SIMON C. WALSH (DEFENDANT).....APPELLANT; 1894

AND

FREDERICK T. TREBILCOCK (PLAINTIFF) ..... } RESPONDENT.

*May 26.
*Oct. 9.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal law—Betting on election—Stakeholder—R. S. C. c. 159 s. 9—Accessory—R.S.C. c. 145 s. 7—Action for money staked—Parties in pari delicto.

R. S. C. c. 159 s. 9 provides *inter alia* that "every one who becomes the custodian or depositary of any money * * * staked wagered or pledged upon the result of any political or municipal election * * * is guilty of a misdemeanour" and a subsection says that "nothing in this section shall apply to * * * bets between individuals."

Held, reversing the decision of the Court of Appeal, Taschereau J. dissenting, that the subsection is not to be construed as meaning that the main section does not apply to a depositary of money bet between individuals on the result of an election; such depositary is guilty of a misdemeanour, and the bettors are accessories to the offence and liable as principal offenders. R.S.C. c. 145. *Reg.* v. *Dillon* (10 Ont. P. R. 352) overruled.

After the election, when the money has been paid to the winner of the bet, the loser cannot recover from the stakeholder the amount deposited by him the parties being *in pari delicto* and the illegal act having been performed.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court in favour of the plaintiff.

The plaintiff and one Richards made a bet on the result of an election for the House of Commons and deposited the sums so bet with the defendant as stakeholder. By the result of the election plaintiff lost his

*PRESENT:—Sir Henry Strong C. J. and Fournier, Taschereau, Sedgewick and King JJ.

(1) 21 Ont. App. R. 55.

1894

WALSH v. TREBILCOCK.

wager and the money was paid by defendant to Richards after notice given by plaintiff claiming a return of the money and plaintiff brought an action to recover his share of the amount deposited with defendant on the ground that the betting was illegal and the contract to pay the money to Richards consequently void. The question for decision was whether or not the stakeholder was guilty of a misdemeanour under R.S.C. ch. 159 sec. 9, and if he was, whether or not the plaintiff was an accessory to the offence under ch. 145; if a misdemeanour was committed to which plaintiff was accessory he could not recover.

The trial judge, the Divisional Court and the Court of Appeal all held that plaintiff could recover following *Reg.* v. *Dillon* (1).

Meredith Q. C. for the appellant. Betting is illegal and even without the statute R. S. C. ch. 159 this action would not lie. *Herman* v. *Jeuchner* (2) overruling *Wilson* v. *Strugnell* (3).

A contract may be enforced where the betting is only collateral to the agreement but not where it is the basis of it. See *DeMattos* v. *Benjamin* (4); *Harvey* v. *Hart* (5). See also *Scott* v. *Brown* (6).

Aylesworth Q. C. and *McKillop* for the respondent. R.S.C. c. 159 only makes illegal the machinery for carrying on the business of betting, and does not apply to transactions between individuals. *Reg.* v. *Dillon* (1). See *Cox* v. *Andrews* (7).

Even if defendant committed a misdemeanour plaintiff cannot be held to be an accessory. *Reg.* v. *Heath* (8); *The Queen* v. *Tyrrell* (9).

(1) 10 Ont. P. R. 352.
(2) 15 Q. B. D. 561.
(3) 7 Q. B. D. 548.
(4) 63 L. J. Q. B. 248.
(5) W. N. [1894] 72.
(6) [1892] 2 Q. B. 724.
(7) 12 Q. B. D. 126.
(8) 13 O. R. 471.
(9) [1894] 1 Q. B. 710.

1894

WALSH
v.
TREBILCOCK.

The Chief Justice.

