

WILLIAM BROWN (PLAINTIFF).APPELLANT;

AND

JOHN R. MOORE (DEFENDANT).....RESPONDENT.

1902
Feb. 18.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA,

*Statutory prohibition—Penal statute—Wholesale purchase—Guarantee—
Validity of contract—Forfeiture—Nova Scotia Liquor License Act—
Practice.*

An agreement guaranteeing payment of the price of intoxicating liquors sold contrary to statutory prohibition is of no effect. The imposition of a penalty for the contravention of a statute avoids a contract entered into against the provisions of the statute.

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc* (1) reversing the judgment by Graham J., at the trial, and dismissing the plaintiff's action against the defendant Moore, with costs.

The action was against one Jenkins, as principal debtor and the respondent Moore, as surety, under a written agreement to guarantee payment of the price

*PRESENT :—Sir Henry Strong C.J. and Sedgewick, Girouard, Davies and Mills, JJ.

(1) 33 N. S. Rep. 381.

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of intoxicating liquors sold by wholesale to Jenkins who carried on business as a hotel-keeper and kept a bar where he sold liquors by retail at Truro, in the county of Colchester, Nova Scotia, without the license required by the Nova Scotia Liquor License Act of 1895, in force in the county of Colchester, at the time of the sale. The trial court entered judgment in favour of the plaintiff for the amount guaranteed, but on appeal by Moore, this decision was reversed by the full court which held that, as the sale had been illegally made without a license, there could be no recovery.

The appeal came on for hearing before the Supreme Court of Canada on the 25th day of February, 1901, but after some arguments on behalf of the appellant, it became apparent that constitutional questions were involved similar to those raised in the appeal then pending before the Judicial Committee of the Privy Council in the case of the *Attorney-General of Manitoba v. The Manitoba License Holders' Association* (1), and the court accordingly ordered that further hearing of the present appeal should stand over until the decision of the Manitoba case in the Privy Council. On the final hearing of this appeal, the constitutional questions raised by the appellant were abandoned, the point having been settled by the decision of the Privy Council in the case above mentioned.

J. J. Ritchie K.C. for the appellant. Unless, reading the whole statute, the intention was to strike down the contract altogether, the plaintiff is entitled to recover. Roscoe, *Nisi Prius* (16 ed.) p. 638; Maxwell on Statutes p. 490; Endlich on Statutes, secs. 276, 458; Hardcastle on Construction of Statutes (2 ed.) p. 267. The courts will not be astute to construe an Act so as to avoid a contract or so as to bring it within the prohibition of the statute. The legislature pro-

(1) 13 Man. L. R. 239; [1902] A. C. 73.

vided penalties for sale without license but has not declared the purchase to be illegal. The provisions as to license are primarily for the regulation of the venders' trade and the security of the license fee. The sales guaranteed were not within the provisions of the statute, each sale being of a large amount—thirty gallons or more.

The object of sections 56 and 74 of the statute is to inflict penalties for the doing of the Act in an unauthorized manner and not for the purpose of prohibiting the sale itself. The purchase is not illegal and the purchaser is not subject to penalties. The statute singles out as the object one particular person, or class of persons, and does not declare that contracts involving disregard or breach of its provisions shall be affected with illegality, especially where the effect would be to prejudice honest claims and permit dishonest defences. *Bailey v. Harris* (1); *Smith v. Mawhood* (2); *Brown v. Duncan* (3); *Gremare v. Le Clerc Bois Valon* (4); *Wetherell v. Jones* (5); *Johnson v. Hudson* (6); Addison on Contracts, 99, and cases there cited. This is not a statute to prohibit, it is a statute to regulate. *Danaher v. Peters* (7). There was nothing illegal in the purchase of the goods and neither party knew that it was necessary to have a license. The court should not declare contracts not expressly dealt with to be avoided by implication. *Waugh v. Morris* (8).

