BRINGING ASSUMPSIT ON ILLEGAL CONTRACTS

By E. K. TEH*

'Long trains of tremulous mist began to creep,
Until their complicating lines did steep
The orient sun in shadow...'

Shelley, *The Revolt of Islam.*

This study proposes to examine, first, the rules on recovery when assumpsit is brought on illegal contracts; and, secondly, mitigation by severance. The modern equivalent of assumpsit is the action to recover damages for breach of contract or to recover a contract debt. The study of illegal contracts should concentrate on assumpsit because it is there that contractual principles can be found. Let us outline the historical development.

In the Middle Ages there was no law of contract. There was the action of debt, which was for the recovery of a precise sum which the defendant deforced from the plaintiff. The writ in its original form read:

> The King to the sheriff greeting. Command N. that justly and without delay he render to R. one hundred marks which he owes, as he says, and whereof he complains that he unjustly deforces [*deforciat*] him. And unless he will do this, summon him by good summoners that he be before me or my justices at Westminster within fifteen days of the close of Easter to show [why he hath not done it].[1]

There was also the action of covenant, which was for the literal keeping of an agreement other than one for the payment of a precise sum. A specimen writ read:

> Command B., keeper of the hospital of St. John the Baptist at N., that justly etc. he keep with A. the covenant [*teneat A. conuencionem*] made between them concerning a certain wall to be rebuilt on the land of the said hospital at W. at the expense of the said B. *And if not* etc. (emphasis supplied)[2]

It will be observed that the defendant was to appear in court only if he did not keep the covenant.

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1 Fifoot, *History and Sources of the Common Law*, p. 234 (Glanvill X, 2) (*c.* 1889).

2 S.S. Vol. 87, p. 233 (R. 534) (1318-20).

These two forms of action left without a remedy an area where there were three elements. First, there was no deed. From the early fourteenth century it was impossible to bring covenant. Secondly, the defendant had received no benefit. Except in the sale of goods, debt could not be brought. Thirdly, the plaintiff had suffered a loss.

In this area it was possible to bring assumpsit if the facts also constituted a trespass, a wrong. At first assumpsit could be brought for misfeasance only, but later on it could also be brought for nonfeasance. Contract came into existence when the judges deduced from the cases on misfeasance and nonfeasance that mutual promises were enforceable. This development occurred about 1558.

To complete the outline, in the first half of the sixteenth century the judges also allowed assumpsit to be brought to recover a debt.[3]

The law which is dealt with here is that applicable to the following unlawful objects:—

(i) The commission of a crime.[4]

(ii) The commission of a tort.

(iii) The commission of a fraud.

(iv) Sexual immorality.

(v) Prejudicing the administration of justice.

(vi) Corruption in public life.

(vii) Restraint of marriage.

(viii) Marriage brokage.

(ix) A contract by a married person to marry a third person.

(x) Breaking the law of a friendly country.

Let us now turn to the rules on recovery.

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3 Milsom's *Historical Foundations of the Common Law*, pp. 213-227, 271-292, 297-304.

4 This includes conspiracy: Atiyah's *Introduction to the Law of Contract*, 2nd ed., p. 215. In *Gibbons* v. *Chambers* (1885) 1 Cab. & El. 577 there was an agreement to build houses on a disused, unconsecrated, cemetery in Bethnal Green, necessitating the removal of 17,000 to 18,000 corpses. Day J. said (at pp. 583-584): 'I... think an agreement between the man who has acquired the freehold of this cemetery and the builder who enters into a contract necessarily involving the removal of these bodies is an agreement by persons who combine together to disturb those vested rights which have been acquired by the persons who have paid for the burials in this place .... Persons who paid money for the deposit of their relatives or friends in that cemetery are entitled to have them lie there, and lie there undisturbed, or at least lie within the place with no other disturbance than such as is usual in places of public burial. If this agreement necessarily involved the disturbance of those bodies, then it was an agreement which in my judgment was an unlawful act. It was a combination or conspiracy to do that which violated the rights of others, therefore it would be as such an indictable offence. That being the view I take of this case, therefore, the agreement could not have been carried out; at the time when it was made it was an agreement incapable of being carried out without doing that which would be illegal. Therefore, in my judgment, it was an illegal agreement, and one which is consequently void.'

I. THE RULES ON RECOVERY

The approach which will be adopted here is that of examining the plaintiff's conduct.[5] *The basic idea is that the court refuses to aid the plaintiff because it disapproves of his conduct.* In *Holman* v. *Johnson*[6] Lord Mansfield C.J. said:

> The principle of public policy is this; ex dolo malo non oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted.[7]

The situations which have come before the court will be examined under five headings: the first is common object; the second aiding and abetting; the third separate objects; the fourth contravention of a statute in performance; and the fifth other situations.

1. *Common Object*

Under this heading the plaintiff and the defendant share a common object. There are six situations.

First Situation

The first situation is where the plaintiff and the defendant agree to carry out an unlawful object. Here one of two things may be illegal: the consideration furnished by the plaintiff or the promise given by the defendant. In either case the plaintiff cannot recover.[8]

In *Herman* v. *Jeuchner*[9] Brett M.R. said:

> What is it that determines and constitutes a contract not under seal? It is the consideration and the promise: these two incidents are necessary to constitute every simple contract: taken together, they form the whole of the contract. When the object of either the promise or the consideration is to promote the committal of an illegal act, the contract itself is illegal and cannot be enforced.[10]

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5 *Williston on Contracts*, 3rd ed., Vol. 14, pp. 20-21; *Chitty on Contracts*, 23rd ed., Vol. I, para. 806.

6 (1775) 1 Cowp. 341; 98 E.R. 1120.

7 (1775) 1 Cowp. 341, p. 343.

8 Selwyn's *Abridgment of the Law of Nisi Prius*, 13th ed. (1869), states (Vol. I, p. 68): 'The two essential parts in every parol agreement are the consideration and the promise. If either of these be illegal, or if part of the entire consideration be illegal, or if the promise be to do two or more acts, one of which is illegal, an action cannot be maintained for a breach of the agreement.' The cases discussed by Selwyn include *Morris* v. *Chapman* (1672) T. Jo. 24; 84 E.R. 1129 (promise illegal); and *Martyn* v. *Blithman* (1611) Yelv. 197; 80 E.R. 130 (consideration illegal).

9 (1885) 33 W.R. 606 (*sub nom. Hermann* v. *Jeuchner*) (original version of the judgment of Brett M.R.); (1885) 15 Q.B.D. 561 (revised version of the judgment of Brett M.R.).

10 (1885) 15 Q.B.D. 561, p. 563.

In *Briggs* v. *Brown*[11] the House of Lords consisting of Lord Blackburn, Lord Watson and Lord FitzGerald refused to allow a married woman suing on an agreement made for an immoral consideration to amend her statement of claim in order to raise the issues whether her husband knew of her connexion with the defendant and whether she was entitled to the benefit of the agreement for her separate use. Their Lordships decided the case (to quote the report):

> ... on the ground that in order to enforce a claim by a married woman under a contract it was necessary to show consideration moving from her in such a way that the subject matter of the contract when recovered would belong to her for her separate use. The real consideration shown in this case was gross immorality ...[12]

Second Situation

The second situation is where the plaintiff and the defendant agree to carry out an unlawful object after a legal contract has been made. The plaintiff, again, cannot recover.

In *Ashmore, Benson, Pease & Co. Ltd.* v. *Dawson Ltd.*[13] the defendants agreed with the plaintiffs to carry a big piece of engineering equipment to a port. The defendants sent an articulated lorry which fell within the 30-ton laden limitation in the regulations. The plaintiffs' transport manager watched the lorry being loaded to a maximum weight laden of 35 tons without making any objection. While on the road the lorry toppled over and the equipment was damaged. The plaintiffs brought an action for breach of contract. The Court of Appeal held that the plaintiffs could not recover even though the contract was lawful in its inception. Scarman L.J. said:

> The question now arises, and it is really a question of law, whether Mr. Bulmer, being the transport manager of Ashmores, his knowledge would be sufficient to impose upon Ashmores the consequences of being parties to an illegal performance of the contract. Mr. Bulmer was their responsible official. But knowledge by itself is not, I think, enough. *There must be knowledge plus participation.* ... There must be some degree of assent to the illegal performance' ....
>
> In the present case Mr. Bulmer could have stopped the loading when he went down to watch it being done. He did not do so, with all his knowledge and experience; and I am driven to the conclusion that he was a participator in the illegality (emphasis supplied).[14]

Third Situation

The third situation is where the plaintiff and the defendant enter into a contract to assist in carrying out an illegal contract. The plaintiff, again, cannot recover.

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11 (1885) 1 T.L.R. 429.
12 *Ibid.*, p. 430.
13 [1973] 2 Lloyd's Rep. 21.
14 *Ibid.*, p. 26.

In *De Begnis* v. *Armstead*[15] the plaintiff and the defendant entered into an illegal contract to produce Italian operas at an unlicensed theatre. Later the plaintiff advanced the defendant two sums of money to assist the defendant to carry out the illegal contract. The plaintiff brought an action to recover the sums. The court held that he could not recover. Tindal C.J. said this about one of the sums:

> ... we cannot upon the evidence doubt, that the object and purpose of the plaintiff in paying for the dresses, was not to assist the defendant in preparing for his own theatre at Manchester, in which the plaintiff had no interest, but *to assist in carrying into effect the illegal contract between himself and the defendant*, of sharing in the profits of the unlicensed theatre at Liverpool (emphasis supplied).[16]

Fourth Situation

The fourth situation is where the plaintiff and the defendant enter into a contract to aid and abet a third party to carry out an unlawful object. The plaintiff, again, cannot recover.

In *Foster* v. *Driscoll*[17] the parties, during the Prohibition, formed a partnership to smuggle whisky into the United States; one of the methods of smuggling which they contemplated being to sell the cargo of whisky in Canada at such a place, in such a manner and under such conditions as would ensure that the purchaser would be able to smuggle it into the United States. In other words, the parties contemplated aiding and abetting a third party to break the law of the United States. The parties then fell out. The Court of Appeal refused to help the parties to extricate themselves from the partnership. Lawrence L.J. said:

> On principle... I am clearly of opinion that a partnership formed for the main purpose of deriving profit from the commission of a criminal offence in a foreign and friendly country is illegal, even although the parties have not succeeded in carrying out their enterprise, and no such criminal offence has in fact been committed; and none the less because the parties may have contemplated that if they could not successfully arrange to commit the offence themselves *they would instigate or aid and abet some other person to commit it* (emphasis supplied).[18]

Fifth Situation

The fifth situation is a mistake of law which arises in the following circumstances. First, the object is one which can be achieved either by performing the contract legally or by performing it illegally. Secondly, in ignorance of the law, the parties agree on the illegal performance. Thirdly, the parties learn in time that they have made a mistake of law, and there is no illegal performance. In these circumstances the plaintiff can recover.

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15 (1833) 2 L.J.C.P. 214.
16 *Ibid.*, p. 219.
17 [1929] 1 K.B. 470.
18 *Ibid.*, p. 510.

