1900
*Nov. 13.
*Dec. 7.
1901
**Mar. 28.

THE CONSUMERS CORDAGE COMPANY (DEFENDANT AND INCIDENTAL PLAINTIFF) ..... APPELLANT;

AND

NICHOLAS K. CONNOLLY AND MICHAEL CONNOLLY (PLAINTIFFS AND INCIDENTAL DEFENDANTS) ..... RESPONDENTS.

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

Contract—Unlawful consideration—Répétition de l'indu—Account—Public policy—Monopoly — Trade combination — Conspiracy—Malum prohibitum—Malum in se—Interest on advances—Foreign laws—Arts. 989, 1000, 1067, 1077, 2188 *C. C.—Matters judicially noticed.*

In an action to recover advances with interest under an agreement in respect to the manufacture of binder twine at the Central Prison at Toronto, the defence was the general issue, breach of contract and an incidental demand of damages for the breach. The judgment appealed from maintained the action and dismissed the incidental demand, giving the plaintiffs interest according to the terms of the contract.

Held, per Sedgewick, King and Girouard JJ. that the evidence disclosed a conspiracy and that, although under the provisions of the Civil Code the moneys so advanced could be recovered back, yet no interest before action could be allowed thereon, as

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

** PRESENT:—Gwynne, Sedgewick, King and Girouard JJ.

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

the law merely requires that the parties should be replaced in the position they respectively occupied before the illegal transactions took place. *Rolland* v. *La Caisse d'Economie, Notre-Dame de Québec*, (24 S. C. R. 405) discussed and *l'Association St. Jean-Baptiste de Montréal* v. *Brault*, (30 S. C. R. 598) referred to.

Held also, that laws of public order must be judicially noticed by the court *ex proprio motû*, and that, in the absence of any proof to the contrary the foreign law must be presumed to be similar to that of the forum having jurisdiction in an action *ex contractu*.

Per Taschereau, J. (dissenting.)—1. A new point should never be entertained on appeal, if evidence could have been brought to affect it, had objection been taken at the trial. 2. In the present case, the concurrent findings of both courts below, amply supported by evidence ought not to be disturbed, and as the company itself prevented the performance of the condition of the agreement in question requiring the assent of the Government to the transfer of the binder twine manufacturing contract, its non-performance cannot be admitted as a defence to the action upon the executed contract.

Gwynne J. also dissented on the ground that the judgment appealed from proceeded upon wholly inadmissable evidence and that, therefore, the action should have been dismissed and further, that the evidence which was received and acted on, though inadmissible for the purposes for which it was intended, shewed that the action was based upon a contract between the plaintiffs and defendant for the commission of an indictable offence; that neither party could recover either by action or by counter-claim upon such a contract and, therefore, that the incidental demand, as well as the action, should be dismissed.

APPEAL from a judgment of the Superior Court, sitting in review, at Montreal, affirming the judgment of the Superior Court, District of Montreal, which maintained the plaintiffs' action to the extent of $22,-324.48 with interest thereon at eight per cent per annum from 1st October, 1896, until paid, and the interest at the same rate on $4,380.26 from 1st October, 1896, to the 18th of April, 1898, and costs, and further dismissing the defendant's incidental demand with costs.

The circumstances under which litigation arose in this case and the questions at issue upon the appeal

1900

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

are stated in the above headnote and in the judgments reported. The appeal was heard upon the merits on 13th November, 1900.

Fitzpatrick Q.C. (Solicitor General of Canada) and *Chase-Casgrain Q.C.* for the appellant.

E. A. D. Morgan for the respondents.

When the arguments of counsel were concluded, judgment was reserved and on the 7th of December, 1900, an order was made, (Taschereau J. dissenting) in terms, settled by the majority of the court, stated as follows by His Lordship Mr Justice Girouard:

"Before we decide this case we order a re-hearing upon the following questions:

1. Does the evidence establish a conspiracy or illegal combination between the parties affecting public interests?

2. If so, can the court take notice of it, although not pleaded or set up in the factums, or argued at the hearing?

3. And finally, if both questions be answered in the affirmative, are the parties or either of them entitled to an account of the moneys paid and received in the course or by reason of the illegal dealings and operations of the parties and recover the same, or should the court refuse to entertain the action?"

His Lordship Mr. Justice Taschereau dissented from the order and said: "I do not take part in this order. I am of opinion that the appeal should be dismissed with costs." His Lordship's reasons for this judgment appear below.

His Lordship Mr. Justice Sedgewick concurred in the order, and His Lordship Mr. Justice King said: "I am of opinion that the questions framed by Mr. Justice Girouard for a re-argument of the appeal are appropriate; they seem to me to be material" and he concurred in the order.

1900

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

On 7th March, 1901, it was ordered that the re-argument should take place after the hearing of the Ontario Appeals at the Winter Sessions and, on 8th March, 1901, an order was made dispensing with the re-argument, discharging all orders and directions therefor, and the case stood for judgment as it was at the close of the hearing in November, 1900.

On the 28th of March, 1901, Their Lordships Justices Gwynne, Sedgewick, King and Girouard being present, (His Lordship Mr. Justice Taschereau, refusing to take any part, and not present,) judgment on the merits was pronounced by the majority of the court, Gwynne J. dissenting, by which the appeal on the principal demand was dismissed in part with costs, the judgment appealed from being reduced and the appellant condemned to pay to the respondents $18,044.86 with interest thereon from the 23rd of December, 1896, and costs in all the courts, and the judgment appealed from on the incidental demand was affirmed with costs.

TASCHEREAU J.*—On this appeal, which presents very little else but questions of fact, we would all be of opinion to confirm the judgment in the case that has been tried, argued and determined in the court of first instance, that has been argued and determined in the Court of Review, and that has been argued here on both sides. But it is now suggested for the first time that the case should be determined upon a ground never taken at bar, never argued here or in the two courts below, and never tried in the court of first instance. Now, that is an untenable proposition.

I should have thought that if a new point, as the one suggested, had, in our opinion, necessarily to be determined, the rational conclusion would have been,

* Reasons for dissenting judgment of 7th December, 1900.

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Taschereau J.

if not to remit the case to the court below, at least to order that the parties should be heard here upon it.

How fraught with danger of doing injustice is the course proposed, it is unnecessary to insist upon.

If such a point had been taken at the trial, evidence to meet it might have been given. The whole matter might have been explained. And it is a rule, never to be departed from, that a new point in appeal should not be allowed to be taken, if evidence could have been brought to affect it, had it been taken at the trial.

To me it seems almost incredible that it could be proposed, upon mere conjectures and suspicions, to find these parties guilty of conduct amounting to a crime punishable by seven years penitentiary, not only without ever having heard them upon that charge, but even when they have never been charged or accused of it.

As to the merits of the case that was argued and determined in the two courts below, the only case that has been submitted for our consideration, the appeal entirely fails. The concurrent findings of the two courts is, upon overwhelming evidence, that as regards the tender and contract and in the taking possession of and working of the binder twine business in the Central Prison, leased to P. L. Connor by the contract of 25th September, 1895, and which was subsequently transferred to Robert Heddle, the said Connor and Heddle were but the *prête-noms* and salaried representatives of the defendants and acted on their behalf and in their interest, under their control and for their exclusive profit; that for the purpose of the tender, contract and working of said business, which had been carried on by the defendants since the said 25th of September, 1895, the plaintiffs advanced and procured for the defendants, at the agreed rate of interest, the sums mentioned in the declaration and that the plaintiffs fulfilled

all their obligations towards the defendants under the agreement of the 29th of February, 1896; that at their request they caused a transfer of the contract of the 25th of September, 1895, to be made to Robert Heddle, the *prête-nom* and employee of the defendants, and also furnished the capital required for operating the said business, and that this transfer would have received the consent of the Lieutenant-Governor-in-Council, if Heddle, under the advice of the defendants, had not withdrawn his demand to that effect.

The appellant's contention based upon the condition requiring the consent of the Lieutenant-Governor-in-Council to the transfer of the contract in question, amounts to nothing else than a fraudulent attempt on its part to get rid of its responsibilities. Under the circumstances of the case, the appellant cannot now be admitted to avail itself of that defence upon an executed contract.

Sir Melbourne Tait, in the Court of Review, has fully demonstrated this. I do not see anything that can be added to his comments upon the case.

GWYNNE J. (dissenting).—This appeal presents a most singular case of what the plaintiffs in the action, the now respondents, claim to be the simple case of money lent and advanced by the plaintiffs to the defendants and paid to and for their use at their request. To establish this contention a volume of 500 pages of printed matter containing the pleadings, evidence and reasons for the judgment now in appeal, and 49 pages of printed matter in an argument presented to us by the respondents in their factum have been deemed to be necessary, an unusual circumstance in the case of a simple action to recover money lent and advanced to, and to the use of, the defendants at their request.

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Gwynne J.

The declaration, in which the plaintiffs' cause of action is asserted, alleges that on the 29th day of February, 1896, the defendants were indebted to the plaintiffs in divers sums of money, to wit, in the sum of $5,000 advanced for their benefit by the plaintiffs and deposited with the Government of the Province of Ontario to accompany a tender for the obtaining of a contract for the manufacture of binder twine at the Central Prison at the City of Toronto, and at their request, and in the further sum of $7,350 for a like sum constituted a first charge on the earnings of said manufacturing institution at the said Central Prison at Toronto and taken over by plaintiffs in settlement of a certain claim due them, and accepted by the said defendants as a debt and charged on said business to be repaid by them, and the further sum of $22,048.52 advanced by the plaintiffs at the request of said defendants *and invested in the said business*, and interest on the said different amounts, and lastly "for an overcharge on a certain lot of twine amounting to $303.30." The declaration then alleges that on the 29th day of February, 1896, the said plaintiffs and the defendants acting by and through their general manager, one Elisha M. Fulton, entered into a certain written agreement whereby it was agreed and covenanted that the plaintiffs should transfer to the defendants the right from the Government of the Province of Ontario to manufacture binder twine in the Central Prison, *which contract* P. L. Connor had already transferred to them, and further, that the plaintiffs would furnish the defendants with the necessary capital to carry on the business of manufacturing twine at said Central Prison during the then ensuing season of 1896, and that they should obtain necessary discounts with the assistance of the defendants from the Dominion Bank of Toronto, and that at least $40,000 of the

sum furnished should be repaid between the 1st and 15th days of June then next, and as to the balance all the moneys *invested by the plaintiffs in the said business* were to be repaid by the 1st day of October then next, save and except the aforesaid mentioned sum of $7,350, the repayment of which sum was to extend over the first two years of the Government contract.

The declaration then proceeded to claim in the itemized account the said several sums of $5,000 as advanced on the 21st August, 1895, with interest thereon from that date; $7,350 as advanced on the 25th day of September, 1895, with interest thereon from that date; $22,048.52 as advanced on November 7th, 1895, with interest thereon from that date, and certain other items amounting in the whole (after deduction of certain sums entered therein as credits) to $34,054.74, which sum with interest thereon at 8 per cent since October 1st, 1896, is what the plaintiffs claimed in the action.

Now here it is to be observed that the declaration contains no averment of the performance by the plaintiffs of any of the acts by the agreement of the 29th of February, 1896, covenanted to be performed by them, nor of any advances having been made by the plaintiffs to the defendants under the clause in that agreement by which they undertook to furnish the necessary capital to carry on the business of manufacturing twine in the Central Prison during the season of 1896. The sole claim made by the declaration is in respect of the principal sums of $5,000, $7,350 and $22,048.52 alleged to have been advanced to the defendants at the respective dates aforesaid of the 21st of August, 25th of September and 7th November, 1895, together with interest thereon and a few other items not appar-

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Gwynne J.

ently connected with the agreement of 29th of February, 1896.

To this declaration the defendants pleaded;

1st plea: A general denial.

2ndly. A special plea that the plaintiffs never performed the essential condition precedent necessary to the contract of 29th February, 1896, going into effect and becoming binding upon the company defendant, and never gave and secured to the defendants the object and consideration of their said contract, to wit, the right from the Government of Ontario to manufacture binder twine at the Central Prison for the period mentioned in the contract of the 25th of September, 1895, but wholly failed to secure such right to the defendants. And

3rdly. A plea in thirty-four paragraphs which is in substance and effect an amplified repetition of the matters pleaded in and covered by the two previous pleas coupled with a long argument insisting with great prolixity upon the particular points in which the plaintiffs failed in the performance of their covenant in the said agreement, as had been pleaded in the said second plea. All of which matters, assuming the defendants' construction of the agreement of 29th of February to be correct, were matters the performance of which it was necessary for the plaintiffs to have averred in their declaration, and to establish in evidence in order to succeed in an action against the defendants for breach of their covenants contained in the instrument.

Now as to the second plea the averments therein contained although proper and essential in an action or an incidental demand instituted by the defendants against the plaintiffs for breach of their covenants in the instrument were quite inappropriate and unnecessary as a plea by way of defence to an action framed

as the cause of action set out in the declaration in the present case is, wherein the contention of the plaintiffs simply is that the true construction of the instrument of February, 1896, is that the defendants thereby covenanted to pay to the plaintiffs moneys then due for money previously lent and advanced by the plaintiffs to and for the use of the defendants at their request, a point determinable by the construction of the instrument.

The whole of the matters in the third plea (it must, I think, be admitted,) were also wholly irrelevant and unnecessary and improper to be set out upon the record as a plea to the cause of action as set out in the declaration. A few of the paragraphs will serve as a specimen of the whole.

The fourth paragraph avers simply a fact appearing on the face of the contract of the 25th September, 1895, mentioned in the declaration, namely, the names and description of the several parties thereto.

