

to indemnify Mr. Scott it is equally improbable that he agreed to forego any right to indemnity that might arise from the circumstances. Mr. Ritchie may, as he says, have warned Mr. Scott against risks, and said that the company would not take them. That the conversation detailed by Mr. Ritchie took place there can be no doubt, though Mr. Scott forgets it. Whether, however, Mr. Ritchie's memory is correct as to the exact expressions used is not so certain, as Mr. Henderson, who overheard the conversation, does not remember them. That there were serious risks if the run had been in the name of the company was true, and that the company would not take them was also true. There was, however, at that time no practical risk if the run were taken up in the name of Mr. Scott. What liability there was, Mr. Scott, of course, primarily incurred by his name being in the license, but it does not follow that he abandoned any right to indemnity he might acquire by having incurred the liability for the company's benefit. It is the very fact of this running the risk of liability that gives him the right to indemnity. Mr. Ritchie says that Mr. Scott at this conversation treated the matter very lightly, and Mr. Scott himself says he remembers nothing about the conversation. There is no sufficient evidence that if the circumstances place Mr. Scott in the position of a trustee he has contracted himself out of the ordinary rights which attach to such a position. That the effect of the purchase of the run in Mr. Scott's name with the company's money was to create a resulting trust of the run in favour of the company is, I think, plain. If before the trouble arose the relation between the parties had been in question it would have been beyond doubt that Mr. Scott was a bare trustee for the company; and this way of looking at it is, in my opinion, the true way of testing what the relation between the parties really was. If that was the relation between the parties in the first instance it is so still. Once the relation is established it lies upon the defendants to show beyond all doubt that the plaintiff has contracted himself out of the ordinary rights which attach to that relation. This they have failed to do. I do not think the case turns on a conflict of testimony. In order to assist the higher Court in dealing with the evidence in the event of an appeal, it is right to say that there is no reason to suppose that the witnesses on either side were untruthful. Experience, however, shows that where an arrangement is the result of verbal negotiations, and unexpected events subsequently happen, which give rise to a conflict of rights, there is a universal tendency in persons who endeavour to recall what actually took place to look at the original negotiations in the light of the subsequent events. Too much reliance, therefore, ought not to be placed on every detail given by a witness of such a negotiation, although the good faith of the witness be free from all doubt. These considerations, of course, apply to the evidence given on both sides. There is, however, very little necessity to apply them. I have had very great difficulty with respect to a point in connection with the case which was not taken by the defendants, but was mentioned by Sir Robert Stout at the hearing. He suggested that the transaction was "illegal and immoral." "Immoral" is a wide word; but, whatever opinion may be formed of the transaction, it certainly was not immoral in the sense which would make it illegal on the ground of its immorality. The Court, however, does not enforce illegal agreements, and if the agreement is illegal on other grounds ought the Court to give effect to rights alleged to arise out of it, even if the defendant does not raise this point? Certainly cases could be suggested of illegal agreements which the Court would not give effect to, even if the defendant raised no objection, and submitted to judgment. It is not for the benefit of defendants that the Court refuses to enforce illegal agreements, but in the interest of the public. I have a pretty strong opinion that the transaction was illegal. There are some grounds for contending that the mere taking-up of the license in the name of Scott on behalf of the company was contrary to law. Apart, however, from that, the intent and effect of the agreement were to impose upon the Crown as licensee a man who had purchased in bad faith, with the intention of not fulfilling his bargain, and who was unable to fulfil it, and to prevent the Crown obtaining a *bona fide* tenant. The agreement therefore interfered directly with the due administration in manner provided by law of Crown lands, and the natural tendency of it was to injuriously affect the revenue derived from Crown lands. This seems to me to be contrary to public policy in the strictest sense as tending to cause a direct injury to the State. Ought, then, the Court to interfere on its own motion if there is reason to believe that the agreement was illegal? Of course, I could not in any case decide against the plaintiff on this ground without further argument. The point, however, was not raised by the defendants, and there is authority in a case which bears some analogy to the present that it was for them to raise it (*Haigh v. Kay*, 7 Ch., 473). As, therefore, there is some authority on the point, and as to give effect to the objections would benefit the principal offender, though I am not free from doubt on the subject, I pass over the objection, and give judgment for the plaintiff. The plaintiff is entitled to a decree against the defendant company, somewhat on the lines of the decree prayed, and to the costs of the action.

*Mr. Chapman*: As to the scale of costs.

*His Honour*: It will be on the highest scale. I do not know exactly what the amount was—over £500.

*Mr. Chapman*: Practically the amount involved in the action is some thousands of pounds.

*His Honour*: I have not considered that.

*Mr. Chapman*: The value of the run is some thousands of pounds. The total rent amounts to some £3,000 or £4,000 in the course of the ten years.

*His Honour*: But that is hardly the way—

*Mr. Chapman*: No, your Honour, the amount actually claimed was £685; that is the amount under the present claim, but it settles future rights to a very much larger amount—to the extent, probably, of some thousands.

*His Honour*: Yes. The trial occupied two days.

*Mr. Chapman*: It closed at 2 o'clock in the afternoon of the second day.

*His Honour*: There were not many witnesses; it was not a heavy case to get up at all.

*Mr. Chapman*: No, your Honour.