Chapter-VIII

ILLEGALITY AND PUBLIC POLICY AS DEFENCES

8.1 Introduction

A contract that is expressly or implicitly prohibited by statute is illegal. In this context, ‘statute’ includes the orders, rules and regulations that ministers of the Crown and other officials are so frequently authorized by Parliament to make.

If the contract in fact made by the parties is expressly forbidden by the statute, its illegality is undoubted. Express statutory prohibition of contracts is by no means uncommon. So Parliament may provide in pursuance of a policy of controlling credit that no contract of hire purchase shall be entered into, unless at least 25 percent of the cash prize is paid by way of an initial payment.1 Where it is alleged that the prohibition is implied, the court is presented with a problem the solution of which depends upon the construction of the statute. What must be ascertained is whether the object of the legislature is to forbid the contract. In pursuing, this enquiry a variety of tests has been applied. For instance, if the sole object of the statute is to increase the national revenue, as for instance by requiring a trader to take out a license, or to punish a contracting party who fails to furnish or furnishes incorrectly certain particulars, the contract that he may have made is not itself prohibited.2 On the other hand, if even one of the objects is the protection of the public or the furtherance of some other aspect of public policy, a contract that fails to comply with the statute may be implicitly prohibited.3 But no one test is decisive, for in every case the purpose of the legislature must be considered in the light of all the relevant facts and circumstances.4

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1 Stonehedge Finance Ltd. V. Phillips (1965) 1 All ER 513.
2 Learoyd v. Bracken (1894) 1 QB 114.
3 Victorian Daylesford Syndicate v. Dott (1905) 2 Ch 624 at p 630.
4 St. John Shipping Corpn v. Joseph Rank Ltd. (1957) 1 QB 267 at pp 285-287
8.2 Contracts Illegal at Common Law on Grounds of Public Policy

Certain types of contract are forbidden at common law and are therefore prima facie illegal. The first essential to an understanding of this head of the law, which has been clouded by much confusion of thought, is to discover if possible the principle upon which the stigma of illegality is based. The present law is the result of a development that stretches back to at least Elizabethan times\(^5\), but its foundations were not effectively laid until the eighteenth century. What the judges of that period were at pains to emphasize was that they would not tolerate any contract that in their view was injurious to society.\(^6\) Injury to society, however, is incapable of precise definition, and it is not surprising that the particular contracts found distasteful on this ground were described in somewhat vague and indeterminate language. To give a few examples, nobody would be allowed ‘to stipulate for inequity’,\(^7\) no contract would be enforced that was ‘contrary to the general policy of the law’,\(^8\) or ‘against the public good’,\(^9\) or contra bonos mores\(^10\) or which had arisen ex turpi causa.\(^11\)

It seems justifiable to infer from such expressions as these that the judges were determined to establish and sustain a concept of public policy. Contractual freedom must be fostered, but any contract that tended to prejudice the social or economic interest of the community must be forbidden.

Not unnaturally a principle stated in such sweeping terms as these has its disadvantages. It is imprecise, since judicial views will inevitably differ upon whether a particular contract is immoral or subversive of the common good; there is no necessary continuity in the general policy of the law, for what is anathema to one generation seems harmless to another; and the public good

\(^6\) Fifoot Lord Mansfield at pp. 122-125.
\(^7\) *Collins v. Blentern* (1767) 2 Wils KB 341 at p 350.
\(^8\) *Lowe v. Pars* (1768) 4 Burr 225
\(^9\) Supra note 7, at p 350.
\(^10\) *Girardy v. Richardson* (1793) 1 Exp 13
\(^11\) *Holman v. Johnson* (1775) 1 Cowp 341 at p 343.
affects so many walks of life that the causes of action that can be said to arise ex turpi causa must in the nature of things very greatly in their degree of harm to the community.

It is this variation in the degree of harm done that requires emphasis, for the word ‘illegal’ has been, and still is, used to cover a multitude of sins and even cases where little, if any, sin can be discovered. The list of ‘illegal’ contracts includes inter alia agreements to commit a crime or a tort, to defraud the revenue, to lend money to an alien enemy, to import liquor into a country where prohibition is in force, to procure a wife for X in return for a reward, to provide for a wife if she should ever separate from her husband and finally an agreement in restraint of trade between master and servant or between the seller and buyer of a business, such as that by which a servant promises not to work in the future for a trade rival of his present employer. If these contracts are scrutinized in the order given, it will be seen that the improbity which they reveal is a constantly diminishing factor and that it is entirely absent from the agreement in restraint of trade. There is nothing disgraceful in a master and servant coming to such an agreement, and the only complaint that their conduct invokes is the possible economic inexpedience of allowing a workman to restrict his freedom to exploit his skill as and where he will.

