ROSS v. GANNON ET AL.

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*Dec. 13, 14, 15.

Promissory note—Illegal consideration—Smuggling transaction—Burden of proof—Findings of trial judge.

APPEAL from the judgment of the Supreme Court of Nova Scotia(1), by which the judgment at the trial was affirmed.

The action was brought by the appellant on certain promissory notes and, at the trial, was dismissed by Graham J., on the grounds that the original note, of which those sued upon had been given in part renewal, was either given without consideration or in connection with smuggling transactions. The learned trial judge considered the evidence unsatisfactory, as the plaintiff did not produce the books of account shewing how the consideration for the note was made up, and as there was evidence to support the plea of illegality. The appeal to the Supreme Court of Nova Scotia, *in banc,* was heard before five judges, but, at the time the judgment appealed from was rendered, one of these judges had resigned and there was an equal division of opinion among the remaining judges who had heard the appeal. The appeal, therefore, stood dismissed without costs, and the plaintiff appealed to the Supreme Court of Canada.

Newcombe K.C. and *Mellish K.C.* for the appellant.

Harris K.C. and *Lovett* for the respondents.

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*PRESENT:—Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

(1) 39 N.S. Rep. 65.

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The judgment of the court was delivered by

Davies J.—I am of opinion that this appeal should be dismissed and the judgment of Graham J., the trial judge, confirmed. An appeal to the Supreme Court of Nova Scotia against that judgment resulted in an equal division of that court, the Chief Justice Weatherbe, and Longley J. being of opinion that the trial judge who dismissed the action should be reversed and judgment entered for the plaintiff for the amount claimed, while Townshend and Russell JJ. were for confirming the judgment.

The action was one brought upon a note of hand signed by the defendants in plaintiff's favour, for $568.68. That note was one of several renewals of a note originally signed by the defendants in favour of one McKenzie for $960.

The defence was that Ross was the son-in-law and clerk of McKenzie, the payee of the $960 and came to the defendants' house and personally induced them to sign this note and also another one for $409.70 as an accommodation for him. McKenzie subsequently became insolvent and Ross purchased his estate and debts. When the $409.70 came due, Ross claimed that they should pay it because it really represented the aggregate amounts of several store accounts which Gannon and his sons, one of whom was dead, had incurred at McKenzie's store. On being satisfied that this was correct, and a statement being rendered of the several accounts, the Gannons paid this $409.70 note.

With regard to the other note for $960, they repudiated any liability on the ground that they never had received any consideration for it and that it was

expressly signed by them for Ross and at his request as an accommodation merely. Ross contended that it too represented a debt which the deceased son Dan Gannon owed McKenzie and of which he had become the assignee.

Joseph Gannon, the father of the three boys and one of the defendants, gave this evidence:

> I remember the transaction about note of $960 and different renewals. Mr. Ross came in to me and asked if I would put my name to a note of that amount, and I said, "No"; and he said, "You might, your son Dan always accommodated me"; and I said, "It is too big, and I won't sign it." Ross said, "There is a vessel down in the dock that I want to buy"; and I said, "Supposing you would die?"; and he said "My wife will look after it." I said I would not sign it, and my son asked me then to put my name to it, and he said that Captain Carlin and himself will put our names to it, and you will never hear of it again; and I did. When the note came due, I came to Ross, and said, "What about the note?" and he said, "Your son Dan owed me more than that." I said, "Didn't you promise I would not be troubled about it?"; and he said, "Your son Dan owed me." I said "If my son owed you anything, and you bring an honest bill, I will pay you"; and *he said he could not bring an honest bill because it was smuggling;* and I said, "If you say anything more about it I will put you behind the bars." I never had any dealings with Ross. The first time he spoke to me about my son Dan owing him anything was when the first note came due. I asked him what my son owed him for, and he said, "We were into the smuggling, and it was my money that went into it"; and I said, "I know nothing about that."

John Gannon, defendant, and Pius Gannon, another son, who was present at the time of the signing of the note, corroborated the old man Joseph that Ross had induced the father and son to sign the note as an accommodation for him merely representing that he, Ross, would protect the note when it fell due and they would not be called upon for it.

When Ross was called he denied that the note was signed as an accommodation for him and contended

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it was for a debt which the deceased son Dan owed McKenzie.

He did not deny, however, in any way the sworn statement of the old man that when the note fell due he had come to Ross and asked what about the note, and that his only reply was, "Your son Dan owed me more than that," and that when taxed by Gannon with having promised when the note was signed that he, Gannon, would not be troubled about it he had only replied, "Your son Dan owed me," or the further statement, "If my son owed you anything and you bring an honest bill I will pay you," and his reply that *he could not bring an honest bill because it was smuggling*.

These statements remained uncontradicted, and were believed by the trial judge. The only book Ross produced of the Gannon's dealings with McKenzie was a ledger shewing accounts due by the several members of the Gannon family including the deceased Dan, amounting in the aggregate to the $409.70 note which they had paid.

Ross contended that there was another book of McKenzie's either a day book or ledger, containing other accounts between McKenzie and the deceased Dan, but his story as to this book was, as the trial judge said, unsatisfactory, and I fully agree with him. There was no pretence of there having been any consideration for the note other than the alleged account due by the deceased boy Dan to McKenzie which Ross himself in the uncontradicted evidence stated was for *smuggling*.

On the whole evidence I think the findings of the trial judge fully sustained by the evidence, and that the appeal should be dismissed with costs.

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Appeal dismissed with costs.

Solicitor for the appellant: *D. L. McPhee.*

Solicitor for the respondents: *R. H. Butts.*