

[HIGH COURT OF AUSTRALIA.]

HORNE AND ANOTHER APPELLANTS,
PLAINTIFFS,

AND

BARBER RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

H. C. OF A. *Contract—Illegality—Public policy—Member of Parliament—Agent for sale of land*
1920. *to Government—Discharged Soldiers Settlement Act 1917 (Vict.) (No. 2916),*
secs. 22, 23, 25—Closer Settlement Act 1915 (Vict.) (No. 2629), secs. 26 et seqq.

MELBOURNE,
May 10, 11,
17.

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Knox C.J.,
Isaacs,
Gavan Duffy
and Rich JJ.

The plaintiffs, who were land agents, were employed by the defendant to bring about a sale of the defendant's property to the Government of Victoria. It was the intention of both parties that those services should be rendered by D., a member of the Parliament of Victoria, who was employed by the plaintiffs as their representative on the terms that he should receive a share of their commission on the sale. D.'s services were an effective cause of the sale. In an action by the plaintiffs against the defendant to recover commission on the sale,

Held, that the transaction, being one the tendency of which was to interfere with the proper discharge by D. of his duties as a member of Parliament, was contrary to public policy, that the agreement between the plaintiffs and the defendant was therefore void, and that the plaintiffs' action failed.

Wilkinson v. Osborne, 21 C.L.R., 89, applied.

Decision of the Supreme Court of Victoria (*Mann J.*) : *Horne v. Barber*, (1919) V.L.R., 553 ; 41 A.L.T., 55, affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court, by Donald Allan McLean Horne and Katherine Charlotte Palmer against Margaret

Barber, by which the plaintiffs claimed £317 13s. 11d. as money payable by the defendant to the plaintiffs for services rendered and for work and labour done at the defendant's request, being commission earned by the plaintiffs in effecting and completing on or about 17th December 1918 the sale to the Crown of the defendant's land known as "Wollaston," in respect of which the purchase money was £37,769 17s. 6d. The action was heard before *Mann J.*, and the only defence material to this report which was taken was that the contract of employment sued upon was illegal and void as being contrary to public policy by reason of the fact that it was made with, and substantially performed by, James Davidson Deany, who at all material times was a member of the Parliament of Victoria for Warrnambool, in which electorate Wollaston is situated. It appeared that the plaintiffs carried on business at Terang in Victoria, as stock and station agents, under the style of Horne & Palmer, and that in May 1918 they employed Deany to represent them at Warrnambool, upon the terms that he should receive a share of the commission received by them upon all sales effected by him with a certain monetary allowance for expenses. The learned Judge found that the plaintiffs were employed by the defendant on or about 8th July 1918 to give their services to bring about the sale of Wollaston to the Victorian Government for repatriation purposes, that the plaintiffs and the defendant intended that the services should be rendered by Deany, and that the services actually rendered by Deany were an effective cause of the sale. The purchase was made by the Lands Purchase and Management Board pursuant to the *Discharged Soldiers Settlement Act* 1917 and the *Closer Settlement Act* 1915. The procedure laid down by those Acts in relation to a purchase by agreement is substantially as follows:—If the Board should be of opinion that any estate was suitable it might, after taking the evidence of any officers of the Public Service and also of any two or more competent valuers, not being members of the Public Service, fix what was in the opinion of the Board the value of the estate and report the same in writing to the Minister of Lands. The Minister thereupon, if the value of the estate as stated in such report should exceed £10,000, was to appoint three competent persons, called "the referees," not members

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of the Public Service, to report to him upon the suitability and value of the land. Upon this report the Minister was to decide whether it was advisable to purchase, and at what price, and might direct the Board to make an offer accordingly. If the Minister should decide to purchase at a price greater than the value appearing in the Land Tax Register (which was the present case) he was required to cause a report of his decision to be presented to both Houses of Parliament. For the purpose of bringing about the sale, Deany interviewed the Minister and proposed to him the purchase of Wollaston, and accompanied the Minister on a visit to that property on 25th July. He subsequently, between 5th September and December 1918, interviewed the Board on several occasions, "hustling them up, and asking them to make valuations and inspections," as he said in his evidence. An offer of £50 per acre having been refused by the defendant, Deany again interviewed the Minister in December, and asked to have the matter reopened. Deany further said in his evidence:—"I urged on the Minister on two occasions the desirability of the property as a suitable one, once when I first introduced the property and once when I asked him to inspect. I had about a dozen attendances on the Board hustling them up." It also appeared that Deany did not at any time inform the Minister that he was acting in the matter as a commission agent; and the learned Judge found that the Minister did not know that Deany or the plaintiffs were so acting until after the sale, and that the members of the Board were for the first time aware that Deany was so acting on the day before the sale. The learned Judge held that the agreement between the plaintiffs and the defendant was illegal and void, and he gave judgment for the defendant: *Horne v. Barber* (1).

