[HIGH COURT OF AUSTRALIA.]

BRUCE . . . . . APPELLANT;
DEFENDANT,

AND

TYLEY AND ANOTHER . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *May* 22, 23, 24, 26.

Barton, Isaacs and Gavan Duffy JJ.

Contract—Validity—Personal contract with the Crown—Services to be performed at military camp—Sub-contract—Delegation of duties — Public policy — Impeding right to contract with Crown—Assignment of contract—Valuable consideration — Right of assignee to sue — Property Act 1860 (*S.A.*) (23 & 24 *Vict. No.* 6), *sec.* 19.*

After the beginning of the war A, who was about to tender to the military authorities for the collection and removal of kitchen refuse from a military camp, agreed with B that in the event of the tender being accepted B should, for a certain monetary consideration, have the right to collect a certain portion of the refuse. A then tendered for the work, and his tender was accepted. Subsequently B, by deed, in consideration of natural love and affection, assigned to his wife his interest in the contract between him and A.

Held, that B's wife was not entitled to sue A for breach of the contract between A and B:

By *Barton* and *Isaacs* JJ., on the ground that the contract between A and the military authorities was a personal one, the duties under which A had no right to delegate to B, and, therefore, that B had no legally enforceable contract with A;

* Sec. 19 of the *Property Act of* 1860 provides that "Every person shall have power to assign any chose in action, and the assignee thereof for the time being may bring every such action thereupon or in respect thereof in his own name as the assignor or the first of the assignors could have brought if no such assignment had been made, without prejudice nevertheless to any equity of the defendant as against the plaintiff or any such assignor."

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By *Isaacs* J., also on the ground that the contract between A and B, if it was an absolute contract to make no agreement with the Crown except one which would permit B to share in the collection of the refuse, was contrary to public policy and void, inasmuch as it affixed a penalty to a free exercise by A of his right to contract with the Crown;

By *Gavan Duffy* J., on the ground that, apart from Statute, as there was no valuable consideration for the assignment of the contract between A and B by B to his wife, that assignment did not operate as an equitable assignment of the legal chose in action consisting of the right to sue A for a breach of the contract, and that sec. 19 of the *Property Act of* 1860 (S.A.), the only relevant effect of which is to dispense with the necessity of joining the assignor as a party where the assignee of a legal chose in action is seeking to enforce his rights in a Court of law, gave no right to B's wife to sue for a breach of the contract.

Decision of the Supreme Court of South Australia (*Murray* J.) reversed.

APPEAL from the Supreme Court of South Australia.

An action was brought in the Supreme Court by Albert Arthur Tyley and his wife, Emily Mabel Tyley, against William Herbert Bruce in which, by the statement of claim, the plaintiffs alleged (*inter alia*) that on 22nd February 1915 it was agreed in writing between the defendant and A. A. Tyley that conditionally upon the defendant obtaining a certain contract with the military authorities for the purchase and removal of certain waste material from a certain military camp, for which tenders had been called, the defendant should sell to A. A. Tyley, who should purchase from the defendant, the waste material from 600 men during the continuance of such contract, and that A. A. Tyley should provide garbage tins for such waste material and pay the defendant for such waste material at the same rate as should be provided in the contract; that the defendant's tender was accepted, and he obtained the contract; that on 3rd March 1915 A. A. Tyley by deed of gift purported to assign the benefit of his agreement with the defendant to his wife, E. M. Tyley; and that on or about 4th May 1915 the defendant repudiated the agreement and refused to further carry it out. Each plaintiff alternatively claimed £1,000 damages. The defendant, in his defence, alleged (*inter alia*) that it was an implied term of the agreement that A. A. Tyley should obtain from the competent military authorities access to the military

camp; that A. A. Tyley on or about 4th May 1915 repudiated the agreement; that the agreement was void for uncertainty; that the competent military authorities refused to admit A. A. Tyley to the military camp, and that if A. A. Tyley was unable to perform or was prevented from performing the agreement it was by reason of such refusal; and that A. A. Tyley discharged the agreement by assigning it to his wife without the consent or privity of the defendant.

The action was heard before *Murray* J. (now Chief Justice), who gave judgment for Mrs. Tyley for £300.

From that decision the defendant now appealed to the High Court.

The material facts are stated in the judgment of *Barton* J. hereunder.

