1904
*Nov. 16.
*Dec. 14.

JAMES PEARSON (DEFENDANT).........APPELLANT,

AND

CARPENTER & SON (PLAINTIFF).......RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Principal and agent—Gambling in stocks—Advances by agent—Criminal Code, s. 201.

P. speculated on margin in stocks, grain, &c., through C. & Son, brokers in Toronto, and in March, 1901, directed them to buy 30,000 bushels of May wheat at stated prices. The order was placed with a firm in Buffalo and the price going down C. & Son forwarded money to the latter to cover the margins. P. having written the brokers to know how he stood in the transaction received an answer stating that "no doubt the wheat was bought and has been carried, and whether it has or not our good money has gone to protect the deal for you" on which he gave them his note for $1,500 which they represented to be the amount so advanced. Shortly after the Buffalo firm failed and P. became satisfied that they had only conducted a bucket shop and the transaction had no real substance. He accordingly repudiated his liability on the note and C. & Son sued him for the amount of the same.

Held, Davies and Killam JJ. dissenting, that the evidence showed that the transaction was not one in which the wheat was actually purchased; that C. & Son were acting therein as agents for the Buffalo firm; that the transaction was not completed until the acceptance by the firm in Buffalo was notified to P. in Toronto; and being consummated in Toronto it was within the terms of sec. 201 Crim. Code and plaintiff could not recover.

Held also, Davies and Killiam JJ. dissenting, that assuming C. & Son to have been agents of P. in the transaction they were not authorized to advance any moneys for their principal beyond the sums deposited with them for the purpose.

Held per Davies and Killam JJ. that the transaction was completed in Buffalo and in the absence of evidence that it was illegal by law there the defence of illegality could only be raised by plea under rule 271 of the Judicature Act of Ontario.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

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APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial in favour of the plaintiff but reducing the amount of the damages.

The facts are sufficiently stated in the above head-note and in the judgments published herewith.

W. R. Smyth for the appellant. Sec. 201 of the Criminal Code makes this transaction illegal and not merely void as was that in *Read* v. *Anderson* (1), and similar cases. See Anson on Contracts, 8 ed. p. 258, for the distinction between the two.

It being illegal the plaintiffs cannot recover. *Leggatt* v. *Brown* (2).

Illegality need not be pleaded. *Re Summerfeldt* v. *Worts* (3).

See also *Walsh* v. *Trebilcock* (4).

Lynch-Staunton K.C. and *A. M. Lewis* for the respondents. The deal was made in Buffalo and was not within our Criminal Code. *Cowan* v. *O'Connor* (5); *Re Noble* v. *Cline* (6).

Whether the wheat was actually bought or not there was a liability on the part of the firm in Buffalo to deliver it which makes it a real transaction. *Universal Stock Exchange* v. *Stevens* (7).

Even if it was a wagering contract plaintiff can recover for money advanced on defendant's behalf *Read* v. *Anderson* (1).

THE CHIEF JUSTICE and SEDGEWICK J. concurred in the opinion of Mr. Justice Nesbitt.

DAVIES J. (dissenting).—I agree with Mr. Justice Killam.

(1) 13 Q. B. D. 779.
(2) 29 O. R. 530; 30 O. R. 225.
(3) 12 O. R. 48.
(4) 23 Can. S. C. R. 695.
(5) 20 Q. B. D. 640.
(6) 18 O. R. 33.
(7) 40 W. R. 494.

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NESBITT J.—In this case, as I understand, a different view having been taken of the facts by at least one of my brother judges I have again gone carefully over the evidence, and a re-perusal of it satisfies me that Camp & Co. were carrying on in Buffalo what is popularly known as a bucket shop, pure and simple, that is to say, there was an absolute unreality as to any transactions. They never placed nor intended to place any order which was telegraphed to them but simply entered same upon the sheets and bet against it. I have also no doubt whatever that Carpenter & Co. were agents for Camp & Co. by whom they were paid a commission, and that when Pearson went in and instructed a purchase or bet, whichever view is taken of the evidence, that that was telegraphed on by Carpenter & Co. to their principals, Camp & Co., and no transaction was entered into either by bet or otherwise until Camp & Co. signified to Carpenter & Co. that Carpenter & Co. were authorised by them to issue a memorandum (which took the form of a sold note) and that the transaction was not completed until the acceptance of it by Camp & Co. was received in Toronto and notified to the customer there. If this is a proper view of the transaction then it was not consumated except in Toronto, and it is to my mind clearly within section 201 of the Criminal Code, and being illegal is within the reasoning of this court in *Walsh* v. *Trebilcock* (1).

