[HIGH COURT OF AUSTRALIA.]

KERRIDGE . . . . . APPELLANT;
DEFENDANT,

AND

SIMMONDS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 25, 26.

Griffith C.J., Barton and Higgins JJ.

Defamation—Prosecution—Compromise of prosecution by deed—Public policy—Uncertainty of duration of payment—Interpretation.

S. and K. who had been cohabiting together agreed by deed to live apart for the future. By the first paragraph of the deed K. agreed to pay S. a certain sum per month, no period being mentioned for the continuance of the payments. By the second paragraph of the deed S. agreed, in consideration of the monthly payment, to withdraw proceedings pending against K. upon a complaint which on the same day she had laid against him for unlawfully publishing oral defamatory matter about her.

Held: That such agreement was not void for uncertainty, as it must be construed as meaning that K. would pay S. the specified monthly sum during their joint lives.

Held, further: That as the offence the subject-matter of the prosecution was not of a public nature, but was one for which the injured person could sue and recover damages, the general rule of law that an agreement to stifle a prosecution is contrary to public policy and void did not apply.

Decision of the Supreme Court: *Simmonds* v. *Kerridge*, 8 W.A.L.R., 132, affirmed.

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APPEAL from the Supreme Court of Western Australia.

S., a married woman, was living in adultery with K., and during a quarrel K. published oral defamatory matter about her. S. summoned K. criminally for defamation. The same day that the summons was issued the parties came to a settlement, and executed a deed whereby it was agreed that K. should pay S. a certain sum per month, no period being mentioned for the continuance of the payments, and S. agreed, in consideration of the monthly payment to withdraw proceedings pending against K. upon a complaint which she had laid against him for unlawfully publishing oral defamatory matter about her. On an action being brought by S. for instalments of the monthly sums, she was nonsuited by Mr. Commissioner Roe on the ground that the agreement was immoral, and also against public policy. The Full Court set aside the nonsuit and ordered a new trial (1). K. appealed to the High Court by special leave.

Keenan A.-G. (*Mayhall* with him), for the appellant. It cannot be argued that the agreement was immoral, as it terminated the illicit relationship; and the fact that the consideration was immoral cohabitation is cured by the agreement being under seal.

But the contract is void for uncertainty; there is no definite term fixed for which the monthly payments are to continue; plaintiff in her evidence, six months after the agreement, spoke of "the end of our contract."

There was an illegal consideration in the agreement, which was for compounding a prosecution. S. charged K. with "unlawfully publishing defamatory matter," under the *Criminal Code*, sec. 358. This may be dealt with summarily, but only by consent; without such consent the offence is indictable.

Any agreement to alter or interfere with the course of justice is illegal and void: *Lound* v. *Grimwade* (2). Where it is an implied term of an agreement that a prosecution shall be stifled, it is illegal. The prosecution puts pressure on the person threatened, and amounts to illegal coercion, practically

(1) 8 W.A.L.R., 132.

(2) 39 Ch. D., 605.

blackmail. If the matter compromised is a mere matter of reparation, as in libel, the Court will favour the compromise; but where it is made a matter of bargain, the Court will discountenance it. Reparation in a case of libel means apology and withdrawal, but can never include money payments, which are purely a bargain, as in this case: *Jones* v. *Merionethshire Permanent Benefit Building Society* (1). The foundation of prosecution for libel is that there is a strong element of public injury, the danger of provoking a breach of the public peace. It is not permissible to stifle a prosecution before it comes into Court; such compromise should be under the eye of the Court; the parties must come into Court and there withdraw the prosecution: *Russell on Crimes*, 6th ed., vol. I., pp. 413-14; *Keir* v. *Leeman* (2). The Courts are jealous to prevent their supervision over the interests of the public in criminal prosecutions from being flouted by secret agreements: *Windhill Local Board of Health* v. *Vint* (3). The true test is whether the parties undertook a "reparation" or a "bargain" when they compromised. It is to the public interest to prevent scandalous libels from being compounded by bargains for money: *Odgers on Libel*, 4th ed., p. 691; *Reg.* v. *The "World"* (4). If any part of the consideration for the agreement is attributable to this illegal purpose, the whole agreement is void.