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Court of Appeal affirming that of the Common Pleas Division, which in turn upheld the decision of Mr. Justice Street, the trial judge. The action was brought by the respondent against the appellant to recover $500, the amount of a deposit which had been paid to the appellant as a stakeholder under the following circumstances. Just before a general election for the House of Commons, on the 23rd February, 1892, the respondent and one John R. Richards made a wager on the result of the election for the electoral district of the city of London, for which John Carling and Charles Hyman were candidates, each party betting $500, Richards betting that Carling would be gazetted as the member elected, and the respondent betting that Hyman would be so gazetted. The bet was reduced to writing and each party deposited $500 in the hands of the appellant as a stakeholder. Subsequently and after the election, on the 29th February, 1892, the respondent gave the appellant a written notice claiming a return of his deposit and directing him not to pay over the money to Richards, and this notice was repeated by one from the respondent's solicitor on the 4th March, 1892. Notwithstanding this the appellant did pay over the money to Richards (whose candidate, Carling, had been gazetted) taking from him a bond of indemnity. The respondent then brought the present action in all the stages of which he has been successful. But one of the learned judges who have dealt with the case in the several courts through which it has passed has taken the view contended for by the present appellant. In the Court of Appeal the Chancellor of Ontario differed from the other three members of the court. The same result was also arrived at in a similar action of *Trebilcock* v. *Gustin*, in

1894

WALSH v. TREBILCOCK.

The Chief Justice.

which the present respondent was plaintiff, and which came before the Queen's Bench Division.

There was no difference between the parties as to the facts. The respondent's right to recover depends entirely on a question of law. There can be no doubt that a wager on the result of a Parliamentary election is at common law a contract forbidden by public policy, and in that sense illegal. This is shown by the case of *Allen* v. *Hearn* (1). It may also be within the prohibition contained in section 131 of the Election Act, although that section, as I had occasion to point out in the *North Perth Election Case* (2), has a much wider scope and is not confined to aleatory contracts like wagers. This question of the legality or illegality of the wager, or whether the illegality depends on common law or statute, is of no importance in the present case. The authorities show most conclusively that whether a wager be legal or illegal either of the parties to it may withdraw his deposit or stake from the hands of a stakeholder at any time before the latter has paid it over. We have no statute such as the Imperial statute 8 & 9 Vict. ch. 110, which was in question in the cases of *Hampden* v. *Walsh* (3); *Batson* v. *Newman* (4); *Diggle* v. *Higgs* (5); and *Trimble* v. *Hill* (6). It was held in these cases that the common law had not been altered in this respect by the statute, and that the law remained as it had been settled by the cases of *Lacaussade* v. *White* (7); *Eltham* v. *Kingsman* (8); and *Hastelow* v. *Jackson* (9).

In *Hampden* v. *Walsh* (3), Lord Chief Justice Cockburn thus states the law:—

(1) 1 T. R. 56. See also *Atherfold* v. *Beard* 2 T. R. 610.
(2) 20 Can. S.C.R. 352.
(3) 1 Q. B. D. 189.
(4) 1 C.P.D. 573.
(5) 2 Ex. D. 422.
(6) 5 App. Cas. 342.
(7) 7 T. R. 535.
(8) 1 B. & Ald. 683.
(9) 8 B. & C. 221.

1894

WALSH v. TREBILCOCK.

The Chief Justice.

A distinction has, however, been taken between cases in which the deposit was made to abide the event of an illegal wager and others in which the wager not being prohibited by statute, or of an improper character, was legally binding. In the former cases, the contract between the principals being null and void, the money remains in the hands of the stakeholder devoid of any trust in respect of the other party, and in trust only for the party depositing who can at any time claim it back before it has been paid over. In the latter the contract, prior to 8 & 9 Vict. c. 109, s. 18, not being invalid it was open to contention that money deposited on the wager with a stakeholder must remain with the latter to abide the event.

