Consequences of Illegality of Contracts in Contravention of Statutes (concluding part; commenced in previous issue)

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3. Illegality of Contracts in the Course of Performance[159]

The problem of illegality in a contract usually arises in connection with its formation, but it may also arise in connection with its performance.[160] The test for determining illegality in a contract in the course of its performance is not different from that adopted when the terms of the contract contravene a statute. In the words of Devlin J: "[T]he test is just the same: is the contract, as made or as performed, a contract that is prohibited by the statute."[161] A contract capable of being performed perfectly legally may become unenforceable if the mode of performance adopted by the plaintiff violates the provisions of a statute.[162]

Some earlier cases might have given misimpression regarding the proper scope of the question of illegality of a contract in the course of its performance. A legal contract does not become illegal simply because some illegality happened during the course of its performance.[163] In *St. John Shipping Corpn.* v. *Joseph Rank Ltd.*,[164] Devlin J. said: "On a superficial reading of *Anderson Ltd.* v. *Daniel*,[165] and the cases that followed and preceded it, judges may appear to be saying that it does not matter that the contract is itself legal, if something illegal is done under it. But that is an unconsidered interpretation of the cases. When fully considered, it is plain that they do not proceed upon the basis that in the course of performing a legal contract an illegality was committed; but on the narrower basis that the way in which the contract was performed turned it into the sort of contract that was prohibited by the statute".

Contracts which depend for their performance upon the use of

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159. See R.A. Buckley, "Participation and Performance in Illegal Contracts", (1974) 25 *N.I.L.Q.* 421; C.J. Hamson, (1973) *C.L.J.* 199.
160. See *Anderson Ltd.* v. *Daniel* [1924] 1 K.B. 138, at 149 (C.A.), per Atkin L.J.
161. See *St. John Shipping Corpn.* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267, at 284; *Yango Pastoral Company Pty. Ltd.* v. *First Chicago Australia Ltd.* 139 C.L.R. 410, at 417, (H.C. of A.), per Gibbs A.C.J.
162. See *Anderson Ltd.* v. *Daniel* [1924] 1 K.B. 138, at 149 (C.A.), per Atkin L.J. In *B. and B. Viennese Fashions* v. *Losane* [1952] 1 All E.R. 909, at 913 (C.A.), Jenkins L.J. said: "Illegality in the performance of a contract may avoid it although the contract was not illegal *ab initio*." This statement was quoted by Lord Denning M.R. in *Ashmore, Benson, Pease & Co. Ltd.* v. *Dawson Ltd.* [1973] 1 W.L.R. 828, at 833 (C.A.).
163. See *Lees* v. *Fleming* [1980] Qd.R. 162, per Connolly J.
164. [1957] 1 Q.B. 267, at 284, quoted by Harman L.J. in *Shaw* v. *Groom* [1970] 2 Q.B. 504, at 518 (C.A.).
165. [1924] 1 K.B. 138 (C.A.).

an instrument which has been treated in a forbidden way should not automatically be held illegal.[166] In *Wetherell* v. *Jones*,[167] Tenterden C.J. carefully distinguished between an infringement of the law in the performance of the contract and a case where "the consideration and the matter to be performed" were illegal. There is a distinction between a contract which has as its objects the doing of the very act forbidden by the statute, and a contract whose performance involves an illegality only incidentally.[168]

A. Contracts for the Sale of Goods

Statutes have been passed prescribing a particular mode of performance on the part of the seller in order to protect the buyer against the fraud of the seller. If the seller does not observe the mode of performance, the contract will be rendered illegal. Bankes L.J. said: "[W]here a person fails to perform the contract in the only way in which the statute says it may be performed, he is in exactly the same position as if the contract had been illegal and void *ab initio*".[169] Thus in *Little* v. *Poole*[170], a statute[171] provided that a vendor of coal should at the time of delivery also deliver a signed certificate as to the quality of the coal, and the vendor, who had neglected to deliver the certificate, was held disentitled to recover the price. The Court was of the opinion that the provision of the statute requiring the signature of the meter was introduced in order to protect the buyer against the fraud of the seller. Bayley J. said: "The object of the Legislature will be best effected, therefore, by holding that the seller should not recover the value of his coals where he does not cause to be delivered to the purchaser a ticket signed by the meter, pursuant to the provisions of the Act of Parliament."[172]

"*Anderson Ltd.* v. *Daniel*[173] is probably the best known"[174] case illustrating the situation where a person performs a legal contract in an illegal manner. In this case, the plaintiff sold and delivered a quantity of artificial fertilisers to the defendant purchaser without