If the view is taken that Carpenter & Co. were agents for Pearson, and that everybody understood that the substance of the transaction was a mere bet, I am unable to find that there was an implied authority to do more than pay over the money deposited at the time, and I think it would require express instructions from Pearson to Carpenter & Co. to pay money

(1) 23 Can. S. C. R. 695.

on a lost bet such as this to enable Carpenter & Co. to recover from Pearson. I do not think that such a transaction as this comes within the purview of *Read* v. *Anderson* (1). That was a case of a simple bet, not of a succession of payments on further bets arising out of the original bet which is this case. Even on this view of the evidence that Carpenter & Co. were agents for Pearson to telegraph to Buffalo to make a bet, it is plain that the bet never became a bet until Carpenter & Co. notified him of the acceptance of it by Camp & Co., and the transaction would still be within the section of the Code I have referred to. In my view, however, the defence set up by Pearson is the correct one. I think that in all of these cases it is a question of fact whether the transaction entered into is really that of betting as in *Universal Stock Exchange* v. *Strachan* (2), or whether there was a knowledge upon the part of both parties that no transaction really ever took place. It is to be noted that both the Messrs. Carpenters swore in the most positive terms that they had no actual knowledge that the transactions of Camp & Co. were merely betting transactions. They both swore that they had a right to assume that when Camp & Co. telegraphed back accepting the order telegraphed to them that such an order was in fact placed; and it is to be noted that when they telegraphed similarly to Ladenburg, Thalman & Company, or Bartlett & Fraser that the transactions were in fact placed, and while as in *Universal Stock Exchange* v. *Stevens* (3), there never was any expectation that the stocks would actually be asked for, yet, if they were asked for at any time, evidence was forthcoming that the transactions had been originally placed and were carried, and, therefore, the customer was bound, on the one

(1) 13 Q. B. D. 779.
(2) [1896] A. C. 166.
(3) 40 W. R. 494.

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hand, to pay any losses that might occur in selling the stocks out or, on the other, he could, if he desired, pay up the balance over and above the margins and get his stocks. I have no doubt whatever that Pearson was perfectly aware of the difference between the two styles of broker's offices, and it was for this reason that he made the inquiry that he did in his letter of April 6th, in which he says:

SATURDAY EVENING, 6th April, 1901.

MESSRS. CARPENTER & SON.

DEAR SIRS,—You will have to tell your people that I cannot arrange more margins just now on that wheat. I suppose Monday will be a holiday but I expect to be back Tuesday. Am going to Rochester tomorrow. If they purchased the stuff I must try and arrange it some way but don't you pay any money on my account.

Yours truly,
J. PEARSON.

and again on April 9th:

TORONTO, April 9th, 1901.

MESSRS. CARPENTER & SONS.

DEAR SIRS,—As you have seen fit to consult a solicitor I presume you are inquiring what your rights are, it will not be out of place for me to see what mine are. I had not been thinking on this line.

The only open transaction is the wheat. The others are closed. I gave you the order to buy and if this order was carried out then I have 30 M bushels of May wheat bought and if party with whom I am dealing has sold this wheat for me then I am behind in my margin and intend to put it up but if he closed out the transaction as soon as the margin I had up was exhausted or before that then I do not owe him anything. It all depends on the facts.

Now as you have asked me for a letter and I have written it I ask you for one to state just how the transaction stands—the actual facts.

Yours truly,
(Sgd.) JAMES PEARSON,
pp. "D."

And, as I have said, until inquiry was made it was impossible for him to tell whether the transaction was a mere bet or was, as in the case of the two brokers' offices I have mentioned, a real transaction. I cannot understand what object he had in writing this letter

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except it was trying to ascertain his position. He knew or supposed that he was not liable to pay if it was a mere bet, which is apparent from the fact that he wanted them not to pay any money on his account. He knew the doctrine of *Read* v. *Anderson* (1) and was guarding himself against the notion of Carpenter & Co. claiming to make good the loss upon his (Pearson's) bet. And, on the other hand, if the transaction was one they could shew had been placed he knew that he would be liable to pay. To this letter Carpenter & Co. replied on the 9th April as follows:

TORONTO, April 9th, 1901.

J. PEARSON, Esq.,
Barrister, &c., City.

DEAR SIR,—Answering yours of to-day you are mistaken in thinking that we consulted a solicitor professionally respecting our right against you. All we did was this: our senior partner's private solicitor is Mr. Teetzel and being with him on private business yesterday it occurred to him to inquire whether he knew you, and on being informed that he was well acquainted with you ventured to inquire as to your standing, and in the course of confidential talk told Mr. Teetzel of the relation between us and expressed his anxiety on account of the size of your account, and also explained that the claim being large, and not knowing you personally, some quibble might be raised, whereupon Mr. Teetzel volunteered to 'phone you more as a friend than a solicitor to know if there was any trouble. Mr. Teetzel assured him you were a gentleman of high honour and if everything was fair we need fear no trouble.

