1909.
May 5.

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wendt.

THENAPPA CHETTY *v.* VEERAPPA CHETTY and another.

D. C., Negombo, 7,144.

Promissory note—Agreement to give evidence in favour of a person—Illegality of consideration—Stake-holder—Recovery from stake-holder—Repudiation of unlawful agreement.

Where a promissory note was granted in consideration of an agreement entered into between the maker and the payee that the payee should give evidence in favour of the maker in a pending litigation,—

Held, that the agreement was unlawful and immoral and that the note was void.

Where a promissory note made in furtherance of an unlawful agreement is deposited with a third party as stake-holder, the maker of the note has a right, before the unlawful agreement is carried out, to repudiate it and demand back the note from the stake-holder; but where the unlawful agreement has been carried out, the right to get back the note ceases.

Hampden v. Walsh [1] referred to.

THE plaint alleged that the plaintiff made a promissory note in favour of the 2nd defendant for Rs. 1,000 and handed it to the 1st defendant, who was to keep it till he was instructed by the plaintiff to give it over to the 2nd defendant; that the 1st defendant, without any such instructions, acting in collusion with the 2nd defendant, fraudulently handed it over to the latter; that the 2nd defendant endorsed the note to one Pidelis de Silva, who obtained judgment thereon, and that the plaintiff paid and satisfied the same. The plaintiff brought this action to recover damages against the defendants jointly and severally for having negotiated the note in breach of their agreement.

[1] *(1876) 1 Q. B. D. 189.*

The defendants admitted the making of the note by the plaintiff, but denied all the other averments in the plaint.

The plaintiff being examined at the trial gave the following evidence :—

"I purchased a share of land at Lianagemulla at a Fiscal's sale and obtained a Fiscal's transfer. Sam. Silva was the owner of the other half. I instituted a partition suit making Sam Silva defendant. He filed statement of claim claiming the whole land by prescription. Second defendant is the headman of Lianagemulla. I spoke to 2nd defendant about giving evidence in the suit. We came to an agreement that I was to sell my half share to him for Rs. 2,250. He agreed to give evidence in the case—on my behalf that I was the owner—to support my title. He did not give evidence. He was summoned. I was not present on the trial day. I was informed he did not give evidence. The agreement was that if he gave evidence in my favour he was to have the land for Rs. 2,250, and a promissory note was made by him in my favour for Rs. 1,000, another promissory note was made by me in his favour for Rs. 1,000 on June 8, 1907. He also paid me Rs. 250 as an advance. I gave him a promissory note for Rs. 250. Three promissory notes were thus drawn. The three notes were left with Veerappa Chetty to be held by him. According to agreement it was fulfilled on terms, the notes were to be returned to the respective parties who signed them. This was to be on the headman's giving evidence and on the deed being signed. It was arranged that I should tell Veerappa. He was to keep the notes till I gave him instructions. I was informed the headman did not give evidence. I informed Veerappa that the headman had not given evidence, and that the notes should not be handed over. I sold my half share to Abraham Gunasekere's wife. The note I had made was sued upon in 7,039, D. C., Negombo. Judgment went against me. The plaintiff was Pidelis, who alleged Harmanis endorsed the note to him. I did not defend the action on advice of my proctor. I did not receive Rs. 1,000 from Harmanis on the note. I did not hand the note to Harmanis, but to Veerappa Chetty. This man present is not Veerappa, but his attorney. In D. C. 7,309 I paid the claim Rs. 1,207·05. I got receipts. Produces P 1, P 2. I claim that amount and Rs. 500 damages."

Cross-examined :—

"I got the Rs. 250 on June 8. The same day as the note was written. Veerappa Chetty has that note. I have not been sued on it. The note in my favour was with Veerappa Chetty. I asked him for the note. He did not give it. I was to have been given the note for Rs. 1,000 if he, the 2nd defendant, did not give evidence. If I had got the note I would have sued upon it. If he had given evidence in my favour, he was entitled to have all the three notes. The condition was his giving evidence in my favour. Veerappa

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Chetty should have given me all the three notes, as the 2nd defendant had not given evidence. If he had given evidence, the note made by him was to be returned to him and my note to me, and the deed of transfer would have been written in my favour. I left for India. I was in India when the case was tried. I do not know that the defendant in the partition case admitted my title. I sold the land. I cannot give the amount. Palaniappa Chetty looked after my business. Pedro wrote the notes. I owe money."

