more, favourable to settlors, and would be contrary to Kitto, J.'s own conception of the policy of the Act, for if a voluntary surrender takes property out of charge, surely a surrender for value should.

As was indicated above, the Full Court did not reach a decision whether "surrender" in s.8(4)(c) could mean a surrender for value, and actually conceded that it might follow from the legislative history of the paragraph that Kitto, J. was right in restricting the word to voluntary surrenders. It can be argued that even if "surrender" is so restricted, the value of a life interest in settled property, surrendered for value, will not be included in the dutiable estate. The argument would run as follows. "Settlement" is defined (so far as is relevant) as meaning "a conveyance . . . or other non-testamentary disposition of property . . . containing trusts or dispositions to take effect after the death of the settlor or any other person dying after the commencement of this Act."[12] If the life tenant surrenders his interest, the remainder takes effect immediately, and it cannot be said that there are trusts or dispositions to take effect after a death. It was to guard against the possibility that a surrender by the life tenant would take property out of charge because it could no longer be said that there was a "settlement" within the definition, that the words "whether or not that interest was surrendered by him before his decease," otherwise redundant, were added to s.8(4)(c). Now, if "surrender" means "voluntary surrender", "surrendered" must have a corresponding meaning "voluntarily surrendered". If the life interest is surrendered for value, so that the remainder takes effect, the conveyance will not be within the definition of "settlement" in s.3, nor will it be deemed to be a settlement by virtue of the words "whether or not that interest was surrendered by him before his decease," because they only refer to voluntary surrenders. The difficulty with this argument is that it would lead to a result different from that which the Full Court reached. If "surrender" means "voluntary surrender", Mrs. Simpson's surrender for value of her life interest would cause the indenture of 1936 to cease to be a "settlement" and the shares would escape inclusion in her estate. This possibility does not seem to have occurred to the High Court when it conceded that "surrender" might mean "voluntary surrender" and yet ordered that the settled shares be included in the dutiable estate.

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PROPERTY ACQUIRED UNDER ILLEGAL CONTRACT

SINGH v. *ALI*

The decision of the Privy Council in *Singh* v. *Ali*[1] is important because it illustrates the English courts' application of the oft-quoted decision in *Bowmakers Ltd.* v. *Barnett Instruments Ltd.*[2] in a manner different from that in which the New South Wales courts have applied the decision. *Singh* v. *Ali* concerns the rights of the parties to an illegal contract where such a contract is executed and in the course of this Note it will be necessary to discuss the meaning of the word "executed".

Regulations made by the Commissioner of Motor Transport of Malaya under powers conferred upon him by proclamation provided that all vehicles should be registered with the Registrar of Motor Vehicles and that no person was allowed to "sell, exchange, part with possession . . . of any motor vehicle without a permit in writing from the Registrar." The regulations further pro-

[11] Estate Duty Assessment Act 1914-1957 (Cwlth.), s.3.
[1] (1960) 2 W.L.R. 180.
[2] (1945) K.B. 65.

vided that no person should allow a goods vehicle to be used for the carriage of goods unless it were a vehicle in respect of which a haulage permit had been issued and in cases where a haulage permit had been issued the holder could not allow the vehicle to be driven by anyone other than his *bona fide* employee.

The plaintiff Ali had been unable to obtain a haulage permit from the appropriate authorities, but Singh held a permit and it appeared could obtain others. Singh entered into an agreement with Ali whereby the former was to purchase a motor-lorry and have it registered in his own name and to obtain the necessary haulage permit in respect of the vehicle. In fact Singh intended to resell the lorry to Ali and to allow Ali the use of the permit. Ali was to pay Singh the various fees incurred in obtaining and renewing the registration of the truck and the haulage permit and Ali was to maintain the lorry and use it as his own.