The fifth paragraph simply stated what was the provision contained in the seventeenth paragraph of the said contract of the 25th of September, namely, that

the contractor shall not assign this agreement or sublet the same without the consent of the Lieutenant Governor in Council.

The plea in its sixth paragraph averred that the contractor referred to in paragraph seventeen of the contract was the said P. L. Connor, and the Lieutenant Governor in Council referred to was the Lieutenant Governor of the Province of Ontario and the Executive Council of that province.

In the seventh paragraph the plea averred that the said Lieutenant Governor in Council had never assented to any assignment of the said contract by the said P. L. Connor to the plaintiffs.

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Gwynne J.

In the eighth paragraph it was averred (in short substance) that it was a condition precedent to any obligation undertaken by defendants by the agreement of February, 1896, without which they would not have entered into that agreement that the said plaintiff should lawfully assign the said contract of the 25th September, 1895, to the defendants in accordance with said seventeenth paragraph thereof, viz., with the assent and approval of the Lieutenant Governor in Council.

In the ninth paragraph it was averred that by the said agreement of February, 1896, the plaintiffs undertook and agreed that the said contract of the 25th September, 1895, should be legally transferred to the defendants with the consent of the Lieutenant Governor in Council.

In the tenth paragraph it was averred that the plaintiffs had frequently acknowledged and submitted, as was the fact, that they were bound to transfer the said contract and to procure the assent of the Lieutenant Governor in Council thereto, and that without such transfer the defendants never consented to, authorised or incurred any liability to the defendants.

By paragraph twenty-seven it was averred that without a due and legal transfer of the said contract of the 25th of September, 1895, duly assented to by the Lieutenant Governor in Council the said defendants would not have had any *locus standi* in and with respect to the said prison plant and would have been without any right or title to conduct the said operations, and as a matter of fact the said prison authorities never in any manner or form recognised the said defendants in any manner in connection with the said prison plant but always dealt in respect thereto, with the said P. L. Connor and his representatives.

All these matters (and all the other paragraphs of this third plea are of similar nature) constitute simply an argument in support of the defendants' construction of the contract of February, 1896, and seem to have been inserted solely for the purpose of meeting the plaintiffs' construction of that agreement as appearing in their declaration to the effect that it was entered into merely in respect of, and to prescribe the times of payment of sums of money antecedently lent and advanced by the plaintiffs to the defendants at their request. These several matters so with great prolixity set out upon the record did not in reality constitute any issuable pleading by way of defences to the cause of action set out in the declaration which, as already observed, was for the recovery of sums alleged to have been lent and advanced by the plaintiffs to the defendants at their request prior to the 29th of February, 1896, and by that instrument covenanted to be paid at the times therein mentioned with interest as therein mentioned.

The plaintiffs by way of answer to the above pleas pleaded to the said second plea as follows:

That each and all and every of the allegations of said plea is and are false except in so far as the same may be specially hereinafter admitted. That as appears by the allegations of the plaintiffs' declaration the defendants were indebted to the plaintiffs for the causes set out in the said declaration prior to the agreement of the 29th of February, 1896, which the said defendants' plea calls the "*pretended contract which is invoked by the plaintiffs, and which is really the sole ground of their pretended demand against defendants,*" and that the said agreement *only fixed the date* of the repayment of said sums advanced long previously by the plaintiffs to the defendants at their request and for their benefit in connection with the Central Prison binder twine contract."

And further among other things not necessary to be set down at large

that the said P. L. Connor, mentioned in the said agreement, had been long previous to the said 25th day of September, 1895, employee and *prête-nom* of the said defendants, and both he and the plaintiffs would

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Gwynne J.

only have been too willing to transfer not only the right to manufacture, which they did, but also would have been willing that the contract should have been in name as it was in fact transferred to defendants, but the latter never wished same to be done, but preferred carrying on as they ever did since the date of the said contract between the Inspector of Prisons and said P. L. Connor the business for the sole benefit of the said company defendant by whom it *was assumed confidentially and under the asked and granted pledge of secrecy*, and that for the benefit and advantage of the defendant company.

To the defendants' third plea the plaintiffs pleaded an answer which, as it is pleaded in reply to a pleading itself irrelevant and defective for the reasons already stated, partakes necessarily of the same defects as those which characterized the plea to which it is pleaded in reply; it is unnecessary therefore to notice it further than to say that it repeats what had been alleged in the answer to the defendants' second plea, and contains what has been throughout the trial, and still is, the main contention upon which the plaintiffs rest their cause of action and their right to maintain the judgment therein now under consideration.

The allegation is

That the said P. L. Connor obtained the said contract for the benefit of his employers the said defendants; that the whole business was assumed confidentially by them, and that from and after the going into force of the said contract of the 25th of September, 1895, the whole business was carried on for the exclusive benefit of the said defendants and under their sole control, the only right pertaining to the said plaintiffs in respect of said contract, and the business connected therewith being their option of advancing the money necessary for the carrying on said business *at six per cent interest per annum and two per cent bonus.*

The defendants filed an incidental demand for damages alleged to have been sustained by them by reason of the non-fulfilment of the covenant of the plaintiffs contained in the said agreement of the 29th of February, 1896, to which the plaintiffs as incidental defendants pleaded by way of defence the same matters

which they had pleaded by way of answer to the pleas of the defendants in the principal action.

Now the sole contention of the plaintiffs upon this singularly framed record was that the defendants being upon the 29th of February, 1896, indebted to the plaintiffs in the several sums stated in the declaration mentioned for advances of like sums made at the respective dates in the declaration mentioned by the plaintiffs to the defendants at their request, executed the instrument of February, 1896, for the sole purpose of prescribing the times and mode of repayment of such loans, and that such was the sole intent and effect of that instrument, while on the contrary the contention of the defendants was that the sole obligation incurred by the defendants to the plaintiffs was incurred under, and by virtue of, the terms of that instrument of February, 1896, which as they contend was a contract of purchase by the defendants, and of sale and transfer by the plaintiffs to the defendants, or as they should direct, of the contract between the Ontario Government and P. L. Connor of the 25th September, 1895, for the residue of the term by that contract created and which the plaintiffs declared to have been transferred to them and to be in their power to transfer to the defendants; and the defendants filed their incidental demand for damages alleged to have been sustained by them for non-fulfilment by the plaintiffs of their covenant in that behalf contained in the said instrument and to be performed by them. The main contention between the parties thus appears to have been as to, and to be determinable by, the construction of the instrument of February, 1896. The case proceeded to *enquête*. The contract of the 25th September, 1895, having been produced by and on behalf of the plaintiffs it appeared that Patrick Louis Connor therein described as of the City of Brantford, in the

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Gwynne J.

County of Brant, thereinafter called the contractor, did for himself, his heirs, executors, administrators and assigns covenant with the Inspector of Prisons among other things,

to at all times at his own cost provide all expert labour and instruction necessary in manufacturing and to supervise and instruct the prisoners in the work required of them in operating the plant, &c.

The contract then contained provisions for limiting the price at which the twine manufactured at the prison should be sold to the farmers. Then by sections 13, 14 and 17 it was agreed as follows:

13. The contractor shall take over at cost all the manufactured twine and binder twine material on hand at the time of entering upon the contract, the twine at a price to be arrived at the same as provided in making up the selling price of twine by the contractor, and the unmanufactured material at invoice prices, with cost of delivery at the prison added.

14. This contract shall, subject to the herein contained provisions as to default and resumption by the Government, be in force from the 1st day of October, 1895, until the 1st day of October, 1900, renewable for a further period of five years provided the Lieutenant Governor in council considers it in the public interest that such further period should be granted.

17. The contractor shall not assign this agreement or sublet the same without the consent of the Lieutenant Governor in Council.

The plaintiffs also produced the agreement of the 29th of February, 1896, which is as follows:

It is hereby mutually agreed by and between the Consumers Cordage Company, limited, a body corporate and politic, with its head office and chief place of business in the City of Montreal, P.Q., party of the first part, and the firm of N. K. and M. Connolly, contractors of the City of Quebec, party of the second part, witnesseth that whereas Mr. P. L. Connor, of Brantford, Ontario, has acquired the right from the Government of the Province of Ontario, to manufacture binder twine in the Central Prison in the City of Toronto, in the said province, for a period of five years from October 1st, one thousand eight hundred and ninety-five, to October 1st, nineteen hundred, the party of the second part hereby agrees to transfer and make over to the party of the first part *the said right from the Government* of the Province of Ontario *to manufacture binder twine in the Central Prison* in the City of

Toronto in the said province *for the full period of said contract with P. L. Connor.*

The party of the second part further agrees to furnish all the capital that may be required for said manufacturing operations at said Central Prison for and during the full term of the twine season of 1896 at which time the party of the first part hereby agrees to reimburse the party of the second part *all money they have invested in the said business*, and not later than October 1st, 1896, with interest thereon at eight per centum per annum, *but* it is understood and agreed that at least $40,000 (forty thousand dollars) of this shall be paid between June 1st and 15th, 1896, and if required the party of the second part shall assist the party of the first part to obtain any part *of this amount* through the Dominion Bank at Toronto, as well as a sum of $7,350 constituted by P. L. Connor as a first charge on the earnings of the said manufacturing institution *and taken over by the party of the second part* in settlement of accounts with John Connor of St. John, N.B. The payment of this amount shall extend over the first two years of the Government contract.

This agreement is signed E. M. Fulton as manager of the Consumers Cordage Company, limited, on behalf of that corporation, and by N. K. and M. Connolly, the plaintiffs in the present action. Now as the main question between the parties as to the plaintiffs' right to succeed in this action is as to the admissibility of evidence tendered by the plaintiffs and objected to by the defendants' counsel and received by the learned judge at *enquête* subject to such objection and to future consideration as to its admissibility and as to whether it should be acted upon, and as that question depends upon the construction of the contract of February, 1896, it will be convenient before entering upon this latter question to advert to certain other evidence given at *enquête* not objected to, or open to objection, and which seems to have also a bearing upon the question whether the evidence objected to by the defendants and received subject to further consideration should be accepted and acted upon as admissible.

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Gwynne J.

It appears then that in the summer of 1895 the plaintiffs, Nicholas K. Connolly and Michael Connolly and one John Connor, trading in partnership together under the name, style and firm of "The Continental Twine and Cordage Company," were carrying on the business of manufacturers of rope and binder twine at certain premises in the City of Brantford, leased from defendants, under a lease dated the twenty-eighth day of January, 1895, and also at the Penitentiary at Kingston under some contract executed by the Dominion Government which was not produced, but of which the said partnership firm had control. The business carried on by the said firm at Brantford was under the management of Patrick L. Connor as superintendent for and on behalf of the said partnership firm in which employment he himself said that he continued until the first of November, 1895, at which time the lease of the Brantford premises where the said partnership business had been carried on, was taken off the hands of the lessees by their lessors the defendants.

In the month of July or early in the month of August, 1895, the Ontario Government advertised for tenders for leasing the Central Prison plant for manufacturing rope and binder twine and required each tender to be accompanied with the deposit of $5,000 as security for the *bona fides* of the tenderer and to remain as security for the fulfilment by the lessee of the terms of the lease in the event of the tenderer becoming the lessee. On or about the 21st of August, 1895, Patrick L. Connor, being at that time in the employment of the Connollys, and John Connor (who was his brother) as their superintendent of the home manufacturing business carried on by them at Brantford, put in a tender to the Ontario Government in reply to their advertisement for tenders for a lease of the Central Prison twine manufacturing plant.

About the 20th of August John Connor drew upon his partners, the present plaintiffs, for $5,000, payable at sight to his own order. This draft was addressed to the plaintiffs, to care of R. Moat & Co., bankers, Montreal, who were the brokers of the plaintiffs and (as deposed by the plaintiffs' bookkeeper) was cashed by Messrs. Moat & Co. and forwarded to John Connor and was deposited with Patrick L. Connor's tender in accordance with the requirements of the Ontario Government's advertisement for tenders. This is the first item in the plaintiffs' declaration and in the itemized account therein charged under date of 21st August, 1895.

Afterwards, on September 13th, 1895, P. L. Connor put in another or substituted tender and in relation thereto, on the 18th September, addressed and sent to the inspector of prisons a letter in which, referring to his new tender of the 13th instant, and to certain matters connected therewith, and to the contract tendered for, he makes use of the following language :—

> It is also understood that the cheque for $5,000 which accompanied my first tender in this matter is to be held by you as security to the Government for carrying out my second tender as explained by this letter.

Then as to $7,350, the second item in the plaintiffs' declaration, and which the plaintiffs therein allege to have been an item of debt owed by the defendants to the plaintiffs upon, and prior to, the 29th day of February, 1896, and which is charged in the itemized account set out in the declaration as having accrued due upon the 25th day of September, 1895, and therefore from that date interest is charged thereon, Martin Connolly, the then book-keeper of the plaintiffs, deposed that all he knew as to that item was that he had seen a note for t at amount made by Patrick L. Connor to the plaintiffs, but when he saw it, he did

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Gwynne J.

not say, but he said that he knew nothing whatever as to the consideration for which it was given, although he adds that he was confidential clerk of the plaintiffs as a rule. In short there is not a particle of evidence offered in the case for the purpose of establishing that, and the plaintiffs do not contend that, as is averred in the plaintiffs' declaration, this sum constituted a debt due by defendants to the plaintiffs prior to the 29th of February, 1896. The evidence does not profess to disclose any liability whatever of the defendants to the plaintiffs in respect of this item other than such as appears in the agreement of the 29th of February, 1896, the nature and character of which we shall consider in the construction of that instrument.