Common sense suggests that the consequences at law of entering into one of these so-called illegal contracts should vary in severity according to the degree of impropriety that the conduct of the parties discloses. It is obvious that an agreement to commit a crime cannot be put on the same footing as an undertaking by a servant that he will not later enter the employment of a rival trader. The former is so transparently reprehensible judged by any standard of morals that it must be dismissed as illegal, with the result that both parties must be excluded from access to the courts and denied all remedies; but the latter should certainly not attract the full rigour of the maxim ex turpi causa non oritur actio, with its implication that it can originate no rights or liabilities whatsoever. The parties have done nothing disgraceful, they have
not conspired against the proprieties and, although they cannot be allowed to enforce such part of the contract as is tainted, it would be unjustifiable to regard them as outcasts of the law unable to enforce even the innocent part of their bargain. To describe their contract as illegal as a whole is an abuse of language. Speaking of the contract in restraint of trade, for instance, Farwell LJ said, ‘it is not unlawful in the sense that it is criminal or would give any cause of action to a third person injured by its operation, but it is unlawful in the sense that the law will not enforce it’. In the eighteenth century, when the principle of public policy was taking root and the instances of unsavoury bargains were comparatively simple, it was perhaps not strange that the judges should have used somewhat exaggerated language in rejecting contracts that revealed wickedness, but in the complex conditions of today the indiscriminate use of the term ‘illegal’ is, to say the least, confusing.

Modern judges have in fact taken a more realistic view of this part of the law and have concluded that the so-called illegal contracts fall into two separate groups according to the degree of mischief that they involve. Some agreements are so obviously inimical to the interest of the community that they offend almost any concept of public policy; others violate no basic feelings of morality, but run counter only to social or economic expedience. The significance of their separation into two classes, as we shall see, lies in the different consequences that they involve.

That the various contracts traditionally called illegal do not involve similar consequences was stressed by Somervell U, in the following passage:

In *Bennett v. Bennett*, it was pointed out that there are two kinds of illegality of differing effect. The lust is where the illegality is criminal, or contra bonos mores, and in those cases, which I will not attempt to enumerate or further classify, such a provision (sic), if an ingredient in the contract, will invalidate

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12 *Northern Western Salt Co. v. Electrolytic Alkali Co.* (1912) 107 Lt 439 at p 444.
13 *Bennett v. Bennett* (1952) 1 KB 249.
14 *Goodinson v. Goodinson* (1954) 2 QB 118 at pp 120-121.
the whole, although there may be many other provisions in it. There is a
second kind of illegality which has no such taint; the other terms in the
contract stand if the illegal portion can be severed, the illegal portion being a
provision which the court, on grounds of public policy, will not enforce. The
simplest and most common example of the latter class of illegality is a
contract for the sale of a business which contains a provision restricting the
vendor from competing in or engaging in trade for a certain period or within a
certain area. There are many cases in the books where, without in any way
impugning the contract of ask, some provision restricting competition has
been regarded as in restraint of trade and contrary to public policy. There are
many cases where not only has the main contract to purchase been left
standing but part of the clause restricting competition has been allowed to
stand.

Assuming, then, that contracts vitiated by some improper element must be
divided into two classes, how are the more serious examples of ‘illegality’ at
common law to be distinguished from the less serious? Which of the contracts
that have been frowned upon by the courts are so patently reprehensible-so
obviously contrary to public policy-that they must be peremptorily styled
illegal? Judicial authority is lacking, but it is submitted that the epithet
‘illegal’ may aptly and correctly be applied to the following six types of
contract:

- A contract to commit a crime, a tort or a fraud on a third party.
- A contract that is sexually immoral.
- A contract to the prejudice of the public safety.
- A contract prejudicial to the administration of justice.
- A contract that tends to corruption in public life.
- A contract to defraud the revenue.

There remain three types of contract which offend ‘public policy’, but which
are inexpedient rather than unprincipled.
• A contract to oust the jurisdiction of the courts.
• A contract that tends to prejudice the Status of marriage.
• A contract in restraint of trade.

If the word ‘illegal’ is to be reserved for the more reprehensible type of
contract, another title must be chosen to designate those which fall within the
second degree of public policy, and which for that reason have been treated -
with comparative leniency by the courts. The most appropriate title seems to
be ‘void’, since these contracts are in practice treated by the courts as void
either as a whole or at least in part. In Bennett v. Bennett Denning LJ
described covenants in restraint of trade as ‘void not illegal’.