To 2nd defendant :—

"When I made the agreement I thought Sam. Silva would contest the case. I did not know in what way. I know the land. I knew the land before I purchased. I was the mortgagee. The 2nd defendant said he would give evidence and do all he could for the case if I were to sell the land to him cheap. He said he would give evidence in my favour. On June 8 the promissory note was written. He had said before that he would give evidence. He came to me first. I did not know him before. He made the proposal. He offered to give evidence on my behalf. He said he wanted to have the land cheap. He said he knew the facts and lived in the village, and there might be disputes. The agreement was that the 2nd defendant was to give evidence in my favour, and on these conditions I was to transfer to him the land cheap. As stakes we each deposited with Veerappa Chetty a promissory note for Rs. 1,000. Second defendant failed to fulfil his part of the agreement. Yet he obtained the note made by me, and I was sued on it."

The District Judge (R. W. Byrde, Esq.) delivered judgment as follows (July 3, 1908) :—

"I find, as a matter of fact, that the promissory note was handed by the plaintiff to the 1st defendant, and the 1st defendant was to keep it in his custody till the plaintiff gave him instructions to hand it to the 2nd defendant.

"2. The note was not handed to the 2nd defendant direct by the plaintiff.

"3. There is no evidence to show why the 1st defendant handed the note to the 2nd defendant.

"4. The 2nd defendant did not pay consideration for the note.

"5. There is no proof that the plaintiff has suffered any damage.

"6, 7. The action cannot be maintained against either of the defendants.

"The facts are those given by the plaintiff—a Chetty. He purchased a certain land. A partition suit was instituted, in which he was the defendant. The 2nd defendant, the Police Headman of Lianagemulla, came to him and made him a proposal. He offered to give evidence in the case in favour of the Chetty, on condition that

the Chetty should transfer the land to him at a low rate. Neither party trusted the other, and so each signed a promissory note for Rs. 1,000, which was deposited with the 1st defendant as stake-holder.

"It subsequently transpired that the headman's evidence was not required, and was therefore not given. He was no doubt quite ready to give evidence. He apparently on the strength of this claimed the note. The 1st defendant no doubt gave him the note. He endorsed it to his brother-in-law Pidelis, who sued the Chetty upon it. The Chetty suffered the case to go against him. I find that the consideration for the note was the 2nd defendant's giving evidence in favour of the Chetty. The giving of evidence in a case is no consideration at law. It was the duty of the 2nd defendant on receipt of a subpœna to appear and give evidence. He was bound so to appear and give evidence. The consideration was illegal. The headman was to give evidence in favour of the Chetty. The headman was prostituting his headmanship for gain. He was trafficking in perjury. He was also guilty of champerty for his offer of assistance in the suit. He was to get the land for Rs. 2,250, whereas it was worth Rs. 2,750.

"It is the duty of the plaintiff to prove his case, but he cannot at law prove an illegal contract. He cannot set up a case on which he must necessarily disclose an illegal purpose as the groundwork of his claim. The maxim '*In pari delicto potior est conditio defendentis*' applies. The plaintiff has no case to put before the Court. His action is based on an illegal contract, of which the Court cannot accept evidence in favour of the plaintiff. It was open to him to have contested the action on the promissory note.

"A negotiable instrument made and given as security for an illegal transaction is as between the immediate parties void. The transaction was illegal, the subsequent holder would consequently have lost the benefit of the rule that consideration is presumed till the contrary is shown, he would have been put to the proof that he gave consideration, and that he was unaware of the illegality. Seeing that he was the headman s brother-in-law this would have been rather difficult. The plaintiff has no case. His action is dismissed with costs."

The plaintiff appealed.

F. M. de Saram (with him *A. St. V. Jayewardene*), for the plaintiff, appellant.

Walter Pereira, K.C., S.-G. (with him *Prins* and *Wadsworth*), for the 1st defendant, respondent.

H. A. Jayewardene (with him *A. Drieberg* and *R. L. Pereira*), for the 2nd defendant, respondent.

Cur. adv. vult.

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May 5, 1909. HUTCHINSON C.J.—

This is an appeal by the plaintiff against a decree dismissing his action. His plaint states that on June 8, 1907, he signed a promissory note with the name of the 2nd defendant Don Harmanis as payee, and handed it to the 1st defendant Veerappa Chetty as his agent; and that the Chetty was to keep it until the plaintiff gave him instructions to issue it, whereupon it was to be handed to Harmanis; that Veerappa without any instructions from him, and acting in collusion with Harmanis with intent to defraud the plaintiff, handed the note to Harmanis; that Harmanis with intent to defraud the plaintiff endorsed the note to K. P. Silva, who sued the plaintiff on it and recovered judgment, and that the plaintiff paid to him the amount of the decree in that action, Rs. 1,207·05; and that he in consequence of the said fraudulent conduct of the defendants had suffered damage to the extent of Rs. 1,707·35, which sum he now claims.