Greater difficulty, therefore, presented itself where, prior to the 8 & 9 Vict. c. 109, s. 18, money was deposited on a wager not illegal, and the Courts of King's Bench and Exchequer were at variance on this point. In *Eltham* v. *Kingsman* (1) the Court of King's Bench, consisting of Lord Ellenborough C. J., Bayley, Abbott and Holroyd JJ., held that even where a wager was legal the authority of a stakeholder, who was also (as is the case of the present defendant) to decide between the parties, might be revoked and the deposit demanded back. "Here" says Lord Ellenborough, "before there has been a decision the party has countermanded the authority of the stakeholder." "A man" says Abbott J. "who has made a foolish wager may rescind it before any decision has taken place." In the later case of *Emery* v. *Richards* (2), the Court of Exchequer, where money had been deposited on a wager of less than £10, on a foot race, and therefore, prior to the passing of the statute 8 & 9 Vict. not illegal under the then existing statute, held that the plaintiff could not demand to have his stake returned, but must abide the event. The case of *Eltham* v. *Kingsman* (1) does not, however, appear to have been brought to the notice of the court, and in our view the decision of this court was the sounder one. We cannot concur in what is said in Chitty on contracts, 8th ed. p. 574, that "a stakeholder is the agent of both parties, or rather their trustee." It may be true that he is the trustee of both parties in a certain sense, so that if the event comes off and the authority to pay over the money by the depositor be not revoked, he may be bound to pay it over. But primarily he is the agent of the depositor, and can deal with the money deposited so long only as his authority subsists. Such was evidently the view taken of the position of a stakeholder by this court in the two cases of *Eltham* v. *Kingsman* (1) and *Hastelow* v. *Jackson* (3), and in that view we concur.

This case was followed and the law as laid down by Cockburn C.J. adopted in the before cited cases of

(1) 1 B. & Ald. 683.
(2) 14 M. & W. 728.
(3) 8 B. & C. 221

1894

WALSH v. TREBILCOCK.

The Chief Justice.

Trimble v. *Hill* (1), *Batson* v. *Newman* (2) and *Diggle* v. *Higgs* (3), and in the two last of these cases, as well as in *Hastelow* v. *Jackson* (4) and *Hampden* v. *Walsh* (5), the notice of withdrawal was not given to the stakeholder until after determination of the event. There can therefore be no doubt of the respondent's right to recover if the law had depended altogether upon these authorities.

Certain statutory provisions peculiar to the legislation of the Dominion, not avoiding the wager, but making, as it is contended, the depositing in the hands of the stakeholder for the purpose of the wager by itself an illegal act, are relied on by the appellant as disentitling the respondent to recover back his money.

By Revised Statutes (Canada) chap. 159, subsec. (*c*), sec. 9, it is enacted that:

(1) Every one who * * *. becomes the custodian or depositary of any money, property or valuable thing, staked, wagered or pledged * * * upon the result of any political or municipal election, or of any race, or of any contest or trial of skill or endurance of man or beast is guilty of a misdemeanour and liable to a fine not exceeding $1,000, and to imprisonment for any term not exceeding one year.

(2) Nothing in this section shall apply to any person by reason of his becoming the custodian or depositary of any money, property or valuable thing staked to be paid to the winner of any lawful race * * * or to bets between individuals.

By Revised Statutes (Canada), chap. 145, sec. 7, it was enacted:

That every one who aids, abets, counsels or procures the commission of any misdemeanour, whether the same is a misdemeanour at common law or by virtue of any act, is guilty of a misdemeanour, and liable to be tried, indicted and punished as a principal offender.

Section 9 of chapter 159 has with a very slight addition been carried into the Criminal Code 1892, of which it now forms the 204th section. Section 7 of chapter 145 has not been adopted textually in the Code, but the act it declares a misdemeanour is now included and made a substantive offence by section 61

(1) 5 App. Cas. 342.
(2) 1 C. P. D. 673.
(3) 2 Ex. D. 422.
(4) 8 B & C. 221.
(5) 2 Q. B. D. 189.

1894

WALSH v. TREBILCOCK.

The Chief Justice.

of the Code. The Code did not, however, come into force until the first of July, 1893, and we must therefore have regard only to the provisions of the Revised Statutes.

The appellant's contention is that the first mentioned statute makes the mere receipt of the deposit or stake to abide the event of the bet a misdemeanour on the part of the stakeholder who becomes the depositary of it and that chapter 145 section 7 also made the party to the wager who deposited the money for the purpose of it guilty of a misdemeanour as a party aiding, abetting and procuring the commission of a misdemeanour. The respondent insists that this being a "bet between individuals" section 9 of chapter 159 has no application inasmuch as the effect of those words in the concluding clause of that section is to save from the operation of the statute, not only "bets between individuals" but also deposits made for the purpose of such bets.