In *Waugh* v. *Morris*[19] the defendant chartered the plaintiff's vessel to carry a cargo of hay from France to London. The carriage of the hay was the common object. The defendant asked the plaintiff to land the hay at a certain wharf in London, and the plaintiff agreed. Unknown to the parties, it was illegal to land the hay. Thus, the mode of performance which the parties agreed upon was illegal. When the vessel arrived in London the parties learnt that the landing of the hay was prohibited. The defendant did not attempt to land the hay. Instead the defendant had the hay shipped abroad. Thus, there was no illegal performance. The court held that the plaintiff could recover on the contract. Blackburn J., delivering the judgment of the court which consisted of Cockburn C.J., Mellor J. and himself, said:

> [1] The charterparty provides that the cargo was to be taken from alongside; and that being so, the consignee might select any legal and reasonable place within the port at which to take it from alongside. [2] He, by his agent in France, named this wharf, which he supposed, erroneously, to be a legal place, and the master, under the same mistake, assented to this, as indeed he would have had no right to refuse, if it had really been a legal place. [3] But when it turned out that the defendant had named a place for the performance of the contract where the performance was impossible, because illegal, that did not put an end to the contract, if the performance in any other way was legal and practicable. In the present case the performance by receiving the cargo alongside in the river without landing it at all was both legal and practicable.[20]
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> He [the shipowner] contemplated that the defendant would land the goods which he thought was lawful; but if he had thought at all of the possibility of the landing being prohibited, he would probably have expected that the defendant would in that case not violate the law. And he would have been right in fact in that expectation, for the defendant did not attempt to land the goods.[21]

Sixth Situation

The sixth situation concerns a mistake of fact. The parties wish to carry out a lawful object, but there is a fact which, unknown to them, makes the object unlawful. Subject to an exception, the plaintiff can recover.

In *Shaw* v. *Shaw*[22] the plaintiff agreed to marry one Shaw deceased. Both parties believed that the deceased's wife had died. The deceased's wife was alive at the time, but died later. Denning L.J. said that if the action was considered as being a claim for breach of promise of marriage, the deceased ought to have married the plaintiff when his wife died, and there was a breach of the promise at that time for which damages could be recovered.

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19 (1873) L.R. 8 Q.B. 202.

20 *Ibid.*, pp. 206-207.

21 *Ibid.*, p. 208. *Cf. Allan (Merchandising) Ltd.* v. *Cloke* [1963] 2 Q.B. 340 (the plaintiffs could not recover where the aiding and abetting was carried out).

22 [1954] 2 Q.B. 429 (case note, (1954) 70 L.Q.R. 445).

The exception which has been alluded to is where the contract is prohibited by statute.

In *Dennis & Co. Ltd.* v. *Munn*[23] the plaintiffs did some painting work for which there was no licence. The defendant, who instructed the plaintiffs to do the work, had told them that there was a licence, but there was no suggestion of deceit. The Court of Appeal held that the plaintiffs could not recover. Bucknill L.J. said:

> The question turns on the interpretation to be given to reg. 56A. I need not read the whole of it, but the material portions of it are as follows:
>
> > '... (2) Subject to the provisions of this regulation, the carrying out in the United Kingdom, except for a purpose specified in the first column of the Table set out in pt. I of sched. 6 to these regulations, of any work specified in pt. III of that schedule or of any maintenance work on a building or on any such works as are mentioned in pt. II of that schedule, shall be unlawful except in so far as there is in force in respect thereof a licence granted by the Minister....'[24]
>
> In this case there was a contract to do a particular work, namely, to paint the stonework on the front of this house. That was illegal except in so far as it was covered by the licence which was only to paint up to the first balcony for the sum of 34*l*. 15*s*. 0*d*. That being so, it was illegal, as I have said, to extend the work beyond that permitted by the licence.[25]

In *Dalgety and New Zealand Loan Ltd.* v. *Imeson Pty. Ltd.*[26] there was a contract for the sale of cattle. Unknown to both parties, one of the animals was diseased. The sale of the diseased animal was an offence. The court interpreted the statute creating the offence as not prohibiting the contract which the parties had made innocently, and on this ground gave judgment for the plaintiffs. What is important is not that the plaintiffs recovered, but the ground on which the court gave judgment for them.

To summarize, the plaintiff cannot recover in four situations. First, the plaintiff and the defendant agree to carry out an unlawful object. Secondly, the plaintiff and the defendant agree to carry out an unlawful object after a legal contract has been made. Thirdly, the plaintiff and the defendant enter into a contract to assist in carrying out an illegal contract. Fourthly, the plaintiff and the defendant enter into a contract to aid and abet a third party to carry out an unlawful object. In the case of a mistake of law the plaintiff can recover if the following conditions are satisfied: (i) the object is one which can be achieved either by performing the contract legally or by performing it illegally; (ii) the

23 [1949] 2 K.B. 327; [1949] 1 All E.R. 616 (complete text of Bucknill L.J.'s judgment).

24 [1949] 1 All E.R. 616, pp. 617-618.

25 [1949] 2 K.B. 327, p. 331.

26 [1963] S.R. (N.S.W.) 998.

parties agree on the illegal performance in ignorance of the law; and (iii) the parties learn in time that they have made a mistake of law, and there is no illegal performance. In the case of a mistake of fact the plaintiff can recover, unless the contract is prohibited by statute.

2. *Aiding and Abetting*

Under this heading there are two situations.

First Situation

The first situation is where the plaintiff aids and abets the defendant to carry out an unlawful object.

Most of the cases on aiding and abetting concern the supply of goods. But aiding and abetting may also take the form of personal services.

In *Crockett* v. *Wiedemann*[27] the defendant was Consul General for the Government of Germany in San Francisco and supervised and directed the espionage service of Germany in the United States. The plaintiff Alice Crockett was asked by the defendant to go to Germany to clear up serious misunderstandings which he had with the Government of Germany and the Nazi Party about his ability to carry on espionage activities, the defendant promising to pay her a salary and expenses. The plaintiff did what she was asked to do, and claimed the salary and expenses which the defendant had promised to pay. Her claim was dismissed. St. Sure, District Judge, said:

> Assuming, under the rules of pleading, that the allegations contained in the complaint are true, it appears that defendant is guilty of violating the espionage act of the United States.... It further appears that plaintiff aided and assisted defendant in his unlawful acts and she is likewise guilty.[28]

Let us now examine the rules on recovery. First of all, we must distinguish between aiding and abetting committed *outside* the jurisdiction and aiding and abetting committed *within* the jurisdiction.

Where aiding and abetting is committed outside the jurisdiction, active participation is required.

In *Holman* v. *Johnson*,[29] the first case on aiding and abetting, the defendant bought a quantity of tea from the plaintiff at Dunkirk with the intention of smuggling the tea into England. The plaintiff knew the defendant's intention. Lord Mansfield C.J. said:

> This is an action brought merely for goods sold and delivered at Dunkirk. *Where then, or in what respect is the plaintiff guilty of any crime?* Is there any law of England transgressed by a person making a complete sale of a parcel of goods at Dunkirk, and giving credit for them? The contract is complete, and nothing is left to be done. The seller, indeed, knows what the buyer is going to do

27 39 F. Supp. 266 (1941).

28 *Ibid.*

29 (1775) 1 Cowp. 341; 98 E.R. 1120.

> with the goods, but has no concern in the transaction itself (emphasis supplied).[30]
>
> If the defendant had bespoke the tea at Dunkirk to be sent to England at a certain price; and the plaintiff had undertaken to send it into England, or had had any concern in the running it into England, he would have been an offender against the laws of this country. But upon the facts of the case, from the first to the last, he clearly has offended against no law of England.[31]

In other words, the plaintiff will not be precluded from recovering, unless there is active participation. The reason is because of the territorial concept of law.

As regards aiding and abetting committed within the jurisdiction, the cases at first were conflicting. Some cases required active participation.[32] Other cases did not.[33]

In *Pearce* v. *Brookes* [34] the court finally disposed of the view that active participation was required. The case concerned an agreement for the hire-purchase of a brougham. The facts were as follows:—

> The plaintiff Pearce had seen the defendant [Mrs. Brookes] at Cremorne before she entered into the agreement, under circumstances calculated to indicate her character. When the defendant called upon the plaintiff Countze, for the purpose of entering into the agreement, she was accompanied by another woman of the town, and directed that the brougham should be precisely similar to one that had been let to a third woman of the same description. The defendant was illiterate, and could scarcely write her signature to the agreement.[35]

The plaintiffs brought an action to recover the rent for the hire of the brougham. Pollock C.B. said:

> ... since [*Cannan* v. *Bryce* and *M'Kinnell* v. *Robinson*] I have always considered it as settled law, that *any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose,*[36] *cannot recover the price of the thing so supplied.* If, to create that incapacity, it was ever considered necessary that the price should be bargained or expected to be paid out of the fruits of the illegal act

30 (1775) 1 Cowp. 341, p. 344.

31 *Ibid.*, p. 345.

32 *E.g., Hodgson* v. *Temple* (1813) 5 Taunt. 181; 128 E.R. 656 (Mansfield C.J.).

33 *E.g., Langton* v. *Hughes* (1813) 1 M. & S. 593; 105 E.R. 222 (Le Blanc J.).

34 (1866) 30 J.P. 295 (statement of the facts); (1866) 4 H. & C. 358; 143 R.R. 652 (original version of Bramwell B.'s judgment); (1866) L.R. 1 Exch. 213 (*sub nom. Pearce* v. *Brooks*) (revised version of Bramwell B.'s judgment).

35 (1866) 30 J.P. 295, p. 296.

36 Bramwell B. remarked (L.R. 1 Exch. 213, at p. 215): '... I put it to the jury, that, in some sense, everything which was supplied to a prostitute is supplied to enable her to carry on her trade, as, for instance, shoes sold to a street walker; and that the things supplied must be not merely such as would be necessary or useful for ordinary purposes, and might be also applied to an immoral one; but that they must be such as would under the circumstances not be required, except with that view.'

> (which I do not stop to examine), that proposition has been overruled by the cases I have referred to, and has now ceased to be law. Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, *Ex turpi causa non oritur actio*, . . . (emphasis supplied)[37]

Bramwell B. said:

> Regarding this question, therefore, not as a matter of reasoning, but as governed by the authorities which I have mentioned, I think that when it was proved that the defendant was a public prostitute, and that to the plaintiffs' knowledge she hired the brougham for the purpose of her prostitution, enough of the plea was proved to constitute a good defence to this action.[38]

Thus, judgment was given for the defendant.

