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UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
- 9 MAR 1960
25 RUSSELL SQUARE
LONDON, W.C.1.

No. 21 of 1958.

In the Privy Council.

ON APPEAL

FROM THE WEST INDIAN COURT OF APPEAL.

~~55486~~

BETWEEN

ISAAC NEWTON SHILLINGFORD as Business
Trustee of A. C. SHILLINGFORD & CO. . *Appellant*

AND

FRANKLYN A. BARON and OCTAVIA MARIA
10 BARON trading as A. A. BARON & CO. . *Respondents.*

Case for the Respondents.

RECORD.

1. This is an Appeal from the Judgment dated 25th October, 1957, p. 125.
of the West Indian Court of Appeal allowing an Appeal against the
Judgment dated 11th August, 1954, of the Honourable Mr. Justice p. 108.
K. L. Gordon sitting as Judge of the Supreme Court of the Windward
Islands and Leeward Islands, Dominica Circuit in the Town of Roseau.
The West Indian Court of Appeal ordered that Judgment be entered in
favour of the present Appellant for the sum of \$3,929.67 on his claim and
costs in the Court below and that Judgment be entered in favour of the
20 present Respondents on their Counter-claim for the sum of \$11,007.15
and costs of the Counter-claim in the Court below and further that the
present Respondents do have the costs of the Appeal to the West Indian
Court of Appeal and that the doctrine of set-off do apply to the amounts
awarded on the Claim and Counter-claim.

2. The Appellant Isaac Newton Shillingford as Business Trustee
of A. C. Shillingford & Co. on the 20th April, 1953, issued a Writ in the p. 1.
said Supreme Court against the Respondents herein Franklyn A. Baron
and Octavia Maria Baron trading as A. A. Baron & Co. whereby the
Appellant claimed \$3,929.67 being the balance due and owing by the
30 Respondents to the Appellant for sugar syrup manufactured by the
Appellant for the Respondents in accordance with a contract entered into
between the Appellant and the Respondents on the 4th July, 1952.

p. 2.

3. By his Statement of Claim dated 2nd May, 1953, the Appellant alleged that he duly manufactured the said sugar syrup in accordance with the terms of the said contract and delivered the same to the Respondents ; and that subject to certain other claims and set-offs not material hereto there remained due and owing to the Appellant by the Respondents the above sum of \$3,929.67.

p. 3.
p. 10.

4. By their Defence and Counter-claim dated 19th May, 1953, and amended by Order dated 4th August, 1953, the Respondents alleged that the Appellant carries on trade as Manufacturer and Exporter of Juices, Syrups, Oils and other similar products. They admitted the alleged contract and alleged that the sugar syrup was not manufactured by the Appellant in accordance with the contract. They further alleged that the Appellant manufactured and delivered to the Respondents on board the s.s. *Planter* in the port of Roseau, Dominica, 50 casks of sugar syrup value \$4,310.52 between the 4th July, 1952, and 19th July, 1952, and that he further manufactured and delivered to the Respondents on board the s.s. *Crispin* in the said port 250 casks of sugar syrup valued at \$21,715.80 between the 4th July, 1952, and the 28th July, 1952. They alleged that the Appellant at all material times well knew that this sugar syrup was intended for export to the United Kingdom for the purpose of human consumption and that the Respondents had contracted to sell the sugar syrup to a consignee in the United Kingdom at \$2.04 per gallon c.i.f. London and that at this price the value of the 300 casks was \$26,026.32. They further alleged that the sugar syrup was not manufactured by the Appellant in accordance with the terms of the contract and that the syrup and the packages therefor provided by the Appellant were of bad quality and not fit for the purpose for which they were intended and that the sugar was manufactured and packaged by the Appellant so negligently and improperly and under such unhygienic conditions that the quantity of syrup was considerably reduced by leakage and the value thereof further diminished by fermentation so that the Respondents were forced to accept \$10,381.80 in full payment for the 300 casks being \$15,644.50 less than the price their consignee had agreed to pay. Accordingly the Respondents counter-claimed damages.

p. 8.

5. By his Reply the Appellant denied that his sugar syrup had been manufactured negligently or improperly or under unhygienic conditions and alleged that the fact that the Respondents had been forced to accept a lower price than that agreed by their consignee was not due to the causes alleged by the Respondents or to any fault of the Appellant's.

6. Evidence was given before the learned Judge on behalf of both parties orally at the hearing and on behalf of the Respondents on commission in England.

p. 91.
p. 101.