Now the facts are: Your order was placed with us as your broker, and we at once wired to purchase, and as your agents forwarded from time to time your margins, as our books will show. No doubt the wheat was bought and has been carried, and whether it has been or not our good money has gone to protect the deal for you. You also knew from the beginning that we held ourselves directly responsible to you and you could have no misgiving as to our financial ability to meet all engagements undertaken. We regret that you should suggest even the idea of a dispute between us, and while greatly regretting the deal has gone against you we feel assured you will acknowledge

(1) 13 Q. B. D. 779.

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our legal and moral claim without delay. Let us have settlement and in the mean time write us when we are to close the deal.

Yours truly,
CARPENTER & SON,
per D.

And upon this Pearson gives the note in question in this action.

How it can be said by Carpenter & Co. that upon its turning out upon their statement that the wheat had actually been carried that they could recover upon a note given entirely upon the faith of its being a real transaction I cannot understand. It does not lie in the mouth of the person who makes the statement of fact to say that the other party should have known better, and that is really what the judgment of the Court of Appeal comes to.

I do not see what object Pearson would have in writing the letter unless it was for the purpose of finding out whether he was bound to pay or not. It has been said that, if it is found to be a gambling transaction, that has not been pleaded, and the defendant has disclaimed any desire to take advantage of the section in the Criminal Code. My answer is that that is not the business of the defendant but of the court whose duty it is to refuse to give assistance to a plaintiff asking to enforce an application arising out of an illegal transaction.

I adopt the language of Lord Justice Lindley in *Scott* v. *Brown* (1) at p. 728.

I think the real facts are that Pearson was not sure whether the whole thing was a bet or not, that in order to make himself sure he wrote the letters that he did, and that Carpenter & Co. are bound by their answer, and that the note was given on the representation that the transactions were real and that the wheat was in fact purchased and carried, and the

(1) [1892] 2 Q. B. 724.

evidence makes it perfectly plain that there never was a transaction. If this view of the evidence is not taken I think certainly that it is clear that if all the parties knew the whole thing was a mere betting transaction from beginning to end that, nevertheless, the substance of the transaction was that Pearson proposed to Carpenter & Co., in Toronto, to make a bet knowing that they would telegraph his offer to a principal of Carpenter & Co., and both parties perfectly understanding that the bet would not be made until Carpenter & Co. signified to Pearson, in Toronto, that they were ready and willing to make the bet on behalf of their principal and went through the form (if it is to be assumed that they were really only betting) showing a real transaction of purchase and sale, and that, therefore, the transaction was expressly within the Criminal Code and Carpenter & Co. cannot recover for moneys paid by them in a matter arising out of such illegal transaction. I would also hold in any event that if Carpenter & Co. are held to be the agents of Pearson that the only authority they possessed was to forward the moneys deposited by him on the original making of the bet and that in such a case there is no implied authority to forward other moneys to make good additional losses, but that there must be in every such case as this an express request to pay the money on behalf of the person sued, and there is no pretence of an express request in this case by Pearson to Carpenter & Co. to pay any further or additional moneys for him, but that they must be taken to have assumed to pay them relying upon his honour to make restitution to them.

People carrying on this type of business should understand that the courts will not be eager to assist, and that when they get the original amount out of the party with whom they deal, they must be very

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alert to get the actual money for further losses; and that if they see fit to give credit for such pretended further losses they cannot come to the courts of this country for aid to collect.

I think the appeal should be allowed with costs.

KILLAM J. (dissenting).—This is an appeal from a judgment of the Court of Appeal for Ontario in an action for the balance claimed by the plaintiffs upon a promissory note for $1,600 made by the defendant in favour of the plaintiffs.

The plaintiffs carry on business as brokers and financial agents in Toronto and Hamilton, Ontario. The defendant speculated through their Toronto office in stocks, grain, etc., upon margin; and the note in question was given in respect of a claim made by the plaintiffs for moneys said by them to have been advanced for him to protect his transactions.

At the trial the plaintiffs recovered judgment for the full amount claimed by them. The Court of Appeal reduced the amount by a sum advanced upon a transaction found by the court to have been made contrary to direction from the defendant, but confirmed the judgment for the balance, which is now alone in question.

There is no doubt that the plaintiffs made the advances. It seems to me quite clear that the courts were correct in finding that the plaintiffs had the authority of the defendant to make advances necessary to protect his transactions.

The defence set up by the pleadings was that the plaintiffs had obtained the note by representing to the defendant that they had made purchase or sales in accordance with the defendant's orders when, in fact, no such purchases or sales had been so made.