Sir Josiah Symon K.C. (with him *F. Villeneuve Smith*), for the appellant. The contract between the appellant and A. A. Tyley was not a contract of sale and purchase, but one under which A. A. Tyley had a right to collect the refuse. That was a personal contract and not capable of assignment, and upon assignment to Mrs. Tyley was discharged. A. A. Tyley's right to collect the refuse was subject to the right of the military authorities to refuse permission to enter the camp. The appellant did not warrant that he would obtain permission for A. A. Tyley to enter the camp, or that the military authorities would give that permission. If A. A. Tyley wished to exercise the right to collect the refuse, it was his duty to obtain access to the camp. The right to collect the refuse which the appellant obtained under his contract with the military authorities could not be delegated, for the contract was a personal one: *Robson and Sharpe* v. *Drummond* (1); *British Waggon Co.* v. *Lea* (2); *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900) *Ltd.* (3); *Kemp* v. *Baerselman* (4); *Halsbury's Laws of England*, vol. III., p. 196. Sec. 19 of the *Property Act of* 1860 is a procedure section only and does not render a chose in action assignable which was otherwise not assignable. See *Wright* v. *Bakewell* (5).

[ISAACS J. referred to *Buck* v. *Robson* (6).]

(1) 2 B. & Ad., 303.
(2) 5 Q.B.D., 149, at p. 153.
(3) (1903) A.C., 414.
(4) (1906) 2 K.B., 604.
(5) 5 S.A.L.R., 108.
(6) 3 Q.B.D., 686.

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There is no evidence that Mrs. Tyley has sustained any damage.

Cleland K.C. (with him *McLachlan*), for the respondent Mrs. Tyley. The contract between the appellant and A. A. Tyley was an absolute contract by which the appellant agreed that in any event he would give the plaintiff the absolute right to collect a certain portion of the refuse. There is nothing to qualify that absolute right. If the right was not so high, at the least the appellant undertook to exercise whatever rights he had under the principal contract with the military authorities in order to enable A. A. Tyley to obtain the benefit of the sub-contract, including the right to bring an action against them. See *Hart* v. *MacDonald* (1); *Milne* v. *Sydney Corporation* (2). In that view the appellant was bound to give a written authority to A. A. Tyley and his servants to obtain the refuse. That was all that the Camp Commandant required. A. A. Tyley would then take his chance of satisfying the military authorities. The position was the same as in an ordinary sub-contract, where the sub-contractor employs his own servants but the principal contractor is responsible under the principal contract for their conduct. The contract between the military authorities and the appellant was not a personal contract. It was not based on any personal confidence reposed in the appellant by the military authorities. They did not entrust him with the selection of the men who should go into the camp, but they reserved the right to refuse admission to the camp to any particular person. If there was any personal confidence the appellant cannot use that fact in derogation of his own contract with A. A. Tyley. If there was that confidence the appellant could only refuse to put A. A. Tyley and his servants in the same position as the appellant's own servants for cause shown. The contract between the appellant and A. A. Tyley was not an assignment of the principal contract or of a part of it. If it were, the appellant would not be in a better position. The principal contract was one for services, and by it the appellant acquired the exclusive right to collect the refuse and undertook the corresponding duty of collecting the whole of it. He was impliedly authorized to employ assistants. The contract between the appellant

(1) 10 C.L.R., 417. (2) 14 C.L.R., 54, at p. 69.

and A. A. Tyley was either to employ the latter as one of those assistants or to employ him as a sub-contractor. That contract was not contrary to public policy any more than was the contract between the appellant and the military authorities, for the military authorities always retained the power to exclude from the camp any particular person. A. A. Tyley was the proper person to demand performance of the contract, because he only assigned the benefit of the contract to his wife. See *Fratelli Sorrentino* v. *Buerger* (1).

Cur. adv. vult.

May 26.

The following judgments were read :—

BARTON J. In this case the plaintiffs, A. A. Tyley and Emily Mabel Tyley, who are man and wife, sued the defendant, W. H. Bruce, for breach of a contract, and the learned Chief Justice of South Australia, who tried the case without a jury, gave judgment for the female plaintiff as assignee of the contract made by the plaintiff with the defendant, awarding Mrs. Tyley £300 damages. The male plaintiff is not represented in the present appeal.

