the cheque might be held for a few days. Greenlaw represents that he saw Ettershank on the 2nd of June at the request of Glass, and told him he was going to "put through the cheque," whereupon the Defendant said, "You may spare yourself the trouble as it will not be paid;" that it was afterwards arranged that Ettershank should take back the cheque and remake the note, which he did by re-writing the name of his firm upon it below the former signature, which had been cancelled, and he then signed the following Memorandum :—

" 43, Queen Street, Melbourne,

" 2nd June, 1869.

" Ettershank, Eaglestone, & Co.,

" Stock and Station Agents,

" Melbourne, Ballarat, Sandhurst, Sydney, Wagga-Wagga, and Deniquilin.

" The Manager, Colonial Bank of Australasia.

" Sir,

" The annexed promissory note for two thousand five hundred pounds (2,500*l.*), dated 12th February, 1869, made by us in favour of Donald Ferguson, Esquire, and due on the 15th May last, was by us inadvertently cancelled, and has been by us made again for the purpose and with the express intention of making it as legal and as valid as if we had never cancelled our signature.

Yours obediently,

" ETTERS HANK, EAGLESTONE, & CO."

Mr. Ettershank represents the cheque to have been given on the 18th, three days after the note became due, and not the day before it became due ; and that he was asked to draw the cheque by Glass and Greenlaw, (who both came to him together,) in order that the Bank might have the cheque to hold

until Ferguson came to town, who was expected to pay the note.

The assertion by Ettershank of an express waiver of his liability by Greenlaw, denied by Greenlaw, becomes immaterial, inasmuch as the jury have negatived any waiver by Greenlaw.

The evidence of waiver on which the verdict must be supported, if at all, is to be found in the version given by Ettershank of two conversations between himself and Burnes, the first about the beginning of August, the second on the 28th of September. It should be remembered that between these dates the note payable to Stackpoole's order, had fallen due, viz., on the 9th of September.

The substance of his evidence, which was given with little precision, admits of the interpretation that an arrangement was made between him and Burnes that if he would procure Glass's authority to pay the notes out of the surplus of the securities he held from Glass, should there be any after paying Glass's debts to him, the Bank would forbear to sue him; in pursuance of which arrangement the following document was drawn up on the 15th of August, antedated the 15th of June:—

“Melbourne, 15th June, 1869.

“Messrs. Ettershank, Eaglestone, & Co., Melbourne.

“Sirs,

“Referring to the promissory note of your firm to Donald Ferguson for the sum of 2,500*l.* sterling, due on 17th May last, and which was discounted by him at his bankers, and the proceeds thereof handed to me by him for my use, I have to request, and do hereby authorize you to discharge and pay the said promissory note, and the interest that will be due thereon at the time of your so doing, out of the securities, or the realisation of them, which you hold from me in security for your advances to me, and liabilities incurred by you on my behalf.

“I am, Sirs, &c.,

“HUGH GLASS.”

Across this letter was written the following:—

“Subject to the concurrence of the bankers, we have no objection to accede to the terms of this letter, on the understanding that the promissory note in question is to be retired out of the surplus (if any), and postponed until all Mr. Glass's liabilities to us are satisfied.

“ETTERS HANK, EAGLESTONE, & CO.”

A document in the same terms was drawn up at the same time with reference to the other note.

Ettershank represents that on the 28th of Sep-

tember the Bank strongly pressed him to sign what is called a letter of licence to Glass, *i.e.*, a deed whereby Glass would be permitted to carry on his business under inspection for two years, which, not being made under a statutory power, would require the assent of all Glass's creditors. That he stipulated that if he signed the deed two years time should be given to him to pay another note of 3,500*l.*, for which he was liable to the Bank on behalf of Glass; that he referred to the former arrangement with respect to Ferguson and Stackpoole's notes, and told Burnes to understand distinctly that he repudiated all liability in respect to them; that they were not to come under that agreement; that if the Bank choose to sue him he desired they would do so at once, whereupon he would at once sue Stackpoole and Ferguson: whereupon Burnes replied, "I have already told you that the Bank looks to Stackpoole and Ferguson for payment, and not to you."

Ettershank adds that he did sign the deed, but as all of the creditors of Glass did not sign it, it never took effect.

