

THE PEOPLES' BANK OF HALIFAX } APPELLANT;
 (PLAINTIFF) }

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*Feb. 29.

*May 2.

AND

THOMAS JOHNSON (DEFENDANT).....RESPONDENT

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Contract—Surety—Consideration—Stifling prosecution.

In an action on a bond executed by J. to secure an indebtedness of L. to plaintiff bank the evidence showed that L., who had married an adopted daughter of J., was agent of the bank, and having embezzled the bank funds the bond was given in consideration of an agreement not to prosecute.

Held, affirming the judgment of the court below, that the consideration for said bond was illegal and J. was not liable thereon.

APPEAL from a decision of the Supreme Court of Nova Scotia, reversing the judgment for the plaintiff at the trial.

The action in this case was brought to recover the amount due the plaintiff bank on a bond executed by the defendant to secure an indebtedness to the bank of H. & A. Locke, a firm doing business at Lockeport, N. S. Austin Locke, one of the members of said firm, was agent of the bank at Lockeport, and had embezzled money of his principals. He had married an adopted daughter of the defendant. The action was defended on the ground that the defendant executed the bond to prevent Austin Locke from being prosecuted for such embezzlement and evidence was given on the trial of threats by the cashier of the bank to prosecute unless security was given for the debt of the firm.

* **PRESENT** :—Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

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The facts are more fully stated in the judgment of the Chief Justice.

Ross Q.C. for the appellant. The cashier could not bind the bank by any threats that he made. *Downer v. Carpenter* (1); *Stainer v. Tysen* (2); *Black River Savings Bank v. Edwards* (3).

The leading case as to duress and illegality of consideration is *Wallace v. Hardacre* (4). See also *Ward v. Lloyd* (5); *McLatchie v. Haslam* (6).

Drysdale for the respondent cited *Jones v. Merionethshire Permanent Building Society* (7).

Sir W. J. RITCHIE C.J.—This appeal is from the judgment of the Supreme Court of Nova Scotia sitting *in banco*. The action is upon promissory notes and upon a guarantee, whereby the defendant guaranteed to the plaintiff payment of the indebtedness of H. A. Locke. The trial was before Mr. Justice Graham who decided in favour of the defendant as to the promissory notes sued on, and in favour of the plaintiff upon the guarantee. No appeal has been asserted in respect of the judgment for defendant upon the promissory notes. The defendant appealed from the judgment against him upon the guarantee, and his appeal was unanimously sustained,—the Supreme Court *in banco* reversing Mr. Justice Graham's judgment and directing judgment to be entered for defendant. From this judgment the plaintiff has taken the present appeal.

The evidence with reasonable certainty, in my opinion, establishes that the defendant signed the guarantee in order to relieve Austin Locke from criminal proceedings which were then being threatened against

(1) 1 Hun. (N.Y.) 591.

(2) 3 Hill (N.Y.) 279.

(3) 10 Gray (Mass.) 387.

(4) 1 Camp. 45.

(5) 6 M. & G. 785.

(6) 8 Times L. R. 134.

(7) [1891] 2 Ch. 587; 8 Times L.R. 133.

him by Braine the plaintiff's agent, and under representations from Braine that such proceedings would be instituted unless the security were given.

Austin Locke was the manager of the plaintiff's branch bank at Lockeport. He had embezzled the plaintiff's money. It was for this embezzlement that the criminal proceedings were threatened, and it was to secure the indebtedness of Austin Locke and his partner Sydney Locke, who composed the firm of H. & A. Locke, that the guarantee was exacted.

At the argument of the appeal plaintiff's counsel contended that the fact of an agreement to compromise the crime of Austin Locke had not been pleaded. This defence, however, is fully raised by the 2nd, 3rd and 4th paragraphs of the defence and was so regarded at the trial, a great part of the evidence on both sides being devoted to this single issue. It is stated in terms in the 4th paragraph of the defence that the guarantee was executed in order to stifle the threatened prosecution for embezzlement.

I quite agree that the defence now relied on was sufficiently pleaded.

I think it a mistake to treat this, as the learned trial judge appears to have done, as a question of duress. It is the question of an agreement entered into to secure the payment of certain moneys in consideration of no proceedings being taken against a party for embezzlement, in other words compounding a felony. In this case there was no other consideration either alleged or proved, and such a consideration, being contrary to the policy of the law, cannot be relied on. I think the evidence very clearly shows that the understanding on which the security was given was that no prosecution would be instituted on the part of the bank, and had that not been the understanding I do

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not think the defendant would have entered into the arrangement.

The learned trial judge says: "I have not thought it necessary to decide as to whether or not Mr. Braine did make the threat alleged because I have come to the conclusion that if it was made it did not so operate upon the mind and will of the defendant that it destroyed his free agency and rendered him unable to give his assent to the contract."