Both the appellant and Tyley were pig farmers and pig dealers at the date of their contract, 22nd February 1915. It runs as follows :—" We the undersigned agree that should the tender for waste material be accepted by the Military Department Mr. A. A. Tyley to have the right to collect from the Morphettville Camp to the extent of 600 men. Should this number decrease he to have the right to get the same amount from some other camp, providing the same number is in camp as when tendered for. Should the number increase W. H. Bruce to have the extra number over the 600 at Morphettville. Garbage tins to be found for the 600 by Mr. Tyley. Price pro ratio of contract.—W. H. Bruce. A. A. Tyley." The next day, namely 23rd February, H. R. Bruce, the defendant's son, acting on the defendant's telegraphed instructions, made on his behalf the tender which was contemplated by the contract now sued on, " for the collection and removal of the whole of the kitchen and waste food from " certain camps, including that at Morphettville, " for the sum of £16 5s. per week, while the present number are in camp, which I am told is 2,600." On 24th

(1) (1915) 1 K.B., 307 ; (1915) 3 K.B., 367.

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February the Military Department, through the Deputy Assistant Quartermaster General, accepted the tender by a letter of which the following are the material terms :—" Your tender for the removal of kitchen garbage and food scraps from the camp at Morphettville &c. at £16 5s. on the assumption that 2,600 are in camp has been accepted from the 28th instant. . . . At the present time 2,680 are in camp . . . the whole of the clearing is to be done to the satisfaction of the Camp Commandant . . . this contract may be terminated by a month's notice on either side." This letter was addressed to H. R. Bruce, but his father has been on all hands accepted as the tenderer and contractor. He is the defendant, and now the appellant. In fact, he admitted on cross-examination that the contract was his. Unless it was his, there was nothing out of which the appellant could contract to supply Tyley's needs.

The work was entered on as arranged, and A. A. Tyley and his men were allowed for some time to collect the material from 600 men out of the 2,600 at Morphettville Camp. It was used as food for his pigs. That camp was removed at the end of March or beginning of April from Morphettville to Mitcham, and the parties to the contract sued on went on removing the refuse, Tyley taking that of 600 men and Bruce that of 2,000 or thereabouts. This lasted up to 28th April, Tyley paying the appellant £16 in advance for March and £16 in advance for April. On the day mentioned the Camp Commandant, Major De Passey, put an end to the visits of Tyley and his men, who were thenceforth excluded. The cause was that two of Tyley's employees, Martin and Shires, who had been collecting the garbage, had been found in the camp with a joint of fresh meat on the trolly upon which they were removing kitchen refuse. Martin, answering an inquiry from the Commandant, said he had got the joint from one of the cooks at the camp. The Commandant objected to their conduct as dishonest, and declined to allow Tyley or any man of his to have anything more to do with the removal of the garbage, on the ground that Tyley was sending dishonest persons to the camp. He had seen in the newspapers the report of a case in which Martin, as a witness, had admitted having stolen at the camp at Morphettville. Tyley, as a

fact, knew the character of Martin, whose confessed thefts at the camp at Morphettville had included jam, tea, and tinned meat, taken while he was in the employment of a previous contractor named Streeter. Tyley, in fact, was present at the trial during which these admissions occurred, but nevertheless continued to send Martin to the camp up to the day on which the shin of beef was found on the trolly. Tyley told the Camp Commandant at their interview that he would go to Mr. Bruce, and claimed a right to bring in whatever men he liked. The Commandant said it was no use going to Mr. Bruce, for he did not consider it in the interests of the discipline of the camp that Tyley's men should be admitted at all, as "the same would happen as happened at the Morphettville Camp." At that time Bruce the appellant was away; but on his return on 4th May Tyley saw him and they had a conversation. Tyley gave his own statement of the facts, and was asked why he did not have a decent man working for him instead of sending a thief to the camp. Tyley replied, "I will please myself whom I will send to the camp for me." Bruce said "The contract is in my name, and I don't want thieves going into the camp for me." Tyley asked Bruce for an order to go out and get "the stuff." The appellant said he would do nothing until he could see the Commandant. He asked Tyley why he did not go out himself, and received the answer that Tyley would please himself whom he would send out to the camp. The appellant saw the Camp Commandant the next day, and afterwards told Tyley, as the fact was, that the Commandant absolutely refused to allow Tyley or his men to go into the camp, and he, the appellant, refused to give the order, as, he said, he would lose the camp himself if he did so. No further facts need be mentioned in view of the nature of the case as I understand it.