166. See *St. John Shipping Corpn.* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267, at 289, per Devlin J.
167. (1832) 110 E.R. 82.
168. See *St. John Shipping Corpn.* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267, at 291, per Devlin J. In *Archbolds (Freightage) Ltd.* v. *Spanglett Ltd.* [1961] 1 Q.B. 374, at 385, (C.A.), Pearce L.J. said: "In *St. John Shipping Corpn.* v. *Rank* Devlin J. held that the plaintiffs were entitled to recover although there had been an infringement of a statute in the performance of a contract, but in that case the contract was legal when made."
169. See *Anderson Ltd.* v. *Daniel* [1924] 1 K.B. 138, at 145 (C.A.).
170. (1829) 109 E.R. 71.
171. 47 G.3, c.68 (U.K.).
172. (1829) 109 E.R. 71, at 76, quoted by Bankes L.J. in *Anderson Ltd.* v. *Daniel* [1924] 1 K.B. 138, at 145 (C.A.).
173. [1924] 1 K.B. 138 (C.A.) discussed, *ante*, under "Consequences of Illegality on Contracts Impliedly Prohibited by Statute". For judicial discussions of the case, see *B. and B. Viennese Fashions* v. *Losane* [1952] 1 All E.R. 909 (C.A.); *Marles* v. *Philip Trant & Sons* [1954] 1 Q.B. 29 (C.A.); *Shaw* v. *Groom* [1970] 2 Q.B. 504 (C.A.); *St. John Shipping Corpn.* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267.
174. See *St. John Shipping Corpn.* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267, at 282, per Devlin J.

supplying him with an invoice as required by a statute. In an action to recover the price of the goods sold, the Court of Appeal did not feel it necessary to consider whether the contract was illegal *ab initio*, but clearly was of the opinion that the vendors committed an illegality in the performance[175] of their contract. The Court of Appeal held that "the giving of the invoice [was] part of the contract";[176] and "it [w]as enough to show that the vendors [had] failed to perform it in the only way in which the statute allow[ed] it to be performed."[177] In this case, the supply of the invoice not only fulfilled the mode of performance required by the statute but also formed the warranty of the contract. Commenting on this case, Sachs L.J. said: "[T]he relevant sections expressly enact not only that the vendor must provide specified information to the buyer, but that a vital warranty must thus be embodied in the contract of sale".[178] The Court of Appeal disagreed with the views of the trial judge that the vendors had a reasonable excuse for not providing the statutory invoice which would have rendered the sale commercially unprofitable. Bankes L.J. said: "Prohibitive expense or the physical impossibility of analysis of the fertiliser sold is no excuse for the absence of an invoice."[179]

Anderson Ltd. v. *Daniel*[180] was applied in *B. and B. Viennese Fashions* v. *Losane*[181], where the plaintiff entered into a contract with the defendant to supply a number of non-utility jackets and actually supplied utility jackets without furnishing an invoice as required by an Order.[182] He brought an action against the defendant to recover the price of the goods supplied. As the plaintiff failed to discharge a positive obligation under the Order, Jenkins L.J. said: "notwithstanding that the contract provided for the sale of non-utility goods, the delivery of what were in fact utility goods without an invoice did so taint the contract in its performance with illegality as to disentitle the plaintiff from recovering the price of the goods"[183].

An illustration of the distinction between an illegality which destroys the cause of action and an illegality which affects only the damages recoverable can be seen in *Marles* v. *Philip Trant & Sons Ltd.*,[184] where the defendant seed merchants bought from a farmer, the third party, seeds under the description of spring wheat known as Fylgia. The defendants sold part of the seeds to the plaintiff, a farmer, under the same description, but omitted to deliver to him a statement of particulars as required by a statute.[185] The seed was in

175. See *Shaw* v. *Groom* [1970] 2 Q.B. 504, at 520 (C.A.), per Sachs L.J.
176. See [1924] 1 K.B. 138, at 148 (C.A.), per Scrutton L.J.
177. Ibid., at 144, per Banks L.J. "[The vendors] can be met with the defence that the way in which they performed the contract was illegal" (at 147), per Scrutton L.J.
178. See *Shaw* v. *Groom* [1970] 2 Q.B. 504, at 522 (C.A.).
179. [1924] 1 K.B. 138, at 146 (C.A.)
180. Ibid.
181. [1952] 1 All E.R. 909 (C.A.).
182. Utility Mark and Apparel and Textiles (General Provisions) Order, 1947, made under the Defence (General) Regulations, 1939 (U.K.)
183. Op. cit., at 914.
184. [1954] 1 Q.B. 29 (C.A.).
185. Seeds Act 1920 (U.K.).

fact not Fylgia but Vilmorin, a seed suitable only for winter sowing, and in consequence the plaintiff suffered damage to his crops, in respect of which he was held to be entitled to recover damages against the defendants. The defendants brought in the third party, claiming an indemnity for the loss of what they had had to pay to the plaintiff farmer. The third party took the point that the non-compliance with the statute by the defendants rendered their contract with the plaintiff illegal, disentitling the defendants to recover their loss from them.

The Court distinguished *Anderson*[186] and *Viennese Fashions*[187] and allowed the defendants to recover their damages from the third party supplier. The contract between the seed merchants and the plaintiff farmer was not unlawful when it was made. Nor was the contract rendered unlawful simply because the seed was delivered without the prescribed particulars inadvertently. If it had been unlawful, the plaintiff farmer himself could not have sued upon it as he had done. It was not the contract itself which was unlawful, only the performance of it. The seed merchants performed it in an illegal way in that they omitted to furnish the prescribed particulars. That rendered the contract unenforceable by them, but it did not render the contract illegal.