7. At the trial it was contended on behalf of the Respondents that the evidence established :—

(i) That the sugar syrup was adulterated by dirt, straw, wood, bees, etc., calculated to produce fermentation in the syrup ;

(ii) That an inadequate amount of sulphur dioxide (SO₂) preservative had been added to the sugar syrup by the Appellant ;

(iii) That the casks in which the sugar syrup was packed by the Appellant were not wax-lined and therefore were calculated to cause both leakage and fermentation, and

(iv) That the casks were badly made or constructed.

10 It was submitted on behalf of the Respondents that the Appellant was under an absolute contractual obligation to produce casks fit for the purpose of exporting sugar syrup from Dominica to the United Kingdom and that he warranted the fitness of his casks for such purpose. It was further contended that the Appellant was under a duty to manufacture with due care and skill and that from the evidence given as to the state of the sugar syrup on its arrival in the United Kingdom the Court was entitled to infer that the Appellant had not discharged this duty.

8. It was contended on behalf of the Appellant at the trial that the Appellant's obligations ended with delivery of the sugar syrup on board ship and that if anything thereafter went wrong through, for example, bad stowage, the risk would be on the Respondents. It was further contended that the evidence had proved hygienic conditions at the Appel-
20 lant's factory and that the casks used had been properly cleaned, sterilized and waxed, and that the correct amount of sulphur dioxide had been put into each cask. It was suggested that the poor condition of the casks and syrup on and after its arrival in London was due to re-coopering of the casks after their arrival in the United Kingdom and to bad handling in the United Kingdom and to delay after arrival in the United Kingdom. It was further submitted that it was an inherent quality of second-hand casks to give trouble when something as heavy as sugar syrup is shipped in them but that the Appellant's contract with the Respondents entitled him to use second-hand casks. p. 98.

30 9. The Learned Judge found that it was common ground that the two shipments of sugar arrived in London on the 6th August and 18th August, 1952, respectively in very bad condition in that there was considerable leakage resulting in the re-coopering on the docks of most, if not all, of the casks some time after they were landed and that many of the casks showed evidence of fermentation within a short period. He further found that owing to a mistake in the shipping documents forwarded by the Respondents to their consignees the goods could not be dealt with until 3rd and 9th September respectively but that in the meantime, sometime at the end of August or early September, 73 out of 200 casks
40 had been examined by a chemist employed by sub-consignees who found the syrup to contain a large number of extraneous particles such as bees, small fragments of straw and chips of wood and that these casks also showed evidence of fermentation and were therefore unsuitable for use in the soft drink trade for human consumption. The Judge found that the Respondents had undertaken to ship the sugar syrup in new casks but had contracted with the Appellant for shipment in once used whisky casks, which p. 102.
p. 103, l. 13.
p. 103, l. 20.
p. 103, l. 28.
p. 104, l. 1.

p. 105, l. 6.

latter casks were in fact used. He further found that material known as "flagging," which is some sort of straw used by the Appellant for keeping the heads of casks in position, was no doubt responsible for some of the straw subsequently found in the syrup.

p. 105, l. 46.

10. The Judge reviewed the evidence and on one aspect, namely that of the Respondents' visits to the Appellant's factory during the period when the syrup was being manufactured and tests alleged then to have been made, the Judge preferred the evidence given on behalf of the Appellant to that given on behalf of the Respondents. The Judge criticized the absence of evidence before the Court relating to what happened to the casks on and after arrival in London. He further pointed out that there was no evidence before the Court as to either the presence or absence of bees during this time in London. He rejected evidence given on behalf of the Respondents from which it was sought to be inferred that the bees found in the syrup entered this syrup prior to delivery on the grounds that this rested on the "rather casual observations by the chemists" in England that the bees found in the syrup did not resemble English bees. He held that "having regard to the positive evidence of the Appellant as to the system of their manufacturing process as against the evidence of the Respondents on this point, the Court is unable to regard the Respondents as having discharged the onus of proof placed on them when they allege or suggest that the bees found in the syrup in England had got into it fully four weeks earlier in Dominica." He further found that "while there is a very strong presumption that the pieces of straw found in the syrup when examined were from the flagging used for steadying the heads of the casks, there is nothing in the evidence which would justify the Court arriving at the arbitrary conclusion that the presence of the straw in the syrup *per se* is indicative of unhygienic or careless manufacture." He found himself unable to say to what extent the extensive re-coopering on the docks in London did or did not contribute to the presence of particles of straw and wood in the syrup. He held that there was an absolute warranty on the part of the Appellant of fitness for the purpose for which the syrup was required namely for human consumption but found that "in so far as the warranty of fitness of the casks for the transportation of the syrup goes, the Court is satisfied that this warranty was fulfilled, since the leakage from casks of the kind used was not abnormal." He was also satisfied that the casks were properly coopered and waxed.

p. 106, l. 12.

p. 106, l. 19.

p. 106, l. 26.

p. 106, l. 37.

p. 107, l. 3.