They are not ‘illegal’, in the sense that a contract to do a prohibited or
immoral act is illegal. They are not ‘unenforceable’, in the sense that a
contract within the Statute of Frauds is unenforceable for want of writing.
These covenants lie somewhere in between. They are invalid and
unenforceable.15

The word ‘void’ used as a descriptive title certainly has its disadvantages. It is
already applied to a number of disparate contracts and is not applied to them
in any uniform sense or with uniform results. At common law it has long been
used to indicate the consequences of mistake; by statute it has been used with
dubious results in wagering transactions and in contracts made by infants. But
linguistic precision cannot survive the complexity of life. A continental jurist
has said that unlike typical sciences where there is no interim stage legal
science the effects of disobeying a legal rule may be graded to suit the
individual situation.

Thus, the difference between an act that is valid and an act that is void is
unlike the difference between ‘yes’ and ‘no’, between effect and no-effect. It
is a difference of grade and quantity. Some effects are produced, while others

15 (1952) 1 KB 249 at p 260.
are not.\textsuperscript{16}

For better or for worse, then, it has been decided for the purposes of this book to describe the three less serious types of ‘illegal’ contracts as contracts void at common law on grounds of public policy.

Some general observations must be added upon the doctrine of public policy in the current law.\textsuperscript{17}

Since public policy reflects the mores and fundamental assumptions of the community, the content of the rules should vary from country to country and from era to era. There is high authority for the view that in matters of public policy the courts should adopt a broader approach than they usually do to the use of precedents.\textsuperscript{18}

Such flexibility may manifest itself in two ways: by the closing down of existing heads of public policy and by the opening of new heads. There is no doubt that an existing head of public policy may be declared redundant. So in the nineteenth century it was stated that Christianity was part of the law of England and that accordingly a contract to hire a hail for a meeting to promote atheism was contrary to public policy\textsuperscript{19} but fifty years later this view was decisively rejected.\textsuperscript{20}

More contrary surrounds the question of whether the courts still retain freedom to recognize new heads of public policy. It has been denied that any such freedom exists\textsuperscript{21} and Lord Thankerton said that the task of the judge in this area was ‘to expound and not to expand’, the law.\textsuperscript{22} It may be thought surprising however that in this of all areas, the courts should abrogate their function of developing the common law. To some extent the discussion is

\textsuperscript{16} 64 LQR 326.
\textsuperscript{17} Lloyd Public Policy (1953); Winfield 42 Harvard L.Rev 76.
\textsuperscript{18} Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. (1894) AC 535.
\textsuperscript{19} Cowan v. Milbourn (1867) LR 2 Exch 230.
\textsuperscript{20} Bowman v. Secular Society (1917) AC 406.
\textsuperscript{21} Janson v. Driefontein Consolidated Mines (1902) AC 484 at p. 491.
\textsuperscript{22} Fender v. St. John Mildmay (1938) AC 1 at p. 23.
artificial since much development may take place within the existing heads but it is difficult to assert that new circumstances cannot arise which do not fall readily into any of the recognized heads. Courts have responded to this challenge in the past by the development of new heads\(^{23}\) and it is thought that they will, in exceptional circumstances, do so again.

This question would be relevant, for instance, if it were argued that contracts involving racial, religious or sexual discrimination were contrary to public policy. It is arguable that the Court of Appeal’s decision in Nagle Feilden\(^{24}\) represents recognition of such a possibility and there is some Australian authority too.\(^{25}\) Undoubtedly any such argument would raise important questions, in particular whether the existence of legislation in this area\(^{26}\) should be regarded as relevant either as (a) delimiting precisely the area of reprehensible discriminatory conductor (b) (preferably) as a legislative signal that discrimination is against the public interest.\(^{27}\) Canvassed head of public policy has involved the validity of contractual provisions, which attempt to allocate some of the risks of inflation by tying repayment of debts to foreign currencies. In *Treseder-Griffin v. Co-operative Insurance Society Ltd.*,\(^{28}\) Denning LJ expressed the opinion, obiter, that such provisions were contrary to public policy but this view was not followed by Browne-Wilkinson J in *Multiservice Bookbinding Ltd. v. Marden*,\(^{29}\) a decision approved in its turn by Lord Denning MR in *Staffordshire Area Health Authority v. South Staffordshire Waterworks Co.*\(^{30}\) In none of these cases was any weight attached to any argument based on novelty.

A final observation may be made as to the way in which the courts determine the content of public policy. Apart from reliance on previous precedents, this

\(^{23}\) *Neville v. Dominion of Canada News Co. Ltd.* (1915) 3 KB 556.