In *Seymour* v. *London and Provincial Marine Insurance Co.*[39] Willes J. accepted the distinction between aiding and abetting committed within the jurisdiction and aiding and abetting committed outside the jurisdiction. He was delivering a judgment which had the concurrence of the other member of the court, Keating J. Willes J. said:

> Now it is unnecessary for me to dwell upon the other cases which might be referred to, but I may mention that in *Benjamin on the Sale of Personal Property*, p. 380 (a work from which I have derived great advantage, and which is remarkable for the acumen and accuracy of the writer, who possesses not only a knowledge of English law but of jurisprudence in general), all the cases are collected, and this principle is clearly stated — 'The sale of a thing in itself an innocent and proper article of commerce is void when the vendor sells it knowing that it is intended to be for an immoral or illegal purpose. In several of the earlier cases something more than this mere knowledge was held necessary, and evidence was required of an intention on the vendor's part to aid in the illegal purpose or profit by the immoral act. The later decisions overrule this doctrine.' He then goes on to show that in the more modern cases, referring amongst others to the case of *Pearce* v. *Brookes*, the knowledge of the illegal purpose for which the goods were supplied is sufficient; and he concludes with a notice of the case of *Pellecat* v. *Angell*, which was another case of smuggling, and where the distinction in sales made in foreign countries for smuggling purposes was thus pointed out by the Court: 'Where the foreigner takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels or otherwise, the contract will not be enforced; but the mere sale of goods by a foreigner in a foreign country, made with the knowledge that the buyer intends to smuggle them into this country, is not illegal, and may be enforced.'[40]

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37 (1866) L.R. 1 Exch. 213, pp. 217-218.

38 (1866) 4 H. & C. 358, pp. 366-367.

39 (1872) 41 L.J.C.P. 193 (affirmed, (1873) 42 L.J.C.P. 111 n.).

40 *Ibid.*, p. 198. The quotation from *Pellecat* v. *Angell* is actually a paraphrase of 2 Cr. M.&R. 311, p. 313; 150 E.R. 135.

There are two exceptions to the rule that where aiding and abetting is committed within the jurisdiction, knowledge is sufficient to preclude recovery. These exceptions are cases where active participation is required.

The first exception (a doubtful one) deals with the converse of *Holman* v. *Johnson*. The plaintiff, within the jurisdiction, sells goods to the defendant knowing that the defendant intends to smuggle the goods into a foreign country.

In *Regazzoni* v. *Sethia (1944) Ltd.*[41] Lord Somervell of Harrow said:

> In *Foster* v. *Driscoll* the majority found that the evidence established a joint enterprise to import whisky into the United States. *'It is not a case,' said Sankey L.J., 'where one or other of them merely knew that the whisky was going to the States.'* I am never very clear as to the effect of 'mere' and 'merely,' though I may have used one or other myself. If the question is one of illegality under our law, the contract is unenforceable if the defendant knew that the goods or money or other consideration were to be used for a purpose immoral or illegal under our law.
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> It would be convenient if the same principle was applied but it does not arise directly in this case (emphasis supplied).[42]

The second exception concerns a solicitor who acts in litigation when his client has made a champertous agreement to share the proceeds with another.

In the case of *In re Trepca Mines Ltd. (No. 2)*[43] Donovan L.J. said:

> As regards champerty, the question is asked: If a solicitor, being employed upon a normal and proper retainer, comes to know that his client has a champertous agreement with another party but nevertheless continues to act for his client, do these circumstances constitute *the aiding and abetting* of the offence of champerty on the part of the solicitor? Again my answer would be 'No.' It is true that in logic a case can be made out for an affirmative answer; but logic here must yield, I think, to common sense and justice. In the example figured, the solicitor simply has knowledge that someone else is committing a misdemeanour. He himself acts perfectly properly within the bounds of an ordinary retainer. If what he does aids the champertors to achieve their purpose, this happens not because the solicitor shares it, but simply as an inevitable by-product of innocent conduct on the solicitor's part; and for that I do not think he would be to blame (emphasis supplied).[44]

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41 [1958] A.C. 301.
42 *Ibid.*, p. 331.
43 [1963] Ch. 199.
44 *Ibid.*, p. 225.

Second Situation

The second situation is where the defendant aids and abets the plaintiff to carry out an unlawful object. In this situation the plaintiff cannot recover if two things happen: (i) if the defendant knows the plaintiff's unlawful object; and (ii) if the plaintiff has taken an overt step, as distinct from having a mere intention.

In *Commercial Air Hire Ltd.* v. *Wrightways Ltd.*[45] the defendants sold an aeroplane to the plaintiffs during the Spanish Civil War. The defendants knew that the plaintiffs intended to re-sell the aeroplane to the Spanish government and that in view of an embargo which might be imposed at any moment the plaintiffs intended to have the aeroplane flown from England to Spain without first obtaining a certificate of airworthiness as required by the regulations. The plaintiffs had the aeroplane flown to Spain in contravention of the regulations. Later the plaintiffs claimed damages for defects in the aeroplane. Their claim was dismissed. du Parcq J. said:

> It may be said that the defendants might, at any rate, persuade themselves that possibly this aeroplane was going somewhere else, *though I think they knew quite well what the purpose of the contract was.* But it is quite clear that the plaintiff company knew that what was intended was to make money as quickly as possible *by hurrying the aeroplane off, ignoring the regulations of the Air Ministry.* I think that I should be doing wrong, in those circumstances, if I allowed the plaintiff company to recover any damages (emphasis supplied).[46]

To summarize, in the first situation, which is where the plaintiff aids and abets the defendant to carry out an unlawful object, we must distinguish between aiding and abetting committed outside the jurisdiction and aiding and abetting committed within the jurisdiction. In the former, active participation is required. In the latter, knowledge, as a general rule, is sufficient. There are two exceptions: first, where the plaintiff, within the jurisdiction, sells goods to the defendant knowing that the defendant intends to smuggle the goods into a foreign country; and, secondly, where a solicitor acts in litigation when his client has made a champertous agreement to share the proceeds with another. In these exceptions active participation is required. In the second situation, which is the converse of the first, the defendant aids and abets the plaintiff to carry out an unlawful object. In this situation the plaintiff cannot recover if two things happen: (i) if the defendant knows the plaintiff's unlawful object; and (ii) if the plaintiff has taken an overt step, as distinct from having a mere intention.

3. *Separate Objects*

Under this heading the plaintiff and the defendant have separate objects. There are two situations.

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45 [1938] 1 All E.R. 89.
46 *Ibid.*, p. 92.

First Situation

The first situation is this. The plaintiff and the defendant have separate objects, and the plaintiff's object is lawful but the defendant's object is unlawful.

Here we must distinguish between a contract which is prohibited by statute and one which is not.

Where the contract is prohibited by statute the plaintiff cannot recover. Prohibition of the contract may take one of two forms: (i) express prohibition; and (ii) implied prohibition.

There is express prohibition where the statute (i) deals with contracts; and (ii) describes the class of contracts which it prohibits.

In the case of *In re an Arbitration between Mahmoud and Ispahani*[47] the relevant provision in the subsidiary legislation was as follows:—

> Until further notice a person shall not either on his own behalf or on behalf of any other person *buy or sell* or otherwise deal in . . . any of the articles specified in the schedule hereto [which included linseed oil] whether situated within or without the United Kingdom, except under and in accordance with the terms of a licence issued by or under the authority of the Food Controller (emphasis supplied).

The words 'buy or sell' indicated that the provision dealt with contracts. The provision then described the class of contracts which it prohibited, *viz.*, contracts relating to 'any of the articles specified in the schedule hereto . . ., except under and in accordance with the terms of a licence issued by or under the authority of the Food Controller.' The plaintiff was licensed to deal in linseed oil, subject to his dealing with licensed dealers only. The defendant falsely represented to the plaintiff that he was a licensed dealer. The plaintiff, relying on such representation, entered into a contract with the defendant to sell him a quantity of linseed oil. Later the defendant refused to accept delivery. The Court of Appeal held that the plaintiff could not recover. Bankes L.J. said:

> The language that has sometimes been employed in these orders has been criticized, but it does seem to me that this is an order the language of which is perfectly plain. It makes it an illegal act, both on the part of the buyer and on the part of the seller, to enter into the kind of contract which is referred to in this first clause . . . .
>
> Now in my opinion it is not material to consider, for the purpose of deciding this particular dispute, whether or not the respondent has or has not been guilty of an offence which would render him liable to punishment.[48]

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47 (1921) 26 Com. Cas. 215 (*sub nom. Mahmoud* v. *Ispahani)* (original versions of the judgments of Bankes and Atkin L.JJ.); [1921] 2 K.B. 716 (revised versions of the judgments of Bankes and Atkin L.JJ.).

48 (1921) 26 Com. Cas. 215, p. 217.

Atkin L.J. said:

> ... here it appears to me to be plain that this particular contract was expressly prohibited by the terms of the Order which imposes the necessity of a compliance with the licence.... Whether or not the plaintiff would be liable to a prosecution does not appear to me to be necessarily the same point, and I desire to abstain from expressing an opinion upon it.[49]

If there is no express prohibition then it becomes necessary to consider whether there is an implied prohibition. Implied prohibition or no is to be determined purely by ascertaining the legislative intent. It is idle to compare the cases.

In *Archbolds (Freightage) Ltd.* v. *Spanglett Ltd.*[50] the relevant provision in the statute said nothing about contracts. The provision was as follows, '... no person shall use a goods vehicle on a road for the carriage of goods... except under licence...' The defendants agreed to carry a consignment of whisky for the plaintiffs. Unknown to the plaintiffs, the defendants intended to use, and did use, a goods vehicle which was not licensed for the purpose. During the journey the consignment was stolen through the defendants' negligence. When the plaintiffs brought an action on the contract, the defendants contended that the contract was prohibited by statute. Devlin L.J. said:

> The statute does not expressly prohibit the making of any contract.
>
> The question is therefore whether a prohibition arises as a matter of necessary implication.[51]
>
> The general considerations which arise on this question were examined at length in *St. John Shipping Corporation* v. *Joseph Rank Ltd.* and Pearce L.J. has set them out so clearly in his judgment in this case that I need add little to them. *Fundamentally they are the same as those that arise on the construction of every statute; one must have regard to the language used and to the scope and purpose of the statute.* 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 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 (emphasis supplied).[52]

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49 [1921] 2 K.B. 716, p. 731. There is a remedy in deceit: *Hatcher* v. *White* (1953) 53 S.R. (N.S.W.) 285.

50 [1961] 1 Q.B. 374; [1961] 1 All E.R. 417 (complete text of Pearce L.J.'s judgment).

51 [1961] 1 Q.B. 374, p. 389.

52 *Ibid.*, p. 390.

Unfortunately, in *St. John Shipping Corporation* v. *Joseph Rank Ltd.*[53] Devlin J. (as he then was) looked at the contract, instead of the statute. Devlin J. said:

> 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,' as Parke B. put it, that the statute so intended. If *a contract* has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication. But unless you get a clear implication of that sort, I think that a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract (emphasis supplied).[54]
>
> In the statutes to which the principle has been applied, what was prohibited was *a contract* which had at its centre — indeed often filling the whole space within its circumference — the prohibited act; contracts for the sale of prohibited goods, contracts for the sale of goods without accompanying documents when the statute specifically said there must be accompanying documents; contracts for work and labour done by persons who were prohibited from doing the whole of the work and labour for which they demanded recompense (emphasis supplied).[55]

These passages are, with due respect, misleading. The right test is what Devlin L.J. stated in *Archbolds (Freightage) Ltd.* v. *Spanglett Ltd.*

This is not the only important point about the case. *Archbolds (Freightage) Ltd.* v. *Spanglett Ltd.*[56] also shows that where the contract is not prohibited by statute the plaintiff can recover. Pearce L.J. said:

> The case has been argued with skill and care on both sides, and yet no case has been cited to us establishing the proposition that where a contract is on the face of it legal and is not forbidden by statute, but must in fact produce illegality by reason of a circumstance known to one party only, it should be held illegal so as to debar the innocent party from relief. In the absence of such a case I do not feel compelled to so unsatisfactory a conclusion, which would injure the innocent, benefit the guilty, and put a premium on deceit.[57]

Second Situation

The second situation is this. The plaintiff and the defendant have separate objects, and the plaintiff's object is unlawful but the defendant's object is lawful.

