[PRIVY COUNCIL.] 1918.

Present: Earl Loreburn, Lord Atkinson, Lord Scott Dickson, and Sir Arthur Channell.

JAYAWICKREME *et al. v.* AMARASURIYA.

D. C. Galle, 11,862.

Consideration—Justa causa—Compromise of threatened action—Verbal agreement to pay money—Action to enforce the verbal agreement—Agreement enforceable, though the fist threatened action was not enforceable in law—Duty of Judge to frame proper issues on the facts proved at trial.

The plaintiff averred that the defendant held certain property received by him from his mother in trust for himself and the plaintiff in equal shares; that the plaintiff had threatened to institute against him a suit to compel him, in performance of that trust, to assign to her an undivided half share of this property; that after much negotiation an amicable settlement was arrived at on the terms following: first, that the plaintiff should refrain from instituting the contemplated action, and should not assert title to any share of the aforesaid properties; and secondly, that the defendant should in consideration thereof pay her a sum of Rs. 150,000 in five yearly instalments.

The District Judge held that the defendant made the promise, but that there was no trust as alleged by the plaintiff. He dismissed the action, holding that the compromise could not be supported, because the alleged trust which the plaintiff threatened to enforce by action was not enforceable at law, nor a *justa causa debendi.*

Held, that the plaintiff could have successfully maintained an action against the defendant on the promise mentioned, even if no suit had ever been threatened and no compromise ever been made, inasmuch as the promise was made deliberately, after much negotiation, in discharge of the moral obligation found to rest upon the defendant to do an act of generosity and benevolence to his sister. "But however that may be, if the plaintiff had threatened to institute a suit to compel the defendant to discharge this moral obligation and do this act of benevolence to her, and had undertaken not to proceed with that suit on the terms that he (defendant) should make the above-mentioned promise, the promise could have been enforced, whether the suit was likely to fail or not."

"If at the trial the District Judge, who had full control over the record, had amended the issue so as to suit the facts proved, he should have given a decree in favour of the plaintiffs for the sum sued for. He did not do so. He, on the contrary, seized the word 'trust' used in the plaint, and having found that no trust existed,

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decided against the plaintiffs, although they had established before him a good and meritorious cause of action according to the system of law applicable to the case."

"It may well be that according to English law, as a general rule, an existing moral obligation not enforceable at law does not furnish good consideration for a subsequent express promise, but according to the Roman-Dutch law a promise deliberately made to discharge a moral duty or to do an act of generosity or benevolence can be enforced at law, the *justa causa debendi*, sufficient according to the latter system of law to sustain a promise, being something far wider than what the English law treats as good consideration for a promise."

June 4, 1918. Delivered by LORD ATKINSON:—

The original defendant, Henry Amarasuriya, died since the commencement of this action, and his widow and executrix has been made a defendant in the suit. She is the sole respondent. The female plaintiff and the original defendant were sister and brother, children of T. D. S. Amarasuriya, deceased, who died in the year 1907 possessed of some considerable property, which he left by will to his widow. The widow subsequently made over this property to the deceased defendant, without making any substantial provision for the female plaintiff and her family.

The action was brought to recover a sum of Rs. 5,500, the unpaid balance of a sum of Rs. 30,000 alleged to have been on or about July 31, 1912, promised and agreed by the deceased defendant to be by him paid to the female plaintiff on March 31, 1913.

The parties had disagreed as to the issues upon which they should go to trial, and thereupon the two issues following were (amongst others) framed by the District Judge:—

1. Did the defendant on or about July 31, 1912, promise and agree to pay first plaintiff a sum of Rs. 150,000 in five annual instalments of Rs. 30,000 each, payable on March 31 in each year, the first payment to be made on March 31, 1913, and were the promise and agreement made for the reasons and considerations stated in the fifth and sixth paragraphs of the plaint?

2. Were the payments made by the defendant in fulfilment of the said agreement, or out of generosity to the plaintiff and her children?