11. Finally the Learned Judge held that :—

p. 107, l. 30.

"(A) Having regard to the many intervening incidents which took place between the shipment of the syrup in apparently good condition and the time when the syrup was found to be unfit, viz. :—

- (i) Delay at London Docks ;
- (ii) Extensive re-coopering ;
- (iii) Extra handling in shipping to different points ;

(B) The fact that the Defendants have failed to prove by any direct evidence that the Plaintiff was in any way negligent in the manufacture of the syrup but rely for this proof on a series of conjunctures and suppositions ;

(C) The fact that the Court is unable to say with any certainty when those extraneous agents which brought about fermentation did enter the syrup ;

10 (D) The fact that the leaky conditions increased the likelihood of the preservative escaping and rendering the syrup more susceptible to fermentation ;

(E) The time when the chemists said that fermentation began ;
the Court is forced to the conclusion that the many circumstances which intervened are sufficient to relieve the Plaintiff of that absolute warranty of fitness which fell on him." He accordingly was not satisfied that the Respondents had proved negligence and declared himself satisfied that the Appellant "manufactured the sugar syrup to the best of his skill and ability and in keeping with the contract," and that "when the shipment was made the packages were sound and the containers equally so." As he found himself unable to say with any certainty at what stage the shipment went bad and found himself unable to attribute the deterioration of the syrup to any particular cause, he entered Judgment for the Appellant on his Claim and the Counter-claim with costs.

p. 108, l. 14.
p. 108, l. 21.

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12. The Respondents appealed to the West Indian Court of Appeal by Notice of Appeal dated 1st February, 1955. p. 109.

13. The West Indian Court of Appeal consisting of Mathieu-Perez, Chief Justice of Trinidad and Tobago, Gomes, Chief Justice of Barbados and Stoby, Acting Chief Justice of British Guiana, heard the Appeal on the 15th, 16th and 25th October, 1957. p. 112.

14. They held that the question falling for decision by the Trial Judge was two-fold, namely :— p. 119, l. 18.

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(A) Was there a warranty of fitness that the once used casks when assembled and treated should be fit for transportation of the syrup to England, and

(B) Was there a warranty that the syrup was and would be suitable for human consumption on arrival in England.

15. As to (A) they held that "although leakage in the type of cask used was to be expected, and although knowledge of that fact, according to Mr. E. P. Shillingford [one of the Managers of the Appellant] strengthened his obligation in regard to the assembly of the casks, yet the amount of leakage that in fact occurred was far beyond normal expectation." They were "unable to agree with the finding of the Judge that the casks were properly coopered." They further held that if it be necessary they were satisfied that the casks were not properly waxed.

p. 119, l. 35.
p. 120, l. 34.
p. 122, l. 30.
p. 120, l. 43.

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16. As to (B) they held that the warranty of suitability for human consumption continued until the arrival of the syrup in England and for a reasonable time thereafter. They found that there was "no evidence

p. 121, l. 10.
p. 122, l. 20.

p. 122, l. 26.

p. 122, l. 31.

p. 122, l. 39.

p. 123, l. 19.

p. 123, l. 38.

of any untoward event happening to the shipment in transit," and that as there was evidence that on arrival the casks were in very bad condition and leaking very considerably, the inference to be drawn from this supported the finding that the casks were improperly coopered. They further held that upon the evidence as to the condition of the syrup after arrival in England given by the witnesses in England on commission which in some respects was uncontradicted and unquestioned, they were led "to the conclusion that the syrup was manufactured under unhygienic conditions which rendered it unfit for the purposes intended." The presence of extraneous matter such as bees, dirt, wood and straw, as they found, was bound to cause deterioration in the quality of the syrup due to fermentation. This fermentation was augmented by the escape of varying quantities of preservative leaving in some casks a very small quantity only. They further held that there was no evidence to support the theory advanced by the Appellant that extraneous matter got into this syrup while in England either while the casks were re-coopered or otherwise. Further they concluded that "the Judge's approach to the case was not the correct one in that among other matters he seems to have considered it obligatory on the [Respondents] to satisfy him by direct evidence that the [Appellant] was negligent in the manufacture of the syrup and that it was necessary for him to come to conclusions with some certainty. Being a civil case he should have concerned himself with probabilities rather than certainties, and especially so, as the fact is there was some evidence on the one hand and conjecture only on the other," meaning conjecture only on the Appellant's part herein. 10 20

p. 125.

