[HIGH COURT OF AUSTRALIA.]

WOOD . . . . . APPELLANT;
DEFENDANT,

AND

LITTLE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1921.

MELBOURNE, Oct. 11, 12.

SYDNEY, *Nov.* 21.

KNOX C.J., HIGGINS and STARKE JJ.

Contract—Illegality—Public policy—Councillor of municipality—Agent for sale of land to Closer Settlement Board—Duty to advise Closer Settlement Board—Exoneration—Prohibition against voting where councillor has pecuniary interest—Discharged Soldiers Settlement Act 1917 (*Vict.*) (*No.* 2916), *sec.* 35—*Discharged Soldiers Settlement Act* 1918 (*Vict.*) (*No.* 2988), *sec.* 2—*Discharged Soldiers Settlement Act* 1919 (*Vict.*) (*No.* 3039), *sec.* 17—*Local Government Act* 1915 (*Vict.*) (*No.* 2686), *sec.* 181.

The defendant, who owned land in a certain municipality, employed the plaintiff, a land agent and a member of the council of that municipality, to sell his land to the Closer Settlement Board under the provisions of the *Discharged Soldiers Settlement Acts* 1917 to 1919 (Vict.). There was no stipulation in the contract of agency that the plaintiff should use his position or influence as shire councillor to push the sale. The plaintiff submitted the land to the Board, but took no further part in relation to the proposed sale, and shortly afterwards resigned his position of member of the council. What the plaintiff had done, however, was the effective cause of the sale to the Board which subsequently took place. Under the *Discharged Soldiers Settlement Acts* the plaintiff, as a member of the council, might be called upon to advise the Board in connection with the purchase by the Board of land within the municipality. In an action by the plaintiff to recover from the defendant commission on the sale,

Held, that the private interest of the plaintiff under his agreement with the defendant had a tendency to interfere with the proper discharge by the plaintiff

of his public duty under the *Discharged Soldiers Settlement Acts*, and therefore that, on the authority of *Horne* v. *Barber*, 27 C.L.R., 494, the agreement was illegal and void as being against public policy.

Horne v. *Barber*, 27 C.L.R., 494, doubted by *Higgins* and *Starke* JJ.

Held, also, that sec. 181 of the *Local Government Act* 1915 (Vict.), which prohibits any councillor from voting upon or taking part in the discussion of any matter before the council in which he has directly or indirectly any pecuniary interest, and imposes a penalty upon any councillor who knowingly offends against the section, does not enable a councillor to acquire a pecuniary interest in a matter in which, apart from the section, the acquisition of such an interest by him would be illegal as being against public policy, and, therefore, afforded no exoneration to the plaintiff.

Decision of the Supreme Court of Victoria: *Little* v. *Wood*, (1921) V.L.R., 153; 42 A.L.T., 159, reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the County Court by Frederick Joseph Little against Herbert Edward Wood to recover £131 8s., being commission alleged to be due in respect of the sale of the defendant's land to the Closer Settlement Board of Victoria. One of the defences was that the contract sued on was illegal and void as being against public policy, in that the plaintiff was at all material times a member of the Council of the Shire in which the land was situated and that his duty as such regarding purchases by the Closer Settlement Board under the *Discharged Soldiers Settlement Acts* of 1917 to 1919 conflicted with the duties which he owed to the defendant. The County Court having given judgment for the plaintiff for the amount claimed, the defendant appealed to the Full Court of the Supreme Court. The Full Court dismissed the appeal: *Little* v. *Wood* (1)).

From that decision the defendant now, by special leave, appealed to the High Court.

The other material facts are sufficiently stated in the judgments hereunder.

Ham and *Joske*, for the appellant. This case falls within the decision in *Horne* v. *Barber* (2), and the Supreme Court found that it would be so except for the provisions of sec. 181 of the *Local*

(1) (1921) V.L.R., 153; 42 A.L.T., 159.

(2) 27 C.L.R., 494.

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Government Act 1915. But that section does not touch the question of the legality or illegality of a contract made by a councillor. It merely imposes a penalty on a councillor who votes upon a matter in which he has a private interest, but does not exclude the principle of law which avoids a contract which has a tendency to interfere with the proper discharge by one of the parties to it of a public duty cast upon him (see *Aberdeen Railway Co.* v. *Blakie Bros.* (1); *Melliss* v. *Shirley Local Board* (2)).

