Original Jurisdiction (*a*)

Original Suit No. 570 *of* 1867.

P. SASHANNAH CHETTI.....*Plaintiff.*

P. RA'MASA'MY CHETTI.....*Defendant.*

A contract to pay money upon the consideration that the plaintiff would give evidence in a Civil Suit on behalf of the defendant cannot be enforced.

Such a contract is either for true evidence and then there is no consideration, or for favourable evidence either true or false, and then the consideration is vicious.

Semble, If the consideration had been the plaintiff's promise not to evade process that would still be no consideration for the defendant's undertaking.

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THIS suit was brought upon a promissory note for Rupees 800, made by defendant and delivered to plaintiff. The defendant requested the plaintiff to give evidence on his behalf in a suit which the defendant had instituted in 1866, to compel a division of undivided family property, and made the promissory note sued on as remuneration for his trouble. The plaintiff was not examined as a witness on behalf of the defendant though he had been served with a subpœna to attend and give evidence. The plaintiff was the uncle of the defendant and was well acquainted with the state of the family to which the suit of 1866 related.

The issue was whether the plaintiff had given any legal consideration for the promissory note mentioned in the plaint.

Mayne for the plaintiff.

The *Advocate General* for the defendant.

The Court delivered the following

JUDGMENT.—This is a suit upon a promissory note and on this issue the plaintiff must recover, unless it was given without consideration, or for a vicious consideration.

(*a*) Present : Holloway, J.

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The facts are that defendant was litigating with his cousin for a share of family property, and asked plaintiff, also a member of the family, to assist him by giving evidence. The plaintiff enquired what he should get by doing so, and demanded Rupees 1,000, but after some negotiation agreed to take this note. He was served with a subpœna, but defendant, hearing that he had joined his opponent, did not examine him.

It is quite clear that if a subpœna had been served, and this note had been given to compensate plaintiff for his loss of time or other inconvenience, it would have been without consideration, because his attendance and the giving of evidence would have been merely the performance of a duty imposed upon him by law (*Willis* v. *Peckham*, 4 Moore, 300, and *Collins* v. *Godefroy*, 1 B. & Ad. 956). Mr. Mayne referred to the cases in which promises of rewards to Constables have been held to create obligations enforceable on the performance of the service, as shewing that the cases of extra rewards promised to seamen are exceptional, and that it is not a rule of English Law that the mere performance of that which a man is legally bound to perform is not a consideration.

England v. *Davidson* (11 Ad. and El. 856) the leading case upon this matter, treats the rule as inflexible, but Lord Denman, delivering the judgment of the Court says, "I think there may be services which the Constable is not bound to render and which he may therefore make the ground of a contract," and Mr. Ingham, for the plaintiff, says, "the Constable was not bound to procure evidence." This case therefore does not contradict but enforces the principle that the performance of a legal duty is no consideration for a promise. Mr. Mayne, however, further contended that until the witness was served with a subpœna, he was justified in either shutting himself up in his house or betaking himself to a distant country to avoid service, and that the agreement patiently to await the subpœna, and suffer the extreme inconvenience of giving evidence, was ample consideration. The latter part of the proposition is clearly untenable, the inconvenience is

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merely incidental to the legal duty, which is no consideration even for an express promise to compensate. There is not a shadow of evidence of any contract not to evade the subpœna, the contract was to give evidence if served. If, however, there were such evidence, the promise of plaintiff would then amount to saying. "If you will promise to pay me rupees 800, I will promise not to take any steps to prevent you from having any evidence to which you are entitled, if you want it." It may be that the evasion would be neither punishable nor actionable, but seeing that it is the legal duty of every citizen to give evidence when called upon, the taking of steps to evade that legal duty must be at least morally wrong. It is a *maleficium*. An agreement not to do that which is morally wrong can scarcely be said to be a consideration, and the Roman Law, to which Wilmot, C. J., referred in *Collins* v. *Blantern,(a)* declared conventions of this kind absolutely void. The reference to the Digest in the report is wrong, but the principle is stated in b. 7, a. 3 *de pactis* (2-14) *si ob maleficium ne fiat promissum sit, nulla est obligatio ex hâc conventione.* If therefore, the consideration of this promissory note had been the plaintiff's promise not to evade process, I should not have hesitated to say that this is no consideration at all. The only contract was Rupees 800 for the evidence. This was either for true evidence, and then there was no consideration, or for favorable evidence either true or false, and then the consideration was vicious. I have not much doubt as to which of the alternatives was meant and understood to be meant. I will not waste a word as to the obvious tendency of such agreements. I find the issue in favor of the defendant, but it is not a case for costs, and the suit will be dismissed without costs.

Suit dismissed.

(a) Smith's L. C. 310 (Fifth edition).