Now as to the sum of $22,048.52, the third item in the plaintiff's declaration, that sum constituted money payable to the Ontario Government by Patrick L. Connor under the 13th paragraph of his contract of the 25th September for the manufactured twine and binder twine material then on hand, and it was paid by him in the month of November of that year to the Ontario Government out of the proceeds of a cheque of Messrs. R. Moat & Co., Montreal, the brokers of the plaintiffs, dated the 7th November, 1895, for $25,000 (twenty-five thousand dollars), and made payable to the order of the plaintiffs and indorsed by them to the said John Connor, the brother of Patrick L. Connor, and plaintiffs' partner. Now as to this item Martin Connolly, the bookkeeper of the plaintiffs, and called as a witness by the plaintiffs, said that he knew that the plaintiffs' brokers in Montreal had charged this sum in the firm's account to Mr. Michael Connolly, and that on a subsequent occasion, but when he did not say, Mr. Michael Connolly told him to charge the amount, $25,000, *to the Central Prison account*, which, he said that he accordingly did; and he added that subse-

quently, it having appeared that some four hundred and odd dollars had gone into the Brantford business, the charge to the Central Prison account was reduced to $22,048.52, and this, he said, took place when the plaintiffs came to have a settlement with Mr. Fulton, but when this took place he did not say, but naturally, in view of the contract of the 29th of February, 1896, it must needs have been after the execution of that instrument and for the purpose of arriving at the amount of the moneys in that instrument referred to as the *investments* theretofore made by the plaintiffs in the binder twine manufacturing industry at the Central Prison with the view of determining the extent of the defendants' liability under that instrument.

Now the materiality of this evidence in the present case is that, in the books of the plaintiffs, there seems to have been an account opened as the Central Prison account to which this sum of $25,000 was, by the direction of one of the plaintiffs, charged.

The evidence given by the plaintiffs' bookkeeper as to this item is important as evidencing the fact that the plaintiffs, when one of themselves directed this amount to be charged against an account opened in their books and known as the Central Prison account, must have been interested in the business carried on at the Central Prison in respect of which the account was opened. That seems at least to be the natural conclusion to arrive at from the bookkeeper's evidence.

There is still one other piece of documentary evidence to be referred to, prior to the execution of the agreement of the 29th of February, 1896. It is a letter of the 24th of February, written by the plaintiff, Michael Connolly, giving to Mr. Heddle an introduction to a Mr. Archbold, a person then employed as an accountant in the business of manufacturing twine at the Central

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Gwynne J.

Prison under the lease to P. L. Connor. My purpose of referring to it is simply to evidence the fact that Mr. Michael Connolly was exercising some control over that business quite inconsistent with the present contention of the plaintiffs' that they never had any concern with, interest in, or control over, the business carried on at the prison, the whole of which, as they allege, was the sole business of the defendants, which in fact and truth had always, from the making of the contract of the 25th September, been under the sole management and control of the defendants.

The terms of the letter are just those which would naturally be used by a person interested in and having management and control of the business. The letter is as follows:—

MONTREAL, February 24th, 1896.

MR. ARCHBOLD,
Central Prison, Toronto.

DEAR SIR,—This letter will introduce to you the bearer, Mr. Heddle, *to whom you will submit your accounts and any statement in connection with the industry* you are able to furnish him; *kindly introduce him to Mr. Daly who, as well as yourself, will kindly take any instructions Mr. Heddle wishes to give.*

Yours very truly,
M. CONNOLLY.

Within four days after the date of this letter, the agreement of the 29th February, 1896, already set out was executed, and the plain construction of that instrument is that the plaintiffs thereby covenanted to transfer and make over to the defendants (or to cause to be transferred to them or to such person as they should direct, for that would be a discharge of the plaintiffs' covenant) the right granted by the Ontario Government by the contract of the 25th September, to P. L. Connor, to manufacture binder twine at the Central Prison for the full period of the five years granted by the said contract to said P. L. Connor; that in the

said business of manufacturing twine under said contract they, the plaintiffs, *had invested* divers moneys, the amount of which is not stated; that further they were possessed of a claim for $7,350 which P. L. Connor had legally and effectually constituted a first charge upon the earnings of the said manufacturing institution in satisfaction of that sum due by John Connor (P. L. Connor's brother) upon a settlement of accounts between him and the plaintiffs his copartners; and by the instrument the plaintiffs further covenanted *to furnish all the capital* that might be required for said manufacturing operations at said Central Prison for and during the full term of the twine season of 1896, and the defendants in consideration thereof and as the purchase money to be paid by them for such transfer covenanted to pay to the plaintiffs all the moneys then already invested by them and thereafter to be invested by them in the said twine manufacturing operations by way of capital to be furnished by them under their covenant in that behalf with interest at 8 per cent not later than the 1st October, 1896, and of the sum total of such investments which was expected to exceed $40,000, the defendants covenanted to pay $40,000 between the first and fifteenth of June, 1896, and they further covenanted to pay to the plaintiffs within the first two years of the term granted by the said contract between the Ontario Government and P. L. Connor, so as aforesaid covenanted to be transferred by the plaintiffs to the defendants, the said sum of $7,350, so as aforesaid alleged to have been constituted by P. L. Connor a first charge in favour of the plaintiffs upon the earnings of the manufacturing operations carried on under said contract.

Now as to this contract, and first as to this sum of $7,350, it appears to be recoverable only by way of satisfaction of a like sum alleged by the contract to have

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Gwynne J.

been constituted by P. L. Connor a first charge in favour of the plaintiffs upon the operations carried on under his contract with the Ontario Government to be so constituted a valid charge upon the industry at the Central Prison by Connor, it must have been so charged as to affect the legal term created by the instrument of the 25th September, 1895, vested in him and his assigns; and for the plaintiffs ever to recover that sum against the defendants upon this covenant of theirs in the instrument of February, 1896, it would be necessary, I apprehend, for the plaintiffs to aver in their declaration and to prove in evidence that the charge was legally constituted by P. L. Connor, and that the legal estate and interest subjected to the charge by Connor had been effectually transferred to the defendants or to some person appointed by them so as to vest in the defendants or such person the legal estate or interest which had been vested in Connor, and by him subjected to the charge. It cannot admit of a doubt that this sum of $7,350 is by the instrument of February, 1896, made part of the purchase money or consideration covenanted to be paid by the defendants for the legal and effectual transfer to the defendants, or as they should direct, of the Ontario Government's contract or lease with Connor, and there is nothing whatever in the instrument to justify a suggestion that the consideration for the other sums made payable by the defendants by the instrument is different from the consideration for the covenant to pay the $7,350, namely, the transfer of the legal and beneficial interest in the contract of the 25th September, 1895, which the plaintiffs covenanted by the instrument to transfer. In the declaration in the present action there is in reality no case whatever made for the recovery of that sum under the terms of the instrument of February, 1896, and so neither for the recovery of any of these

other sums mentioned in the instrument to become payable by the defendants.

Then as to these sums of $5,000, and $22,048.52, claimed by the plaintiffs in their declaration, these sums clearly appear to be, and must be regarded as being, moneys then already *invested* by the plaintiffs in the said twine manufacturing business at the Central Prison. As to the $5,000 it was *invested*, as we have seen, on the 21st of August, 1895, at which date Mr. John Connor admits that he was not engaged in the service of the defendants, but was then the partner of the plaintiffs in manufacturing twine at Brantford, of which business, as already stated, P. L. Connor admitted himself to have been superintendent on behalf of the partnership firm consisting of his brother and the plaintiffs until the 1st of November, 1896, when the lease was taken off their hands by the defendants.

As to the $22,048.52 I have already adverted to the manner in which that sum came to be entered by the plaintiffs in the books kept by them as a charge against the Central Prison Account. As to the covenant to furnish *all the capital necessary to carry on the manufacturing operations* at the Central Prison during the season of 1896, it is to be observed that such capital was to be furnished at the sole charge and expense of the plaintiffs; the defendants were under no obligation whatever to assist the plaintiffs in providing that capital or any other sum whatever. This, the plaintiffs' covenant to furnish all the necessary capital to carry on the business during the year 1896, seems to constitute a joint adventure or partnership between the plaintiffs and the defendants in the said manufacturing operations until the close of the season of 1896 upon an agreement that the moneys which the plaintiffs had already *invested* in the said

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Gwynne J.

manufacturing operations prior to the 29th of February, 1896, together with what should thereafter be *invested* by them under their covenant to furnish the necessary capital for the season's operations, together with interest at the rate of 8 per cent should be paid by the defendants to the plaintiffs at latest by the 1st of October, 1896, when the plaintiffs' connection with the business should cease; the intention and expectation of both parties being, as I think would seem, that these sums should be paid out of the proceeds of the sale of the season's manufactured twine which by that time were expected to be realised; and this would seem to account also for the plaintiffs covenanting to assist the defendants, if required, in raising at the bank in June the moneys then payable in advance of the realisation of the stock manufactured during the season. Now that the plaintiffs had in fact at the time of the execution of the agreement of the 29th February, 1896, the beneficial interest of P. L. Connor in the agreement of the 28th September, 1895, and although not the legal estate vested in them in the sense of being accepted as lessees in the place of Connor under the seventeenth paragraph of the Government's contract yet that they had absolute control over P. L. Connor in compelling him to transfer such contract so that it should be effectually transferred and made over to the defendants or as they should direct for the full period of five years mentioned in the contract of September, 1895, as covenanted by the plaintiffs, appears from the following letter addressed by the plaintiff, Michael Connolly, to Martin Connolly the plaintiff's bookkeeper at Quebec:

COLORADO SPRINGS, Colo., April 18th, 1896.

MY DEAR MARTIN,—On my return I intend to stop off a day in Toronto and in order to save time and avoid making another trip there, *if I had the papers that P. L. Connor signed making the transfer of*

the Central Prison contract I might get it transferred while I am there, I wish therefore you would send the transfer he has signed to my address, Queen's Hotel, Toronto, and when I am there I will see if the transfer cannot be made to Heddle ; but perhaps N. K. (meaning the other plaintiff) had best see Fulton and find out from him if there is no other person to whom he would as soon have the transfer made.

I expect to reach Leadville this evening about six and of course will then know what there is in sight.

Yours truly,
M. CONNOLLY.

The bookkeeper to whom this letter was addressed complied with the request therein contained.

Then there is a letter dated the 18th May, 1896, from the plaintiffs to Mr. Heddle which seems to show very plainly that Mr. Heddle was then under the actual control and in the employment of the plaintiffs in the discharge of duties in connection with the Central Prison. It is as follows:

QUEBEC, May 18th, 1896.

R. HEDDLE, Esq , Brantford.

DEAR SIR,—Referring to your favour of the 12th instant we would say that we have been assured by Mr. John Connor that the different owners of the respective notes that have been protested would take immediate steps to make a settlement and we would wish you to get them from the bank when paid and forward to us here.

Our Mr. Michael Connolly writes asking us to get you to ascertain whether Mr. P. L. Connor's house at Brantford is free from incumbrance, and he also states that Mr. P. L. C. was to pay for horse and rig purchased by him from the Continental Company. If this has not been done it would be well for you to take possession of the horse for the company or sell it if you cannot find use for it.

Mr. Connolly also states that he promised the Dominion Bank that he would give them all our collections in connection with the Central Prison and wishes you to act accordingly.

Yours faithfully,
(Signed,) N. K. & M. CONNOLLY.
Per M. P. CONNOLLY.

Then by a letter dated 30th May, 1896, from the plaintiff, Michael Connolly, to Mr. Heddle, it appears

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Gwynne J.

that the plaintiffs were as anxious, as they allege the defendants were, to preserve secrecy as to the business of manufacturing twine at the Central Prison, and that such secrecy consisted in not letting it be known that either the plaintiffs or the defendants had any connection with the business carried on at the prison. The letter is as follows:

DEAR MR. HEDDLE,—I wrote you to-day sending you a copy of a letter to be addressed to Mr. Gibson asking that you be substituted for Connor as the contractor for the Central Prison output or manufacture. I hope you will get the thing through as soon as possible.

I also sent you a letter from parties to Kelly making inquiries about prices of binder twine. *When answering them you had best use plain paper so as to not identify the Continental with any of the prisons.*

The copy of the letter to be sent to Mr. Gibson was also produced and it was headed with the words following:

Do not use any letter heading but plain paper.

"The Continental" here mentioned is a body corporate into which, by letters patent dated the 28th of December, 1895, Messrs. John Connor and the plaintiffs who had previously carried on business in partnership under the name, style and firm of the "Continental Twine and Cordage Company," and two others were incorporated into a company under the same name with the affix, "Limited."

If as is now contended by the plaintiffs, P. L. Connor acquired the Government contract of the 25th September in his own name, but in truth to and for the sole use and benefit of the defendants, holding it as their servant, agent or *prête nom*, and if from that date, (as is also now contended by the plaintiffs) always continually enjoyed the full benefit of that contract to their own use, and have always had the sole management and control of the business carried on under the contract, and if as is also now alleged

by the plaintiffs they had no interest whatever in said business and never interfered in its management or control it is difficult to understand how Mr. Heddle (if at the date of the 30th May, 1896, he was acting solely as the agent of and under the sole management and control of the defendants), should have had in his possession the paper headed with the name of the Continental Twine and Cordage Company, or why Mr. Michael Connolly should have been the person to caution him to be guarded as to what paper he should use upon the occasions referred to in the letter of 30th May.

It must be admitted *that the act* of Mr. Michael Connolly upon that occasion is inconsistent with the present contention of the plaintiffs.

