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*May 12,
*Oct. 8.

L'ASSOCIATION ST. JEAN-BAPTISTE DE MONTREAL (DEFENDANT)..... APPELLANT;

AND

HENRI ALEXANDRE A. BRAULT (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Constitutional law--Legislative powers—B. N. A. Act, 1867—*Criminal Code*, 1892—*R. S. C. ch.* 159—*R. S. Q. art.* 2920—53 *V. c.* 36 *(Que.)*—*Lottery—Indictable offences—Contract—Illegal consideration —Co-relative agreements— Nullity —Invalidity judicially noticed— Arts.* 13, 14, 989, 990 *C. C.*

The Provincial Legislatures have no jurisdiction to permit the operation of lotteries forbidden by the criminal statutes of Canada.

A contract in connection with a scheme for the operation of a lottery forbidden by the criminal statutes of Canada is unlawful and cannot be enforced in a court of justice. The illegality which vitiates such a contract cannot be waived or condoned by the conduct or pleas of the party against whom it is asserted and it is the duty of the courts, *ex mero motû*, to notice the nullity of such contracts at any stage of the case and without pleading. Judgment appealed from reversed, Girouard J. dissenting.

Per Girouard J. (dissenting).--In Canada, before the Criminal Code, 1892, lotteries were mere offences or contraventions and not crimes, and consequently the Act of the Quebec Legislature was constitutional.

* PRESENT:—Sir Henry Strong C. J. and Taschereau, Gwynne, Sedgewick and Girouard JJ.

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APPEAL from the judgment of the Superior Court, sitting in review, at Montreal, affirming the judgment of the Superior Court, District of Montreal, maintaining the plaintiff's action with costs.

The respondent and his partner, (whose interests he subsequently acquired), entered into a written agreement, in 1890, with the appellant for the operation of a lottery scheme authorized to be carried on by the appellant under the provisions of a statute of the Legislature of Quebec, (53rd Vict. ch. 36), and an order of the Lieutenant-Governor-in-Council, passed in conformity therewith, and deposited $30,000 in a chartered bank as a continuing security for the operation of the lottery according to the terms of the agreement. The object of the scheme was to secure funds for the erection by the appellant of a national building, now known as the "Monument National," in Montreal, for the establishment of a public library and the organization of courses of lectures and practical instruction, in the edifice to be constructed upon lands belonging to the appellant. The lottery was carried on under the conditions stated in the agreement and in 1892, another agreement was entered into by the same parties whereby the $30,000, which had been so deposited, was to be utilized by the appellants to facilitate the continuation of the construction of the building, above referred to, which had already been commenced.

This second agreement referred to the agreement of 1890 and provided that, notwithstanding such use of the money, appellant would be deemed to continue to hold the same, and to be the depositary thereof, to secure the execution of the obligations undertaken in the first agreement. It also provided:—That if Brault should carry out the lottery operations during the whole term of the first agreement, appellants might apply the $30,000 on

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account of the last of the annual payment due them under its conditions; that appellant might also (should occasion arise) apply all or any part of said sum, in accordance with the provisions of agreement of 1890, to extinguish obligations towards appellant or holders of lottery tickets; that if the government withdrew the permit appellant was to repay said $30,000 or any part of it that might remain due in five years from the date of such revocation, or at the end of the time when the agreement was to run in the event of such time being not more than five years from such revocation; that so long as respondent should carry on the lottery operations, appellant was to pay them four per cent interest on the $30,000; that should he discontinue the lottery operations, appellant was thereafter to pay him five per cent instead of four, and that each interest instalment was to bear interest from its due date till paid; and, as security for the repayment of said deposit, appellant mortgaged certain property described in the deed. It was further provided that nothing in the second agreement should be construed as in derogation or novation of the conditions or obligations of the first agreement.

Subsequently, in 1892, the Government of Quebec revoked the permit by Order-in-Council and conferred the right to hold the lottery on other persons for the benefit of the appellant, and the respondent brought his action for $2,306.75, for instalments of interest at 5 per cent on the deposit of $30,000. The Superior Court maintained the plaintiff's action and the present appeal is asserted from the judgment of the Court of Review affirming that decision.