17. The West Indian Court of Appeal accordingly held that the Respondents were entitled to succeed on their Counter-claim subject to their having to pay the contract price for this syrup to the Appellant and ordered as above set out.

18. The questions which arise in this Appeal are accordingly, first, whether the Court of Appeal were right in holding as they did that the Judge at first instance failed to appreciate the difference between the onus of proof in a civil case and in a criminal case; second, whether the Court of Appeal were right in holding as they did that the Appellant's obligations did not end with putting the syrup on board ship in Dominica, but that he warranted that the syrup would continue fit for human consumption until its arrival in England and for a reasonable time thereafter; third, whether on the evidence the Appellant was in breach of that warranty and the related warranty that the once used whisky casks would be fit for transportation of the syrup to England; and fourth, whether on the evidence the Respondents had in fact discharged the onus upon them to prove as a matter of probabilities that the Appellant was in breach of the above two warranties or either of them. 30 40

19. As to the first question, the Respondents humbly submit that the extracts quoted above from the Judgment of the Learned Judge at first instance, show clearly that the Learned Judge failed to appreciate the difference between the onus of proof in civil and criminal cases and failed to give any or sufficient weight to the probabilities rather than the certainties of the matter and to the legitimate inferences to be drawn

from the largely uncontradicted evidence given by the Respondents' witnesses on commission in England. The Respondents further submit that the Learned Judge allowed himself to be unduly influenced by what at its highest was mere conjecture and no more than speculation as to what might possibly have happened to the syrup and casks to cause the admittedly bad state of both on arrival in England. This conjecture and speculation was totally unsupported by any evidence and accordingly the Respondents respectfully submit that it was not proper for the Learned Judge to pay any regard thereto.

10 20. As to the second question, the Respondents respectfully submit that as it was admitted on the pleadings that the Appellant knew that this sugar syrup was intended for export to the United Kingdom for the purpose of human consumption, and as it was further admitted that it was in the course of the Appellant's business to manufacture this sugar syrup and to make casks therefor, there can be no doubt that the two warranties stated by the Court of Appeal were implied in this contract and that the warranty that the syrup would be suitable for human consumption must necessarily extend for a reasonable time beyond the date of arrival of these casks in England.

20 21. As to the third and fourth questions, the Respondents humbly submit that there was ample evidence before the Court upon which the Court of Appeal could hold as it did and upon which the Learned Judge at first instance should have held as the Court of Appeal did. The material evidence may be summarised as follows :—

22. On behalf of the Appellant it was conceded by Edward Patrick Shillingford one of his Managers that the Appellant firm assemble and cooper used American whisky casks which they import from the United States. It was further conceded by him that it was part of the contract that the Appellant should add 500 parts per million of SO₂ preservative and that they were to sterilize thoroughly and wax-line the casks. He knew that second-hand casks might well give trouble through leakage since he had been unable to effect insurance for this consignment due to this risk. He knew fermentation would render this sugar syrup unfit for what he knew was its purpose and he knew that impurities such as dirt, bits of wood and straw and bees would be dangerous because they had been likely to cause fermentation. He agreed that his knowledge of the fact that leakage is apt to occur in used casks strengthened his sense of obligation in re-coopering and construction of the casks. He advanced a number of hypothetical possibilities which might cause the introduction of the impurities found in this sugar syrup and the excessive leakage but admitted that these reasons do not in the normal course of things happen and that to his own knowledge the two vessels concerned were very careful.

23. Wilfred Theodore Shillingford, the Appellant's Assistant Manager, gave evidence of the methods employed by the Appellant in manufacturing sugar syrup and in making and coopering casks. His evidence did not especially refer to this particular sugar syrup or these particular casks but was evidence of general method for the supervision of which he stated he was responsible. He admitted in cross-examination that bees do

p. 75, l. 1. hang around the Appellant's factory during the manufacturing process, and that they do go after the syrup but suggested that they keep away because of the heat of this syrup. He suggested that at no stage in this process could impurities get into the syrup but admitted that unless great care was taken dirt and indeed bees could get in. He did not give any evidence in detail as to the precautions taken by the Appellant to prevent bees or impurities from getting into sugar syrup.