[HIGGINS J. referred to *Dimes* v. *Grand Junction Canal* (3).]

Moreover, that section only applies to the operations of a council as a local governing body, and does not apply to the performance of duties cast upon a council by other statutes such as the *Discharged Soldiers Settlement Acts*. Under sec. 35 of the *Discharged Soldiers Settlement Act* 1917 a duty is cast upon municipal councils to advise the Closer Settlement Board generally as well as to advise them in special cases. The principle is based on the general position of a trustee, and is *à fortiori* where the trustee is in a public position (*Horne* v. *Barber* (4), per *Rich* J.). [Counsel also referred to *Cope* v. *Rowlands* (5); *Watson's Bay and South Shore Ferry Co.* v. *Whitfeld* (6).]

Pigott and *Braham*, for the respondent. In this case the question is as to the common law rule relating to contracts against public policy, and not as to the law relating to trusts. Under the various Acts no duty is imposed upon a municipal council except upon the request of the Minister for advice (see *Closer Settlement Act* 1915, sec. 22, as amended by the *Closer Settlement Act* 1918, sec. 10 (1), and the *Discharged Soldiers Settlement Act* 1919, secs. 16 (*a*), 17 (1) (14); *Discharged Soldiers Settlement Act* 1917, sec. 35). The tendency to interfere with the public duty of a person in a public position must be a real tendency. Here there was no real tendency, for the Council had no statutory duty either generally or in reference to any specific case, unless requested by the Minister to give advice. Any such duty was cast upon the Council as a whole, and not on an individual councillor. He is not bound to vote on any particular

(1) 1 Macq. H.L.C., 461, at p. 475.
(2) 16 Q.B.D., 446.
(3) 3 H.L.C., 759, at p. 770.
(4) 27 C.L.R., at p. 501.
(5) 2 M. & W., 149, at p. 157.
(6) 27 C.L.R., 268, at p. 276.

question. Sec. 181 of the *Local Government Act* 1915 renders a councillor incapable of taking part as a member of the council in giving advice as to a matter in which he has an interest. The section relieves a councillor from the duty of taking part in the discussions of the council in the particular matter. The position of the respondent here is not analogous to that of Deany in *Horne* v. *Barber* (1), for the latter had a duty to hold himself free to take part in discussing and voting on the particular matter. If the matter is not one of public policy, then the contract of employment was not void, but was only voidable. [Counsel also referred to *Egerton* v. *Earl Brownlow* (2).]

Ham, in reply.

Cur. adv. vult.

Nov. 21.

The following written judgments were delivered :—

KNOX C.J. This was an action for commission alleged to be due to the plaintiff on the sale to the Closer Settlement Board of Victoria of certain land belonging to the defendant. By way of defence the defendant pleaded (*inter alia*) that the contract sued on was illegal and void as being contrary to public policy, in that the plaintiff was at all material times a member of the local Repatriation Committee or Shire Council and that his duty as such regarding purchases by the Lands Purchase Board under the *Discharged Soldiers Settlement Acts* 1917 and 1919 conflicted with the duties which he owed to defendant.

The action was tried before his Honor Judge *Moule*, who found the relevant facts to be as follows, viz. :—In October 1918 defendant placed the property in plaintiff's hands for sale and suggested that it be offered to the Closer Settlement Board. This was done, but after some negotiations with the Board the offer was withdrawn. On 5th March 1920 defendant again placed the property in plaintiff's hands for sale, and the plaintiff again on the same day offered it to the Board. Eventually on 30th June 1920 the Board purchased the property. From the year 1918 till 17th March 1920 plaintiff was a shire councillor for Jeetho and Poowong Shire, in which the

(1) 27 C.L.R., 494.

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

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property was situate. During the first negotiations a sub-committee of the Shire Council reported on the property. The plaintiff was not a member of the sub-committee. The report of the sub-committee was considered by the Shire Council at a meeting at which the plaintiff was present, but while this report was being considered the plaintiff withdrew from the table. The plaintiff's work was the effective cause of the sale to the Board.