Fitzpatrick Q.C. (Solicitor-General), and *Beïque Q.C.* for the appellant. The action is an attempt to enforce a contract which appears from respondent's own declaration to be not only illegal, but an offence against the

criminal law; arts. 989, 990, 1062 C. C. The Quebec Act, 53 Vict. ch. 36, and the Orders-in-Council passed thereunder, cannot afford any justification. The holding of lotteries was made penal before Confederation, and these penal statutes remained in force till repealed or modified by parliament. Sec. 129 B. N. A. Act; *Dobie* v. *Temporalities Board* (1). The Dominion Acts, since Confederation, have re-enacted and extended the old law, and any Quebec statute, purporting to authorize a lottery such as here in question, was an attempt to repeal or suspend the operation of legislation upon criminal law by the Parliament of Canada or its predecessors and therefore *ultra vires*.

The deeds of 1890 and 1892 cannot be separated from the rest of the subject matter and treated as distinct contracts. The covenants in the deeds have but one object and form but one contract which, if illegal in one part, is wholly illegal. This constitutes absolute nullity which should be judicially noticed even in the absence of any plea to that effect. The principal covenants are null because they relate to operations opposed to public order and forbidden by the criminal law and the accesssory obligations must be equally null. Dal. '63, 2, 113; Dal. Rep. *vo.* "Obligations," n. 5531; *McKibbin* v. *McCone* (2). We refer also to *Cronyn* v. *Widder* (3); *Ex parte, Rousse* (4); *Reg.* v. *Lawrence* (5); *Pigeon* v. *Mainville* (6); *Kearley* v. *Thomson* (7); *Collins* v. *Blantern* (8); *Dawson* v. *Ogden* (9); Cass. Dal. '76, 1, 45; Pothier, "Nantissement" *n.* 6; 28 Laurent, *nn.* 426, 494, 495, 498; Guillouard "Depot" *n.* 65; *The Queen* v. *Lorrain* (10); Hawkins P. C. 733.

(1) 7 App. Cas. 136.
(2) Q. R. 16 S. C. 126.
(3) 16 U. C. Q. B. 356.
(4) Stu. K. B. 321.
(5) 43 U. C. Q. B. 164.
(6) 17 Legal News 68.
(7) 24 Q. B. D. 742.
(8) 1 Sm. L. C. (10 ed.) 355.
(9) Cass. Dig. (2 ed.) 797.
(10) 28 O. R. 123.

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Belcourt Q.C. for the respondent. The second agreement is separate and distinct from the agreement as to the operation of the lottery and is a mere contract of loan. The rate of interest is dependant on conditions mentioned, by reference, only as a matter of convenience.

The rate of five per cent per annum prevails on account of the Order-in-Council having been made for the cancellation of the permit according to the terms provided, in that event, by the agreement for the loan of the capital. The association, which procured the annullment of the permit and the substitution of other persons for respondent in the operation of the scheme, cannot be allowed to disregard the contract and retain the principal loaned without payment of any interest for the use of the money. These funds were not used for an illegal purpose, but for the erection of a national educational institution. The respondent would be, in any case, entitled to the legal rate of interest. Art. 1785 C. C.

The Quebec Acts in question are police regulations, properly within the legislative jurisdiction of the province, and caused no interference with Dominion Criminal Legislation at the time they were passed. The contracts are both anterior to the Criminal Code, 1892, and at their date the operation of such a lottery, under the control and permission of the provincial authorities was not, in any sense, criminal, nor against good morals or public policy. Even therefore if the agreement for the loan be held to have been based upon any such consideration and that the contracts are co-relative, there cannot be any ground for nullity.

THE CHIEF JUSTICE.—I concur in the judgment of Mr. Justice Taschereau.

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TASCHEREAU J.—The respondent claims from the appellant by this action divers sums due to him, as he contends, in virtue of two deeds passed between them in 1890 and 1892 for the carrying on of certain lottery operations in the Province of Quebec purported to have been authorised by a statute of the provincial legislature. Had the provincial legislature the power under the British North America Act to so authorise a lottery which was then made an offence by chapter 159 of the Revised Statutes of the Dominion, as it is now likewise by the Criminal Code? There is, in my opinion, no room whatever to doubt that the legislature had no such power. The legislation in question was *ultra vires* and void, and an undue interference with the criminal law of the Dominion over which the federal legislature has exclusive authority under the Constitutional Act.