In Australia, *Anderson* was applied in *Olsen* v. *Mikkelsen,*[188] where the plaintiff produce merchant, bought a quantity of grass seed from the defendant farmer, who, in contravention of a statute,[189] failed to furnish him with an invoice. The seed, having been resold to J., failed to pass the statutory germination test, whereupon J. sued the plaintiff and recovered damages. The Full Court of the Supreme Court of Queensland refused the plaintiff to recover damages from the defendant on the ground that the contract of sale was illegal and void by reason of the defendant's failure to deliver the invoice. It is submitted that this case is likely to be decided differently in light of the Court of Appeal's later decision in *Marles* v. *Philip Trant & Sons Ltd.*[190] In the present case, the plaintiff was totally innocent, yet failed to recover damages which he had to pay to the purchaser under the contract of resale, whereas in *Marles*, the defendant sellers inadvertently contravened the statute, but were allowed to recoup their loss.

B. Contracts for the Carriage of Goods

In *Ashmore, Benson Ltd.* v. *Dawson Ltd.,*[191] the plaintiffs engineering manufacturers, employed the defendants haulier company, to carry two 25-ton tube banks to a port of shipment abroad at £55 a trip. The plaintiffs knew that the only vehicle suitable to carry such loads were "low loaders", whereas the

186. [1924] 1 K.B. 138 (C.A.).
187. [1952] 1 All E.R. 909 (C.A.).
188. (1937) Q.S.R. 275.
189. The Pure Seeds Act 1913 (Qld.), s.5.
190. [1954] 1 Q.B. 29.
191. [1973] 1 W.L.R. 828 (C.A.).

defendants' articulated lorries were unsuitable for the purpose. If they employed hauliers using "low loaders", each trip would have cost £85. At the time of loading, the plaintiffs' manager saw that the two articulated lorries exceeded the maximum weight laden by 5 tons, thus infringing the Motor Vehicles (Construction and Use) Regulations 1966 (U.K.). On the road one of the lorries toppled over and the load was damaged. The plaintiffs brought an action against the defendants to recover the damage of £2,225 on the ground of negligence. The defendants pleaded illegality. The majority of the Court of Appeal did not disturb the finding of the trial judge that the contract was legal in its inception. But in dismissing the action of the plaintiffs, the Court was clearly of the opinion that they not only knew of the illegality but also participated[192] in the illegal performance of the contract.

Summary

A contract may be perfectly legal when formed but may turn into an illegal contract in the course of its performance. A legal contract does not automatically become illegal simply because some violation of a statute has been committed during the course of its performance. However, a legal contract is rendered illegal if it is not performed in the only way it can be carried out. A person who is responsible for contravening a statute in the course of performing a contract disentitles himself from enforcing it. But this does not mean that he loses his right of indemnity from a third party who was in breach of contract with him.

4. Contracts Not Rendered Illegal Where The Object of the Statute is not Prohibition[193]

It is not in every case that a contract forbidden by a statute is illegal and void.[194] The statute may expressly indicate that it is not intended that the illegality shall avoid the transaction, but only that the wrongdoer shall incur some punishment.[195] The question which has caused serious anxiety in the minds of judges is whether the person in breach of the provisions of the statute also loses his civil rights under the contract into which he has entered. These days, countless offences have been created each with its appropriate penalty, and it

192. Cf. *Fielding and Platt* v. *Najjar* [1969] 1 W.L.R. 357 where the Court of Appeal dealing with illegality of contract under foreign law, held that the plaintiff company neither had knowledge of illegality nor actively participated in it.
193. See Shand, "Unblinking the Unruly Horse: Public Policy in the Law of Contract", [1972A] *C.L.J.* 144, at 148–150.
194. *Ashe* v. *Wypow* (1961) Qd.R. 225, at 229, per Mack J.
195. See *O'Neill* v. *O'Connell* (1945) 72 C.L.R. 101, at 132 (H.C. of A.), where Williams J. said: "The only circumstance in which a contract, though expressly prohibited is nonetheless valid is where the language of the statute discloses an intention to preserve its validity." *First Chicago Australia Ltd.* v. *Yango Pastoral Co. Pty. Ltd. (No.3)* [1977] 2 N.S.W.L.R. 583, at 587 (C.A.), per Glass J.A.; *Batu Pahat Bank Ltd.* v. *Official Assignee of Tan Keng Tin* [1933] A.C. 691, at 697–698 (P.C.).

is for the courts to see that this does not result in additional forfeitures and injustices which the legislature cannot have intended.[196] It may well be that a party to a contract has violated the requirements of a statute quite unwillingly and unwittingly. To nullify a bargain in such circumstances may mean that he forfeits a sum vastly in excess of any penalty that a criminal court would impose; in addition, the sum forfeited will not go into the public purse but into the pockets of someone who is lucky enough to pick up the windfall or astute enough to have contrived to get it.[197] In *St. John Shipping Corp.* v. *Joseph Rank Ltd.*,[198] Devlin J. said: "The way to test the question whether a particular class of contract is prohibited by the statute is to test it in relation to a contract made in ignorance of its effect." Where a statute imposes a penalty upon a person entering into a contract, the precise terms of the statute must be examined very carefully. In *Re Mahmoud and Ispahani*[199], Lord Atkin said: "One may find that the statute imposes a penalty upon an individual, and yet does not prohibit the contract if it is made with a party who is innocent of the offence which is created by the statute."

