MAGLOIRE LAPOINTE (PLAINTIFF) . . APPELLANT;

AND

CHRISTOPHE MESSIER (DEFENDANT) . . . . . RESPONDENT.

1913
*Nov. 18.
1914
*Feb. 3.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Municipal corporation—Member of council—Interest in municipal contract—Public policy—Legal maxim—Money received under prohibited contract—Recovery of funds—Right of action—Statute —(Que.) 58 *V., c.* 42, *ss.* 1, 2, 11—*Arts.* 989, 1047 *C.C.*

A contractor with a municipality applied to the mayor thereof for financial assistance in carrying out works he had agreed to construct and obtained the necessary financial aid from him upon an understanding that the mayor should receive a bonus in consideration of the financial assistance to be rendered. On the completion of the works, but prior to the dates when the corporation was obliged to make payment, a promissory note was obtained from the municipality which was indorsed by the contractor, delivered to the mayor as collateral security for the amount owing to him, and, by the latter, was discounted at a bank. The mayor retained the proceeds of the note for the purpose of satisfying the amount of the bonus promised to him and some other charges which he claimed in connection with his services in financing the contractor. In an action by the contractor to recover the funds,

Held, that the arrangement so made had the effect of giving the mayor an interest in the contract incompatible with his duty as a member of the municipal council, contrary to public policy and in violation of the provisions of sections 1 and 2 of the Quebec statute, 58 Vict. ch. 42, and that he was not entitled to retain the moneys.

Held, also, that, in the circumstances of the case, the plaintiff's right of action was not affected by the illicit nature of the agreement and that he was entitled to recover the amount so retained in

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

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an action for money had and received to his use by the defendant, or under the provisions of section 11 of the Quebec statute, 58 Vict. ch. 42.

Judgment appealed from reversed. *Consumers Cordage Co.* v. *Connolly* (31 Can. S.C.R. 244) followed.

APPEAL from the judgment of the Court of King's Bench, appeal side, by which the judgment of Bruneau J., in the Superior Court for the District of Montreal was varied.

In the circumstances stated in the head-note, the plaintiff brought this action to recover from the defendant the sum of $11,136.24 with interest from 17th September, 1908. With his plea the defendant tendered the sum of $5,122.25 as the whole amount of the balance due by him to the plaintiff, after deduction of the amount of the bonus and other charges mentioned in the head-note. In the Superior Court Mr. Justice Bruneau declared that the amount so tendered was insufficient and entered judgment in favour of the plaintiff for $10,519.25 with costs. By the judgment appealed from the Court of King's Bench reduced the amount of the Superior Court judgment by the sum of $3,000, the amount of the bonus claimed by the defendant.

The questions in issue on the present appeal are stated in the judgments now reported.

Sir Auguste Angers K.C. and *A. E. deLorimier K.C.* for the appellant.

R. C. Smith K.C. and *R. Monty K.C.* for the respondent.

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Court of King's Bench of Quebec,

varying a judgment of the Superior Court which had maintained the plaintiff's action.

That action was brought to recover from the defendant a sum of money alleged to be illegally retained by him out of a larger sum received from the plaintiff. The facts are susceptible of simple statement and the differences in the versions given by the parties of the circumstances out of which this suit arose are perhaps more apparent than real. Where they differ, the trial judge says that he accepts in preference the plaintiff's story.

The undisputed facts are: In the year 1907, the defendant was mayor of the municipality of the Village of DeLorimier, and in the month of September of that year the plaintiff was awarded a contract for the building of sewers in some of the main streets of the village. The terms of the contract are fully set out in notarial deeds executed on the 26th of the same month.

At that time the parties were apparently strangers to one another. On or about the 26th of October following, the plaintiff applied to the defendant for financial assistance to enable him to carry on his work, and it is admitted that without that assistance the contract could probably not have been executed. There is some dispute as to what occurred at the time and the trial judge apparently believes the plaintiff, but, so far as the issue to be determined on this appeal is concerned, it is not material to say more than this. The parties after some negotiations agreed that the defendant would assist the plaintiff to obtain the advances he required in consideration of the payment of a bonus of $3,000 for which a promissory note was then given. The contract was proceeded with vigorously,

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the defendant made the necessary advances amounting in all to $12,201.30 and the work was completed in the summer of 1908, the defendant being still in office as mayor of the municipality. Notwithstanding the provision in the agreement that the contract price was to be paid in five equal annual instalments, the first falling due one year after the works were completed and accepted, on the 15th August, 1908, a promisssory note, payable at six months, was given for the total value of the work done. The corporation gave the note to the contractor on his undertaking to renew at maturity, but he indorsed it over at once to Messier, the mayor. No importance seems to have been attached below to this serious departure from a term evidently inserted in the agreement for the protection of the municipality. It was quite in the interest of the mayor, creditor of the contractor, that the contract price should be paid at once, and evidently his interest prevailed against that of the ratepayers which he was supposed to protect.

There is some dispute as to what occurred at the time the note was given to the mayor. The plaintiff says that it was given as *collateral security* for his then existing indebtedness, the defendant is assumed below to have said that it was in *payment* of that indebtedness. What he really says is at page 26 of the case. The trial judge believes the plaintiff.

Be this as it may, the defendant refused at the time, under one pretext or another, to account to the plaintiff for the note against which he, the defendant, had obtained an advance of $17,797.95 from the bank, *i.e.*, to the extent of his own claim for advances, commission and interest. There is some dispute here as to whether the note was discounted or merely given

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to the bank as collateral security for an advance then made. The defendant says in his examination on discovery:—

1. R. Monsieur Lapointe aurait voulu avoir la différence et je lui ai dit:—Si je ne peux pas l'escompter je ne pourrai pas vous donner la différence maintenant.