Two points which have not been seriously disputed may be disposed of at once. First, if the proper construction of section 9 is that which the appellant contends for and the depositary of such a bet as the parties made in the present instance on the result of a political election is guilty of a misdemeanour, there can be no doubt that the party to the wager who deposits the stake is within the definition of one who aids and abets or procures the commission of a misdemeanour within the 7th section of chapter 145. It follows that in such case the respondent would, by reason of his complicity in the unlawful act of taking the money on deposit, be *in pari delicto* with the appellant, and if such was the respondent's position the law is clear that he cannot recover money so deposited. The authorities show decisively that when money is paid for an illegal purpose which when consummated would

1894

WALSH v. TREBILCOCK.

The Chief Justice.

put the party paying and the party receiving it *in pari delicto* there is *locus pœnitentiæ* open to the party paying so long as the illegal purpose has not been carried out. But where both parties are equally wrong, and the mere payment of the money (as to the stakeholder in the present case) constitutes the illegal act, there can be no withdrawal, and the money cannot be recovered back. This is so clearly the law that it is hardly necessary to cite cases to maintain the proposition. I will, however, refer to one or two of the latest authorities. In *Scott* v. *Brown* (1) Lord Justice Lindley says:

> *Ex turpi causâ non oritur actio.* This old and well known legal maxim is founded on good sense, and expresses a clear and well recognized legal principle which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him. If authority is wanted for this proposition it will be found in the well-known judgment of Lord Mansfield in *Holman* v. *Johnson* (2).

In *Herman* v. *Jeuchner* (3) the case was that a man procured another to go bail for him on depositing in the hands of the surety the amount of the bail by way of indemnity in case of default. This was of course illegal, being in contravention of the Statute of Bailbonds, 23 Hy. 6 ch. 9. The principal sued the bail to recover the money alleging the illegality and insisting that the illegal purpose had not been carried out. The Court of Appeal held that the payment of the money to the surety was itself an illegal act. In *Kearley* v. *Thomson* (4) the illegal purpose had only

(1) [1892] 2 Q. B. 724.
(2) Cowp. 343.
(3) 15 Q. B. D. 561.
(4) 24 Q. B. D. 742.

1894

WALSH v. TREBILCOCK.

The Chief Justice.

partly been consummated, yet it was held that the money paid for the illegal purpose could not be recovered back. In *Taylor* v. *Bowers* (1) the Court of Appeal say:

> If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action.

And it is worthy of remark that so far from the courts evincing any disposition to relax the law on this head we find the Court of Appeal in *Kearley* v. *Thomson* (2) saying that:

> The application of the principle laid down in *Taylor* v. *Bowers* (1) and even the principle itself may at some time hereafter require consideration, if not in this court, yet in a higher tribunal.

Next, we come to what is really the single substantial question in the case, that on which the judgments of all the courts below have proceeded, the proper construction of the 9th section of chapter 159 of the Revised Statutes. If we read the first part of this section 9 apart from the proviso contained in subsection 2, I cannot conceive any one having a reasonable doubt of its application to the present appellant as the custodian or depositary of money staked and wagered upon the result of a political election. These are the very words of the statute. Surely the appellant received the money now sought to be recovered as a custodian or depositary of it as money which had been staked and wagered by the respondent with Richards on the result of the London Parliamentary Election. The case comes, therefore, within the exact and literal terms of the enactment. Its plain construction according to the language used (reading it of course without the proviso) involves no absurdity, no inconsistency,

(1) 1 Q. B. D. 300. (2) 24 Q. B. D. 742.

1894

WALSH v. TREBILCOCK.

The Chief Justice.

and does not bring it into collision with any other provisions of the statute. Construing it thus according to the plain meaning of the words it is, in my opinion, a most salutary enactment, and one which would be effectual in stopping the evil practice of betting on elections. To any one who would doubt this I would say the very case before us shows that this would be the beneficial consequence of a strict construction of the statute. The actual bet now in question never would have been made without putting up the money, and the money never would have been put up if it could have been foreseen that neither the winning gamester nor the party depositing could have made the stakeholder pay it over (1).