By the criminal law of England, as introduced in the Province of Quebec by the Royal Proclamation of 1763 and the Act 14 Geo. III. c. 83, all lotteries were prohibited and punishable as public nuisances; 10 & 11 Wm. III. c. 17; 8 Geo. I. c. 2, sec. 36; and 12 Geo. II. c. 28; *Ex parte Rousse* (1); *Cronyn* v. *Widder* (2). Under the French law previously in force in the province, though this is immaterial, they were likewise illegal. 4 Brillion, Dict. des Arr. vo. "*Lotterie*"; Frère-Jouan du Saint. *Jeu et Pari*, n. 185. In 1856, the legislature of the Province of Canada passed a statute (19 Vict. ch. 49; C. S. C., ch. 95), also prohibiting them under pain of penalties recoverable by summary conviction. That statute was in force as ch. 159 R. S. C. till it was superseded by sec. 205 of the Criminal Code. But the offence remained a misdemeanour as it previously was, and probably still continued to be an indictable one, as this statute did

(1) Stu. K. B. 321. (2) 16 U. C. Q. B. 356.

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not create a new offence, though, whether it did or not, would not make any difference in this case. Sec. 933 Criminal Code; 1st Russell, Crimes and Misdemeanors (6 ed.) 200 *et seq.*; *Rex.* v. *Gregory*(1); *Reg.* v. *Crawshaw* (2); *Reg.* v. *Hall* (3); *Hamilton* v. *Massie* (4); Bishop Stat. Cr. 250 *et seq.* By altering the punishment the nature of the offence was not altered. If it was a misdemeanor previously as it certainly was (Burbidge, Criminal Law, p. 181), it was not less a misdemeanor afterwards, which passed at Confederation under the exclusive control of the Federal Legislative authority. The provincial legislature therefore had not the power to authorise the lottery in question, and its legislation on the subject is null of a nullity *de non esse.*

The respondent, however, claims the right at common law, to recover back from the appellants what he has paid or loaned to them or deposited with them, notwithstanding the illegality of his contract. But that is a matter which cannot be determined here. His action is upon a contract; that contract is illegal and void, and his action must consequently be dismissed. Arts. 13, 14, 989, 990 C. C. He also in his factum invokes *res judicata.* But there is no such issue raised by the pleadings, could it affect the result of our decision upon the constitutional question.

His further contentions as to his good faith and the bad faith of the appellants are based upon a total misapprehension of the nature of the objection upon which his action must fail. Upon his own allegations, he has entered with the appellants into a conspiracy to commit an unlawful act. It is hardly necessary to say that courts of justice cannot sanction such dealings or give them any countenance whatso-

(1) 5 B. & Ad. 555.
(2) Bell, C. C. 303.
(3) 17 Cox, C. C. 278; [1891], 1 Q. B. 747.
(4) 18 O. R. 585.

ever. It is on the contrary their duty to notice illegalities of this nature *ex officio*, and allow them to be suggested without any plea at any stage of the case. Nor could the illegality of the respondent's claim be waived or cured by his adversary's pleas or conduct. And the fact that he may have believed that the Quebec legislature had the power to authorise this lottery is, in law, no ground to support his action. Sec. 14 Crim. Code.

Les nullités de droit public, c'est à dire celles qui ont pour cause principale et première, l'intérêt de tous (says Solon, 2 Nullités no. 345) ne se couvrent point par le consentement des parties directement intéressées à l'acte ; en pareil cas la loi résiste continuellement, et par elle-même à l'acte qu'elle défend ; elle le réduit à un pur fait qui ne peut être confirmé ni ratifié. *Privatorum conventio juri publico non deroget.*

Compare *The Manufacturers Life Ins. Co.* v. *Anctil* (1).