Now, it is to be remembered that these contracts and transactions took place during the still existing state of war. Whatever precautions were necessary or advisable in relation to the admission of strangers to the military camps in time of peace, it cannot be denied that the need for precaution became intensified when the Empire of which this country is a part became involved in war. The question is not what sort of persons might be engaged in the

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mere act of removing garbage from any ordinary place. The military authorities and all concerned were under the strict necessity of exercising great vigilance as to the character of the persons allowed to enter the camps, and they had a duty to see to it that contracts involving entry into the residential quarters at this or any camp were to be given only to persons whose judgment they could trust, not merely as to the manner of performing their contracts in other respects, but as to the persons whom each contractor would employ for the execution of his agreed duties in so far as he could not perform them personally. In this case it was obvious, as to the whole 2,600 men concerned, that infinite damage to order and discipline might be done by the admission of bad characters into the camp, or by the acceptance of persons who might send bad characters there. It is equally obvious that the officer in charge of the camp, Major De Passey, was fully alive to this necessity, and that he trusted no one but the contractor Bruce, whose servants he would regard as proper persons to admit, retaining himself nevertheless the power to exclude those whom he discovered to be undesirable. When the contract sued on was made, the tender which was immediately afterwards offered and accepted was in contemplation as a tender by the appellant himself. If the acceptance of the tender, which may be called the superior contract, in itself involved, as I am clear that it did, personal confidence on the part of the Department in the character and judgment of the accepted tenderer, it is clear that the latter could not assign or delegate that contract: *Robson and Sharpe* v. *Drummond* (1), which may be considered a leading case. Its principles have been approved by the Court of Queen's Bench in *British Waggon Co.* v. *Lea* (2), and in later cases. In *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900) *Ltd.* (3) Lord *Macnaghten* said:—"There are contracts, of course, which are not to be performed vicariously, to use an expression of *Knight Bruce* L.J. There may be an element of personal skill or an element of personal confidence to which, for the purposes of the contract, a stranger cannot make any pretensions." Here no question arises as to the first of these elements, but the

(1) 2 B. & Ad., 303.
(2) 5 Q.B.D., 149.
(3) (1903) A.C., 414, at p. 417.

second is deeply involved. The Department might and did entrust the person whose tender it preferred to accept with the choice of servants responsible to himself. But that does not involve liberty to the accepted tenderer to assign or delegate the whole of his duties in respect of any particular part of his contract, or to part with his control over its execution. I have pointed out that the Commandant, who in respect of the control of this camp was the representative of the Military Department, trusted the appellant and no one else, and I have adverted to that because I think in that respect he appreciated the duty and interpreted the resolve of the Department to leave the execution of the contract solely and wholly to the chosen contractor.

Now, if the superior contract were not a personal contract it might well be contended that the appellant was bound to do all that was necessary to be done on his part to enable Tyley to get the refuse from the camp. That would at least involve his doing his best to obtain access to the camp for Tyley and his servants. Indeed, it might necessitate success in obtaining it: *Mackay* v. *Dick* (1)—where Lord *Blackburn* lays down the general rule applicable to such cases in a passage which I cited in *Milne* v. *Sydney Corporation* (2). But that rule does not cover the whole ground in this case, because in view of the nature of the superior contract with the Department the appellant was only bound to the extent which that other contract allowed. The contract sued on was conditional on the acceptance of the tender. But the tender and acceptance constituted a personal contract by Bruce. True, the agreement with Tyley was not an assignment, inasmuch as consideration for it moved to the appellant and not to his superior contractee, but if Tyley had any right at all and his right is not as an assignee, it must be as a person to whom all the duties of the contract were delegated "to the extent of 600 men." Such a delegation is not admissible in the case of a contract of a personal character such as that which the appellant had with the Military Department, and I come to the conclusion that Tyley had no legally enforceable contract with the appellant.

If, then, the contract sued on was not enforceable by Tyley it

(1) 6 A.C., 251, at p. 263.

(2) 14 C.L.R., 54, at p. 69.

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is equally unenforceable at the suit of Mrs. Tyley, since the voluntary deed of 3rd March 1915 could not vest in her any right which her assumed assignor could not possess.

Hitherto I have dealt with the matter simply as a delegation of all the duties involved in a part of the superior contract construed as a personal one. My learned brother *Isaacs*, holding equally with myself that the superior contract is in the circumstances a personal one, is also of opinion that the contract sued on is in effect an attempt to defeat it in part—and is therefore against public policy and void—if Mr. *Cleland* is right in his contention that the appellant engaged absolutely with Tyley to obtain in all events access to the camp for him and whomsoever he employed to help him to carry out his duties as to the 600 men. On the whole I agree with my brother's view as to the consequences of Mr. *Cleland's* construction, but I do not hold it with so much confidence as the opinion which I have expressed above. My own view, of course, is satisfied by a construction of the appellant's obligation to Tyley as being limited by the rights of the appellant under the superior contract. It is right to add that the question of public policy was not raised before the learned Chief Justice of South Australia. Indeed, the question of personal confidence was applied by the appellant only to the contract sued upon.