* * * * * *

20. Q. Vous ne lui avez pas crédité ce billet à son compte ?

R. Je l'ai crédité le montant de $17,597.95 par le billet de la Corporation, du moment que je l'eus escompté.

* * * * * *

40. R. Je ne pouvais pas lui créditer si je ne l'avais pas en mains.

Again, I do not think, in my view of the case, that the difference is important; the result was that the plaintiff took out of the advances made by the bank on the note of the municipality the amount of his claim against the plaintiff including the bonus of $3,000 which is in dispute here.

On these facts two questions arise: Was the promissory note for $3,000 given for an illegal consideration, and if so, is the defendant entitled to retain that sum out of the proceeds of the note given by the municipality in payment of the work done under contract ?

I am quite satisfied that although there was no concert between the parties at the time the contract was awarded, the plaintiff's subsequent undertaking to pay a bonus of $3,000 for the advances which the defendant undertook to make was, in the circumstances, within the mischief of the Act hereafter cited and come within the words of the enactment, because it gave the mayor an interest in the contract which made him liable to the penalty prescribed by 58 Vict. ch. 42, sec. 2, which reads:—

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Any member of a municipal council who knowingly during the existence of his mandate has or had, directly or indirectly, through a partner or partners, or through the agency of any other person, any interest, commission or percentage (in a contract) with the municipal council of which he is a partner, or knowingly during the existence of his mandate has or had derived any pecuniary remuneration from any contract for work performed or to be performed, shall, upon a judgment obtained against him under this Act, be declared disqualified from holding any public office in the said council or under the control thereof for the space of five years.

What is an interest sufficient to disqualify? See cases collected in 19 Halsbury, Laws of England, No. 627, p. 304, also *Miles* v. *McIlwraith*(1); *Mayor of Salford* v. *Lever*(2); *Norton* v. *Taylor*(3); *In re Campbell*(4); *Burgess* v. *Clark*(5); *Hunnings* v. *Williamson*(6).

I have looked at the case of *Le Feuvre* v. *Lankester* (7), much relied upon at the argument and, if still binding as an authority, it can be distinguished from this case. There the defendant sold the contractor certain ironwork which was used in carrying out the contract. No attempt was made to shew fraud or any interest which would affect the price of the goods or the manner in which they were to be paid for. Here the bonus of $3,000 was to be paid at the expiration of the contract out of the profits, which the contractor expected to make, and the defendant admits that if the contract was unprofitable, he stood a chance to lose not only his bonus, but also his advances. So that, if we take the view which is most favourable to the defendant, there is no doubt that by reason of that agreement he had a pecuniary interest in the result of

(1) [1883] 8 App. Cas. 120.
(2) [1891] 1 Q.B. 168.
(3) 75 L.J.P.C. 79.
(4) (1911) 2 K.B. 992, at p. 997.
(5) 14 Q.B.D. 735.
(6) 11 Q.B.D. 533.
(7) 3 E. & B. 530.

the contract and he was, therefore, in a position where he had necessarily to choose between that interest and his duty towards the municipality. I entirely agree with what is said by Arnold, Law of Municipal Corporations, pp. 26, 27. The members of a council should have no interest to bias their judgments in deciding what is for the public good. Members of a town council should be advised to keep themselves absolutely free from the possibility of any imputation in this respect.

This case affords a striking illustration of the necessity of strictly interpreting the section above quoted. As evidence, I refer again to the way the interests of the municipality were, to say the least, put in jeopardy by the payment of the contract price before the time fixed to ascertain if the work had been satisfactorily executed.

As to the second question — the right to recover — it has been argued that the old Roman maxim *nemo auditur propriam turpitudinem allegans* applies, and much reliance is placed, and very properly so, upon the opinion of Pothier, Obligations, No. 45. But it must not be overlooked that the legislature had the opinion of Pothier brought to its notice when the Civil Code was enacted and that opinion was deliberately departed from. If the undertaking to pay a bonus gave the mayor an interest in the contract, then the statute makes that undertaking unlawful and the payment was without consideration. The right, therefore, to recover exists. There was no debt and the defendant received a sum that was not due him. (See arts. 1047-1048 and 1140 C.C.) Neither was there a natural obligation. (16 Laurent 164; Marcadé 4, p. 399.)

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It is quite evident here that the defendant took an unfair advantage of the financial necessities of the plaintiff, and the latter cannot be said to have been a party to the illicit agreement. His promise to pay the bonus was not made to give the defendant an interest in the contract, although that was the effect of it, and as Planiol puts it, vol. 2, No. 846:—

> Il semble que cette action (en répétition) devrait toujours être accordée, car si l'obligation illicite or immorale est condamnée par le droit, il importe que le créancier ne soit jamais autorisé a conserver ce qu'il a reçu, quand le débiteur s'est volontairement acquitté; lui laisser l'argent en privant le débiteur de son action en répétition, ce serait *donner effet à un acte illicite*, contrairement à l'article 1131 qui dit que ces obligations n'en doivent produire aucun.

It would be a curious result, if, under the statute, a briber could withhold from the bribee, in a case like this, the money paid when an innocent party would be obliged to suffer his loss.

It is said in the respondent's factum that *Consumers Cordage Co.* v. *Connolly*(1), decided in this court, is based upon modern French jurisprudence, but that is not the case. As far back as 1839, the French courts began to restrict the application of the Roman maxims *nemo auditur*, etc., and *quod nullum est nullum producit effectum.* (S.V. 33, 1, 668; S.V. 44, 1, 584; S.V. 90, 2, 97; Meynial's note and Marcadé, vol. 4, at page 399), and to-day it is universally admitted that they do not apply where the obligation is based on an illicit, as distinguished from an immoral, cause. (Vide Fuzier-Herman, vo. "Paiement," No. 451. All the cases on this subject are collected in "La Revue Trimestrielle," 1913, at page 553 *et seq.*)

The appeal should be allowed with costs.

(1) 31 Can. S.C.R. 244.

IDINGTON J.—Whilst respondent was mayor of De-Lorimier, a municipal corporation, appellant tendered for the work of constructing some sewers and his tender was accepted and contract let accordingly.

