RELATIVE UNENFORCEABILITY AND IMPLIEDLY PROHIBITED CONTRACTS

The doctrine of statutory illegality as it has been traditionally and widely understood is designed to identify, so to speak, contracts which are void because they are either expressly prohibited by statute or prohibited by necessary implication. The question which is addressed in this article is whether the doctrine of statutory illegality can ever operate so as to make a contract not void, but relatively unenforceable, *i.e.* enforceable by one party but not by the guilty party.

I. INTRODUCTION

A CONTRACT is said to be void[1] by virtue of statutory illegality when statute expressly or by necessary implication prohibits the making or carrying out of such contract. Where that happens neither party can enforce the contract[2] and it is immaterial that the party seeking to enforce the contract is innocent of the illegality. In contrast, a contract is merely unenforceable by virtue of common law illegality. If the subject matter of that contract or the very purpose of it is contrary to good morals or public policy, neither party can enforce it.[3] But that result does not necessarily and universally follow in all contracts tainted by common law illegality as opposed to statutory illegality. There are, it has been said, many categories of common law illegality in which the contract is enforceable by the innocent party although not by the guilty party.[4] Some relevant examples are where:-

(i) the contract is to do something which the statute forbids;[5]

(ii) the contract though lawful on its face is to effect a purpose rendered illegal by statute;[6]

* My thanks to Jack Beatson, Fellow of Merton College, Oxford for help and suggestions.

1 For distinction between void and unenforceable, see below at p. 329.

2 *Per* Gibbs A.C.J. in *Yango Pastoral Co. Pty. Ltd.* v. *First Chicago Australia Ltd.* (1978) 139 C.L.R. 411,413: "It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy it needs qualification, because it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable…."

3 See generally Treitel, *Law of Contract* (6th ed. 1983), at pp. 364-370.

4 See *e.g.* M. Furmston, "The Analysis of Illegal Contracts" (1965-66) 16 U. Tor. L. J. 267; E.K. Teh, "Bringing Assumpsit on Illegal Contracts" (1971/72-74) 4 U. Tas. L.R. 219; R. Buckley, "An Examination of the Circumstances Rendering Contracts Unenforceable for Illegality" Oxford D.Phil. Thesis (1973).

5 Such as the commission of a crime: *Bostel Bros. Ltd.* v. *Hurlock* [1949] 1 K.B. 74 (evasion of building licensing statutes); *Bigos* v. *Boustead*[l951] 1 All E.R. 92 (evasion of exchange control legislation).

6 *Langton* v. *Hughes* (1813) 1 M. & S. 593 where the subject matter of the contract was used for a purpose contrary to an 1802 Act.

(iii) the contract though lawful according to its own terms is performed in a manner rendered illegal by statute;[7]

In all these cases, some notion of relative unenforceability will be seen to apply. Generally, the innocent party who has laboured under a mistake of fact concerning facts giving rise to the illegality will be able to enforce the contract, but not if the mistake is one of law.[8] Moreover, in some cases a suit by the guilty party will also be possible.[9]

But the question arises whether a similar result may be reached not by application of the rules of common law illegality but by principles of statutory interpretation, which are said to underlie the doctrine of statutory illegality.[10] Is it possible to construe a statute as not expressly or impliedly prohibiting a contract but as providing that though the guilty may not sue on it, yet the innocent party may? If so the doctrine of statutory illegality would not be the narrow one of simply making void a contract but may result in relative unenforceability. There would of course be an overlap with common law illegality. For example, in some cases both the rule of common law illegality and statutory interpretation may lead to the conclusion that the innocent party under a mistake of fact can enforce the illegal contract. But there would also be differences because, in other cases the common law illegality rule may say that the innocent party under a mistake of law may not maintain a contract action but statutory interpretation says otherwise. And of course the position of the guilty party is *ceteris paribus.* The question posed is also important where statute declares that it shall be an offence to make a contract without certain conditions and formalities but provides that the contract so made shall be enforceable by the innocent but not the guilty party. Is the fact of illegality then immaterial? Or will it be possible to introduce, apart from statutory interpretation, the rules of common law illegality so that the innocent party may be able to sue on the contract only if he has made a mistake of fact as to the illegality or that the guilty party shall nevertheless be entitled to an action if he does not need to rely on his illegality?

Chitty on Contracts contains a purported statement of the law which suggests that statutory relative unenforceability exists in a particular type of case. The Malaysian Court in *Beca (Malaysia) Sdn. Bhd.* v. *Tan Choong Kuang*[11] has apparently applied it, or rather misapplied it. Hobhouse J. in *Phoenix General Insurance Co. of Greece S.A.* v. *Halvanon Insurance Co. Ltd.*[12] has also recently evolved a new approach permitting relative unenforceability with which the Court of Appeal seems to agree. This paper argues that the proposition in Chitty is wrong, that not only have the Malaysian and Singapore

[7] *St John Shipping Corp.* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267; *Ashmore, Benson Pease & Co. Ltd.* v. *Dawson Ltd.* [1973] 1 W.L.R. 828.
[8] See generally Treitel, *op. cit.*, pp. 366-370.
[9] See *St John Shipping Corp.* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267.
[10] An example of where this is expressly provided for is s. 40(1) of the Consumer Credit Act 1974 under which a regulated agreement with an unlicensed moneylender is not illegal but only unenforceable against the debtor unless the Director of Fair Trading orders otherwise. Use of the term "doctrine" follows R.A. Buckley, "Implied Statutory Prohibition of Contracts", (1975) 38 M.L.R. 535.
[11] [1986] 1 M.L.J. 390 (S.C.); (H. H. Lee C.J. (Borneo), Wan Suleiman & S.C. Seah J.J.).
[12] [1986] 1 All E.R. 908.

courts overlooked the error, but they have also misapplied the proposition, and that Hobhouse J.'s innovative approach is not withoutdifficulties.

II. CHITTY ON CONTRACTS

A. *Source of Problem*

The relevant statement in Chitty is as follows:-[13]

> "… 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, the contract and its performance without those formalities or conditions is illegal, and cannot be sued upon by the person liable to the penalties. But the other party to the contract is *not deprived of his civil remedies* because of the criminal default of the guilty party." (emphasis added).

The problem with the above passage is that if taken out of context it can be read as saying that where there is only unilateral prohibition (as opposed to bilateral prohibition) then although the party prohibited cannot enforce the contract, the "innocent" party can. Regard to the context reveals that no such doctrine of relative unenforceability was intended to be laid down. The first part is a proposition from the judgment of Scrutton L.J. in *Anderson Ltd.* v. *Daniel,*[14] a decision of a very strong Court of Appeal on the effect of section 1(1) of the Fertilizers and Feeding Stuffs Act 1906. That section provided that the seller had to furnish the buyer with a statutory invoice upon penalty of summary conviction. The Court of Appeal held that the object of the statute was to protect buyers from fraud. Hence, non-compliance with the requirement not only rendered the seller liable to the criminal penalty but made the sale illegal so as to preclude the vendor from suing for the price.

Anderson Ltd. v. *Daniel* was unquestionably regarded by the Court as a case of implied prohibition. No importance was attached to the fact that only one party, the seller, was prohibited from selling without also supplying an invoice. Nor was it considered material that the contract was not illegal in formation although illegal in performance.[15]

[13] Chitty on Contracts (25th ed. 1983), para. 1152.