If the court too readily implies that a contract is forbidden by statute, it takes it out of its own power to discriminate between guilt and innocence. But if the court makes no such implication, it still leaves itself with the general power, based on public policy, to hold those contracts unenforceable which are *ex facie* unlawful, and also to refuse its aid to guilty parties in respect of contracts which to the knowledge of both can only be performed by a contravention of the statute.[200] A court should not hold that any contract or class of contracts is prohibited by statute unless there is a clear implication or "necessary inference".[201] The courts should be slow to imply the statutory prohibition of contracts, and should do so only when the implication is quite clear.[202] It may be questionable also whether public policy is well served by driving from the seat of judgment everyone who has been guilty of a minor transgression.[203]

196. See *Shaw* v. *Groom* [1970] 2 Q.B. 504, at 523–524 (C.A.), per Sachs L.J.
197. See *St. John Shipping Corpn.* v. *Joseph Rank Ltd.* [1957] Q.B. 267, at 288, per Devlin J.; *Cafferky* v. *Nepean Co-op. Dairy & Refrigerating Society Ltd.* 1960 S.R. (N.S.W.) 57, at 64, per Herron J.
198. Ibid., at 288.
199. [1921] 2 K.B. 716, at 731, (C.A.), per Atkin L.J. Also see *Yango Pastoral Company Pty. Ltd.* v. *First Chicago Australia Ltd.* (1978) 139 C.L.R. 410, at 426, (H.C. of A.), per Mason J.; *Dalgety & N.Z. Loan Ltd.* v. *Imeson Pty. Ltd.* [1963] S.R. (N.S.W.) 998, at 1002 (F.C.). In *Bassin* v. *Standen* (1946) 46 S.R. (N.S.W.), 16, at 18 (F.C.), Jordan C.J. said: "But the language of the statute may be such as to indicate an intention that, if a contract be made in breach of the prohibition, it is not to be void although a penalty is incurred: *Smith* v. *Mawhood* (1845) 153 E.R. 552".
200. See *Archbolds (Freightage) Ltd.* v. *S. Spanglett Ltd.* [1961] 1 Q.B. 374, at 387 (C.A.), per Pearce L.J.
201. See *St. John Shipping Corpn.* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267, at 288, per Devlin J.
202. Ibid., at 289, per Devlin J. See *Chappel Pty. Ltd.* v. *Pett Pty. Ltd.* (1971) 1 S.A.S.R. 188, at 197, (F.C.), per Sangster J.; *Cunningham* v. *Cannon* [1983] V.R. 641, at 646, per King J.
203. Ibid., at 288, per Devlin J.

In *St. John Shipping Corp.* v. *Joseph Rank Ltd.*,[204] Devlin J. in rejecting the contention of the defendant cargo-owner that the contract was impliedly prohibited by the statute, relied on the words of Lord Wright in *Vita Food Products Inc.* v. *Unus Shipping Co.*[205] that "the true construction of the statute, having regard to its scope and its purpose and to the inconvenience which would follow from any other conclusion". In order to find an implied prohibition of a contract by statute, the court should be careful not to overemphasize the importance of the protection of the public criterion. Harman, L.J. in *Shaw* v. *Groom*,[206] said: "Bankes L.J. declared in *Anderson Ltd.* v. *Daniel*[207] that the test is whether the statute is for the protection of the public. That that is one test, of course, we would all agree, but I do not think that it can be the only test. The true test is whether the statute impliedly forbids the provision of the contract to be sued upon." The statute is to be construed in the ordinary way; one must have regard to all relevant considerations and no single consideration, however important, is conclusive.[208]

A. Contracts for the Sale of Goods

In both *Johnson* v. *Hudson*[209] and *Smith* v. *Mawhood*,[210] the seller brought an action against the purchaser to recover the price of a quantity of tobacco sold to him. The purchaser pleaded illegality on the ground that the seller did not have a licence to sell tobacco as required by the relevant statute. In the former case, the court held that the contract of sale was not illegal but at the most was the breach of a mere revenue regulation, which was protected by a specific penalty. In the latter case, the court was of the opinion that the plaintiffs were not dealers in tobacco requiring them to have a licence. Allowing the plaintiffs to recover upon their contract, Parke B. said: "I think the object of the legislature was not to prohibit a contract of sale by dealers who have not taken out a licence pursuant to the Act of Parliament . . . its object was not to vitiate the contract itself, but only to impose a penalty on the party offending, for the purpose of the revenue".[211]

