1914. *August* 20, 25. MASON, J.

Contract. — Illegality. — Promissory notes. — Recovery. — English exceptions to general rule.—Less guilty party.—Contract not executed.

Where plaintiff gave promissory notes to defendant in terms of a fraudulent agreement, he was *held* not entitled to recover them, or to restrain the defendant from parting with them, though the defendant might negotiate them to *bona fide* holders and so obtain payment, as to grant the relief claimed would enable the plaintiff to reap the benefit of his fraud.

Two exceptions *inter alia*, are recognised in the English law, to the rule that parties to a fraudulent agreement cannot sue upon it, (1) That the less guilty party may recover, (2) That either party may recover where the transaction has not been completed. Assuming that these exceptions are in force in the Roman-Dutch Law, *Held*, that the first exception applies only where there has been oppression or extortion, and does not cover the case of a voluntary purchaser, and that the second exception applies only where the person entering upon the transaction has repented and desires to annul it, and does not cover a purchaser who wants to retain his purchase and also recover what he has paid for it.

Exception to the plaintiff's declaration as disclosing no cause of action.

The declaration alleged that the private and partnership estates of Sam Levy and Harry Levy, trading in partnership as Levy Brothers, were sequestrated on November 7th, 1913, and Harry Lurie was elected sole trustee. The defendant and Lurie, who were carrying on business in partnership as Katz and Lurie were creditors of the insolvent firm. On or about January 31st, 1914, an agreement was entered into between Lurie, in his capacity as trustee, and the plaintiff, Max Levy, whereby Lurie agreed to sell to the plaintiff, who agreed to purchase from him, all the assets of the insolvent estates for a sum sufficient to pay each creditor an amount equal to 5s. in the £ of the amount due to each creditor. Plaintiff also agreed to pay all costs of sequestration. The agreement was confirmed by all the creditors, who agreed to accept the amounts payable by plaintiff thereunder in full satisfaction of their claims. Prior to the said agreement it was agreed between Lurie, acting on behalf of the firm of Katz and Lurie, with the knowledge and consent of the plaintiff and of the defendant, that in consideration of the firm agreeing to the terms of the aforesaid agreement the plaintiff should deliver to the defendant over and above the amount payable to Katz and

Lurie under the aforesaid agreement, seventeen promissory notes, each for the sum of £28, made by plaintiff in favour of defendant. Alternatively the plaintiff pleaded that it was agreed between Lurie and plaintiff with the knowledge and consent of defendant, that in consideration of the consent by Lurie, both in his capacity as trustee and on behalf of Katz and Lurie to the terms of the first-mentioned agreement, that plaintiff was, as before pleaded, to deliver the seventeen promissory notes to defendant. The agreement between plaintiff and Lurie and Katz and Lurie was not disclosed to the other creditors of the insolvent estate and was a fraud on them. Plaintiff duly delivered to defendant the said promissory notes, of which defendant was still in possession. The plaintiff claimed an order directing defendant to return to him the seventeen promissory notes or alternatively judgment for £476 as and for damages, and an interdict restraining defendant from parting with the notes.

J. Stratford, K.C. (with him *P. Millin*), for the excipient (the defendant): The exception is that as there is a fraud on the part of both parties neither can recover. I admit that the facts alleged constitute a fraud. This is a secret commission given to an agent; the plaintiff cannot recover it, but creditors could. Pollock, *Contract* (7th ed., 379,384). If, however, the plaintiff had repudiated the transaction he could recover, *Kearley* v. *Thomson* (24 Q.B.D. 742); *Jackman* v. *Mitchell* (13 Ves. 581); *Smith* v. *Cuff* (6 M. and S. 160); *Danby* v. *Atkinson* (7 L.T. N.S. 93). There is no difference between giving bills and paying cash. The plaintiff cannot show oppression so as to bring himself within the exceptions under the English cases, *Wells* v. *Du Preez* (23 S.C. 284); *Merwitz* v. *Jagger & Co.* (1910, T.P.D. 1016). I admit the defendant cannot sue on the notes.

