RECENT ENGLISH DECISIONS.

High Court of Justice of England; Queen's Bench Division.

THACKER v. HARDY.

The defendant employed the plaintiff, a stockbroker, to speculate for him on the stock exchange, knowing that for the purpose of carrying out his transactions the plaintiff would have to enter into contracts to buy or sell stocks and shares, and, in order to protect himself and the defendant, would have to enter into other contracts to buy or sell respectively. The plaintiff knew that the defendant never expected or intended to accept actual delivery of the stocks and shares which the plaintiff might buy for him, nor actually to deliver the stocks and shares that the plaintiff might sell for him. The defendant, nevertheless, knew that he incurred the risk of having to accept or deliver; but was content to run that risk in the expectation and hope that the plaintiff would arrange so as to make nothing but "differences" payable to or by him; and unless that arrangement was made the defendant was, to the knowledge of the plaintiff, wholly unable to pay for or deliver the stocks and shares bought or sold.

In an action by the plaintiff against the defendant for commission and indemnity against the liabilities incurred by the plaintiff on the stock exchange, with the authority and for the benefit of the defendant, the defendant pleaded that the claim was founded on gaming and wagering transactions, illegal at common law and under 8 & 9 Vict. c. 109, s. 18. *Held,* that the plaintiff was entitled to recover both the commission and indemnity claimed.

Grizewood v. *Blane,* 11 C. B. 538, discussed.

THIS was an appeal from a judgment of LINDLEY, J., at a trial without a jury, and raised the question of the right of a stockbroker to recover from his employer, commission and money paid for differences arising in transactions on the stock exchange, in which, to the knowledge of the broker, no actual transfer of stock was intended to be made.

The plaintiff was a stockbroker, and the defendant a gentleman possessed of about 20,000*l.* At the time of the transactions, out of which the present action arose, the defendant shared the plaintiff's offices, and employed his capital in gambling transactions, in which the plaintiff acted for him as broker, employing a jobber in the usual way. The action was for a sum of 18,414*l.* 17*s.* 6*d.*, due from the defendant to the plaintiff, on account of a long series of sales of stocks and shares, and of carrying over and closing various contracts and sales, and for commission on the several transactions. The main defence set up by the defendant was that the contracts in respect of which the plaintiff claimed were made by way of wagering, and were therefore void and illegal.

The judge gave judgment for the plaintiff for the full amount claimed, with costs, whereupon defendant appealed.

Mackenzie, for defendant.

McIntyre, Q. C., and *Payne*, for plaintiff, were not called upon.

BRAMWELL, L. J.—I am of opinion that this judgment must be affirmed. The question is not what was the bargain between the jobber in the house and the defendant (the principal), through the intervention of a broker, but between the broker and the principal. It was admitted that these bargains are what they purport to be, bargains which gave the jobber a right to call upon the broker or principal to take the stock, and the broker a right to call upon the jobber to deliver, there was nothing in the dealing between the jobber and the broker, on behalf of the principal, by which the jobber could tell whether the transaction was one for an investment for the principal or for a speculation; and accordingly, Mr. *Mackenzie* does not rely on the bargain between the broker and the jobber being a gambling or wagering transaction. If the fact had been, as it was supposed erroneously in *Grizewood* v. *Blane*, (perhaps rightly enough on the evidence as it was understood), the judgment in that case would be quite right, but it was not so; all these bargains between the man in the house and the broker are real bargains, and mean what they say, though, very probably, when the time comes for their fulfilment another bargain may be made in lieu of the original one. Mr. *Mackenzie* admits this, but puts a new matter before us. He says, assuming it to be true that the jobber or dealer in the house could enforce an exact performance of the contracts, yet that the bargain between the plaintiff, who is suing, and who was the broker and not the jobber, and the defendant, was that, "though you, the broker, are to buy for me or sell for me, I am never to pay for the article bought, or take or deliver it and receive or pay the price accordingly, but you are, when the time arrives for my taking or paying the price, or delivering or receiving the article, to make another bargain with some one else or somehow, or in some way arrange so that I shall be enabled to set the one transaction off against the other, and neither have to deliver nor receive actual stock or the price of it."

I am not sure whether that was the bargain between the principal and broker; but most certainly it is not the bargain if you take an isolated case.