In *Brown* v. *Duncan*,[212] the five plaintiffs carried on business as distillers. One of the plantiffs was not named in the licence as he should have been according to the relevant statute, and he also contravened another statute by carrying on the business of a retailer of spirits within a prohibited distance. The courts allowed the

204. Ibid., at 290.
205. [1939] A.C. 277, at 295 (P.C.).
206. [1970] 2 Q.B. 504, at 518 (C.A.); Also see *Yango Pastoral Co. Pty. Ltd.* v. *First Chicago Australia Ltd.* (1978) 139 C.L.R. 410, at 414 (H.C. of A.), per Gibbs A.C.J.; Treitel, n.1, *ante*, p. 325.
207. [1924] 1 K.B. 138 (C.A.).
208. See *St. John Shipping Corpn.* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267, at 287, per Devlin J.
209. (1809) 103 E.R. 973.
210. (1845) 153 E.R. 552; see *Shaw* v. *Groom* [1970] 2 Q.B. 504, at 520 (C.A.).
211. See (1845) 153 E.R. 552, at 557.
212. (1829) 109 E.R. 385.

plaintiffs to recover the price of the whisky sold, from the defendant who had guaranteed the contract. The court was of the opinion that non-compliance with the excise regulations on the part of the plaintiffs did not amount to the committing of any fraud on the revenue authorities. The plaintiff in *Wetherell* v. *Jones,*[213] sued for the price of spirits sold and delivered. A statute provided that no spirits should be sent out of stock without a permit. The court held that the permit obtained by the plaintiff was irregular due to his own fault and that he was therefore guilty of a violation of the law, but that the statute did not prohibit the contract. Tenterden C.J. said: "[W]here the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law, not contemplated by the contract, in the performance of something to be done on his part."[214]

The appellant in *Bassin* v. *Standen,*[215] sold a motor car in excess of the maximum fixed price. Jordan C.J. was of the opinion that the breach of the Regulation[216] should not avoid the sale, but should merely subject the vendor to a penalty and to the risk of being ordered to refund to the purchaser the unlawful excess price.[217] In the well-known case of *Dalgety & N.Z. Loan Ltd.* v. *Imeson Pty. Ltd.,*[218] a butcher bought six head of cattle from an auctioneer. At the time of slaughtering, it was discovered that one of them had suffered from bovine tuberculosis and had therefore been a "diseased animal" under the Cattle Slaughtering and Diseased Animals and Meat Act 1902 (N.S.W.). The butcher withheld the payment of the price of the lowest-priced of the six animals purchased, claiming that the contract was illegal by the statute. Finding that neither party knew nor had the means of knowing at the time of sale that the animal was diseased, the Full Court of the Supreme Court of New South Wales was of the opinion that although the statute was "designed for the protection of the public",[219] the contract was made "the subject of a discretionary penalty only and not impliedly prohibited".[220]

B. Commercial Transactions

In *Yango Pastoral Co. Pty. Ltd.* v. *First Chicago Australia Ltd.*[221] the respondent lent to the appellant the sum of $132,600 secured by

213. (1832) 110 E.R. 82.
214. Ibid., at 84.
215. (1946) 46 S.R. (N.S.W.) 16 (F.C.).
216. National Security (Prices) Regulations 1944, Reg. 29.
217. Op.cit., at 19. Cf. *Bradshaw* v. *Gilberts (Australasian) Agency (Vic) Pty. Ltd.*, (1952) 86 C.L.R. 209 (H.C. of A.) (discussed, *ante*, under "Consequences of Illegality on Contracts Expressly Prohibited by Statute", where the contract of sale of goods in excess of the maximum price expressly prohibited by the Prices Regulation Act 1948 (Vict.), was held to be void.
218. [1963] S.R. (N.S.W.) 998 (F.C.).
219. Ibid., at 1003.
220. Ibid., at 1004.
221. (1978) 139 C.L.R. 410 (H.C. of A.).

a mortgage over property belonging to the latter. On default in repayment by the appellant, the respondent brought an action to recover the loan. The appellant pleaded that the loan was illegal and void for contravention of the Banking Act 1959 (Cth.). The respondent was successful in enforcing the mortgage against the appellant in the trial court, the Court of Appeal of the Supreme Court of New South Wales and the High Court of Australia. The High Court held that the contract was "not rendered void, either expressly or impliedly, by the Act".[222] The intention of the legislature was not to vitiate such contracts but only to impose a heavy penalty upon the offender.[223] The contract was found to be collateral[224] to the breach of the statute. A contrary decision would have penalized the innocent depositors who kept their money in the respondent bank in good faith. Mason J. said: "In this case it is not for the court to hold that further consequences should flow, consequences in financial terms could well far exceed the prescribed penalty and could even conceivably lead the plaintiff to insolvency with resultant loss to innocent leaders or investors."[225] Mocatta J. in *Credit Lyonnais* v. *Barnard*[226] was concerned with the consequences of prohibition of export of bills in foreign currency. Rejecting the defence of illegality his Lordship said:

> Looking at the policy of the Exchange Control Act, 1947, which was plainly to protect the currency and not parties to bills of exchange . . . I can find no justification for reaching the conclusion that by implication the result of the prohibited export of the accepted bills pending maturity renders subsequent enforcement of those bills upon dishonour in this country illegal.[227]

C. Contracts for the Sale of Land

The breach of a statute and the covenants for title to a land may be wholly unconnected so that there may be no justification for a purchaser's failure to comply with the vendor's notice to complete. In *Curragh Investments Ltd.* v. *Cook*,[228] Megarry J. held that even assuming that the vendor was in breach of the Companies Act 1948 (U.K.), this did not provide the purchaser with any ground for contending that the covenants for title that the vendor must give would be impaired by illegality. By construing the word 'void' in a statute as 'voidable', the Supreme Court of Victoria saved a contract from invalidity for contravention of a statute. In *Amatruda* v. *Roberts*,[229] the State Savings Bank Act (Vict). 1928[230] provided that

222. Ibid., at 430, per Mason J. and also at 435, per Murphy J.
223. Ibid., at 427, per Mason J., and also at 415, per Gibbs A.C.J.
224. Ibid., at 418, per Gibbs A.C.J. In *St. John Shipping Corpn.* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267, at 287, Devlin J. said: "collateral contracts of this sort are not within the ambit of the statute." See *Archbolds (Freightage) Ld.* v. *S. Spanglett Ltd.* [1961] 1 Q.B. 374, at 385, (C.A.), per Pearce L.J. agreeing with the views of Devlin J.
225. Ibid., at 429.
226. [1976] 1 Lloyd's Rep. 557.
227. Ibid., at 562.
228. [1974] 1 W.L.R. 1559.
229. [1938] V.L.R. 154.
230. State Savings Bank Act (Vict.) 1928, s.78.

the sale of land subject to a mortgage to the Commissioners of the State Savings Bank of Victoria without the prior written consent of the Commissioners would be void. Finding that the vendor had obtained the consent of the Commissioners after entering into the contract but before the time for completion, the Court did not allow the purchaser to rescind the contract.

A statute may expressly preserve the validity of a contract notwithstanding contravening its provisions. In *Benbow* v. *Leonard,*[231] the defendant landlord entered into an agreement with the plaintiff to sell a tenanted premises without offering the premises first to the tenant, thus contravening the provisions of the Landlord and Tenant (Amendment) Act 1948 (N.S.W.). The Supreme Court of New South Wales granted specific performance of the contract to the purchaser, holding that the statute expressly preserved the validity of the contract in spite of non-compliance with its provisions.[232] In *O'Neill* v. *O'Connell,*[233] the High Court of Australia was concerned with the question of illegality of the exercise of an option conferred by will to purchase land of a testor. Interpreting the National Security (Economic Organization) Regulations, Williams J. said: "Regulation 10 . . . provides expressly that where a transaction is entered into in contravention of the Regulations the transaction shall not thereby be invalidated".[234]

D. Tenancy Agreements

In *Shaw* v. *Groom,*[235] the plaintiff landlord brought an action to recover arrears of rent against the defendant, a weekly tennant. The defendant contended that no rent was recoverable by the landlord because of her failure to provide a proper rent book containing all the statutory[236] information, which failure made the landlord guilty of an offence. The Court of Appeal allowed the landlord to recover the rent, holding that the contract was not impliedly prohibited by the statute.[237] Sachs L.J. said: "[E]ven if the provision of a rent book is an essential act between landlords and weekly tenants, yet the legislature did not . . . intend to preclude the landlord from recovering any rent due or impose any forfeiture on him beyond the prescribed penalty."[238] His Lordship further stated that "if it had been intended that the landlord should on committing the offence forfeit sums that can be far greater than the maximum penalty, the Act of 1962 would have so stated."[239] Moreover, Harman L.J. was

231. [1975] 1 N.S.W.L.R. 122.
232. Ibid., at 129 where Needham J. said: "[T]he statute here expressly says, in effect, 'we prohibit the act, but permit a contract to do it'." See *Chappel Pty. Ltd.* v. *Pett Pty. Ltd.* (1971) 1 S.A.S.R. 188 (F.C.), discussed *post.*
233. (1946) 72 C.L.R. 101.
234. Ibid., at 132.
235. [1970] 2 Q.B. 504 (C.A.).
236. See Landlord and Tenant Act 1962 (U.K.), s.4; Rent Book (Forms of Notice) Regulations 1965.
237. [1970] 2 Q.B. 504, at 516 (C.A.), per Harman L.J.
238. Ibid., at 526.
239. Ibid., at 525.

of the opinion that the manner in which the contract has been performed did not turn it into a contract prohibited by the statute.[240]