Even in the learned judge's view of the case it seems to me it would have been better for the learned judge to have decided one way or the other, whether the threat was or was not made, for if made it appears to me difficult, if not almost impossible, to say what effect it had on the mind and will of the defendant, or how it operated on him; but whether this operated on the mind or will of the defendant is, in my opinion, entirely beside the question, because outside of any question of duress or its effect on the free agency of the defendant any consideration of forbearance to prosecute a felony is void as being against public policy. *Keir v. Leeman* (1). It is clear that a consideration must not only be valuable but it must be a lawful consideration, and not repugnant to law or sound policy or good morals. *Ex turpi contractu actio non oritur*.

The allowance of such an objection as this is not for the sake of the party who raises it but is grounded on general principles of policy. Where the fact comes to the knowledge of a party, as this most assuredly did, that a felony has been committed, if it is not his duty to prosecute it certainly is contrary to his duty to compromise or compound the felony, because by so doing he is thereby enabled to secure to himself a pecuniary advantage by obtaining security for the amount embezzled or stolen. Considering that em-

bezzlement is rampant at the present day, if we may judge from the cases from day to day detailed in the public print, one would think the banks especially would endeavour to put a stop to such practices instead of practically encouraging them by hushing the offence up on being secured the pecuniary loss they would otherwise sustain.

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If they will not prosecute is it not right and proper that courts should not allow them to benefit by agreements made to compensate their loss by letting the offender go free in consideration of their not prosecuting? Surely it is the duty of banks and monetary institutions, and one would think their interest, to prosecute and to bring offenders of this sort to justice rather than, by concealing and stifling prosecutions, if not to encourage practically not to discourage such offences, all parties being well aware by confessions of the embezzler that a large amount of the plaintiff's money had been embezzled.

Inasmuch as I can discover no other consideration for the defendant entering into this contract with the plaintiff but the clear intimation that if he did not do so criminal proceedings would be instituted against the embezzler, and the irresistible inference from the evidence being that if he did nothing would be done in the matter, and the contract now sought to be enforced having been entered into under these circumstances, I am of opinion that such consideration was unlawful and no court can be asked to enforce a contract based on such an unlawful consideration.

STRONG J.—The judgment appealed against seems to me to be in all respects correct. The defence that the bond sued upon was given for the purpose of inducing the appellants to refrain from instituting criminal pro-

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ceedings against Austin Locke, which proceedings were threatened by their agent, Braine, is sufficiently pleaded and was substantially proved. It is impossible to suppose that the respondent, who appears from the evidence to be an experienced man of business, would have become a surety for a person in the position of Locke unless there had been some inducement of the most urgent kind. Then no other motive for the respondent's intervention has been suggested than that he executed the bond to save his relation or connection Locke from prosecution. The irresistible inference, therefore, is that it was given for this purpose alone.

The case is in all respects like that of *Jones v. Merionethshire Building Society* (1) and does not resemble that of *McClatchie v. Haslam* (2) where a married woman gave a security for her husband's debt and afterwards impeached it as having been given to stifle a prosecution. In the last cited case the court were able to say that the inducement to give the security might have been the conjugal influence of the husband, and that there was consequently a motive to which it might be ascribed other than that of an intention and desire to shelter a relative from a prosecution by compounding a criminal offence.

The appeal must be dismissed.

TASCHEREAU J.—It seems to me evident that the bank cannot recover in this case. The transaction upon which they base their claim arose out of an agreement to stifle a criminal prosecution illegally made by their agent, of whose illegal acts they cannot take advantage. The evidence, it seems to me, leaves no room for another conclusion as to this fact, and it is settled law that "any contract or engagement having a tendency, however slight, to affect the adminis-

(1) 1892 1 Ch. 173.

(2) 65 L. T. R. 691.

tration of justice, is illegal and void." Per Lord Lyndhurst in *Egerton v. Earl Brownlow* (1). The case of *Jones v. The Merionethshire Permanent Building Society* (2), has, since the judgment in the present case, been affirmed by the Court of Appeal (3). I refer to it.

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GWYNNE J.—I entirely agree with the review of the evidence as made by Justices Weatherbe and Townshend, and concur with them that the fair conclusion to be drawn from it is that the defendant was induced to give the guarantee which is the subject of this suit upon the faith of an agreement that by his so doing Austin Locke, who had rendered himself liable to a criminal prosecution for fraud upon the plaintiffs, and who was married to a young lady who had been adopted and brought up by the defendant as his daughter, should not be prosecuted. The guarantee was given upon an illegal contract or to stifle a criminal prosecution. The appeal must therefore, in my opinion, be dismissed with costs.

PATTERSON J.—I concur in the dismissal of this appeal.

Appeal dismissed with costs.

Solicitor for appellant: *A. A. Mackay.*

Solicitor for respondent: *N. W. White.*

(1) 4 H.L. Cases 1, 163.

(2) 1891 2 Ch. 587.

(3) 8 Times L.R. 133.