The 1st defendant Veerappa in his answer simply denied all the allegations of the plaint; and he also set up some legal objections, which were not referred to before us, and which seems to be trivial. The 2nd defendant Harmanis in his answer denied that the note was handed to Veerappa, or was handed by Veerappa to him, and alleged that it was handed to him by the plaintiff himself; denied any fraud or collusion with Veerappa, and admitted that he endorsed the note to K. P. Silva. He also, as Veerappa had done, set up the legal objection that there was a misjoinder of causes of action, because the cause of action against him was distinct from that against Veerappa.

The issues settled included the following:—Was the note handed by the plaintiff to Veerappa, and was he to keep it till the plaintiff instructed him to hand it to Harmanis; or was it handed to Harmanis by the plaintiff? And if the former, did Veerappa hand it to Harmanis in collusion with him and with intent to defraud the plaintiff? And did Harmanis pay consideration for the note?

So far there had been no hint of the real defence, or of the real nature of the transaction between the parties, as it was afterwards disclosed by the evidence. The evidence showed, as the District Judge rightly found, that the plaintiff had bought a half share in a piece of land, and brought a partition action against the owner of the other half, who claimed the whole of it; and he then made a bargain with Harmanis, who was a Police Headman, that if Harmanis would give evidence in his favour to support his title, he would sell his share of the land to Harmanis for Rs. 2,250. In pursuance of that bargain each party signed a note for Rs. 1,000 in favour of the other; and the notes were deposited with Veerappa as stake-holder. When the partition action came on for trial Harmanis was cited as a witness, but the case was settled without his being called upon to give evidence, and one-half of the land was allotted to the plaintiff, and he afterwards sold it to another person

for Rs. 2,750. Veerappa did not give evidence in the present case, and we do not know the circumstances under which, or the date when, he gave up the plaintiff's note to Harmanis, or the date when the plaintiff sold the land ; but Harmanis says that he assigned the note to Silva in August, 1907, which was the month in which the partition action was tried. The probability is that the defendants thought that the plaintiff had broken his bargain, and that Harmanis was entitled to the note.

The District Judge held that the consideration for the note was illegal ; that the headman was prostituting his headmanship for gain and was trafficking in perjury ; that the plaintiff had to rely on an agreement which was illegal ; and he accordingly dismissed the action.

The plaintiff cannot succeed against either of the defendants, except by proving that they parted with his note in breach of his agreement with them. The Judge was right in holding the agreement to be immoral and illegal. The headman agreed to give evidence in favour of the plaintiff's case ; if he was merely to give true evidence of what he knew, there was no need to bribe him ; but one cannot doubt that both parties understood that he was not to confine himself to telling the truth, but was, if necessary, to give such evidence as would enable the plaintiff to win his case. I hope that the District Judge would report to the proper authority Harmanis' conduct in making such a bargain and in giving false evidence ; for if the finding of the District Court is right, Harmanis' evidence as to the circumstances under which he obtained the note was false. But the plaintiff cannot succeed in this action against Harmanis.

As regards Veerappa, perhaps on the authority of *Hampden v. Walsh*[1] and similar cases the plaintiff would have had a right, before the unlawful agreement was carried out, to repent and repudiate it and demand his note back from the stake-holder. But he does not allege in his plaint that he demanded the note back before Veerappa had parted with it, and there was no issue as to that. He does say in the course of his evidence that he informed Veerappa that Harmanis had not given evidence, and that the notes should not be handed over, and also that he asked Veerappa for the other note (the one given by Harmanis) ; but it is not clear when all this took place, and it seems that the plaintiff did not repudiate the agreement, but claimed that in pursuance of it he was entitled to the two notes. I think that his claim against Veerappa also must fail, because it is founded on an alleged breach by Veerappa of an unlawful agreement, and that the appeal should be dismissed with costs.

WENDT J.—

I take the same view as that expressed by the Chief Justice, and think that the appeal should be dismissed with costs.

Appeal dismissed.

[1] *(1876) 1 Q. B. D. 189.*