E. Contracts for the Carriage of Goods

In the celebrated case of *St. John Shipping Corpn.* v. *Joseph Rank Ltd.*,[241] the plaintiff shipowners carried grain from a United States port to a port in the United Kingdom. The ship put in at a port in Florida and took on bunkers, overloading the ship and causing the loadline to be submerged. The loadline was still submerged when the ship arrived at its destination and the master was convicted under a statute.[242] The defendants, holders of a bill of lading in respect of the part of the cargo, paid most of the freight due, but they withheld a sum equivalent to the freight on overall additional cargo carried by the ship by which it was found to be overloaded. They contended, when sued for the balance of the freight, that the shipowners were not entitled to recover any part of it as they had performed the charter in an illegal manner. Allowing the plaintiffs to recover freight, Devlin J. held that the contracts for the carriage of goods were not within the ambit of the statute at all,[243] stating that "an implied prohibition of contracts of loading does not necessarily extend to contracts for the carriage of goods by improperly loaded vessels".[244] His Lordship was of the opinion that a contract for carriage of goods was not to be considered void merely because the ship in which they were carried did not comply with the law.[245] In this case, the court was very much concerned with the inconveniences[246] to commercial men which would follow if the contract was held to be impliedly prohibited. The wellknown Privy Council decision, *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.*,[247] was concerned with the question of illegality of a bill of lading issued by the defendant shipowner, without complying with the provision of a statute.[248] The Privy Council held that the provision of the statute was directory and not obligatory and that failure to comply with its terms did not nullify the contract contained in the bill of lading.[249]

What happens when a carrier carries goods in unlicensed vehicles and goods are lost or damaged in the course of transit due to his negligence? In *Archbolds (Freightage) Ltd.* v. *S. Spanglett Ltd.*,[250] the plaintiffs employed the defendants for reward to carry, and they

240. Ibid., at 519.
241. [1957] 1 Q.B. 267.
242. Merchant Shipping (Safety and Loadline Conventions) Act 1932 (U.K.), ss.47, 52.
243. [1957] 1 Q.B. 267, at 288.
244. Ibid., at 287.
245. Ibid., at 290.
246. Ibid., at 289; Also see *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.* [1939] A.C. 277, at 295 (P.C.), per Lord Wright.
247. [1939] A.C. 277 (P.C.).
248. Newfoundland Carriage of Goods by Sea Act 1932, s.3.
249. Op. cit., at 295.
250. [1961] 1 Q.B. 374 (C.A.).

carried, a third party's goods by road. The motor vehicle in which the goods were carried had a "C" licence, not an "A" licence as required by the Road and Rail Traffic Act 1933 (U.K.). The defendants knew this fact, but the plaintiffs neither knew it nor should have known it. As a result of the defendants' negligence the goods were stolen in the course of transit. On a claim by the plaintiffs for damages for the loss of their goods, the defendants pleaded the illegality of the contract. Assuming that the contract was for carriage in the particular vehicle which in fact the defendants used, the Court of Appeal was of the opinion that the contract was neither expressly nor impliedly forbidden by the statute. The object of the statute was to regulate the means by which carriers should carry goods, providing penalties for the offender. The statute did not prohibit the making of a contract for the carriage of goods in unlicensed vehicles. In this case there was no contract for the "use" of the vehicle. To load a vehicle was not to "use" it on the road, which was what was forbidden. The plaintiffs of course could have been convicted of aiding and abetting if they had known of the defendants' purpose. Devlin L.J. said:

> I think that the purpose of this statute is sufficiently served by the penalties prescribed for the offender; the avoidance of the contract would cause grave inconvenience[251] and injury to innocent members of the public without furthering the object of the statute. Moreover, the value of the relief given to the wrongdoer if he could escape what would otherwise have been his legal obligation might, as it would in this case, greatly outweigh the punishment that could be imposed upon him, and thus undo the penal effect of the statute.[252]

If a road carrier carries goods without a permit in deliberate defiance of a statute and goods are lost in the course of transit, does he lose his rights of indemnity under a policy of insurance covering his liability to the owners of goods? In *Fire & All Risks Insurance Co. Ltd.* v. *Powell,*[253] the respondent, a road carrier violated the Motor Car Act 1958 (Vict.), while carrying goods in the course of his business. The Full Court of the Supreme Court of Victoria allowed him to claim an indemnity of liability under his policy of insurance issued by the appellant insurance company. The Court held that the public policy did not require to refuse the enforcement of the rights under the policy. The crime was a breach of a mere regulatory provision. The Court said: "[A] fine not exceedng £100 is not an insubstantial penalty, and it is not, we think, necessary for the protection of the public that a further penalty should be provided."[254]

251. See *St. John Shipping Corpn.* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267, at 289, per Devlin J.; *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.* [1939] A.C. 277, at 295, (P.C.), per Lord Wright; *Yango Pastoral Co. Pty. Ltd.* v. *First Chicago Australia Ltd.* (1978) 139 C.L.R. 410, at 415, (H.C. of A.), per Gibbs A.C.J.
252. [1961] 1 Q.B. 374, at 390. (C.A.). Cf. *St John Shipping Corpn.* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267, where the master of the plaintiffs' ship was fined £1,200 but the extra freight earned amounted to £2,295.
253. (1966) V.R. 513 (F.C.). Noted, (1967) 40 A.L.J. 316.
254. Ibid., at 524, per O'Bryan, Pape J.J.