The first issue was treated by the learned District Judge who tried the case as composed of two parts, involving two distinct but inseparable issues, the first part ending with the word and figures "March 31, 1913," putting in issue the making of the promise mentioned, which the defendant stoutly denied; and the second part ending with the word "plaint," designed apparently to raise two questions: first, whether the consideration for the deceased defendant's promise alleged in the fifth and sixth paragraphs of the plaint had in fact moved to and been received by him; and, second, whether, even if it had so moved and been received by him, it amounted to good consideration for his promise according to

English law, or a *justa causa debendi* according to Roman-Dutch law. The consideration, as stated in the above-mentioned paragraphs, was in effect this, that the deceased defendant held certain property received by him from his father through his mother in trust for himself and the female plaintiff in equal shares; that she, the female plaintiff, had threatened to institute against him a suit to compel him, in performance of that trust, to assign to her an undivided half share of this property; that after much negotiation an amicable settlement was, on or about July 31, 1912, arrived at on the terms following: first, that the female plaintiff should refrain from instituting the contemplated action, and should not assert title to any share of the aforesaid properties; and secondly, that the deceased defendant should in consideration thereof pay to her a sum of Rs. 150,000 in five yearly instalments of Rs. 30,000 each on March 31 in each and every year.

The female plaintiff may in these two paragraphs have phrased her claim too strongly in point of law, but it is not found proved or even alleged in the pleadings that she did not make it honestly, in perfect good faith, and in the *bona fide* belief in its justice and legality, and, if pressed to a conclusion, in its ultimate success.

Both Courts below have found that the deceased, despite his sworn evidence to the contrary, did make the promise in the first part of the above-mentioned issue set forth, and not only this, but that he had paid to the female plaintiff in pursuance of it a sum of Rs. 24,500. But when the District Judge came to deal with the second part of the issue, namely, " the reasons and considerations " for which this promise was in the fifth and sixth paragraphs of the plaint alleged to have been made, he in effect started to try upon its merits the suit threatened by the female plaintiff against her brother to compel him to perform the trust by which she alleged he was bound. He found that the alleged trust was not proved, but that it was established that the deceased defendant felt himself under a moral obligation to perform the sacred duty imposed upon him by his father's verbal enjoinder, " which was not legally compellable," to provide for his sister, the female plaintiff, and her family: " that he had knowledge that litigation would result," which in their Lordships' view must mean litigation at the suit of his sister, directed to enforce this obligation, misnamed by her a trust, and that it " was in that state of mind he promised and agreed to pay her Rs. 150,000 in five years and be quit of the duty." Upon the second issue, he found that the payment of Rs. 24,500 was made " in pursuit of the agreement arrived at; that it was not made for the reasons and considerations stated in the fifth and sixth paragraphs, but something different, viz., the responsibility and duty of providing for his sister and her family." This he describes as something more than a generosity, since it was made under a moral obligation and in pursuit of a promise.

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He then sums up the grounds of his decision in the seventh paragraph of his judgment in the words following:—

7. To sum up, then, the position is this. The plaintiffs have proved a promise and an acceptance. They have failed to discharge the burden of proving the "trust" and "agreement" set out in the paragraphs 2 and 3 and 4 of the plaint. Their *justa causa* fails, and if the two parts of the first issue must stand or fall together, their whole case falls to the ground.

I do find that the inducement for the promise was quite of another kind, viz., the consciousness that the defendant had received the larger share of the inheritance of the father, and that he was in duty bound and charged with the sacred trust of providing for his sister and her family. He had taken all the estate except the amount which had gone to the plaintiffs, whether Rs. 60,000 or Rs. 100,000. The plaintiffs have not been able to deny that the defendant had Rs. 240,000 to pay as his father's debts, however incurred; but they aver that the father was worth Rs. 600,000 or Rs. 700,000.

I come to the conclusion that the "moral obligation" created by the "sacred trust" reposed in him to support the family of his sister does not constitute an adequate "*justa cause debendi*" for the pact to pay Rs. 150,000.

The *justa causa* pleaded by the plaintiffs fails. There is no alternative but to dismiss the plaintiffs' action, with costs.