Clydesdale, for the respondent. As to the point that coercion was used to bring about this agreement, no evidence was given of coercion. The plaintiff's evidence disclosed none, and a nonsuit was thereupon granted.

An injured individual may compromise his private damage in any way he chooses: *Keir* v. *Leeman* (2), which was a case for assault and riot. That was the law in 1846 and has been recognized from then to the present time. In 1890, in *Windhill Local Board of Health* v. *Vint* (5), *Fry* L.J., explained the rule to mean that when the subject of the indictment was a matter of general public concern it could not be compromised.

(1) (1892) 1 Ch., 173.
(2) 6 Q.B., 308; 9 Q.B., 371.
(3) 45 Ch. D., 351.
(4) 13 Cox C.C., 305.
(5) 45 Ch. D., 351, at p. 364.

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In *Jones* v. *Merionethshire Permanent Benefit Building Society* (1) the offence compromised was a crime, viz., embezzlement, and no agreement to stifle that prosecution could on any account be held valid. The distinction between "bargain" and "reparation" there drawn was only directed to the crime there involved. *Clubb* v. *Hutson* (2) was also a case of a crime. The sole test is whether the public could possibly have an interest in the injury compromised, which they clearly could not in a mere personal dispute over abusive language.

On the alleged uncertainty, *Hitchcock* v. *Coker* (3) established that similar words as to the duration of agreement were valid. It was a promise to pay the monthly sum during their joint lives so long as unmolested.

Keenan A.G., in reply. Criminal informations cannot be compromised: *R.* v. *Newton* (4). There is a social duty to prosecute every injury which amounts to a misdemeanour; the injured person who institutes or threatens criminal proceedings cannot compromise them for money, at peril of the growth of public disorders.

GRIFFITH C.J. This is an action brought by the plaintiff, a married woman, against the defendant to recover arrears of money payable under a deed dated 1st June 1905. The deed recited that the plaintiff and defendant had been cohabiting together and had agreed to live apart for the future upon the terms thereinafter mentioned. By the first paragraph the defendant agreed to pay to the plaintiff the sum of £13 per month, no period being mentioned for the continuance of the payment. The second paragraph was to the effect that for the consideration aforesaid the plaintiff agreed to live apart from the defendant, and not to call upon him or interfere with or molest him in any way, and also to hand over to him any letters and telegrams which she had in her possession, and also to withdraw the proceedings then pending in the Laverton Police Court against him for defamation. It appears that upon the same date, 1st June

(1) (1892) 1 Ch., 173.
(2) 18 C.B. N.S., 414.
(3) 6 A. & E., 438.
(4) 19 T.L.R., 627.

1905, a summons had been issued against the defendant on the plaintiff's complaint for unlawfully publishing oral defamatory matter about her. The plaintiff sued on this deed for arrears of the stipulated payment. At the trial before Mr. Commissioner Roe the deed was proved, and the summons was proved. Objection was taken that the agreement was void in point of law, first, on the ground that it was an agreement made without consideration upon the determination of an immoral cohabitation. That objection is met by the fact that the instrument was under seal. A further objection was taken that the agreement was against public policy, and therefore void, being given for the purpose of stifling a prosecution for an indictable offence. No doubt, by the agreement the plaintiff expressly agreed to withdraw proceedings for an indictable misdemeanour. The question, therefore, whether an agreement to withdraw proceedings for defamation is void as being contrary to public policy is distinctly raised for our consideration. The withdrawal of such a prosecution was a part of the consideration for the promise sued on, and if it is bad it vitiates the whole deed. I think the law on the subject is fairly clear. Although there are no recent express decisions of any Court of appellate jurisdiction on the point, I think the accepted view of the law has been recognized so long that it cannot now be said to be in doubt. The first case which I propose to consider is that of *Keir* v. *Leeman* (1) which was an action upon an agreement to compromise proceedings in respect of an assault amounting to a riot. In that case Lord *Denman* C.J., delivering the considered judgment of the Court, after reviewing all the previous reported cases, said:—"The result of the cases makes it clear that some indictments for misdemeanour may be compromised, and equally so that some cannot; the line will, as we apprehend, be found correctly traced by *Gibbs* C.J., in the passage just quoted, and by *Le Blanc* J. in *Edgcombe* v. *Rodd* (2)." The passage quoted from *Gibbs* C.J., was from his judgment in the case of *Baker* v. *Townsend* (3) and is as follows:—"The parties have referred nothing but what they had a right to refer. They have referred the several assaults; these may be referred. They have referred the

(1) 6 Q.B., 308, at p. 321. (2) 5 East., 294.
(3) 7 Taunt., 422.