If I went to a broker and said, "I wish you would sell for me 10,000 consuls for the next account," and he did so, I clearly am of opinion that I should have no right to go to him afterwards and say, in the sense of his being bound to do it, "you must rebuy them for me; for he could say, "I am not bound to do so." Whether such an obligation or duty arises on the part of the broker in cases where there has been a continual mode of so transacting business may be more doubtful. If it could be proved that the principal had said, "I cannot take these things in reality, and so you must resell them," and the broker had said, "of course," or if he had used an expression to the effect that he would rather not do it, but had done it, it might be that a jury would find that the understanding between the parties was not that that state of things should go on *ad infinitum*, but that there was at least this arrangement between the broker and the principal, viz.: that every transaction for one account should be disposed of, *quoad* that account, by a transaction in a contrary sense, so that only the difference between the two should be paid. It is possible that one might conclude, under such circumstances, that the principal would have a right to say, "you made bargains for me by which I must deliver; you must undo those bargains by selling, so that I receive; the result will be that you can set off the two transactions, and I shall only have to pay you, or receive from you, the difference." That, however, is subject to this limitation, that the broker might say, "I am not bound to do it; I will try to do it if there is a market."

Whether or not I should come to that conclusion in the present case would require me to have a more minute knowledge of the facts than I have; but I will suppose, in favor of Mr. *Mackenzie* that that was the bargain between the two parties, and that the principal would have a right to say to the broker, "The transaction you entered into is for a purchase, and accordingly I am bound to receive the stock and pay for it; but I call upon you by virtue of the bargain you and I made when I employed you, to sell that stock for me, so that, instead of my taking and paying for it, I shall only have to take or pay the difference." In my opinion there is nothing in that transaction within the Gaming and Wagering Act, for it is quite clear that even in a bargain like that the principal would have a right to say, "I will not go on with these speculations, but I will take the article purchased and hold it as an investment." I have no doubt that that does continually happen, and that men who have bought with the hope of a rise, intending to sell again (not to any enormous extent, but men who have bought for speculative purposes), have been met with a fall, and have been so disgusted at having to end the matter by reselling or continuing it on and paying continuations or backwardations, as the case might be, that they have under such circumstances found the money and taken the stock and paid for it; and so in that case the transaction comes to this, that the principal has a right to say, "Well, I will take the stock I have bought (if it was a purchase), or deliver the stock I have sold," (if it was a sale); or a right to say, "You must try to end the transaction by buying or selling again." I say "try," for the broker might be unable to do so, and all he would be bound to do would be to endeavor to buy or sell again. What is there illegal in that? I employ you to buy with a right to call on you to sell if it does not suit me to take the article; what gambling or wagering is there between a broker or jobber in that case? Absolutely none. The broker can say it does not matter to me if the thing goes up or down; but in a case of wagering as to the price of stock it does matter to him. In *Grizewood* v. *Blane*, it mattered to both parties if the thing went up or down, but in the case I put that is not so, and there is no wager or gaming at all. The gamester in heart would be the principal, but the broker would not be wagering or gaming at all.

I am of opinion, therefore, even if everything were found in Mr. *Mackenzie's* favor, which he has suggested should be found, that this case would not be within the Gaming and Wagering Act. I will not, under the circumstances, say anything more about *Grizewood* v. *Blane.* The difference is that there the question was not between the broker and the principal, but between two principals—a jobber in the house, and a principal out of the house —and the case has no bearing on the present one.

Now, as to time bargains. Mr. Justice LINDLEY has shown what he understood to be a time bargain and an invalid one. A time bargain, merely because it is one, is not invalid. If a man were to undertake to sell me a crop of apples for next year, that is not invalid. But when, by a time bargain, you understand something different in reality from what it purports to be, and that, whereas it purports to be an agreement to deliver and sell an article on a particular day, it is really no such agreement, but is an agreement to pay what shall be the difference between the price when the bargain was made and the price at the future time they name; such an arrangement is something in the nature of a wager or gaming on the question of what would be the price.

On these grounds I am of opinion that this judgment must be affirmed.

It may be a shocking thing that there should be gaming on the stock exchange, but that is not the question we have to consider: and I am not sure that some place where people could speculate, and buy and sell, not with a view so much to making an investment as to making a profit, is not for the public benefit, for it is a certainty that by it markets can be found for persons who are so minded, and I believe that we are indebted to it for a great many of the railways and useful undertakings that we now have.