Here four points arise: (i) a contract prohibited by statute; (ii) mere intention; (iii) an overt step; and (iv) a *locus poenitentiae.*

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53 [1957] 1 Q.B. 267.
54 *Ibid.*, p. 288.
55 *Ibid.*, p. 289.
56 [1961] 1 Q.B. 374.
57 *Ibid.*, p. 387.

If the contract is prohibited by statute, there is no need to go further. The plaintiff cannot recover.

In *Smith* v. *Mawhood*[58] the question was whether a dealer in tobacco who did not have his name painted on his premises as required by statute could recover the price of tobacco sold. Parke B. said that the legislature did not intend to vitiate the contract by reason of a non-compliance, but continued:

> I quite agree, that if it be shewn that the legislature intended to prohibit *any contract*, then . . . the contract is illegal and void, and no right of action can arise out of it (emphasis supplied).[59]

Thus, the question is whether the legislature intends to prohibit the contract.

Alderson B. agreed with Parke B., but went on to ask a different question. Alderson B. said:

> . . . I think the true principle of law is that which has been stated by my Brother Parke. The question is, does the legislature mean to prohibit *the act done* or not? If it does, . . . then the doing of the act is a breach of the law, and no right of action can arise out of it. But here the legislature has merely said, that where a party carries on the trade or business of a dealer in or seller of tobacco, he shall be liable to a certain penalty, if the house in which he carries on the business shall not have his name, &c. painted on it, in letters publicly visible and legible, and at least an inch long, and so forth. He is liable to the penalty, therefore, by carrying on the trade in a house in which these requisites are not complied with; and there is no addition to his criminality if he makes fifty contracts for the *sale* of tobacco in such a house. It seems to me, therefore, that there is nothing in the Act of Parliament to prohibit any act of sale, . . .[60]

There is no inconsistency between the judgments of Parke and Alderson BB. Alderson B. was dealing with a question which Parke B., with due respect, should have dealt with first. Was the plaintiff's object (the sale) unlawful at all? If not, there was no occasion to consider whether the contract was prohibited by statute. Parke B. did not consider whether the plaintiff's object was unlawful.

If the contract is not prohibited by statute, then the question arises, Is mere intention sufficient to preclude the plaintiff from recovering?

In *St. John Shipping Corporation* v. *Joseph Rank Ltd.*[61] Devlin J. said:

> There are two general principles. [Principle 1] The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends upon proof of the intent, at the time the contract was made,

58 (1845) 15 L.J. Ex. 149.
59 *Ibid.*, p. 154.
60 *Ibid.*, p. 155.
61 [1957] 1 Q.B. 267.

> to break the law; [a] if the intent is mutual the contract is not enforceable at all, and, [b] if unilateral, it is unenforceable at the suit of the party who is proved to have it.... [Principle 2] The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute.[62]

Principle 1 deals with one kind of unlawful object only, *viz.*, the commission of a crime. This is clear from the words 'illegal' and 'to break the law.'

Devlin J. then explained the relationship between principle 1 and principle 2. Devlin J. said:

> A significant distinction between the two classes is this. In the former class you have only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is *deliberately* made to do a prohibited act, that contract will be unenforceable (emphasis supplied).[63]

Thus, if the parties agree to commit a crime 'deliberately,' then principle 1 (a) applies. The principle which Brett M.R. stated in *Herman* v. *Jeuchner* comes to the same thing. The only difference is that Brett M.R. distinguished between an illegal consideration furnished by the plaintiff and an illegal promise given by the defendant.

Proceeding to deal with principle 2, Devlin J. said:

> In the latter class, you have to consider not what acts the statute prohibits, but what contracts it prohibits; but you are not concerned at all with *the intent* of the parties; if the parties *enter into* a prohibited contract, that contract is unenforceable (emphasis supplied).[64]

Thus, if the parties agree to commit a crime under a mistake of fact, it becomes necessary to consider whether principle 2 applies. But this is not the only situation where it becomes necessary to consider whether principle 2 applies. Devlin J. said:

> Of course, if the parties *knowingly* agree to ship goods by an overloaded vessel, such a contract would be illegal; but its illegality does not depend on whether it is impliedly prohibited by the statute, since it falls within the first of the two general heads of illegality I noted above where there is an intent to break the law.

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62 *Ibid.*, p. 283. In *Archbolds (Freightage) Ltd.* v. *Spanglett Ltd.* [1961] 1 Q.B. 374 Devlin L.J. repeated principle 1 (at p. 388): 'If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all.' But instead of repeating principle 2, Devlin L.J. said (at p. 388): 'The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute *or is otherwise contrary to public policy*' (emphasis supplied).

63 [1957] 1 Q.B. 267, p. 283.

64 *Ibid.*, p. 283.

> 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* (emphasis supplied).[65]

The words 'a contract made in ignorance of its effect' deal with three types of contract: (i) a contract which is made to carry out a common object agreed upon under a mistake of fact (both parties are 'in ignorance of its effect'); (ii) a contract in which the plaintiff's object is lawful but the defendant's object is unlawful (the plaintiff is 'in ignorance of its effect'); and (iii) a contract in which the plaintiff's object is unlawful but the defendant's object is lawful (the defendant is 'in ignorance of its effect').

Let us now examine principle 1. The operative words are: 'at the time the contract was made.' Thus, principle 1 (a) cannot apply to a case like *Ashmore, Benson, Pease & Co. Ltd.* v. *Dawson Ltd.* In *Archbolds (Freightage) Ltd.* v. *Spanglett Ltd.*[66] Devlin L.J. explained such a case in this way:

> If, for example, Mr. Field [the plaintiffs' traffic manager] had observed that the van had a 'C' licence [which enabled the defendants to carry their own goods but did not allow them to carry for reward the goods of others] and said nothing, he might be said to have accepted a mode of performance different from that contracted for *and so varied the contract and turned it into an illegal one*: see *St. John Shipping Corporation* v. *Joseph Rank Ltd.* where that sort of point was considered (emphasis supplied).[67]

Let us now examine the two limbs of principle 1. In stating principle 1 (a): 'if the intent is mutual the contract is not enforceable at all,' Devlin J. had in mind the situation where the plaintiff and the defendant agreed to commit a crime. Principle 1 (a) is correct so far as it goes. But it is, with due respect, incomplete. It does not deal with the situation of aiding and abetting.

Devlin J. then stated principle 1 (b): 'if unilateral, it is unenforceable at the suit of the party who is proved to have it.' Devlin J. thought of this as the antithesis of principle 1 (a). Principle 1 (b) is qualified by principle 2. In *Archbolds (Freightage) Ltd.* v. *Spanglett Ltd.* Devlin L.J. said:

> *In re Mahmoud* is that sort of case. The statute forbade the buying and selling of certain goods between unlicensed persons. The buyer falsely represented himself as having a licence. It is not said that he so warranted but, if he had, it could have made no difference. Once the fact was established that he was an unlicensed person the contract was brought within the category of those that were prohibited.[68]

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65 *Ibid.*, pp. 287-288.
66 [1961] 1 Q.B. 374.
67 *Ibid.*, p. 393.
68 *Ibid.*, p. 393.

Principle 1 (b) states that mere intention to carry out an unlawful object is sufficient to preclude the plaintiff from recovering. Is principle 1 (b) right? Principle 1 (a) states: 'if the intent is mutual the contract is not enforceable at all.' Principle 1 (b) states the antithesis: 'if unilateral, it is unenforceable at the suit of the party who is proved to have it.' Principle 1 (a) is correct so far as it goes. But, with due respect, the antithesis does not follow. The law is not so harsh.

The plaintiff must have taken an overt step. This view has the support of two cases — *Alexander* v. *Rayson* and *Edler* v. *Auerbach.*

In *Alexander* v. *Rayson*[69] the plaintiff, when letting a flat to the defendant, split up the transaction into a lease and a service agreement. Unknown to the defendant, the plaintiff's purpose in splitting up the transaction into two documents was to evade assessment. The plaintiff brought an action to recover a quarter's instalment under the two documents. The Court of Appeal held that he could not recover. The court was a particularly strong one consisting of Greer, Romer and Scott L.JJ. Romer L.J., delivering the judgment of the court, said:

> du Parcq J. (who came to a different conclusion) considered that the present case was much the same as one in which a party to an agreement enters into it with the intention of altering it at a later date and using the document so altered for his own fraudulent purposes.... He thought that in such a case it was something altogether too remote from the contract itself to say that the contract was illegal. In that we respectfully agree with him. But, with all deference, it seems to us that the case he supposed is fundamentally different from the case now before us. In the former case the document is a harmless one, and can only be rendered dangerous by a subsequent act. We see no reason why, before the commission of that act, the document should not be used for an innocent purpose. *The intention was mental only and no overt step in carrying out the fraudulent intention was taken in the transaction itself.* In the present case, however, the documents themselves were dangerous in the sense that they could be and were intended to be used for a fraudulent purpose, without alteration, and the splitting of the transaction into the two documents was an overt step in carrying out the fraud (emphasis supplied).[70]

Romer L.J. was dealing with an intent to commit a fraud. But the same reasoning would apply to the case which Devlin J. dealt with, the case of an intent to commit a crime.

In *Edler* v. *Auerbach*,[71] which was decided seven years before *St. John Shipping Corporation* v. *Joseph Rank Ltd.*, Devlin J. himself applied the test of an overt step. In *Edler* v. *Auerbach* the relevant provision in the subsidiary legislation was as follows:

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69 [1936] 1 K.B. 169 (case note, (1936) 52 L.Q.R. 156).

70 *Ibid.*, p. 189.

71 (1949) 65 T.L.R. 645 (original version of Devlin J.'s judgment); [1950] 1 K.B. 359 (revised version of Devlin J.'s judgment).

> No person shall, except with the consent of the local housing authority, *use* for purposes other than residential purposes any housing accommodation which has been used for residential purposes at any time since December 31, 1938 (emphasis supplied).