It seems the appellant, who was not a man of much financial substance, then applied to respondent to finance him through the execution of these works.

There were proposals and counter proposals between these men, which ended by appellant giving respondent his promissory note for three thousand dollars, which is the note referred to in the following receipt given by respondent:—

Montréal, 26 Oct., 1907.

Reçu ce jour de M. M. Lapointe un billet à trois mois pour valeur reçu il est entendu que le dit billet sera renouvable jusqu'à la fin des travaux comprenant les canaux des rues Chabot, Simard et Gilford.

Ce billet est renouvable sans intérêt.

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Seeing that the total amount earned under said contract and owing by the corporation in respect of these works when finished was the sum of twenty-two thousand seven hundred and twenty dollars and fifty cents ($22,720.50), for which the corporation gave its promissory note, on the 18th of July, 1908, and that the entire advances of the respondent to the appellant between the dates of his getting the remarkable document above quoted and the acquisition of this promissory note of the corporation was never more than nine thousand four hundred and fifty-nine dollars and twenty cents ($9,459.20), one is surprised at the audacity which can claim that the transaction truly represents interest or compensation of that sort for making such advances and means nothing else.

The appellant says that the respondent proferred a

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partnership in the contract on the basis of sharing equally in the profits, that he (appellant) did not assent, but, after several interviews that the respondent preferred it should be put in the shape of giving him the promise above set forth of three thousand dollars, and that when he discounted the corporation's note or renewal thereof (broken into four notes spread over a term of years) and wanted him to settle up, he claimed two thousand dollars in addition to this three thousand dollars, besides an item of three hundred and ninety-six dollars and sixty-five cents, for interest, which together would so closely represent the half of the actual profits admittedly made on this small contract, that I think it quite clear the respondent never let the proposal of partnership out of his mind. In truth, I infer, he was determined on the double advantage of securing at least three thousand dollars and, if the results should so turn out that he would find half the profits to be still better, to claim that as he did, in the mode he did.

The item of three hundred and ninety-six dollars and sixty-five cents ($396.65) for interest, the respondent says was interest computed up to the 22nd of May, 1908, at 7% or 8% on the actual advances made up to that date, and, in the witness box claimed he ought to get interest on later advances, but indicates that was overlooked by reason of the disputes that followed.

If all this does not indicate that he had in mind the idea that he intended to be and was interested in the profits, I am puzzled to know what his process of reasoning was.

It is quite clear he claimed he intended he should

get five thousand dollars over and above the usual bank interest.

If it could not be called anything else, it certainly was a lavish commission coming to him out of a transaction in which the corporation of which he was mayor was concerned, and, I think, unless the statute prohibiting such officers from taking commission or other interests on its contracts is to be frittered away or repealed by judicial interpretation and construction, it is a violation thereof.

There are, besides the plain import of the transaction, several things in the respondents' evidence, such as his attempt to represent there were two contracts, when clearly only one, between the appellant and the corporation, and the erasure in the respondent's books, which, when taken with his evidence, shew or tend to shew a possibly false and fraudulent purpose on the part of the respondent and colour the whole story as against him.

The section 1, of 58 Vict., ch. 42 (Que.), relied upon is as follows:—

1. Any member of a municipal council who knowingly, during the existence of his mandate, *has* or *had*, directly or indirectly, *by himself or his partner any share or interest in any contract or employment* with, by or on behalf of the council, or who knowingly during the existence of his mandate, *has or had through himself or his partner or partners*, any commission or interest, directly or indirectly, or who *derives any interest in or from any contract with the corporation or council* of which he is a member, shall, upon a judgment obtained against him under the provisions of this Act, be declared disqualified from holding any public office in the said council or under the control thereof during the space of five years.

Section 2 puts the matter thus:—

2. Any member of a municipal council who knowingly, during the existence of his mandate, has or had, directly or indirectly, *through a partner or partners*, or *through the agency of any other*

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person, any interest, commission or percentage (in a contract), with the municipal council of which he is a member, or knowingly, during the existence of his mandate, has or had derived any pecuniary remuneration from any contract for work performed, or to be performed, shall upon a judgment obtained against him under this Act, be declared disqualified from holding any public office in the said council or under the control thereof for the space of five years.

I have quoted these sections to shew how clear the purpose of the legislature was to prevent any member of the council from entering into any transaction which should place his personal interest in conflict with his duty to the corporation.

From the moment the respondent accepted the document I have quoted above from a man whose financial position was such as to induce him to give it, he (respondent) was no longer fit to sit in council and effectively discharge his duty. The restrictive interpretation pressed upon us of this statute is not in harmony with the rules laid down in *Heydon's Case* (1) as applicable to penal as well as other statutes.

The duty of the judge relative to statutes and their interpretation can never be better defined than as expressed therein. And, if we are ever tempted by reason of a case presenting a want of "honour among thieves" or such like cause, to forget this, let us read the rule again.

Then it is argued that the three thousand dollars by the discounting of the corporation's note or notes were paid and cannot be recovered back.

Had the parties so proceeded as to bring this about, an arguable question might have been raised. But the best evidence they did not is that the respondent held on to the document quoted above and was driven to a tender thereof in answer to the demand of the appel-

(1) 3 Rep. 7*b*.

lant to settle by paying the balance of the proceeds of the corporation's notes.

His rapacity was such that he insisted on retaining the whole five thousand dollars and the interest he claimed and shews how and what he thought of the question of payment. It was still an unsettled thing and so remained, has herein been in substance and effect claimed by him in his pleadings as his due, and asserting that as his right he has never so pleaded as to raise the question his counsel now seeks to raise as a matter of law.

The issue has been fought out on such contentions at the trial and the suggestion now made is the thought of the able and ingenious counsel, who was not at the trial. There is no room left for arguing that this is a suit to recover back that already paid. If there were I should have to consider the effect of 58 Vict. ch. 42, sec. 11, cited in the appellant's factum.

The appeal should be allowed with costs here and in the court of appeal and the judgment of the learned trial judge should be restored.