In 1948 Singh purchased a number of lorries and in respect of one Ali paid him 1,500 dollars and a further 3,500 dollars in 1950. The agreement was embodied in a document which when translated read: "I, Sajan *Singh* (Malacca) have sold a Dodge lorry No. M.2207 to N . . . *Singh* and S . . . *Ali* jointly for 3,500 dollars. Both of them can sell this lorry but cannot sell the haulage permit. The haulage permit is to be returned to Sajan *Singh* . . .". Ali subsequently bought out the other purchaser, and from 1953 used the lorry for his own use exclusively and kept it at his premises. He paid to Singh the amounts due in respect of income tax, insurance and other outgoings, and the vehicle was registered and the haulage permit issued in the name of Singh. In addition, Ali paid for the maintainence and upkeep of the vehicle and received the profits from its use. In 1954 Ali and Singh fell out and Ali then attempted to obtain a haulage permit in his own name. He failed. On either 26th or 27th January, 1955, Singh went to Ali's premises and took possession of the vehicle, which he refused at all times to return.

Ali instituted proceedings against Singh and in his Statement of Claim he set out the written agreement in full. He also alleged that he had paid 5,000 dollars for the vehicle which had been in his possession until the date of seizure. Plaintiff sought a declaration that he was the owner of the vehicle and an order for its return together with the use of the haulage permit, or, in the alternative, damages for detinue. The judge at first instance dismissed the plaintiff's claim on the ground of *ex turpi causa non oritur actio*. The Court of Appeal of Malaya reversed this decision and on appeal the Privy Council held that the plaintiff should suceed in detinue.

In an action in detinue the plaintiff must show that at the time the action was instituted, he had the right to immediate possession arising out of an absolute or special property in the goods. It is submitted that the *ratio decidendi* of the case was stated by the Privy Council thus: "Although the transaction between the plaintiff and the defendant is illegal, nevertheless it is fully executed and carried out; and on that account it was effective to pass the property in the lorry to the plaintiff."[3] Therefore the contract, though illegal, was nevertheless held to be effective as a conveyance of the property.

The decision of the Court of Appeal in *Bowmaker's Case* was referred to by the Privy Council in the instant case and it is therefore important to note that decision. The plaintiffs sued the defendants in conversion and an essential element in the action was that the plaintiffs had the right to immediate possession. The plaintiffs had purchased certain goods from a third party, Smith, under a contract which was illegal, but the obligations of both parties had been performed. The plaintiffs then hired the goods to the defendants and the defendants converted the goods. In neither *Bowmaker's Case* nor in *Singh* v. *Ali* was

[3] (1960) 2 W.L.R. 185.

it alleged that the contracts between Smith and the plaintiffs in the former case and Singh and Ali in the latter case were void and the courts did not consider this aspect. Du Parcq, L.J. delivering judgment in *Bowmaker's Case* said:

> They (the plaintiffs) simply say the machines were their property, and this, we think, cannot be denied. We understand Mr. Gallop to concede that the property had passed from Smith to the plaintiffs, and still remained in the plaintiffs at the date of conversion. At any rate, we have no doubt that this is the legal result of the transaction, and we find support for this view in the *dicta* of Parke, B. in *Scarfe* v. *Morgan*.[4]

The concession was not significant because the Court of Appeal, which the Privy Council had no hesitation in following, held that the conveyance was sufficient to pass the property, even though it arose out of an illegal contract.

The rule applied in these two decisions is dependent upon a decision that the contract is fully executed. "Executed" may mean that the property in the goods has passed under the rules as to the passing of property in goods, which are contained in the Sale of Goods Act, 1923-1953. However, "executed" may simply mean that both parties have performed their obligations under the contract as was the case in the two above-mentioned cases. It may therefore be adduced from these two cases that when the obligations have been performed on both sides and there has been a conveyance which is sufficient to pass the property in the goods, the property will pass to and remain in the transferee. This is explained in *Singh* v. *Ali* thus: "then so soon as the contract is executed and the fraudulent or illegal purpose is achieved, the property (be it absolute or special) which has been transferred by the one to the other remains vested in the transferee, notwithstanding its illegal origin."[5] The reason given for this conclusion is that the transferor, having fully achieved his unworthy end, cannot repudiate it and the transferee, having obtained the property in the goods, may assert that title not because of any virtue on his own part, but purely because there is no other person who is able to assert a better title. The law seeks to make no excuse for this and the Privy Council says that "if the law were not to allow the plaintiff to recover in this case, it would leave the defendant in possession of both the lorry and the money which he received for it."[6]