The court will not add to the penalties imposed by the statute, a forfeiture of the right to recover on the contract unless it is apparent on the face of the statute that the legislature so intended. *Wright v. Horton* (9); *Learoyd v. Bracken* ; (10). A statute forbidding

(1) 12 Q. B. 905.

(2) 14 M. & W. 452.

(3) 10 B. & C. 93.

(4) 2 Camp. 144.

(5) 3 B. & Ad. 221.

(6) 11 East 180.

(7) 17 Can. S. C. R. 44.

(8) L. R. 8 Q. B. 202.

(9) 12 App. Cas. 371.

(10) [1894] 1 Q. B. 114.

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sales without license and imposing recurring penalties on such sales does not necessarily render the contract of sale void. *Foster v. Oxford, etc., Railway Co.* (1).

The Nova Scotia decisions shew that the limitation imposed by the statute is the only one ever recognized. *McGowan v. Holden* (2); *Smith v. McEachren* (3); *Smyth v. O'Neil* (4).

Borden K.C. for the respondent. The sales to Jenkins were illegal, because made in violation of the Act. *Smith v. Mawhood* (5); *Melliss v. Shirley Local Board* (6); per Bowen L.J. at page 454.

The said goods were sold to Jenkins for resale in the county of Pictou in violation of the provisions of the Canada Temperance Act. *Bensley v. Bignold* (7); *Fergusson v. Norman* (8); *Tyson v. Thomas* (9); *McKinnell v. Robinson* (10); *Buck v. Buck* (11); *Langton v. Hughes* (12); *Cope v. Rowlands* (13); *Gallini v. Laborie* (14); *Barton v. Piggott* (15); *Ritchie v. Smith* (16). If the sales were illegal, any guarantee in respect of them is also illegal. *Morck v. Abel* (17), per Lord Alvanley C.J. at page 38. If the contract be illegal no action can arise out of it. *Ribbans v. Crickett* (18); *Duvergier v. Fellows* (19); Decolyar on Guarantees (3 ed.) pp. 34, 210; *The Queen v. McNutt* (20).

The judgment of the court was delivered by :

THE CHIEF JUSTICE (oral.)—This appeal as originally taken involved the decision of an important question

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| (1) 13 C. B. 200. | (10) 3 M. & W. 434. |
| (2) 15 N. S. Rep. 266. | (11) 1 Camp. 547. |
| (3) 9 N. S. Rep. 279 ; 7 N. S. Rep. 299. | (12) 1 M. & S. 593. |
| (4) 6 N. S. Rep. 75. | (13) 2 M. & W. 149. |
| (5) 14 M. & W. 452. | (14) 5 T. R. 242. |
| (6) 16 Q. B. D. 446. | (15) L. R. 10 Q. B. 86. |
| (7) 5 B. & Ald. 335. | (16) 6 C. B. 462. |
| (8) 5 Bing. N. C. 76. | (17) 3 B. & P. 35. |
| (9) McC. & Y. 119. | (18) 1 B. & P. 264. |
| | (19) 10 B. & C. 826. |
| | (20) 33 N. S. Rep. 14. |

of constitutional law but that has now been settled by authority of the court of last resort* and does not come before us upon this argument. The only question that remains for us to decide is as to the effect of the provisions of the statute upon the validity of the contract.

It is settled law that contracts entered into in the face of statutory prohibition are void and the prohibition of sales of liquor without license provided by the statute in question has, therefore, the effect of rendering the contract here of no effect.

It is also settled that the imposition of a penalty for the contravention of a statute avoids a contract against the statute.

In the present case, we have both the prohibition in express terms and a penalty provided for.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *H. A. Lovett.*

Solicitor for the respondent: *Charles E. Tanner.*

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 The Chief
 Justice.

*REPORTERS' NOTE.—See *Attorney-General of Manitoba v. Manitoba License Holders' Association* ([1902] A. C. 73.