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right of possession; that may be referred. The reference of all matters in dispute refers all other their civil rights, which may well be referred." The dictum of *Le Blanc* J. is as follows:—"This was a prosecution for a public misdemeanour, and not for any private injury to the prosecutor." Lord *Denman* proceeded:—"We shall probably be safe in laying it down that the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it." The learned Lord Chief Justice went on to observe that in that case the offence was not confined to personal injury, but was accompanied with riot, and these were matters of public concern and therefore not legally the subject of compromise. He also said, speaking of an agreement to compromise made with the sanction of the Court:—"Plainly it cannot make that legal which the law condemns." That case was taken to the Court of Exchequer Chamber (1) where the judgment was delivered by *Tindal* C.J. He is reported to have said:—"Indeed it is very remarkable what very little authority there is to be found, rather consisting of *dicta* than decisions, for the principle, that any compromise of a misdemeanour, or indeed of any public offence, can be otherwise than illegal, and any promise founded on such a consideration otherwise than void. If the matter were *res integra*, we should have no doubt on this point. We have no doubt that, in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. It is said, indeed, that in the case of an assault he may also undertake not to prosecute on behalf of the public. It may be so: but we are not disposed to extend this any further." This case establishes, in my opinion, that there is no objection to compromising a claim for private injury resulting from an act which amounts to an indictable offence provided that it is not a matter of public concern. As to the argument

(1) 9 Q.B., 371, at p. 395.

founded on the concluding words of *Tindal* C.J., I would point out that an agreement by an individual not to prosecute can only bind himself, and cannot prevent the assertion of the rights of the public by anyone else. That case has been referred to in several later cases. In *Fisher & Co.* v. *The Apollinaris Co.* (1), a suit to impeach the validity of an agreement to compromise criminal proceedings for an offence against the *Trade Marks Act* (25 & 26 Vict. c. 88), *James* L.J. expressed, *obiter*, the opinion that an indictment for not repairing a highway might be compromised. This dictum has, however, been adversely criticized. In the same case *Mellish* L.J., after referring to the nature of the charge which had been compromised, said (2):—"Previously to the *Trade Marks Act* (25 & 26 Vict. c. 88), the sole remedy for the wrong complained of by the company would have been by action at law or suit in equity, but under this Act the wrong became also the subject of a criminal prosecution. There was no authority for saying that it was wrong in the prosecutors to withdraw from such a charge of this kind. The prosecutors allowed him to state that his offence was not wilful, and accepted an apology. Such compromises are constantly made before criminal Courts in cases of assault or libel. In some cases there is a payment of money; in other cases, no payment at all; and it has never been considered that there was anything wrong in such transactions." As a statement of the received law in England, I think those words are strong authority coming from so great a Judge as Sir George *Mellish*. In my opinion he was merely stating what was always the law. In the case of *Windhill Local Board of Health* v. *Vint* (3) the question was again considered. The question there was as to an agreement to compromise a prosecution for a nuisance, *Cotton* L.J. said:—"To my mind, the reason of the rule goes deeper than that; it is this, that the Court will not allow as legal any agreement which has the effect of withdrawing from the ordinary course of justice a prosecution when it is for an act which is an injury to the public." *Fry* L.J. said (4):—"It appears to me that the law on this point is determined by the case of *Keir* v. *Leeman* (5). That

(1) L.R. 10 Ch., 297.
(2) L.R. 10 Ch., 297, at p. 303.
(3) 45 Ch. D., 351, at p. 363.
(4) 45 Ch. D., 351, at p 365.
(5) 6 Q.B., 308; 9 Q.B., 371

