only, because the *practice* of courts in England and Australia does not differ. However, the second and third are of considerable practical importance. The effect of illegality of motive upon the presumption of resulting trusts has not been considered by the highest English domestic tribunals, and it may be added here, with great respect, that the position adopted by Australian courts does not truly accord with fundamental equitable principles.

As to the third question, the matter is much confused, but one is inclined, at least until the legislatures speak with greater clarity, to reject 'palm tree justice' and to hope that the title and proprietary rights of married persons continue to rest upon the law and not upon judicial discretion.

D. GRAHAM

KIRIRI COTTON CO. LTD v. RANCHHODDAS KESHAVJI DEWANI; SAJAN SINGH v. SARDARA ALI[1]

Contract—Statutory illegality—Payment under contract—Whether recoverable—Basis of recovery

Contract—Illegal purpose—Payment under contract—Whether goods passed into ownership of buyer—Basis of right of ownership

The basic classification of illegal contracts is between contracts declared illegal by statute, contracts, the making of which is legal, but which have an illegal purpose, and contracts declared illegal at common law because they offend against public policy.

It is a general principle of law that where a contract is *per se* illegal because of statute or public policy, it is void and of no effect and no rights or duties can accrue under it. Nor can any property in goods pass under it.[2] However, where the making of a contract is legal but where there is an illegal purpose involved, the knowledge of the parties becomes relevant.[3] The contract is voidable and is not avoided until the innocent party becomes aware of the illegality, so that rights under it may accrue to the innocent party although the party with knowledge of the illegality remains remediless.

Even though both parties may be aware of the illegality, it is possible for a party to recover the property in goods under an illegal contract where:

(a) He can claim the property in the goods by virtue of some title which is independent of the illegal contract, so that no reliance is placed on the illegal contract.[4]

[1] [1960] 2 W.L.R. 127; [1960] 2 W.L.R. 180.

[2] *Re Mahmoud and Ispahani* [1921] 2 K.B. 716, 728; Cheshire and Fifoot, *The Law of Contract* (4th ed. 1956) 293.

[3] Cheshire and Fifoot, *op. cit.* 289; Anson, *Principles of the English Law of Contract* (21st ed. 1959) 314.

[4] *Bowmakers Ltd v. Barnet Instruments Ltd* [1945] K.B. 65; Cheshire and Fifoot, *op. cit.* 297; Anson, *op. cit.* 323.

(b) The contract is still executory. A party can refuse to sanction the illegal purpose and can withdraw from the contract before it is executed.[5]

(c) The parties are not *in pari delicto* because of some fiduciary relationship or element of fraud or where the contract is declared illegal by statute to protect a certain class of which the party seeking to enforce rights is a member. The less guilty party or party protected can recover property or money under the illegal contract.[6]

An example of this latter exception is *Kiriri Cotton Co. Ltd v. Ranchhoddas Keshavji Dewani.*[7]

K agreed to sub-lease a flat, 'for residence only' to D for seven years and one day at a rent of 300 shillings a month and for the additional consideration of a 10,000 shillings premium. This additional consideration was contrary to a regulation,[8] which provided that a lessor of a dwelling-house who received any sum of money other than rent was to be guilty of an offence to which a penalty was applicable. D entered into possession and then claimed the 10,000 shillings as money received by K for D's use.

The Court of Appeal for East Africa, affirming the decision of the High Court of Uganda, gave judgment for D and on appeal to Her Majesty in Council, the Judicial Committee of the Privy Council affirmed the Court of Appeal's decision and dismissed the appeal.

Lord Denning delivered the advice of the Judicial Committee. He was first concerned to explain one of the disputes between the parties on statutory interpretation. Neither party thought they were doing anything illegal; they considered that a premium could be charged on a lease for a period exceeding seven years. This misconception was due to a proviso to section 3 (2) of the relevant Ordinance,[9] which stated that the charging of a premium on a lease *of premises*[10] for more than seven years was lawful. However, the definition section of the Ordinance defined premises as business premises and not as residential flats. Thus as the flat was let 'for residence only' this proviso was inapplicable. The only point to interest the Committee was that a premium had been charged in contravention of a statute; the question whether the premium was extortionate or not was irrelevant.