[14] [1924] 1 K.B. 130. That might at first blush seem like a harsh decision because there was no illegality in the formation of the contract; the illegality was merely in the performance of it. The fact however was that the statutory invoice could not be drawn up without expensive chemical analysis; so as Bankes L.J. remarked, the probability was that the statute was intended to prevent people dealing at all in the artificial manures where for some reason it was impossible to have an analysis.

[15] One can also infer that the important thing is not whether the contract is illegal as formed as opposed to illegal as performed. As Bankes L.J. put it, it is enough to show that the vendors failed to perform it in the only way in which the statute allows it to be performed. Or as Delvin J. has expressed it in the *St. John Shipping* case the real question is whether the statute impliedly prohibits this contract as formed or as performed.

B. *Class Protection versus Revenue Protection*

The Court of Appeal in *Anderson Ltd.* v. *Daniel* clearly accepted and applied the distinction between statutes protecting a class or the general public as opposed to those which are designed to yield revenue. The Court seems to have thought that class protecting statutes make void all contracts within their reach. Nevertheless, the march of authority since the case has manifestly rejected the notion that class protection is a conclusive test. In *Shaw* v. *Groom,*[16] also a Court of Appeal decision, Harman L.J. said of the test:[17] "That that is one test of course we would all agree, but I do not think that can be the only test. The only test is whether the statute impliedly forbids the contract to be sued on." Sachs L.J. in a luminous judgment rejects it entirely, citing *Smith* v. *Mawhood*[18] in support; for though the statute there was to raise revenue, yet neither Parke B. nor Alderson B. thought the fact worth any attention. Moreover, on principle, the test reflects one aspect of public policy whereas there are many other aspects, such as the desirability of courts being seen as assisting statute enforcement and the requirement of public policy in the wider sense of not crippling the commercial life of commercial men operating in a multiplicity of regulations. Sachs L.J. accordingly and for good reason thought that the propositions (especially of Scrutton L.J.) in *Anderson Ltd.* v. *Daniel* were stated too widely.

In the light of more recent cases,[19] to state the proposition of Scrutton L.J. without qualification is to suggest that whenever a statute requires conditions and formalities for the protection of a class or the general public, a contract without those is impliedly prohibited. This cannot be correct.

C. *Availability of Civil Remedies to Innocent Party*

The second part of the passage states that the other party to an impliedly prohibited contract is not deprived of his civil remedies on the ground of the criminal default of the guilty party. The words "civil remedies" are ambiguous. If civil remedies include a right on the part of the innocent party to sue on the contract, that would be manifestly wrong. The important case of *Re Mahmoud and Ispahani*[20] involved a plaintiff seller, who was licensed to sell and sold linseed oil to the defendant buyer. The defendant however was not licensed to buy, and the sale therefore contravened the Seeds, Oils and Fats Order 1919 which provided that "a person shall not *buy or sell*... except with a licence issued by the Food Controller." (emphasis added) The plaintiff subsequently sued the defendant for damages for non-acceptance of delivery. It was held by a very strong Court of Appeal that he had no claim because the contract was prohibited. This decision has been criticised as being unsatisfactory because the plaintiff seller would

16 [1970]2Q.B. 504.
17 *Ibid,* at p. 518.
18 (1845) 14 M. & W. 452.
19 Indeed a contract has been held illegal although it only violated a revenue protection statute: *Napier* v. *National Business Agency Ltd.* [1951] 2 All E.R. 264.
20 [1921] 2 K.B. 716. Also *J.M. Allan (Merchandising) Ltd.* v. *Cloke* [1963] 2 Q.B. 340 and *J. Dennis & Co. Ltd.* v. *Munn* [1949] 2 K.B. 327.

have had a good defence to a criminal prosecution for selling to a unlicensed buyer, *viz.* absence of *mens rea* because in fact the plaintiff was tricked into selling to the defendant by the defendant's assurance that he had a licence. Alternatively it has been distinguished as a case of double as opposed to unilateral prohibition. But in truth the fact that the Court of Appeal was not impressed by the plaintiff's lack of *mens rea* shows that the result would have been the same had the statute merely provided for unilateral prohibition on the buyer's part. It would therefore seem incontrovertible that even an innocent party cannot sue to enforce a prohibited contract.

If civil remedies encompass a right to restitution where the law recognizes its existence, that would be correct. It is well settled that the innocent plaintiff is not precluded from restitution where the statute making the contract illegal is for his protection.[21] If civil remedies are intended to include any other legal effects, that would be incorrect because a prohibited contract is not only unenforceable, it is also void. True, the proposition that a prohibited contract is void seems to be no more than *obiter dicta.* There seems to be no case in which that proposition constitutes the ratio although *Oram* v. *Hutt*[22] comes close to being such a case. In that case one McNicholas made slanderous remarks against certain highly placed union officials. The union resolved that their officials should take legal proceedings in their own names against McNicholas and that they would be indemnified against costs by the union. The general secretary, Mr Johnson, and another commenced proceedings and obtained judgment against McNicholas. McNicholas however could not pay and the union purported to pay Johnson £775 towards his costs. This was an action brought by a member of the union against the executive committee and trustees of the union for a declaration that the payments under the indemnity would be *ultra vires* and for an order against the solicitors of Johnson to repay the £775 which the union had paid towards Johnson's costs. The Court of Appeal held that the indemnity agreement was illegal for maintenance and ordered the repayment of the £775. If so, that must be because the Court of Appeal regarded the agreement as being void so that no title in the money could pass to the solicitors.[23] However it is not very clear whether maintenance should be regarded as a case of statutory illegality or common law illegality.[24] So *Oram* v. *Hutt* is not as strong a decision as it appears to be. Moreover the case might be explained on another ground, *viz.* that no title passed to the solicitors because the payments were *ultra vires* payments.

But it is suggested that there have been far too many statements that a prohibited contract is void for a contrary position now to be ta-

[21] Such cases as *Kiriri Cotton Co. Ltd.* v. *Dewani* [1960] A.C. 192; *Jacques* v. *Golightly* (1776) 2 WB. 1 1073; *Browning* v. *Morris* (1778) 2 Cowp. 780; *Barclay* v. *Pearson* [1893] 2 Ch. 154. If the illegality in the contract has not been created for his protection, the innocent party though innocent, will not be entitled to restitution unless the effect of the void contract is that title to property remains with him. Such are the cases where the innocent party is denied recovery of payment for services rendered by a unlicensed contractor.

[22] [1914] 1 Ch. 98.

[23] Had the money been paid to Johnson instead of his solicitors it is arguable that title would have passed by delivery. See text at p. 332.