Appeal dismissed.

BRETT and COTTON, L.JJ., delivered concurring opinions.

[1] Ever since the days of *Hibblewhite* v. *McMorine*, it has generally been held that a contract for the sale and future delivery of personal property is not void at common law, merely because the seller did not then own the same, provided he had a bona fide intention of obtaining it by purchase, manufacture or otherwise, before the day of promised delivery. See *Stanton* v. *Small*, 3 Sandf. 230 (1849); *Cassard* v. *Hinman*, 1 Bosw. 207 (1857); *Porter* v. *Viets*, 1 Biss. 177; *Logan* v. *Musick*, 81 Ill. 415 (1877); *Wolcott* v. *Heath*, 78 Ill. 433 (1875); *Clarke* v. *Foss*, 7 Biss. 540 (1878), a valuable case on this point.

Nor are such contracts void at common law merely because it is therein made optional in either party to fulfil it or not as he chooses. If a seller is willing to absolutely bind himself to sell and deliver at a certain price, and allow the buyer to take it or not at his option, there is no illegality in the contract. Whether it would be binding without some other consideration than *such* a promise to take is another question. And apparently a consideration is usually advanced by the party who has the privilege by the contract. But aside from the question of consideration, optional contracts—in which one may be bound and the other not,—are of course not illegal at common law; *Giles* v. *Bradley*, 2 Johns. Cas. 253 (1801); *Disborough* v. *Neilson*, 3 Johns. Cas. 81 (1802); *Pixley* v. *Boynton*, 79 Ill. 351 (1875); *Bigelow* v. *Benedict*, 70 N. Y. 202 (1877).

Optional contracts are sometimes forbidden by statute. Such is the case in Illinois and probably elsewhere: Rev. Stat. c. 38, sect. 130. But optional contracts in which the only option reserved is, *on what particular day*, within a given time, the seller shall deliver, are not contrary to the statute of Illinois: *Pixley* v. *Boynton*, 79 Ill. 351; *Gilbert* v. *Gaugar*, 10 Ch. Leg. News, p. 340 (1877).

All optional contracts, therefore, are not *per se* illegal. A bargain for an option may be legitimate and for a proper business object. But as such agreements can be readily prostituted to the worst kind of gambling ventures, their character may be weighed by a

[1] Our readers will find a note upon the same subject, *ante*, p. 229, the two having been simultaneously prepared without knowledge of each other.

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jury in considering whether the bargain was a mere scheme to gamble upon the chance of prices. The form of the venture, aided by other evidence, may clearly indicate a purpose to wager upon the rise or fall in the price of an article, at some future day, and not to deal in the article as men usually do in that business. But gambling is not to be confounded with honest speculation. Therefore it was held in *Kirkpatrick* v. *Bonsall*, 72 Penn. St. 155 (1872), that the court could not say that *on its face*, such a contract as the following was illegal:

"Nov. 10th 1870. In consideration of $1000, we agree to deliver B., should he call for it, during the first six months of 1871, 5000 barrels of oil. If said oil is called for, this call becomes a contract; ten days' notice shall be given, and B. agrees to receive and pay for the same cost on delivery, at 10½ cents a gallon." And a similar view was taken of an optional contract for gold, in *Bigelow* v. *Benedict*, 70 N. Y. 204 (1877). See also, *Barry* v. *Crosky*, 2 Johns. & Hem. 2 (1861).

It is real intention of the parties, which makes such contracts valid or invalid, and it has been thought that such unlawful intention must have been *mutual*, in order to make the contract void. A secret intention of one party not to fulfil his contract unknown to the other would not have that effect: *Clarke* v. *Foss*, 7 Biss. 540 (1878). And the intention of the parties in making such contracts, is one of fact for the jury, to be determined if need be by extrinsic evidence; and the admission of such evidence does not violate the rule that parol evidence is not admissible to contradict or vary a written agreement: *Cassard* v. *Hinman*, 1 Bosw. 207 (1857). And see *In re Morgan*, 2 DeGex, F. & J. 634 (1860). And of course the party himself, if a witness, may be asked what his real intention was: *Yerkes* v. *Salomon*, 18 Hun 471 (1877).