As the contract had been executed the lessee could not rely on a *locus poenitentiae* to recover back his premium but had to show that he was not *in pari delicto* with the lessor, and this was his main contention. The lessor denied this and said that as the payment had been made voluntarily under a mistake of law, common to both parties, a law they were both supposed to know, they were *in pari delicto*. Lord Denning showed the fallacy in this argument by restating the principle *ignorantia juris neminem excusat* thus: 'It is not correct to say that everyone is presumed

[5] Cheshire and Fifoot, *op. cit.* 300; *Taylor v. Bowers* (1876) 1 Q.B.D. 291.
[6] Cheshire and Fifoot, *op. cit.* 299; *Browning v. Morris* (1778) 2 Cowper 790, 792.
[7] [1960] 2 W.L.R. 127.
[8] Rent Restriction Ordinance 1949, s. 3 (2) (Uganda).
[9] *Ibid.* [10] Writer's italics.

to know the law. The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter.'[11] Thus, as the Ordinance placed the duty of observing it on the lessor, both parties were not *in pari delicto,* and so the lessor could not rely on the mutual mistake of both parties to prevent recovery by the lessee.

The contention that money paid under a mistake of law is irrecoverable was also rejected by the Committee who reiterated the point made in *Harse v. Pearl Life Assurance Co.*[12] that the principle is that mistake of law alone is insufficient to warrant the recovery of money paid under it. What is required is rather mistake of law together with some factor which makes the parties not *in pari delicto,* something in a defendant's conduct which shows that he is primarily responsible for the mistake. Such a factor is present where the duty of observing the law is placed on the shoulders of one for the protection of another who is in danger of oppression from the former; then the parties are not *in pari delicto* and money paid under the contract is recoverable.[13] Likewise misrepresentation by one party means that the parties are not *in pari delicto,* and so the deceived party can recover money paid.[14] These principles of recovery are applicable to the remedy claimed of money had and received,[15] an action for restitution which is not an action on a contract or on an imputed contract.[16]

Having arrived at the conclusion that the lessee was entitled to his remedy on common law principle, the Judicial Committee then had to deal with the contention that the lessee was denied recovery because there was no provision in the Uganda Ordinance enabling him to recover his premium.[17] The Committee was also faced with the task of distinguishing *Rex v. Godinho*[18] which stood as authority for the proposition that, as there was no statutory right of recovery in the Uganda Ordinance comparable with the English provision,[19] the giver of an illegal premium is a party to an offence committed by another and so cannot come to a civil court with clean hands. In support of this proposition the court had applied a principle stated in *Langton v. Hughes*[20] that 'What is done in contravention of an Act of Parliament cannot be made the subject-matter of an action'. However, the Committee was quick to point out that this

[11] [1960] 2 W.L.R. 127, 132. [12] [1904] 1 K.B. 558.

[13] *Browning v. Morris* (1778) 2 Cowp. 790, 792.

[14] *Harse v. Pearl Life Assurance Co.* [1904] 1 K.B. 558, 564.

[15] In *Moses v. Macferlan* (1760) 2 Burr. 1006, 1012, Lord Mansfield stated: 'This kind of equitable action to recover back money which ought not in justice to be kept . . . lies for money paid by mistake or an undue advantage taken of plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.'

[16] *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32, 62-64.

[17] Compare the English Rent Restriction Act 1920, s. 8 (2). 'A person requiring any payment or the giving of any consideration in contravention of this section [which prohibited the request for and payment of a premium] shall be liable . . . to a fine . . . and the court . . . may order the amount paid . . . to be repaid to the person by whom the same was made or given . . .'.

[18] (1950) 17 E.A.C.A. 132 (a decision of the Court of Appeal for East Africa).

[19] *Supra* n. 17. [20] (1813) 1 Mau. & Sel. 593, 596.

principle only applies to cases where a party is seeking court assistance *positively to enforce* an illegal contract, and has no application to the case where a party is seeking to recover money paid under an illegal transaction. In such a case the money can be recovered if the contract is executory or if the parties are not *in pari delicto*.[21]

The Rent Restriction Ordinance was passed with the intention of protecting tenants from exploitation during a housing shortage by landlords by charging premiums, *et cetera,* in addition to rental. This fact is shown by the imposition of a penalty for a breach of the Ordinance on the lessor alone, and not on the potential lessee. The duty of observing the law is thus cast on the lessor to prevent him from exploiting his property rights. All these factors go to show that the parties were not *in pari delicto* and so the omission of a statutory remedy is irrelevant as the lessee is entitled to recover the premium at common law as money had and received.[22]