[24] Because maintenance was until 1967 both a common law and statutory offence. See 3 Edw. 1, c. 25, 28; 13 Edw. 1.c. 49.

ken. If then a prohibited contract is void for illegality it cannot create future nor alter existing legal relationships nor have implications for third party relationships.[25] So, for example, the innocent party would not have an action based on the tort of inducing breach of contract where the contract is void *ab initio*.[26] So also, it is suggested, property cannot pass. Thus the commonly accepted notion that property can pass under an illegal contract fails to distinguish sufficiently between a contract illegal by virtue of statutory illegality and one illegal by virtue of common law illegality. Where the case is one of statutory illegality, property can only pass by delivery as in *Scarfe* v. *Morgan*[27] for example. If common law illegality is the case, property can of course pass because at most the contract is only unenforceable. This was precisely what happened in the well-known cases *of Singh* v. *Ali*[28] and *Belvoir Finance Co. Ltd.* v. *Stapleton*[29] both of which involved common law illegality in that the common purpose of the parties was to evade the law. It is only *Bowmakers Ltd.* v. *Barnett Instruments Ltd.*[30] that appears to suggest that property can pass under a void contract. Professor Treitel's suggestion that it is possible that the contracts expressly provided that failure to pay any instalment should *ipso facto* determine the contracts and entitle the owner to recover the hired property does not entirely work because if the contracts there were void, no effect could be given to such a term anyway. One answer — though it is a lame suggestion — is that there was no specific finding that the contracts were in fact illegal and void.

What then are these civil remedies of which the innocent party is not deprived? Apart from the restitution remedy, these remedies, if they exist, must be contractual. It seems moreover that Chitty has contractual remedies in mind because no restitution cases are cited; nor for that matter are the cases on passing of property.

Chitty cites in the accompanying footnote three cases but these upon examination fail to establish the existence of any other civil remedies, contractual or otherwise. Of the three cases, *Anderson Ltd.* v. *Daniel* itself was concerned only with a suit by the guilty party. The statute there in question expressly provided that the offence created was without prejudice to any civil liability of the guilty party. Scrutton L.J. said: "But I read those words… as referring to the civil liability of the person who has broken the contract"; in other words that the imposition of a penalty does not relieve the vendor from any obligation he may be under to pay damages.[31] In the light of express statutory provision, it might have been inferred that the statute did not prohibit

[25] *Per* Lord Edmund Davies in *Orakpo* v. *Manson Investments Ltd.* [1977] 3 All E.R. 1, 15-16:- "The Infants Relief Act 1874 rendered void where the Moneylenders Act 1927 rendered unenforceable and,… the reported decisions show that the difference can be vital. Thus, in the former case the lender obtained nothing in return for her loan, whereas in the latter the lender obtained a valid legal charge …" Another consequence would seem to be that a void contract cannot transfer title to property, but the cases seem to suggest it can. Whether in an appropriate case the innocent party can claim subrogation is not clear from *Orakpo* v. *Manson Investments Ltd.*

[26] Although no authority yet exists.

[27] (1838) 4 Ml & W. 270; *Simpson* v. *Nichols* (1838) 3 M. & W. 240; *Elder* v. *Kelly* [1919]2K.B. 179.

[28] [1960] A.C. 167.

[29] [1971] 1 Q.B. 210.

[30] [1945] K.B. 65.

[31] [1924] 1 K.B. 138, 148.

the contract in question, only a suit by the guilty party, so that the innocent party would not be deprived of his civil remedies. But that was not the decision and Scrutton L.J. could have envisaged a situation where the guilty party found himself liable to a third party other than the innocent party to the contract.

The case *of Maries* v. *Philip Trant & Sons Ltd.*[32] is also cited in support by Chitty. There section 1(1) of the Seeds Act 1920 required sellers under penalty of conviction to deliver to buyers a statement of particulars. The plaintiff sellers omitted to do this when they sold seeds as Fylgia seeds to certain farmers. The seeds turned out to be Vilmorin seeds and completely unsuitable for spring sowing. The sellers were held to be liable to a farmer for his loss and now claimed damages from their suppliers. The real question was therefore whether a third party could set up as a defence the sellers' illegality. The Court of Appeal quite rightly held that the third party could not. If one looks to the policy of the statute, which presumably was to protect buyers of seeds, that policy was in no way undermined by the decision. It was the suppliers' negligence and breach of their contract that was the source of all the trouble.

However, in *obiter dicta,* Singleton L.J. stated that the decision in *Anderson Ltd.* v. *Daniel* that the contract became an illegal contract was unnecessary, adding that clearly the purchaser there could have sued on the contract. Denning L.J. likewise said, "Nor was the contract rendered unlawful simply because the seed was delivered without the prescribed particulars. If it were unlawful the farmer himself could not have sued on it as he has done."[33] But why was the farmer allowed to sue on it? That is the crucial question and it would have helped to know the ground on which the farmer had been held entitled to sue.

Maries v. *Philip Trant* can be explained as a case in which the sellers did not have to rely on their illegal contract in order to be able to sue the suppliers. *Maries* v. *Philip Trant* shows that the fact that a contract is prohibited by statute does not necessarily mean that any other contract which is in some tenuous way connected with it must also be unenforceable. Suppose however the contract between the supplier and the sellers had contemplated the contracts between the sellers and the farmers. Then it might be argued that the former contract is so connected with the latter that the illegality in the latter would also affect the former. No doubt logic would demand that if the original contract is void *ab initio* all other contracts dependent on it must likewise fall with it. Parker J. in the *Bedford Insurance Co. Ltd.* v. *Instituto de Resseguros do Brasil*[35] takes this view. On this view a guarantee of a void contract would itself be void.[36] Nevertheless, it is arguable that whether a contract between a third party and the guilty party is enforceable or not depends on whether the guilty party needs to rely on his illegality and not on any *a priori* consideration. There is no reason

32 [1953] 1 All E.R. 645.
33 *Ibid*., at p. 658.
34 [1961] 1 Q.B. 374.
35 [1985] Q.B. 966.
36 What the rule is is uncertain; see *Coutts & Co.* v. *Browne-Lecky* [1947] K.B. 104.

why the approach in *Thackwell* v. *Barclays Bank PLC*[37] should not apply, so that the court will look at the quality of the illegality relied on and the proximity of the illegal conduct to the claim maintained. It will then determine (a) whether there has been illegality of which the court should take notice and (b) whether affording the plaintiff the relief sought would in all circumstances be contrary to public policy because the court would be seen to be indirectly assisting or encouraging the plaintiff in his criminal act. If so, even assuming that the first contract had contemplated the second, it would not follow that because of the illegality in the second, the first must also be illegal. *Maries* v. *Philip Trant* would still be explicable without having to depend on the lawfulness of the second contract.

In the last case cited by Chitty, *Ailion* v. *Spiekermann,*[38] the question was whether a vendor who contracts to sell a lease for an illegal premium can be compelled to assign the lease to the purchaser without the premium. One of the objects of the Rent Act 1968 plainly was to protect a purchaser from a vendor seeking to exploit the financial value of the controlled rent and security of tenure established by Parliament. Thus a vendor who exacted a premium was guilty of an offence under the Act, notwithstanding that he has merely offered furniture at a price which he knew or ought to have known was unreasonably high. A material factor also was the additional protection given by reason of the fact that any premium was recoverable by the person by whom it was paid.

Significantly Templeman J. regarded the passage in Chitty as encouraging him as to the right approach but as of little assistance to him on the principal issue which he framed as one of severance. He saw neither difficulty nor objection in authority in severing the illegal premium from the assignment and ordered the assignment accordingly. So the case can hardly be authority for the proposition that the other party to an impliedly prohibited contract is nevertheless not deprived of his civil remedies. If the illegal part may be severed, what is left to be enforced by the other party is simply a legal contract.