For the reasons given, I think that the appeal ought to be allowed.

ISAACS J. The appellant, W. H. Bruce, was defendant in an action brought by Albert Arthur Tyley and his wife Emily Mabel Tyley. It is important to observe that the action was purely a common law action for breach of contract, and nothing was claimed but damages. The defence and the reply similarly rested on purely common law grounds. In other words, the contentions of the parties as set up on both sides are not founded on equitable rights, no equitable claims are made or resisted, and the whole matter resolves itself into a contest of contractual obligations or nothing.

The basis of the claim is the written agreement made on 22nd February 1915 between Bruce and Tyley, the husband, before the Government contract was made, and therefore, necessarily, no assignment at law of rights under it. The wife's claim is founded

on the deed of assignment of 3rd March, which, it is said, vests in her by force of the *Property Act of* 1860, sec. 19, the right of enforcing the agreement on her own behalf. This latter point, in the view I take of the whole case, it is unnecessary to determine, and so the respondent's contention in this respect I simply assume for the purposes of this appeal to be correct. Judgment was given for her for £300 damages—nothing being said about the husband, who was eventually treated apparently by all parties as a mere nominal party. His original contractual rights are now only important as constituting when transmitted those of the wife. The agreement of 22nd February sued on was made in anticipation of an expected contract between Bruce and the Commonwealth, for which Bruce, by arrangement with Tyley, tendered on the same day, and for which Tyley also tendered at a lower price on the following day. The appellant's son in his own name, but really for the appellant —as it has been regarded by all parties, and as the appellant admitted in cross-examination—put in a higher tender also on the 23rd, and this was accepted upon terms contained in the departmental letter of acceptance of 24th February which, with the son's tender, constitutes the contract which is the subject matter of the agreement here sued on.

Without direct reference to the Government contract there is nothing upon which the Bruce-Tyley agreement can operate ; and nothing for which damages can be given ; and the question for us is, what is the legal operation of the agreement when it is directly referred to the Government contract as its subject matter. If that subject matter were a contract between private persons it would be necessary to discuss fully several of the points argued before us and determined by the learned Chief Justice of South Australia : for instance, the question as to what acts Bruce was bound to perform in discharge of his obligation to let Tyley have the right of collecting—whether, for instance, he was bound to sign an authority at large to Tyley, or to appoint as his servants such men as Tyley chose to nominate, or to sue the Government for refusing Tyley access. The principle is quite clear, and is stated with unquestionable authority by Lord *Blackburn* in *Mackay* v. *Dick* (1) as follows :

(1) 6 App. Cas., 251, at p. 263.

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—" Where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect." That is necessary in order, as has been said, to give the business efficacy to the agreement which both parties must have understood it was to have. But Lord *Blackburn* immediately adds these words :—" What is the part of each must depend on circumstances."

It is only just to observe that before the learned Chief Justice, and up to a certain point before us, the case was presented as if the main contract were to be regarded in the same light as a private contract, and the parties' rights ascertained on that footing. Nor can I discover that the personal nature of the contract was presented to his Honor. If, however, the distinction between the main contract as a public personal contract and as it would be if it were a private contract, personal or impersonal, had been presented to the learned Chief Justice, I entertain little doubt that his Honor would, upon the authorities, have taken the same view as I am taking now. Up to a certain point the considerations are the same. For instance, in order to discover whether the contract is or is not what is known as a " personal " contract, the same principles apply ; though the fact that a contract is a public one may be, and is in the present instance, an important fact, helping the Court to arrive at the conclusion that the contract is personal to Bruce, and therefore one with respect to which the Commonwealth could insist upon Bruce not introducing any other person to perform it instead of Bruce himself. Lord *Macnaghten* in *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900) *Ltd.* (1) said :—" There are contracts, of course, which are not to be performed vicariously, to use an expression of *Knight Bruce* L.J. There may be an element of personal skill or an element of personal confidence to which, for the purposes of the contract, a stranger cannot make any pretensions." If there is such an element, that makes it personal. But it may be personal by reason of other considerations, as in *Humble* v. *Hunter* (2)

(1) (1903) A.C., 414, at p. 417. (2) 12 Q.B., 310.

and *Boulton* v. *Jones* (1). *Lindley* L.J. in *Dr. Jaeger's Sanitary Woollen System Co.* v. *Walker & Sons* (2) spoke of the contract then before the Court "as a 'personal' agreement in this sense, and to this extent, that the performance of it by other people nominated by the manufacturers would not in my opinion be a performance of the agreement if objected to by the Company." His Lordship added: "In other words I do not think that it is what is called an 'assignable' agreement."