The provision dealt with user, and not letting. We are here concerned with the counterclaim. The defendant let certain premises to the plaintiff knowing that the premises had been used for residential purposes since 31st December 1938 and that it would be a breach of the law to use them for non-residential purposes; and knowing further that the plaintiff, who did not know the facts, intended to use the premises for professional purposes. In certain proceedings which the plaintiff brought, the defendant counterclaimed for arrears of rent. His counterclaim was dismissed. Devlin J. said that the plaintiff was the innocent instrument through which the defendant sought to effect his intention that the law should be broken (by the illegal user). Devlin J. continued:

> Secondly, it is said that all that is shown against the defendant is an intention to break the law, and that is not enough to attract the principle: see *Alexander* v. *Rayson.* I do not think that this is a case of mere intention. The granting of the lease which permitted only professional use was itself an overt step in carrying out the illegal intention which the defendant had already formed. Indeed, when the defendant, having deceived the plaintiff, had granted him the lease, there was nothing left for him to do: the breach of the law would follow naturally the steps which he had taken. *There was more than an intent to break the law: there was an attempt to break it*; . . . (emphasis supplied)[72]

Devlin J. was right to apply the test of an overt step; and he, with due respect, erred in *St. John Shipping Corporation* v. *Joseph Rank Ltd.* when he departed from his previous decision in *Edler* v. *Auerbach.*

There is also some authority, admittedly slight, for the proposition that even after the plaintiff has taken an overt step he still has a *locus poenitentiae.*

The origin of this view is a passage in Mellish L.J.'s judgment in *Taylor* v. *Bowers*[73] which actually does not recognize a *locus poenitentiae* for assumpsit. The passage reads:

> [1] If [a] money is paid or [b] goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or [2] if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that to be done.[74]

In *Alexander* v. *Rayson*[75] Romer L.J., after dealing with the need for an overt step, said:

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72 [1950] 1 K.B. 359, p. 370.
73 (1876) 46 L.J.Q.B. 39 (original version of Mellish L.J.'s judgment); (1876) 1 Q.B.D. 291 (revised version of Mellish L.J.'s judgment).
74 (1876) 1 Q.B.D. 291, p. 300.
75 [1936] 1 K.B. 169.

> The law, it was said, would allow to the plaintiff a locus poenitentiae. *So, perhaps, it would have done, had the plaintiff repented before attempting to carry out his fraud into effect*: see *Taylor* v. *Bowers*. But, as it is, the plaintiff's repentance came too late — namely, after he had been found out. Where the illegal purpose has been wholly or partially effected the law allows no locus poenitentiae: see Salmond and Winfield's Law of Contract, p. 152 (emphasis supplied).[76]

To summarize, in both situations the plaintiff and the defendant have separate objects. In the first situation, which is where the plaintiff's object is lawful but the defendant's object is unlawful, the plaintiff cannot recover if the contract is prohibited by statute. But the plaintiff can recover if the contract is not prohibited by statute. In the second situation, which is the converse of the first, the plaintiff's object is unlawful but the defendant's object is lawful. Here again the plaintiff cannot recover if the contract is prohibited by statute. But if the contract is not prohibited by statute then the plaintiff can recover, unless he has taken an overt step; and even then, it seems, he has a *locus poenitentiae.*

4. *Contravention of a Statute in Performance*

Under this heading both parties enter into a contract for a lawful object, but there is a contravention of a statute in the performance of the contract. There are two situations.

First Situation

The first situation is this. The plaintiff and the defendant enter into a contract for a lawful object but the plaintiff contravenes a statute in the performance of the contract.

The question is not whether *the contract* is prohibited by statute, but whether *recovery* is prohibited by statute.

In *Anderson Ltd.* v. *Daniel*[77] the plaintiffs entered into a contract to sell the defendants fertilizers. The contract was legal. Later the plaintiffs contravened a statute when they delivered the fertilizers without also delivering an invoice giving particulars of the fertilizers. The Court of Appeal held that the plaintiffs could not recover. Bankes and Scrutton L.JJ. decided the case on the narrow ground that the statute was for the buyers' protection. Atkin L.J. did not do so, and his judgment has been criticized as being too wide. But Atkin L.J. drew the distinction between prohibition of the contract and prohibition of recovery. That

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76 *Ibid.*, p. 190. On the view that there is a *locus poenitentiae*, *Cowan* v. *Milbourn* (1867) 16 L.T. 290 (original version of Bramwell B.'s judgment); (1867) L.R. 2 Exch. 230 (revised version of Bramwell B.'s judgment), may be explained as a case where the plaintiff did not repent. Bramwell B. said (L.R. 2 Exch. 230, at p. 236): 'Now it appears that the plaintiff here was going to use the rooms for an unlawful purpose; he therefore could not enforce the contract *for that purpose*, and therefore the defendant was not bound, though he did not know the fact' (emphasis supplied).

77 (1923) 22 L.G.R. 49 (original version of Atkin L.J.'s judgment); [1924] 1 K.B. 138 (revised version of Atkin L.J.'s judgment).

Atkin L.J. drew this distinction after much thought will appear from a comparison of the original version and the revised version of his judgment. In the original version Atkin L.J. said:

> ... [1] The question of the illegality has very often arisen, and I think has generally arisen in respect of the formation of the contract, that is to say, the assent of the parties is given to something which, in itself, is prohibited by Act of Parliament, or is illegal for other reasons. When that arises there can be no question about *the contract being unenforceable*; [2] but again the question may arise in respect of a contract as to the formation of which no complaint can be made, where the illegality arises because the particular mode of performance of the contract adopted by the performing party is in fact prohibited by Act of Parliament, though the executory contract might be performed in a manner which was entirely legal (emphasis supplied).[78]

Atkin L.J. did not say what was the consequence of illegality in performance. But in the revised version Atkin L.J. said:

> The question of illegality in a contract generally arises in connection with its formation, but it may also arise, as it does here, in connection with its performance. In the former case, where the parties have agreed to something which is prohibited by Act of Parliament, it is indisputable that the contract is unenforceable by *either party*. And I think that it is equally unenforceable by *the offending party* where the illegality arises from the fact that the mode of performance adopted by the party performing it is in violation of some statute, even though the contract as agreed upon between the parties was capable of being performed in a perfectly legal manner (emphasis supplied).[79]

The distinction between prohibition of the contract and prohibition of recovery is that between the contract being unenforceable by 'either party' and the contract being unenforceable by 'the offending party.'

How do we ascertain whether recovery is prohibited by statute?

The previous law was discussed by Lynskey J. in *Marles* v. *Philip Trant & Sons Ltd. (No. 1).*[80] Lynskey J. said:

> *Anderson, Ltd.* v. *Daniel* was considered recently in *B. and B. Viennese Fashions* v. *Losane,*[81] which was a curious case. It looked as if the plaintiff had been guilty of sharp practice, if nothing else, because he supplied utility clothing without a mark in performance of a contract which called for non-utility clothing, and then sued for the price. The court followed the decision in *Anderson, Ltd.* v. *Daniel*, and did not extend that decision, as far as I can see from the judgment. [1] JENKINS, L.J., said:
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> > 'It is plain from *Anderson, Ltd.* v. *Daniel* that illegality in the performance of a contract may avoid it although the contract was not illegal ab initio. That being so, one has to

78 (1923) 22 L.G.R. 49, pp. 67-68.
79 [1924] 1 K.B. 138, p. 149.
80 [1953] 1 All E.R. 645 (reversed as to third party proceedings).
81 [1952] 1 T.L.R. 750.

> consider whether the mode in which the contract was performed, or purported to be performed, in this case sufficed to turn it into an illegal contract. I find myself constrained to hold that this was the result.'

What I understand him to say is that it is an illegal contract *from the point of view of the plaintiff, who was the offending person trying to enforce the contract.* He does not say it is illegal ab initio. I do not think that the learned lord justice was there considering the position of the innocent party for whose protection in that particular case the order was made.

[2] HODSON, L.J., quoted with approval the judgment of SCRUTTON, L.J., in *Anderson, Ltd.* v. *Daniel* where he said:

> *'When the policy of the Act in question is to protect the general public or a class of persons* by requiring that a contract shall be accompanied by certain formalities or conditions, and a penalty is imposed on the person omitting those formalities and conditions, the contract and its performance without those formalities or conditions is illegal, and cannot be sued upon by the person liable to the penalties' (emphasis supplied).[82]

Unfortunately, Devlin J. misinterpreted Jenkins L.J.'s words when he decided *St. John Shipping Corporation* v. *Joseph Rank Ltd.*[83] There the plaintiffs agreed to carry for the defendants a cargo of grain from Mobile to Birkenhead. The contract was legal. During the voyage the plaintiffs overloaded the vessel in contravention of statute. In deciding whether the plaintiffs could recover freight, Devlin J. should have considered whether *recovery* was prohibited by statute. Instead he considered whether *the contract* was prohibited by statute, and he held it was not. Devlin J. said:

> On a superficial reading of *Anderson Ltd.* v. *Daniel* 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

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82 [1953] 1 All E.R. 645, p. 649. In *Learoyd* v. *Bracken* (1893) 9 T.L.R. 476 'MR. JUSTICE WILLS said that where there was a precise prohibition or enactment in a statute passed for the benefit of the public generally, the effectual protection of the public would require that this should not be dispensed with, and contracts in contravention thereof might be void. Thus there was the case of printers who failed to put their names on their publications.... But when the provision relied on was found in a Revenue Act, the circumstances would have to be cogent, indeed, to make the Court hold that it had the same effect. The revenue would be protected by the penalty imposed in case of disobedience. That was sufficient. As between broker and client it would be unreasonable to hold... that the transaction would be void and not be enforceable against the broker because he had forborne to send out a broker's note.' The decision was affirmed by the Court of Appeal, [1894] 1 Q.B. 114.

83 [1957] 1 Q.B. 267.

> 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* (emphasis supplied).[84]

We shall see what trouble Devlin J. had.

Today we do not consider whether, in Scrutton L.J.'s words, 'the policy of the Act in question is to protect the general public or a class of persons.' The sole question is whether the statute intends to preclude the plaintiff from recovering.

In *Shaw* v. *Groom*[85] the plaintiff issued the defendant with a rent book which did not comply with statute. The defendant contended that the plaintiff could not recover arrears of rent. The Court of Appeal rejected this contention. Sachs L.J. said:

> What is the correct general approach of a court to the question whether a plaintiff suing on a legal contract is precluded from recovering what would otherwise be due to him because in the course of its performance he has done some act in a manner which a particular statute has enacted to be an offence? In particular, does the mere fact that the act is one without which the contract cannot be performed ('an essential act') *automatically* result in all cases that the plaintiff must fail? . . .
>
> It has been contended that, although there may be different results where an offence is created to protect the revenue, yet, at any rate, in any case where the offence is created for the benefit of the class of persons to whom the defendant belongs the above result is thus automatic.[86]
>
> One must look at the relevant statute or series of statutes *as a whole* and then assess whether the legislature intended to preclude the plaintiff recovering in the action, even when an essential act is under consideration.[87]
>
> Today's generation is dominated by that ever mounting mass of legislative control to which reference has already been made: in support of that control numberless offences have been created each with its appropriate penalty, and it is for the courts to see that this does not result in additional forfeitures and injustices which the legislature cannot have intended.[88]

Second Situation

The second situation is this. The plaintiff and the defendant enter into a contract for a lawful object but the defendant contravenes a statute in the performance of the contract.

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84 *Ibid.*, p. 284.
85 [1970] 2 Q.B. 504.
86 *Ibid.*, p. 520.
87 *Ibid.*, p. 523.
88 *Ibid.*, pp. 523-524.