\(^{24}\) (1966) 2 QB 633, (1966) 1 All ER 689.

\(^{25}\) *Newcastle Diocese (Church Property Trustees) v. Ebbeck* (1960) 34 ALJR 413.

\(^{26}\) Race Relations Act, 1968; Equal Pay Act, 1970.

\(^{27}\) *Blathwayt v. Baron Cawley* (1976) AC 397 at pp. 425-426

\(^{28}\) (1956) 2 QB 127 (1956) 2 All ER 33.

\(^{29}\) (1979) Ch 84 (1978) 2 All ER 489

\(^{30}\) (1978) 3 All ER 769, (1978) 1 WLR 1387.
is done by a priori deduction from broad general principles. It is not the practice in English courts for the parties to lead sociological or economic evidence as to whether particular practices are harmful and it is doubtful to what extent such evidence would be regarded as relevant if it were adducted.31

8.3 The Consequence of Illegality

8.3.1 The Relevance of the State of Mind of the Parties

Whether the parties are influenced by a guilty intention is inevitably material in estimating the consequences of an illegal contract. Its materiality may be stated in three propositions.

First, if the contract is illegal in its inception, neither party can assert that he did not intend to break the law. Both parties have expressly and clearly agreed to do something that in fact is prohibited at common law, as for example, where a British subject agrees to insure an alien enemy against certain rides. The position is the same if the parties have agreed to do something that is expressly or implicitly forbidden by statute.32 In both these cases, the contract is intrinsically and inevitably illegal, and, so far as consequences are concerned, no allowance is made for innocence. The British subject, for instance, may well be ignorant that it is unlawful to contract with an alien enemy, but none the less he will be precluded by the maxim ignorantia juris haud excusat relying upon his ignorance.33 The very contract is unlawful in its formation.

Secondly, if the contract is ex facie lawful, but both parties intend to exploit it for an illegal purpose, it is illegal in its inception despite its innocuous appearance. Both parties intend to accomplish an unlawful end and both are remediless. This is true, for instance, of an agreement to let a flat if there is a common intention to use it for immoral purposes.

31 Texaco Ltd. v. Mulberry Filling Station (1972) 1 All ER 513.
32 Re Mahmood and Ispahani (1921) 2 KB 716.
33 Waugh v. Morris (1873) LR 8 QB 202 at p. 208.
Thirdly, if the contract is lawful in its formation, but one party alone intends to exploit it for an illegal purpose, the law not unnaturally takes the view that the innocent party need not be adversely affected by the guilty intention of the other.34 This has been frequently stressed by the judges. In one case in 1810, for instance, the plaintiffs, acting on behalf of a Russian owner, had insured goods on a vessel already en route from St Petersburg and had paid the premium. The contract was made after war had broken out between Russia and England, but the fact was not known, and could not have been known to the plaintiffs. The ship was seized by the Russians and taken back to St Petersburg. The plaintiffs succeeded in an action for the recovery of the premium.35 Lord Ellenborough, after remarking that the insurance would have been Illegal in its inception had the plaintiffs known of the outbreak of war, said:

“But here the plaintiffs had no knowledge of the commencement of hostilities by Russia, when they effected this insurance; and, therefore no fault is imputable to them for entering into the contract; and there is no reason why they should not recover back the premiums which they have paid for an insurance from which, without any fault imputable to themselves, they could never have derived any benefit.”36

Whether a party is innocent or guilty in this respect depends upon whether ‘he is himself implicated in the illegality’,37 or more precisely whether he has participated in the furtherance of the illegal intention.38 If, for instance, A lets a flat to B, a woman whom he knows to be a prostitute, the very contract will be unlawful if he knows that B’s object is to use the premises for immoral purposes,39 but this will not be the case if all that he is aware of is B’s mode of life, for a reasonable person might not necessarily infer that the purpose of

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34 Oom v. Bruce (1810) 12 East 225.
35 Ibid.
36 Id at p 226.
37 Scott v. Brown, Doering, McNab & Co. Ltd. (1892) 2 QB 724 at p. 728.
38 In Re Trepca Mines Ltd. (No. 2) (1963) Ch 199, (1962) 3 All ER 351.
39 Girardy v. Richardson (1793) 1 Esp 13.
the letting was to further immorality. Even a prostitute must have a home.