p. 77.
p. 78, l. 26. 24. Isaac Newton Shillingford, the Appellant, gave evidence in the course of which he stated that bees could not have got into syrup at his factory having regard to the conditions under which he manufactured this syrup. However, Isaac Newton Shillingford gave no evidence relating to these particular casks and this particular syrup and did not suggest that he had personal knowledge of this. 10

p. 80.
p. 80, l. 27.
p. 82, l. 21.
p. 82, l. 31. 25. A Chemist, Mr. Victor Alleyne Archer, Headmaster of Roseau Grammar School, was called on behalf of the Appellant but he appears not to have seen this consignment of sugar syrup or these casks or indeed the Appellant's factory. He stated that it was characteristic of sulphur dioxide SO₂ to lose its effect in case of leakage because its volatile nature would cause it to escape. No fermentation would take place if this preservative was present in proper quantity. In cross-examination he was not prepared to say that in the normal course of things, that is in normal leakage, SO₂ would evaporate. He also stated that the presence of a thin coat of wax inside casks should be detectable with the naked eye. In re-examination he stated that if wax had been properly applied to casks, it should be visible in scraping with a knife and that if when scraped a part of a cask did not show wax waxing had not been done properly. 20

p. 83.
p. 83, l. 21.
p. 83, l. 37.
p. 84, l. 3. 26. Finally the Appellant called William Flanders Harrison, the Agent of Harrison Line Steamers in Dominica who on behalf of the shipping company dealt with the two shipments concerned. He gave evidence that the shipments appeared to be in order on inspection at the docks in Dominica and that he saw no signs of leakage or fermentation. Both he and the ships' personnel were fully forewarned of the problem of leakage and the ships' personnel took all care with regard to stowage. The casks were stowed properly and in the usual manner. 30

p. 84.
p. 86, l. 42.
p. 88, l. 30.
p. 88, l. 40.
p. 87, l. 9. 27. On behalf of the Respondents' evidence was given orally at the trial by Franlyn Andrew Baron, their Managing partner. He stated that on a visit to the Appellant's factory he observed a number of bees about the place and that he found that although the vats in which the syrup was kept were covered, bees could get in anywhere. He further stated that at the Appellant's factory there was no wire mesh for keeping out bees or flies as was the case in his factory where he made candied fruit peel. His factory unlike the Appellant's was insect proof. He admitted that he had overlooked that his own contract with this consignee provided for new casks whereas his contract with the Appellant provided for used casks. 40

p. 89. 28. The Respondents also called one Joseph Reid, the Assistant Yard Overseer of a firm called Bath Estate, who are competitors of the

Appellant in Dominica. He stated that in preparing sugar syrup Bath Estate have to guard against bees which are likely to get into syrup. Bath Estate take a great deal of precaution against bees. They further use a very fine strainer in filling casks and despite all precautions they still get bees in their strainer. He also stated that if a waxed cask was open a normal person would be able to see the wax and if the inside of the cask was scraped wax would come away.

29. In addition to the above the Respondents read evidence taken on commission in England. This consisted of Sydney James Billson, the Secretary of Burnell Hardy Limited of Covent Garden, London, who had considerable knowledge of the essential oils and fruit juice trades. His company were the Respondents' consignee in England of this sugar syrup. He gave evidence of sub-sales and of the fact that on arrival of the first consignment in London the company's forwarding agents at once notified the company of the very bad condition of the first consignment. He at once gave instructions to have the casks re-coopered but stated that it was practically an impossibility to do very much in that way. The first consignment, consisting of 50 casks was re-coopered by the dock authorities at West India Dock because of the very bad and leaking condition of the casks. The casks were then forwarded to buyers in Belfast. This witness produced a document showing very substantial leakages from these 50 casks prepared by forwarding agents in Belfast on behalf of the sub-consignees there. He further stated that the second consignment of 250 casks was also re-coopered for the same reason by Messrs. Weber Smith and Hoare (Overseas) Limited, the company's forwarding agents, whose official landing accounts showing short weights and leakages he produced. The first consignment was not accepted on arrival in Belfast by the sub-consignees because of the leaking condition of the casks. A further 50 casks had been resold to Compounds and Essences Limited of Southampton who returned 38 casks to Burnell Hardy Limited and only kept 12 casks of which they destroyed 6 and used only 6. Two hundred casks were sold by Burnell Hardy Limited to Cantrell Cochrane. These buyers only kept 29 casks and returned 171. Mr. Billson sent a sample from the Cantrell Cochrane consignment to an independent chemist Dr. Richard Harold Morgan. As a result of what Mr. Billson found and the advice given to him by Dr. Morgan and other witnesses, Mr. Billson decided that the sugar syrup was not fit for use in the soft drinks trade. As a result of further advice he arranged for treatment of the syrup returned to his company and this was carried out by the West Ferry Wharfage Company Limited whose accounts he proved in the sum of £1,108 4s. 4d. The witness also proved the amount of his company's claims in respect of this sugar syrup against the Respondents.