III. Application To Unlicensed Contractor Cases

One may observe that the proposition in Chitty is stated with respect to contracts required by statute to be accompanied by certain formalities and conditions ("sale cases"). Would the position be different with respect to the unlicensed contractor cases? Typically the plaintiff having performed his contract of services or the vendor having delivered the goods is refused payment by the other party on the ground that the plaintiff was not licensed at the time of the making of the contract. There are of course differences between the unlicensed contractor cases and the sale cases. One difference is that the connection between contravention of the licensing statute and the

[37] [1986] 1 All E.R. 677. See now *Eurb-Diam Ltd.* v. *Bathurst* [1988] 2 All E.R. 23. This argument may seem at first blush to contradict the proposition that a void contract cannot create any other relationship. But the point is that the *ex turpi causa* defence is based on a principle of public policy, and more particularly on whether it would be an affront to the public conscience not to take cognisance of the illegality. This principle could be seen as transcending strict *a priori* considerations.

[38] [1976] Ch. 158.

contract made is not as intimate as in the sale cases where the connection is usually obvious. So, for example, where statute forbids carrying on a trade or business save with a licence, contravention of that statute does not necessarily suggest that all the contracts which could conceivably be made by the unlicensed contractor, including contracts of employment of subcontractors, must be affected. But this seems to be a difference in degree and not of kind.

Another difference may be gleaned from the availability of restitution in class protection cases. In *Lodge* v. *National Union Investment Co.*[39] Parker J. accepted that as an exception a plaintiff for whose protection the illegality of the contract has been created could sue for restitution. But applying the cases on statutes dealing with usury, which he regarded as analogous to section 2 of the Moneylenders Act 1900,[40] he imposed terms on the recovery of the securities mortgaged to the unregistered defendant moneylender. On the other hand, in the Privy Council case of *Kasumu* v. *Baba-Egbe*[41] Lord Radcliffe delivering judgment refused to impose terms on the recovery of possession of mortgaged premises from a moneylender who failed to keep a book as required by section 19 of the Nigerian Moneylenders Ordinance. There is of course a difference between section 2 and section 19. The contravention of section 2 makes the contract of loan illegal and void by necessary implication. Section 19 expressly declares that a contract of loan in which no book is kept is unenforceable. But as Lord Radcliffe observes,"... it is not inherently satisfactory that the law should accord to the moneylender who has committed an offence and made an illegal contract more favourable treatment than one who has done no more than enter into an unenforceable bargain."[42] What was satisfactory to Lord Radcliffe was the fact that the statutes on usury could not be seen as analogous to section 19 (and by implication section 2). Those statutes were concerned with the intrinsic nature of the contract made whereas section 19 was concerned with the conditions under which it was made. He says:-

> "What the law [*i.e.* the usury statutes] penalised and made void was a particular kind of grasping contract; and it was evidently felt by equity judges … that they were doing nothing that contravened the policy of the Acts if they insisted that the price of their remedies should be the return of the principal money and a reasonable rate of interest, so long as no effect was given to those

[39] [1907] 1 Ch. 300.

[40] S. 2 provides that a moneylender shall register as one, shall carry on business in his registered name, shall not enter into any agreement or take any security in the course of his business otherwise than in his registered name and that the failure to comply constitutes an offence. (Equivalent to s. 1 of the 1927 Act). Contrast s. 6 which regulates the form of moneylenders' contracts, providing that no contract for repayment or security given shall be enforceable unless a note or memorandum in writing of the contract is made and signed personally by the borrower.

[41] [1956] 3 All E.R. 266.

[42] *Ibid*., at p. 269. On the other hand the guilty party to an illegal contract will be liable to prosecution or a fine. It is not true to say that he is accorded more favourable treatment. If the guilty party may have terms in his favour, the same must be so with respect to the unenforceable contract, not because otherwise the guilty party will be accorded more favourable treatment but because logically the two contracts are equally unenforceable.

> elements of the loan in which the usury itself consisted... [On the other hand, the provisions of s 19]... seem to assume that no loan that is not contemporaneously recorded can be established with sufficient certainty to be recognised by law. If a court, therefore, were to impose terms of repayment as a condition of making any order of relief, it would be expressing a policy of its own... which is in direct conflict with the policy of the Acts themselves."[43]

This passage then, speaks of a distinction between the vice of content and the vice of conditions. In this area of law the link between restitution and enforceability is very real because restitution will be denied where the effect of it is equivalent to enforcement of the contract. So the question arises whether the distinction between content and conditions is a general one, applicable also to enforceability. If there is that distinction, the sale cases would fall within the former whereas the unlicensed contractor cases would fall within the latter. For example, suppose that the plaintiff sells underdimensioned bricks to the defendant in contravention of statute, the reason that the plaintiff cannot enforce the contract is the vice of content. But often enough the reason that a unlicensed operator cannot enforce his contract is the vice of conditions.[44]

However, even in the restitution cases, the distinction would not appear to be capable of wide application. There are cases where courts have denied the recovery of payments made to unlicensed contractors for services rendered.[45] If the distinction between content and conditions were universally true, recovery of payments should have been allowed. On the other hand, there are cases where, without question, the vice is that of content, but courts have allowed restitution to the unlicensed contractor on the basis of *quantum meruit*.[46] Furthermore, suppose that statute makes unenforceable a contract to sell underdimensioned bricks. That would be a vice of content. Suppose further that the plaintiff who has received the bricks and paid the defendant the price seeks to recover his payment. Would

[43] *Ibid*., at p. 271. The Moneylenders Act 1927 would be an example of a statute containing both types of vices; contrast s. 1 and s. 6.

[44] One objection that may be raised is that if this distinction exists, then it was misapplied in the very case that points to its existence. In that case the defect in the contract, so to speak, might be regarded as being a defect of content and not of conditions. Non-registration in contravention of s. 2 would be a vice of condition: *Cornelius* v. *Phillips* [1918] A.C. 199. A usurious contract would fall on the other side as being defective in content. So also a contract to sell underdimensioned bricks in contravention of statute as in *Law* v. *Hodgson 2* Camp. 147. But what about a requirement that a contract for the sale of butter must be accompanied by certain specification (see *Forster* v. *Taylor* (1837) 5 B. & Adol. 187) or that a contract of loan must be accompanied by a book of record? The failure to satisfy the statutory requirements in such cases might properly be regarded as a vice of content and not conditions where the purpose of the requirements is to prevent fraud. Where the purpose is merely to record the terms of the contract the position may well be different. Lord Radcliffe in *Kasumu's* case seems to have regarded the purpose of s. 19 as bound up with "(assuming) that no loan that is not contemporaneously recorded can be established with sufficient certainty to be recognised at law."

[45] See generally Palmer, The Law of Restitution, (1978) Vol. II, S. 8.1, p. 169.