The learned County Court Judge having decided in favour of the plaintiff, the defendant appealed to the Full Court of the Supreme Court of Victoria. The appeal was dismissed by that Court, on the ground that by virtue of sec. 181 of the *Local Government Act* 1915, which prohibits a councillor from voting upon or taking part in the discussion of any matter before the council in which he has directly or indirectly a pecuniary interest, the plaintiff might say in effect that he was not a councillor in so far as the Council dealt with defendant's land, and that he was relieved from the embarrassment of exercising any judgment on the matter from the moment he acquired an interest in it. The Court was of opinion that upon this ground the contract sued on was not contrary to public policy. Against this decision the defendant, by special leave, appealed to this Court.

On the argument before us the appellant relied on the decision in *Horne* v. *Barber* (1) as governing this case in principle. I agree with the statement in the judgment of the Supreme Court that the appellant has to establish that the agreement sued on has a tendency to interfere with the due discharge of a public duty imposed on the respondent. In my opinion this is the test laid down in *Horne* v. *Barber*. The Supreme Court found in the provisions of sec. 181 of the *Local Government Act* 1915 a ground of distinction between that case and this. That section seems to have been regarded by the Supreme Court as in effect conferring on a councillor a privilege to enter into transactions which he could not lawfully enter into apart from its provisions. I am unable to take this view of the enactment. In my opinion the object of the section is to prohibit under a penalty of £50 any councillor from voting upon or taking part in the discussion of any matter before the council in which

(1) 27 C.L.R., 494.

he has a pecuniary interest, and not to enable a councillor to acquire a pecuniary interest in a matter in which, apart from the section, the acquisition of an interest by him would be illegal as being opposed to public policy. Consequently I think the reasoning on which the judgment of the Supreme Court is founded affords no valid ground of distinction between this case and the case of *Horne* v. *Barber* (1).

The plaintiff was under a public duty as a member of the Shire Council to advise the Closer Settlement Board in connection with the purchase by the Board of the defendant's property. He was interested as agent for the vendor in making a sale of the land to the Board and in obtaining on that sale as high a price as possible. His private interest under the contract had a tendency to interfere with the proper discharge of his public duty to join in advising the Board as to the purchase, and in my opinion it follows that he cannot be allowed to recover on the contract by which he was to receive commission from the vendor on the sale of the property to the Board.

I should add that in my opinion the decision in *Simpson* v. *Lord Howden* (2) in no way conflicts with the decision in *Horne* v. *Barber* (1), or with the opinion which I have expressed in this case. I agree with the view expressed by *Isaacs* J. in *Wilkinson* v. *Osborne* (3) that the decisions in that case and in *Earl of Shrewsbury v. North Staffordshire Railway Co.* (4) are special exceptions to the rule that private interests cannot be allowed to conflict with public duty.

For these reasons I am of opinion that the appeal should be allowed and judgment entered for the appellant. The respondent should pay the costs of the action, of the appeal to the Supreme Court of Victoria and of this appeal.

HIGGINS J. The only question left for us to decide is this: Is the contract of agency illegal as being against public policy? The facts, so far as they seem material, are as follows:—Wood, a land-owner in a certain shire, employed Little, a land agent in that shire, to offer his land to the Government Closer Settlement Board,

(1) 27 C.L.R., 494.
(2) 10 A. & E., 793; 9 Cl. & Fin., 61.
(3) 21 C.L.R., 89, at p. 105.
(4) L.R. 1 Eq., 593.

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as being suitable for purchase for the repatriation of soldiers. Little communicated with the Board on 5th March, enclosing particulars. At that time Little was a councillor of the shire, but on 17th March he retired from the Council. On 20th May the Council sent to the Board its replies to questions put by the Board as to the land; and on 30th June Wood accepted an offer made by the Board.

It is not now contended that Little did not earn his commission as the effective agent for the sale; but it is urged that because on 5th March Little was a member of the Shire Council, and because, under sec. 35 of the *Discharged Soldiers Settlement Acts* 1917 and 1918 the council of every shire became an advisory committee to the Board, having the power and duty to advise the Board on matters relating to the selection and purchase of land within the shire, the contract of agency is illegal as contrary to public policy.