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

Cussen and *Owen Dixon*, for the appellants. In order to determine whether the contract between the plaintiffs and the defendant was void, the object of the contract must first be looked at. If the object to be achieved is lawful, then the means by which that object is achieved must be looked at. Here neither the object to be achieved

(1) (1919) V.L.R., 553; 41 A.L.T., 55.

nor the means to attain it were illegal. If the agreement had in fact been a sale of political influence, it would have been illegal; but, if the true position was that the employment of the plaintiffs was in the ordinary course of business and was carried out in the ordinary way, then the principle of *Wilkinson v. Osborne* (1) does not apply. The contract in that case was that the member of Parliament should use his political influence upon the Government, and no case has carried the principle any further. (See *Egerton v. Earl Brownlow* (2).) The contract between the plaintiffs and the defendant was one which could have been carried out by proper means, and, without any evidence, it should not be assumed that improper means were to be used. There was nothing in that contract which required it to be carried out by Deany, and it might have been performed by a member of the plaintiffs' firm. Having regard to the procedure by which the purchase had to be made, the possibility of any conflict between Deany's private interest and his public duty was too remote to affect the validity of the contract between the plaintiffs and the defendant. [Counsel referred to *Discharged Soldiers' Settlement Act* 1917 (Vict.), secs. 22, 23, 25; *Closer Settlement Act* 1915 (Vict.), secs. 26 *et seq.*] A member of Parliament has private rights of which he cannot be deprived by reason of his being a member of Parliament (see *Earl of Shrewsbury v. North Staffordshire Railway Co.* (3)). Unless the direct and immediate result of his employment as an agent in a transaction with the Government is to bring his private interest into conflict with his public duty, there is no rule of law which restrains him from carrying out that employment in the ordinary way. The contrary view would invalidate many transactions which were never meant to be affected by the principle. The principle has never been extended to the case of the employment of a man to do work which can be done to better advantage because he is a member of Parliament, and it only comes into operation where there is a balance between doing justice to the parties and public policy. Although it may be the duty of a member of Parliament to criticize the Government for having made a purchase at too high a price, he is not

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(1) 21 C.L.R., 89.

(2) 4 H.L.C., 1, at p. 69.

(3) L.R. 1 Eq., 593, at p. 613.