Now the admissibility of the evidence which was objected to by the defendants' counsel, and which was received subject to such objections and to future consideration as to its admissibility, and as to its being acted upon by the court, must be tested not merely by reference to the instrument of the 29th February, 1896, and to its true construction, but also by the other acts, documents and evidence to which I have referred.

The Superior Court adopted and acted upon as admissible the whole of the evidence so objected to, and the judgment founded upon that evidence has been maintained by the Court of Review. The judgment in its first *considérant* adjudges

that it results from the proof and documents in the case that the tender, the contract, the taking possession and the operation of the rope factory established in the Central Prison of Ontario, at Toronto, and leased to one Patrick Louis Connor, by contract dated September 25th, 1895, and subsequently transferred to one Robert Heddle, the said Connor and Heddle were only the *prête noms* and salaried representatives of the defendant, that they acted on its behalf and for its interest, under its exclusive control and direction and for its profit and advantage solely, and that for the purpose of the tender, contract

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Gwynne J.

and operation of the said rope factory which was always operated by the defendants since September 25th, 1895, the plaintiff advanced and furnished to the defendant on demand of its authorised officers the sums of money at the rates of interest mentioned in the principal demand.

Then in a second *considérant* it is declared that the defendants have fulfilled all the obligations incumbent upon them by the agreement of February 29th, 1896. No possible force can be given to this *considérant*. It was doubtless introduced in reference to the second plea above set out, which, as I have already shewn, offered no issuable matter by way of defence to the plaintiffs cause of action as set out in their declaration. The first *considérant* wholly disposed of that cause of action, and in view of that adjudication the second *considérant* is insensible as in truth amounting no more than this—that whereas by the first *considérant* it is established that the plaintiffs had never had any interest in or control over the property which, by the agreement of the 29th of February, 1896, they covenanted to transfer to the defendants, but that such property was always the property of the defendants and in their actual possession and enjoyment, and under their sole management and absolute control, and that therefore the plaintiffs could not have been and were not under any obligation to transfer to the defendants the property which they had always had in their actual possession and enjoyment and being under no such obligation by the instrument of the 29th of February, 1896, they fulfilled that obligation. In another *considérant* the court held that the $7,350 is not yet exigible and for that reason and for that only was deducted from the amount claimed, and after another *considérant*, that the pretention contained in the defendants' plea and incidental demand against the incidental defendants are unfounded, the judgment condemned the defendants to pay to the plaintiffs the sum

of $22,324.48, with interest at 8 per cent from 1st October, 1896, until payment, with costs, and dismissed the incidental demand with costs.

The effect of acting upon as admissible the evidence which was objected to by the defendants has been, in my opinion, and I say it with the greatest deference, and the effect of the first *considérant* found thereon as above set out, has been to subvert and render wholly nugatory a rule prevailing in the jurisprudence of every country, and which, in the jurisprudence of the Province of Quebec, where the action in the present case was instituted, is expressed in art. 1234, C.C.,

that testimony cannot in any case be received to contradict or vary the terms of a valid written instrument.

It has also had the effect of pronouncing at the instance of one of the parties, the instrument of the 29th February, 1896, deliberately signed by both parties, to be absolutely delusive, nugatory and false, and for that reason to be wholly void, or else to be capable of the construction now contended for by the plaintiffs, which construction is wholly inadmissible as being in direct contradiction of the plain terms of the instrument and wholly inconsistent moreover with all the facts in evidence exclusive of the evidence objected to. The admission of the evidence objected to has also had the effect of introducing into the case a flood of false swearing, an evil, the prevention of which constitutes a large portion of the foundation upon which the rule of law, as expressed in art. 1234, C.C., is based. As I am of opinion that the evidence upon which the judgment is founded was inadmissible, and that, therefor, the judgment founded thereon cannot be maintained, I do not propose to analyze the evidence for the purpose of discovering upon which side the false swearing has been, nor whether upon one side only;

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Gwynne J.

but no one can read the large mass of matters which have been introduced for the purpose of establishing a claim which, in contradiction of the plain terms of agreement of 29th February, 1896, is now alleged to have been at the time of the execution of that instrument, the common case of a debt then due for moneys previously lent by the plaintiffs to the defendants at their request, without seeing that there has been much false swearing in the case somewhere.

Now the judgment being based, as I think it is, upon inadmissible evidence, cannot be maintained. But although the evidence is inadmissible for the purpose for which it was tendered by the plaintiffs, having been acted upon by the court, it is now before us on this appeal, and we cannot shut our eyes to what we think it does establish beyond all serious doubt or controversy, namely, that the contract of the 25th of September, 1895, and everything which has taken place thereunder which has been the subject of discussion in the action including the agreement of the 29th February, 1896, constitute merely steps in the carrying out or attempt to carry out a combination, arrangement, agreement and conspiracy entered into between Mr. John Connor and the plaintiffs, and Mr. Fulton, the manager of the defendant company, to unduly enhance the price of binder twine in the interest of and for the benefit of the plaintiffs and the defendant company and others engaged in the manufacture of that article, and to the manifest loss and prejudice of the farmers of the Province of Ontario for whose benefit the manufacture of binder twine at the Central Prison was instituted by the Government of the province under the authority of an Act of the Provincial Legislature in that behalf. I much doubt that a contract of that nature or any contract to give effect to a combination or arrangement of such a nature could be made by

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Gwynne J.

Mr. Fulton so as to be binding upon the corporate body whose manager he is, but assuming the corporate body to be bound by Mr. Fulton's act, so as to make such his act the act of the corporate body, I cannot entertain a doubt that courts of justice when a contract under discussion appears to a court of justice to have been entered into for the purpose of giving effect to a combination, arrangement or conspiracy of the nature mentioned, should not permit themselves to be made instruments in giving effect to such a contract. That a combination and arrangement of the nature I have spoken of is the true and only natural solution of the dealings of all the parties concerned in the combination, namely, Mr. John O'Connor, the plaintiffs, and Mr. Fulton is, I think, the proper conclusion resulting from the evidence which has been acted upon by the Superior Court in the present case. Mr. Heddle, a witness called by both the plaintiffs and the defendants, accredited by both of them, and in the confidence of both, seemed to have no doubt upon the point, and he seems to have been in a position to know. The principal part of the delicate business seems to have been confided to Mr. John Connor as a person from his ability and experience in matters of the very delicate nature of those in question made him most competent to assume and discharge the duties of the office. Some of his letters, to which I refer, without setting out their contents at large, throw light upon his method of procedure, namely, those filed as exhibits D 79, D 80, D 84, D 87, D 88, D 89, D 91, D 92.

In declining to give any effect to this contract, either for plaintiffs or defendants, I would do so in the interest of public order and morality, and to maintain the integrity of courts of justice. As we are bound to give the judgment which in our opinion should have been given by the Court of Review our judg-

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Gwynne J.

ment, I think, should be to dismiss the principal action and the incidental demand and to leave each party to bear and pay their own costs of the action, the incidental demand and this appeal.

SEDGEWICK and KING JJ. concurred in the judgment delivered by GIROUARD J.

GIROUARD J.—The majority of this court agrees that the binder twine business of the Toronto Central Prison was the business of the appellants, carried on by agents for their sole advantage and benefit, and that if we had to decide this case upon the issues presented in the courts below and also in this court, our duty would be to dismiss the appeal for the reasons given by Mr. Justice Tellier, and more elaborately developed by Acting Chief Justice Tait. But in the course of our deliberations, suspicion came to our mind that perhaps the respondents were endeavouring to enforce an illegal contract, and, in consequence, we felt in duty bound to order a re-hearing upon some new points which embarassed us, and to which we desired to have the assistance of counsel. As these points affect public interests, which private parties might not perhaps feel inclined to clear up, we instructed the registrar of this court to communicate our order, together with the factums and case, to the Attorneys-General for Quebec and Ontario, and also to the Minister of Justice of Canada, who are by statutes the constitutional guardians of the administration of justice, although no machinery is provided for such an emergency. We thought that this want of legislative enactment did not preclude courts of justice from giving such order as the ends of justice might commend in a particular case. Art. 3 C. P. Q. In taking this course we followed quite a respectable precedent in *Scott* v.

Brown (1), where, in 1892, the English Court of Appeal took the same objection and maintained it after hearing both parties. It is unfortunate that for reasons which appear upon the proceedings of this court the re-hearing could not take place. Nothing more is left for us to do, but to dispose of the case as it stood before the re-hearing was ordered.

I must confess that my suspicions arose at the outset, when reading the factums. At page 5, of the appellants' factum, they say:

To form a correct idea of what was the true position between the respondents and the appellants previous to the 29th of February, 1896, it is necessary to recall the condition of the binder twine trade at that time. The appellants for several years had controlled the business in Canada. They had factories in Halifax, Montreal, Brantford, Port Hope, etc. They could produce sufficient twine for the Canadian consumption, and were protected against imported twine by a duty of 25 per cent. In 1896, the protective duty was reduced to 12½ per cent. Previous to this date, the Government of Ontario introduced into the Central Prison at Toronto, a plant to manufacture twine, and the Dominion Government did the same thing in the Kingston Penitentiary, with the object of competing by prison labour against the appellants. The Ontario Government, after working the plant themselves, advertised for tenders. It will be seen at a glance how important it was for the appellants that the contractor who secured the plant, should work in harmony with them to prevent the slaughter of prices which had previously taken place under the management of the Ontario Government. Two contractors were bidding for the plant, Mr. Hallam and Mr. John Connor, under the name of his brother, P. L. Connor. John Connor, in the name of his brother, was the successful competitor.

The two courts below unanimously found that Hallam and Connor were bidding confidentially for and on behalf of the appellants As Sir Melbourne Tait, A.C.J., truly observes:

As to the transfer of the Government contract to the defendants, I think the evidence clearly shows that they wanted to keep it secret that the Central Prison business was carried on in their interest and never wanted the contract transferred to their own names.

(1) 61 L. J. Q. B. 738.

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Girouard J.

And at page 43 of the respondents' factum, more light is thrown upon the true character of the transactions:

> The question naturally arises, if the appellants owned this contract, why should the respondents agree to obtain a transfer of it through P. L. Connor to them? It must be remembered, however, that absolute secrecy was necessary for the purpose of the successful working of the scheme by which the appelants wanted to control the output of all the twine mills in Canada, and of this prison mill where the Government was endeavouring by the means of prison labour to defeat the monopoly in binding twine by selling it to the farmers at a fraction over cost, and had P. L. Connor refused to carry out the provisions of the letter of 29th of October, the appellants could never have compelled him to do so, as the Government of Ontario would have cancelled the right to manufacture as provided in clause 12 of the contract, (exhibit P., 6, case p. 55,) had it become known that the appellants, the very institution which the Government was seeking to fight, were the contractors

The respondents do not seem to realize that by giving to the appellants the aid of their money and credit, and every other possible assistance, they placed themselves in almost the same objectionable position. They, perhaps, thought that they were only helping a movement tending to remove slaughtering prices in an article of commerce, which, jointly with John Connor, they were producing in the Brantford mill leased by them from the appellants in January, 1895, and operated for export only. But they knew, at least should have known, that legal combinations are formed openly and in good faith between all the producers interested for the honest purpose of giving them all fair and equal protection against ruinous competition, without causing any injury to the public or any class of the community. They should have known that combinations secretly organized by the fraudulent interposition of third persons paid and salaried for the purpose, to unduly enhance the price of a commercial commodity, are contrary to public

policy and even criminal. Secrecy and false representations constitute one of the elements of conspiracy. Gain to be made and injury to be done to the public or an individual are another.

I do not propose to review the 250 pages of oral evidence, and the 200 pages of printed documents thrown in *pêle-mêle* at different stages of the trial. Conspiracies are always intricate and difficult to prove, and I regret that I cannot be as brief as I would like to be. Dealing with facts in the first instance and of our own motion, our findings must be clear.

It appears that in August and September, 1895, John Connor, of St. John, N.B., a large shareholder of the company appellants, E. M. Fulton, its president and general manager, Michael Connolly, and others, met in Toronto and Montreal for the purpose of acquiring, for and on behalf of the said company, the business of the Toronto Central Prison, then advertised to let. As it is important to know exactly what took place at the very inception of the proceedings, I will quote the story as told by all the parties interested.

Patrick L. Connor's story is short. He was not a leading actor on the scene, but merely played a secondary and passive roll assigned by the Consumers' manipulators; he does not appear to have possessed pecuniary means of any consequence; he was a practical twine manufacturer in charge of the Brantford mill, and his name was necessary to better deceive the Ontario Government. His brother, John, conducted the negotiations.

> The Consumers' Cordage Company, (he says) put through the deal, and my brother, as well as I, considered we were both representing the Consumers' Cordage Company.

On the 18th September, 1895, he writes to Mr. Noxon, the inspector, that he is ready to satisfy him-

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Girouard J.

self and the Government as to his financial ability to carry out the terms of his tender.

It is also understood (he adds) that the cheque for $5,000 which accompanied my first tender in this matter is to be held by you as security to the Government for carrying out my second tender.

John Connor:

Q. Will you please state now that the correspondence is filed, as shortly as possible, what have been your transactions with the Consumers Cordage Company, your brother, and the officials of the Ontario Government, with regard to the Central Prison twine contract?