It is plain from these passages that the decision of the learned District Judge was based upon the view that the compromise could not be supported, because the alleged trust which the female plaintiff threatened to enforce by action was not a valid trust enforceable at law, nor a *justa causa debendi*. He thus permitted himself to be led astray by the form of the pleading and the issue, from determining whether the alleged compromise which it was sought by the suit before him to enforce was valid, into that of determining whether the threatened suit alleged to have been compromised could have succeeded if prosecuted to its end—a wholly different and irrelevant question. The legal validity or invalidity of the claim the female plaintiff threatened to enforce by action is entirely beside the point if she, however mistakenly, *bona fide* believed in its validity. Lord Blackburn, in *Callisher v. Bischoffsheim*,[1] pointed out that in *Cook v. Wright* [2] it was decided that, even if the defendant actually knew that the plaintiff's claim, which was compromised, was invalid, yet the compromise of it was enforceable; and it was in the former case decided that the compromise of a disputed claim made *bona fide* is a good consideration for a promise, even though it ultimately appears the claim was wholly unfounded. In the case of *Miles v. New Zealand Alford Estate Company*,[3] Bowen L.J., as he then was, said:—

It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim even if he turns out to be in the wrong. It seems to me it is equally a mistake to suppose

[1] *5 Q. B. 449, at p. 452.* [2] *1 B. & S. 559, 570* [3] *32 Ch. D. 266.*

that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defence, and I think, therefore, that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession. Otherwise you would have to try the whole cause to know if the man had a right to compromise it, and with regard to a question of law, it is obvious you never could compromise a question of law at all.

In the Court of Apppeal, in the present case, the learned Chief Justice states in the following passage the grounds of his judgment. He said:—

The defendant had benefited largely by his father's death, and there can be no doubt that it was his father's wish that he should provide for the first plaintiff and her large family. He was aware that the first plaintiff, under the influence to some extent of her husband, the second, had thoughts of involving him in legal proceedings. But the District Judge does not find, and the evidence would not, in my opinion, have supported him had he done so, that the fear of litigation was the motive for the agreement into which he entered to pay the first plaintiff a sum of Rs. 150,000. The District Judge expressly holds that the defendant's action in this matter was guided by his father's wishes, and by his consciousness that he had himself been enriched out of the family property to a far greater extent than his sister. In these circumstances, the present action, which is based on an allegation of a trust imposed upon the defendant by his father in the first plaintiff's favour, must fail.

Mr. Justice Shaw said:—

The learned District Judge in the course of his judgment finds that the defendant did promise to pay the second plaintiff Rs. 150,000, and that he in fact did make payments in fulfilment of the said promise. He also finds that the consideration for the payments was something more than mere generosity, and was the responsibility and duty of providing for the plaintiff's family, and that the payments were made under a moral responsibility in pursuit of the promise.

He concurs in the result with the Chief Justice.

It is plain, therefore, from those passages that the decision of the Court of Appeal, like that of the District Judge, was not based on any assumption that a dispute had not arisen between the female plaintiff and her brother touching her claim upon his property, nor that she did not threaten litigation against him to enforce it, nor that the threatened suit had not been compromised, but solely in the ground that the " trust " upon which she alleged in her pleading he held the aforesaid property was not valid in law or did not exist. She was held rigidly bound by the word " trust " used in the pleading, and her action defeated, not because she had no just claim to relief, but because her claim was not of the kind she had described it to be.

It may well be that according to English law, as a general rule, an existing moral obligation not enforceable at law does not furnish

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good consideration for a subsequent express promise (*Eastwood v. Kenyon*,[1] *Pollock on Contracts 189*); but the Roman-Dutch law, by which, in their Lordships' view, this case must be governed, is wholly different. According to this latter law it would appear that a promise deliberately made to discharge a moral duty or to do an act of generosity or benevolence can be enforced at law, the *justa causa debendi*, sufficient according to the latter system of law to sustain a promise, being something far wider than what the English law treats as good consideration for a promise.

In Pereira's *Laws of Ceylon, 2nd ed., p. 568*, it is stated that where there is what the English law treats as consideration for a contract, there is what the Roman-Dutch law treats as a *justa causa debendi* for it, but that the converse is by no means true; that these latter terms have a much wider meaning than the English word "consideration," that they comprise motive (*sensu latiori*) or reason for a promise, or what in English law is known as purely moral considerations; that, according to the Dutch author Van der Keessel, a promise which is not founded on a *justa causa debendi* (*i.e., obligandi*) does not give a right of action, although otherwise an action is maintainable on a *nudum pactum*. He then quotes, apparently with approval, the following passage from the work of a Mr. Morice on Dutch law:—