30. In cross-examination Mr. Billson stated that the first consignment of 50 casks arrived on the 6th August and that his company were notified by their forwarding agents Weber Smith and Hoare Limited that the consignments were in very bad condition outwardly and were leaking very considerably. While his company had always stipulated for new barrels, it would be possible to use old barrels providing the waxing inside was sufficient and was properly applied. He agreed with a proposition put by Counsel for the Appellant that fermentation really follows leakage.

p. 32.

Re-called the witness stated that the *Planter* arrived on the 6th August, 1952, and the *Crispin* arrived on the 18th August, 1952. Incorrect Certificates of Origin were received by his company in respect of the *Planter* through Barclays Bank on the 13th August, 1952, and correct certificates were received on the 3rd September, 1952. In respect of the *Crispin* incorrect Certificates of Origin were received on the 4th September, 1952, and correct Certificates were received on the 9th September, 1952.

p. 35.

p. 36, l. 10.

p. 36, l. 18.

p. 36, l. 26.

p. 36, l. 31.

p. 36, l. 40.

p. 37, l. 1.

p. 37, l. 8.

p. 37, l. 20.

p. 37, l. 30.

p. 38, l. 36.

p. 39, l. 23.

p. 39, l. 34.

p. 40, l. 8.

p. 40, l. 18.

p. 40, l. 28.

p. 40, l. 32.

p. 40, l. 37.

31. The Respondents also took the evidence of Mr. Victor Trevor Walkley in London. He was the Chief Chemist of the Cantrell Cochrane Group who are Mineral Water Manufacturers and held a number of degrees and other chemical qualifications. He had published a number of scientific papers on fermentation. His company had purchased 200 casks of this sugar syrup from Burnell Hardy Limited. He had tested the contents of 73 of these casks especially for fermentation and had carried out a survey of the contents of the remaining 127 casks. Of the 73 casks 16 showed evidence of fermentation in 6 to 14 days and 57 showed evidence of fermentation within a period of 6 days. In the syrup he found a large number of extraneous particles such as bees, small fragments of straw and chips of wood. He found these in every cask he examined. He could not say whether or not they were British bees but they were not like the bees he had seen. He found bees in every cask he looked at. He also found bits of straw and wood in every cask he opened. The syrup was in an obviously advanced state of fermentation and had a pronounced beer-like smell. The contents of the casks were quite unfit for the purpose for which his company required them. The 127 casks surveyed showed leakage and when the bungs were lifted there was evidence of a certain amount of gas pressure in the casks indicating that fermentation had taken place or was taking place. There were signs of frothing and a pronounced smell of fermentation. He thought the 127 casks surveyed showed no marked difference from the 73 casks examined in detail. His company at the time were very short of this raw material and particularly anxious not to have to send it back. He carried out tests on 9 casks for sulphur dioxide content. The resulting figures were respectively 52, 57, 80, 260, 280, 320, 361, 362 and 385 parts SO₂ in parts of a million. As a result of his tests he concluded that this sugar syrup would have been impossible to use in the manufacture of soft drinks. It was not suitable for human consumption. The casks themselves showed signs of leaking. In one or two cases the syrup obviously under pressure, was being forced through the bungs at the top of the cask when the casks were turned slightly on one side. He looked inside two of the casks and could not decide whether they had been waxed and the waxing had worn off or whether there was still wax in the casks. He was unable to form a precise opinion as to whether they had been waxed or not and was unable to say whether wax was there or not. In his opinion the condition of the syrup in the casks would depend as much on the syrup itself as it would on the casks. If one had put syrup with the amount of bees, straw and wood that he found in this syrup into new casks, it would also have fermented. If one had put carefully manufactured syrup free from foreign bodies and containing the stipulated amount of preservative into casks similar in quality to the casks that this syrup was put into and these casks had been sterilised

beforehand he would not have expected fermentation. From his examination of the syrup he gained the impression that at some stage in its processing there had obviously been a certain amount of negligence. One would not expect to find extraneous particles in the syrup normally and he found a lot of bees, small particles of straw and wood chips. p. 41, l. 2.

