8

IN THE HIGH COURT OF AUSTRALIA.

GROGAN

V.

COEN AND ANOTHER

ORIGINAL

REASONS FOR JUDGMENT.

Judgment delivered at MELBOURNE

on THURSDAY 14th March, 1946.

H. J. Green, Govt. Print., Melb.

C.2774

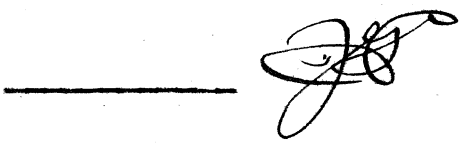
GROGAN

v.

COEN & ANOR.

ORDER

Order of Full Court varied by setting aside the part of the order directing that the plaintiff should pay the costs of the appeal in the Supreme Court. Otherwise appeal dismissed, appellant to pay costs of appeal to this court.



GROGAN

v.

COEN & ANOR.

REASONS FOR JUDGMENT. LATHAM C.J.

REASONS FOR JUDGMENT. LATHAM C.J.

This is an appeal from an order of the Full Court of the Supreme Court of New South Wales setting aside a verdict for £3750 for a plaintiff and entering judgment for the defendant. A verdict can be set aside if it is against evidence, but in order to justify the entry of judgment for the defendant it is necessary that the Court in Banco should be of opinion that upon the evidence the defendant was as a matter of law entitled to a verdict: Supreme Court Procedure Act 1900, sec. 7.

The plaintiff's claim was made against the estate of his deceased brother John B. Grogan, the defendants being the executors of John B. Grogan's will. The plaintiff relied entirely upon his own evidence. The jury was warned by the learned trial Judge as to the danger of recognising stale claims against the estates of deceased persons where the evidence of the claims was uncorroborated, but the jury believed the plaintiff and gave a verdict in his favour for £3500 and £250 interest.

The agreement as pleaded was an agreement between the plaintiff and his brother John, the plaintiff having a claim against John "the amount of which had to be ascertained" and in order to meet which it would have been necessary for John to sell certain land "and in consideration that the plaintiff would not insist upon the said claim being met immediately and in further consideration that the plaintiff would accept £3500 as being the amount to which he was entitled under the said claim", John promised the plaintiff that he would pay to the plaintiff £3500 and interest thereon until the said sum was paid.

The father of the plaintiff, W.J. Grogan, owned two pastoral properties, "Frankfield" and "Groganville", in the Yass district. He, with his two sons, F.J. (the plaintiff) and John, against whose estate this claim is now made, carried on the two properties in partnership. The father was ageing, the brother John was in delicate health and the plaintiff did most of the responsible /

responsible work upon both properties. In 1913 a discussion took place between the father and these two sons as to the disposition of the father's property. The plaintiff said that after considering the matter the father said "'This is my proposal: you [F.J.] take Frankfield and give the other brothers [i.e. other than John] £3,000 each less what I have advanced them. You stick to John and I as you have been doing until my death, and at my death John will pay to you half the difference between the value of Frankfield and the value of Groganville. T.M. Burke will value Frankfield now and he will value Groganville at my death'. He asked us if we were agreeable, and we both said yes."

Frankfield was transferred to the plaintiff. He sold 705 acres for a sum of £4450. He paid three (other than John) his/brothers/£7098 and was left with 1800 acres for which in effect (according to his evidence) he had paid only £2648, the difference between £7098 and £4450.

The agreement upon which the plaintiff sued was made, according to his evidence, on 8th May 1926, within a fortnight after his father's death. The father by his will left an unsold portion of"Groganville", namely 1427 acres, to John for his life only, and made no provision for John paying to the plaintiff half the difference between "Groganville" and "Frankfield". The plaintiff's evidence as to the making of the agreement was as follows:-

> "I said 'If I cannot get satisfaction I will prosecute'. My brother Jim said 'We don't want law between brothers'. I said to him 'That is all right for you; you have lost nothing. I spent 30 odd years carrying these two men, and I am going to get what I am entitled to. There is nothing in the will about John doing his duty to anybody, the other brothers or me or anybody else'. John said 'I will honor the agreement; I will do what the agreement says'. Then we turned to the question of value. I said 'You could not possibly pay half what the present value would be. Since I bought Frankfield there has been a tremendous rise in land values, and the value of Groganville would be something like £28,000. When you bought it it would be about £19,000. If we fix the difference at £9,000 you will be able to pay it and it will be fair.' He said that was very fair and that would do him. I said 'Under Father's will I have £1,000, and I think it only fair that I should take that £1,000 off and leave the amount at £3,500.' * He said 'That will do me. I will honor that; I will pay it as soon as I can. I am in a bit of trouble with the probate and that kind of thing. In the meantime I will pay you bank interest.'"