C. F. Stallard, K.C. (with him *L. Greenberg*), for the respondent (the plaintiff): The principle applicable is that a person enriched *ex injusta causa* cannot retain the benefit. Schorer, *Institutes* (315 *et seq.*); Voet (12, 5, 5); Grotius, *Intro.* (3, 30, 15 *et seq*); *Digest*, (12, 5, 2, 4). Where there is immorality on both sides, questions of public interest prevail. This exception really allows the defendant to recover indirectly as he may negotiate the notes, *Wood* v. *Barker* (1 Eq. Cases 139); *McKewan* v. *Sanderson* (15 Eq. L.R. 229). I am therefore entitled to an interdict in order to prevent the defendant getting the benefit of the notes, even if I cannot recover on them. I admit that the plaintiff has received delivery

of the property. If the doctrine *in pari delicto potior est possidentis conditio* is not applied, then here the defendant would be in the worse position.

Stratford, K.C., in reply: As to public policy, see Voet (12, 5, 2); the Court has no right to invoke new privileges, *Janson* v. *Driefontein Consolidated Mines Limited* (1902, A.C. 484); *Silke* v. *Goode* (1911, T.P.D. 991). There is no question of oppression here; the turpitude of both parties is equal. The contract is not executory as the defendant has completed his part. One can only rely on an illegal transaction if one repents. Pollock, *Contract* (384); Schorer (*Note* 315, p. 568). See also *Currie* v. *Misa* (10 Ex. L.R. 153).

Cur. adv. vult.

Postea (August 25).

MASON, J.: The defendant excepts to the plaintiff's declaration as bad in law. The action arises out of the sequestration of the private and partnership estates of Sam Levy and Harry Levy trading as Levy Brothers. The firm of Katz and Lurie were creditors of the insolvent firm; Lurie was elected sole trustee of these estates; Katz the other partner is the defendant.

The trustee agreed to sell all the assets of the insolvent estates to the plaintiff, one Max Levy, for a sum sufficient to pay each creditor of the estates 5s. net in the £; the plaintiff was also to pay all the costs of sequestration. The agreement was confirmed by all the creditors who agreed to accept this sum in full satisfaction of their claims.

The declaration then alleges that, in order to obtain the consent of Katz and Lurie to this sale, it was agreed between Lurie and plaintiff with the knowledge of defendant that over and above the 5s. in the £ the plaintiff should give the defendant seventeen promissory notes of £28 each made by him in defendant's favour, and that the promissory notes were delivered accordingly.

It was admitted at the bar that the plaintiff had received all the assets in terms of the sale.

This separate agreement, it is averred, was not disclosed to the other creditors, and was therefore a fraud upon them. The plaintiff claims a return of the promissory notes or an interdict against the defendant parting with them.

The defendant maintains that, if the transaction be illegal, then the plaintiff cannot recover because he was a party to the fraud.

That an agreement of this nature, by which creditors,—with the concurrence of the trustee who was a member of the firm,—received a private advantage over other creditors whilst professing to share equally with them, is fraudulent and cannot be enforced by action, is in accordance with the Roman-Dutch law, and is settled by a long course of decided cases. [See *inter alia, Jackman* v. *Mitchell,* 13 Ves. 581; *Cohen* v. *Hermann and Canard,* 21 S.C. 621; *Merwitz* v. *Jagger,* 1910, T.P. 1016.]

The Roman and the Roman-Dutch authorities *Digest* (12, 5); Voet (12, 5), state clearly that, where an agreement is made upon an immoral consideration (*turpis causa*), no action will lie to recover anything delivered in terms of the immoral agreement at the suit of either party, if both are privy to the illegality, or at the suit of the guilty party, if only one is concerned in the illegality.

Here it is clear, if the facts alleged are true, that plaintiff and defendant were both concerned in the fraud upon the creditors, and, unless there is an exception to the general rule, the plaintiff cannot sue to recover anything which he has given in terms of this fraudulent agreement.

But it is contended that his claim can be supported upon two grounds; first that the principle of public policy on which this general rule rests, namely that the Courts shall not be used as instruments for carrying frauds into effect, is in his favour; and second that this case is one of the recognized exceptions to the general rule.

As to the first ground, it is urged that, if the promissory notes are left with the defendant, he may negotiate them to *bona fide* holders, who would be entitled to sue, and thus the defendant would be able by this indirect method to obtain payment by process of the Court of these tainted notes. There is no doubt this is true.

On the other hand to grant the relief claimed would be to enable the plaintiff to reap the benefit of the fraud and by the active interposition of the Court protect him from paying what he had agreed to pay.

The public interest, which was invoked as the guiding principle in these cases, does not seem to me to lie in making the plaintiff's fraud even more successful than he originally planned it to be.