La loi qui interdit les loteries est une loi d'ordre public (says Frèrejouan du Saint, Jeu et Pari, No. 211), et elle frappe d'une pénalité ceux qui y contreviennent. La nullité des conventions qui ont la loterie pour base est donc une nullité radicale et absolute que peuvent invoquer toutes les parties intéressées indtistincement. Le promoteur de l'opération lui-même peut se retrancher derrière la prohibition légale pour se dispenser d'exécuter ses engagements, car nul ne peut être contraint de violer une loi pénale, sous prétexte qu'il s'y est obligé par contrat.

La loi ne peut admettre, (says Bédarride, Dol et Fraude, Nos. 1291, 1295), que ce qui a pour objet d'éluder les préceptes de la morale, l'exigence des bonnes moeurs ou les dispositions d'ordre public puisse jamais produire aucun effet. Tout ce qui a été fait en sens contraire doit donc s'effacer et disparaître.

Upon that principle, it was held in a case cited in Sirey, 69, 2, 53, that

les loteries étant prohibées par la loi francaise toutes conventions ou obligations relatives à leur organisation sont nulles comme ayant une cause illicite et ne peuvent donner lieu à une action devant les tribunaux.

(1) 28 Can. S. C. R. 103 ; [1899] A. C. 604.

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Other cases to the same effect are reported in Sirey, 67, 2, 86; 67, 2, 87; 65, 1, 77; 70, 1, 357; and Dalloz, 46, 2, 195.

In a Louisiana case, *Davis* v. *Caldwell, et al.* (1), the plaintiff claimed from the defendants a certain sum as remuneration for services rendered by him in aid of their project to organise a lottery. But his action was dismissed on the ground that

> the contract sued upon being intimately connected with a speculation reprobated and forbidden by law could not be enforced in a court of justice.

The respondent's attempt to separate the agreement of 1892 from that of 1890 cannot succeed. They are both in furtherance of an unlawful scheme, and the invalidity of the first vitiates the other collateral or auxiliary agreement springing from it. *Davis* v. *Holbrook* (2): *Fox* v. *New Orleans* (3); *Cummings* v. *Saux* (4); *Armstrong* v. *Toller* (5). *Fisher* v. *Bridges* (6), to which His Lordship the Chief Justice has called my attention, is a case in point.

Appeal allowed, and action dismissed. No costs in the three courts.

GWYNNE and SEDGEWICK JJ. concurred in the reasons given by Taschereau J.

GIROUARD J. (dissenting).—We have not to inquire whether or not a contract prohibited by law can have any effect; that point is formally settled by Arts. 989 and 990 of the Civil Code. On the other hand, it would not be sufficient to content ourselves with an inquiry as to whether lotteries are prohibited under the criminal laws of England. As a matter of fact,

(1) 2 Rob. (La.) 271.
(2) 1 La. Ann. 178.
(3) 12 La. Ann. 154.
(4) 30 La. Ann. 207.
(5) 11 Wheaton, 258.
(6) 3 El. & B. 642.

when, in 1774, the latter were introduced into Canada, lotteries were forbidden in England as crimes or misdemeanors. Since the end of the 17th century, the British Parliament has declared that all lotteries, which until then had been permitted by the common law, should be *common and public nuisances*, that is to say, *indictable offences* (10 & 11 Wm. III, ch. 17). This statute was still in force at the time of the passing of the Quebec Act, which introduced the criminal laws of England as part of the law of Canada. *Ex parte Rousse* (1). This statute was subseqently modified in England by several Acts of Parliament, (19 Geo. III, ch. 21; 22 Geo. III, ch. 47; 27 Geo. III, ch. 1; 42 Geo. III, ch. 57 and ch. 119. sec. 27; 46 Geo. III, ch. 148; 6 Geo. IV, ch. 60).

All these statutes continued to define lotteries as being public nuisances, and finally, by 46 Geo. III, ch. 148, the penalties imposed could not be demanded except in the name of the Attorney-General before the Court of Exchequer, instead of before ordinary justices of the peace. *Reg.* v. *Tuddenham* (1).