[46] *E.g*. where the contract is void for champerty; see *Grell* v. *Levy*. (1864) 16 C.B.N.S. 73. Atkin L.J. in *Wild* v. *Simpson* [1919] 2 K.B. 544 expresses the view that there can be no *quantum meruit* claim and that if *Grell* v. *Levy* decided otherwise it is wrong and should be overruled. The United States courts allow *quantum meruit* to the attorney at law; see *Stearns* v. *Felker* 28 Wisc. 594.

a court order recovery of payment subject to the plaintiff returning the defendant the bricks? Arguably not, because the policy which such a statute is aimed at is the prevention of fraud. Hence, allowing the seller to recover his bricks would be to facilitate perhaps a second fraud on a second buyer. Lord Radcliffe's distinction cannot therefore be of general application. There is nothing inherently less or more offensive about a vice of content as opposed to a vice of conditions.

No mention of a possible distinction between the unlicensed contractor and the sale cases is discernible in the cases. The same test of public protection was invoked from very early times. In *Johnson* v. *Hudson*[47] the plaintiff sued for the price of cigars delivered to the defendant and recovered the price although it was argued that he had not possessed a licence as required by 29 Geo. III c. 68 which enacted in section 70 that every person who deals in tobacco shall before he deals therein take out a licence. By virtue of section 72 this licence had to be renewed yearly on pain of a penalty of £50. In reaching the result, the court observed that there was *inter alia* no fraud on the revenue nor any clause making the contract illegal but that there was at most a breach of a mere revenue regulation. This reasoning was taken up in *Brown* v. *Duncan*[48] which was an action to enforce a guaranty that the defendant had given in order that one Glennie might secure a contract of agency from the plaintiffs. The defendant argued that the action was barred because contrary to statute one of the names of the plaintiffs had not been entered in the application for licensing as distillers and because further and contrary to statute, one of the plaintiffs was at the material time carrying on business as a retailer of spirits within two miles of the distillery. The court however upheld the action on the ground that the statute infringed was intended merely to raise revenue and not to protect the public.

Now in fact it may be noticed that *Brown* v. *Duncan* was not a proper occasion for drawing a distinction between public protection and revenue provision. The case could have been decided on other grounds, namely that whatever might be the position between the plaintiffs and Glennie, it was different in the case of the contract of guaranty. The contract of guaranty was to guarantee the plaintiffs against the bankruptcy of Glennie. The event having arisen, the illegality was irrelevant. Enforcing the contract of guaranty could neither advance nor undermine the policy of the statute infringed.

A second difficulty in the case is the court's reliance on *Law* v. *Hodgson.*[49] That case was explained as involving a statute for the public protection; that although the statute there was also designed to raise revenue it was enough that one of its objects was the protection of the public. But *Law* v. *Hodgson* was a sale case and it is not immediately obvious that an unlicensed operator case must receive similar treatment.

47 (1809) 1 East 180.
48 (1829) 5 B. & C. 93.
49 (1809) 2 Camp. 147.

Nevertheless, after *Brown* v. *Duncan,* the test of public protection found ready acceptance in the unlicensed contractor cases; so that by the *time Anderson Ltd.* v. *Daniel*[51] came to be decided the Court of Appeal could draw indiscriminately from both categories of cases.

When *Shaw* v. *Groom*[52] rejected the public protection test as the conclusive test in the sale cases, it follows that the same must be true of the unlicensed contractor cases. This is seen to be so in the Australian High Court case of *Yango Pastoral Co. Pte. Ltd.* v. *First Chicago Australian Ltd.*[53] Moreover, if Scrutton L.J.'s proposition truly involved relative unforceability, then where in an unlicensed contractor case the element of class protection (and unilateral prohibition) is found, we should be constrained to apply the supposed proposition of relative unenforceability in the *Yango Pastoral* case.

The facts of that case were these. The respondents lent a large sum of money to the first appellants which was secured by a mortgage and personal covenants given by the second appellants. The first appellants having defaulted, the respondents sued the second appellants on their personal covenants of guarantee. Their defence was that the action was barred by illegality in that the respondents were at the material time carrying on an illegal banking business in contravention of section 8 of the Banking Act 1959. The High Court unanimously held that the respondents were entitled to sue upon the guarantee.

Gibbs A.C.J. explained the unlicensed contractor cases as those in which the unsuccessful plaintiffs did the very thing which statute forbade them to do unless authorised.[54] However, he held that section 8 was not directed at contracts at all whether they were distinctive of the business of banking or not. He thought that a banking business involved all manner of contracts including contracts of employment and it was impossible that the legislature could intend to invalidate these contracts. He rejected the suggestion that loan contracts were different because unlike employment contracts they were central to the business of banking. The notion of what was central, he said, was too vague and unsatisfactory. Mason J. on the other hand took the view that the unlicensed contractor cases were cases of implied prohibition because the contracts there impugned were distinctive of the business which statute prohibited from being carried out save by licensed contractors. The loan contract in question was therefore not void because it was by no means distinctive of the banking business. Both approaches are unsatisfactory for this reason. Supposing that instead of the loan contract the actual contract of deposit fell to be considered. Applying Gibbs A.C.J.'s reasoning, there can now be no valid

[50] Although in *Cope* v. *Rowlands* (1836) 2 M. & W. 149, Parke B. said: "And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract."

[51] [1924] 1 K.B. 130.

[52] [1970]2Q.B. 504.

[53] (1978) 139 C.L.R. 410.

[54] There is some ambiguity as to whether Gibbs A.C.J. regarded these cases as based upon express prohibition; see p. 416 where he says: "Those cases are clearly distinguishable from the present, where in making and performing the contract the parties have not done or contracted to do anything which the Act expressly forbids."

distinction between the hypothetical case and the unlicensed contractor cases. Applying Mason J.'s reasoning, no one can doubt that the contract of deposit is distinctive of the banking business. It would seem therefore to follow that both judges must hold that section 8 impliedly prohibits the contract of deposit though not the loan contract. And nothing is clearer than that both judges accepted as beyond controversy that section 8 did not prohibit the contract of deposit. It was not rational, as Mason J. put it, to suppose that Parliament intended to inflict such dire consequences on innocent depositors. Nor was it rational to suppose that Parliament intended to place innocent borrowers at an advantage while penalizing innocent depositors. Put another way, whether the attempts by both judges to distinguish the unlicensed contractor cases succeed can be tested with respect to the contract of deposit. The attempted distinctions prove elusive in that respect.

Nevertheless the importance which the Court on the whole[55] attached to considerations of public policy is evident. Whatever their points of departure from one another, there is broad agreement amongst the judges along these lines. If it were true that section 8 prohibited the contract of loan by the unauthorised bank, it would also prohibit the contract of deposit. But it was not rational to suppose the legislature intended such a policy regarding the contract of deposit. If then the contract of deposit was not prohibited, it follows that the contract of loan was also not prohibited. This conclusion was reinforced by the unlikelihood that the legislature intended to invalidate the wide range of commercial and other securities which are brought into existence in the course of carrying on a banking business.

Implicit in the foregoing reasoning is this, that if the statute did prohibit the contract of deposit, then neither contracting party, whether innocent or guilty, would be able to sue on the contract. When the Court could so easily have held that the proper conclusion was that the contract of deposit would be enforceable by the innocent depositors but not by the unauthorised bank, it never occurred to them to do so. So if the proposition in Chitty were true, this Australian case would have gone on a false assumption. Secondly, only one of the High Court judges who decided the *Yango Pastoral* case bothered to discuss seriously the public protection or revenue producing test. He came to the conclusion that "[i]t would be contrary to reason and principle to allow one circumstance to override all other considerations in the interpretation of a statute."[56] If the public protection test were still conclusive the contract in that case should have been unenforceable (which it was not) because without controversy the statute infringed was one designed for class protection.

