Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Charles Henry Pearse v. *Schweder and Company, from the Supreme Court of Natal; delivered 24th July* 1897.

Present :

LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.
MR. WAY.

[*Delivered by Sir Richard Couch.*]

The principal question in this case is whether an agreement was come to and conclusively made between the Appellant and Respondents, whereby the latter agreed to employ the former as their Agent in Natal for buying wool and other produce, on the terms contained in a memorandum in writing made on the 21st October 1892 by the Appellant and Percy Schweder a member of the Respondent firm. The suit was brought by the Appellant against the Respondent for breaches of this alleged agreement. The Appellant at the time of the transaction was a wool buyer and carried on business at Durban in the Colony of Natal. The Respondents are wool merchants carrying on business in the city of London, and prior to 1893 the Appellant had been in the habit of purchasing wool and other produce for them on commission. In March 1893 Percy Schweder went out to South Africa and some correspondence and interviews then took place between him and the Appellant with a view of

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altering the business relations which had previously existed between the Appellant and the Firm. These resulted in making the memorandum in question. The evidence by which the Appellant sought to prove that there was a concluded agreement is as follows :

On the 2nd May 1893 Percy Schweder wrote a letter from Capetown to the Appellant at Durban which contains the following paragraph :—" But " for our better understanding it is necessary for " me to enlighten you as to my position viz. " that the London firm and myself are one since " I am the responsible partner in charge of the " entire South African business and therefore so " long as I am in this part of the world my " instructions have to be your guide and none " other and in case of conflict of instruction or " doubt your reference has to be to me. Your " presumption that you must follow London as " they have better information than I probably " is quite wrong and you will please dismiss this " from your mind. I am in constant cable " communication and correspondence with my " people at home as you may imagine and even " their letters to you (the copies) pass through " my hands here before you see the originals. I " wish to avoid everything causing misunder- " standing but I beg to remind you of the first " message I wrote to you on landing in this " country, viz., that henceforth the whole " business centres in me and you must take your " instructions from me. If not it will give " trouble." The other part of the letter is not material to the present question. On the 5th August 1893 he wrote from Cape Town to the Appellant at Durban a letter in which after saying he had determined not to entrust him with any further credits " because it is not safe " for us to give you the power to draw seeing " that we have no guarantee through your part

" that your shipments will turn out what they " profess " he says " If you are in a position to " place an effective and substantial guarantee to " the extent of 2,000*l.* at my disposal to be " availed of by me or my firm to cover deficiencies " arising at any time throngh your disregard of " orders and instructions, short falls of yields or " the like, if you are able to get me the guarantee " of a bank or thoroughly responsible and sub- " stantial guarantor I shall be willing to approach " the subject of employing you in some shape or " other again for the execution of our Natal " orders."

On the 16th August 1893 the Appellant wrote to Percy Schweder complaining that for the past few months he had suffered from constant misunderstandings and saying that if they had met he intended proposing that for the purpose of acquiring a complete control of his Natal agency Percy Schweder should alter the Appellant's terms to a salary and commission and making various suggestions for the conduct of the business. To this letter Percy Schweder replied by one of the 25th August 1893 dated Cape Town in which he says " I have been considering your letter 16th instant " and after justifying himself in regard to the complaints of the Appellant says " I could not without con- " sulting with my London partners express " myself as to the expediency of entertaining " your proposal to take over your business and " place you on salary and commission. I am " writing them this mail and will hear what they " say." It was admitted before their Lordships that the time of the post between Cape Town and London was 19 days and it may reasonably be assumed that this letter was answered and that Percy Schweder had received their opinion before the 21st October. The correspondence between him and the firm in London was not

put in by the Respondents. On the 9th September the Appellant again wrote to Percy Schweder referring to his letter of the 16th August and the reply to it and submitting an outline of business on the new basis he proposed that it should in future assume. In it he says "The season will soon be upon us and "if you wish to wait the exchange of letters "with London before finally agreeing I further "suggest that we commence working on these "lines on the understanding that the agreement "may be cancelled if letters you shortly expect "veto it." This was relied upon by the learned Counsel for the Respondents but Percy Schweder in his reply of the 14th September where he discusses the proposals does not take any notice of it only saying that he should not think of taking a new departure like this without a personal interview.

The interview took place at East London on Saturday the 21st October. The Appellant in his evidence said "I met Mr. Schweder at "Boorman's Hotel. Off and on we spent the "whole day discussing the matter, I was most "of my time there with him discussing the "future working of Natal agency. Certain "conditions were reduced to writing late on "Sunday night. The matter was very much "discussed on Saturday and Sunday. We both "agreed to put our agreement in writing. He "reduced it to writing and I now see this docu-"ment. It was entirely his own composition. "I merely threw in a word now and then. After "he had written it out, at his suggestion I "wrote a copy of it for him. This writing I "also see. The one he wrote is not dated. My "copy is dated 21st October 1893 the date "being in Schweder's. This was done on "Sunday because I was leaving early on Monday "morning. I suggested he should sign his

" copy and he mine. He said I am not very " particular about formal documents. I think " you had better go back to Natal and elaborate " it in a letter addressed. It was a bargain then " and there. He said 'I hope you leave East " 'London in good spirits for the new season.' " I said I was satisfied it was a fair arrangement. " There was not one word said about its being " provisional or that it was subject to veto or " ratification from London, I had no such idea " in my mind and I also acted accordingly." The Appellant also said that a proposal as to the union of Schweder & Co.'s business with Flack and Company was discussed at considerable length and he believed the arrangement P. Schweder thought of was to be subject to ratification in London. The two copies were put in evidence. Percy Schweder was not called as a witness and this evidence of the Appellant is uncontradicted. The only explanation of his not being called is in a letter of the Respondents' solicitors in which it is said that he was debarred from coming to Natal by a threat of arresting him.