> Under Dutch law a consideration in the English sense of the word is not an essential of a contract. The nearest approach to anything of the nature is a *causa*, the presence of which is essential to a contract. The *causa* was taken from Roman law, and is perhaps the germ of the English doctrine of consideration. The meaning appears clear from Grotius's expression "reasonable cause." There must be a reason for a contract, a rational motive for it, whether that motive is benevolence, friendship, or, other proper feeling, or, on the other hand, is of a commercial or business nature. In other words, the agreement must be a deliberate, serious act, not one that is irrational or motiveless. This point of view would appear very similar to that of English law in recognizing the validity of a contract under seal without consideration. The solemn forms of the deed under seal are assumed to involve deliberation.

In *Lipton v. Buchanan*[2] the two defendants, named respectively Buchanan and Frazer, were partners in trade. They incurred a debt to the plaintiff, for which they were, of course, jointly and severally liable. The partnership was subsequently dissolved by a decree of the Court, and a receiver appointed. Frazer paid to the plaintiff, through the receiver, one-half of this debt, the plaintiff, in consideration thereof, undertaking not to take any steps against Frazer personally for the recovery of the balance due by the firm, until he had exhausted every possible means of recovering it against the other partner, Buchanan. At the date of this payment Buchanan was possessed of ample means to pay his debts. The plaintiff

[1] *11 A. & E. 438, 482.*

[2] *(1904) 8 N. L. R. 49.*

delayed taking action against him for more than a year, during which time Buchanan incurred additional debts, in the payment of which his property was exhausted. Thereupon the plaintiff sued both the former partners for the unpaid balance of the partnership debt. Two points bearing upon this case were decided. First, that the case did not come within Ordinance No. 22 of 1866, which applies the English law to partnership transactions, and it was, therefore, governed by the common law of Ceylon, which was the Roman-Dutch law; and, second, that the maxim of the Roman law, *ex nudo pacto non oritur actio*, did not obtain in the Roman-Dutch law, and that *causa* in the latter law denotes the ground, reason, or object of a promise; that it has a much wider meaning than the English term " consideration," and comprises motive or reason for a promise, and also purely moral consideration; and it was accordingly held that there was a lawful *causa* for the above-mentioned agreement of the plaintiff, inasmuch as the receiver, though he had been in possession of the assets of the firm for three years, had not been able to pay the plaintiff anything, and that Frazer then came forward and paid half the debt, presumably saving the plaintiff further delay and trouble.

It would, in their Lordships' view, appear from these authorities that the plaintiffs in the present case could have successfully maintained an action against the deceased defendant on the promise mentioned in the first part of the above-mentioned issue, even if no suit had ever been threatened and no compromise ever been made, inasmuch as the promise was made deliberately, after much negotiation, in discharge of the moral obligation found to rest upon the deceased defendant to do an act of generosity and benevolence to his sister, namely, to make a provision for her and her children; but however that may be, it is perfectly clear that if the female plaintiff had threatened to institute a suit to compel her deceased brother to discharge this moral obligation and do this act of benevolence to her, and had undertaken not to proceed with that suit on the terms that he should make the above-mentioned promise, the promise could, according to the Roman-Dutch law, have been enforced, whether the suit was likely to fail or not.

But that is very much what the female plaintiff really did. The deceased defendant, in his letter dated March 7, 1912, while his mother was still alive, addressed to his sister, stated that he and his mother were prepared to do what was required of them for the welfare of her. the sister's family. The District Judge has found that the female plaintiff's letter of March 10, 1912 (exhibit P 2), was not proved to have reached the deceased defendant; but she wrote it. It is an indication of her mind and intention, at all events, though he cannot be fixed with knowledge of its contents. It contains a distinct threat to institute litigation to obtain from the brother a share of her father's property. Dr. Cooray, in his letter of

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March 27, 1912, to the deceased defendant, his uncle, distinctly stated that the female plaintiff was willing to accept Rs. 150,000, secured by a promissory note, and payable in three instalments, and mentioned that he, the writer, considered it very commendable in his uncle to have made up his mind to settle the dispute in this manner. The deceased defendant replied to this letter on March 30, stating that he offered to give her money, not on a business note, but upon an agreement, which would be more binding. In his letter of April 10, 1912, to Dr. Cooray, he says:—

> As, in my opinion, a business note as the one you describe will not protect me, the only way of securing the interests of either party is by notarial agreement, and I therefore think it quite essential to have such a document ..... Therefore, please suggest to my sister to accept my terms, and try to induce her to enter into the notarial agreement.