DUFF J.—In September, 1907, the appellant entered into a contract for the construction of certain municipal sewers. Finding himself unable to obtain the necessary advances from his bankers he applied to the defendant for assistance, who agreed to lend his credit in consideration of a bonus of $3,000. This term of the arrangement was evidenced by a promissory note for the sum of $3,000 and a contemporaneous acknowledgment in writing by the appellant of the receipt of the note which was declared to be renewable until the municipal works in question should be completed.

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The respondent was the mayor of the municipality and, on behalf of the municipality, had executed the contract to which the appellant was a party. In August, 1908, the works in question having been finished, the appellant received from the municipality a promissory note for $22,720.50 (the sum due to him under his contract), payable in six months, the understanding being that the note was to be renewable at maturity. This promissory note, indorsed by the appellant, was delivered to the respondent; and one of the controversies at the trial related to the terms of the arrangement under which that was done. On this point it is sufficient for the present to observe that the appellant himself admits that the note of the municipality was transferred to the respondent "*en garantie* of the notes which I owed him."

The respondent discounted the municipality's note at the Merchants Bank. In September, the appellant offered to repay the respondent the sums actually advanced by the respondent to him, with interest, demanding at the same time the return of the promissory note just referred to. This the respondent refused, alleging that he was entitled to retain a sum of $17,500 out of the proceeds, offering at the same time to return the difference between that sum and those proceeds. The appellant then procured possession of the note by paying the amount due upon it at the Merchants Bank; and this action was brought to recover the difference between the amount so paid and the advances made by the respondent.

The dispute concerns the amount nominally payable in respect of the promissory note already referred to by way of bonus. The position taken by the appellant is this. He says that this note was the outcome

of an arrangement which in effect gave to the respondent an interest in his contract with the municipality. And such an agreement he says is void as offending against public policy. The respondent meets this by denying that the arrangement gave him any interest in the appellant's contract and by asserting that, in any event, the note was paid and that, consequently, the appellant is in the position of being obliged to rely upon an agreement which he alleges was unlawful to which he himself was a party.

The appellant's contention is based upon the provisions of sections 1 and 2 of 58 Vict. ch. 42 (Que.), which are as follows:—

1. Any member of a municipal council, who knowingly during the existence of his mandate has or had, directly or indirectly, by himself or his partner, any share or interest in any contract or employment, with, by or on behalf of the council, or who knowingly during the existence of his mandate, has or had through himself, or his partner or partners, any commission or interest, directly or indirectly, or who derives any interest, in or from any contract with the corporation or council of which he is a member, shall, upon a judgment obtained against him under the provisions of this Act, be declared disqualified from holding any public office in the said council or under the control thereof during the space of five years.

2. Any member of a municipal council, who knowingly during the existence of his mandate has or had, directly or indirectly, through a partner or partners, or through the agency of any other person, any interest, commission or percentage (in a contract) with the municipal council of which he is a member or knowingly during the existence of any mandate has or had derived any pecuniary remuneration from any contract for work performed or to be performed, shall, upon a judgment obtained against him under this Act, be declared disqualified from holding any public office in the said council or under the control thereof for the space of five years.

There can be no doubt, I think, that it was understood between the appellant and the respondent in September, 1907, that the bonus of $3,000 should be paid out of the proceeds of the appellant's contract. Such being the understanding it appears to me that

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the respondent acquired an interest in the contract within the meaning of this statute, and that an agreement having that as its effect and one of its direct objects must, in view of the statute, be held to be an agreement contrary to public policy and void as such.

The substantial point in issue appears to be whether or not the appellant is precluded from recovering the amount of the note in question on the principle that the court will not assist a party to an illegal contract to recover moneys paid or property delivered under it where, at all events, the illegal purpose of the contract has been completely performed.

The appellant disputes the application of this principle, first, on the ground that, in the circumstances, there was no payment. This particular contention, I think, misses the mark. As I have already pointed out the note was delivered, by the appellant's own admission, to the respondent as collateral security for the promissory notes held by the respondent. It is not suggested that any exception of this note of $3,000 was made and, if the arrangement under which the note was given had not been tainted by illegality, it seems indisputable that the respondent would have been entitled to retain the note received from the municipality until the bonus note had been discharged. Assuming that the respondent committed a wrongful act in negotiating the municipality's note, the appellant would still only be entitled to recover, all question of illegality put aside, the damages suffered by him which would be measured by the difference between the value of the municipality's note and the amount for which the respondent was entitled to retain it as security.

In either view the appellant must impeach the bonus note as given for an illegal consideration and could, therefore, succeed only through setting up the illegality of his own contract. The question comes squarely to be decided whether, according to the law of Quebec, such an action can succeed on such grounds. The respondent's counsel largely rests upon the decisions of the English courts, and, since the argument was mainly devoted to a discussion of these decisions, it is worth while, perhaps, going through them, although they do not appear to me to be strictly relevant to the point to be determined.

In applying the English law it may be observed the same principles apply as if the amount of the bonus note had been paid in money. *Taylor* v. *Chester*(1).

The general rule of the English law is stated in the judgment of Lord Mansfield in *Holman* v. *Johnson* (2) :—

> The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which defendant has the advantage of contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of the country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault. *potior est conditio defendentis.*

(1) 10 B. & S. 237.

(2) Cowp. 341, at p. 343.

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There are, however, apparent exceptions to this rule and the question is whether or not the present case comes within any of those exceptions. These exceptions have been stated in two text-books of high repute and in two comparatively recent judgments. And before considering the scope of them in their application to this case it will be convenient to reproduce the passages:—1st, Pollock on Contracts, pages 404, 405:—

> Money paid or property delivered under an unlawful agreement cannot be recovered back, nor the agreement set aside at the suit of either party — unless nothing has been done in the execution of the unlawful purpose beyond the payment or delivery itself (and the agreement is not positively criminal or immoral);
>
> Or unless the agreement was made under such circumstances as between the parties that, if otherwise lawful, it would be voidable at the option of the party seeking relief.—Note *b*. This form of expression seems justified by *Harse* v. *Pearl Life Assurance Co.*(1).
>
> Or in the case of an action to set aside the agreement, unless in the judgment of the court the interests of the third persons require that it should be set aside.

