25th July, 1963.

IN THE COURT OF APPEAL, JAMAICA

R.M. COURT CIVIL APPEAL NO. 19/63

Before: The Hon. Mr. Justice Cundall (President)
The Hon. Mr. Justice Lewis
The Hon. Mr. Justice Henriques.

FREDERICK CROSBY

v.

STANISLAUS LYN

Mr. D.V. Daley for the Plaintiff/Appellant

Mr. D.h. McFarlane for the Defendant/Respondent.

MR. JUSTICE LEWIS: On the 27th of July, 1959 while the appellant was on the respondent's truck on the Mavis Bank road it overturned and he was thrown to the ground and suffered certain injuries. In respect of this accident he sued the respondent for damages. The defence as filed was a denial of negligence and an allegation that the appellant was a trespasser on the truck.

In the course of his evidence the plaintiff/appellant stated that the respondent had visited him after he left hospital and given him Six Pounds then a further Thirty Shillings, totalling Seven Pounds Ten Shillings, for nourishment, in respect of which he had signed a receipt. In his cross examination he said that he had not read the receipt nor was it read to him, that he could only sign his name but could not read, and that he had not been told that money was being paid to him without prejudice. He also said that the respondent had left the receipt with him although he had not actually put it into his hand.

The defendant/respondent in the course of his evidence in chief said that he had gone to see the appellant at the request of the appellant and that he had paid him Seven Pounds Ten Shillings after conversation, 'without prejudice'. In cross examination he said that the appellant asked him if he could help him with something and he told him that he could give him something but without prejudice and they had a further conversation in which he explained to him that by without prejudice he meant that once he had given him this money he would have no further recourse against him, it would be a complete compensation. In the course of the cross examination counsel for the appellant put to the respondent a document which was admitted in evidence as exhibit 1, and the respondent said, "yes, it was a document of this kind that I presented to the appellant for signature. It is not true that I told him that the money was to buy extra nourishment, nor is it true that anybody helped the plaintiff to sign the document."

It is significant that this document came out of the possession of the plaintiff/appellant, and up to that time it had not been relied upon as a defence in the action. I should at this stage read the document, or rather, the pertinent parts of it. It reads as follows: "5th August, 1959 - Mr. Stanislaus Lyn" (that is the respondent), and gives his address, "I agree to accept the sum of £7.10/- in full satisfaction and settlement of any claims on my behalf arising out of the accident involving truck No. 8873 on the 27th of July,1959 at Mount Charles, St. Andrew. This letter operates as a discharge of any claim by me for costs, and I acknowledge receipt of the said amount. Yours faithfully", and it is signed by the appellant.

It seems quite probable that the defendant/respondent's Soliciters were not aware of the contents of this document, which had apparently been left with the plaintiff quite inadvertently. As soon as counsel realised what the document was he promptly closed his case and applied for leave to amend his defence by pleading accord and satisfaction. There was argument about this application and the objection was taken, firstly, that the

document had been signed 'without prejudice', and, secondly, that it was unstamped. The learned Resident Magistrate in the exercise of his discretion permitted the defence to be amended. The argument with respect to its having been signed without prejudice was again put forward, but the learned Resident Magistrate held that it was not applicable to the case. He found that the defendant's servant was negligent in the driving of the truck and that the plaintiff was not a trespasser, but that this document was a complete discharge of accord and satisfaction, and a complete answer to the action and he dismissed the action.

It is against this decision that this appeal has now been brought. The main ground which has been argued is that the learned Resident Magistrate did not address his mind to a possible defence of non est factum which may have arisen on the evidence, and made no finding of fact as to whether this document had been signed by the appellant with full knowledge of its contents. There seems to be some misapprehension that in a civil case there is a duty upon a Resident Magistrate or Judge to look for possible defences in cases and to direct himself about them. That, of course, is not so. The Judge or Resident Magistrate, in my view, must decide the case upon the issues raised by the parties. In this case, curiously enough, it was the plaintiff's counsel who completely nullified the plaintiff's case by putting in evidence this document which on the face of it purports to be a discharge by accord and satisfaction. He never raised the question of non est factum and never suggested in argument that this document did not have in law the effect which it purported to have; but merely suggested that it should not have been admitted in evidence because it was unstamped, or that it should not be given its legal effect because it was made pursuant to the conversation in which reference was made to 'without prejudice'.

Where in the course of negotiations for settlement of a matter conversations take place or letters are written without

prejudice, it is quite clear that evidence of those conversations or those letters cannot be given in evidence if the matter is not subsequently settled, but where a settlement is reached and a document drawn up in pursuance of that settlement, to give effect to the settlement, then the fact that this document was preceded by conversations or correspondence 'without prejudice' does not, in my view, affect the admissibility of the document, nor prevent the document from having its full effect. If the reverse were true, then quite clearly no settlement could ever be brought to completion because it would merely be a futile exercise and the party who had put his name to the document recording the settlement could always exclude it from being put in evidence against him. That seems to be contrary to common sense, and I do not think I need cite any authority for the view I have stated.

The other ground of appeal that was taken was that the learned Resident Magistrate wrongly exercised his discretion in permitting the defence to be amended. I confess that I cannot see how the learned Resident Magistrate could have done otherwise than to exercise his discretion in favour of the respondent when he made this application. This document had been produced out of the possession of the appellant and put in evidence by the appellant's counsel. It was the first time that the respondent and his advisers were able to see the contents of it since this suit had been filed, and it is clear that the right course to take and which counsel for the defence took, was to apply for the amendment. In my view the learned Resident Magistrate quite properly allowed the amendment in these peculiar circumstances. That being so, I am of opinion that the learned Resident Magistrate was right in dismissing the case on the plea of accord and satisfaction.

The question arises whether this Court ought to interfere and send the case back for a new trial on the ground that the plea of <u>non est factum</u> which was never advanced on behalf

of the plaintiff, arising from a document which was put in by plaintiff's counsel, was not considered by the Resident Magistrate. To do so would be, in my view, to allow the case to be reopened for the purpose of being fought on a completely different basis. The plaintiff's counsel, who had this document in his possession, ought, if he intended to put it in, to have cross examined the defendant so as to indicate that they were pleading that the document did not bind the plaintiff because he was not aware of what he was signing and did not mean to sign this discharge, and should have drawn the legal aspect of this plea to the attention of the learned Resident Magistrate. He had ample opportunity so to do.

In these circumstances I do not think that it would be right to send this case back. I thinkthat this appeal should be dismissed with costs.

MR. JUSTICE CUNDALL: I agree.

MR. JUSTICE HENRIQUES: I also agree.