It is not contended that the contract of agency contained any stipulation, either express or implied, that Little was to use his position or influence as shire councillor to push forward the sale. If there had been such a stipulation or undertaking, secret or open, it seems clear that the contract ought to be treated as against public policy and therefore illegal (*Montefiore* v. *Menday Motor Components Co.* (1)). It is not even contended that the questions of the Board came to the Shire Council before Little retired, or that Little in the slightest degree used his position or influence as councillor in aid of the sale. Wood knew, in employing Little, that Little was a member of the Council; but there is no evidence that he would not have employed Little, as a local agent, whether Little was a councillor or not. There is a provision in the amending Act of 1919 for the appointment by the council of "valuation sub-committees," for the purposes of the Acts; but Little was not a member of any such sub-committee, and, in short, did not take part in any of the deliberations of the Council or its committees with regard to the land.

Does the mere fact that Little could have misused his position make the contract or agency itself illegal? According to *Shearman* J., in his judgment in the *Montefiore Case* (2), "a contract may be

(1) (1918) 2 K.B., 241. (2) (1918) 2 K.B., at p. 245.

against public policy either from the nature of the acts to be performed or from the nature of the consideration "—that is to say, it depends on the terms of the contract. There is nothing against public policy in the actual promise of Little in this case, or in the consideration for the promise. If there were a promise to use his influence as councillor, then it would be no answer on the part of Little to say that the influence used by him was little or nothing; it is the tendency of such a promise that is to be regarded. There has been no case cited to us from the English reports in which a contract of agency has been treated as contrary to public policy and illegal on the mere ground that the position of one or both of the parties rendered it liable to abuse in the fulfilment; and yet in the long course of English law the interest of agents must frequently have conflicted with their duty.

It may be that the Board, on finding that one of its official advisers (even though he did not advise) was the agent for the vendor, making profit from the sale, could have refused to carry out the main contract of purchase, or could have got the contract rescinded. But it is not every contract that the Courts of equity will refuse to enforce, or will order to be rescinded, that is illegal as being against public policy. The contract of purchase here is certainly not illegal, for the Board could elect to affirm the contract notwithstanding Little's double position, and compel Wood to convey; and yet, if the contract were illegal, neither party could enforce it (*Smith* v. *White* (1)). If the main contract is not illegal, it is hard to see how the subsidiary contract of agency can be treated as illegal.

In the analogous case of solicitors—who are agents of another class—it is quite a common thing for one solicitor to act in the same transaction for vendor and purchaser, for mortgagor and mortgagee, for lessor and lessee, and even for different parties or classes of parties in the same action. It is a practice which the Courts recognize as valid (see *Doe d. Peter* v. *Watkins* (2)); and, although the double function often leads to breach of duty to one or other of the clients, I know of no case in which the solicitor has failed in

(1) L.R. 1 Eq., 626.

(2) 3 Bing. N.C., 421, at p. 425.

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his action for costs on the ground that his duty to one client conflicted or might conflict with his duty to the other.

Unless the fact that the purchaser here is a public Board makes the contract to be contrary to public policy, it seems clear that this defence cannot stand. In *Salomons* v. *Pender* (1)) an agent for sale of land sold it to a company of which he was a director and shareholder. He sued his principal for the commission, and the action was dismissed. It was dismissed, not because of any public policy, but because he had not carried out his contract, for the contract meant that he should act for his principal only, and not for the purchaser. In this case, Little carried out his contract of agency precisely. In *Aberdeen Railway Co.* v. *Blakie Bros.* (2) a firm of ironfounders, of which Blakie was a member, sued the company for the fulfilment of a contract to accept goods. Blakie was a director of the company acting when the tender was accepted. The House of Lords decided against the firm, pointing out that the contract was not illegal—that at common law it would be no defence to plead that one of the plaintiffs was a director. The decision rested on equitable grounds only, equity refusing to enforce a contract made under such circumstances.

It is not every contract unenforceable or liable to be set aside in equity that can be treated as illegal, tainting and infecting every contract or transaction based upon it. Therefore, also, if trustees depart from the strict letter of their trust on getting a covenant of indemnity—as is quite common—the covenant is valid and enforceable; as when trustees pay (on the faith of such a covenant) money to a beneficiary before the proper time, on the chance that he will live to become entitled, and he fails to live to that time. On the other hand, a covenant to pay a man £10,000 "if he commit a murder" would be invalid. The latter covenant is "illegal"; the former is not.