A personal agreement is one which entitles one party to an actual performance of it by the other party personally, and, in the absence of express provision, the right may be inferred from the terms of the contract applied to the subject matter and the circumstances of the parties. Now, even if this were a private personal contract, Bruce would not have the right to introduce Tyley or his wife or anyone else into the matter as the party to perform it, for that would be altering the other party's right. It might or might not cause an additional burden upon the other party; but the basic consideration is that it would alter the rights he had under his contract. Of course, if Tyley could transfer the right as to 600 men, he could do so as to the whole of the men, which would be a simple and complete substitution of another contractor, who, by the hypothesis, is excluded. If the Government contract be not "personal," then Bruce could no doubt have performed it by openly getting Tyley to do the work as long as the work was properly done. But if it is "personal," then it is an impossible contention that Bruce could at the same time, by automatically appointing Tyley's nominees as his own servants, though they were not so in truth, have fulfilled on the one hand his obligation to the Commonwealth to do the work himself, and on the other hand his obligation to Tyley to let Tyley do it. That would have been a mere ostensible adherence to his obligations to the Commonwealth—a mere pretence. He would thereby have abdicated his duty, and secretly delegated or deputed to another the care and supervision which he was paid to exercise himself. The law does not countenance, much less does it enforce, such a fraud. Consequently, if the Bruce-Tyley agreement means, as for considerations to be presently mentioned I think it

(1) 2 H. & N., 564. (2) 77 L.T., 180, at p. 187.

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does mean, that Tyley should have the right to collect the refuse so far as the Government contract permitted Bruce to allow it, the plain answer to the claim is that there is no breach, because the Government contract did not allow it.

It is not pretended—nor could it be maintained—that the Bruce-Tyley contract is one by which Bruce undertook to collect and remove from the camp all the garbage, and then sell for the consideration mentioned the specified proportion. That would be innocuous; and would be clear of all difficulty. But the bargain insisted on involves the entry by Tyley into the camp and the performance by him of the very duties Bruce has undertaken to discharge. It is, as I read it, a promise, subject only to a reservation to be presently mentioned, that if Bruce should obtain the right and undertake the corresponding duty of collecting and disposing of the garbage representing the refuse from 2,600 men, he would allow Tyley to have the right to collect and have the garbage representing the refuse from 600 of those men. In effect, he agreed irrevocably, for the consideration stated, that he would personally withdraw from the performance of the Government contract so far as 600 men were concerned, and that he would to that extent substitute Tyley for himself as the person to actually perform the contract without control or supervision by Bruce.

I assent to the proposition that the Government contract by necessary implication empowered Bruce to engage assistants. But that means assistants to himself as the principal in the actual performance of the work, answerable to him, controlled by him, paid by him and removable by him, and for whose acts within the scope of their authority he would as on ordinary relations of master and servant be responsible. And in like manner the Bruce-Tyley agreement contemplated Tyley having assistants, standing in precisely the same relation to him and not to Bruce, Tyley being as regards Bruce an independent contractor. That involved two sets of operators entering the camp, and being entirely independent of each other. True, the Commonwealth, if its own contract is personal, would not recognize any of them except as representing Bruce, but if, for instance, Bruce had put Tyley's men forward as his (Bruce's) servants, that, as already stated, would have been a

false representation, a mere device to cover up the real facts—the real fact being that Bruce was not doing the work but was delegating or deputing it to another, not only not responsible to Bruce but claiming the right to be there even against Bruce's will. Bruce could not validly so agree, after he made the main contract; and, in the interests of validity, a contract such as the one sued on, if in general terms, should be construed as applying to the case of a main contract that permitted substitution, and not otherwise. But if so there is, as I have said, no breach if the Government contract be one "personal" to Bruce.