IV. Another Attempt At Relative Unenforceability

The story would not be complete without a discussion of the recent case *of Phoenix General Insurance Co. of Greece S.A.* v. *Halvanon Insurance Co. Ltd.*,[57] because it would appear that that case, although not

[55] See *e.g.* Jacobs J., at p. 434.
[56] *Ibid.*, at p. 414, *per* Gibbs A.C.J.
[57] [1986] 1 All E.R. 908.

relying on the proposition in Chitty nor the cases that are there cited, has come up with an approach to statutory illegality that produces the same result. The plaintiffs carried on business in London as an insurance company, authorised under section 83(4) of the Insurance Companies Act 1974 to carry on marine aviation and transport insurance business. Following an amendment to the 1974 Act, the plaintiffs' business came to be authorised under new categories and the result was that their aviation contingency business became unauthorised business. The defendant reinsurers argued that that rendered the original contracts illegal and consequently precluded the plaintiffs from suing on their contracts of reinsurance.

Only two years earlier the English courts dealt with the same issue in two cases, *Bedford Insurance Co. Ltd. v. Instituto de Resseguros do Brasil*[58] and *Stewart* v. *Oriental Fire and Marine Insurance Co. Ltd.*[59] In the first case Parker J. held that the reassured could not recover under the contract of reinsurance because of the illegality of the original contracts of insurance. In the second Leggatt J. held that the reassured could recover under the contract of reinsurance from the reinsurer who was unauthorised to carry on business. Both Parker and Leggatt J.J. agreed that the Act was intended to protect potential assureds who did insurance business with insurance companies in England. But their decisions were based on opposing views of the effect of the Insurance Company Act 1981, not materially different from the 1974 Act in this respect.

In the *Phoenix Insurance* case Hobhouse J. having considered that Leggatt J. had relied mainly on the *Yango Pastoral case,* turned to address it in these terms:–

> "The passages I have quoted from Gibb A.C.J.'s judgment make a clear, and … appropriate distinction between transactions to which the offence under the statute is merely casual or adventitious, or as said in the English cases, "collateral", and those where the relevant party was doing the very thing which the statute forbade him to do unless he was authorised. The 1974 Act specifically and expressly defines the offending business as being that of effecting and carrying put insurance contracts of the relevant type. In view of such legislation it cannot be said that the relevant contracts had no more than a casual or adventitious relationship to what was forbidden; they constituted the very business which the statute forbade unless authorised."[60]

Hobhouse J. considered therefore that Leggatt J. had been wrong to rely on the *Yango Pastoral* case because there the contract sued upon bore no more than a casual or adventitious relationship to the forbidden business. With respect, this is to misunderstand the judgment of Gibbs A.C.J. When Gibbs A.C.J. mentions that the illegality there is something merely casual or adventitious, he is not saying that that is why the contract of loan is not prohibited. But he has come to that conclusion by a different route and then he asks whether the guilty party can enforce the contract of loan which is clearly now

[58] [1985] Q.B. 966.
[59] [1985] Q.B. 988.
[60] [1986] 1 All E.R. 908, 918d–e.

not prohibited. And he answers that the guilty party can because the illegality is merely casual or adventitious.[61] The more serious objection to Hobhouse J.'s peremptory dismissal of the *Yango Pastoral* case is the failure to consider whether as a matter of policy in the wider sense the statute was meant to forbid a suit on the contract. This however the Australian High Court did with respect to the contract of deposit which must surely constitute the very business which the statute forbade.

But the really interesting thing is that having concluded that the statute did prohibit the contracts in question, he was bound to but did not hold that the contract in question must be illegal and unenforceable by both parties. Hobhouse J. continued however as follows:–[62]

> "… there is nothing illegal in the contracts *per se;* at the most they become, to a greater or lesser extent, unenforceable. Since the essence of the present situation is that the illegality is unilateral … the illegality does not affect the whole of the transactions but only the part of the plaintiffs in them."

This is very striking indeed. Parker J. was at least being logical when having decided that the contracts were illegal he refused to allow any suit directly based upon them. Hobhouse J. declined on this part of the matter to follow Parker J., holding that the original assureds being innocent parties would have been entitled to enforce their contracts of insurance against the plaintiffs for two reasons:–

(i) what the innocent assureds would be enforcing was not the primary obligation of performance but the secondary obligation to pay damages in the absence of performance; and

(ii) the court could so easily have implied a term in the contract that the insurance company would obtain the requisite authority with the result that the company could be sued for damages for failure to perform that obligation.

The effect of this line of reasoning, which is unprecedented and springs from confounding statutory illegality with common law illegality, is to suggest that even where a contract is impliedly prohibited, the other party is not deprived of his civil remedies.

The following criticisms may be made. First, whether the innocent assureds are enforcing a primary obligation or a secondary obligation surely is immaterial. If the contract is illegal, the primary obligation clearly is unenforceable because to do so would be contrary to the policy of the statute. *A fortiori* also the secondary obligation. Secondly, no doubt the implication of a term may be something of a fiction but it is another thing to turn it into a reason for making an award.

On appeal,[63] the Court of Appeal held that by virtue of the transitional provision in paragraph 2 of Schedule 4 the plaintiffs continued to be authorised after the material date to write aviation

[61] (1978) 139 C.L.R. 411, pp. 417–418.
[62] [1986] 1 All E.R. 908, 918h.
[63] [1987] 2 All E.R. 152, *sub nom. Phoenix General Insurance Co. of Greece S.A.* v. *Administratia Asigurarilor de Stat.*

contingency business and accordingly the original primary insurance contracts were not illegal. Nevertheless, in view of the importance of the illegality issue the Court of Appeal thought it desirable to express a view. The Court accepted that whether a contract was prohibited by necessary implication was a matter to be decided by resort to policy considerations. In the judgment, there is also welcome recognition that class protection itself does not of necessity lead to unenforceability. In the case of moneylending transactions, it does. In the case of insurance contracts it does not because:–

> "In cases of moneylending the contract leaves virtually every subsequent obligation to be performed by the borrower, whereas in contracts of insurance the position is precisely the opposite. Once the contract has been made and the premium paid, every relevant obligation is imposed on the insurer. The statutory prohibitions are designed to protect the insured by seeking to ensure that undesirable persons are not authorised to carry on insurance business and that authorised insurers remain solvent. Good public policy and common sense therefore require that contracts of insurance, even if made by unauthorised insurers, should not be invalidated. To treat the contracts as prohibited would of course prevent the insured from claiming under the contract and would merely leave him with the doubtful remedy of seeking to recover his premium as money had and received."[64]

Nevertheless the Court felt unable to apply the above reasoning to the instant case because this was a case not of prohibition by necessary implication but of express prohibition. The relevant statute prohibited "carrying out contracts of insurance". In a case of express prohibition there therefore is no room for the introduction of policy considerations. So like Hobhouse J. in the Court below, the Court of Appeal fails to appreciate that "it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable."[65] The Court of Appeal fails to appreciate that the *Yango Pastoral case* may well be an example of such rare cases. Moreover the Court of Appeal omits to comment on the relative unenforceability approach taken by Hobhouse J. and it is conceivable that the approach will present itself again in a case not of express prohibition but of implied prohibition.