One of the terms in the writings is that the Respondents were to provide the Appellant with a clean overdraft at a bank for 2,000*l.* and R. Richards the father-in-law of the Appellant was to stand guarantor for the proper application and faithful repayment to the extent of 1,000*l.* of such overdraft. In their plea the Respondents say that Richards did not give a guarantee in the terms of the " treaty or " negotiation " and this objection was taken before their Lordships. Richards was examined as a witness and said that he had always been willing to become a guarantor on the basis set out in the agreement and considered himself bound by his letter of the 26th October. In this letter addressed to the Respondents' firm, which he said he handed to the Appellant for Percy Schweder,

he gave a guarantee for 1,000*l.* and it appears in his letter of the 4th November that P. Schweder had received it. The terms of this guarantee are in their Lordships' opinion sufficient to satisfy the provision in the memorandum of agreement.

On the 27th October 1893 the Appellant wrote a letter to Percy Schweder in which he said "For convenience sake I recapitulate the "terms arranged in East London for the conduct "of your Natal business during the coming "season." The recapitulation was substantially the same as the memorandum made at East London but was not in the same words. On the 4th November P. Schweder replied to this letter objecting to parts of it as not entirely following the headings and terms of the memorandum and saying that the guarantee was not sufficient. The Appellant replied to this on the 11th November and on the 17th November P. Schweder wrote to him thus "Agreement— I "think it will be better to have it set forth "clearly; at the same time now that we are "agreed in principle and have all the points "thereof defined through our exchange of "letters the matter can rest till I get to Durban "which however will not be as early as I "hoped." The letter of the 4th November contained instructions to the Appellant to buy skins which he did to a considerable extent and an account having been opened with the Bank of Africa there was on the 14th December an overdraft of 850*l.* On that day P. Schweder sent a telegram to the Appellant "Schweder's London "write me not complete proposed agreement "nor grant clean overdraft. Consequently in-"structed bank you will repay amount taken "cancelling remainder" and on the same day he wrote a letter saying that the proposed arrangement must full through and be abandoned.

The Defendants' counsel called no witness and the jury found that a binding agreement was made on the 21st October 1893 and was acted upon and assessed the damages at 750*l*. Thereupon judgment was entered for the Plaintiff. On the 1st September 1894 an application was made to the Supreme Court for an order setting aside the verdict and judgment and entering judgment for the Defendants or absolving them from the instance or granting a new trial. On the 11th September the Court ordered the judgment to be turned "into absolution of Defen-"dants from the instance" which was understood on the hearing of the appeal to be a judgment for the Defendants setting aside the verdict.

Now before the verdict could be set aside it was necessary to determine whether upon the evidence before the jury it was one which they could reasonably find. In their Lordships' opinion it was and they do not see any ground for setting it aside and granting a new trial, still less for entering judgment for the Defendants. There was certainly evidence for the jury to consider. From the reasons of the learned Judges stated in the Supplemental Record it appears to their Lordships that the order was made on the ground that the Court did not agree with the jury, and thought the verdict was wrong. The Chief Justice says "We have "heard and carefully considered the facts in this "case and have had the benefit of the corre-"spondence both before and after this alleged "contract of the 22nd October and we have "come to the conclusion that there was no "completed contract on which the Plaintiff "could succeed in a court of law." In another part he says "My impression is that they settled "the terms between themselves subject to "adoption by the English firm and that they "had not corrected the terms between them.

"When the corrections came before the English "firm the arrangement was altered in several "particulars; and those alterations show me "that the East London contract was not a "completed contract; it was intended to be "supplemented by a more formal document." Mr. Justice Wragg says "I am not satisfied "that there was a completed contract between "the parties." And at the end of his reasons he says "In strict law the verdict ought not to "stand. As to substantial justice I do not think "that it has been done by the jury." Mr. Justice Turnbull referring to P. Schweder's letter of the 4th November says "From that and the "correspondence which followed it is clear to "me that there never was a completed contract "between the parties and that the jury were "mistaken in arriving at the verdict pronounced." In fact the learned Judges appear to have considered the application to set aside the verdict as if they were a court of appeal upon the facts and were at liberty to decide upon the evidence which party was entitled to judgment. No authority in the law of Natal was produced to show that they have this power. If they have their Lordships think that in this case they have come to a wrong conclusion upon the evidence. They are of opinion that there was not sufficient ground for setting aside the verdict and judgment for the Plaintiff and will humbly advise Her Majesty to reverse the order of the Supreme Court and order the application of the 1st September to be refused with costs. The Respondents will pay the costs of this appeal.