The transactions in question were carried on between the plaintiffs and a firm in Buffalo, N.Y., styled Camp & Co. The defence pleaded rests upon the theory that the plaintiffs were merely the agents of Camp & Co., by whom the purchases and sales were to be made, and that, in reality, none were so made or attempted to be made by Camp & Co., but that, as between the plaintiffs and Camp & Co , there was merely a series of speculations by Camp & Co. in differences which were charged or credited to the plaintiffs according to circumstances as upon assumed purchases and sales.

The learned trial judge found that Camp & Co. were the agents of the plaintiffs to effect the purchases and sales, that while Camp & Co. did not make real purchases or sales they reported such to the plaintiffs as having been actually made, and that the plaintiffs, believing the reports and having made the payments relying upon them, were entitled to recover the amounts.

The Court of Appeal held, upon the evidence, that the plaintiffs were the agents of Camp & Co., whose real business and the transactions in question were of the nature found by the trial judge, but that both the plaintiffs and the defendant knew the nature of the transactions, and that, as the moneys had been paid under authority to so deal, the defendant was bound to repay them.

There can be no doubt that Camp & Co. never made or assumed to make any contracts of purchase or sale on the defendant's behalf with any other persons. The most that can be contended for is that any contracts or transactions were made or conducted between Camp & Co. and the defendant through the medium of the plaintiffs acting as the agents of one party or the other or partly for each. And in my opinion none of the parties ever intended or expected that there were to

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be any real contracts for the purchase or sale of commodities or stocks.

In the particular cases out of which this action has arisen the defendant initialled and gave to the plaintiffs a memorandum in the following form :

MEMO.

Buy 18th May.
10 May wheat
at 76 7-8 & 20 at 76 1-2.
J. P.

The plaintiffs telegraphed an offer in these terms to Camp & Co., and it was accepted. The defendant knew nothing of Camp & Co. It was not material to him whether the plaintiffs effected a deal with another party directly or through the medium of some one in Buffalo. He obtained what he sought--an arrangement by which there was to be the semblance of a sale to him and a subsequent re-sale, as a result of which he was to receive or pay the difference in market prices. The result was a loss which he, and not the plaintiffs, should bear. The defence on the record failed.

Before the Court of Appeal, as appears by the judgment of the learned Chief Justice of Ontario, the defendant disclaimed any desire to avail himself of the defence that these were gambling transactions. He now seeks to do so.

If it were clear that the contracts were wholly made in Toronto between the defendant and Camp & Co. through the agency of the plaintiffs, it appears to me that they were directly within section 201 of "The Criminal Code, 1892."

And, probably, as the transactions and the authority to make the advances were all linked together and the plaintiffs directly parties to them all, the advances would not be recoverable.

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On the other hand, there seems to be nothing in the statute or otherwise to make it unlawful to employ a person in Canada to enter into such transactions abroad, though the agent's right to recover for moneys advanced upon them would probably depend upon the law of the country where they were entered into.

In the absence of express or implied prohibition by statute, moneys paid at the request of another in discharge of a lost bet or wager made by or for the latter is recoverable under the law of the Province of Ontario. See *Hussey* v. *Crickitt* (1); *Rosewarne* v. *Billing* (2); *Knight* v. *Cambers* (3); *Bubb* v. *Yelverton* (4); *Oldham* v. *Ramsden* (5); *Read* v. *Anderson* (6); *Bank of Toronto* v. *McDougall* (7).

Whether this is the law in the State of New York; whether there is there any statute similar to ours or which, either expressly or by implication, makes money paid upon such transactions as that now in question non-recoverable, there is nothing to show.

By Rule 271 under the Judicature Act of the Province of Ontario:

Each party in any pleading shall raise all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as for instance, fraud, Statute of Limitatations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds.

If the evidence made it clear that the consideration for the note was illegal the defect in pleading would be easily got over. Although the plaintiffs were spoken of by some of the witnesses as agents of Camp & Co. and were allowed commissions in their dealings, yet,

(1) 3 Camp. 168.
(2) 15 C. B. N. S. 316.
(3) 15 C. B. 562.
(4) 19 W. R. 739.
(5) 32 L. T. 825.
(6) 13 Q. B. D. 779.
(7) 28 U. C. C. P. 345.

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upon the evidence as a whole, I am inclined to the view that the plaintiffs acted as agents of the defendant to carry on the dealings for him, and that the transactions should be deemed to have occurred in Buffalo. But whether this view is correct or not, still, in the absence of the plea, it should not be assumed that all the evidence was given that could be given upon the question as to where the transactions should be considered to have taken place. And whatever might be the presumption in a proper case as to the law in New York, it would be a presumption of fact which could not properly be raised without the plea because, if raised, it might have been rebutted.

I think that the new defence should not be allowed at this stage, and in my opinion the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *Wm. R. Smyth.*

Solicitors for the respondents: *Harrison & Lewis.*