It is true that the abstention of the Court may be beneficial to the defendant; it is the inevitable result of the maxim *melior est possidentis conditio.*

Exceptions to the general rule that parties to a fraudulent agreement cannot sue upon it, are recognized in English law. Two of them were relied upon as justifying the declaration; the one is that the party who is less guilty than the other may recover, the other is that either party may recover where the transaction has not been completed. The first exception seems to be an inference from the maxim *in pari delicto potior est conditio possidentis;* see *Digest* (50, 17, 154), that, if the guilt of the parties differs, the less guilty may recover. It is, it seems, the degree of moral guiltiness which would be in issue in such a case.

But though this maxim is referred to in the English cases dealing with this exception, relief has only been afforded apparently in cases where there has been something in the nature of oppression or extortion. *Smith* v. *Cuff* (6 M. and S. 160); *Wood* v. *Barker* (1 Eq. L.R. 139); *McKewan* v. *Sanderson* (15 Eq. L.R. 229). See *Wells & Another* v. *Du Preez* (23 S.C. 284).

I doubt whether in Roman-Dutch law the compounding debtor would not be held equally guilty with the creditor. The cases in the *Digest* (12, 5, 2), in which an action lies to recover money paid to prevent a theft or murder or libel, are stated to be examples of guilt on the part of the recipient only, and are explained by Zoesius, *ad Digest* (12, 5, 1), as being payments made not willingly, but under compulsion.

But however this may be, the plaintiff cannot bring himself within the English cases; he was not a debtor under pressure; he was merely a purchaser of goods who was ready to pay the price demanded. Nor am I able to see how he can claim to be less guilty of this fraud than the other parties.

The second exception to the rule is illustrated by the case of *Taylor* v. *Bowers* (1 Q.B.D. 291). There the plaintiff had delivered goods to A to protect them from seizure by his creditors with whom he was endeavouring to compromise. The compromise fell through; the plaintiff repudiated the whole transaction; the Court held he

was entitled to recover because it was "well established that where money has been paid over or goods delivered under an unlawful agreement but there has been no further performance of it, the party paying the money or delivering the goods may repudiate the transaction and recover back his money or goods."

But the principle thus stated has not escaped challenge, *Kearley* v. *Thomson* (24 Q.B.D. 742). It seems, however, to be analogous to the rule laid down in *Clarke* v. *Bruning* (1905, T.S. 295), which is based upon Voet (11, 5, 9), that either party to an unlawful wager may recover the money which he has lodged with a stakeholder, so long as it has not been paid over; the loser may recover even after the event has been decided against him. But, so far as the stakeholder is concerned, his contract with the parties is still executory. In *Kearley* v. *Thomson* (24 Q.B.D. 742), it was laid down clearly that this exception did not apply where the transaction had been partially carried out.

Now here, so far as the trustee of the insolvent estate and the defendant are concerned, they have carried out the agreement to the full. The firm of Katz and Lurie consented to the sale and their claims are satisfied; the trustee has delivered, and the plaintiff has received, the property he bought. None of the English cases allow recovery under such circumstances.

It is true that in *Jackman* v. *Mitchell* (13 Ves. 581), the plaintiff was allowed to recover a bond given to secure the creditor's consent, and that the CHANCELLOR does not rely on the doctrine of oppression, but the subsequent cases explain and follow the decision on that basis. In *McKewan* v. *Sanderson* (15 Eq. L.R. 229) the VICE-CHANCELLOR uses words which by themselves may support the plaintiff's claim, but the circumstances are the same as in those other cases in which a debtor's necessities have been taken advantage of.

The passage which appears most to support the claim for recovery of the notes is Voet (12, 5, 5). He there states that a person giving a surety bond or deed upon an immoral consideration is entitled to recover it: no qualification is stated and no direct authority is cited in support of the proposition. The *lex* of the *Code* only states that an action upon such a contract can be defeated.

Voet, I think must refer to the case in which the person entering upon the transaction has repented and desires to annul it; not to such a case as the present, in which the plaintiff wants to retain his purchase and also recover what he has paid for it.

The plaintiff comes clearly within the scope of the rule laid down in *Silke* v. *Goode* (1911, T.P.D. 991); his action can only succeed by his taking advantage of his own wrongful act and by his proving the fraud he has committed; this the law does not allow.

The exception must therefore be upheld with costs and there must be judgment for the defendant with costs unless the plaintiff desires to amend, in which event he must do so within one week.

Plaintiff's Attorneys: *Kaplan & Cooper;* Defendant's Attorney: *E. Gluckmann.*

[G. W.]