Secondly, Anson on Contracts, p. 253-4:—

> But there are exceptional cases in which a man may be relieved of an illegal contract into which he has entered; cases to which the maxim just quoted does not apply. They fall into three classes: (1) The contract may be of a kind made illegal by statute in the interests of a particular class of persons of whom the plaintiff is one; (2) the plaintiff may have been induced to enter into the contract by fraud or strong pressure; (3) no part of the illegal purpose may have been carried into effect, before it is sought to recover the money paid or goods delivered in furtherance of it.

The first of the judgments is in *Kearley* v. *Thomson*(2), where Lord Justice Fry says (pp. 745-6):—

> To that general rule there are undoubtedly several exceptions, or apparent exceptions. One of these is the case of oppressor and

(1) [1904] 1 K.B. 558. (2) 24 Q.B.D. 742.

oppressed, in which case usually the oppressed party may recover the money back from the oppressor. In that class of cases the dictum is not par, and, therefore, the maxim does not apply. Again, there are other illegalities which arise where a statute has been intended to protect a class of persons, and the person seeking to recover is a member of the protected class. Instances of that description are familiar in the case of contracts void for usury under the old statutes, and other instances are to be found in the books under other statutes, which are, I believe, now repealed, such as those directed against lottery keepers. In these cases of oppressor and oppressed, or of a class protected by statute, the one may recover from the other, notwithstanding that both have been parties to the illegal contract.

I do not think the transaction in question here could be brought within the exceptions as stated by Lord Justice Fry, by Sir Frederick Pollock, or by Sir William Anson. Take first the judgment of Fry L.J. The transaction, as I view it, is not one prohibited by a statute passed for the "protection of a class of persons" of whom the appellant is one. It is a statute merely intended to disqualify from occupying certain positions of trust in relation to municipalities persons who bring themselves within the provisions of the Act. The object is to protect the municipalities and the public generally against the evils of corruption in municipal office. I do not think there is any ground for saying that this statute was passed with the object of protecting the interests of persons who engage in contracts with municipalities. The statute has nothing material to the present purpose in common with the class of statutes to which Lord Justice Fry refers — to the "Usury Acts" and the statutes against lottery-keepers.

Then, is this a transaction between "oppressor and oppressed" as the phrase is used by Lord Justice Fry? It will be convenient to expand this

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phrase a little. Sir William Anson puts it in a slightly different way. He speaks of contracts procured "by strong pressure." And Sir Frederick Pollock sums up the exceptions as consisting of agreements made in

> such circumstances as between the parties that, if otherwise lawful, they would be voidable at the option of the party seeking relief;

in other words, all cases in which illegal agreements completely executed may be set aside by a person who is a party to them and in the interests of such persons alone are cases in which on substantive grounds, independently altogether of illegality, the transaction would be voidable by and for the benefit of such persons according to the general principles of law or according to the true intendment and effect of the statute which forbids it. The author cites in support to his proposition the following passage from the judgment of Collins M.R. in *Harse* v. *Pearl Life Ass. Co.*(1), p. 563:—

> Unless there can be introduced the element of fraud, duress, or oppression, or difference in the position of the parties which created a fiduciary relationship to the plaintiff so as to make it inequitable for the defendants to insist on the bargain that they had made with the plaintiff, he is in the position of a person who has made an illegal contract and has sustained a loss in consequence of a misstatement of law, and must submit to that loss.

Whether or not this view of the law on this point be open to criticism, it is clear enough when one comes to consider the decisions referred to in the text-books mentioned illustrating the attitude of the courts towards such plaintiffs, that one cannot bring the present transaction within the class of cases referred to by Fry L.J., as being cases of "oppressor and op-

(1) [1904] 1 K.B. 558.

pressed" or by Sir William Anson as contracts procured "under strong pressure." In *Reynell* v. *Sprye* (1) it was held that the champertous agreement was obtained by fraud and that alone was sufficient ground for setting it aside. In *Osborne* v. *Williams* (2) the court had to consider a transaction between a father and son, the transaction itself being unfair and the son being at the time wholly within the father's control. In *Atkinson* v. *Denby* (3) the defendant had taken advantage of the plaintiff's situation to force him into an unfair bargain.

There is no evidence in this case of any such fraud or undue influence or unconscientious taking advantage of the appellant's situation. The appellant had a valuable contract; he approached the respondent, not as mayor, but as a person of capital in a position to assist him. The respondent was able to dictate terms quite independently of his position as mayor, and I think there is no adequate ground for holding that in fact the appellant was intimidated by the circumstance that the respondent held that office. The appellant had not entered upon the performance of his contract; if he were unable to get the necessary assistance to carry it out there is no reason to suppose that the municipality would not have permitted him to abandon it.

It was suggested that public policy would be better served by compelling the respondent to refund. That may be so; but I do not think the law of England on this subject leaves it to the judge or the court to determine in each particular case whether or not

(1) 1 DeG. M. & G. 660. (2) 18 Ves. 379.
(3) 6 H. & N. 778; 7 H. & N. 934.

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public policy will be best served by allowing moneys paid or property delivered under an executed contract void as against public policy to be recovered back by the party paying. On the contrary the general principle of the law is that stated by Lord Mansfield in the passage quoted above. The person seeking to recover must bring himself within one of the recognized exceptions to that principle or he must fail. I think in this case the appellant has not done so, and that if his right to recover were to be determined according to the law of England he could not succeed.

It remains to consider the question whether according to the law of the Province of Quebec the appellant is precluded from recovery because of the unlawful character of his agreement with Messier.