The plaintiff can recover. This, we have seen, was Atkin L.J.'s opinion in *Anderson Ltd.* v. *Daniel.*

Let us now examine a case where the plaintiff recovered. In *Marles* v. *Philip Trant & Sons Ltd. (No. 2)*[89] the defendants bought a quantity of seeds from the third party and re-sold the seeds to the plaintiff. The seeds were bought from the third party under the description of spring wheat and re-sold to the plaintiff as such. In fact the seeds were winter wheat. The plaintiff recovered damages from the defendants for breach of warranty. The defendants in turn claimed an indemnity from the third party. The third party raised an objection. When the defendants delivered the seeds to the plaintiff they did not deliver a statement of particulars as required by statute. This, contended the third party, turned the contract between the defendants and the plaintiff into an illegal contract and hence the defendants were not entitled to an indemnity. The Court of Appeal held, first, that the contract between the defendants and the plaintiff was not turned into an illegal contract; and, secondly, that the defendants were entitled to an indemnity. Singleton L.J. said this about *Anderson Ltd.* v. *Daniel*:

> While I follow the reasoning that the delivery was a bad, or an incomplete, delivery, I cannot see that the contract became an illegal contract, nor was that point necessary for the case under review. Clearly the purchaser could have sued on the contract.[90]

Later as to the claim for an indemnity Singleton L.J. said:

> Thus the claim of the defendants can be put in this way: 'We have been ordered by the court to pay damages to the plaintiff, and the cause of that was your breach of contract or breach of warranty. It is unnecessary to consider how we performed our contract with the plaintiff; that has nothing to do with the breach of warranty between you and us. The court has ordered us to pay damages, and the responsibility falls upon you.'[91]

> Unless either (1) the contract was an illegal contract, or (2) the damage resulted from the omission, it does not seem to me that the third party can rely by way of answer to this claim upon the fact that the defendants inadvertently omitted to supply to the plaintiff the statement in writing required by section 1 (1) of the Seeds Act, 1920.[92]

In *St. John Shipping Corporation* v. *Joseph Rank Ltd.*[93] Devlin J. referred only to that part of *Marles* v. *Philip Trant & Sons Ltd. (No. 2)* which dealt with the indemnity. Devlin J. said:

> Secondly, he [counsel for the defendants] relies upon the well-known principle — most recently considered, I think, in *Marles* v.

89 [1954] 1 Q.B. 29 (*sub nom. Marles* v. *Philip Trant & Sons Ltd.*); [1953] 1 All E.R. 651 (complete text of Singleton L.J.'s judgment).

90 [1954] 1 Q.B. 29, p. 32. *Contra, Olsen* v. *Mikkelsen* [1937] Q.S.R. 275.

91 [1954] 1 Q.B. 29, p. 34.

92 *Ibid.*, p. 35.

93 [1957] 1 Q.B. 267.

> *Philip Trant & Sons Ltd.* — that a plaintiff cannot recover money if in order to establish his claim to it, he has to disclose that he committed an illegal act.[94]

Devlin J. was unable to fit into his scheme the earlier part of the decision in *Marles* v. *Philip Trant & Sons Ltd. (No. 2)* that the innocent party could recover. This was the result of misinterpreting Jenkins L.J.'s words.

5. *Other Situations*

There are two situations.

First Situation

The first situation is where the plaintiff and the defendant agree to carry out a lawful object but the plaintiff commits a crime in making the contract. As a general rule the plaintiff cannot recover.

In *Berg* v. *Sadler & Moore*[95] there was a contract which amounted to an attempt by the plaintiff to obtain goods by false pretences. Scott L.J. referred to the contract as an 'illegal contract.' Scott L.J. said:

> Here the plaintiff made a contract of purchase from the defendants by fraudulently inducing them to believe that somebody else was the purchaser. On their suspicions being aroused, after the purchase price had been paid, the defendants refused delivery of the goods. How does the plaintiff thereupon frame his action? He says he claims for money had and received upon the total failure of consideration of his contract. The contract was, however, fraudulently induced. In my opinion, he is inevitably invoking the assistance of the Court to enforce that *illegal contract* when he frames his claim in that way, and the maxim [*ex turpi causa non oritur actio*] applies (emphasis supplied).[96]

But there are limits. In *Meyers* v. *Freeholders Oil Co. Ltd.*[97] Martland J. said:

> In the present case I have come to the conclusion that it was not the intention of s.17*a* of the *Security Frauds Prevention Act* to render completely void a trade in securities because it is made at a residence. The general intent of the statute is to afford protection to the public against trades in securities by persons seeking to trade who have not satisfied the Registrar as to their proper qualification so to do. For that reason the registration provisions of s.3 are incorporated in the Act. But s.17*a* is not part of this general pattern, because it applies to registered brokers and salesmen as well as to those who are not registered. As I see it, its purpose is not to prevent trading of an unauthorized kind, but is intended to prevent persons in their own residences from being sought out there by stock salesmen.[98]

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94 *Ibid.*, p. 282.
95 [1937] 2 K.B. 158.
96 *Ibid.*, pp. 168-169.
97 (1960) 25 D.L.R. (2d) 81 (Supreme Court of Canada).
98 *Ibid.*, p. 93.

Second Situation

The second situation is where the plaintiff and the defendant agree to carry out a lawful object but the plaintiff puts himself in a position to perform the contract by committing an illegality. As a general rule the plaintiff cannot recover.

Prevost v. *Wood*[99] was decided before a contract by a married person to marry a third person was considered illegal. There the plaintiff instituted proceedings against her husband for divorce. Pending the hearing, the defendant promised to marry the plaintiff if she obtained a decree, and thereupon immoral relations took place between them. A decree nisi was afterwards granted, the plaintiff concealing the fact of her immoral relations with the defendant. The decree was made absolute. But the defendant failed to marry the plaintiff. The plaintiff brought an action against the defendant for breach of the promise to marry her. Darling J. said that if this plaintiff were to be allowed to maintain this action by having deceived the Divorce Court, it would be allowing an action to be founded on deceit, immorality and fraud. The action was dismissed.

But, again, there are limits. In *McConnell* v. *Commonwealth Pictures Corporation*[100] the court dismissed an action brought by an agent for commission and accounting of profits where the agent had procured a film distribution contract for his principal by bribing a representative of the film producer; but Desmond, Chief Judge, said in passing:

> We cannot now, any more than in our past decisions, announce what will be the results of all the kinds of corruption, minor and major, essential and peripheral.[101]

These then are the situations which have come before the court.

The Rules

Let us now bring together the rules. They are as follows:—

1. Where the plaintiff and the defendant agree to carry out an unlawful object, the plaintiff cannot recover (*Herman* v. *Jeuchner*; *Briggs* v. *Brown*).

2. Where the plaintiff and the defendant agree to carry out an unlawful object after a legal contract has been made, the plaintiff cannot recover (*Ashmore, Benson, Pease & Co. Ltd.* v. *Dawson Ltd.*).

3. Where the plaintiff and the defendant enter into a contract to assist in carrying out an illegal contract, the plaintiff cannot recover (*De Begnis* v. *Armstead*).

4. Where the plaintiff and the defendant enter into a contract to aid and abet a third party to carry out an unlawful object, the plaintiff cannot recover (*Foster* v. *Driscoll*).

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99 (1905) 21 T.L.R. 684.
100 166 N.E. 2d 494 (New York, 1960).
101 *Ibid.*, p. 497.

5. Where the plaintiff and the defendant agree upon a common object under a mistake of law, the plaintiff can recover if the following conditions are satisfied: (i) the object is one which can be achieved either by performing the contract legally or by performing it illegally; (ii) the parties agree on the illegal performance in ignorance of the law; and (iii) the parties learn in time that they have made a mistake of law, and there is no illegal performance (*Waugh* v. *Morris*).

6. Where the plaintiff and the defendant agree upon a common object under a mistake of fact, the plaintiff can recover (*Shaw* v. *Shaw*), unless the contract is prohibited by statute (*Dennis & Co. Ltd.* v. *Munn*).

7. Where the plaintiff aids and abets the defendant to carry out an unlawful object then:
(i) If the aiding and abetting is committed outside the jurisdiction, active participation is required to preclude the plaintiff from recovering (*Holman* v. *Johnson*; *Seymour* v. *London and Provincial Marine Insurance Co.*).
(ii) If the aiding and abetting is committed within the jurisdiction, knowledge is sufficient to preclude the plaintiff from recovering (*Pearce* v. *Brookes*), except in two situations where active participation is required, *viz.*:

(a) Where the plaintiff sells goods to the defendant knowing that the defendant intends to smuggle the goods into a foreign country (*Regazzoni* v. *Sethia (1944) Ltd.*).

(b) Where a solicitor acts in litigation when his client has made a champertous agreement to share the proceeds with another (*In re Trepca Mines Ltd. (No. 2)*).

8. Where the defendant aids and abets the plaintiff to carry out an unlawful object, the plaintiff cannot recover if two things happen: (i) if the defendant knows the plaintiff's unlawful object; and (ii) if the plaintiff has taken an overt step, as distinct from having a mere intention (*Commercial Air Hire Ltd.* v. *Wrightways Ltd.*).

9. Where the plaintiff and the defendant have separate objects, and the plaintiff's object is lawful but the defendant's object is unlawful, the plaintiff can recover (*Archbolds (Freightage) Ltd.* v. *Spanglett Ltd.*), unless the contract is prohibited by statute (*In re an Arbitration between Mahmoud and Ispahani*).

10. Where the plaintiff and the defendant have separate objects, and the plaintiff's object is unlawful but the defendant's object is lawful then:

(i) If the contract is prohibited by statute, the plaintiff cannot recover (*Smith* v. *Mawhood*).

(ii) If the contract is not prohibited by statute, the plaintiff can recover, unless he has taken an overt step (*Alexander* v. *Rayson*; *Edler* v. *Auerbach*); and even then, it seems, he has a *locus poenitentiae* (*Alexander* v. *Rayson*).

11. Where the plaintiff and the defendant enter into a contract for a lawful object but the plaintiff contravenes a statute in the performance of the contract, the question is not whether the contract is prohibited by statute, but whether recovery is prohibited by statute (*Anderson Ltd.* v. *Daniel*; *Marles* v. *Philip Trant & Sons Ltd. (No. 1)*); and this question is to be answered solely by considering whether the statute intends to preclude the plaintiff from recovering (*Shaw* v. *Groom*).

12. Where the plaintiff and the defendant enter into a contract for a lawful object but the defendant contravenes a statute in the performance of the contract, the plaintiff can recover (*Marles* v. *Philip Trant & Sons Ltd. (No. 2)*).

13. Where the plaintiff and the defendant agree to carry out a lawful object but the plaintiff commits a crime in making the contract, as a general rule the plaintiff cannot recover (*Berg* v. *Sadler & Moore*).

14. Where the plaintiff and the defendant agree to carry out a lawful object but the plaintiff puts himself in a position to perform the contract by committing an illegality, as a general rule the plaintiff cannot recover (*Prevost* v. *Wood*).

Here is a set of precise rules. It is impossible to reduce them into a few general principles. But some judges have attempted to do so!

Judicial Generalizations

In *St. John Shipping Corporation* v. *Joseph Rank Ltd.* Devlin J. made a bold attempt to reduce one area of the law (the commission of a crime) into two general principles. Devlin J.'s judgment contains valuable insights but its scheme is, with due respect, confused. Let us review what we have found. First, principle 1 (a) cannot apply to a case like *Ashmore, Benson, Pease & Co. Ltd.* v. *Dawson Ltd.* Secondly, principle 1 (a) is incomplete in that it does not deal with the situation of aiding and abetting. Thirdly, principle 1 (b) is wrong: *Alexander* v. *Rayson*; and *Edler* v. *Auerbach.* Fourthly, the earlier part of the decision in *Marles* v. *Philip Trant & Sons Ltd. (No. 2)* cannot be fitted into the scheme.