* The brother said that was very good. This /

This conversation is relied upon as an agreement to compromise a disputed claim by agreeing upon a certain amount, the plaintiff promising to forbear from immediately enforcing his claim in consideration of a promise to pay the amount fixed, with interest.

After 1926 the plaintiff worked at Groganville for his brother John for some years and received cheques for sums amounting to £2112 in respect of such work. His wife also received cheques amounting to £1125. The plaintiff said that these latter payments were made under the agreement to pay interest to him (the plaintiff).

The evidence stated constitutes the whole of the plaintiff's case.

There is no evidence that any valuation of Frankfield was made in 1913 by Mr. Burke or by any other person. In cross-examination it was elicited that in 1913 the father wrote a letter to the plaintiff in the following terms:-

"For F.J. Grogan

Groganville, June 21st 1913.

> The final agreement of distribution between my four sons James Joseph Grogan Bernard John Grogan Patrick William Grogan & Francis Joseph Grogan of my landed property situated at Douglas near Young in this State containing 2505 acres with all stock & improvements is as follows. Francis Joseph Grogan to retain 1800 acres all stock & improvements there on. And to each of the Brothers mentioned above to pay £1000/-/- each on completion of Transfer to him of the said (1800) acres the respective residues of Bonuses as shown to be still due to each To be paid as soon as the Balance of area (705) acres now on the market is sold. If not such Balances as shown as due to each be not paid on or before the 1st day of January (1914) then such unpaid balances in each case shall carry Interest, ..."

A memorandum attached to this letter bearing the same date and in the same handwriting showed the amounts payable to the three brothers, J.J., B.J. and P.W. The plaintiff gave evidence that he paid over £7000 to these brothers in accordance with the memorandum. The position as to Frankfield is fully and completely set out in the letter and the plaintiff obtained the full benefit of the agreement with respect to Frankfield. It will be seen that no reference is made in the writing to the agreement which the plaintiff now alleges. The agreement deals entirely with Frankfield. There is nothing at all

about /

about Groganville though, as the obligation of the brother John was to arise in the future and could not be discharged immediately, it would have been a very reasonable course to express the agreement with respect to Groganville in the writing which the father signed in 1913.

It was also proved (in spite of denials of the plaintiff in cross-examination) that in 1916 the father sold to his son John 820 acres of Groganville for £1640 and in 1918 529 acres for £1000. Thus the only part of Groganville which was dealt with by the will, and in which John was given only a life estate, was 1427 acres. It was not suggested by the plaintiff that any objection was taken in 1916, 1918 or at any other time to the father selling part of Groganville to John. If, as now argued, the agreement in 1913 implied that the father was to leave the whole of Groganville to John as a testamentary gift, it is strange that there is no indication that John or the plaintiff ever challenged the propriety of the action of the father in selling part of Groganville to John.

The case for the plaintiff is that the father agreed (as the plaintiff says in particulars given in the action) to transfer or devise Groganville, <u>or part of it</u>, to John, John to pay to the plaintiff what might be a large sum of money - for which he might receive only some unspecified "part" of Groganville. The improbability of such an agreement being made is obvious.

After the death of John the plaintiff made (through solicitors) several claims against his estate. In the first place he claimed that payments made by John to him were not gifts, but were made in pursuance of an agreement whereby the plaintiff refrained from applying under the Testators' Family Maintenance Act for more adequate provision out of the estate. Soon afterwards the plaintiff drafted a letter in which he claimed £3500 "for breach of agreement". This draft was altered so as to state "I think the share due to me amounts to £3500, but I am obtaining particulars and you will hear from my solicitors later". This was followed by another claim for payment of an annuity during his life. The solicitors who wrote these letters on behalf of

the plaintiff were not called as witnesses.

It is difficult to understand how any jury could have accepted the plaintiff's evidence. It was, in my opinion, inconsistent and unconvincing in almost every particular. I agree with the Full Court that the verdict is too unsatisfactory to be allowed to stand and that it should be set aside on the ground that on the evidence it is unreasonable.