IV. *BECA (MALAYSIA) SDN. BHD* v. *TAN CHOONG KUANG*[66] AND A HALF WAY HOUSE?

Beca's contribution to all this is in possibly endorsing the correctness of Chitty's proposition for the local courts; secondly, in misapplying the proposition and thereby creating what seems like a halfway house between relative unenforceability and enforceability by both parties.

The facts in *Beca's* case, as found by the trial judge, were simple. The appellants were housing developers who at the time they entered

[64] *Ibid*., at p. 175.
[65] See note 1 above. The Court of Appeal also misunderstands the judgment there. Kerr L.J. at p. 178 says: "Furthermore, it was held that the contracts in question, a loan, mortgage and guarantee, were not central to the business of banking."
[66] [1986] 1 M.L.J. 390.

into provisional agreements with the respondent buyers were not in possession of a developer's licence, in contravention of certain rules made under the Housing (Control and Licensing of Developers) Enactment 1978. That was the first offence. The second offence was the failure to make a deposit with the Comptroller of a sum of money equivalent to 5% of the estimated costs of the development. At the time of the provisional agreement[67] the buyers paid a deposit of $20,000 which they sought to recover by this action on the ground that, the developers were not authorised to collect the deposit. On that ground, which he accepted, the learned president of the Sessions Court ordered the refund and that judgment was affirmed by both the High Court and the Supreme Court.

Understanding the judgment of the Supreme Court is not an easy task. The passage from Chitty[68] occurs after a somewhat inconclusive discussion of cases which are mostly incidental.[69] The only case of relevance was the Singapore High Court case *of Mary-Ann Arrichiello* v. *Tanglin Studio Pte. Ltd.*[70] in which Chua J. held that the Housing Developers (Control & Licensing) Act merely prescribed a method of performance by a housing developer for the protection of purchasers, so that the contract in question was not illegal but was enforceable by the innocent plaintiff. Chua J. appears to have relied on the proposition in Chitty and some of the ensuing remarks will therefore apply to that judgment. First, it is possible that in *Seed's* case the Court did not rely on that passage or regarded it as irrelevant because *Beca's* case was not a case of implied prohibition of contract. The difficulty with this is that if the contract was not prohibited, on what basis could the court allow the contract to be rescinded? If so, would the court be correct in ordering rescission? Would it not be better to follow *Ailion* v. *Spiekermann* and simply sever the booking fee altogether? The problem with the severance approach would be that it leaves the developers in a position to enforce the contract, which was presumably what the Court wanted to avoid. The Court said:–

> "Since the Enactment is meant to be for the benefit of the house buyers it would seem in our view, proper and right to regard the provisional agreement as binding but voidable at the instance of the house buyers. They should be given the option of either enforcing or repudiating the agreement depending upon the market situation of the housing development in the country. If the provisional agreement were to be declared illegal it might in a given situation prove profitable to the developers, for instance, when there is a housing boom. In which case it would be absurd to say that the Enactment is to protect the buyers from exploitation when it is actually aiding the developers to enrich themselves. So the avoidance of the agreement would cause inconvenience and injury to innocent members of the public. To declare the agreement binding but voidable at the instance of the buyers

67 Held to be a binding contract in *Daiman Development Sdn. Bhd.* v. *Mathew Lui* [1981] 1 M.L.J. 56(P.C.)
68 The court cited para 1022 of the 24th edition.
69 Such as *Kin Nam Development Sdn. Bhd.* v. *Khan Daw Yau* [1984] 1 M.L.J. 256 and *Yeep Moi* v. *Chu Chin Chua* [1981] 1 M.L.J. 14.
70 [1981] 2 M.L.J. 60.
71 Cap. 130, 1985 (Rev. Ed.).

> would provide no incentive to the developers to do any act before obtaining a proper licence."[72]

The solution adopted is ingenious but bereft of authority. If a contract is legal, it is enforceable by both parties according to its terms. Unless the grounds for rescission exist, the court cannot arbitrarily allow rescission, even on terms. As a matter of logic also, a court cannot say on the one hand that the offence of the developers has no spillover contractual effects but that on the other hand he will be penalised if the market has turned down because the buyer will be allowed to rescind the contract. This is nonetheless just the sort of halfway house solution that is attractive and perhaps justifiable in the Malaysian context, given section 66 of the Contracts Act 1950. That section provides that:–

> "when an agreement is discovered to be void … any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

One might justify the granting of rescission as in line with the policy of section 66 as a person ought not to be worse off under a contract that has been found to be legal than under an illegal contract. Indeed even if section 66 had not been available a well settled line of cases[73] establishes that the parties were not in *pari delicto* because the statute infringed against was designed to protect a class of which the plaintiff was a member. The plaintiff would have got his money back. The significant point is that by holding the contract voidable the plaintiff secures the additional advantage of being able to affirm the contract in a rising market and this actually well serves the policy to be achieved. So then *Beca's* case would be bad law though unimpeachable in result.

It is also possible that the court relied on the second part of the passage that the other party is not deprived of his civil remedies although it seems to have held that this was not a case of implied prohibition. If so it has omitted to observe that the proposition is made in the context of implied prohibition of contract. More likely, the Court did rely on the passage for the proposition that the developer was prohibited from enforcing the contract and especially for the proposition that the other party is not deprived of his civil remedies, meaning enforcement of the contract.

If this third explanation is correct, then we are saying that where a statute contains a unilateral prohibition, the correct conclusion may well be that the contract is unenforceable by the guilty party but enforceable by the innocent. We then arrive at relative unenforceability *via* statutory interpretation. Indeed there may already be an hint of this in the Court of Appeal judgment in *Phoenix General Insurance Co of Greece S.A.* v. *Administratia Asigurarilor de Stat.*[74] Kerr L.J. thought that with respect to the Food Act 1984, which imposes penalties on persons who prepare, sell or otherwise deal with food in prohibited circumstances, that customers who are the victims of food poisoning clearly could sue on their contracts for damages for

[72] [1986] 1 M.L.J. 390, 395.
[73] See *Kiriri Cotton Co. Ltd.* v. *Dewani* [1960] A.C. 192.
[74] [1987] 2 All E.R. 152.

breach of contract and that there could be no objection raised on the ground that such contracts are impliedly prohibited by statute and void. Supposing that the customer had discovered the poison after accepting delivery of the food. Would Kerr L.J. have allowed a suit on the contract? In his food poisoning example, would he have allowed the seller to sue for the price? It is not clear. But it is perfectly plausible that the seller should not be allowed to sue for the price.

