GEORGE WESTCOTT, SOLE SURVIVING EXECUTOR OF THE ESTATE OF ARCHIBALD McCORMICK, DECEASED (DEFENDANT). } APPELLANT;

1933
*Feb. 22.
*Mar. 15.

AND

MARTIN LUTHER (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Promissory note—Nature of agreement—Effect of document—Conditional or unconditional promise—Consideration—Onus—Collateral engagement—Request by maker not to produce note until after maker's death—Bills of Exchange Act, R.S.C., 1927, c. 16, ss. 176, 58.

Respondent, who had long worked for M. on M.'s farm, sued, after M.'s death, on an alleged promissory note to him from M., dated January 13, 1927, for $5,000, payable one year after date. Respondent (believed by the trial judge) testified that M. made the note on the occasion of one of their yearly settlements to fix the balance due respondent on wage account, that the balance found due for wages was $206.87, that respondent, asked by M. if he needed the money, replied that he did not as long as he remained there, that M. then said that he wanted to give respondent something, referred to services for M. of respondent's mother (who had recently died) and had respondent fill out (on M.'s directions) a note form and signed it, but stated that he wanted to keep it for a while, to which respondent agreed; that M. kept the note until January, 1928, when he handed it to respondent, asking him not to tell anyone that he had it, and not to produce it until after M.'s death and then only if there was more than enough in M.'s estate to support M.'s sister, and if he would remain on the farm at his present wages until M. died; to all of which respondent agreed. M. died in February, 1929, leaving an estate of $50,000. His sister died soon after. Respondent then presented the note and sued thereon.

Held: Respondent's evidence that the note was signed by M. was abundantly corroborated in the evidence. The note was a promissory note within the *Bills of Exchange Act* (R.S.C., 1927, c. 16, s. 176) and respondent was entitled to recover thereon.

Respondent's acceptance of M.'s requests amounted to no more than a collateral engagement not to enforce his rights until the requests had been complied with. That did not make the document any the less an unconditional promise in writing by M. to pay at a fixed time a sum certain in money to respondent. The agreement not to enforce payment while M. lived was no part of the note. The terms of the note imported a present and unqualified obligation, and there was nothing in the evidence to justify the conclusion that its delivery by M. was conditional upon the fulfilment of his requests. Even if respondent could have been enjoined from enforcing payment in M.'s lifetime, the document was still a promissory note within the meaning of the Act. As such, it imported that valuable consideration had been given for it (s. 58), and the onus (thus shifted) to establish want of

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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consideration had not been met. Consideration being presumed until the contrary was shewn, M.'s obligation on the note was contractual, and not by way of testamentary gift.

APPEAL by the defendant, the sole surviving executor of the estate of Archibald McCormick, deceased, from the judgment of the Court of Appeal for Ontario (1), allowing the plaintiff's appeal from the judgment of His Honour, Judge Ross, Acting Judge of the County Court of the County of Kent, dismissing the plaintiff's action, which was brought to recover upon an alleged promissory note given by the said deceased to the plaintiff. The material facts of the case are sufficiently stated in the judgment now reported. The defendant's appeal to this Court was dismissed with costs.

A. G. Slaght K.C. and *J. H. Clark* for the appellant.

R. S. Robertson K.C. and *G. P. Campbell* for the respondent.

The judgment of the court was delivered by

LAMONT J.—The questions involved in this appeal are, (1) whether the document handed to the respondent under the circumstances detailed by him, by the late Archibald McCormick (hereinafter called the Deceased) is a promissory note within the *Bills of Exchange Act,* and (2), whether there was corroboration of the plaintiff's evidence that the document was signed by the deceased, sufficient to satisfy the requirement of section 11 of the Ontario *Evidence Act?*

A promissory note is defined by section 176 of the Act as follows:—

176. A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer.

Section 11 of the *Evidence Act* provides:—

11. In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment, or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

(1) (1931) 40 Ont. W.N. 559.

The document in question here is:—

$5000.

Due Jan. 13th 1928

Jan. 13th 1927.

One year after date I promise to pay to the order of Martin Luther Five Thousand Dollars at The Royal Bank of Canada for value received with interest at the rate of 5 per cent per annum as well after as before maturity.

A. McCormick.

The respondent had lived with the deceased on his farm during his whole life, some 43 years. After he quit attending school he received wages which were increased until he was getting $500 a year, a free house and garden, with liberty to pasture and feed his stock without charge if there was feed for them. The respondent worked the farm under the deceased's direction and took care of the stock. He lived in the house with the deceased and his sister Kate until he got married some fifteen years ago, and from that time he lived in the tenant's house which was close by. During the year it was customary for the deceased to give the respondent, from time to time as he required them, advances on account of his wages and an account of these sums was kept by each of the parties. Then, in the early part of January in the following year, they had a final settling up. The deceased's sister Kate kept the accounts for him.

On January 13, 1927, the respondent went to the deceased's house for a settling up of the accounts for the year 1926. Both account books shewed that there was a balance of $206.87 due to the respondent. According to the respondent's testimony the deceased asked him if he needed the money and he replied that he did not as long as he remained there. The deceased then said that he wanted to give him something; that he owed his mother something; that he had not given her anything for the last two years and only $1.50 per week at any time; that he was going to give him a note and if he did not need the money he would let it go on the note. The deceased went to an adjoining room and got a note form and gave it to the respondent to fill up, as the deceased could only write his name; that he filled it out, the deceased telling him to make it for $5,000 and to put in 5% interest. This he did, and the deceased signed it. It might here be pointed out that the

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respondent's mother had worked for the deceased for over forty years, and that she had died in 1926.