Our ancestors considered that these provisions were not suitable to a new country, and they mitigated their rigour considerably by several statutes passed as well before as since confederation of the provinces in 1867, (19 & 20 Vict. ch. 49; C. S. C. ch. 95; 23 Vict. ch. 36; 40 Vict. ch. 36; R. S. C. ch. 159; 32 Vict. ch. 36 (Que.); R. S. Q. Arts. 2911-2920; 53 Vict. ch. 36 (Que.). Not one of these statutes declares lotteries to be crimes or public nuisances; all of them prohibit lotteries, it is true, except in certain cases, but an offender incurs simply a fine of twenty dollars to be recovered in a summary manner upon the suit of any person brought before a mayor, alderman or other justice of the peace, one-half of the fine being payable to the prosecutor and

(1) Stu. K. B. 321. (2) 5 Jur. 871.

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the other half to the municipality. (C. S. C., 1859, ch. 95, sec. 1). If the intention of the Canadian Legislature had been to make them crimes, it would have made use of the language of the section following for the punishment of "betting and pool selling," in which it is declared that the offender shall be guilty of a *misdemeanour* and liable to fine and imprisonment (R. S. C. ch. 159, sec. 9).

It is so clear that, up to that time, the Canadian legislature intended to consider lotteries merely as being of a purely local or municipal character, that several exceptions were made, in the first place in favour of bazaars for charitable purposes approved by municipal authority, and then in favour of art societies. The first time that lotteries were prohibited as crimes in Canada was when the Criminal Code of 1892 was brought into force, in 1893, and at the same time an end put to the jurisdiction of the provincial legislatures, for the Parliament of Canada may validly declare anything, even the most innocent, local or private matter, to be a crime. But in this case, the contracts which are attacked were signed before the coming into force of the Criminal Code, under the authority of a provincial law adopted with that precise object. In 1890 the legislature of Quebec passed a statute (53 Vict. ch. 36), which permitted the operation of a lottery for the purpose of establishing any institution of public interest, or for instruction, on the condition, however, that, if it should be of a permanent character, the sanction of the Lieutenant Governor in Council should first be obtained. This sanction was duly granted to the appellant on the 30th of June, 1890, modified on the 24th of September, 1892, and finally revoked on the 15th of October of the same year.

The contention of the appellant is that the legislation of the Province of Quebec is *ultra vires*, because,

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it is said, before Confederation, the laws concerning lotteries were part of the body of the criminal law of Canada, which, by the Confederation Act of 1867, became subject to the exclusive jurisdiction of the Parliament of Canada. I cannot accept the first part of this proposition. The law, prior to the Criminal Code, 1892, forbids lotteries, it is true, but not as a crime, either expressly or impliedly, by declaring, as did the Imperial Parliament and the legislatures of almost all the States of the American Union, and also the Penal Code of France, that all lotteries were public nuisances or *misdemeanours* or *délits* (Am. & Eng. Ency. of Law, 1 ed. vo. "lottery," p. 1172; Gilbert sur Sirey, Code Pénal, Arts. 410, 464, 475 and notes). They are simply prohibited and punishable in a summary manner in the same way as an infinity of other offences or breaches of regulations which are undoubtedly under provincial jurisdiction, for example, offences against municipal by-laws, against good order, public health and safety of the province, respecting constables, bailiffs and public officers in the province, and the laws relating to hunting and fishing, asylums for the insane, licenses, manufactures, mines, the practice of pharmacy, provincial and municipal elections and so forth, which are always punishable in a summary manner before justices of the peace. *Reg.* v. *Wason* (1).

In my humble opinion the distinction between penal offences or simple contraventions and crimes or indictable offences presents itself as a condition of our federal system, and from this point of view the promulgation of our criminal code was no doubt a national benefit. Before the code, the criminal law recognises three kinds of crimes, *treason*, *felony* and *misdemeanour*, but all were *indictable*. Owing to this, the code did not preserve the former distinction;

(1) 17 Ont. App. R. 221.

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to-day all crimes in Canada are indictable offences, even although a certain number may be prosecuted in a summary manner before justices of the peace. But, before the code, lotteries were not indictable, and consequently, in view of the codifier, were not crimes. It was necessary to have a special enactment to render them criminal.

A great number of English precedents have been cited to establish that, under the common law, all infractions of laws of public order were misdemeanours. As many can be cited to the contrary effect. Chief Justice Harrison has carefully analysed them all in *Reg* v. *Roddy* (1). The learned Chief Justice concludes that they cannot possibly be reconciled. It must be admitted that the English jurisprudence upon this point is in a deplorable state of confusion which cannot be overcome save by codification of the criminal law.