32. In cross-examination he stated that the bees found by him were complete and that the pieces of wood and straw measured up to a $\frac{1}{4}$ -inch in length. His examination took place through the top of the cask in which there is a 2-inch bung. He looked through this with a light. He also
10 through this extracted syrup with a sterile sampling tube. He stated that it was a well-known fact that bees carry fermented yeast and yeast organisms and that therefore it was highly probable that direct access of bees to sugar syrup of this kind would cause fermentation. He found between 10 and 20 bees in 3 casks but all the casks were very bad. In normal trade conditions fermentation would not set in within 4 months and indeed up to 12 months. He could not decide whether there was wax in the barrels or not. He had in the past seen casks in which the waxing was very thick, so thick that you could scrape it off. In this case he tried to scrape the insides of the casks but he was not able to form a
20 definite conclusion in regard to waxing. He found particles floating, obviously on top of the liquid, but he also took samples with a large sampling tube resulting in syrup which was very cloudy and contained much smaller particles. As the syrup was obviously fermenting he did not think it worthwhile to test other casks for sulphur dioxide content. In his opinion the insufficiency of SO₂ was a contributory factor to fermentation. The type of barrel, in his view, did not have anything to do with the fermentation. When Counsel for the Appellant put to him that he was not suggesting that the bees crawled into the stuff in transit, he agreed with this. In his view the syrup was not sufficiently viscous to hold
30 down bees and other particles but they would float on top. p. 41. p. 43, l. 9. p. 43, l. 20. p. 43, l. 32. p. 43, l. 42. p. 44, l. 8. p. 44, l. 22. p. 44, l. 40. p. 45, l. 20. p. 45, l. 37. p. 47, l. 15. p. 47, l. 29.

33. In re-examination Mr. Walkley stated that his company treated 29 casks, in the cases of all of which he took the lids right off. In all of these the characteristics were the same including the finding of at least 10 bees in every cask and bits of wood and straw floating at the top of the liquid. There were also some substances which would sink into the syrup. The syrup itself when poured was very dirty and contained small black specks. p. 48. p. 49, l. 10.

34. The Respondents further called on commission Walter Henry Lambert principal of the firm of Perfect Lambert & Co., Insurance
40 Surveyors, of 52-53 Crutched Friars, London. He inspected some of the casks discharged from the s.s. *Crispin* after they had been delivered to Cantrell Cochrane. He found the syrup to be obviously out of condition. It was dirty. There were large numbers of bees, dirt, wood and straw in it and it was generally in a disgraceful condition. The bees were not English bees. He himself picked out casks and had the tops removed as he wanted. He found anything up to 100 or 150 bees in some of them, pieces of wood 2-in. long, pieces of straw of various lengths and innumerable particles of dirt and other foreign matter which he could not identify by looking at it. He saw no English bees among the bees at all. The syrup was p. 50. p. 51, l. 1. p. 51, l. 6. p. 51, l. 11. p. 51, l. 17.

p. 51, l. 27.

p. 51, l. 30.

obviously fermenting and smelt beery and sour. He examined the casks which were second-hand rebuilt casks. They were not wax-lined. He formed the opinion that the syrup must have been manufactured under the most unhygienic conditions possible. He did not think that the use of second-hand casks had any bearing on the condition of the syrup because the syrup was so bad in itself that it did not matter what it was packed in. Whatever it was packed in, it would have fermented just the same. There was leakage from the casks due to bad construction.

p. 51, l. 40.

p. 52.

35. In cross-examination Mr. Lambert stated that he had no scientific qualifications in chemistry but that he had seen many thousands of tons of syrup come into this country and knew about the composition of syrup. He could say on looking at syrup that it was so bad that it would ferment. With foreign matter it could not help fermenting. He acts for underwriters and as such inspects every parcel of syrup which comes into this country on which there is a claim. He explained the difference in the number of bees seen by Mr. Walkley and himself by the fact that Mr. Walkley was only looking through the bung hole whereas he had the tops taken off casks. He spent 2 or 3 hours examining these casks on about 1st October, 1952. The bees were not English bees. They had far too long bodies for English bees and their colour was different from the colour of English bees. They were a very light yellow and their bodies were more like the bodies of wasps seen in this country. He tried scraping the sides of the casks to see if they were wax-lined. He scraped with a pen-knife. He was an expert in casks. He knew about the treatment of syrup which had fermented. In re-examination he thought that £1,100 would be a reasonable figure for treating 53 tons of sugar syrup.

p. 53, l. 6.

p. 54, l. 10.

p. 54, l. 20.

p. 55.

p. 55.