A. In the latter part of August, 1895, I had various conversations with E. M. Fulton, sr., in the office of the Consumers Cordage Company, in reference to the Central Prison binder twine plant, which was at the time advertised through the public press, by which tenders for the operation of this plant were invited from the public. I think it would be probably the 28th or 29th of August, Mr. Fulton, on behalf of the Consumers Cordage Company, closed an agreement with me by which I was to enter the employment of the Consumers Cordage Company. The agreement, which was then closed verbally, was reduced to writing, and signed under the date of 29th of August, that is the agreement was kept in abeyance from the latter part of August, and only executed in the office of Mr. Fulton's solicitor in the latter part of October, but I was to enter the employ of the Consumers Cordage Company under the terms of the company on the 1st day of September. * * *

So, on September 1st, I entered the employ, pursuant with the agreement—the understanding with Mr. Fulton, on behalf of the company. I was immediately detailed to go to Toronto, for the purpose of preparing a tender which was to be presented to the Ontario Government, and I was directed by Mr. Fulton to secure if possible, that tender. Before starting for Toronto, it was arranged that that tender would go in, in the name of my brother, P. L. Connor, who was a resident of Brantford, Ontario, and it was thought, both by Mr. Fulton and myself, that it was better that the bidder on this contract should be from the province of Ontario, more especially as my brother was acquainted with some of those governing the province, and he resided in the city of Brantford, and was a binder twine manufacturer. * * *

Q. In the conversations you had, and in the negotiations with Mr. Fulton, or the Consumers Cordage Company, and the Messrs. Connolly, how was Mr. P. L. Connor treated in relation to that contract?

A. He was treated, Your Honour, as an employee of the Consumers' Cordage Company; just simply his name was used as the

lessee, believing it was expedient in the interests of the Consumers' Cordage Company that his name should be so used?

Michael Connolly:

Q. Mr. Connolly, would you tell us what you know about the obtaining of the contract for the Central Prison in the month of September, one thousand eight hundred and ninety-five, and how you came to be mixed up with it?

A. Well, the first intimation I had, or the first knowledge I had of the matter, was from John Connor, who called to see me in Kingston and laid the matter before me, telling me the Consumers' Cordage Company desired to control the output from the different mills in the Dominion, as fast as they could acquire them, and when the time came he would tender on their behalf, but in somebody else's name, and thereby secure the contract for them, and if we chose, we would contribute. * * *

Q. After meeting Mr. Connor did you meet anybody connected with the Consumers' Cordage Company?

A. Yes.

Q. Whom, and tell us what took place?

A. I met Mr. Fulton, senior, the president and general manager of the Consumers' Cordage Company, who confirmed all that Mr. Connor had represented to me.

N. K. Connolly:

At the time that the lease of the Toronto binder twine factory, or the prison factory, was leased, the Consumers' Cordage Company was very anxious to control the output of the country, and they wanted to get that lease, and I believe they employed Mr. Connor, as well as another gentleman in Toronto, to get it for them. * *

The promise (to refund advances) was made soon after the contract —on or about the contract being signed. It may have been done previous to the contract being signed, for Mr. Fulton was talking to both my brother and myself regarding getting the contract—what a good thing it would be for the Consumers' Cordage Company to have control of the whole outfit, that it would then keep the market at any price they thought fit, or at least, at a paying price.

The testimony of Mr. Fulton, an old man of 70 years, is somewhat contradictory, but the documentary evidence produced, which, in cases like this, is always of great value in determining *les faits et gestes des parties*, clearly shews that his memory was very deficient; he admits himself that it is weak. In substance his evi-

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Girouard J.

dence does not, however, differ from that of the other witnesses. He states that the Toronto Central Prison and the penitentiary at Kingston had practically ruined the twine business of Canada, and on hearing of the advertisements for the lease of the Toronto mill, he preceeded to that city about the middle of August, 1895, to see what could be done in the interests of his company. He made several trips to Toronto, always in great secrecy, being even afraid to register his name at any hotel. On the 4th September, 1895, he writes a note to John Connor while in Toronto:

I am here by invitation, *incog.*, so do not mention it to any one.

He first saw one Hallam, and immediately came to terms with him. He learned from him that John Connor was also looking after the Central Prison contract. After some delay and a good deal of negotiations, held both in Montreal and in Toronto, he succeeded in securing the services of both Hallam and Connor, and the assistance of the respondents. Fifty-seven cents per 100 lbs. of twine or rope to be produced was the figure first settled by them as the bid or rent of plant and convict labour. But on the 31st of August, Fulton telegraphed John Connor to raise it to 72, and finally, when the Government decided to call for new tenders, John Connor and Hallam agreed with him to put in a concurrent bid of 75c, prepared by himself and similar in every respect. It turned out however that this was done by Hallam alone, and not by Connor. The latter had learned that "eighty will close and nothing else;" in fact, Fulton had telegraphed him on the 10th of September, that Hallam wired him so. He, therefore, came to the conclusion that it would be prudent to advance his tender by $7\frac{1}{2}$, and make it $82\frac{1}{2}$. Fulton looked upon this change as a "trickery," and he complained bitterly in a letter written to Patrick L. Connor, on the 21st September, but the same day, John Connor telegraphed Fulton:

Executed contract with my brother. Hallam out of it. Agreed to take over stock October 1st. Rest easy and do nothing more.

The contract was actually signed on the 25th September, 1895, by Patrick L. Connor and Noxon, the inspector of prisons and public charities for Ontario.

In order to prevent the possibility of a combination with monopolists, several clauses were inserted in the contract, which will be noticed later on; but one should be mentioned here. Clause 17 provides that

the contractor shall not assign this agreement or sub-let the same without the consent of the Lieutenant-Governor in council.

What a revelation! if, before signing or afterwards, the inspector had been told that the "contractor" was the great Consumers' Cordage Company. Noxon swears that neither Fulton or any employee of the company ever told him that Fulton was at the back of the Central Prison contract.

A cheque for $5,000 accompanied both the tender and the contract, as requested in the advertisements. It had been provided for by the respondents accepting and cashing on the 21st August, 1895, in Montreal, the draft of John Connor on them for the same amount, dated Brantford, 20th August, 1895. P. L. Connor swears that this cash reached him in the shape of a "certified cheque or draft" which he deposited with his tender.

During all these negotiations, no complete understanding was put in writing beyond telegrams and letters, which might be mislaid or destroyed. On the 18th October, 1895, Fulton writes to John Connor:

I think it advisable that you and Connolly should come to Montreal just as soon as possible and have all understandings and agreements placed in proper ship shape.

This was done in Montreal on the 29th October, 1895, where four documents were carefully prepared and signed simultaneously in Mr. Fulton's lawyer's office:

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Girouard J.

First. A letter from John Connor to Fulton in the following terms:

As my brother, P. L. Connor, has secured the control of the Ontario prison plant for five (5) years on certain terms, with which you are familiar, I beg hereby to state, on his behalf, that this contract was secured by him and myself in the interests and for the benefit of your company, and is to be assumed by you confidentially, the business to be conducted in P. L. Connor's name; our colleagues, Messrs. M. and N. K. Connolly, to have the option of contributing the working capital required at 6 per cent interest and a bonus of 2 per cent.

The output is to be marketed from year to year.

Secondly. A proposal of agreement respecting the Brantford mill and also the Toronto Central Prison, signed by John Connor, and agreed to in a P. S. by the respondents, who are styled his "associates," where he formally offers to appellants his services in the twine and cordage business for a term of years, from the 1st of September, 1895, at a salary of $2,500 per annum, not more than six months to be called for annually. In fact, he had been engaged on the 29th of August, and on the 22nd October, 1895, he received $208.33, "being for one month's salary." Mr. John Connor's last conditions were:

8. This agreement and the connection between me and your company to be kept absolutely confidential and secret by myself and my associates.

9. P. L. Connor to be retained as superintendent of the Brantford mill, or otherwise in the employ of the company at fifteen hundred dollars ($1,500) per annum.

Thirdly. An acceptance by Fulton of the above proposals and terms, in which he says:

On behalf of the company, I now agree to all the terms and conditions of your letter, and shall consider the agreement a binding one from September 1st, 1895, until September 1st, 1896, and thereafter until terminated according to your letter. * * *

With respect to the necessity for preserving the secrecy regarding your connection, I think the suggestion an admirable one, but we will have many opportunities of discussing this and other business matters

I see no necessity for further contracts between us. Your letter and this reply are enough, and, therefore, again accepting the offer made by you with the approval of your esteemed colleagues.

The fourth document had reference to the price of twine to be manufactured at the prison and will be noticed hereafter.

The combination having been thus fully organized, the respondents were called upon by Fulton, John Connor, and sometimes by Patrick, his brother—who from time to time came down from Brantford to look after the Central Prison affairs,—to advance the necessary funds to carry on the business, and among others a sum of $22,048.52 to make to the Government of Ontario the payment of the raw material and manufactured goods in the prison at the time of the contract. This sum was advanced in Montreal on the 7th November, 1895, by a cheque of R. Mowat & Co., brokers, of Montreal, for $22,500 on the Molsons Bank in that city, payable at par in their Toronto branch, to the order of the respondents, indorsed by them to the order of John Connor, and indorsed by the latter, and finally deposited by P. L. Connor with the Dominion Bank, in Toronto, where it was checked out by him in favour of the Ontario Government. Mr. N. K. Connolly, who indorsed the cheque for his firm, at the request of Fulton, thinks with hesitation that he sent it to John Connor. It was certainly issued, certified by the Molson's Bank, and indorsed by the respondents in Montreal. John Connor, who, on the 1st November, had been requested by letter from Fulton to go down to Montreal to arrange about finance, is positive. At page 268 of the case, he says, and he repeats the statement at page 269 :

That was a draft handed me in Montreal by N. K. Connolly, which amount I took to Toronto to pay for the material.

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Girouard J.

This sum of $22,500, and also the $5,000 deposited with the contract, are the only amounts in question in the present appeal.

Soon after a line of credit with a bank became necessary, and on the 12th December, 1895, the respondents guaranteed the account of the Toronto prison agency by P. L. Connor with the Dominion Bank in Toronto, who advanced them, in the latter city, large sums of money, amounting altogether to $17,000, which are not, however, involved in this case.

It will not be necessary either to refer at length to the assignment in 1896 of the contract by Patrick L. Connor to Robert Heddle, which was not carried into effect. It appears conclusively that this assignment was made with the full knowledge, and I may say at the special solicitation of the respondents, who, as recent investors (February, 1896), in the capital stock of the Consumers, exercised considerable influence over the board of directors. Being dissatisfied with the past management they desired the change.

On the 30th of May, 1896, Michael Connolly sends Heddle a draft letter, to be addressed to the Hon. Mr. Gibson, member of the Ontario Government, "on plain paper, having no letter heading," enclosing a copy of the assignment, and requesting him to have the same ratified, and Heddle accepted in place of Connor. Of course the fact that Heddle was, like Connor, a servant and *prête nom* of the appellants, is carefully concealed. By this time, Noxon, the inspector,

> knew all about the combine in prices, and so, writes Heddle to Fulton, fears an attack from the Patron element in time.

But he had no reason to suspect that he was dealing with the Consumers Cordage, and in the interest of their gigantic monopoly. But, adds Mr. Connolly to Heddle,

> I hope you will get the thing through as soon as possible.

This Mr. Heddle had been the confidential book-keeper of the appellants for years, and in February, 1896, had been sent to the Central Prison to look after their interests, which he reported to be in bad shape. Contracts were "mixed up" with the Brantford business. The accounts were "not in such a state as they should." On the 28th of February, 1896, he writes to Fulton:

> I mentioned to you last night that my impression as to the working of Central had not been satisfactory. I regret to confirm this.

From that time Heddle took the full management of the whole business on behalf of the appellants, and was recognized as the representative of P. L. Connor by the prison authorities, expecting that the assignment would soon be completed.

In the meantime (20th June, 1896) the respondents had guaranteed a new line of credit in his favour with the Dominion Bank to the extent of $60,000.

The assignment had been signed by P. L. Connor, on the 7th March, 1896, the name of the assignee being, however, left in the blank, but filled afterwards with the name of Robert Heddle at the request of the appellants and respondents. Months elapsed before the matter was really approached by the Ontario Government. It appears from the evidence of Mr. Noxon that no objection would have been made to the assignment, provided an additional bond of $10,000 was given which the respondents readily granted, and, in fact, executed on the 15th October, 1896. But serious difficulties between the appellants and respondents were brewing about the repayment of advances. Heddle, acting at the request of the appellants, dropped his application for a confirmation of the transfer to himself, and the business continued to be carried on by Heddle in the name of P. L. Connor, as previously.

1901

THE CONSUMERS CORDAGE COMPANY. v. CONNOLLY.

Girouard J.

Finally, two other documents fully exhibit the true position of the parties:

1st A deed of agreement set forth in the declaration of the respondents, signed by them and the appellants on the 29th February, 1896, which reads as follows:—

That, whereas Mr. P. L. Connor, of Brantford, Ontario, has acquired the right from the Government of the province of Ontario to manufacture binder twine in the Central Prison in the city of Toronto in the said province, for a period of five years, from October 1, one thousand eight hundred and ninety-five, to October 1, nineteen hundred, the party of the second part hereby agrees to transfer and make over to the party of the first part the said "right" from the Government of the province of Ontario to manufacture binder twine in the Central Prison in the city of Toronto in the said province, for the full period of said contract with P. L. Connor.

The party of the second part further agrees to furnish all the capital that may be required for said manufacturing operation at said Central Prison for and during the full term of the twine season of 1896, at which time the party of the first part hereby agrees to reimburse said party of the second part all moneys they have invested in said business, and not later than October 1, 1896, with interest thereon at eight per cent per annum, but it is understood and agreed that at least $40,000 (forty thousand) of this amount shall be paid between June 1st and 15th, 1896, and, if required, the party of the second part shall assist the party of the first part to obtain any part of this amount through the Dominion Bank of Toronto, as well as a sum of seven thousand three hundred and fifty dollars ($7,350.00) constituted by P. L. Connor as a first charge on the earnings of said manufacturing institution, and taken over by the party of the second part in settlement of the accounts with John Connor, of St. John, N.B. The payment of this amount shall extend over the first two years of the Government contract.