We have been referred to no case (with the possible exception of *Horne* v. *Barber* (3)) in which a contract has been treated as illegal on the mere ground of conflict between the interest and the duty of one of the contracting parties—even where the duty is duty to

(1) 3 H. & C., 639. (2) 1 Macq. H.L.C., 461.
(3) 27 C.L.R., 494.

a public Board or to the public. On the other hand, in *Simpson* v. *Lord Howden* (1) the defendants contracted with H., who was a peer of Parliament, that if a certain railway Bill were passed they would pay him £5,000; the Bill was passed; H. sued for the £5,000; the plea of illegality was raised and rejected. It was pointed out by the Lords that there was no promise on the part of H. to vote for the Bill, that the money was not promised as a consideration for H.'s vote, and that H. had a right to bargain in his individual character for the injury to his property. Yet there is no doubt that the contract tended to interfere with the duty of H. as a legislator. It cannot be that there is one law for property owners and another for land agents. The law is not a respecter of persons. "A landowner cannot be restricted of his rights because he happens to be a member of Parliament" (*Earl of Shrewsbury* v. *North Staffordshire Railway Co.* (2)). Why should not this principle be applied to a land agent as well as to a landowner? So long as H.—so long as Little—did not promise to use his position and influence in furtherance of the transaction, there was no illegality in the contract; and it is the contract alone that we are asked to declare illegal. The case of *Egerton* v. *Earl Brownlow* (3), on which so much stress has been laid in this Court, was a case of a condition in a will being treated as against public policy and illegal. The condition itself was treated by the majority of the Law Lords as tending directly to subvert the House of Peers in its judicial, legislative and governmental functions; and the question whether the tendency in fact would operate in greater or in less degree had, of course, nothing to do with the case. But the important matter to observe is that what was treated as illegal was the condition contained in the instrument, just as here we must find something illegal in the contract. As the Supreme Court has said in this very case (4), "it is only when the contract itself necessarily imposes shackles on the discharge of a public duty that the principle applies which is invoked in this case" (and see *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (5)). The utmost care is needed in applying a

(1) 9 Cl. & Fin., 61.
(2) L.R. 1 Eq., at p. 613.
(3) 4 H.L.C., 1.
(4) (1921) V.L.R., at p. 162.
(5) (1894) A.C., 535, at p. 554.

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Court's power to find illegality where Parliament has not enacted illegality; as a false course once taken, any deviation from the old track will lead to much confusion and injustice.

If a wholesale warehouseman is a member of Parliament, and in making a contract with a retailer for the future delivery of goods promises to use his vote and influence for or against the increase of the tariff on such goods, the contract would no doubt be properly treated as illegal; but if there be no such promise or understanding, are we to say that the retailer can lawfully refuse to accept the goods because of the possible conflict—or the actual conflict—between the interest of the vendor and his duty as member?

If a wheat buyer is a member of Parliament, and make a contract for purchase under circumstances which make it his interest to vote for a Bill for a wheat-pool, can the farmer who sells him the wheat refuse to deliver it on the ground that the interest of the wheat buyer tends to conflict with his duties as a legislator—even if the wheat buyer vote against his own interest? If a policeman be found to have agreed in effect with a motor-car owner to overlook the latter's conduct in driving, the agreement would be, of course, illegal, and any action for the money would fail; but if the policeman hire a motor for himself to drive, can it be that he can refuse payment of the hire on the ground that, as driver, he tends to become more compassionate towards offenders against the regulations, and less likely to prosecute?

In *Wilkinson* v. *Osborne* (1) this Court treated as being against public policy and illegal a contract made by two members of Parliament to use their pressure on Ministers to purchase certain land. The members were promised a share of commission, but the Court refused to enforce the promise. I can well understand this decision. But in the more recent case of *Horne* v. *Barber* (2) the landowner and the agent agreed to use one Deany, who was a member of Parliament, as an intermediary for the sale to the Government. The Court was prepared to find, if necessary, that Deany was to be employed in order that he might use his pressure on the Government; but the Court disclaimed any intention to base its decision on this ground. The words of my learned brothers *Knox* C.J. and *Gavan*

(1) 21 C.L.R., 89. (2) 27 C.L.R., 494.