The tendency of the more recent decisions is that the old definition of crime by Blackstone is too large, and that a crime

> is more accurately characterised as a wrong, directly or indirectly affecting the public, to the commission of which the state has annexed certain punishments and penalties and which it prosecutes in its own name in what is called a criminal proceeding. (Am. & Eng. Encycl. of Law, (2nd ed.) 1898, vo. "Crime," pages 248 *et seq.*)

One of the last commentators of Blackstone adds that a misdemeanour does not include

> a multitude of unclassified offences of which inferior magistrates, such as justices of the peace, police magistrates and the like, have exclusive jurisdiction. (Lewis on Blackstone ed. 1897, pages 4 and 5, where a number of authorities are collected.)

In *Attorney-General* v. *Radloff* (2) Baron Martin said:

> There are many crimes properly so called which are liable to be punished on summary conviction. But there are a vast number of

(1) 41 U. C. Q. B. 291. (2) 10 Ex. 84.

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acts which in no sense are *crimes*, which are also so punishable; such for instance as keeping open public houses after certain hours, and a variety of breaches of police regulations which will readily occur to the mind of any one. The bringing tobacco into this kingdom is of itself a perfectly innocent act, but the requirements of the public revenue, which induce the legislature to impose a very high duty upon the article, probably render it a matter of necessity that the bringing it into the kingdom without payment of the duty should be subjected to a penalty. But this cannot affect or alter the intrinsic and essential nature of the act itself, and it seems to me that it cannot be denominated a 'crime,' according to the ordinary and common usage of language and the understanding of mankind. The proper meaning of 'crime' is an indictable offence.

It is true that the opinion of Baron Martin did not prevail, the judges being equally divided. But it was recently approved by the English Court of Appeal in the celebrated case of the *Attorney-General* v. *Bradlaugh* (1). Lord Justice Brett said at page 688:

If I had been a member of the court at that time, I should have seen no answer to the reasoning of Martin B. in that case, and I should have been of opinion in that case that an information for a penalty on the revenue side of the Court of Exchequer could not at any time, unless there were special and clear words in an Act of Parliament saying it was so, be considered as a criminal proceeding.

At page 686 His Lordship also says:

It has been at different times during this argument contended before us on both sides, for different purposes, that the third section of the Parliamentary Oaths Act, 1866, imposes on every member a legal obligation to take and subscribe the oath, and that if a member does not take and subscribe the oath in the manner therein set forth, an indictment will lie against him on that section alone as for a misdemeanour, and that the penalty in the fifth section is cumulative * * * * Wherever an Act of Parliament imposes a new obligation, and in the same Act imposes a consequence upon the non-fulfilment of that obligation, that is the only consequence. Therefore, it seems to me that the only consequence of voting as a member, without having taken the oath in the manner appointed, is that the member becomes liable to a penalty. If that be so no indictment will lie, and, as far as my judgment goes, nothing in the nature of a criminal proceeding can be taken upon this statute. The recovery of

(1) 14 Q. B. D. 667.

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a penalty, if that is the only consequence, does not make the prohibited act a crime. If it did, it seems to me that that distinction which has been well known and established in law for many years between a penal statute and a criminal enactment, would fall to the ground, for every penal statute would involve a crime, and would be a criminal enactment. In construing this Act of Parliament, I should on that ground alone say that no crime is enacted by this Act.

The head-note dealing with this part of the judgment is as follows:

> An information at the suit of the Attorney-General to recover penalties under sec. 5 of the Parliamentary Oaths Act, 1866, from a member of parliament, for voting without having taken the oath of allegiance required by that statute, as amended by the Promissory Oaths Act, 1868, is not a 'criminal cause or matter' within the meaning of the Supreme Court of Judicature Act, sec. 47.