We have already seen that soon after the respondents obtained from P. L. Connor a transfer in favour of Heddle, for and on behalf of the appellants, that they did everything in their power to have the same ratified by the Government, and that finally without their interference, its acceptance would have been obtained.

The above agreement, if it has any validity, establishes beyond doubt that the judgment appealed from,

allowing the whole of their demand, with the exception of $7,350, which was not due before September, 1897, is well founded.

The second deed, although not signed by the respondents, contains admissions by the appellants which are, perhaps, unnecessary in face of all the documents and the evidence in the case. But, as it is approved by the board of directors, it is not without importance. First, on the 15th September, 1896, the following resolution was adopted by the board:

That Mr. Elisha M. Fulton, sr., be, and is hereby authorized to sign and enter into an agreement indemnifying Messrs. Nicholas K. Connolly and Michael Connolly, in respect of the bond and suretyship undertaken by them in respect to the Toronto Central Prison contract, on the 25th day of September, 1895, and assigned by Patrick L. Connor to Robert Heddle, acting for this company, which the directors consider it advisable to carry out.

This is, I believe, the only paper passed by the board of directors, but it is sufficient to establish the authority of Fulton to act as he did. The business of the Central Prison in the name of Patrick L. Connor, conducted first by John Connor and last by Robert Heddle, was the business of the appellants.

It must be added, however, that it does not appear that the directors were aware of the methods used by their president and manager. These were probably considered as mere details left to his own judgment.

The deed of indemnity is dated the 3rd of October, 1896, and reads as follows:—

Whereas, the said Nicholas K. Connolly and Michael Connolly have become sureties and bondsmen to and in favour of the Inspector of Prisons and Public Charities for the province of Ontario, for the fulfilment by one Patrick Louis Connor and his assignee, Robert Heddle, of a certain contract made between the said Inspector of Public Prisons and Charities and the said Patrick L. Connor, on the twenty-fifth day of September, 1895, at the request of the Consumers Cordage Company, and;

Whereas, the said Robert Heddle is an *employee* of the said Consumers Cordage Company, Limited, and carries on the said enterprise

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Girouard J.

in the interests of the said company, and the said Consumers Cordage Company, Limited, and the said Elisha M. Fulton, senior, personally, desire to indemnify the said Nicholas K. Connolly and Michael Connolly, in respect of the undertaking given by him to the Inspector of Prisons and Charities.

Now, therefore, it is agreed and covenanted by and between the said parties hereto as follows, to wit:—

1. In consideration of the said Messrs. Nicholas K. Connolly and Michael Connolly having become bondsmen and sureties, as hereinabove set forth, the said Consumers Cordage Company, Limited, and the said Elisha M. Fulton, senior, personally, hereby guarantee and agree to indemnify and hold harmless the said Nicholas K. Connolly and Michael Connolly, in respect of all undertakings given by them as such bondsmen and sureties, and agree to pay to the said Nicholas K. Connolly and Michael Connolly, on demand, the amount of any damages which they may be put to in respect of their said undertakings.

Finally, as the respondents were pressing for money, an itemized account was made up, on or about the 1st of October, 1896, at the request of both parties, by Heddle and one Martin R. Connolly, confidential bookkeeper of the respondents (but not related to them), in the head office of the Consumers Cordage in Montreal, and accepted as "settled" there by the parties.

That settlement of accounts is produced and the respondents claim what still remains due and payable under the same. The two courts below have found it proved and they also found that the appellants promised to pay the same. As remarked by Sir Melbourne Tait, A.C.J., the appellants practically admit this fact in their pleadings. They allege,

that the said statement was prepared by plaintiffs simply as being the amount which would have been payable by the defendants to the plaintiffs, had plaintiffs procured the consent of the Lieutenant-Governor in council to the transfer of the said contract to them, (the said defendants), and the said defendants never undertook or promised, or bound, or obliged themselves to pay the said sum of money or any part thereof, until the said transfer and consent were legally and formally given, and granted by the Lieutenant-Governor in council, and at the time the said statement was prepared, the said plaintiffs

specially and particularly promised and undertook that they would procure the said consent of the said transfer as required by paragraph 17, of the said contract, of the 25th September, 1895.

By the deed of the 29th February, 1896, the respondents,

agreed to transfer over to the party of the first part, the said 'right' (to manufacture binder twine in the Central Prison), from the Government of the province of Ontario.

It is impossible that the parties contemplated a transfer to the appellants in their own name. Such a deed would have killed the enterprise. What was intended in the agreement of the 29th of February, 1896, was a transfer to Heddle from Patrick L. Connor, whose management, through John Connor, had been recently found unsatisfactory by Heddle. This transfer from Patrick L. Connor to Heddle was soon afterwards executed and would have been finally accepted by the Ontario Government, if no hostile action had been taken by the appellants.

There is ample evidence in support of the findings of the courts below, partly quoted by Sir Melbourne Tait.

Writing to Heddle, on the 12th November, 1896, Fulton, speaking of the itemized account, further says :—

That is only showing a balance due them of nearly $40,000, because that amount was made up with the $5,000 security deposit, $7,500 Connor's election contribution, a large amount of interest and several other things that I allowed to go in at that time on a basis of their giving us the prison now and carry until next summer all last season's twine.

On the 7th November, 1896, Fulton, hearing further that the bank was also pressing for the payment of a demand note for $47,000, wrote to Heddle :—

I am sorry to feel so distrustful of the Connollys, for in most respects they have behaved generously towards the company, but they are evidently now trying to force us to take over the prison and all its twine or transfer the lease to some new party, and are using the

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Girouard J.

bank to force us to an issue. This places us in a very embarrassing fix. The company is now carrying so much twine it will be impossible to take on this additional prison load, and to throw it up means our losing the control of the prison altogether, which will be most unfortunate.

On several occasions Fulton expressed his regrets at his inability to raise the necessary funds to put the Connollys out of the concern. He offered bonds of an American coal company, in liquidation, but as they were not marketable they were not accepted, and no other alternative was left to both the bank and the respondents, but to take legal proceedings. The present action was instituted on the 23rd of December, 1896, and the business of the appellants, in the name of P. L. Connor, in the Central Prison, soon after collapsed.

Now let us see how this contract was worked out in so far as the Ontario Government and the farmers of Canada were concerned. The results were:—

1. The uniformity of prices and a monopoly in the twine mills of Canada, which were all either owned or operated by the appellants. At the very beginning, Fulton boasted to the Connollys that the getting of the twine mills would permit the appellants "to keep the market at any price they thought fit, or, at least, at a paying price."

On the 29th October, 1895, on the very occasion of signing of the contracts between the parties, in the solicitor's office, in the presence of the respondents, called the "associates," John Connor writes to the appellants:—

Gentlemen,—As my brother, P. L. Connor, has secured the control of the Ontario prison plant, for making binder twine, for a period of five years, on the terms of the Government public prospectus, I beg hereby to state in his behalf, that this contract was secured by him and myself in the interests and for the benefit of the Consumers' Cordage Co. The business is to be conducted in P. L. Connor's name, but

under the direction and control of the Consumers' Cordage Co. It is understood that I am to be allowed 8 per cent interest on the capital employed. The output is to be marketed from year to year. Having also the disposition of the product of the binder twine plant of the Kingston Penitentiary, it is hereby agreed that said output of binder twine shall be marketed conjointly with the Consumers' Cordage Company, and the undersigned, in conformity with such conditions as will guarantee absolute uniformity of prices.

On the 1st May, 1896, Fulton sends to Heddle, a "list of prices now established for the season," that is the first season following the date of the contract, observing at the same time:

I suppose you have all twine particulars from Jenkins or Bonnell. Note your telegram about Bonnell, representing all the manufacturers. I have thought a good deal about this and of the importance of avoiding even the appearance of a combination, but it will not pay to put out a man for each company and Bonnell can so easily attend to all. The price list is not issued by any one or combination of manufacturers, but goes out as from Bonnell, commercial broker, salesman, or whatever you please to call him, not the special representative of any one manufacturer. You can now quote prices in reply to all inquiries, not sending price list, but writing each party and quoting prices you know especially adapted to their trade or wants.

He wished so much to avoid even the appearance of combination that, on the 5th of June, 1896, he did not hesitate to request Heddle to ask Noxon for permission

to do business in the name of the Central Prison, or Central Reformatory, Robert Heddle, agent or contractor

but whether the permission was granted or not, does not appear.

2. Fictitious cost of twine.—The contract provides for a certain mode of ascertaining the price to be paid by farmers, by adding to the cost price of the fibre, cost for manufacturing, allowing for waste, etc., and one and one-half cents per pound, and finally, adds clause 5, par. d:

The aggregate shall be the maximum selling price of the twine to farmers for their own use.

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Girouard J.

On the 1st May, 1896, Fulton writes to Heddle:

We will be called upon by Noxon to submit items of our cost of prison twine, under the contract. We are required to sell any farmers applying to the prison at cost, and 1½c per pound profit. Noxon may ask for these items and you must be prepared to furnish them and support your figures with evidence. Here is my idea of cost per 100.

Follows a list of figures shewing cost price to be $8.25 per 100 lbs, for manilla rope and $6.06 for sisal. And he concludes:

So if you can make good our estimate of cost, our prices must be satisfactory to the Government.

On the 4th of May, Heddle answers:

I shall go carefully into your costs of twine at the Central.

So far as we can judge from a letter of Noxon to P. L. Connor of the 29th December, 1896, this estimate of cost was accepted under reservation.

3. Fraudulent decrease of production.—The contract provides for a production of four tons or over of binder twine per day of ten hours, subject to a heavy fine. Early in the season of 1896, he urges the necessity of closing down the Central, so that the stock in hand in other mills, where no contract limitations existed, might reach the market. As early as the 28th February, 1896, and for two months previously, Heddle reports to Fulton that the Central Prison had not worked "an average of two hours per day." Writing to Heddle on the 26th of June, 1896, Fulton says: "Cannot we get up an excuse to shut Central Prison down until next holidays. Intimate casually that machinery is in bad shape, making bad twine." On the 14th of July he writes that Halifax has been closed for the season; Port Hope, now running on Standard, will also close down this week.

We are not making, he adds, any twine at this mill. As soon as you finish sisal orders you will have to shut down too. We have so much mixed twine that we can change tags and bags to suit any

orders that may come in. When you shut down you should arrange to get your packers on very short notice to change bags and tags when required.

Subsequently, during September and till the 11th of December, 1896, Fulton incessantly writes to close down for a year if possible, or at least for any length of time. See letters of the 12th October, 21st October, 1896, 11th November and 8th and 11th December, 1896. In a letter of the 24th of September, 1896, Heddle writes to Fulton:

As wired you yesterday, Mr. Noxon has decided to place the prisoners in the binder twine mill on Monday and continue from day to day, charging the contractor on four tons per day. I interviewed the warden in regard to this, but he flatly refused to remain any longer idle. Mr. Noxon would not argue the matter one moment: the latter gentleman is perfectly aware that Connolly wants to go out of it.

And on the 7th of November, 1896, he instructed Heddle:

Go as slow and light on prison work as possible, so that your present stock of hemp will hold out until we get the matter settled.

It is evident that the combined efforts of Fulton and of his agents were directed to injure the Government of Ontario in particular and the community in general.

It must be remarked that the respondents, although fully aware of the end which the appellants had in view when acquiring the business of the Central Prison, do not appear to have taken any part in, or to have had any knowledge of, the methods employed by Fulton and Heddle to reduce the production or increase the cost price. The same remark applies to the board of directors, who, like the respondents, were acquainted with the nature and object of the organization. Conjectures and suppositions might be made as to these matters and other details, but they are insufficient to sustain a verdict.

1900

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Girouard J.

Such are the facts proved in the case. Unfortunately for the parties in this cause they establish clearly that a conspiracy, affecting injuriously public interests by unreasonably raising the price of an article of commerce, had been organized and maintained by them and their agents for more than one year for the benefit of the company appellants.

But can we take notice of these facts, which have not been set up in the pleadings, nor in the factums, or even at the hearing before us? Can we, of our own motion, pronounce the adventure illegal and even criminal, and as a necessary consequence, all the transactions connected with it? In France before the promulgation of the code, the opinion seemed to prevail that courts of justice can do so, and since the code, there are quite a few jurists who hold the same view. D'Argentré, Ancienne Coutume de Bretagne, art 266, ch. 2, n. 11: Dunod, Prescriptions, 1st Part, ch. 8, p. 47; Bouhier, Coutume, ch. 19, n. 12; 7 Toullier, n. 553; Dalloz, Rep. vo Nullité, n. 49; Arrêt of the 26th March, 1834, reported in Troplong, Société, vol. 1, p. 111; Premier Des Actions, n. 201. According to some other authorities, illegality of contracts cannot be pronounced except at the request of one of the parties interested, or of the state, if the nullities are absolute and in the public interests. See 1 Biret, Des Nullités, 49; 1 Laurent, nn. 69 to 72; 1 Demolombe, n. 381.

The rule is clearly laid down in the English and American jurisprudence—although, perhaps, not more than one or two precedents can be quoted where it was actually enforced—that a judge is in duty bound, *ex-officio*, to notice illegality of that character. I have been able to collect from the law reports two cases in point, *Scott* v. *Brown*, (2) decided in 1892 by the English Court of Appeal, and *Fabacher* v. *Bryant*, (1) which was

(1) 61 L.J.Q.B. 738.