An example of the recovery of property without reliance on the contract is provided by *Sajan Singh v. Sardara Ali*.[23] By statutory regulations made in Malaya no-one could use a motor vehicle for the carriage of goods without a haulage permit and it was the policy of the authorities at the time of the execution of the contract in this case to restrict the issue of permits to persons who had had them before the war. A, a lorry driver who wanted to carry goods but who was not entitled to a permit, came to an agreement with S, a road haulier entitled to such a permit, whereby S was to acquire a second-hand lorry, register it and obtain a haulage permit for it in his own name. However, it was always intended that A should own and use the lorry for himself. Subsequently S bought six lorries and A paid a contribution towards their cost on the understanding that one of them would belong to him. This vehicle was registered and had a permit issued for it in S's name. On the payment of a later contribution by A and a friend, S executed a document to the effect that S had sold the lorry to A and his friend and that the lorry belonged to them so that they could sell the lorry but not the permit. Later A bought his friend's share in the lorry and so became the sole beneficiary from its use. Thus the lorry allegedly belonged to A but was operated in the name of S.

This method of operation was illegal as the permit was personal to the holder, to be used by him alone or by his *bona fide* employees and was not to be transferred. In this way the two parties were carrying out a deception on the Malayan public authorities. Ultimately the two parties fell out and S took away the lorry, refused to return it and claimed it as his own.

A brought proceedings against S for the return of the lorry and the use of the permit, or alternatively for damages in detinue. In addition he claimed a declaration that he was the owner of the lorry and for this claim he relied on the purported document of sale. In his defence S

[21] *Supra* nn. 4 & 5.
[22] *Green v. Portsmouth Stadium Ltd* [1953] 1 W.L.R. 487.
[23] [1960] 2 W.L.R. 180.

alleged that the lorry was his, that he had not signed the alleged document of sale and that A was employed by him as a driver.

Although no question of illegality appeared on the pleadings, both parties admitted the illegality and so, taking notice of this, the trial judge applied the maxim *ex turpi causa non oritur actio* to deny the plaintiff recovery. However, the Malayan Court of Appeal reversed this decision on the ground that the claim lay not in contract but in trespass for which the plaintiff could recover damages (the value of the lorry at the date of the trespass). This decision went on appeal to the Judicial Committee of the Privy Council which affirmed it, but on different grounds.

The judgment[24] of the Judicial Committee was delivered by Lord Denning who stated that the decision turned on the rights of the parties consequent upon the illegality. The contention as to the forgery of the document of sale had been settled in favour of the plaintiff and this point was not in dispute on appeal.

The Judicial Committee decided that the action was rather one for a declaration together with a claim in detinue and to succeed in both these pleas plaintiff had to show ownership of an authorized vehicle and the right to immediate possession of it, at the time of the action, because of 'an absolute or special property' in it.[25] The plaintiff succeeded in detinue because, although the contract was illegal, it was executed and so the alleged sale and delivery of the lorry was effective to pass the property in it. Thus the Judicial Committee classified the contract as one legal *per se* but followed by illegal performance, so that it remained alive to pass property but was unenforceable by the guilty parties.[26]

However, it is submitted that the fact situation lays the Judicial Committee's classification of the contract and their judgment open to criticism. The fact situation is a novel one, not covered by any previous English authority, but nevertheless a better view of the contract would have been to regard it as void *ab initio* which would have meant that no contract

[24] This case is an example of the Judicial Committee of the Privy Council acting in an entirely novel capacity. Under the Federation of Malaya Independence Act 1957, s. 3 (1) (U.K.), the Privy Council is no longer resorted to in the capacity of a Judicial Committee advising Her Majesty in Council but is rather an appellate court within the Malayan hierarchy of courts. Appeals are made to the Head of the Federation of Malaya, not to Her Majesty in Council, and so the value of cases of this nature as precedents in Australian and other Dominion courts may possibly be altered. However as the composition of the Judicial Committee is the same for appeals from all Dominions and federations within the British Commonwealth of Nations, it would seem that the weight of authority attached to such a case as this would not be altered.

[25] Bullen and Leake, *Precedents of Pleadings* (11th ed. 1959) 425.