36. There also gave evidence on commission on behalf of the Respondents Roy Warren Watridge, the Borough Analyst for Southampton and the City of Winchester. He was called in by Compounds and Essences Limited to inspect 30 casks of this syrup received by them from Burnell Hardy Limited. Twenty-five of these were under pressure and were fermenting so badly that they were obviously unfit for the use for which they were intended. The other 5 were undergoing incipient fermentation and again were not suitable for use in the Soft Drinks industry. This witness saw no bees because he did not look for them. He put his nose over the bungs and the fact that there was pressure in the casks convinced him that the syrup was useless for the purpose for which it was wanted. Of the 5 casks in respect of which he found incipient fermentation he had samples taken which were of very bad colour. He did not look inside the barrels with a light. He did not think he would have spotted bees because he used no light for his inspection. In taking his samples bees would be pushed out of the way and would not be likely to be in the sample syrup.

p. 56, l. 10.

p. 57, l. 32.

p. 58.

37. Finally the Respondents on commission called Dr. Richard Harold Morgan, a Consultant Chemist who is Consultant Chemist to the soft drinks industry and the author of standard textbooks on soft drinks. He received a 26 oz. sample bottle of this sugar syrup from Cantrell & Cochrane. This he analysed. Its appearance was bad in that the syrup was dirty, contained pieces of wood and straw, was olive coloured rather

p. 59, l. 22.

than clear and contained two of what he regarded as wasps. He did not think it necessary to determine the origin of these wasps but thought that they were probably British Empire wasps. The colour of the syrup ought to have been almost water white but it was in fact slightly opaque and olive coloured. It smelt beery and of being in a fermented condition. It also tasted beery. He found 367 parts per million of sulphur dioxide in the sample. 500 parts per million would be a reasonable quantity of this preservative provided that the syrup had been made under hygienic conditions. 367 parts per million could be a reasonable amount if the syrup was sterile initially. He further found by chemical tests that fermentation had occurred. He also found by micro-biological examination that the syrup was very full of yeast, a further indication of fermentation. In his opinion the cause of the fermentation was the presence of yeast cells. These were present because the syrup must have become infected at some stage. The amount of sulphur dioxide present was not sufficient to deal with this infection. He formed the conclusion that the syrup must have been exposed to some unhygienic conditions at some stage. He found it very difficult to say when the contamination occurred but thought probably during manufacture. He could not envisage a cask being so dirty as to introduce the degree of contamination which he found in these samples. The sugar itself he thought was good quality from its ash content. The syrup was unfit for the manufacturing process for which it was required. If used for manufacture of soft drinks or food it would have formed the subject of complaint by the local medical authorities because of the presence of foreign matter in it. Dr. Morgan was not cross-examined on behalf of the Appellant.

38. Correspondence was produced between the Respondents and the Appellant at the hearing, by Mr. Edward Patrick Shillingford and this showed that the Respondents had invited the Appellant to inspect the consignment of sugar syrup in England and had offered to furnish samples if required by the Appellant. Apparently the Appellant did not avail himself of this invitation. There was also put in as evidence a Report from Messrs. Perfect Lambert, a Certificate from Mr. Watridge and a report from Dr. Morgan all of which confirmed their respective evidence.

39. The Respondents respectfully submit that the above evidence amply entitled the West Indian Court of Appeal to come to the findings of fact which they made.

40. Accordingly the Respondents humbly submit that the Order made by the West Indian Court of Appeal on the 25th October, 1957, should stand and was right and should be upheld for the following, among other

REASONS

- (1) BECAUSE the Appellant warranted that the sugar syrup agreed to be sold and delivered by him to the Respondents would be suitable for human consumption on arrival in England and for a reasonable period thereafter.

- (2) BECAUSE the Appellant further warranted that the said sugar syrup would be packed in casks fit for the transportation of the said syrup to England.
- (3) BECAUSE each of the said warranties was broken by the Appellant.
- (4) BECAUSE the Judgment of the West Indian Court of Appeal was right.
- (5) BECAUSE the Judgment of The Honourable Mr. Justice K. L. Gordon was wrong.

JOHN WILMERS. 10

In the Privy Council.

ON APPEAL

from the West Indian Court of Appeal.

BETWEEN

**ISAAC NEWTON
SHILLINGFORD** as
Business Trustee of A.
C. SHILLINGFORD & Co. *Appellant*

AND

**FRANKLYN A. BARON
and OCTAVIA MARIA
BARON** trading as A.
A. BARON & Co. . . . *Respondents.*

Case for the Respondents

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