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lays down this principle, which I take to be one of general application, that where the matters of indictment are matters of public concern they are not the subject of compromise." All the learned Lords Justices thought it necessary to show that the matter under consideration was one of public concern, and for that reason, which was assumed to be the governing consideration, it was held that the agreement in question was void because it was an agreement to stifle the course of public justice. Upon the authority of these cases I am of opinion that the law allows the compromise of a prosecution for oral defamation for which the injured party can sue and recover damages. Here the plaintiff was entitled to sue for damages for the oral slander. Can it then make any difference that she had laid a complaint for the slander upon the same day on which the agreement was signed? On that complaint the defendant might have been punished by a fine, or committed for trial, but the injury complained of was a purely personal injury. I can draw no distinction between a case of defamation and a case of common assault from the point of view of public concern. For these reasons I am of opinion that it is not unlawful for a person defamed, or who has sustained purely personal injury, to withdraw a prosecution already instituted for such an offence, or to agree not to institute such a prosecution. Where a person is entitled to recover pecuniary damages, the suggestion that there is a social duty incumbent upon him to prosecute is untenable. The law allows him either to prosecute or to sue for damages, and I can see nothing to prevent him from agreeing to receive an indemnity for the personal injury he has sustained, leaving the representatives of the public to prosecute if they think fit. If, as in some cases, he is the only person entitled to institute the prosecution, then *â fortiori* it is a matter of private, and not of public, concern. With regard to the point of uncertainty, I think that the agreement should be read as meaning that the defendant would pay the plaintiff £13 a month during their joint lives. For these reasons, I am of opinion that the decision appealed from is correct and should be affirmed.

BARTON J. I am entirely of the same opinion. The validity of this agreement was contested on two grounds; first, that it is uncer-

tain, and next that it is an agreement against public policy, in other words, that there was a moral duty to continue the prosecution, which tainted the withdrawal of it under compact. The question of uncertainty is, I think, settled by the case of *Hitchcock* v. *Coker* (1). As to the other ground the cases referred to by my learned brother the Chief Justice seem reasonably conclusive. I would also like to read a passage from the judgment of *Bowen* L.J. in the case of *Jones* v. *The Merionethshire Permanent Benefit Building Society* (2). In that case the secretary of a building society had made default in accounting for money paid to him, and was threatened with a prosecution for embezzlement. He applied for assistance to the plaintiffs, and they gave a written undertaking to the society to make good the greater part of the debt due from the secretary, and they gave two promissory notes and some title deeds as collateral security. It was proved that the plaintiffs in giving the undertaking were actuated by the desire to prevent the prosecution, and that was known to the directors of the society; but no promise was made that there should be no prosecution. The society brought an action on the promissory notes, and the Court held that it was an implied term of the agreement that there should be no prosecution; that the agreement was therefore founded on an illegal consideration and void; and that the society could not recover on the promissory notes. In giving his judgment *Bowen* L.J. said:—"The cases may be ranged under two heads: first of all, the cases where there is the suggestion of an agreement to stifle, as it is called, a prosecution; and secondly, the cases where there has been that which amounts to pressure or undue influence within the meaning attached to those terms by a Court of Equity. First of all, with regard to an agreement to stifle prosecutions. The duty to prosecute, or not to prosecute, is a social and not a legal duty, which depends on the circumstances of each case. It cannot be said that it is a moral duty to prosecute in all cases. The matter depends on considerations, which vary according to each case. But the person who has to act is bound morally to be influenced by no indirect motive. He is morally bound to bring a fair and honest mind to the consideration and to exercise his decision from

(1) 6 A. & E., 438.

(2) (1892) 1 Ch., 173, at p. 183.