[26] Cheshire and Fifoot, *op. cit.* 294. *Scarfe v. Morgan* (1838) 4 M. & W. 270, 281, was quoted as one example of a number of cases which support the proposition that if property is transferred under a contract between two persons both of whom intend to effect an illegal purpose through the contract, as soon as the contract is executed the property remains in the transferee notwithstanding the implementation of an illegal purpose. The rationale of this principle is stated as being that the property lies where it falls and the transferee can assert a better title to it than anyone else (in a negative way only since he does not do this on his own merits but because no-one else has a better title). So although the parties to the illegality will be punished personally, no action will lie to alter the ownership of the property.

ever came into existence. This being so, there never was any sale of the lorry and so no property could ever have passed under this non-existent contract to the plaintiff. Though the defendant would keep the lorry as well as the money, this is not such an outrageous result when it is remembered that the plaintiff intended to perpetrate the illegality from the beginning.

The reason for holding the contract void *ab initio* is that the contract was entered into with the illegal acquisition of the permit being a fundamental condition of the contract. It was not strictly a condition precedent as the permit could only be obtained after the lorry was purchased, but it had the same effect and was rather a concurrent condition. As this fundamental condition, which on the facts was the sole basis for the making of the contract, was illegal, it tainted the entire contract with illegality and by so offending against the statutory regulations, the contract was void *ab initio.*[27]

An alternative basis for declaring the contract void *ab initio* can be ascertained, not from the authorities, but from a consideration of the principles of illegality. Both parties knew of the illegality before the contract, legal in its bare form (for the sale of a lorry), was entered into. The nearest approach to this fact-situation in decided cases is where a contract is legal *per se* but which is intended to be exploited by one party, unknown to the other, for an unlawful purpose.[28] In such a situation, as soon as the innocent party becomes aware of the illegality, he must refuse to proceed with the contract. Thus the contract is voidable by the innocent party because as soon as he has knowledge of the illegality, it is mandatory that he avoid the contract. By a process of analogy, therefore, where both parties know of the illegality to be consequent upon the execution of the contract before they enter into the contract, it is avoided, necessarily *ab initio,* because the knowledge accrued before the execution of the contract.[29]

Because the plaintiff had actual possession of the lorry at the time it was seized and because he had the right to immediate possession of it arising out of an absolute or special property in it,[30] the Judicial Committee thought that the claim in detinue succeeded. This conclusion is valid if it is considered that the Committee's view of the nature of the contract is correct, since, as it was only the performance that was illegal, the contract, having been executed, stood to pass proprietary rights under it.

But on the above assumption that the contract was void *ab initio* the claim in detinue should have failed. Detinue is an action for the wrongful detention of goods and is brought to regain the possession of them.[31]

[27] *Re Mahmoud and Ispahani* [1921] 2 K.B. 716.

[28] *Cowan v. Milbourn* (1867) L.R. 2 Exch. 230.

[29] *Re Mahmoud and Ispahani* [1921] 2 K.B. 716, 725. 'Where there is a contract for the sale of goods which may be used either for a lawful or for an unlawful purpose, and the vendor at the time of the sale knows that they are going to be used for the unlawful purpose, the rule applicable is the same as that where the contract is *ab initio* unlawful.'

[30] Bullen and Leake, *op. cit.* 425.

[31] *Salmond on Torts* (12th ed. 1957) 283.

However, it appears that to succeed in an action for detinue, plaintiff must show in his statement of claim, in addition to a right to immediate possession, a proprietary interest in the goods.[32] This view was stated in *Jarvis v. Williams*[33] and, although that case has been criticized, the Judicial Committee appears to have tacitly approved of it when it says that the plaintiff must show a right to immediate possession 'arising out of an absolute or special property in it'.[34] Thus the Judicial Committee is admitting that the plaintiff must show that his possessory right is based on either a special proprietary right (of which the only example appears to be bailment), or an absolute proprietary right, which is ownership good against the whole world. On the basis of this assumption, the plaintiff, to establish his proprietary right, must turn to the illegal contract to support his claim in detinue, but because the court will not enforce an illegal contract or allow rights to accrue under it, no reliance can be placed on the contract and so the claim in detinue must fail.