It is argued, however, that the second subsection of chapter 9 in saying that the penal clauses shall not apply to "bets between individuals" makes the whole statute inapplicable to a deposit made for the purpose of a bet or wager such as this on a parliamentary election, because such wager was made between "individuals." I am not able to read the words of the proviso in this way. *Primâ facie* they mean that the section shall not apply to a bet or wager, not that they shall not apply to the case of a deposit made for the purpose of a bet or wager. It is said, however, that we are to construe these words as equivalent in meaning to the words "any money deposited for the purpose of a bet between individuals." I know of no principle upon which we are entitled so to alter the *primâ facie* meaning of the words in which the intent of the legislature is expressed by adding other words, at least under such conditions as we have here. The words of exception as they stand are perfectly intelligible. They apply to bets only, not to deposits. The legislature says, in effect, nothing which

(1) See in connection with this, *Barclay* v. *Pearson* the missing word case. [1893] 2 Ch. 154.

1894

WALSH v. TREBILCOCK.

The Chief Justice.

has been said in the preceding part of the section, making a deposit of money illegal and punishable, shall apply to the bets in respect of which such deposit has been made if such bets are between individuals. There is nothing absurd or even inconsequential in this. It may well be that it was considered by Parliament that making the deposit of money an illegal act, without extending the prohibition to the bets themselves, would be an effectual way of putting down the evil the act was aimed at; but whether it would or would not have that effect is not the question; it is sufficient that the words have in their primary signification a plain obvious meaning which leads to no illegal or absurd result, and is controlled by no context requiring us to apply to them an extended or secondary meaning. The well known "golden rule" so often referred to in the judgments of Lord Wensleydale (1) and originally propounded by Mr. Justice Burton in the case of *Warburton* v. *Loveland* (2) therefore requires us to give the language used its plain ordinary meaning. The courts have sometimes construed the words used in statutes not according to their strict grammatical and ordinary signification, but as elliptical modes of expression used as symbols for some secondary meaning. This was the case of *Robertson* v. *Day* (3) where the Privy Council adopted this mode of construction. But this was expressly referred to the principle that the context called for such an interpretation. Here, as I have said, I can find no such context, for I cannot find that there is pervading the statute any general intent to confine it to pool selling or pool-rooms, which is the reason ascribed for enlarging the actual words "bets between

(1) See per Lord Blackburn, *British Railway Co.* 6 App. Cas. 131. *Caledonian Railway Co.* v. *North* (2) 1 Hud. & Br. 635.
(3) 5 App. Cas. 63.

1894

WALSH v. TREBILCOCK.

The Chief Justice.

individuals" so as to include deposits for the purpose of such bets. If the legislature had indicated an intention to confine this provision of the act to pool-rooms and pool selling it would, of course, be the duty of the courts to obey their mandate, but it must be observed that the statute in that case so far as applicable to bets on elections would have been useless; it would not have struck at the mode in which such bets are usually made, and would moreover be palpably open to evasion. I cannot agree that we are to add words which would manifestly have the effect of producing such a result. Moreover the statute was a remedial one; construing it literally it was intended as a remedy designed for the public benefit to suppress the evil practice of depositing money for the purposes of bets at elections. It ought, therefore, to receive a beneficial construction which in this instance accords with the strict grammatical construction. If there had been in the enactment itself any indication that it was to be restricted to deposits made at particular places, or with persons belonging to particular classes such as pool sellers, or professional gamblers, it would have been different, but as I have said there is no indication of any such intent in the statute. Betting on elections between individuals may be considered a great evil, but if the legislature did not think fit to inflict a penalty for that their omission to do so is no reason why we should hold that they did not intend to suppress another attendant evil, when they have in so many words said that they did so intend.

I regret that I should be compelled to differ from so many learned judges for whose opinions I have a most sincere respect, but I can find no answer to the argument on which the Chancellor has based his judgment.

1894

WALSH v. TREBILCOCK.

The Chief Justice.

Since writing the above I have read the judgments delivered in the Queen's Bench Division in the case of *Trebilcock* v. *Gustin*, not yet reported. The learned Chief Justice of the Queen's Bench rests his judgment in that case on the principle that the appellant, a stakeholder, is estopped from disputing the right of his bailor, the person who has deposited the money with him, to withdraw it. I entirely agree that this would be so if there had been no illegality in the act of depositing itself. But if I have successfully demonstrated, as I have to my own satisfaction, that the mere making of the deposit was in itself made by the statute an unlawful act, then, for a reason of public policy which makes the resulting rule altogether paramount to any estoppel operating as between the parties, an illegal act having been consummated, the depositor cannot recover back his stake.