The question remains whether there should be a new trial. Was there any evidence upon which a jury could reasonably find for the plaintiff? The case sought to be made for the plaintiff is not at all clear. I understand that in substance it is alleged that the evidence shows an agreement to compromise a disputed claim. It is put that the plaintiff made a claim for half the difference between the value of Frankfield in 1913 and the value of Groganville in 1926, that is, as he said, for £4500, and that in consideration of the plaintiff agreeing with him to fix the amount at £3500 and to pay interest, he agreed to forbear the taking of proceedings and to accept the new agreement in satisfaction of his claim. It is argued that if the plaintiff had a bona fide belief in this claim as a legal claim, the fact that the claim may in law have been unfounded would not prevent the compromise from bringing about a binding agreement between the parties. There can be no doubt as to the soundness of this legal proposition, but the question is whether it applies to the present case. In considering this question I pay no attention to the improbable elements in the plaintiff's story to which I have already referred, nor do I pay any attention to the fact that in the conversation in 1926 the value of Groganville was apparently treated by the plaintiff as the value of the whole of Groganville, including the part of Groganville for which his brother John had already paid the sum of £2640. The question is whether, if the plaintiff's evidence is accepted, the agreement particularly alleged or any agreement covered by the pleadings can reasonably be inferred.

According to the plaintiff's evidence, he did threaten "to prosecute". It is not clear whether he regarded his claim as

being /

being a claim against his brother John for not doing what, according to the plaintiff, he was bound to do under the 1913 agreement or as being a claim against his father for not carrying out an agreement made in 1913. It would have been difficult for the plaintiff, even upon his own view of the facts, to have an honest belief that when John had received under his father's will only a life estate in part of Groganville, John was bound to make a payment to the plaintiff upon the basis of having received a testamentary gift of the whole of Groganville, especially when he had paid for the only part of Groganville which he held in full ownership. In my opinion there was no evidence from which the jury could conclude that the plaintiff had a bona fide belief that he had a legal claim against his brother John.

John, however, was the executor of his father's will, and it may be said that the plaintiff at least believed that he had a claim against his father's estate. Here again I leave out of account elements of improbability. Any claim against the father's estate could have been based only upon a contract with the father. What obligation to the plaintiff himself did the father undertake in 1913? It is possible to regard the transaction of 1913 as not intended by any of the parties to create legal obligations in itself, but as amounting merely to a statement of the intention of the father with respect to bounty to his sons, which the father in fact carried out in relation to Frankfield, so that the plaintiff, accepting Frankfield from the father, became bound to pay £7098 to his brothers, an obligation which he duly performed. Then the statement with respect to Groganville may be regarded as a statement of testamentary intention which the father was at liberty to change as he thought proper. It may be pointed out that the transaction with respect to Frankfield gave to the plaintiff a very real bounty independently of anything which might be done with respect to Groganville.

But /

But it is contended for the plaintiff that the conversation in 1913 went further than a statement of testamentary intention on the part of the father and that it did create an agreement legally binding upon the father. If, in favour of the plaintiff, it is conceded that the jury was at liberty to take this view of the facts, then the plaintiff's claim in 1926 against the father was a claim only against the father's estate and was not a claim against his brother John personally and the agreement in 1926 was not a compromise of any claim against John personally.

But John was his father's executor, and it is argued that there was an agreement with him as executor for the compromise of a claim against his father's estate. That claim depended upon an alleged breach of contract - that is, the breach of contract by the father in not leaving the whole of Groganville in full ownership to John and imposing a condition that he should pay half the difference of the value between Groganville and Frankfield to the plaintiff. The only consideration which can be suggested as moving from the plaintiff to John for John's alleged promise is that the plaintiff undertook not to prosecute this claim against the father's estate. In my opinion it is impossible to extract from the evidence of the conversation in 1926 any claim clearly made against the father's estate in respect of the abandonment or diminution of which his brother John made a promise to pay £3500 and interest. On the contrary, the words which the plaintiff deposes to as used by John were "I will honour the agreement". I agree with Jordan C.J. in his opinion that these words show that, even if the plaintiff's evidence is accepted, the parties were not discussing the matter upon the basis of legal obligation. It must have been recognised by the parties that John was under no personal legal obligation to pay to the plaintiff half the difference between the value of the properties. Accordingly, when John said that he would honour the agreement, the only reasonable construction which can be placed upon his words was that, though he did not admit any obligation resting upon him (either personally or as executor), he was prepared to pay £3500 with interest. But he was doing this as a matter of honour and not as a matter of contract.

Accordingly /

Accordingly, in my opinion, the conversation of 1926 could not be regarded by any reasonable jury as involving a claim honestly believed in by the plaintiff against his brother John. On the other hand, if the conversation is regarded as involving the making of a claim by the plaintiff against his father's estate, then the promise made by his brother John is a promise which could not have been regarded by the parties at the time as intended to create a legal obligation.

One of the grounds of appeal is that the Supreme Court was in error in asking the trial Judge to express his opinion of the verdict of the jury. The trial Judge informed the Full Court that in his view the verdict was unsatisfactory and surprising, and that every material circumstance in the case, including the plaintiff's demeanour, weighed against the probabilities of the claim.