VI. CONCEPTUALLY?

There is a hint that Professor Treitel in The Law of Contract accepts the notion of relative unenforceability for he treats cases such as *Archbolds (Freightage) Ltd.* v. *S. Spanglett Ltd.*[75] as cases where the innocent party could sue although the illegality was statutory and he says later on that where the statute exists for class protection purposes, its object will obviously not be furthered by denying a remedy to an innocent member of that class. It is clear enough that Professor Treitel means contractual remedies because he says in a footnote, "The contract cannot of course be enforced against a member of the protected class: *Johnson* v. *Moreton* [1980] A.C. 37".[76] But Professor Treitel is then bound to treat *St. John Shipping Corp.* v. *Joseph Rank Ltd.*[77] which concerns the position of the guilty party as likewise a case of statutory illegality in the sense of relative unenforceability, so that statutory interpretation alone determines whether the guilty party may sue on the contract. Contrary to and inconsistent therefore with his treatment of the position of the innocent party, he says that an illegal contract cannot be enforced by a guilty party. And he explains *St. John Shipping Corp.* v. *Joseph Rank* as a case of illegal performance, where a party is not thereby guilty merely because he performs in an unlawful manner.[78]

It is suggested that traditionally the doctrine of statutory illegality serves to isolate the case where the contract is void. It does not follow that if the contract is not prohibited and hence not void, that therefore the contract must be valid and enforceable by both parties. That is why in the *Yango Pastoral* case notwithstanding the contract was not prohibited, both Gibbs A.C.J. and Mason J. passed on to consider whether the guilty party could enforce the contract. Gibbs A.C.J. thought that it could because the illegality was merely casual or adventitious. Mason J. considered whether the guilty party was prevented by the principle of *ex turpi causa non oritur actio* and concluded that it was not.

So it seems that if a contract is not caught by the doctrine of statutory illegality, the matter falls to be resolved according to the rules of common law illegality. There cannot be a principle of construction whereby the statute is found to provide for relative unenforceability. If relative unenforceability results, it will be by

[75] [1967] 1 Q.B. 374.
[76] *Op. cit.,* at p. 368, footnote 55.
[77] [1957] 1 Q.B. 267.
[78] Buckley in "Illegality and Conceptual Reasoning" (1983) 12 Anglo-American L.R. 280 argues that Devlin J.'s approach in the 5;. *John Shipping* case fails to distinguish between statutory and common law illegality.

virtue of common law illegality and not statutory illegality. Where the statute expressly spells out that the illegal contract is unenforceable by one but enforceable by the other, effect will be given to this clear parliamentary utterance. The fact of the illegality is incidental. The case is similar to a Statute of Frauds case. It may be possible by construction to say that Parliament intended that only the guilty party who does not need to rely on his illegality may sue on the contract. Conversely, that only the innocent party who has not made a mistake of law may sue to enforce the contract. But it would not be possible to apply the rules of common law illegality on top of whatever statutory construction yields.

This kind of typology is not only illogical but highly unsatisfactory. Why should the effect of statutory prohibition be confined to the determination whether the contract is void? If it is possible to determine from the statute whether a contract is to be void, it is possible to ascertain also whether it shall be enforceable by one and not the other or by both. If Parliament may intend the contract to be void, Parliament may also intend it to be enforceable by one and not the other.

Moreover, the development of a policy approach in determining whether there is implied prohibition of the contract accentuates the logical difficulties. The Court of Appeal in *Phoenix General Insurance Co. Ltd. of Greece S.A.* v. *Administratia Asigurarilor de Stat* seems to accept that the best test of implied prohibition is to ask whether the purpose of the statute is sufficiently served by the penalties prescribed for the offender, whether the avoidance of the contract would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute and whether the value of the relief given to the wrongdoer if he could escape what would otherwise have been his legal obligation might greatly outweigh the punishment that could be imposed on him and thus undo the penal effect of the statute.[79] This test was stated by Devlin L.J. in *Archbolds (Freightage) Ltd.* v. *S. Spanglett Ltd.*[80] though the origin of it might be traced to Devlin J.'s decision in *St. John Shipping Corp.* v. *Joseph Rank Ltd.*[81] The trouble is — as may be discerned in Mason J.'s judgment in the *Yango Pastoral* case — that we may apply that test and conclude that there is no implied prohibition, so that there is really merely common law illegality and then apply, it might seem, the same test in order to decide whether the guilty party may sue on the contract. Examination of Mason J.'s judgment reveals that in testing the issue of common law illegality he considers the undesirability of providing a windfall gain to the defendants and other borrowers in a similar position and of indirectly imposing substantial hardship on depositors, which in fact he took into account in his earlier decision that the contract was not impliedly prohibited. It would seem that there is but one difference between the two tests, namely that when one is considering whether the guilty party may enforce the contract, personal as opposed to general considerations will count. Mason J., for example, supposes a case where the facts disclose that this particular

[79] [1987] 2 All E.R. 152, 175.
[80] [1961] 1 Q.B. 374, 390.
[81] [1957] 1 Q.B. 267.

plaintiff stands to gain by enforcement of rights gained through an illegality activity far more than the prescribed penalty. He says: "[on] this basis the common law principle of *ex turpi causa* can be given an operation consistent with, though subordinate to, the statutory intention, denying relief in those cases where a plaintiff may otherwise evade the real consequences of a breach of a statutory prohibition."[82] On the other hand he also says: "This circumstance might provide a sufficient foundation for attributing a different intention to the legislature."[83] In other words, there is no difficulty logically why personal factors should not be taken into account when construing the statutory intention. Indeed, whether inadvertently or deliberately, the Court of Appeal in *Phoenix General Insurance Co. Ltd. of Greece S.A.* v. *Administratia Asigurarilor de Stat* has reformulated the *Archbolds (Freightage) Ltd.* v. *S. Spanglett* test so as to make it possible to consider the personal circumstances of the innocent party, saying: "Whether or not the statute has this effect *(i.e.* of implied prohibition) depends on considerations of public policy in the light of the mischief which the statute is designed to prevent, its language, scope and purpose, *the consequences for the innocent party,* and any other relevant considerations (including the nature of the contract as in the case itself)."[84] (emphasis added)

Another problem with the existing typology is that it creates anomalies. Historical accident and no more explains why common law illegality seldom strikes at contracts but rather at conduct whereas statutory illegality frequently strikes at contracts. Often the fact that the subject matter is dealt with by statute as opposed to common law is incidental or of little consequence. A serious policy may as well inform a common law offence as a statutory one. But the result of the typology is that the statutory offence receives a more blunt treatment than the common law offence.

Why has this typology developed? Doctrinally, it may be said that this is inevitable given the notion of parliamentary supremacy. The problem faced is one of shades of illegality. The policy each statute hopes to promote is not of identical weight. But it is not for the judge to introduce his own values or evaluation of the seriousness of the policy and in the absence of all else he must treat the regulation of plumbing as being of similar importance to the regulation of doctors. Obviously this is right for it is Parliament's task to express its scale of values. Yet how often, assuming it can be done, does that happen? Only rarely and judges are left to work out some scale of values as they grasp at the little straws they see. We resort to close analysis of words and only hope that they are not fortuitous.

Besides, it would have been perfectly in accordance with the doctrine of parliamentary supremacy for the courts to have assimilated statutory illegality to common law illegality. This need not have been seen as a usurpation of legislative authority. No such attempt ever manifested itself, the distinction between statutory

[82] (1978) 139 C.L.R. 411, at pp. 429–430.
[83] *Ibid*., at p. 429.
[84] [1987] 2 All E.R. 152, 176.

illegality and common law illegality is too well settled to be upset, and as a consequence there can be no idea of relative unenforceability as far as statutory illegality is concerned.

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