It is contended that the mere fact of having inserted in the Consolidated Statutes of 1859 the Act concerning lotteries under the title "Criminal law," in effect constitutes it a crime. Text writers have often said that the preamble of a statute may remove certain doubts as to the text, but this is the first time that it has been pretended that the title or classification of a statute is to be construed as part of it. Who would contend seriously that a public statute included by error or otherwise among the private statutes bound separately at the end of each volume of the statutes of each session of parliament, could become, merely on this account, a private statute. For a similar reason, the insertion of statutes actually in force in a schedule of repealed Acts is of no consequence. (22 Vict. ch. 29, sec. 11, 1859; 49 Vict. ch. 4, sec. 10, 1886). Classifications are never absolute any more than marginal notes or references to formerly existing laws. Notwithstanding classification, we find an infinity of criminal offences outside the chapter relating to criminal law, and in them we find a great number of simple breaches of municipal and

police regulations, and even provisions in respect to civil and municipal law. See C. S. C. 1859, ch. 6, ss. 85, 86, 88; ch. 17, s. 55; ch. 29, s. 8; ch. 31, s. 55; ch. 92, s. 80; ch. 93, ss. 25, 26, 27, 28; ch. 95, s. 3; ch. 96, ss. 1, 13, 14.

A statute must be construed by considering the import of the context. 22 Vict. ch. 29, ss. 8 and 9. In the present case, at least, the classification is a mere matter of form, a work of secondary consideration and simple convenience.

But even if the classification of the Consolidated Statutes of 1859 could have the effect which is claimed for it, it has not been continued in those of 1886, and it is under these latter that the nature of the offence of operating a lottery must be determined.

It has further been objected that the Interpretation Act of Canada, 1867, 31 Vict. ch. 1, s. 7, par. 20, has the effect of completing the statutory provisions relating to lotteries by declaring that the breach of any statute which does not constitute an offence of any other nature shall be a misdemeanour and punishable as such:

> Any wilful contravention of any Act, which is not made any offence of another kind shall be a misdemeanour and punishable accordingly.

This provision refers only to legislative acts of the Dominion of Canada (s. 3), and consequently cannot apply either to the statutes of the late Parliament of United Canada, nor to those of the provincial legislatures. It does not even effect ch. 159 of the Revised Statutes of Canada of 1886, which practically reproduces ch. 95 of the Consolidated Statutes of Canada, 1859, because it was not reproduced in the Interpretation Act of the Revised Statutes.

But, supposing that this provision is still in force, does it apply to a lottery? Is the offence of operating a lottery an undefined and unknown one? If

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the Revised Statutes had simply prohibited lotteries, if they had said nothing more, it might perhaps be contended that this simple prohibition made it a misdemeanour. But it is provided that the offender will incur a fine of $20 to be recovered in a summary manner before a justice of the peace, and this, in effect, defines the offence as being a simple contravention. If the fine is paid there cannot even be imprisonment.

Finally, by paragraph 21, the Interpretation Act of 1867 declares that offences exist that are not misdemeanours.

> Whenever any wilful contravention of any Act is made an offence of *any particular kind or name*, the person guilty of such contravention shall on conviction thereof be punishable in the manner in which such offence is by law punishable.

The offence of holding a lottery has not perhaps any particular designation or name, but it is of a special nature or kind and is known under the general name of a simple penal offence or contravention.

It appears to me evident that the offence of operating a lottery was not a crime before the criminal code, neither under the old statutes of Canada, nor in virtue of the laws enacted after Confederation, and that consequently it was a subject matter in respect to which the Provincial Legislature had authority to legislate.

I cannot discover in it any of the characteristics of crime. I cannot see that a lottery in a municipality or even within a province can affect or be of interest to the whole country. Neither can I see any necessity for intervention by public authority for its prosecution and punishment. No infamy is attached to conviction, not even simple incarceration, much less imprisonment with hard labour. It is a matter, in my humble opinion, of a simple breach of regulations of a police

or local nature, punishable by a light fine—like an infinity of other offences within the jurisdiction of the province—before local magistrates, for the advantage of the prosecutor who alone undertakes the responsibility of the prosecution, and who might even abandon it or make a compromise. I cannot conceive how I can declare criminal the commission of an act permitted by the common law at least until constrained to do so by precise and positive statutory enactments. Crimes cannot be presumed; it is necessary to have a clear text of law to create them, and particularly so when in derogation of the common law.