Then, is the main contract a personal contract or not? There being no express provision on the question, we have to consider the nature of the bargain itself in relation to the subject matter. The removal of garbage *per se* is of course not a matter involving personal confidence. But the subject matter of the main contract is not garbage *per se*. The real subject matter is the cleansing of a military camp during time of war, with all that such an establishment connotes, and among other things all the notorious attempts of the enemy to damage military property and to probe into secrets. If the Commonwealth were during the war to let to a particular individual a contract to enter a war-ship or a munition factory and remove the refuse, it would be absurd to suppose that he could at his own will and without the consent of the Commonwealth substitute someone else to perform the work. A military camp in war time is practically in the same category. A place where thousands of men are in training, where arms and ammunition are collected and served out, where valuable artillery is stored, where secrets may be learned and carried away, where orders or communications are received and issued and may be preserved and inspected, where unguarded action or speech might afford information which the enemy would value, and where valuable and perhaps irreplaceable property might be imperilled, is, in my opinion, beyond any serious controversy a place which by force of its own character and surroundings stamps the contract, made in war time with Bruce, as one partaking of the element of personal confidence. Before entrusting a man with the right and the duty of entering the camp and selecting

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his servants to enter the camp and come into contact with the soldiers and to roam over a considerable portion of the camp, it is so manifestly the duty of the military authorities to satisfy themselves of his personal reliability both as regards his own direct conduct and as regards the care he would exercise in selecting servants not merely capable but loyal and trustworthy, that, unless the contrary were established by the most positive evidence, the Court must assume his tender was accepted in reliance upon his personal qualities. The contrary view maintains that it is immaterial whom he empowered to enter the camp as substitute for himself, whether a German, a licensed victualler, or a woman. Indeed, the subsequent assignment to Mrs. Tyley is a direct assertion that a woman—any woman the contractor happens to authorize—is a permitted substitute for the original contractor, to take any part she chooses in entering the camp and collecting or directing others in collecting garbage.

I take the opportunity of suggesting that, to prevent misapprehension or doubt in any case, a distinct intimation be inserted in every similar contract that no sub-letting or substitution be permitted. It is not every case that would be as clear as the present is to me. In my view this is a clear case in which is involved the element of personal confidence in the person entrusted with the duty of entering and moving about the camp, even though merely for the collection of garbage.

To meet this difficulty, and to avoid the necessity of insisting on the right of substitution, Mr. *Cleland*, in the course of his clear and able argument, contended that the Bruce-Tyley agreement, being made before the Government contract, created an absolute obligation to share the collection; in other words, that Bruce bound himself to Tyley, whatever were the terms of the future contract, to let him share the collection—not to share the refuse after collection by Bruce, but to share the actual work of collection itself with its consequent retention of the garbage collected. It was said that at all events Bruce was bound by that, and, though it might be a breach of Bruce's contract with the Government to actually share, he had contracted that he would, and must abide by the consequences.

If the whole matter were private the principle invoked by Mr. *Cleland* would be possible of application, leaving the matter merely one of construction. The rule of *Paradine* v. *Jane* (1) is clear that "when the party by his contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." And still more clear is it that, where an absolute undertaking is given, the promisor has only himself to blame if he afterwards acts so as to embarrass himself by making a contract with a private person which he is not at liberty to share with his original promisee. No question of public policy is there involved, the rights and claims of one subject are as high as those of another, and so a party may, with perfect immunity, agree not to bargain with another except on specific conditions which allow him to carry out his original contract, and, if he breaks his bargain, there is no general rule to prevent his becoming liable for the consequences.

If, therefore, the true construction of the agreement of 22nd February be absolute that, whatever the terms of the expected main contract might be, even although an express stipulation against sub-letting were insisted on by the other party, still Bruce had bound himself to give over a portion of his rights to Tyley, then Bruce, having chosen to contract in that form, must in a purely private transaction bear the burden of failing to perform it, particularly as his failure was due to his voluntary act.

I may observe, in passing, that it is more than probable that when the Bruce-Tyley agreement was made both parties understood that the main contract would be in such a form that there would be no impediment in fact or in law to prevent the bargain being carried out. That may have been the mutual understanding, accepted as the basis upon which their agreement was made. And it may be that when it appears that the basis is non-existent, and that both parties have been mutually mistaken fundamentally, their agreement fails to have binding effect. But I pass from the consideration of that matter to the vital factor which, on the assumption that the Government contract is personal, determines the result

(1) Aleyn, 26, at p. 27.

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of this case, even if the obligation of the Bruce-Tyley agreement is absolute.

Lord *Ellenborough*, in *Atkinson* v. *Ritchie* (1), after recognizing the general rule applicable to private interests, recognizes the paramount force of public policy in regard to the interests of the State, where he observes that even contracts originally lawfully made become incapable of being any longer carried into effect when they derogate from the clear public duty which a British subject owes to his sovereign and the State of which he is a member.