The present case, I think, is not a case of payment of money. The appellant affirms that the respondent had no authority to discount the note; and, in view of the conduct of the respondent in the litigation and the discredit cast upon him by the trial judge, the appellant's story should, I think, be accepted. However, as I have already pointed out, the appellant can only make out his case by alleging the illegality of his contract and on principle he appears to be in the same position as if payment had been made; and, moreover, as I have already said, it was, no doubt, understood that the bonus was ultimately to be paid out of the proceeds of the contract. The general question is dealt with very elaborately in the judgment of the late Mr. Justice Girouard in *Consumers' Cordage Co.* v. *Connolly*(1), with which Mr. Justice Sedg-

(1) 31 Can. S.C.R. 244.

wick and Mr. Justice King concurred. The authorities cited appear to shew that according to the more modern view the effect of section 989 of the Civil Code, a plaintiff in the situation of the appellant is entitled to relief on the ground that the illegal contract being without effect the defendant ought not to be permitted to retain that to which he never had any legal right.

Although it may be doubtful whether that decision is strictly binding upon us in view of the subsequent course of the litigation, yet I think I ought to give effect to the opinion of the majority of the court which was not overruled by the Judicial Committee.

ANGLIN J.—The evidence, in my opinion, clearly discloses that the defendant had a share or interest in the plaintiff's contract with the municipal corporation of the Village of DeLorimier which falls under the penalizing provisions of articles 1 and 2 of the Quebec statute, 58 Vict. ch. 42. I am, with respect, unable to understand how the Court of King's Bench reached the conclusion that the agreement between the plaintiff and the defendant was not "illegal, prohibited or against good morals or public policy." But the case, in my opinion, is not within the purview of section 11 of the statute. There is no evidence that the defendant either performed or agreed to perform any service in his official capacity for the plaintiff in consideration of the $3,000 note given him.

If I could read the evidence as warranting a conclusion that the plaintiff had never authorized the defendant to retain out of the proceeds of the note of the municipal corporation, the amount of the $3,000 note now in question, the disposition of this case

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would be comparatively simple. The plaintiff would, in that event, be suing to recover money had and received to his use by the defendant, and the latter would be compelled to invoke the illicit contract as his only justification for retaining it. In such a defence he certainly could not succeed. I feel constrained, however, to take the view that, in directing the defendant to retain out of the proceeds of the note of the municipal corporation the sums due him, the plaintiff intended that he should pay to himself the amount of the $3,000 note which represented his illicit share of the plaintiff's profits on the contract with the municipality, and that this should be deemed a payment of this sum of $3,000 by the plaintiff to the defendant. It is, I think, a fair inference from the evidence that "it was understood" that the defendant was to pay himself the amount of the $3,000 note out of the proceeds of the discount of the note of the municipality.

I agree with the view which has prevailed in the provincial courts in regard to the $2,000 kept by the defendant on the pretext that he was entitled to it for financing a second contract — that he has neither right nor colour of right to retain it. There was no second contract.

Two objections are urged against the plaintiff's right to recover the sum of $3,000: 1st, that it was paid voluntarily, and, if in mistake, that the mistake was of law, not of fact; and 2ndly, that, in order to recover, the plaintiff must invoke the illegality of the contract under which this money was paid. Notwithstanding these objections, under the Civil Code of the Province of Quebec, the right to recover appears to exist.

Article 1047 of the Civil Code provides that:—

He who receives what is not due to him through error of law or of fact is bound to restore it.

Money voluntarily paid in mistake of law is, therefore, recoverable, as has been held in many cases: *Leprohon* v. *Le Maire de Montréal*(1); *Leclerc* v. *Leclerc* (2); *Bain* v. *City of Montreal*(3), at pages 265, 285.

There appears to be no doubt that under the system which prevailed before the adoption of the Civil Code full effect was given in French courts to the maxim of the Roman law, *ex turpi causâ non oritur actio,* and the action *en répétition de l'indu* did not lie to recover moneys paid under illegal contracts, save in cases of the sale or cession of public offices, which were treated as exceptional. It suffices to cite Pothier in support of this statement. But, by article 989 C.C., it is declared that

a contract without consideration or with an unlawful consideration has no effect.

Modern commentators, as well as modern decisions, appear to agree that, by this article, it was intended to do away with the operation of the Roman rule in so far as it precludes actions to recover back moneys paid under illicit contracts. Otherwise, it is said, some effect would be given to the illicit contract in contravention of the article of the Code. And it is pointed out that, while the Code was based largely upon the views of Pothier, in this particular his ideas were deliberately departed from. The right to recover moneys illegally paid is now the accepted rule, at all events where, as in the present case, the contract under which the payment has been made is merely

(1) 2 L.C.R. 180. (2) Q.R. 6 Q.B. 325.
(3) 8 Can. S.C.R. 252.

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illicit or contrary to public policy and not *in se* immoral or criminal. With this latter class of contract we are not now called upon to deal.

This subject was carefully reviewed by the late Mr. Justice Girouard in *Consumers' Cordage Co.* v. *Connolly*(1), at pages 298 *et seq.* His conclusion was that, under the Civil Code, money paid upon such an illicit contract is recoverable. I regard this authority as binding and I follow it without hesitation both as to the principal sum of $3,000 and as to the interest, $396.65, which the provincial courts disallowed.

In such a case as we have now before us, if the difficulty as to voluntary payment did not exist (*Wilson* v. *Ray*(2)), the money illegally paid to the defendant would be recoverable in an English court. Although ordinarily money paid upon an illegal contract is not recoverable in a court administering English law, because *nemo allegans suam turpitudinam est audiendus,* and the maxim *potior est conditio defendentis* is applied

> where the parties to a contract against public policy or illegal are not *in pari delicto* (and they are not always so) and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him as we know from various authorities of which *Osborne* v. *Williams*(3) is one. *Reynell* v. *Sprye*(4), at p. 679.