H. C. OF A. necessarily hampered in the performance of that duty because he
 1920. has urged the Government to purchase at that price. [Counsel also
 ~~~~~ referred to *In re Wallace : Champion v. Wallace* (1).]

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*Pigott* (with him *Lowe*), for the respondent. This case is covered by *Wilkinson v. Osborne* (2) and *Egerton v. Earl Brownlow* (3). The whole question is: Was there a tendency to interfere with the proper discharge by Deany of his duties as a member of Parliament? There cannot be degrees of tendency. Here the contract was one which required Deany to use, or involved him in using, political influence, and he admits that he did use it by interviewing the Minister and the Board and pressing upon them the desirability of purchasing the land.

*Cur. adv. vult.*

May 17.

The following judgments were read:—

KNOX C.J. AND GAVAN DUFFY J. (read by KNOX C.J.). This is an appeal from the decision of *Mann J.* (4) directing judgment to be entered for the defendant. The ground upon which the learned Judge based his decision was that the contract sued on, which he found to have been made in fact, was void as being contrary to public policy within the principle governing the decision of this Court in *Wilkinson v. Osborne* (2). The facts of the case now before us are sufficiently set forth in the judgment under appeal, and it is unnecessary to repeat them here. In our opinion they would have justified the learned Judge in finding that the parties to the contract intended that Mr. Deany should use his political influence in order to bring about the sale; his task under the contract was to induce the Minister and the members of the Board to approve of a purchase at the highest possible price. It is sufficient to say that the learned Judge was of opinion that both parties to the contract intended that the services contracted for were to be rendered by Mr. Deany, a member of the Parliament of Victoria; that the object of the employment of the plaintiffs was the sale of the defendant's property to the

(1) (1919) 2 Ch., 305.  
 (2) 21 C.L.R., 89.

(3) 4 H.L.C., at pp. 163, 178.  
 (4) (1919) V.L.R., 553; 41 A.L.T., 55.



Government of Victoria ; that Mr. Deany had a pecuniary interest in the transaction, being entitled to share in the commission payable to the plaintiffs ; and that the services rendered by Mr. Deany were an effective cause of the sale. We think it unnecessary to determine whether Mr. Deany undertook to use his position as a member of Parliament for the purpose of procuring a sale of the defendant's land. So long as he remained a member of Parliament he could not, in our opinion, effectively divest himself of that character in dealing with the Minister and the Board, and he in fact made no attempt to do so. The Minister and the members of the Board must have known that he was a member of the Legislative Assembly for the district in which the defendant's land was situated ; the Minister was never informed that he was the defendant's agent, and the members of the Board did not know that fact until shortly before the completion of the sale. It is abundantly clear that the agreement sued on in this case afforded an inducement to Mr. Deany to misuse his position and influence as a member of Parliament for his own pecuniary gain as a commission agent, and was also calculated to hamper him in forming an unbiased judgment and in expressing a free and honest criticism on the transaction as an act of the Executive Government or its agents. It had, to adopt the words of Lord *Lyndhurst* in *Egerton v. Brownlow* (1), a tendency to interfere with the proper discharge of the duties of Mr. Deany as a member of Parliament, and was consequently opposed to the public good. As was pointed out in that case by Lord *Truro* (2), the law in such a case looks not to the probability of public mischief occurring in the particular instance, but to the general tendency of the transaction ; and this aspect of the matter was emphasized by Lord *Brougham* in the same case, where he said (3) :—" The tendency is alone to be considered, and unless the possibility is so remote as to justify us in affirming that there is no tendency at all, the point is conceded. Gifts, bequests, conditions, contracts, are illegal from their tendency to promote unlawful acts, without regard to the amount of the inducement held out, or interest created,

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(1) 4 H.L.C., at p. 162. (2) 4 H.L.C., at p. 196.  
(3) 4 H.L.C., at p. 174.



H. C. OF A. the position of the parties, or any other circumstances which go to  
1920. affect the probability of the unlawful act being done.”

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We can see nothing in the circumstances proved in the present case to withdraw it from the operation of the principle governing the decisions in *Egerton v. Brownlow* (1) and *Wilkinson v. Osborne* (2), and in our opinion the decision of *Mann J.*, and the reasons given by him for that decision, were correct.

ISAACS J. Notwithstanding the very earnest arguments addressed to us by learned counsel for the appellants, this case appears to me to be quite clear. I entirely agree with the conclusions and the reasoning of *Mann J.* The principal authorities which must guide us in such a case as the present, I have stated in *Wilkinson v. Osborne* (3); and the observations I there made I adhere to.

When a man becomes a member of Parliament, he undertakes high public duties. Those duties are inseparable from the position: he cannot retain the honour and divest himself of the duties. One of the duties is that of watching on behalf of the general community the conduct of the Executive, of criticizing it, and, if necessary, of calling it to account in the constitutional way by censure from his place in Parliament—censure which, if sufficiently supported, means removal from office. That is the whole essence of responsible government, which is the keystone of our political system, and is the main constitutional safeguard the community possesses. The effective discharge of that duty is necessarily left to the member's conscience and the judgment of his electors, but the law will not sanction or support the creation of any position of a member of Parliament where his own personal interest may lead him to act prejudicially to the public interest by weakening (to say the least of it) his sense of obligation of due watchfulness, criticism, and censure of the Administration. It is not a question of whether there was a contract to use his political interest or influence, or of whether he posed before the Minister and the Board as a member or a land-agent. It is, in this case, whether the services claimed for were services which were understood to be, or to include, those

(1) 4 H.L.C., 1.

(2) 21 C.L.R., 89.

(3) 21 C.L.R., at pp. 102, 105.



of a person whose public duty was inconsistent with the private transactions which are the subject of the claim. I do not say the question might not be even wider, but that is all that is necessary in this case, having regard to the findings of fact which cannot be displaced. In the present instance it was, and is, the clear public duty of Deany to call the Government to account if, in his opinion, the Minister decided that an extravagantly high price was to be given for the property. But, on the other hand, the member's private interest, according to the ordinary impulses of human nature, would, of course, lead him to try to make the price as high as possible. The higher the price, the greater his commission; the higher the price, the better standing would he have with his employers; the higher the price, the better for his private client, and the greater his chance for future business. In short, private advantage pulled him one way; public duty might, at any moment, require him to challenge the whole transaction. How can it be doubted he was assuming antagonistic positions? And, if he was, the law declines to recognize any but the public obligation. It refuses to recognize any claim for private advantage. If it did, it would be as inconsistent as the person invoking it. Whether the price asked was a fair price or not in this particular case, is quite immaterial; the law will not inquire. It discountenances such a transaction because it is inherently dangerous that a man in such a position should place himself in a situation of temptation. The bargain was a void one; the judgment appealed from was sound, and the appeal should be dismissed.

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RICH J. Members of Parliament are donees of certain powers and discretions entrusted to them on behalf of the community, and they must be free to exercise these powers and discretions in the interests of the public unfettered by considerations of personal gain or profit. So much is required by the policy of the law. Any transaction which has a tendency to injure this trust, a tendency to interfere with this duty, is invalid (*cf. Hamilton v. Wright* (1)). Courts of equity, in dealing with transactions between private persons, have always avoided as contrary to the policy of the law

(1) 9 Cl. & Fin., 111, at p. 123.



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purchases by trustees from themselves. "Without any consideration of fraud, or looking beyond the relation of the parties, that contract is void" (*Morse v. Royal* (1)). This applies with greater force to public affairs and the obligations and the responsibility of the trust towards the public implied by the position of representatives of the people. In this case the Court is not concerned with the intention of the parties. It does not "look beyond" Deany's position. His public duty and private interest were in conflict, and any other facts are immaterial. No claim can be enforced by the appellants founded on a bargain involving their employment of Deany in such a position of conflict of public duty and private interest.

I agree that the appeal fails.

*Appeal dismissed with costs.*

Solicitors for the appellants, *Doyle & Kerr*.

Solicitors for the respondent, *J. M. Smith & Emmerton*.

B. L.

(1) 12 Ves., 355, at p. 372.