Selling an article "short," is not therefore, *ipso facto*, a wager and illegal. It may be evidence of a wager, but there must be other facts to characterize the transaction, and to show that the actual intention of the parties was to wager merely upon the prospective price: *Maxton* v. *Gheen*, 75 Penn. St. 168 (1874); *Smith* v. *Bouvier*, 70 Id. 325 (1872); *Appleman* v. *Fisher*, 34 Md. 540 (1871).

These optional contracts are often styled, "puts" and "calls." A "put," in commercial language, is a contract in which the seller retains the privilege of delivering or not delivering the subject-matter of the sale at his option; and a "call" is one which in the buyer has the privilege of calling or not calling for it at the time named.

The law in regard to such contracts was carefully examined in *Chandler's Case*, 13 Am. Law Rep. N. S. 310 (1874). There Chandler of Chicago, seeking to make a corner in oats for June 1872, purchased all the "cash oats," and took all the "options" offered him for June delivery, his object being to put all the oats in market, and compel those who had sold "options" for June to pay his price, or settle with him by paying the difference between the prices he paid for the options, and the price he should establish in June. He purchased about 2,500,000 bushels for cash, and bought June options for about 3,000,000 more. The total amount of oats in Chicago during the whole month of June was only about 3,500,000 bushels. As part of the arrangement for creating a corner, Chandler also sold what are called "puts," or privileges of delivering him oats during the month of June, for 41 cents a bushel, for which the other party paid ½ cent a bushel for the quantity named in the contract, which read thus: "Received of A. B. $50, in consideration of which, we give him the privilege of delivering to us, or not, prior to 3 o'clock P. M. of June 30th 1872, 10,000 bushels oats, at 41 cents a bushel; and if delivered, we agree to receive and pay for the same at the above rate." The total quantity contracted for by these "puts" was about 3,700,000 bushels, and for which Chandler received at the rate of ½ cent a bushel, about $18,500. Before the last day of June, oats declined about 26 cents a bushel, and the holders of the puts claimed of Chandler the difference between the market price of the oats and 41 cents a bushel, which Chandler had agreed to pay, or about $400,000. Chandler failed and went into bankruptcy, and the creditors sought to prove the amount of their loss against his estate; which BLODGETT, J., disallowed, on the ground not only that the transaction was a wager, and contrary to the statute of Illinois, but also void at common law, as contrary to public policy. The opinion of Judge BLODGETT well deserves perusal. See also *Ex parte Young*, 6 Bissell 56, (1874); *In re Green*, 7 Bissell 338 (1877).

In *Brua's Appeal*, 55 Penn. St. 294 (1867), it was held that a contract to purchase stocks without the intention to deliver or receive them, is a gaming contract and void. And this was directly affirmed in *Swartz's Appeal*, 3 Brewst. 131 (1869). In *Pickering* v. *Cease*, 79 Ill. 327 (1875), it was held that a contract for the sale and future delivery of grain, by which the seller has the privilege of delivering or not delivering, and the buyer that of calling or not calling for the grain, as each may choose, and which on maturity is to be fulfilled by adjusting the differences in the market value, is an "optional contract," and in the nature of gambling transactions, and void even *at common law*, as well as under the statute of Illinois.

So in *Lyon* v. *Culbertson*, 83 Ill. 34 (1876), it was held that a contract for the sale of grain in store, to be delivered at a future time, with a provision that the parties shall put up margins as security, and that if either party fails, a notice to put up further margins, according to the market price, the other may treat the contract as filled at the then market value, and recover the difference between such market price and the contract price, and without any offer to perform on his part, or showing an ability to perform, is illegal.

In *Rudolph* v. *Winters*, 7 Neb. 126 (1878), the defendant deposited money in the plaintiff's hands, to be invested in grain options in Chicago, in which venture each party was to receive a proportion of the profits and bear the losses, and the loss largely exceeded the amount invested by both parties, which losses the plaintiff paid and charged the defendant. He was not allowed to recover. See also *Sampson* v. *Shaw*, 101 Mass. 145 (1869).

Thus far the question of the validity of the contract seems to have arisen between the parties to it, and not between one party and his broker whom he had employed to negotiate the contract, as in *Thacker* v. *Hardy*, *supra*. Whether an agent may recover of his principal, may depend upon two considerations: 1st, upon the language of the statute, if there be one, which prohibits such contract; and 2d, upon the guilty participation of the broker or agent in aiding the party to violate the statute.