As I have already said, the principle of the decisions in such cases as *Osborne* v. *Williams*(3), and *Morris* v. *M'Cullock*(5), appears to have been accepted in France in regard to the sale of public offices even when it was held that the action *en répétition*

(1) 31 Can. S.C.R. 244.
(2) 10 A. & E. 82.
(3) 18 Ves. 379.
(4) 1 DeG. M. & G. 660.
(5) Amb. 432.

did not lie to recover payments under illegal contracts.

Where, as here, there is a statutory prohibition of the contract under which the money has been paid and a penalty imposed on only one of the parties, they may be regarded as not *in pari delicto;* and, where public policy requires it, the party who is not penalized may have relief. 15 Am. and Eng. Encyc. (2 ed.) 1005.

It is very material that the statute itself, by the distinction it makes, has marked the criminal. For the penalties are all on one side; upon the office keeper.

Browning v. *Morris*(1), at page 793, *per* Lord Mansfield; *Williams* v. *Hedley*(2). Here the penalties are imposed only on the municipal office-holder. The purpose of the legislation is to ensure, for the protection of the public, whom the office-holder represents, that he shall not have interests which may conflict with his duty to them. Public policy requires that he shall not be allowed to retain profits made out of contracts which give or may give him such a conflicting interest. In such a case public policy demands the intervention of the court. The guilty party to whom relief is granted is simply the instrument by which the public is served. 7 Cyc. 750.

It is upon grounds of public policy that similar relief is granted by English courts of equity in marriage brokage cases. *Hermann* v. *Charlesworth*(3); *Hall* v. *Potter*(4).

These references to English law are probably quite superfluous in the present case, since I dispose of it

(1) 2 Cowp. 790.
(2) 8 East 378.
(3) (1905) 2 K.B. 123.
(4) Show. P.C. (4 ed.) 98.

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on the authority of *Consumers' Cordage Co.* v. *Connolly*(1). I make them merely to indicate that, in courts in which the maxim *ex turpi causâ non oritur actio* ordinarily precludes relief where the plaintiff is obliged to set up illegality in which he has participated, such a case as the present would, on grounds of public policy, be deemed an exception to the general rule and the public official would not be permitted to retain the fruits of his illicit bargain.

While the plaintiff's conduct may savour of ingratitude and may appear to be such as not to entitle him to assistance of a court of justice, it must be borne in mind that he succeeds, notwithstanding his own demerit, solely because of the supreme importance, in the public interest, of frustrating attempts on the part of public officials to enrich themselves by forbidden means.

I am, with respect, of the opinion that the plaintiff's appeal should be allowed with costs in this court and in the Court of King's Bench, and that the judgment of the Superior Court should be restored.

BRODEUR J.—Nous avons à déterminer dans cette cause:—

1. Si le maire d'une municipalité peut être intéressé dans un contrat qu'un entrepreneur a fait avec cette municipalité;

2. S'il peut réclamer le paiement d'un billet promissoire qui lui aurait été donné pour son intérêt dans ce contrat.

Nous avons aussi à examiner en troisième lieu si le billet promissoire ayant été payé ou compensé il y a

(1) 31 Can. S.C.R. 244.

lieu à une action en répétition de la part de l'entrepreneur signataire du billet.

Le législateur a vu avec un soin jaloux à ce que les conseils municipaux soient composés d'hommes désintéressés qui, en acceptant de devenir membres du conseil, doivent se laisser guider exclusivement par l'intérêt public.

Il peut arriver sans doute que la décision de certaines questions affecte particulièrement un ou plusieurs membres du conseil. Par exemple, s'agit-il d'un chemin ou d'un cours d'eau dans lequel des conseillers municipaux pourraient être intéressés, ils doivent alors s'abstenir de siéger ainsi que le déclare l'art. 135 du code municipal qui dit:—

> Nul membre d'un conseil ne peut prendre part aux délibérations sur une question dans laquelle il a un intérêt personnel.

La question de savoir s'il est intéressé ou non, doit être décidée par ses collègues sans qu'il puisse voter sur cette question.

Nombre de décisions ont été rendues par nos tribunaux annulant des procès-verbaux ou des règlements parce que les conseillers qui les avaient adoptés étaient personnellement intéressés.

Quand il s'agit de contrats avec la municipalité, non seulement ils ne peuvent pas voter sur ces contrats mais ils ne peuvent pas être nommés membres du conseil ni agir comme tels (art. 205 du Code Municipal).

Dans le cas actuel, Lapointe, l'appellant, avait le 26 septembre, 1907, fait un contrat avec le municipalité de DeLorimier pour la confection d'égoûts. Il s'est trouvé, à un moment donné, gêné dans ses affaires, et il s'est adressé au maire, l'intimé, Messier,

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pour qu'il lui aide à financer son entreprise. Ce dernier accéda volontiers à sa demande, mais exigea en retour que Lapointe lui donnât la moitié de ses profits. Lapointe a trouvé que les exigeances de Messier étaient trop fortes et ils se sont entendus pour une somme de $3,000. Et Lapointe donna son billet pour ce montant le 26 octobre, 1907.

Messier avança alors, dans le cours de l'automne 1907 et du printemps 1908, l'argent nécessaire, savoir environ $12,000, pour payer les matériaux et la main d'œuvre en prenant des billets promissoires de Lapointe qu'il escomptait dans une banque ou qu'il gardait en sa possession.

L'entreprise fut terminée au commencement de l'été de 1908. Tous comptes tirés, la municipalité devait à Lapointe $22,720.50, et comme il n'avait dépensé qu'environ $12,000, il se trouvait avoir fait un profit de $10,000.

Il était convenu par le contrat entre Lapointe et la corporation que les paiements devaient se faire par cinq versements annuels et consécutifs dont le premier devenait dû un an après l'acceptation des travaux.

Le premier versement serait donc devenu dû au commencement de l'été de 1908. Messier, le maire, a-t-il trouvé que les échéances étaient trop éloignées, ou bien est-ce le résultat d'une erreur de la part des autorités municipales ? Le conseil municipal, à tout évenement, a décidé d'autoriser son maire à signer au nom de la municipalité un billet promissoire qui serait payable en janvier, 1909, pour tout le montant.