The appeal must be allowed with costs and the action dismissed with costs to the appellant in all the courts below.

FOURNIER J.—I am of opinion that this appeal should be allowed with costs, for the reasons given in the judgment of the Chief Justice which I have read.

TASCHEREAU J.—I would dismiss this appeal. The defendant, appellant, has, in my opinion, entirely failed to impeach or weaken in any way the cogent reasoning of the learned judges who formed the majority in the court appealed from. Chief Justice Armour's opinion in the analogous case of *Trebilcock* v. *Gustin* also clearly demonstrates, in my opinion, the unsoundness of the defendant's contentions.

SEDGEWICK J.—This is an action brought by the respondent against the appellant to recover five

1894

WALSH v. TREBILCOCK.

Sedgewick J.

hundred dollars deposited in the month of February, 1892, with the appellant to abide the event of a wager. The wager was in writing as follows:

> Mr. F.T.Trebilcock [the respondent] bets Mr. J. E. Richards ($500) five hundred dollars, that C. S. Hyman is the gazetted Member of Parliament for the city of London at the coming election for the Dominion House to take place on Friday, the 26th day of February, 1892.
>
> (Signed,) FRED. T. TREBILCOCK.
> (Signed,) JOHN E. RICHARDS.

After the election the respondent demanded from the appellant the $1,000 deposited with him, and subsequently demanded from him the sum of $500 deposited by him with the appellant.

After the gazetting of the member for the city of London (Sir John Carling, the opponent of Mr. Hyman, having been declared elected) the appellant paid over the whole money to Richards.

The action was tried before the Honourable Mr. Justice Street, sitting without a jury, who directed judgment to be entered for the respondent for the sum of $500 deposited by him with the appellant, with interest and costs.

The appellant then appealed to the Common Pleas Divisional Court of the High Court of Justice, and subsequently to the Court of Appeal for Ontario, both appeals being dismissed, Mr. Chancellor Boyd, sitting as a member of the Court of Appeal, dissenting.

The appeal is now from the judgment of that court.

The only questions involved are, first, the proper construction to be given to cap. 159 R.S.C. sec. 9, and cap. 145 R.S.C. sec. 7, and secondly, the effect of these statutes upon the transaction.

Now, I propose to construe this statute cap. 159 sec. 9 according to its plain and obvious meaning. I do not care what the intention of Parliament was in passing it if that intention has not been given effect to by the

language used. The words themselves must govern. These words so far as they affect this case are as follows:

> Every one who * * * (*c*) becomes the custodian or depositary of any money, property or valuable thing staked, wagered or pledged * * upon the result of any political or municipal election * * is guilty of a misdemeanour and liable to a fine not exceeding $1,000, and to imprisonment for any term not exceeding one year.

Now the appellant Walsh became the custodian of $1,000 staked upon the result of the London election, a political election. Was that a misdemeanour under the statute? The majority of the Court of Appeal have said no, that the object Parliament had in view was to restrain the abuse to which gambling and betting leads where betting houses or places for recording or registering bets or wagers or selling pools are kept in which money may be staked or deposited in advance or otherwise by all comers, or in which other forms of gambling upon the result of a race or election or other event are facilitated, but that it leaves untouched the stakeholder or depositary of moneys casually bet upon a political election as not being within the mischief of the act; and they rely upon subsection 2, viz.: "nothing in this section shall apply to * * bets between individuals" as conclusively showing that such was the object of the legislation.

Now, if the words of the section are to be any guide as to the legislative intention they show that instead of proposing to deal with two the legislature intended to deal with four practices supposed to be detrimental to public welfare, describing each practice in a separate sub-clause. These are (*a*) the use of premises for registering bets and selling pools; (*b*) the use of apparatus for these purposes; (*c*) the holding of stakes in connection with election bets and bets upon illegal matches of any kind; and lastly (*d*) the registration of such bets.

1894

WALSH v. TREBILCOCK.