I am therefore of opinion that the legislation of the Province of Quebec concerning lotteries is constitutional, and consequently that the contract upon which the respondent bases his action is valid. I find less difficulty in arriving at this conclusion inasmuch as the appellant has not thought proper to question the legality of that contract in his defence. Judging from the record it is only before this court that the appellant has seen fit to raise the question for the first time. And if it is true that a defence of this nature ought not to be received with favour, as the courts have declared upon many occasions, much more ought it to be so in a matter in which it has never been pleaded. *Wallbridge* v. *Becket* (1); *Evans* v. *Morley* (2).

The appellant's only serious plea is an exception of compensation which very properly was rejected; but the mere production of such an exception constitutes an admission on the part of the defendants that the action and the contract upon which it is based are well founded.

And further still, the appellant's claim for compensation is based upon the very deeds and contracts

(1) 13 U. C. Q. B. 395. (2) 21 U. C. Q. B. 547.

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which are now complained of as illegal in the factum and oral pleadings before this court. The appellant actually alleges:

17. Que les dits Brault et Labrecque, a partir du deux de novembre mil huit cent quatre-vingt-douze (1892) jusqu'au premier juillet mil huit cent quatre-vingt-treize (1893), exploité la dite loterie appelée "La loterie Mont-Royal," comme agents et mandataires de la dite défenderesse et notamment le dit demandeur, tant en vertu du dit acte de conventions, en date du vingt sept (27) décembre mil huit cent quatre-vingt-dix (1890) et du dit acte de conventions en date du dix-neuf mars (19) mil huit cent quatre-vingt-douze (1892), qu'à l'occasion de ces actes et en continuation de leur mandat résultant de ces dits deux actes, pour le bénéfice et avantage de la dite défenderesse.

Then the appellant prays that the court may declare the demand of the respondent more then compensated, reserving for the surplus, still in virtue of the same deeds and contracts, the right of taking such furthur action as may be deemed proper.

Finally, even supposing that the lottery in question was not authorised by competent authority, I am far from entertaining the opinion that the deed of the 19th March, 1892, which formed the basis of the present action, is affected by the illegality of the lottery. It is not this deed which provides for its organization or for its operation, but the other deed of the 27th December, 1890, which is not mentioned in the latter, except in an incidental manner. The deed of 1892 is an ordinary contract of loan, distinct from the first agreement, the duration of the lottery organised by virtue of the first deed being merely mentioned for the purpose of fixing the date for the repayment of the loan and the rate of interest. There is no question of a loan "by any lottery, ticket, card or other mode of chance whatsoever," which the laws of Canada have in view. (C. S. C. 1859, ch. 95, s. 3; R. S. C. 1886, ch. 159, s. 4). The appellant received from the respondent $30,000 in one sum in current money which was the property of the respondent and his partner, before the

commencement of the lottery operations, and simply promised to return this sum with a rate of interest varying from four to five per cent, according to the duration of the lottery. That is all. Before the loan, this sum was on deposit at interest in a bank to the credit of the respondent and Labrecque, his partner, (from whom he subsequently acquired all rights) as a guarantee for the due execution of the obligations stipulated in favour of the appellant. It is to-day contended that the appellant should keep this sum during a term of years without interest. It is even suggested in the factum that perhaps the appellant need not return the capital, except on the principle of the moral obligation—which is not always true in law—" that no one may enrich himself at another's expense." Common honesty should at least require the appellant to offer to the respondent the interest that he and his partner were receiving from the bank upon these same funds at the time they were borrowed by the appellant, not for the purpose of operating a lottery, but to complete the construction of the " Monument National."

It matters not whether the appellant and the respondent have or have not operated an illegal lottery; that could not prevent one of the parties from lending his own monies to the other at any legal rate of interest which might be stipulated. *Clark* v. *Hagar* (1); 15 Am. & Eng. Encycl. of Law, (2 ed.) p. 992, vo. " Illegal contract."

For these reasons I am of opinion that the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Béïque, Lafontaine, Turgeon & Robertson.*

Solicitors for the respondent: *Lamothe & Trudel.*

(1) 22 Can. S. C. R. 510.