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a sense of duty to himself and others. What is it that the law requires about the exercise of this moral duty? It is that it shall not be made a matter of private bargain. 'It is to the interest of the public,' says Chief Justice *Erle*, in the case of *Clubb* v. *Hutson* (1), 'that the suppression of a prosecution should not be made matter of private bargain.' It may be made the matter of private bargain in two ways: first of all, if forbearance to prosecute is promised on condition of the receipt of a particular sum of money or a particular security; secondly, if the forbearance is given in consideration of money or security actually received. The second class of cases is a class in which there is a private bargain, because the security or the money is taken upon the terms that it shall be retained if the forbearance is given. Both these classes of cases fall within the rule stated by Chief Justice *Erle*—a rule which is much older than Chief Justice *Erle*, but which is tersely put in the case which I have mentioned. The difficulty in practice arises when reparation has been made by the offender. I put aside the somewhat limited branch of instances in which the personal interest of the injured party is really alone the matter in question, such as assaults not of an aggravated character, or possibly private slanders or libels. I will not now consider the limitation which ought to be placed upon contracts or agreements made in that limited branch of cases; but I will deal generally with wrongs committed against the public as well as against the individual." Feeling that the passage I have been reading expresses the sense of the authorities, I have been trying to find out in what way it is thought that any interest of a public character could be involved in a prosecution of this kind. Here the parties had been living in an immoral connection. They had disagreed, and we may take it to be the fact that the defendant had used an opprobrious expression to the woman whom he had brought to the condition of which the expression was a more or less gross exaggeration. She instituted proceedings, and I fail to see how by any possible construction those proceedings can be called matters in which the public had an interest, in the sense in which that expression is used in the case to which I have referred. If there was any injury,

(1) 18 C.B. (N.S.), 414, at p. 417.

"the personal interest of the injured party is really above the matter in question." Can it be said that any wrong was done to society by the abandonment of this prosecution, or that any good would have been done to society by persisting in it? I think that, so far as public interest was concerned, it was more in the interest of society that this dirty linen was not washed in public. In such a case there was no question of an attempt to stifle a prosecution in the sense in which that expression is used in the cases. There was some suggestion of blackmail, but no evidence has been pointed out to us that this prosecution was commenced with the desire of making money by it. There has been no evidence before us to show that the agreement was anything more than the making of a provision for the person with whom the defendant had been living. Such provision is not uncommon, one has some comfort in thinking, under such circumstances. It might be called reparation. In the larger sense it was reparation—for what he had said about her, as well as for what he had done. I see nothing in the bargain evidenced by that agreement which infringes the rule of public policy, or which comes within the distinction referred to in the case I have cited. I entirely agree that the appeal must be dismissed.

HIGGINS J. I am of the same opinion. I am glad to find that, in spite of the industrious research of counsel for the appellant, no case has been found which obliges us to hold that which is against common sense. The learned Chief Justice has described the agreement. The facts are that the woman had been living with the man, and in consequence of some quarrel he called her an unpleasant name. She took out a summons against him with a view to criminal proceedings for slander under sec. 358 of the *Criminal Code*. In place of going on with that prosecution, the parties went before a solicitor, and an agreement was drawn up by which the plaintiff agreed to withdraw the prosecution, and to give the defendant back certain letters which she held, he agreeing to pay her so much a month. The agreement was drawn in haste; but I shall assume for the present that the promise to pay the money was in consideration of the promise to withdraw proceedings. Of course, if the consideration was illegal, the promise

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to pay the money was illegal. The learned Commissioner based his non-suit upon the point of immorality of the agreement, but the Attorney-General has very properly refused to press that view. The only question now remaining is, whether we are obliged to hold that the agreement was against public policy. I think that this Court would be bound to refuse to give effect to the agreement if it was against public policy; but I think that the law—although it is not in a very satisfactory condition on this point—contains no decision to the effect contended for by the Attorney-General. There must be either a legal or a moral duty to prosecute or to proceed with a prosecution. Where is the legal duty? Looking at the Act, and at secs. 3, 136 and 358, which have been read during the course of the argument, it is perfectly clear to me that there is no legal duty to prosecute, nor is there any legal duty not to take money to stop the prosecution. Where is the moral duty? There was no such moral duty in the case referred to by *Barton* J. Is it to be said that when the only person directly injured is this woman, and the injury is only to her good name, she cannot say, "I will stop all further trouble, and will not wash our dirty linen in public if I get certain moneys?" The great principle of the British law in this direction is expressed exhaustively in the old maxim *quilibet potest renunciare juri pro se introducto.* I think that direct authority on both points here is to be found in the case of *Fisher & Co.* v. *The Appollinaris Co.* (1), and in the judgment of *Mellish* L.J. referred to by the learned Chief Justice. I agree that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors, for the appellant, *A. F. Abbott* (for *C. Mayhall*, Kalgoorlie).

For the respondent, *J. W. Clydesdale*, Kalgoorlie.

(1) L.R. 10 Ch., 297.

N. G. P.