Duffy J. were (1) :—" 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 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." I thought at first that this must mean that the parties employed Deany *because* he was a member of Parliament, with all that the fact implied, but I am assured that this is not the meaning intended to be conveyed. If, then, that case decides that the mere fact of the agent's double duty, to purchaser as well as to vendor—although there was no abuse of that duty in fact or promise to abuse it—made the contract between the vendor and the agent illegal, I cannot say that the same principle ought not to be applied here, although there certainly are some differences of detail. The case of *Horne* v. *Barber* (2) has not been impugned before us, and must be accepted as law. But it is right for me to say that but for *Horne* v. *Barber* I should give my judgment in favour of Little.

I concur with my learned brothers in their opinion that sec. 181 of the *Local Government Act* does not prevent a contract which would otherwise be illegal as against public policy from being illegal, or render a contract enforceable which would otherwise be unenforceable—that the " prohibition " in sec. 181 does not, as stated by the Supreme Court, " cover the whole field of action." It is simply an additional safeguard provided by Parliament for the purposes of local government, but it does not in the slightest degree repeal the law as to contracts against public policy or the equitable rules against the enforcement of contracts made by persons in breach of their fiduciary duties. In the case of *Aberdeen Railway Co.* v. *Blakie Bros.* (3), already cited, there was a provision in the

(1) 27 C.L.R., at pp. 498-499. (2) 27 C.L.R., 494.
(3) 1 Macq. H.L.C., 461.

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Companies' Clauses Consolidation Act to the effect that a director of a company who votes in a matter in which he is personally interested shall vacate his seat, and the Scottish Judges held that this was the only penalty. But the House of Lords reversed the decision, pointing out that the enforcement of the contract was forbidden on fundamental equitable principles, apart from this Act.

STARKE J. The argument for the appellant was rested upon the proposition that any transaction is unlawful in which the personal or private interest of one of the parties to the transaction conflicted, or tends to conflict, with the due performance of any public duty. Apart from authority I should have felt considerable difficulty in assenting to so far reaching a proposition. But *Wilkinson* v. *Osborne* (1) and *Horne* v. *Barber* (2) in this Court establish, so it is said, the proposition contended for. There are expressions in the judgments in *Wilkinson* v. *Osborne* that favour the contention, but the case was decided on a much narrower and safer ground, namely, that the contract there involved was one to exert political influence or pressure upon the Government. *Horne* v. *Barber* might have been decided on the same ground, namely, that the contract was one to exert political influence upon a Minister of the Crown or the Closer Settlement Board (see p. 498), or even on the ground that the position of the agent was such that political influence or pressure must necessarily be exerted in dealing with the Minister or the Board—that the agent could not effectively divest himself of the influence and pressure attaching to his position and made no attempt to do so (see p. 499). However this may be, I am satisfied that the learned Chief Justice is right in saying that the case was decided upon a broader principle, namely, that the contract was unlawful because the personal or private interest of the agent conflicted or tended to conflict with the due performance of his public duty. Thus, at p. 499, the Chief Justice said : " It " (that is, the agreement) " had . . . 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 " ; and, at p. 500, " the decision of *Mann* J.,

(1) 21 C.L.R., 89. (2) 27 C.L.R., 494.

and the reasons given by him for that decision, were correct." *Mann* J. had said (*Horne* v. *Barber* (1)):—"The reason for that decision" (*Wilkinson* v. *Osborne* (2)) "was that the agreement had a tendency to interfere with the proper and faithful discharge of the public duties of a member of Parliament . . . . All the members of the Court in *Wilkinson* v. *Osborne* relied upon the fact that the agreement in question in that case raised a conflict between the interest of the plaintiffs and the duty they were under as members of Parliament of considering whether the purchase should be approved." The opinions of my brothers *Isaacs* and *Rich* in *Horne* v. *Barber* are rested entirely upon the conflict, or the tendency to a conflict, between the private or personal interest of the agent and the proper discharge of his public duty (see *Isaacs* J. at p. 500, *Rich* J. at p. 502). It is not for me to canvass that decision but to accept it and apply the rule of law so laid down to the present case.