The view which the New South Wales courts have taken varies, however, from that of the English courts. In *Bassin* v. *Standem*[7] Jordan, C.J. stated:

> The general rule is clear. If the making of a particular type of contract is prohibited by statute a purported contract in breach of the prohibition is not only illegal but is void because it is illegal unless the statute indicates a contrary intention. . . . If a particular class of sale is prohibited by statute, I think it is clear that, *prima facie*, a purported sale in breach of that prohibition is void; no property in the thing sold is acquired by the purported purchaser . . . the purported vendor can recover it . . . at common law by virtue of the title with which he has never effectively parted.

This statement was *obiter* but nonetheless of very high authority and it firstly states that the contract is void and secondly that the contract is ineffective as a method of conveyance. To state that an illegal contract is *per se* void is too wide a statement. Where the parties are not in equal delict the party who is in lesser delict may have rights under the illegal contract.[8] The second point made by Jordan, C.J. on illegal contracts cannot be treated as an effective method of conveyance. The learned Chief Justice had the report of *Bowmaker's Case*

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[4] *Op. cit.* at 70.
[5] (1960) 2 W.L.R. 185-86.
[6] *Id.* at 187.
[7] (1945) 62 W.N. (N.S.W.) 238.
[8] See the discussion in *St. John Shipping Corporation* v. *Joseph Rank Ltd.* (1957) 1 Q.B. 267.

before him at the time of pronouncing judgment and it is therefore difficult to see how he reconciled his own statement with the express holding of the Court of Appeal in *Bowmaker's Case* that the property in the goods had passed from Smith to the plaintiffs.

The next relevant New South Wales decision is that of the Full Court in the *Newcastle District Fisherman's Case*,[9] where the Full Court affirmed that Jordan, C.J. had said in *Bassin* v. *Standem* subject to a qualification. It had been stated in *Bowmaker's Case* that the plaintiff was entitled to succeed "provided that the plaintiff does not seek, and is not forced, either to found his claim on an illegal contract or to plead its illegality in order to support his claim."[10] Street, C.J. therefore put together the proposition of Jordan, C.J. and the statement in *Bowmaker's Case* that a party to an illegal contract could not succeed when he had to set up the illegal contract as founding his action. It is submitted that this statement from *Bowmaker's Case* was not the *ratio decidendi* of the case and that the misconception concerning the statement flowed from certain academic opinion then prevalent. In *Bowmaker's Case* the defendant had admitted that the property had passed from Smith to the plaintiff and was at all material times vested in the plaintiff. The view which was expressed by some was that the whole case turned on these admissions. Clearly, it did not and the Court of Appeal found that the property had passed notwithstanding the admissions.

However, it is necessary to consider the facts in the *Newcastle Fisherman's Case* to see what problem was before the Court. In that case the plaintiff sold fish to the defendant under a contract which the parties agreed was illegal. The defendant sold the fish and refused to pay the plaintiff, who sued in tort for conversion and failed. A subsequent appeal was dismissed. In that case the contract was executed in that the property in the goods had passed under the Sale of Goods Act (N.S.W.) 1923-1953 but the contract was not executed in the sense that the obligations had been performed on both sides. Therefore the N.S.W. Full Court held that the plaintiff was forced to rely upon the illegal contract to show how the defendant received the goods, for a mere delivery of the goods by the plaintiff to the defendant without any further evidence was consistent with several things, e.g. a gift. It was for this reason that the plaintiff failed. Authority for the proposition that one may not enforce an illegal contract where one has to reply on the illegal contract is to be found in *Hollman* v. *Johnson*, [11] *Taylor* v. *Chester*[12] and *Bowmaker's Case*.