It was argued for the appellant that this procedure was unjustifiable in that the responsibility of dealing with the appeal rested solely upon the Full Court, and that it was improper to consult the trial Judge upon matters which fell within the sphere of the jury, the trial Judge having no duty or responsibility in relation to the matters upon which he expressed an opinion, i.e. credibility and demeanour of a witness and probability of his evidence. If the matter were res integra, these arguments would be very weighty. But the practice to which objection is taken is one of very long standing: see Mellin v. Taylor, 3 Bing. N.C. 109, as quoted in Houston v. Stone, 43 S.R. (N.S.W.) 118, at p. 121. There Tindal C.J. said that it had been a constant practice to have a report from a trial Judge from the earliest times at which new trials have been granted "and is acted upon every day". The judgment of the Full Court cannot be upset upon this ground.

The plaintiff is an "assisted" person" under the Legal Assistance Act 1943. Sec. 8(5) of that Act provides that an assisted person shall not, except where express provision is made in the Act, be liable for costs to any other party in any

proceeding to which the certificate given under the Act relates. Sec. 11(1) provides that orders for payment of costs may be made when a certificate has been obtained by fraud or misrepresentation. It is not argued that this provision applies to the case. Sec. 11(2) is as follows:-

> "(2) Where it appears to a court or judge that an assisted person has acted improperly in bringing or defending any legal proceedings or in the conduct of them the court or judge may order the assisted person to pay the costs of the solicitor who acted for him or the costs of the other party, or the costs of both such solicitor and such party."

The Full Court, without adverting to these provisions, ordered the plaintiff to pay the costs of the appeal. The Court did not decide that the plaintiff had acted improperly in bringing the proceedings or in the conduct of them. Apparently this question was never raised. This court can now determine the question. I have stated my opinion that the plaintiff has no case, but that opinion does not exclude the possibility that the plaintiff, labouring under a sense of grievance, may have thought that he had a case of some kind. The jury gave him a verdict and, on the whole, I do not think that sec. 11(2) should be applied against him.

In my opinion the appeal should be dismissed with costs - the Legal Assistance Act applying only to the proceedings in the courts of New South Wales - but the order of the Full Court should be varied by striking out the order for payment by the plaintiff of the costs of the appeal to the Supreme Court.

GROGAN

V.

COEN AND ANOTHER

JUDGMENT: RICH J.

The plaintiff's evidence in this case is very unsatisfactory and quite insufficient to support any of the claims made by the plaintiff.

I would dismiss the appeal with costs but make no order as to the costs of the appeal to the Supreme Court.

GROGAN v COEN AND PHILLIPS

JUDGMENT DIXON J.

I agree that, except for striking out the order as to costs, we should affirm the order of the Supreme Court entering a verdict for the defendants and we should dismiss the appeal.

There are three counts in the declaration. The first is based upon an allegation that the plaintiff had a certain claim against John Bede Grogan, the defendants' testator, which had to be ascertained. That means a claim against John Bede Grogan in his personal capacity and not as executor of his father. The consideration, or considerations, alleged for the promise of John Bede Grogan, which is sued upon, is that the plaintiff would not

insist upon the said claim being met immediately and that the plaintiff would accept the sum of £3,500 as being the amount to which the plaintiff was entitled under the said claim.

In my opinion the evidence does not support this count, because it does not show that a claim against John Bede Grogan personally existed or that one was put forward. The evidence is not reasonably capable of such an interpretation.

The foundation of the second count also is that a claim existed in the plaintiff against John Bede Grogan personally. The count alleges that the plaintiff had a certain claim against John Bede Grogan the amount of which had not been ascertained and in consideration that the plaintiff would forbear from immediately enforcing the said claim and would agree that the

amount should be ascertained at the sum of £3,500, the said John Bede Grogan made the promises sued upon.

The count is open to the objection that it appears to declare upon an accord executory : see McDermott v Black 63 C.L.R. 161 at p. 184. But, independently of that objection, it fails because the evidence adduced in support of the plaintiff's case, as I have already said, is not, in my opinion, reasonably open to an interpretation which would enable the jury to find that a claim against John Bede Grogan personally existed in the plaintiff or had been put forward by him.

The third count contains the common money counts. The only one of these that upon the facts could be in point is account

stated. But, again, the evidence fails to support the cause of action. For no admission is disclosed of an amount due in respect of an antecedent demand or liability . Cf. Clarke v Webb 1834 I Cr.M & R 29 at p. 30 : 149 E.R. 980 ; Witton v Simmons 1914 V.L.R. 452 ; Camillo Tank S.S. Co Ltd v Alexander Engineering Works 1921 38 T.L.R. 134 and R.M. Jackson's History of Quasi Contract in English Law pp.109-111.

It follows that the defendants were entitled to judgment or to a nonsuit.