Let us examine another judgment. In *Archbolds (Freightage) Ltd.* v. *Spanglett Ltd.*[102] Pearce L.J. said:

> [a] If a contract is expressly or by necessary implication forbidden by statute, or [b] if it is ex facie illegal, or if both parties know that though ex facie legal [c] it can only be performed by

102 [1961] 1 Q.B. 374.

> illegality or [d] is intended to be performed illegally, the law will not help the plaintiffs in any way that is a direct or indirect enforcement of rights under the contract.[103]
>
> If the court too readily implies that a contract is forbidden by statute, it takes it out of its own power (so far as that contract is concerned) 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, [b] to hold those contracts unenforceable which are ex facie unlawful, and also to refuse its aid to guilty parties in respect of contracts [c] which to the knowledge of both can only be performed by a contravention of the statute: see *Nash* v. *Stevenson Transport Ltd.*, or which though apparently lawful are [d] intended to be performed illegally or [e] for an illegal purpose, for example, *Pearce* v. *Brookes.*[104]
>
> This case has been argued with skill and care on both sides, and yet no case has been cited to us establishing the proposition that where [f] a contract is on the face of it legal and is not forbidden by statute, but must in fact produce illegality by reason of a circumstance known to one party only, it should be held illegal so as to debar the innocent party from relief. In the absence of such a case I do not feel compelled to so unsatisfactory a conclusion, which would injure the innocent, benefit the guilty, and put a premium on deceit.[105]

Contract (a), 'a contract... expressly or by necessary implication forbidden by statute,' does not distinguish between prohibition of the contract and prohibition of recovery. Contract (b), a contract 'ex facie illegal,' contract (c), a contract which 'though ex facie legal... can only be performed by illegality,' and contract (d), a contract which 'though ex facie legal... is intended to be performed illegally,' all deal with the same situation, *viz.*, where the plaintiff and the defendant agree to carry out an unlawful object. Contract (e), a contract 'which though apparently lawful' is 'for an illegal purpose,' deals with aiding and abetting. But it does not distinguish between aiding and abetting committed outside the jurisdiction and aiding and abetting committed within the jurisdiction. Contract (f) is a contract which 'is on the face of it legal and is not forbidden by statute, but must in fact produce illegality by reason of a circumstance known to one party only.' In contract (f) the innocent party is not debarred from relief. But it is necessary to add that the guilty party is also not debarred from relief, unless he has taken an overt step; and even then, it seems, he has a *locus poenitentiae.*

The judgments of Devlin J. and Pearce L.J. show how dangerous generalizations are.

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103 *Ibid.*, p. 384.
104 *Ibid.*, p. 387.
105 *Ibid.*, p. 387.

II. MITIGATION BY SEVERANCE

There is a subject which is not even hinted at in the judgments of Devlin J. and Pearce L.J. which we have examined. The subject is severance.

There are two types of severance. They may be called 'true severance' and 'false severance.' True severance is a case where something is severed — cut out — from the contract. False severance is a case where nothing is cut out from the contract.

Let us first examine the cases of false severance. They are an odd collection of cases.

The first case of false severance is this. The defendant inserts a term in the contract which, unknown to the plaintiff, is intended to achieve an unlawful object. Later the plaintiff learns this. Must the plaintiff still comply with the term? If he must, he will become a party to the illegality. The answer is No. The plaintiff can brush aside the term. If we like, we may call it 'severance.' But really the matter is one of mode of performance.

In *Fielding & Platt Ltd.* v. *Najjar*[106] the defendant contended that the contract included a term that the plaintiffs should invoice an aluminium extrusion-press as 'parts for rolling-mill.' Even if there was such a term there was no evidence that the plaintiffs knew of the illegality. Lord Denning M.R. said:

> There is another point: even if there was a term that these goods should be invoiced falsely in order to deceive the Lebanese authorities, I do not think it would render the whole contract void. That term would be void for illegality. But it can clearly be severed from the rest of the contract. It can be rejected, leaving the rest of the contract good and enforceable. The English company would be entitled, despite the illegal term, to deliver the goods f.o.b. English port, and send a true and accurate invoice to the Lebanese buyer. The Lebanese buyer could not refuse the goods by saying 'I stipulated for a false invoice.' He could not rely on his own iniquity so as to refuse payment.[107]

The second case of false severance arises in the following circumstances. First, the plaintiff cannot recover on the contract. Secondly, the plaintiff has a claim arising out of the contract (i) which is founded on an act not prohibited by statute; and (ii) which is a claim distinct from a claim under the contract.

In *Smith* v. *Lindo*[108] the plaintiff, an unlicensed broker, was instructed by the defendant to purchase shares. The plaintiff did so, but the defendant refused to pay for the shares. The plaintiff paid the price

106 [1969] 1 W.L.R. 357.

107 *Ibid.*, p. 362.

108 (1858) 31 L.T.O.S. 132 (affirmed, (1858) 6 W.R. 748 (*sub nom. Lindo* v. *Smith*)).

of the shares, and sued the defendant for the sum which he paid. He also claimed his commission. The court held that the plaintiff could not recover any commission, but he could recover the sum which he paid. Crowder J. said:

> It appears to me that the plaintiff is entitled for [to] the money he has so paid. It appears in the evidence that there is a usage, that a broker employed for the purpose of making such contracts, makes himself a principal with the person with whom he makes that contract. That is the usage. Of course, if this money is paid for the buyer, the buyer must remunerate the broker for money paid on his behalf. That is the usage which has been established and exists. But it seems to me that does not make it [1] part [of] the duty of a broker and [2] part of the contract which is entered into between a person who is a broker and another who desires that he shall purchase shares for him; it is incident to it so far as by the custom there is a usage; money is paid on behalf of the person who has employed the broker; it need not be necessarily paid in the capacity of a broker.[109]

The last case of false severance is where one part of the work done is prohibited by statute but the other part is not.

In *Smith & Son (Bognor Regis) Ltd.* v. *Walker*[110] Somervell L.J. said:

> Let us take a case somewhat simpler than this, a case where there is a lump sum contract for work for, say, £4,000; payments are made from time to time under provisions such as these — say, £2,500 spread over the course of the contract — and when the builder or contractor comes to sue for the balance it turns out that £1,000 worth of the work ought to have been, but was not, licensed. *Perhaps he may have thought that it did not need a licence; but however that may have been,* I am assuming, for the purpose of this example, that £1,000 worth of work was illegal because unlicensed and, therefore, on principles which have been laid down by this court and the House of Lords, no sum could be recovered in respect of it. The builder, therefore, could claim only £3,000 (emphasis supplied).[111]

Let us now turn to true severance.

We have seen from the judgment which Brett M.R. delivered in *Herman* v. *Jeuchner* that where the plaintiff and the defendant agree to carry out an unlawful object one of two things may be illegal: the consideration furnished by the plaintiff or the promise given by the defendant. From this two points arise: (i) whether an illegal consideration furnished by the plaintiff may be severed; and (ii) whether an illegal promise given by the defendant may be severed.

Severance of an illegal consideration furnished by the plaintiff

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109 *Ibid.*, p. 133.

110 [1952] 2 Q.B. 319; [1952] 1 T.L.R. 1089 (fuller text of Somervell L.J.'s judgment).

111 [1952] 2 Q.B. 319, p. 324.

The report of *Fetherstone and Hutchinson's Case*[112] reads:

> In an action upon the case, the plaintiff declared, that whereas one Hill had recovered in an action of debt against J.S. 10*l.* upon which a capias was awarded against J.S. that by force thereof he was arrested [by the plaintiff], and being under arrest, the defendant [1] in consideration that the plaintiff would suffer the said J.S. to go at large circa negotia sua, and to go to his own house, and [2] also in consideration of 2*d.* paid [by the plaintiff] to the defendant, he promised to pay to the plaintiff the said 10*l.* It was holden by the Court, a void promise within the statute of 23 H.6.[113] For, the consideration to let a prisoner go at large is not lawful or good; and if part of the consideration be not good, the whole is naught, and so it was adjudged.

The plaintiff furnished as consideration (i) the release of J.S.; and (ii) the payment of 2d. The defendant promised to pay £10. The defendant's promise was 'a void promise within the statute of 23 H.6.' That was sufficient to decide the case, and the last sentence was unnecessary. But the last sentence gave rise to the opinion that an illegal consideration furnished by the plaintiff could not be severed.

This opinion was expressed by Tindal C.J.[114] *Shackell* v. *Rosier*[115] was a case where the plaintiffs furnished as consideration (i) the publication of a libel; and (ii) the defence of the action brought for the libel. The defendant promised to indemnify the plaintiffs. The declaration was set out in Tindal C.J.'s judgment:

> 'That the defendant, [1] in consideration of the premises [the publication of the libel], and [2] that the said E. Shackell and W. Shackell, the now plaintiffs, would defend the said action, undertook and faithfully promised the said plaintiffs to save harmless and indemnify them from and reimburse them all payments, damages, costs, charges, and expenses which they should or might incur, bear, pay, sustain, or be liable for, by reason of their as so aforesaid publishing the said statement and paragraph, and of their said action.'[116]

Tindal C.J. said:

> If, upon the other hand, you do not reject the part of the declaration referred to ['in consideration of the premises'], — and for my part I do not see how it can be rejected, — you let in that other objection, namely, that what you published was a libel against the party respecting whom it was published, and in the publishing and inciting to publish which all are principals. In this view of the case, the court do say that the parties act together in committing a breach of the law, and they make such breach a part of the consideration for their promise. It is, however, said, that this [the

112 (1590) 3 Leon. 208; 74 E.R. 637.

113 23 Henry VI, c. 9 (1444).

114 N. S. Marsh, 'The Severance of Illegality in Contract,' (1948) 64 L.Q.R. 230, 347, at pp. 238-239.

115 (1836) 5 L.J.C.P. 193.

116 *Ibid.*, p. 198.

> publication of the libel] may be rejected, because it was a breach of the law. No doubt there are cases in which two considerations for a promise may be found, and in which, if one of those considerations is impossible, or if it is of a nature which is not seen through or understood, the promise will, in such case, be referred to that consideration which is plain, certain, and specific. All the cases lay down the distinction which is admitted to exist where the consideration is void, and where it is illegal.[117]

Tindal C.J. then cited *Fetherstone and Hutchinson's Case.*

Let us preface the next case with a passage from Windeyer J.'s dissenting judgment in *Brooks* v. *Burns Philp Trustee Co. Ltd.*[118] The passage reads:

> That our law should still treat covenants by deed differently from other promises in writing may seem to be today a regrettable historical survival — a relic of a very distant past, and of the distinction in somewhat later times between covenant, or debt, and assumpsit as forms of action .... But it is not for any court administering the common law to shut its eyes to a seal and in impatience to treat words of covenant as if they were promises which, *in the absence of consideration,* the law would not enforce (emphasis supplied).[119]

Consideration does not figure in covenant or in debt on a bond.