(2) 46 La. An. 820.

decided in 1894 by the Supreme Court of Louisiana. These decisions, and the language of all the judges in the other cases, proceed upon the ground that if, from the statements of one of the parties, either in the courts below or in appeal, or otherwise, the cause of action appears to arise *ex turpi causâ*, or out of the transgression of a positive law, "there," continues Lord Mansfield,

> 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.

Holman v. *Johnson* (1); *Price* v. *Mercier* (2); *City of Montreal* v. *McGee* (3); *L'Association St. Jean-Baptiste de Montréal* v. *Brault* (4). But see *Clark* v. *Hagar* (5).

At first I entertained some doubts upon this point of procedure. I was afraid that articles 110 and 113 of the new Code of Civil Procedure of Quebec might interfere with the old ruling. This code came into force some months before the case was argued in the first court, but after the issues were joined. Article 110, which is new, says:—

> Every fact which, if not alleged, is of a nature to take the opposite party by surprise, or to raise an issue not arising from the pleadings, must be expressly pleaded.
>
> Article 113: The court cannot adjudicate beyond the conclusions, that is, as set up in the issues.

These rules were no doubt enacted in the interest of the parties themselves, and were never intended to apply to a case like this, where law and order are alone at stake, and where both parties are interested to be silent rather than to expose themselves to a criminal charge

There is, however, a declaration of principle in article 2188 of the civil code which seems to settle

(1) 1 Cowp. 341.
(2) 18 S.C.R. 303.
(3) 30 S. C. R. 582.
(4) 30 S.C.R. 598.
(5) 22 S.C.R. 510.

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Girouard J.

this point. It is conceded that laws of prescription under the code are laws of public order, but, in consequence of that article, they cannot be applied by the judge *ex proprio motû*, meaning that, in every other case, laws of public order must be noticed by him. Art. 2188:—

> The court cannot, of its own motion, supply the defence resulting from prescription, except in cases where the right of action is denied.

And does not article 1000 likewise lay down the principle that absolute nullities can be noticed officially, without any action or pleading?—

> Error, fraud and violence or fear are not causes of absolute nullity in contracts. They only give a right of action, or exception, to annul or rescind them.

Now let us see what effect in law this unforeseen feature of the case will have upon the action of the respondents.

Ex turpi causâ, non oritur actio.—This and other kindred maxims of the Roman law have been adopted by all civilized nations, whether governed by that system of laws or by the common law of England. The law reports of every country are full of decisions where courts of justice have refused to enforce contracts opposed to good morals or public policy or prohibited by positive laws. It would be a waste of time to cite the cases where this fundamental principle, upon which rests the whole social edifice, has been applied; they are well known to the bar and are collected in the text books and the law digests, and more particularly in the American and English Encyclopædia of Law, (2 ed.) vo., Illegal Contracts, and in Dalloz, *Repertoire*, vo. Obligations, nn. 553 to 651, and *Supplement*, nn. 157 to 193. The difficulty exists only when courts of justice come to deal with actions arising incidentally out of illegal transactions. In these cases, the jurisprudence of Great Britain and France are far

apart; and it must be added that in some of them there is great diversity of opinion in the courts governed by the English Common law.

This case, as I understand it, is not to be decided according to the principles of the English jurisprudence, nor by those of the Roman law, but by the rules laid down in the Civil Code of the province of Quebec, similar in this respect to the French code. All the contracts were executed and signed in the city of Montreal. The advances, which are involved in this cause, were also made in Montreal to the appellants or their agents, although the money was actually used by them in Toronto. In fact the headquarters of the adventure were in Montreal, where all reports were made and all instructions came from. But even if the transactions had taken place in Toronto, sitting as we do in a Quebec case without any proof that the laws of Ontario differ from those of Quebec, I must assume that they are alike. *Glengoil S. S. Co.*, v. *Pilkington* (1). Finally, article 6 of the Civil Code, says that the law of Lower Canada is applied,

whenever the question involved relates * * * to public policy.

There is no room for doubting that in Old France, and for many years after the promulgation of the *Code Napoléon*, judges and jurists followed the rules of the Roman law. As in England, it was held that courts of justice would not assist a wrongdoer in recovering any money, whether due or paid, in respect of a contract prohibited by law or contrary to good morals or public policy, for few French jurists make the distinction between *malum in se* and *malum prohibitum*. The Civil Code is explicit:-

The consideration is unlawful when it is prohibited by law, or is contrary to good morals or public order. C.C., art. 990; C.N., art. 1133.

(1) 28. S. C. R. 146.

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Girouard J.

Under the old law, recovery *condictio indebiti* would not be allowed in any such case. As Pothier, Obl. No. 43, observes, the wrongdoer having sinned against the laws and public morals is unworthy of the assistance of the public courts,

est indigne du secours des lois pour la répétition de la somme due.

Domat and Merlin are of the same opinion, and all the early commentators of the French Code, such as Toullier, Duranton, Troplong, Delvincourt and others, who simply adopt the Roman law and ignore the articles of the Civil Code. Larombière and Aubry et Rau and a few others make a distinction between contracts which are immoral or criminal and those which are only illegal, *ultra vires* or against public policy, a distinction which has been followed by the Quebec Court of Appeal, in *Rolland* v. *La Caisse d'Economie de Notre Dame de Québec* (1), without, however, expressing any opinion as to the question of *répétition* in cases of immoral contracts, *n'étant pas appélés à la décider* observes Mr. Justice Bossé, speaking for the court, but when this court came to deal with the same case, the principle was merely laid down that money lent by a bank contrary to law, can be recovered back (2). This and other distinctions were introduced by the Scholastics, Grotius even holding that after the consummation of the crime, the wrongdoers could assert their rights in a court of justice. See Barbeyrac sur Puffendorff (ed. 1713), vol. 1, pp. 402 to 410. They were partially recognized by the tribunals of Europe, including the English courts, at least till after the time of Lord Mansfield, but since they have been very considerably modified, both in England and in France. See Benjamin on Sales and Smith's Leading Cases and Pandectes Françaises, Rep. vo. Obligations.

(1) Q R. 3. Q. B., 315.

(2) 24 S. C. R. 405.

For the purposes of this case, it is unnecessary to examine the nature and effect of these distinctions, which are altogether inapplicable to it. The broad rule must be established that, under the Code, moneys advanced or paid, not being the profits of the illegal, or even immoral or criminal adventure or contract, can always be recovered back by the advancing party, whether or not he be a principal to the same. Ernest Dubois, in a foot note to an *arrêt* of the Court of Cassation, of the 15th December, 1873, which is reproduced by Mr. Justice Routhier in the recent case of *McKibbin* v. *McCone* (1), is about the only recent writer of note who advocates the old rule. He takes some notice of the articles of the Civil Code, but considers them inapplicable. His reasoning, however, is refuted by nearly all the subsequent commentators. Dubois asserts that

parmi les auteurs qui ont écrit depuis la promulgation du Code Civil, l'exclusion de la répétition est encore la doctrine qui compte le plus de partisans.

This was undoubtedly true at the time Dubois wrote in 1873. But among those he mentions, how many did refer to the articles of the code? They all invoke, purely and simply, the rules of the Roman law, precise and express if you like, but inconsistent with the spirit and text of the code. And, if we look at the number of writers who, since Dubois' time, have expressed an opinion on the subject, it cannot be denied that to-day the large majority of the commentators are opposed to the Roman doctrine. Dubois further states that *la grande majorité des arrêts* is in favour of it; but to do so he is obliged to set aside quite a number of *arrêts* rendered in cases of sale or cession of public offices, which he endeavours to distinguish from the ordinary cases of illegal contracts.

(1) Q. R. 16 S. C. 126.

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Girouard J.

The commentators adverse to his views cannot see any ground for distinguishing, and in support of the general rule that *la répétition de l'indu* lies to recover back moneys paid under an illegal or even an immoral contract, Marcadé, for instance, concludes:

> La doctrine contraire dont quelques arrêts ont fait l'application à la répétition de la partie du prix d'offices ministériels convenu en dehors du traité ostensible, est enfin respoussée aujourd'hui par la jurisprudence. See Huc, Vol. 8, n. 392.

There may possibly be cases where the sense of justice would be so shocked as to close its eyes and ears and turn the rascals out of court the moment the true character of the suit is revealed, for instance, a demand to recover back moneys paid to commit murder or other atrocious crimes, although I do not wish to express any opinion upon a supposition of that kind. No case of this description can be found in the reports, and there is very little probability that, in the future more than in the past, criminals of this class will ever soil the precincts of courts of justice, for they are well aware that they would have to face a cross-demand by the State for confiscation. We need not trouble, for the present at least, about these imaginary cases, and we may treat them as the legendary English one of *Everett* v. *Williams*, where, in 1725, the highwayman, in a disguised declaration, was suing his companion to account for his share in the plunder. It is not reported anywhere, except in the European Magazine for 1787, vol. 2, p. 360, undoubtedly as a good sensational story for its readers. Lord Kenyon, after examing the office, found no record of it, and we may well pronounce it a fiction, as much as the more amusing case of *Bardell* v. *Pickwick*, reported in Dickens. See Evans' Pothier, vol. 2, p. 3.

The Code Napoléon, art 1131, 1235, 1376, 1965 and 1967 is reproduced almost word for word in articles

989, 1047, 1140 and 1927 of the Civil Code of the province of Quebec. Art. 989 says:

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

It is argued that to refuse *la répétition de l'indu* would be to give to such a contract a most important effect, which, also upon grounds of public policy, ought not to be tolerated. Even partners, whatever may be their rights to demand an account of the unlawful profits, are entitled to restitution of moneys put by them into the legal firm. In all cases of illegal, immoral or criminal contracts, the parties should be replaced where they stood before the illegal act was committed.

Articles 1140 of the Civil Code introduced a new maxim into the French law:

Every payment presupposes a debt; what has been paid where there is no debt may be recovered.

The Roman law, which was followed by Pothier, Domat and the old commentators, admitted the action *condictio indebiti* only when error was shown. The principle of our code that no one is allowed to enrich himself at the expense of another did not exist in the Roman law.

Then article 1140 makes an exception to the general rule:

There can be no recovery of what has been paid in voluntary discharge of a natural obligation.

Finally, article 1927, already referred to, contains another exception in respect to gaming contracts and bets, which are generally prohibited by the same article:

If the money or thing has been paid by the losing party, he cannot recover it back, unless fraud be proved.

These exceptions, it is contended, establish the general rule that in all other cases of illegal contracts

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Girouard J.

recovery of moneys paid can be obtained. After some hesitation and not without some dissenting voices, it has finally been accepted by the courts and commentators.

Marcadé was one of the first, about 1845, to denounce the old doctrine as being contrary to the text of the code and to public policy, and no doubt the authority of his great name had considerable influence upon the change which about that time took place in the French jurisprudence. He says, vol. 4, n. 458:

Nous ne saurions adopter ce système qui nous parait aussi contraire à l'intérêt social qu'au texte de la loi. Notre Code, à la différence du droit romain, ne permet pas qu'on s'enrichisse jamais aux dépens d'autrui; il ne veut pas qu'on puisse jamais garder le bien qui appartient à d'autres. Aussi l'art. 1376 déclare-t-il de la manière la plus absolue que quiconque reçoit ce qui ne lui est pas dû est obligé à le restituer sans distinguer pourquoi ni comment a été livrée la chose qui n'était pas due; tandis que le droit romain ne permettait la répétition à celui qui avait payé indûment qu'autant qu'il l'avait fait par erreur; *Si quis indebitum ignorans solvit, condicere potest; sed se sciens* se *non debere solvit, cessat repetitio* (1). Il ne faut donc pas argumenter ici du droit romain: et du moment qu'un bien n'a été livré qu'en exécution d'une obligation nulle, et dès lors sans être dû, le juge ne peut pas se dispenser, en face de l'art. 1376, d'en ordonner la restitution. La doctrine contraire, dont quelques arrêts ont fait l'application à la répétition de la partie du prix d'offices ministériels convenu en dehors du traité ostensible, est enfin repoussée aujourd'hui par la jurisprudence.

In a foot note to the 7th edition of his work published in 1873, nearly twenty years after his death, no less than twelve decisions of the *Cour de Cassation* are quoted in support of his views.

Demolombe soon followed and did not hesitate to hold the same opinion. He says:

Notre avis est que la répétition devrait être toujours admise, lorsque le payement a été en vertu d'une obligation qui avait une cause illicite * * * D'une part, l'article 1131 dispose dans les termes les plus absolus, que l'obligation *sur une cause illicite ne peut avoir aucun*

(1) D. I. 12 t. VI. 1.

effet; or, cette obligation aurait un effet, et même un effet très important, si elle faisait obstacle à la répétition ; donc, il résulte du texte même qu'elle n'y saurait faire obstacle. D'autre part, les plus hautes considérations d'intérêt public nous paraissent exiger que ces obligations soient considérées de la façon la plus considérable, comme destituées de toute valeur juridique, et qu'elles ne puissent engendrer aucun droit (1).

Laurent, Vol. 16, n. 164:

Aux termes de l'article 1131, l'obligation sur une cause illicite ne peut avoir aucun effet, or, n'est-ce pas lui donner un effet très-important que d'empêcher la répétition? L'ordre public et la moralité ne seraient-ils pas blessés si celui qui a retiré un bénéfice d'une convention que la loi réprouve pouvait le conserver? Voilà la vraie turpitude, pour nous servir du langage traditionnel, il n'y a qu'une manière de prévenir ce scandale, c'est de donner l'action en répétition dans tous les cas.