But while that is settled law, there is no other authority for the formulation of the principle by Street, C.J. Let it be assumed that the defendant in the *Newcastle Fisherman's Case* had paid the plaintiff and then the plaintiff had sued for conversion. According to Jordan, C.J. the action would succeed because the plaintiff had not effectually parted with the property and therefore the plaintiff would not only be entitled to his original payment but also apparently to damages for the conversion. In the light of the *Newcastle Fisherman's Case*, however, as the plaintiff would have to set up the illegal contract in order to prove his right to immediate possession and as he would be prevented from relying upon the illegal contract, he would fail. The defendant would have a title by estoppel.

Similarly if the case of *Singh* v. *Ali* had arisen in New South Wales, Ali could bring an action for detinue or conversion founded upon his right to immediate possession, and in order to repudiate this the defendant would have to rely upon his right under the illegal contract and this he may not do. There-

[9] (1950) 50 S.R. 237.
[10] (1945) K.B. 71.
[11] (1775) 1 Cowp. 341.
[12] (1869) L.R. 4 Q.B. 309.

fore the title which the defendant had in the *Newcastle Fisherman's Case* and which Ali would have in New South Wales is a title by estoppel. The result is the same as that at which the English courts have arrived, but the English courts have held affirmatively that where there is a contract which is executed in the sense that obligations have been fulfilled on both sides, then that contract is sufficient as an instrument of conveyance to transfer the property in the goods.

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HUSBAND AND WIFE AND RESULTING TRUSTS

MARTIN v. *MARTIN*

In the adjudication of disputes over property between husband and wife under the summary procedure provided for in the Married Women's Property legislation,[1] the courts sometimes have vacillated between two opposing interpretations of the effect of the statutory provision.[2] On one view the property rights of a husband and wife arise independently of their marital status, and disputes between them regarding their respective property rights should be determined according to ordinary proprietary principles. On another view, however, the Married Women's Property legislation gives the court power to override the normal rules governing proprietary rights and to exercise wide discretion in distributing the property of the parties *ex aequo et bono* according to the exigencies of each particular situation.[3] Australian courts have taken the attitude that the statutory provisions in question merely lay down procedure for ascertaining and enforcing existing rights.[4] The law of property governs the ascertainment of the proprietary rights and interests of those who marry and those who do not. . . . The title to property and proprietary rights in the case of married persons no less than in that of unmarried persons rests upon the law and not upon judicial discretion."[5]

While application of ordinary principles of property law may induce a greater degree of certainty and predictability in matrimonial property law than the discretionary principle, in many cases, especially in those in which the property in question forms part of assets used by all members of the family, the quest for *indicia* of title tends to assume an air of unreality. The truth of the matter is that all too often the spouses have been indifferent as to the *locus* of proprietary rights until the marriage begins to founder. What the court is obliged to do when the spouses appear before it is to establish their respective proprietary rights according to intentions which may never have existed at the time the property was acquired.

The difficulties confronting a court in ascertaining where the beneficial ownership of property employed in a joint matrimonial venture was intended

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[1] Married Women's Property Act. 1901 (N.S.W. s.22; Marriage Act, 1958 (Vic.) s.161; Married Women's Property Act, 1890-1952 (Queensland) s.21; Law of Property Act, 1936 (S.A.) s.105; Married Women's Property Act, 1935 (Tas.) s.8; Married Women's Property Act, 1892 (W.A.) s.17.

[2] See O. Kahn-Freund "Separation of Property Systems in England" in W. Friedmann (ed.), *Matrimonial Property Law* (1955) 295-98.

[3] Thus in *Ward* v. *Ward* (1958) V.R. 68, Smith, J., held that the discretionary powers given to the court under s.161 of the Victorian Act enabled the court to make orders inconsistent with strict proprietary rights. This view was disapproved by the Full Court in *Noach* v. *Noach* (1959) V.R. 137; followed by Sholl, J. in *Clark* v. *Clark* (1961) V.R. 181.

[4] *Wirth* v. *Wirth* (1956) 98 C.L.R. 228; *Martin* v. *Martin* (1959-60) 33 *A.L.J.R.* 362; *Bartke* v. *Bartke* (1961) 78 W.N. 1039. See also cases cited *supra* n. 3.

[5] *Wirth* v. *Wirth (supra)* at 231, *per* Dixon, J.