F. Building Contract

In *Hayes* v. *Cable,*[255] the plaintiff builder built a swimming pool for the defendant without prior approval of the Municipal Council, thus contravening the Local Government Act 1919 (N.S.W.). Construing the relevant section of the statute, the Full Court of the Supreme Court of New South Wales allowed the plaintiff to recover the payment due to him, holding that "the intention of the legislature [was] not to vitiate such contracts for building work."[256] "[T]he problem of the rights of an unlicensed builder to sue the person for whom he has done building work", "has been hanging around for years".[257] Helsham C.J. in Eq. made an attempt to find a solution to this problem in the recent case of *Trimtor Building Consultants Pty. Ltd.* v. *Hilton.*[258] In this case his Honour allowed the builder to recover upon a quantum meruit[259] claim for work done and materials provided. Construing the Builders Licensing Act 1971 (N.S.W.), his Honour said: "The law places a prohibition on activities of an unlicensed builder, including the carrying out of building work and subjects contravention to penalty. But that section does not touch a contract, and s 131 makes this clear. Therefore no question of illegality arises."[260]

G. Remuneration for Services Rendered

In *Chappel Pty. Ltd.* v. *Pett Pty. Ltd.,*[261] the appellant company which carried on business as an architect, but was not registered as an architect under the Architects Act 1939 (S.A.), entered into a contract with the respondent for designing and superintending the erection of a dwelling house. In an action brought by the appellant to recover a sum for professional services rendered, the respondent contended that the contract was illegal for contravening the statute. Allowing the appellant to recover the fees, the Full Court of the Supreme Court of South Australia was of the opinion that the legislative intent was not to prohibit the contract but to preserve expressly the right to recover fees.[262] In *Ashe* v. *Wypow,*[263] the Full Court of the Supreme Court of Queensland held that the Ordinance in question of the Brisbane City Council was introduced not in the public interest but for internal efficiency and a breach of it by an

255. [1962] S.R. (N.S.W.) 1.
256. Ibid., at 9.
257. See *Trimtor Building Consultants Pty. Ltd.* v. *Hilton* [1983] 1 N.S.W.L.R. 259, at 260, per Helsham C.J. in Eq.
258. Ibid.
259. In *Craven-Ellis* v. *Canons Ltd.* [1936] 2 K.B. 403, at 414 (C.A.), it was argued that no claim on a quantum meruit can be made where there is a contract which is in fact illegal and not void. Greene L.J. said, "I will assume that this . . . argument is correct even in a case where the party who performs services under the contract is unaware of its illegality."
260. Op. cit., at 261.
261. (1971) 1 S.A.S.R. 188. Also see *Benbow* v. *Leonard* [1975]1 N.S.W.L.R. 122; *O'Neill* v. *O'Connell* (1946) 72 C.L.R. 101 (H.C. of A.).
262. Ibid., at 198, per Sangster J.
263. (1961) Qd. R. 225, noted, (1961) (C.A.) 35 A.L.J. 300.

employee constituted only a breach of discipline. The effect of the penalty was to deter employees from doing remunerative work outside the service of the Council, but it was not intended that a breach should make a contract either illegal or void.[264]

Conclusion

The present world of the late twentieth century is governed by a host of statutes, orders, rules and regulations. It is not surprising that an individual in entering into a contract may quite unwillingly contravene a statute or a rule having the effect of a statute. A contract is expressly prohibited by a statute if the prohibition is clear by construing the language used in the statute. An innocent party to such a contract may have a remedy if he relies upon a collateral contract or upon fraud. While failing to find express prohibition of a contract by the terms of a statute, a court may find implied prohibition by invoking the rule of public policy. A perfectly legal contract may turn into an illegal contract where the mode of its performance violates a statute.

If there are no express words in a statute prohibiting a contract, the question which seriously concerns the minds of judges is whether the party to such a contract who inadvertently violates the statute, loses his civil rights in addition to incurring any penalty. In the absence of clear words in a statute, courts have been slow to declare a contract to be impliedly prohibited by the statute. Courts exert themselves in scrutinizing the objects of a statute closely in order to ascertain the intention of the legislature. Can it be the intention of the legislature to deprive a plaintiff of his contractual rights which are vastly in excess of the amount of penalty prescribed in a statute? Needs of public policy may be questioned when the denial of the pecuniary claim of a plaintiff does not go to the coffers of the State but goes to swell the pockets of persons pressing their unmeritorious claims. It is therefore not surprising that on many an occasion, courts have made valiant efforts to declare that a contract is not impliedly prohibited for minor transgression of a statute.

264. Ibid., at 231, per Mack J. Cf. *Mellis* v. *Shirley Local Board of Health* (1885) 16 Q.B.D. 446 (C.A.), (discussed, *ante*, under), "Consequences of Illegality on Contracts Expressly Prohibited by Statute" where the contract was held to be prohibited by the statute.