Bowmakers Ltd v. Barnet Instruments Ltd[35] was approved and cited to support the Committee's conclusion in favour of recovery, but on the facts of that case it does not appear relevant to the matter in dispute. In that case a hire purchase agreement was involved and when the goods hired were sold in contravention of the agreement, the bailment automatically terminated, leaving no rights legal or tainted with illegality vested in the bailee. There was no dispute as to ownership of the goods which was admitted to be vested in the bailor (plaintiff) and the only question to interest the court was whether the property could be recovered. In this case the question of ownership *was* in dispute and cannot be settled independently of the contract. It must be noted also that in *Bowmakers Ltd v. Barnet Instruments Ltd* the plaintiff was attempting to recover back goods which had passed under the contract and so the contract was not being enforced even indirectly. However, in this instance, the transferee, by trying to gain ownership of the lorry was, in effect, indirectly enforcing the contract even though he was not directly relying on it. It would thus appear that *Bowmakers Ltd v. Barnet Instruments Ltd* is not a valid authority to be used to support the case in dispute.

The fact that the lorry was registered in the defendant's name was not regarded by the Committee as being conclusive proof of who was entitled to the ownership of the lorry. This is because a registration book is not a document of title in English law; title passes by sale and delivery of the goods, not by the fact of registration.[36]

Although it does appear that the claim in detinue should have failed, there can be no criticism of the Committee's alternative decision of allowing plaintiff's claim in trespass. Trespass is essentially an injury to possession and not to ownership,[37] and so the plaintiff can succeed

[32] Bullen and Leake, *op. cit.* 425; *Halsbury's Laws of England* (2nd ed. 1939) xxxiii, 62.

[33] [1955] 1 W.L.R. 71. [34] [1960] 2 W.L.R. 180, 185. [35] [1945] K.B. 65.

[36] *Bishopgate Motor Finance Corpn Ltd v. Transport Brakes Ltd* [1949] 1 K.B. 322, 338.

[37] Bullen and Leake, *op. cit.* 638; Salmond, *op. cit.* 246.

by merely establishing that he had actual possession at the time the lorry was seized. No reference to the contract need be made to establish a proprietary right (as in detinue) and the defendant cannot plead the illegality of the contract as a defence. So the plaintiff's remedy would be in damages for the value of the lorry, but no restitution of the lorry could be allowed. Although trespass was not expressly pleaded, the facts of the trespass were pleaded, and the plaintiff was entitled to rely on these facts to establish an alternative claim in trespass, as the court was prepared to allow an amendment of the pleadings.

A. H. GOLDBERG

BEYER v. BEYER[1]

Present agreement for the sale of shares held on death—Present binding obligations—No power of revocation—Non-testamentary document—Wills Act 1928

By an indenture dated 22 January 1948 between G.H.B. and his son, brother, and three nephews, the deceased agreed to dispose of such shares as he held at his death in a proprietary company (in which all parties were shareholders) in the manner set out in that document.

After his death, the plaintiffs C.H.B. and W.J.B., who were to receive shares under the indenture, took out an originating summons to determine whether the defendants, the legal personal representatives of the deceased, were bound by such indenture.

The main point in issue was whether the deed constituted a testamentary disposition of property. If so, it was inoperative as it was not executed in accordance with the requirements of the Wills Act 1928.

The chief ground urged by counsel for the defendants was that there remained in the covenantor a power tantamount to that of revocation, for he was at liberty during his lifetime to dispose of all his shares, thus leaving nothing on which the covenant could operate. It fell, therefore, within the class defined by Starke J. in *Bird v. Perpetual Trustees*[2] as testamentary documents—'a document made to depend on the event of death for its vigour and effect'.[3]

This argument was decisively rejected by Pape J. There was no revocable mandate here: one must distinguish a document such as Starke J. had in mind. Here there was imposed on all parties, present and binding obligations—to buy and sell at a price fixed in accordance with the agreement, such shares as the deceased held on his death, and the fact that these obligations were not to be performed until death was irrelevant.

In this part of his judgment, His Honour relied on two cases, *In the Will of Kininmonth*[4] and *Bird v. Perpetual Trustees.*[5] In the former case, it was held that an assignment under a marriage settlement of all household furniture belonging to the assignor at his death operated as an immediate equitable conveyance to the assignee despite the fact that the assignor may have disposed of it all in his lifetime.

[1] [1960] V.R. 126; Supreme Court of Victoria; Pape J. [2] (1946) 73 C.L.R. 140.
[3] *Ibid.* 144. [4] (1897) 23 V.L.R. 134. [5] (1946) 73 C.L.R. 140.