Colmet de Santerre, ed. 1883, Vol. 5, n. 49 *bis:*

L'exécution même de l'obligation n'en couvrirait pas la nullité, et la partie pourrait répéter ce qu'elle aurait payé, car elle aurait payé ce qu'elle ne devait pas. Cette decision, admise généralement en ce qui concerne les obligations sans cause, est cependant l'objet de vives controverses quand il s'agit des obligations sur cause illicite. On trouve, en effet, dans des textes de droit romain, une distinction que Pothier a reproduite et qu'un grand nombre de jurisconsultes modernes ont adoptée. On accorde la répétition à la partie dont le rôle, dans la convention, n'a rien d'immoral, et on la refuse du moment que celui qui a fait un paiement avait joué un rôle immoral dans la convention primitive. Si Pierre a promis 1,000 francs à Paul pour que celui-ci s'abstienne de commettre un délit, on accorde à Pierre la répétition après qu'il a payé ; mais s'il s'agissait d'exciter Paul à commettre un délit on refuse la répétition.

Sur la première hypothèse la solution de Pothier est incontestable, soit qu'on accorde la répétition, d'après les principes sur les obligations sans cause, soit qu'on la concède en vertu de la règle sur les conditions illicites. Mais, dans la deuxième espèce, nous ne voyons pas comment, dans le droit français actuel, la répétition peut être déniée à celui qui a payé. Il ne devait pas (2), il a payé, donc il a le droit de répéter (3). Les articles qui consacrent le droit de répéter l'indu ne distinguent pas en vertu de quelle règle la chose payée était indue. Il faudrait une exception à l'article 1235 et à l'article 1376, pour que

(1) 1 Contrats, n. 382.

(2) Art. 1133.

(3) Art. 1235.

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Girouard J.

l'opinion de Pothier pût être admise dans notre droit. Cette exception n'est pas dans notre Code, et nous pouvons ajouter elle ne devait pas s'y trouver. En effet, la société est intéressée à ce que celui qui stipule le salaire d'un acte illicite soit bien convaincu qu'il ne possédera jamais ce salaire en toute sécurité, que non-seulement il ne pourra en obtenir le paiement, mais que le paiement, même effectué, n'aura pas un caractère stable et définitif.

Pont, *Explications du Code Civil*, ed. 1884, vol. 7, n. 53, under the title, *Sociétés:*

Assurément, la prétention du détenteur serait audacieuse, puisqu'elle ne tendrait à rien moins qu'à retenir pour lui toutes les mises et à s'enrichir ainsi aux dépens de ses coassociés en invoquant le fait délitueux, ou en tout cas illicite, dont, aussi bien que ceux-ci, il serait lui-même l'auteur ou le complice ; mais il s'en faut de beaucoup que sa défense pût être considérée comme *péremptoire*. On lui répondrait justement que, ayant reçu les mises non comme propriétaire, mais comme simple dépositaire en vue d'un emploi spécial et convenu entre tous, il est détenteur sans cause et ne peut échapper à l'action en répétition dès que l'emploi est prohibé par la loi, ou dès qu'il est contraire aux bonnes mœurs ou à l'ordre public. Et il n'est pas de tribunal qui pût se considérer comme empêché de faire droit à l'action en répétition, parce que, bien loin d'invoquer l'existence de la société, celui qui forme cette action se fonde précisément sur l'invalidité de la convention. C'est pour faire prévaloir la nullité qu'il intente sa demande ; et c'est en l'accueillant seulement qu'on donne satisfaction à la loi puisque la repousser ce serait maintenir les effets du contrat, l'un des associés retenant alors le montant des apports, qu'il n'a pu toucher, cependant, qu'en vertu de ce contrat.

Guillouard, *Sociétés*, ed. 1892, n. 58 :

Toute autre est la nature de l'action par laquelle l'associé réclame la restitution de l'apport qu'il a versé ; il invoque pour agir, non pas le fonctionnement de la société, non pas l'existence d'une communauté de fait, que l'on ne peut pas substituer après coup, nous le reconnaissons, à une société illégale ; mais il invoque précisément ce qui a été jugé, la nullité de la société, et, se fondant sur le principe qu'un contrat nul ne peut produire aucun effet il demande à son ancien associé de lui restituer des valeurs qu'il détient sans cause. C'est donc le defendeur qui est amené pour s'approprier d'une manière immorale des apports auxquels il n'a aucun droit, à rappeler la cause pour laquelle la société avait été contractée. Les tribunaux devront, croyons-nous, lui répondre qu'ils n'ont plus à s'occuper de la cause de la société, car la société n'est plus en question, mais des consé-

quences de la nullité qu'ils ont prononcée, et ils ordonneront la restitution des valeurs pour la rétention desquelles il ne peut invoquer aucune cause légitime.

Dalloz, *Supplément*, 1893, evidently does not consider the question as yet open to any discussion. At n. 2308, vo. *Obligations*, he merely observes:

Il y a lieu à l'action en répétition lorsque le payement a été effectué en vertu d'une cause illicite.

The compilers of the Pandectes Francaises vo. *Obligations*, n. 7855, also published in 1893, after setting forth the two systems in controversy and authorities *pro* and *con*, conclude:

La meilleure manière de prévenir la formation de certaines conventions honteuses ou illicites, c'est de donner l'action en répétition dans tous les cas. Cette raison d'intérêt général a une valeur bien supérieure à celles que l'on peut donner en sens contraire, soit que l'on s'arme du fait de la possession, c'est-à-dire que l'on subordonne la décision à un pur hasard, soit qu'un repousse le demandeur en répétition à raison de son indignité, comme si l'on pouvait raisonnablement le déclarer indigne d'exercer la répétition après le payement, alors qu'on ne le considère pas comme indigne d'invoquer la nullité de l'obligation par voie d'exception s'il ne l'a pas encore payée.

It is useless to add that the *Répertoire* of Dalloz and the Pandectes Françaises are considered as the best legal periodical publications of France at the present time, published as they are by a committee of professors, lawyers and judges renowned for their learning and accuracy.

Huc and Baudry-Lacantinerie, the recognised leading authorities at the Bar and Bench and in the University of France, to-day, both hold the same views. Huc, vol. 8, n. 392, ed. 1895, says:

On admet par exception que la répétition est possible, indépendamment de toute erreur, quand le paiement a été effectué en vertu d'une convention illicite, alors même que le débiteur aurait participé sciemment à l'acte illicite, par exemple quand il s'agit de la cession d'une part d'office ministériel.

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Girouard J.

Baudry-Lacantinerie, after referring to a few contrary *arrêts* rendered chiefly by inferior courts, concludes likewise that the jurisprudence allowing recovery is the correct one:

L'article 1131 qui dispose que l'obligation sur cause illicite ne peut avoir aucun effet, serait violé s'il n'y avait pas lieu à répétition ; car l'obligation sur cause illicite, devenant ainsi inattaquable, serait plus résistante que les obligations dont la cause est licite (1).

Huc and Lacantinerie quote several recent *arrêts* of the Court of Cassation in support of their contention; Cass. 11th Feb. 1884, S. 84, 1, 265; 25th Jan. 1887, S. 87, 1, 224; 11th Dec. 1888, and 8th Dec. 1889, S. 89, 1, 213. They also refer to the articles of Meynial, S. 90, 2, 87; 91, 2, 89; and G. Appert, 96, 1, 290. See also Cass. 3rd Feb. 1879, S. 79, 1, 411; Cass. 14th May, 1888, D. P. 88, 1, 487; Caen, 16th Jan. 1888, Id. 2, 319; Seine, 26th July, 1894, P. F. 95, 2, 282; Besançon, 6th March, 1895, P. F. 96, 2, 221; Poitiers, 28th Dec. 1896, P. F. 98, 1, 529.

Mr. Charmont, reviewing the whole French jurisprudence in a foot note to the *arrêt* of Poitiers on the 28th December, 1896, concludes:

Nous souhaitons vivement que le système consacré par notre arrêt, conforme à l'interprétation de la chambre civile, (a branch of the Court of Cassation), finisse enfin par l'emporter. Dans tous ces cas de convention sur cause illicite, il nous paraît impossible de refuser l'action en répétition de l'indu sans violer le texte du code et les principes de notre droit. L'art. 1131 déclare que l'obligation sur cause illicite ne peut avoir aucun effet. Comment ne pas reconnaître qu'elle en aurait un si elle pouvait valider un payement, et si la convention pouvait devenir inattaquable par le seul fait de son exécution ? Ce qui nous semble encore plus évident, c'est que la maxime, qui s'expliquait en droit romain, n'a plus aucune raison d'être dans notre législation ; son application n'est qu'une sorte d'anachronisme ; c'est tout au moins le résultat d'une confusion. Pour s'expliquer les restrictions apportées à l'exercice de la *condictio ob turpem causam*, il faut ne pas oublier que cette *condictio* est, en réalité, le correctif d'une législation qui ne se préoccupe pas de la cause. A Rome le contrat

(1) 1 Traité Thé. et Pra. 1897, vol. 1, p. 316.

normalement est formel ; l'obligation résulte de l'accomplissement de certaines formalités légales. Quand on a prononcé la formule de la stipulation, le débiteur est obligé ; on ne se demande pas quel but il a poursuivi en s'obligeant. Cependant, pour tempérer la rigueur de ce principe, on vient, dans certains cas, au secours de débiteur ; s'il est obligé sans cause, sur fausse cause ou sur *l'exceptio non numeratæ pecuniæ*, la *condictio sine causâ*, la *condictio ob turpem causam*. Mais cette protection ne peut jamais lui être accordée que s'il paraît digne d'intérêt ; il ne peut être considéré comme tel lorsqu' il a lui-même poursuivi un but illicite, et c'est pourquoi, dans cette hypothèse la *condictio* lui est refusée (1). Il en est tout autrement dans notre droit. La cause est actuellement un élément nécessaire à la formation du contrat ; si ce contrat n'a pas de cause, ou si la cause est illicite, il est nul et ne peut avoir aucun effet. Les parties n'étant pas obligées, tout payement fait par l'une d'elles est indu. Et puisque le droit d'agir en répétition n'est qu'une simple conséquence de cette nullité, on n'a pas à se demander si le contractant qui prétend l'exercer, n'encourt aucun reproche ; on ne peut jamais le lui refuser (2).

I might add considerably to this list of authorities. See for instance, Bédarride, Fraude, vol. 3, nn. 1304 to 1307 ; Rivière, *Jur. Comparée*, nn. 366 to 369 ; Pillette, *Rev. Pra.* 1863, t. 15 p. 467 ; Boistel, *Dr. Com.* n. 356 ; Pont, *Société*, n. 51 ; Lyon-Caen et Renault, 2 *Dr. Com.* ed. 1892, n. 236 ; Duvergier, *Société*, n. 30, sur Toullier, vol. 6, n. 126 ; 7 *Rev. Etran. et Fr.* vol. 7. p. 568 ; Boileux, art. 1123, vol. 4, p. 386 ; Vavasseur, *Société*, ed. 1897, vol. 1, n. 40 ; 3 Arntz, n. 39.

Hardly one of the two writers can be found within the last quarter of a century in favour of the old rule. I know that we are not bound by the French text books, nor even the French decisions, but both have always been considered as forming the jurisprudence of France, which could not be, and never was, overlooked by this court, nor by the Privy Council on all occasions—and they are so numerous that it is unnecessary to recall them—whenever dealing with articles of the Quebec Code similar to the French Code.

(1) D. 8, au Dig. liv. xii, t. 5. (2) P. F. 98, 2, 2.

1901

THE CONSUMERS CORDAGE COMPANY v. CONNOLLY.

Girouard J.

I feel that I cannot disregard the opinions of these great jurists, who are generally considered in Quebec cases as the best exponents of our code; nor can I ignore the numerous decisions of the Court of Cassation and other French tribunals. Even if I were entertaining a different view, I would hesitate to regard it as the true interpretation of the articles of the code. But the reasons they advance commend themselves to my mind; they are conclusive, and I have no hesitation in coming to the conclusion that the respondents are entitled to recover back the amount of their advances, but without interest, so as to place the parties exactly where they stood when the illegal transactions took place. In the lottery case of *L'Association St. Jean Baptiste de Montréal* vs. *Brault*, (1), this court decided last term that the contract was illegal, and even criminal, and without adjudicating as to the reimbursement of the principal sum advanced, which was not involved in the case, refused the interest, which alone was demanded. Few recent French decisions have allowed legal interest from the date of payment, the debtor being considered in bad faith. C. N., art, 1878. There is a similar article in our code, art. 1049, but it applies only to payments made "through error of the law, or of fact," and not to a case like the present one; Art. 1047. In France it applies to all payments not due, whether made by error or knowingly, *sciemment*. C. N. Art, 1376. We have only Art. 989, which declares that a contract with an unlawful consideration has no effect, and consequently cannot carry interest from the day of maturity, although of a commercial nature, as provided for by article 1069. Therefore, no interest can be allowed before the institution of the action. C. C. Arts. 1067, 1077.

(1) 30 S. C. R. 598

As to the incidental demand for damages claimed by the appellant for the alleged breach of the contract of 29th February, 1896, the judgment dismissing the same must be confirmed, not only for the reasons given in the courts below, but also because it purports to enforce an illegal contract.

For these reasons, I would deduct from the itemized account all the items for interest, amounting altogether to $4,339.62, thus reducing the judgment against the respondents to $18,044.86, with interest thereon from the 23rd of December, 1896, date of the institution of the action, and all costs

The judgment on the incidental demand is confirmed with costs

*Appeal allowed in part with costs.**

Solicitors for the appellant: *McGibbon, Casgrain, Ryan & Mitchell.*

Solicitor for the respondents: *E. A. D. Morgan.*

*An application for leave to appeal to the Judicial Committee of the Privy Council was refused.