Sedgewick J.

I cannot here see the slightest indication on the part of the legislature that the two last mentioned practices were limited by the question of place; that they might lawfully be exercised on the street but became indictable offences when indulged in within the threshold of the betting house; that their criminal character was to be determined by the matter of a road line.

Neither is there any indication that the holding of moneys bet upon elections was, in the conscience of Parliament, less injurious to public morals than the keeping of betting houses or the possession of gambling apparatus. The same sanction is prescribed in each case; the same penal consequences ensue. In the legislative eye they are equal mischiefs. Then as to the exception in subsec. 2 above set out; it is clear that the main section does not attempt to make betting of itself a misdemeanour, not even betting upon political or municipal elections. Betting in any shape or form may be, I believe it is, a mischief; its tendency from first to last is opposed to the greatest good of society; but as a sensible legislature never attempts to suppress even an admitted evil unless there is a fair chance that with the nation's help the attempt will succeed, it did not in the present instance make betting pure and simple, a mere exchange of words between individuals, a criminal offence. But the keeping of betting houses, the public selling of pools, the possession and working of gambling apparatus, the registration in books kept for the special purpose of wagering transactions, and the actual receiving and possessing of money or other property as a stake upon political or other illegal bets, were overt acts, admittedly mischievous but at the same time susceptible of easy proof, and therefore they one and all were made illegal. The excepting statement as to bets between individuals was a declaration by the legislature (it

1894

WALSH v. TREBILCOCK.

Sedgewick J.

may have been an unnecessary statement) that in this particular act it was not attempting to deal with betting *per se*, but only with these concomitants of betting specified in the main section.

So far I am discussing whether the appellant Walsh, the stakeholder, was chargeable with the statutory offence. In any event I do not see how the excepting clause assists him. He made no bet, but he did an act which certainly within the letter, and I believe within the spirit and intention, of the act was expressly declared to be a misdemeanour.

And I am strongly confirmed in this view by a consideration of the analogous Imperial act, 16 & 17 Vict. ch. 199, the provisions of which I doubt not were present to our own Parliament when passing this act. In that act it is manifest that the practices dealt with were acts done in particular places. From the fact that in our act *place* is not made by express words material as regards the offences specified in *c* and *d*, we are justified in assuming that the question of place was immaterial.

Then as to the construction of sec. 7 of chap. 145 :

> Every one who aids, abets, counsels or procures the commission of any misdemeanour whether the same is a misdemeanour at common law or by virtue of any act is guilty of a misdemeanour and liable to be tried, indicted and punished as a principal offender.

Now the making of a bet is one thing, the recording or registration of a bet is another thing and the depositing in the hands of a stake-holder of the amount bet is again another thing. I admit that under the statute the bet itself was not proscribed ; whether the committing to writing of the terms of the bet was a recording or registration of the bet, and consequently a misdemeanour, we are not called upon in this case to decide. I am of opinion, at all events, that it was a misdemeanour on the part of Walsh to act as stake-

1894

WALSH v. TREBILCOCK.

Sedgewick J.

holder of the money. His offence, his only offence, was the taking of the money. Was not the giving of the money to him by the respondent Trebilcock, knowing as he did the purpose of the deposit, an aiding or counselling or procuring of the stake-holder's taking? In my view of this there can be no doubt and therefore Trebilcock was a misdemeanant liable to punishment as a principal offender.

The final inquiry then is: Trebilcock having paid the stake in question, having committed an indictable offence and (we may assume for the purpose of argument having, upon conviction, undergone a year's imprisonment and paid a fine of $1,000,) can he now recover from the stake-holder the $500 wager? (It is quite immaterial that he may have lost his bet and that Richards under the *code d'honneur* was entitled to the $1,000).

Now I agree that apart from the statutes referred to the respondent was entitled to recover and the decision of the courts below was right.

In Roscoe's *nisi prius*, 16th edition, page 590, the law is summed up as follows:

> Where money has been paid in pursuance of an illegal contract it is generally irrecoverable.