On June 16, 1912, he again writes to Dr. Cooray, and says:—

> My lawyers tell me that I cannot write the deed without running the risk of litigation. You can, therefore, assure my sister that I will give her the amount I have promised every year. The first instalment will be paid to her by March 30, 1912 ..... " She can be angry until such time as the full amount is paid, and proportionally deduct her anger accordingly as each payment is made."

On June 26, 1912, he again writes to Dr. Cooray, saying:—

> I am in receipt of your letter of the 20th instant. What you say regarding the proposed deed is quite true. The one you refer to is a very important objection, as far as my lawyers are concerned. I am certainly genuine as to my intentions, as regards my sister and her children. Let us try and do our best in the matter, and I am convinced that your sympathies are on either side and well balanced. I have not met my sister since she had the rupture with mother.

He proceeds to ask to have a meeting with his sister arranged, as nothing definite can be done without it.

Dr. Cooray, who is married to the daughter of the female plaintiff, was examined. He stated that on March 12, 1912, the deceased defendant approached him, and discussed with him the matter of the plaintiffs' claim; that he, Cooray, was then aware that the plaintiffs had for six or eight months before that been telling him that if the deceased defendant did not settle their claims they intended to bring an action; that the deceased defendant then said to him, " Do you know that my sister has got angry about a share in the estate and is going to sue me?" that the witness replied, " Yes, I know about it, but why don't you settle it amicably without going to Court "; that the defendant replied, " How to settle? She is asking a share in the land which I have improved and added to "; that the witness replied, " You need not give the land if you do not like, you can give a reasonable amount for the share "; that the defendant then said, " What is a reasonable amount? "

and the witness replied, " According to the value of the land when it came to him from his father "; that the defendant then asked, " What amount? " and the witness replied, " You know best," whereupon the defendant, after some thought, said, " Well, I will give her Rs. 150,000, and there must be no further claim "; that the witness replied, " I can't accept your statement to convey "; and asked the defendant to give it to him in writing, and that the defendant said he would enter into an agreement or a business note. The witness further stated that he communicated what had passed to the second plaintiff, and requested him to inform his wife of it. On cross-examination the witness further stated that he was present on July 31, 1912, at the interview between the female plaintiff and the deceased defendant, which the latter had asked for; that the whole discussion, which lasted a long time, was about her claim to the land, and the upshot of it was, if her brother paid her the money she would keep quiet. This evidence is absolutely consistent with the letters above referred to, and is corroborated by them, and from both it is, in their Lordships' view, perfectly clear that the female plaintiff had long asserted a claim to the land the deceased defendant had derived from his father; that there was a dispute between them as to whether this claim was good; that she threatened to institute proceedings to enforce it, and that the deceased defendant agreed to compromise with her by paying her Rs. 150,000 on the instalments described in satisfaction of this claim. The validity of the claim, or the ultimate success of a suit brought to enforce it, is entirely beside the point. On those facts the plaintiffs were, in their Lordships' opinion, entitled to succeed in the present action. The question is, are they to be denied justice because their pleader has chosen to over-state his clients' case, and the Judge to frame an issue embodying that over-statement?

If at the trial, which did not take place before a jury, the learned District Judge, who had full control over the record, had amended the issue so as to suit the facts proved, he should, in their Lordships' opinion, have given a decree in favour of the plaintiffs for the sum sued for. He did not do so. He, on the contrary, seized upon the word " trust " used in the fifth paragraph of the plaint, and having found that no trust existed, decided against the plaintiffs, although they had established before him a good and meritorious cause of action according to the system of law applicable to the case.

Their Lordships are therefore of opinion that the decision appealed from, as well as that of the District Judge, were on the facts proved at the trial erroneous, and should be set aside, and this appeal be allowed, with costs here and below, and that judgment be entered for the appellants for the sum sued for, and they will humbly advise His Majesty accordingly.

Set aside.