Lound v. *Grimwade*[120] was about a conditional bond and a mortgage which was given as collateral security for the bond. Kay J. ordered two issues to be tried. The order was set out in Stirling J.'s judgment:

> 'Whereas the plaintiff John Adams Lound affirms, and the defendant William Lott Grimwade [trustee in bankruptcy] denies, that the bond and indenture, both dated the 13th Oct. 1881, in the indorsement of the writ mentioned, were obtained by the bankrupt William Lush Hiscock from the plaintiff John Adams Lound [1] without good and sufficient *consideration* and [2] by duress, and the judge considering it desirable that such issue should be tried by the judge, it is ordered that the same be tried accordingly by the judge, and set down among the actions for trial with witnesses' (emphasis supplied).[121]

In the order the word 'consideration' was used in the loose sense. On the issue of consideration, Stirling J. said that the consideration was partly illegal, and concluded:

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117 *Ibid.*, pp. 198-199.

118 (1969) 121 C.L.R. 432.

119 *Ibid.*, p. 464. The writer owes Professor D. Roebuck a debt of gratitude for drawing his attention to this authority.

120 (1888) 39 Ch.D. 605; (1888) 59 L.T. 168 (fuller text of Stirling J.'s judgment).

121 (1888) 59 L.T. 168, p. 169.

> As part of the consideration is illegal it follows that the whole is bad: *Fetherstone* v. *Hutchinson*; *Waite* v. *Jones*; *Shackell* v. *Rosier*.[122]

Thus, Stirling J., using the word 'consideration' in the strict sense, held that as part of the consideration was illegal the whole was bad.

In view of *Shackell* v. *Rosier* and *Lound* v. *Grimwade* we must conclude that it is impossible to sever an illegal consideration furnished by the plaintiff.

Severance of an illegal promise given by the defendant

In *Bourke* v. *Blake*[123] the consideration furnished by the plaintiff, who lived in county Galway, was a promise to give up his plan to move to county Kerry and instead to move to Ballyglass in county Mayo and there set up in business in a house to be provided by the defendant. The defendant made the plaintiff four promises: (i) to build him a house; (ii) to lease him certain lands; (iii) to procure him to be appointed postmaster of Ballyglass (this promise was illegal); and (iv) to procure him the office of coach and car agent in Ballyglass. The question arose whether the plaintiff could sue on the legal promises. Monahan C.J. said:

> We have been referred to the authorities upon this point, and find that they all clearly prove that if there be several considerations for a contract, an illegality in any portion, whether separate and distinct or not, of what was done or to be done by the plaintiff, vitiates the contract, and he cannot maintain an action against the defendant, although the act to be done by the defendant may be legal. But it [is] said that the converse is not true. We cannot find any grounds, either in law or sense for such a distinction, nor any authority for saying, where there is one good consideration [promise by the defendant] and one illegal consideration [promise by the defendant], that there the plaintiff may maintain an action though the defendant could not.[124]

From this case we must also conclude that it is impossible to sever an illegal promise given by the defendant.

But the court has devised better methods of severance. There are two methods: (i) the severance of an illegal transaction which constitutes a separate transaction; and (ii) the severance of an illegal element which is outside the core of the contract. Both mitigate the rule that where the plaintiff and the defendant agree to carry out an unlawful object, the plaintiff cannot recover.

Severance of an illegal transaction which constitutes a separate transaction

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122 (1888) 39 Ch. D. 605, p. 613.
123 (1857) 7 I.C.L.R. 348.
124 *Ibid.*, p. 354.

In *Mosse* v. *Killick*[125] the plaintiff and the defendant were both clergymen of the Church of England. They entered into an agreement which consisted of two separate transactions: (i) in consideration of the plaintiff's presenting the defendant to a living the defendant promised to hand over to the plaintiff the rent which he would receive from a lease of the rectory house; and (ii) in consideration of the plaintiff's allowing certain removable fixtures in the rectory house to remain the defendant promised to pay a sum of money for them. The first transaction was simoniacal and expressly made void by statute, and consequently a claim for the rent failed. But a claim under the second transaction succeeded. Grove J. said:

> I do not say that all the cases are wholly consistent, but they really go to this, that where the consideration is incapable of apportionment, and one part is void, the whole is void; but here I think the consideration is separable.[126]

When Grove J. said: '... but here I think the consideration is separable,' he was using the word 'consideration' to describe collectively the separate transactions. They could be severed.

The test of a separate transaction was also recognized in two cases which went the other way.

The first case is *Hopkins* v. *Prescott*.[127] There in consideration of the plaintiff's promising (i) to sell his business to the defendant, which business included that of sub-distributor of stamps and collector of assessed taxes; and (ii) to cease to carry on such business and to introduce the defendant to such business, the defendant promised to pay the plaintiff the sum of £300, payable by instalments. When the plaintiff sued for an instalment, the defendant contended that the agreement was one for the sale of an office. Wilde C.J. said:

> The declaration sets out an agreement; and the first question is, does it set out a contract which is single and entire, *or one severable in its nature, and treating of matters unconnected with and independent of each other*? It seems to me that the agreement is one entire contract, though it embraces several distinct acts (emphasis supplied).[128]

The plaintiff therefore could not recover.

The second case is *Napier* v. *National Business Agency Ltd.*[129] There in consideration of the plaintiff's promising to serve as the defendants' secretary and accountant, the defendants promised to pay him (i) a salary of £13 a week; and (ii) £6 a week for 'expenses.' The remuneration was split up to evade income tax, both parties knowing

125 (1884) 44 L.T. 149.
126 *Ibid.*, p. 151.
127 (1847) 16 L.J.C.P. 259.
128 *Ibid.*, p. 263.
129 [1951] 2 All E.R. 264.

that, except on very exceptional occasions, the plaintiff would not incur any expenses. The plaintiff was summarily dismissed and claimed payment in lieu of notice at the rate of £13 a week for a certain period. The Court of Appeal held that he could not recover. Evershed M.R. said:

> The contract is, to my mind, not severable. *It cannot properly be treated as consisting of two separate and distinct bargains*, and, therefore, although it is true that the plaintiff sues only in respect of £13 a week, he is really seeking to enforce a contract which is tainted to the extent I have mentioned. It being so tainted, I think that the court will not enforce it at his suit (emphasis supplied).[130]

Severance of an illegal element which is outside the core of the contract

In *Kearney* v. *Whitehaven Colliery Co.*[131] the plaintiffs entered into a contract with the defendant whereby they employed him as a collier. The plaintiffs sued the defendant for quitting his employment without giving fourteen days' notice as required by the contract. The defendant contended that the contract was illegal because it provided for a mode of making deductions from wages which was contrary to statute. A. L. Smith L.J. said:

> [1] If the consideration for an agreement is tainted with illegality, in whole or in part, every promise founded on that consideration must fail; [2] but if the consideration is not tainted with illegality, in whole or in part, and there are several promises, *a*, *b*, *c*, and *d*, depending on it, although promise *d* may be illegal, nevertheless promises *a*, *b*, and *c*, if not otherwise open to objection, are valid and binding upon the person making them. *Here the consideration moving from the master to the workman is an agreement by the master to employ him*, and the workman, in consideration that the master will employ him, promises that he will serve the master, and will not leave his employment without giving fourteen days' notice. *The consideration moving from the workman to the master is his agreement to serve the master.* Both considerations — namely, from the master to the workman, and from the workman to the master — are good. It follows that, though the illegal promise in respect of the deductions from wages cannot be enforced by either party to the agreement, nevertheless the promise by the workman not to leave his employment without giving fourteen days' notice, in which there is nothing illegal, is founded upon a good consideration, and can be enforced against him by the master (emphasis supplied).[132]

In the lines emphasized A. L. Smith L.J. used the word 'consideration' to describe the core of each set of promises. The illegal promise was outside the core, and could be severed. This would leave the contract good. Similarly, Lord Esher M.R. said:

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130 *Ibid.*, p. 266.

131 (1893) 62 L.J.M.C. 129 (original versions of the judgments of Lord Esher M.R. and A. L. Smith L.J.); [1893] 1 Q.B. 700 (revised versions of the judgments of Lord Esher M.R. and A. L. Smith L.J.).

132 (1893) 62 L.J.M.C. 129, p. 136.

> Now the contract here is a contract of employment. The consideration on the one side is, 'If you will enter into my employment [this being the consideration moving from the master] [,] I will make you one, two, or more several promises.' The consideration on the other side is, 'If you will take me into your employment [this being the consideration moving from the workman], I will make you one, two, or more several promises.' Therefore on both sides there is consideration which stands without any blemish whatsoever. *On the one side there is the consideration, 'I will take you into my employment'; on the other, 'I will enter into your employment.'* There is a stipulation in the contract which is illegal in itself, and cannot therefore be supported by the good consideration; but there are other promises not illegal in themselves which can be supported by the consideration which is perfectly good (emphasis supplied).[133]

Next, in *Dillon* v. *Nash*[134] there was a contract for the sale of a business together with vacant possession of the business premises. The contract contained a clause which provided that should the vendor be able to give early vacant possession an additional £25 would be paid by the purchaser to the vendor on the giving of vacant possession. Sholl J. said:

> In my opinion, even if this clause is certain, and illegal, and if the consequences of illegality are not limited to penalties and recovery of the 25*l.* if paid, the matter should be dealt with by holding that it is a *superadded* and severable provision, dealing with a particular contingency which never arose, and not affecting the operation of the remaining (*and principal*) terms of the contract (emphasis supplied).[135]

Sholl J. distinguished between the 'principal' terms and a 'superadded' provision.

Lastly, in *Keeton* v. *Graham*[136] the plaintiff entered into a contract to sell a piece of land to the defendant. The contract gave the defendant the option of requiring from the plaintiff the grant of a right of way over certain adjoining land of the plaintiff. When the defendant was sued for repudiating the contract he contended that the contract was illegal because it was contrary to statute to grant a right of way without the prior consent of the local authority. Tompkins J. said:

> It seems to me that the option to give the right of way is *subsidiary* to the *main* purpose of the agreement.... In my opinion the contract is severable and if the option regarding the right of way is illegal as being a breach of s.180 then I think it should be deleted without affecting the validity of the rest of the agreement (emphasis supplied).[137]

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133 [1893] 1 Q.B. 700, p. 711.
134 [1950] V.L.R. 293.
135 *Ibid.*, p. 298.
136 [1964] N.Z.L.R. 99.
137 *Ibid.*, pp. 106-107.

Tompkins J. distinguished between the 'main' purpose of the agreement and a provision 'subsidiary' to such purpose.

Three Maxims

Thus, we have seen that there is a set of precise rules on recovery, and the possibility of mitigation by severance. When deciding whether or not a plaintiff can recover the court has always, consciously or unconsciously, adopted the approach of examining the plaintiff's conduct: *ex dolo malo non oritur actio* (or *ex turpi causa non oritur actio*). This is why the actual decision is inevitably right, even if the generalizations are wrong. Both on recovery and severance, the law has adopted a practical approach. We must also adopt a practical approach. Three maxims will remind us to do so:

1. Beware of generalizations;
2. Examine the plaintiff's conduct; and
3. Remember severance.