Lord *Alvanley* C.J., in *Touteng* v. *Hubbard* (2), states the principle thus :—" If a party contract to do any thing, he shall be bound to the performance of his contract, if from the nature of that contract it is capable of being performed, and legally may be performed. But where the policy of the State intervenes and prevents the performance of the contract, the party will be excused." And see *per* the same learned Chief Justice in *Furtado* v. *Rogers* (3). As *Willes* J. phrases it in *Esposito* v. *Bowden* (4), " the law justifies what it commands." The principle receives recent illustration in the case of *In re Shipton, Anderson & Co. and Harrison Brothers & Co.'s Arbitration* (5).

It needs no elaboration to demonstrate that that principle carries with it the proposition that a bargain between A and B whereby B agrees not to contract with the Crown for public purposes, or, what is the same thing, not to contract on the terms the Crown desires, is contrary to the public policy which requires unfettered freedom on the part of every man to contract for the public service, subject only to such exceptions as the law itself prescribes. A bargain which contemplates prevention, impediment or embarrassment of the free will of a subject to serve his country is inherently illegal, and the law will not enforce it. Consequently, such a pre-determination, affixing a pecuniary penalty to a free exercise of contractual will towards the Sovereign, is not one which can support the plaintiff's claim as a prior created obligation now co-existent

(1) 10 East, 530, at p. 535.
(2) 3 B. & P., 291, at p. 301.
(3) 3 B. & P., 191, at p. 198.
(4) 7 E. & B., 763, at p. 794.
(5) (1915) 3 K.B., 676.

with a public contract of that nature, whether the latter be made before or after the private bargain.

In my opinion, therefore, the bargain of 22nd February relied on is unenforceable with reference to the Government contract actually made, whatever the form of demand or refusal, and apart from Major De Passey's refusal to admit Tyley. Had such permission been given and had Bruce consequently authorized Tyley, it would have been a variation of the Government contract, not a simple performance of its terms.

I agree that the appeal should be allowed.

GAVAN DUFFY J. In this case I am relieved from the necessity of expressing either assent to, or dissent from, the opinion enunciated by the other members of the Court. In my opinion there are technical difficulties in the way of the female plaintiff, and the view entertained by my colleagues renders useless any inquiry as to whether we have power to direct judgment to be entered for the male plaintiff on this appeal. Counsel for the female plaintiff admitted, and in my opinion rightly admitted, that section 19 of Act No. 6 of 1860, on which he relies, deals with procedure, and that its only relevant effect is to dispense with the necessity of joining the assignor as a party where the assignee of a legal chose in action is seeking to enforce his rights in a Court of law, and thus to enable him to do directly in his own name what he had theretofore been able to insist on doing indirectly in the name of his assignor. Now, apart from the Statute, what are Mrs. Tyley's rights under the instrument executed by her husband which purported to assign to her among other things "a contract with W. H. Bruce for removal of waste materials"? I shall assume, without deciding it, that Bruce has committed a breach of his contract, and that such an instrument if made for valuable consideration would have entitled Mrs. Tyley to sue in her husband's name for damages for that breach; but there was no valuable consideration, and where there is no consideration there can be no equitable assignment of a legal chose in action. A volunteer in such circumstances takes nothing; he cannot sue in his own name, nor can he compel the

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assistance of the person entitled to sue, though of course that person may lend his name if he chooses, as Mr. Tyley did here. The result is that when Mrs. Tyley invokes the assistance of the Statute she is met by the answer that her case is not within its provisions, and that, if either of the plaintiffs is entitled to judgment, it is her husband and not herself.

Appeal allowed. Judgment appealed from set aside and judgment entered for defendant.

Solicitor for the appellant, *F. Villeneuve Smith.*

Solicitors for the respondents, *McLachlan, Napier & Browne.*

B. L.

[HIGH COURT OF AUSTRALIA.]

RUSSELL AUBREY ROGERS . . . APPELLANT;
DEFENDANT,

AND

GEORGE ALBERT ROGERS AND OTHERS RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 6, 7.

Griffith C.J., Barton, Isaacs, Gavan Duffy and Rich JJ.

Will—Interpretation—Absolute gift—Gift over—Cutting down absolute gift—Remoteness—Res judicata.

By his will a testator gave all his property real and personal to his three named sons, whom he appointed his executors and trustees, with directions for payment of his debts and certain legacies and for the carrying on of his business, and a direction as to the amount of the drawings thereout by the youngest of such sons until he attained the age of 25 years. He then declared that the residue of his estate "is to become the property of" the same three