Burnes, who had left the Colony, and was examined in New Zealand, distinctly denies having ever intimated to Ettershank that the Bank would not hold him liable, and represents that the arrangement for giving Ettershank time, conditional on his requiring the letter of licence, extended to the two bills, the subject of this action, a view which appears also to have been taken by Mr. Moule, the attorney of Bank, under whose advice this action was not brought until the expiration of the two years. This view is admitted to be erroneous *quoad* the bills in question by the Counsel for the Appellants, and indeed seems inconsistent with the terms of a letter of the 1st of October, which has been put in. Mr. Burnes admits that Stackpoole and Ferguson were what is termed good marks, *i.e.*, that they were persons of sufficient means to pay the notes; and, indeed, that the Bank held securities of theirs to a considerable amount.

There was little or no dispute between the learned Counsel for the Appellants and Respondents as to the law applicable to this case, which is, in their Lordships' opinion, sufficiently clear. In the absence of evidence as to the actual authority of the manager

of the Bank, of which none was given in the second trial, it would be within the scope of his implied authority to waive the liability on the notes of Ettershank to the bank on good consideration, and in the course of transacting the Bank's business, but beyond the scope of his authority to waive that liability without consideration, and as a mere matter of favour; in other words to make him a present of the value of the notes.

It has been contended on behalf of the Appellants that it appears from the judgments of the Supreme Court, together with the questions submitted to the jury, that the learned Judge omitted to define the authority of the manager, and to distinguish between his authority to waive with or to waive without consideration, and that he must be taken to have intimated to the jury that the Defendants were entitled to the verdict if the manager did in fact waive the payment of the notes unconditionally, whether with or without consideration.

Their Lordships have to observe upon this that no motion was made on the ground of misdirection, and that the Appellants have not brought before them any note or account whatever of the summing up of the learned Judge.

In the absence of any information as to his summing up their Lordships cannot assume that it was wrong, and that he did not advert to the distinction referred to; and although some ambiguous expressions have been referred to in the Judgments of the Supreme Court, their Lordships, on a careful perusal of them as a whole, do not come to the conclusion that this distinction was not present to the mind of the Court.

The question whether or not the manager waived so as to bind the Bank, and to support the plea of the Defendants, would, if properly explained to the Jury, involve the questions what the nature of the waiver was, why, and under what circumstances it was given.

Their Lordships cannot assume that the meaning of the plea, and the kind of evidence required to support it, were not properly explained to the Jury. This being so, the sole question on the rule becomes whether or not there was any evidence which could properly be submitted to the Jury of such a waiver as the manager would be authorized to make.

Their Lordships have come to the conclusion that the learned Judge who tried the case was right in submitting the evidence of Ettershank to the Jury, and although that evidence appears in many respects loose and unsatisfactory, they are not able to say that the Jury, who must be assumed to have believed it, may not have been warranted in concluding from it that as between the Bank, himself, and Ferguson and Stackpoole, (who had obtained payment of the notes,) Ferguson and Stackpoole were the principals and he the surety; that he communicated this view to the Bank who agreed to look to Ferguson and Stackpoole, both of them solvent men, and released him from his liability, in consideration of his obtaining the authority from Glass before referred to, and of his signing Glass's letter of licence. It is true that this letter of licence never took effect; yet at the time it may have been deemed by the Bank of vital importance to obtain the signature of so large a creditor as Ettershank and Co., without which a letter of licence would have been impossible, and which, when obtained, might have induced the other creditors to sign. Under these circumstances his signature only, though the deed ultimately did not take effect, may have been a good consideration for the waiver of his liability on the notes. The enormous advances made by the Bank to Glass, and the great interest they had in keeping him afloat, may explain, and even show to have been prudent, conduct on their part which would otherwise be inexplicable.

For these reasons their Lordships are of opinion that a verdict should not be entered for the Plaintiffs.

Whether or not the verdict is entirely satisfactory is another question. Considering, however, that the cause has been twice tried, that two Juries have pronounced for the Defendants, and that the Court have expressed their satisfaction with the latter trial, their Lordships do not deem it right to direct a third trial.

Their Lordships will, therefore, humbly advise Her Majesty that the Judgment of the Court below be affirmed, and this Appeal dismissed with costs.