If a statute merely declares a contract void, but does not clearly make it *illegal*, an agent or broker who advances his funds or services to his principal to enable him to make or fulfil a merely void contract, is not precluded from recovering. Some contracts are void under the Statute of Frauds, but not "illegal;" and any person who lends money to enable a party to fulfil a contract void under that statute, would be surprised to hear he could not recover it back of the borrower; and of course he could: *Pawle* v. *Gunn*, 4 Bing. N. C. 445.

But if the contract be made "illegal" by the statute, an agent who knowingly contributes by money or services to enable his principal to violate the law can not recover. It is for this reason that one who lends a friend money to gamble with, knowing the purpose, cannot recover the loan: *McKinnell* v. *Robinson*, 3 M. & W. 434; *White* v. *Buss*, 3 Cush. 448; because by statute, that gambling contract was *illegal* and not merely void. So if a stock-jobbing act makes contracts in stocks not then owned illegal, one who knowingly lends money to enable one to pay up his losses by such a contract, cannot recover it: *Cannan* v. *Bryce*, 3 B. & Ald. 179. And see *De Begnis* v. *Armistead*, 10 Bing. 105.

But as the stock-jobbing act under which *Cannan* v. *Bryce*, was decided, is repealed in England by stat. 23 Vict. c. 28, such contracts are now simply "void," under 8 & 9 Vict. c. 109, and of course a different decision might now be made on the same state of facts.

But as the statute of 8 & 9 Vict. c. 109, on which *Thacker* v. *Hardy*, was decided, merely makes a wagering contract in stocks "void," but not illegal, it has frequently been held that a person who helps another to fulfil such a void contract by loaning him money, or paying the amount due to the other party, may recover it back of the party for whom and at whose request he advanced it. See *Knight* v. *Cambers*, 15 C. B. 562; *Oulds* v. *Harrison*, 10 Exch. 572; *Rosewarne* v. *Billing*, 15 C. B. N. S. 316; *Jessopp* v. *Lutwyche*, 10 Ex. 614.

Several American decisions are in harmony with the decision of *Thacker* v. *Hardy;* holding that when a broker has made contracts for the future sale or delivery, on the order of his principal, he may recover for his fees and disbursements, notwithstanding the principal did not intend to either take or deliver according to the broker's contract, but merely "to settle the differences," at the maturity of the contract; and especially when it did not clearly appear that the broker was aware of such intention. The most notable, perhaps, in support of this view are *Lehman Brothers* v. *Strassberger*, 2 Woods 554 (1873); *Gilbert* v. *Graugar*, 10 Ch. Leg. News 340 (1877); *Clarke* v. *Foss*, 7 Bissell 540 (1878).

In *Rumsey* v. *Berry*, 65 Me. 570, the defendant, having no wheat to sell, employed the plaintiff, a broker, to sell 10,000 bushels at $1.30 per bushel, to be delivered any time during May 1872, and deposited $700 as a "margin," to secure the plaintiff against loss in the rise of wheat; and the plaintiff as agent for the defendant, made contracts to sell accordingly. Wheat rose above $1.30, and the plaintiff was obliged to settle with his customers at a loss of about $3000. He was allowed to recover of the defendant, the balance of this, above his $700 margin, although he knew the defendant did not own any wheat when he made the bargain with him. Three judges dissented, one did not sit, and four concurred in the decision. This difference of opinion may perhaps have been in part owing to the reason that the facts had not been distinctly determined by the jury, as they should have been, and so no clearly defined question of law was presented to the court.

A different view seems to have been taken in Pennsylvania: *Furrira* v. *Gabell*, 4 Weekly Notes 572 (1877). So in *Green's* case, 7 Bissell 338, it was held that a broker, or agent of the buyer who makes the bargain and pays the "differences" to the seller, knowing the character of the transaction, cannot recover of his principal the amount so paid. And see *Tenney* v. *Foote*, 11 Ch. Leg. News 71 (1878). But these may have proceeded on the ground that such speculating contracts in gold or grain, are not only void, but "illegal," either at common law, or by force of some local statute, and that the plaintiff could not make out his own case, without showing the illegal contract between the defendant and the third party; and upon that state of facts, the decisions would be in harmony with the well-settled principles of law.

EDMUND H. BENNETT.