1911. *Present:* Lascelles C.J. and Middleton J.

ISMAIL *v.* CARLIS APPU *et al.*

289—D. C. Galle, 10,636.

Promissory note given for compounding criminal case—Consideration illegal.

Where a promissory note which was given by a person charged with criminal breach of trust to the complainant to compensate him for his loss formed part of a bargain that the complainant should, as far as he is able to do so, abandon the criminal proceedings—

Held, that the consideration for the note was illegal.

"The point is whether the transaction in its essence and substance was a bargain to abandon or withdraw the prosecution."

IN this case the plaintiff-appellant sought to recover a sum of Rs. 400 on a promissory note granted by the defendants. The plaintiff alleged that he entrusted some gold and brilliants worth Rs. 600 to the second defendant to be converted into a pendant, and that he subsequently prosecuted the second defendant for misappropriation of the said things; that pending the said prosecution, the first defendant, who had originally recommended the second defendant to this appellant, induced the plaintiff to take a sum of Rs. 50 in cash and a promissory note for Rs. 400, signed by both defendants, to compensate the plaintiff for the loss of the articles.

The learned District Judge (B. Constantine, Esq.) delivered the following judgment:—

The plaintiff is bringing an action on a promissory note, and the defence is that there was no valid consideration for the note. The promissory note was given in the morning of the day in which second defendant was to be tried for criminal breach of trust, and after receiving the promissory note the plaintiff has appeared in Court and stated that he did not press the charge. The question at issue is whether there was any understanding that plaintiff would not press the charge if he were given the value of the property, or whether the promissory note was given simply to make up the plaintiffs' loss without any reference to the pending Police Court case. But I think the fact that it was given immediately before the Police Court trial shows there was an understanding that plaintiff would not press the charge, and this being so, the note is bad in accordance with the authorities quoted for defendants, and I therefore dismiss plaintiffs' case with costs.

Plaintiff appealed.

A. St. V. Jayewardene (with him *Canekeratne*), for the plaintiff, appellant.—The charge against the defendants was a non-summary one, and one which the plaintiff could not have withdrawn even if he chose.

The note was not given for compounding the case; it was given in settlement of plaintiff's claim. In the local cases there was a clear finding that the note was given for compounding the offence. See *Silva v. Dias*[1]; *Valipulle v. Konamale Ponniah*;[2] *Low v. Poloris*;[3] *Encyclopædia of the Laws of England, vol. XII. (2nd ed.), at page 124.*

H. A. Jayewardene (with him *Zoysa*), for respondents.—It is not necessary that withdrawal of the criminal charge should be the only consideration for the note to make the transaction illegal. Even if the withdrawal was part of the consideration for the note, the note could not be sued upon. Counsel cited *Jones v. Merioneth-shire Permanent Benefit Building Society*;[4] *Lound v. Grimwade*;[5] *Fisher & Co. v. Apollinaris Co.*;[6] See also *Calcutta Law Journal 131, 133; Pollock on Contracts 330.*

A. St. V. Jayewardene, in reply.

September 28, 1911. LASCELLES C.J.—

In this case we have been referred to all the leading authorities on the question of law involved, and in my opinion there is no great difficulty so far as the law is concerned. If the promissory note, which was given to the plaintiff to compensate him for his loss, formed part of a bargain that the plaintiff should, as far as he is able to do so, abandon the criminal proceedings, there can be no doubt

[1] *(1910) 5 Bal. 3.*
[2] *(1883) Wendt's Rep. 276.*
[3] *(1894) 1 N. L. R. 142, at page 145.*
[4] *(1892) 1 Ch. D. 173.*
[5] *(1889) 39 Ch. D. 605.*
[6] *(1875) 10 Ch. 297.*

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but that the consideration for the promissory note was illegal. The point is whether the transaction, in its essence and substance, was a bargain to abandon or withdraw the prosecution. The learned District Judge has decided the question in the affirmative, and in my judgment it is impossible to arrive at any other conclusion. It is true that the plaintiff lodged a criminal charge with very little evidence in support of it, and it is probable that he did so because he believed that this was the most effectual means of obtaining redress for the loss that he had sustained. We find the promissory note was given in the morning of April 3, and on the same day the plaintiff appeared in the Police Court and stated that he did not press the case. It is almost impossible to believe that the receipt of the promissory note, and the action of the plaintiff in withdrawing from the prosecution, were not cause and effect. In my judgment the finding of the District Judge is correct. It is true that the conduct of the prosecution was in the hands of the Magistrate, and if he had liked he could have gone on with the inquiry without the assistance of the plaintiff. But in the circumstances of the case it would have been hopeless for him to have done so. The prosecution was practically in the hands of the plaintiff, and when he came into Court and said that he did not press the case, it was practically at an end. I think the judgment of the District Judge is right and must be confirmed. The order as to costs will be that the respondents will have the costs of the appeal, and that each side must bear their own costs in the District Court.

MIDDLETON J.— I agree.

Appeal dismissed.