Certain exceptions are, however, given as follows:

> But in some cases it is recoverable as money had and received to the use of party paying it; e.g. 1. Where the contract remains executory though the plaintiff and defendant be *in pari delicto* as a deposit upon an illegal wager. Where the plaintiff authorized his money to be applied to an illegal purpose he may recover it before it has been paid over or applied to such purpose. 2. Money is recoverable from a stake-holder in whose hands it has been placed upon an illegal consideration though executed by the happening of the event upon which a wager is made, provided the money has not been paid over by the stake-holder to the other party, or was paid over after notice to the contrary.

1894

WALSH v. TREBILCOCK.

Sedgewick J.

And this statement of the law is fully borne out by the very recent case of *Barclay* v. *Pearson* (1) where the cases of *Hasletow* v. *Jackson* (2) and *Hodson* v. *Terrill* (3) are reviewed and followed, and the law as above stated by Roscoe is approved.

It will be observed that in this extract from Roscoe, as well as in *Barclay* v. *Pearson* (1), the phrases "illegal contract," "illegal purpose," "illegal consideration," are used, and that the right to recover from a stake-holder is treated as an exception to the general rule that "money paid in pursuance of an illegal contract is generally irrecoverable." The word "illegal" has more than one meaning; a contract may be voidable and in that sense illegal at the option of only one of the parties to it; he may take advantage of its illegality although the other party may not; a contract may be illegal because solely upon grounds of public policy the courts will refuse to enforce it, no further penal consequences resulting; and a contract may be illegal because Parliament has enacted that the entering into it is a criminal offence, subjecting the parties to punishment in consequence of their having made it. Is there any distinction between these different kinds of illegality? The general principle is illustrated by Lord Mansfield in *Holman* v. *Johnson* (4).

But courts will aid a party, as the cases cited show, where having only contemplated an illegal act and paid money to an agent (as in the case of an unenforceable bet) in furtherance of it he has, before anything further is done, before any offence is actually committed, done all things necessary to reinstate himself.

But where a plaintiff has actually crossed the line and committed an offence against the criminal law is

(1) [1893] 2 Ch. 154; 3 Rep. 396.
(2) 8 B & C. 221.
(3) 1 C. & M. 797.
(4) Cowp. 341.

1894

WALSH v. TREBILCOCK.

Sedgewick J.

there then a place for repentance? I am inclined to think there is not.

Pollock in laying down the general rule says:

> Money paid or property delivered under an unlawful agreement cannot be recovered back 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).

In *Tappenden* v. *Randall* (1) where the exception above referred to is established, it is intimated that it probably would not be allowed if the agreement were actually criminal or immoral; in that case Heath J. says:

> Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the court to enter into any discussion of it, as where one man has paid money by way of hire to another to murder a third person. But when nothing of that kind occurs I think there ought to be a *locus pœnitentiæ*, and that a party should not be compelled against his will to adhere to the contract.

I pass by numerous cases since; *Pearce* v. *Brooks* (2); *Rex* v. *Dr. Berenger* (3); *Reg.* v. *Aspinall* (4); and refer particularly to *Scott* v. *Brown* (5) decided by the court of Appeal in August last, where the court refused to enforce a contract held to be an illegal transaction and subjecting the parties to indictment for conspiracy.

In the present case, as already stated, the plaintiff had not only proposed the committing of an indictable offence—if that had been all the *locus pœnitentiæ* would have still been open—but had carried his proposition into effect, had committed a criminal act—had by the simple act of paying the stake-holder the money aided and abetted him in becoming in the words of the statute "the custodian of money staked upon the result of a political election," the result being that both are *in pari delicto*, both are amenable to the

(1) 2 B. & P. 467.
(2) L. R. I Ex. 213.
(3) 3 M & S. 67.
(4) 2 Q. B. D. 48.
(5) [1892] 2 Q.B. 724; 4 Rep. 42.

criminal law and neither can avail himself of the civil courts for redress. In my judgment the appeal should be allowed with costs and the action dismissed with costs in all the courts below.

1894

WALSH v. TREBILCOCK.

Sedgewick J.

KING J. I concur in the judgment delivered by the Chief Justice.

Appeal allowed with costs.

Solicitors for appellant: *Meredith & Fisher.*

Solicitors for respondent: *Magee, McKillop & Murphy.*