C'était là une faveur considérable qui était faite à l'entrepreneur mais qui en même temps permettait au maire de rentrer dans ses fonds sans plus de délai.

La preuve ne nous dit pas les circonstances qui ont

motivé ce changement dans les termes de paiement. Mais il est à présumer que l'intimé n'y a pas été absolument étranger. D'ailleurs il a signé lui-même le billet qui allait lui permettre de se rembourser de suite des avances qu'il avait faites à Lapointe.

Le billet est endossé par Lapointe et remis à Messier qui en fait faire l'escompte et en touche le montant.

Messier, qui n'avait avancé qu'environ $12,000 à Lapointe, aurait dû remettre à ce dernier environ $10,000. Mais il exigea d'abord $3,000 pour le billet qu'il s'était fait donner le 26 octobre, 1907, et il réclamait en outre environ $2,000 pour l'avoir aidé à l'égard d'un autre contrat avec la municipalité. La cour supérieure et la cour d'appel ont été unanimement d'opinion que Messier n'avait pas droit à ces $2,000.

La cour d'appel cependant a déclaré que Messier pouvait garder les $3,000, montant du billet du 26 octobre, 1907.

Ce billet de $3,000 représente-t-il une convention légale ?

Je n'hésite pas à dire que non.

Le maire d'une municipalité ne peut pas avoir directement ni indirectement un intérêt dans un contrat avec sa corporation (art. 205). Cette prohibition du code municipal a été édictée en termes encore plus sévères dans la législation contenue dans le chapitre 42 de 58 Vict.

Le section 2 dit:—

> Tout membre d'un conseil municipal qui a sciemment, pendant la durée de son mandat, directement ou indirectement, par un associé ou des associés, ou par l'intermédiaire d'une autre personne, quelque intérêt ou commission dans un contrat avec le conseil muni-

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cipal dont il est membre, ou qui a sciemment, pendant la durée de son mandat, retiré de ce contrat quelque avantage pecuniaire pour travaux exécutés ou a exécuter, sera, sur jugement obtenu contre lui, en vertu de cette loi, déclaré inhabile à remplir une charge dans le dit conseil ou sous le contrôle du dit conseil durant l'espace de cinq ans.

Nous relevons à la section 11 du même statut la disposition suivante qui autorise dans certains cas l'action en répétition et qui dit:—

Quiconque a payé quelque somme d'argent, commission, honoraire ou récompense à un membre du conseil municipal pour services rendus ou à rendre par tel membre en sa qualité officielle, qu'il s'agisse de services rendus par tel membre lui-même, directement ou indirectement ou par l'entremise d'un tiers, et pour s'occuper d'une affaire devant le conseil ou devant un comité du conseil, peut, en tout temps, recouvrer cette somme par action ordinaire devant une cour de juridiction compétente.

Il est bien évident pour moi que la considération du billet de $3,000 en question était pour la part de bénéfice du défendeur intimé dans les travaux exécutés pour la corporation.

Cette considération était illégale parce qu'elle est contraire à l'ordre public et aux bonnes mœurs.

L'article 990 du Code dit:—

La considération est illégale quand elle est prohibée par la loi, ou contraire aux bonnes moeurs ou à l'ordre public.

Les bonnes mœurs et l'ordre public requièrent que les municipalités soient administrées par des personnes désintéressées, que les membres du conseil n'aient pas d'intérêts ni directement ni indirectement dans aucun contrat municipal.

Ils sont les mandataires des municipes et l'intérêt public doit être leur seul guide. Même s'il n'y avait pas de disposition formelle dans nos lois statutaires contre la mauvaise foi du mandataire infidèle, sa responsabilité serait la même sous la loi commune.

Toute convention qu'il fait contrairement à cela, viole les principes de la loi naturelle et elle est contraire à l'ordre public et aux bonnes mœurs.

Le billet du 26 octobre, 1907, est donc nul et de nul effet. Je trouve dans la jurisprudence américaine la décision suivante qui peut s'appliquer à la présente cause: *Smith* v. *City of Albany*(1): "Where by the charter of a city the members of the common council were prohibited from being interested in any contract for which payment must be made under any ordinance of the common council and a member of the council, by a secret arrangement with a contractor, became interested in such a contract, it was held that a note given by the contractor to such member for his share of the profits of the contract was void and, being void, an assignee thereof could not recover upon it."

L'action en répétition existe-t-elle si ce billet a été payé ?

Il y a eu divergence d'opinion à ce sujet. Mais l'opinion générale chez les auteurs modernes est que cette action existe. Voir Marcadé, vol. 4, No. 458; Huc, vol. 8, No. 392; Laurent, vol. 16, No. 164; Baudry Lacantinerie, vol. 11, No. 316.

Cette question est venue devant cette cour dans la cause de *Consumers' Cordage Co.* v. *Connolly*(2), et mon prédécesseur, le regretté juge Girouard, dans son jugement, en a fait une étude complète. On a dit que cette opinion avait été renversée par le Conseil Privé. C'est là une erreur. Au contraire, le Conseil Privé l'a adoptée, puisqu'il a ordonné un nouveau procès pour trouver si l'acte criminel que l'on reprochait aux parties et qui donnait lieu à l'action en répétition

(1) 61 N.Y. 444.

(2) 31 Can. S.C.R. 244; 89 L.T. 347.

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avait réellement eu lieu. Voir la décision du Conseil Privé rapporté au volume 89 du Law Times, p. 347.

En résumé, je suis d'opinion que le billet de $3,000 avait été donné pour une considération illégale et que le maire est obligé de le remettre à l'entrepreneur Lapointe sans pouvoir en exiger le paiement.

L'appel doit donc être maintenu avec dépens de cette cour et de la cour d'appel.

Appeal allowed with costs.

Solicitors for the appellant: *Angers, deLorimier, Godin & deLorimier.*

Solicitors for the respondent: *Monty & Duranleau.*