Under the *Discharged Soldiers Settlement Act* 1917, sec. 35, the council of every municipality was for the purposes of the Act an advisory committee to the Lands Purchase and Management Board, and had the power and duty of advising the Board generally on matters relating to the selection and purchase of land within the municipal district. The plaintiff in this case was authorized to negotiate with the Board for the sale and purchase of certain land within the municipal district of the Shire of Jeetho and Poowong, and he was to receive the ordinary agent's remuneration if he effected a sale. Unhappily for him he was also a member of the Council of the Municipality of Jeetho and Poowong, and it might so happen that the Council, in accordance with its statutory duty, would feel called upon or be required to advise the Board in connection with the land in the hands of the plaintiff as an agent for sale. A conflict of interest and duty might arise. The tendency of the agreement might cause the plaintiff to prefer his private interest to the advice that he ought to persuade the Council to tender to the Board or to fail in attendance upon the Council rather than sacrifice his private interest. It is of no importance, as I

(1) (1919) V.L.R., 553, at pp. 562-563; 41 A.L.T., 55, at p. 59.
(2) 21 C.L.R., 89.

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understand the authorities, that the parties had no corrupt or sinister intent or that a conflict of interest and duty was unlikely to arise and never did in fact arise. The rule of law is clear and it is rigid. The agreement to employ the plaintiff and to pay him the usual commission for his services as an agent tended to bring his interest and his public duty into competition. It was inimical to the State, and therefore unlawful.

The learned Judges of the Supreme Court did not, I think, dispute the rule, but rather denied that the public duty contended for rested upon the plaintiff. In sec. 181 of the *Local Government Act* they found a provision that no councillor should vote upon or take part in the discussion of any matter in or before the council in which such councillor had directly or indirectly by himself or his partners any pecuniary interest, under a penalty of not more than £50. The section, so it was said, debarred the councillor from, or relieved him from the embarrassment of, exercising any judgment on any matter in which he had a personal interest, or operated as a resignation *pro tanto* of the position of advisor. A similar argument might, perhaps have been used in *Horne* v. *Barber* (1), based upon the well-known provision in the *Constitution Amendment Act of Victoria*, sec. 24; but it is not mentioned. I do not place any reliance upon this, for the *Constitution Act* is expressed in words differing from those used in sec. 181 of the *Local Government Act*, which may account for the fact that sec. 24 was not referred to.

The view taken by the learned Judges of the Supreme Court is, in my opinion, wholly untenable. The section does not save parties from the consequence of entering into agreements which the law treats as unlawful. It puts a further sanction upon the public representative, and inflicts a penalty upon him if he knowingly votes or takes part in the discussion of any matter in which he has any pecuniary interest. The view of the Supreme Court would lead to most dangerous consequences. Many cases might easily arise in which the mere penalty would be trifling as compared with the pecuniary gain which would accrue to the councillor if the matter in which he was interested were pushed through the council by his vote or influence.

(1) 27 C.L.R., 494.

As the authorities stand my judgment must be that this appeal be allowed.

Appeal allowed. Judgment entered for defendant. Respondent to pay costs of the action, of appeal to Supreme Court and of this appeal.

Solicitors for the appellant, *Parkinson & Wettenhall.*

Solicitors for the respondent, *Boothby & Boothby.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF TAXES FOR VICTORIA . . . . APPELLANT;

AND

LENNON . . . . RESPONDENT.*

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. of A. 1921.

Melbourne, *Oct.* 21.

Sydney, *Nov.* 16.

Knox C.J., Higgins and Starke JJ.

Probate Duty (Vict.)—Gifts inter vivos—Rate of duty—Aggregation of several gifts—Statute—Interpretation—Consolidating statute—Alteration of law—Administration and Probate Act 1915 (*Vict.*) (*No.* 2611), *secs.* 122, 128, 143-146.

Sec. 143 (1) of the *Administration and Probate Act* 1915 (Vict.) provides that "Every conveyance or assignment gift delivery or transfer of any real or personal property, whether made before or after the commencement of this Act, purporting to operate as an immediate gift *inter vivos* whether by way of transfer delivery declaration of trust or otherwise shall—(*a*) if made within twelve months immediately before the death of the donor; or (*b*) if made at any time relating to any property of which property *bonâ fide* possession and enjoyment has not been assumed by the donee immediately upon the

*As to this case, see now the *Administration and Probate Act* 1921 (Vict.) (No. 3154).—*Ed. C.L.R.*