The respondent further testified that the deceased stated he wanted to keep the note for a while. To this the respondent was agreeable, and the deceased kept the note until January, 1928, when the respondent went over to settle up for the year 1927. On that occasion the question of the note was brought up and the deceased said that, as he was repairing the buildings on the place from which the respondent would obtain considerable benefit, he did not think he should pay interest on the note for that year. Whereupon the respondent indorsed on the back of the note a receipt for the payment of one year's interest. The interest had not been paid. The deceased then handed the note to the respondent and asked him not to tell anyone that he had it and not to produce it until after his (deceased's) death, and then only if there was more than enough in his estate to support Kate. The deceased also asked him if he would remain on the farm at his present wages until the deceased died. To all these requests the respondent agreed.

The deceased died on February 8, 1929, leaving an estate worth $50,000. Six weeks later his sister Kate died. The respondent then presented his note to the appellant who is the sole surviving executor of the deceased's estate. The appellant required strict proof of the respondent's claim. The respondent then brought this action on the note.

The County Court Judge, before whom the matter came, believed the story of the respondent and found that the note had been duly executed by the deceased, and delivered to the respondent as stated by him. He, however, thought that, on the respondent's own evidence, the note was not to be paid until the death of the deceased. From this he concluded that the respondent was setting up a parol agreement entirely different from that disclosed by the note on its face. Furthermore he was unable to find any corroboration of the statement of the respondent that he had given valuable consideration for the note, namely, the unpaid balance of his wages for 1926, and his promise to continue working on the farm, at his then wages, until after the death of the deceased. For these reasons he dismissed the action. This decision was reversed by the Court of Appeal.

Before this Court the burden of the argument on behalf of the appellant was that, according to the respondent's evidence, the real agreement between the parties was that the note was to be paid only after the deceased's death and then only conditionally; that this was not the agreement set out on the face of the note; that the note was, therefore, a false and misleading document, the falsity of which prevented it from being a promissory note within the meaning of the *Bills of Exchange Act* and, therefore, no presumption could arise, under section 58 of the Act, that the respondent was a holder for value.

In my opinion this contention cannot be upheld. What the respondent agreed to when the note was handed to him was: (*a*) that he would not mention to anyone the fact that he held it; (*b*) that he would not produce it until after the death of deceased; and (*c*) then only if there was in the deceased's estate more than sufficient to support his sister.

The deceased's reason for making the requests contained in (*a*) and (*b*) presumably was to prevent any unpleasantness with those nephews and nieces who will be entitled to the money if respondent does not succeed in establishing his claim, and to whose importunity he may have feared he would be exposed if it were known that he had benefited a stranger to the prejudice of his own blood relations. The reason for requiring (*c*) was a desire to make sure that his sister would not come to want.

It will be observed that nowhere did the deceased suggest that the note was not to be a present obligation in favour of the respondent. All he does is to request the respondent not to enforce his rights until after he himself has passed away, leaving an estate more than sufficient to support his sister. The acceptance by the respondent of these requirements amounts, as the Court of Appeal held, to no more than a collateral engagement on his part not to enforce his rights until the requests had been complied with. That does not make the document any the less an unconditional promise in writing by the deceased to pay at a fixed time a sum certain in money to the respondent. There is no ambiguity in the note itself. The respondent's agreement not to enforce payment while the deceased was living, was no part of the note, the terms of which import a present and unqualified obligation, and there is nothing in the evidence to justify the conclusion that the delivery

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of the note by the deceased was conditional upon the fulfilment of his requests. He was satisfied that the respondent would respect his wishes.

Whether the agreement of the respondent not to enforce the note in the deceased's lifetime would have afforded any defence to the note had action been brought upon it before the deceased's death, we need not inquire, for, even if it would and the respondent could have been enjoined from enforcing his rights, the document was still a promissory note within the meaning of the *Bills of Exchange Act,* and, as such, it imports that valuable consideration has been given for it (section 58). This shifts to the appellant the onus of establishing want of consideration, as was pointed out by Riddell J. in *Mercier* v. *Campbell* (1). That onus the appellant has not met. Consideration being presumed until the contrary is shewn, the deceased's obligation on the note was contractual, and not by way of testamentary gift, as the trial judge held.

The respondent's evidence, that the note was signed by the deceased, was abundantly corroborated by the testimony of experts in handwriting, and by Dr. MacPherson, who testified that, before his death, the deceased told him that he had seen the respondent well provided for by a note, and had divided the rest of his estate between Colin and Kate.

It was also argued for the appellant that if the document was a promissory note importing that it had been given for value and was thus an enforceable contract, there should be a new trial for the reason that the claim had been framed and the action had been conducted throughout on the basis that the respondent was seeking to enforce a gift and not a contractual right. There is no substance in this contention. The appellant knew, from the statement of claim and the examination for discovery of the respondent, just what the respondent was claiming and the grounds upon which he based his claim, and was not in any way taken by surprise.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *McTague, Clark, Springsteen, Racine & Spencer.*

Solicitors for the respondent: *Shaw & Shaw.*

(1) (1907) 14 Ont. L.R. 639, at 652.