Perhaps the best known case on this subject so far as illegality at common law is concerned, is *Pearce v. Brooks*, where the facts were as follows:

*The plaintiffs agreed to supply the defendant with a new miniature brougham on hire until the purchase money should be paid by installments during a period that was not to exceed twelve months. The defendant was a prostitute and she undoubtedly intended to use the carriage, which was of a somewhat intriguing nature, as a lure to hesitant clients. One of the two plaintiffs was aware of her mode of life, but there was no direct evidence that either of them knew of the use to which she intended to put the carriage. The jury, however, found that the purpose of the woman was to use the carriage as part of her display to attract men and that the plaintiffs were aware of her design. On this finding, Bramwell B gave judgment for the defendant in an action brought against her to recover a sum due under the contract.*

It was held on appeal that there was sufficient evidence to support the finding of the jury. The Court of Exchequer Chamber was satisfied on the evidence that the plaintiffs were not only aware of the defendant’s intention, but were even guilty of some complicity in her provocative scheme.

In order to emphasize the distinction between innocence and guilt that affects this branch of the law, the precise consequences of an illegal contract will now be detailed under two separate heads, namely: the consequence where a contract is illegal in its inception; the consequence where a contract lawful in its inception is later exploited illegally or is illegally performed.

### 8.3.2 The Consequence Where the Contract is Illegal in its Inception

The general principle, founded on public policy, is that any transaction that is tainted by illegality in which both parties are equally involved is beyond the pale of the law. No person can claim any right or remedy whatsoever under an
illegal transaction in which he has participated. 42 *Ex turpi causa non oritur actio.* The court is bound to veto the enforcement of a contract once it knows that it is illegal, whether the knowledge comes from the statement of the guilty party or from outside sources. 43 Even the defendant can successfully plead the *turpis causa*, and though this ‘defence is very dishonest’ 44 and ‘seems only worthy of the Pharisee who shook himself free of his natural obligations by saying Corban,’ 45 it is allowed for the reasons given by Lord Mansfield in *Holman v. Johnson*: 

The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. 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 appear to arise *ex turpi causa*, or the transgression of a positive law of this country, then the Court says he has no right to be assisted is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, me latter would then have the advantage of it; for where both are equally in fault *potior est conditio defendentis.* 46

The practical application of this general principle must now be stated in some detail.

A contract that is illegal as formed and is therefore void *ab initio* is treated by

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42 *Gordon v. Metropolitan Police Chief Comr.* (1910) 2 KB 1080 at p. 1098.
43 *Re Mahmood and Ispahani* (1921) 2 KB 716 at p. 729.
44 *Thomson v. Thomson* (1802) 7 Ves 470 at p. 473.
46 (1775) 1 Cowp 341 at p. 343.
the law as if it had not been made at all. It is totally void, and no remedy is available to either party. No action lies for damages, for an account of profits or for a share of expenses. Thus, in the case of an illegal contract for the sale of goods, the buyer, even though he has paid the price, cannot sue for non-delivery; the seller who has made delivery cannot recover the price. A servant cannot recover arrears of salary under an illegal contract of employment. In the case of an illegal lease, the landlord cannot recover the rent or damages for the breach of any other covenant. The position is the same not only where a contract is prohibited at common law on grounds of public policy, but also where its very formation is prohibited by statute. An apt illustration is afforded by Re Mahmoud and Ispahani where the facts were these:

The plaintiff agreed to sell linseed oil to the defendant, who refused to take delivery and was sued for non-acceptance of the goods. A statutory order provided that no person should buy or sell certain specified articles, including linseed, unless he was licensed to do so. Before the conclusion of the contract, the defendant untruthfully alleged that he held a licence and the plaintiff, who himself was licensed, believed the allegation.

Once it was established that each party was forbidden by statute to enter into the contract, the court had no option but to enforce the prohibition even though the defendant relied upon his own illegality. The honest belief of the plaintiff that the defendant held a licence was irrelevant.

Again, an award made by an arbitrator in respect of a prohibited contract will be set aside by the court. A builder who does work at a cost exceeding the sum authorised by statute cannot recover the excess, and if, having done both authorised and unauthorised work, he receives payment under the

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49 Alexander v. Rayson (1936) 1 KB 169.
50 (1921) 2 KB 716.
51 David Taylor Son Ltd. v. Barnett Trading Co. (1953) 1 All ER 843.
52 Bostel Bros Ltd. v. Hurlock (1949) 1 KB 74, (1948) 2 All ER 312.
contract generally, he cannot appropriate the sum to the unlawful work.\textsuperscript{53}

In all cases where a contract is illegal in its formation, neither party can circumvent the rule \textit{ex turpi causa non oritur action} by pleading ignorance of the law.\textsuperscript{54}

Although a contract is illegal in its formation and therefore void, the Court of Appeal has now held that the ownership of goods may pass to the buyer trader an illegal contract of sale even if both parties are in \textit{pari delicto}.\textsuperscript{55} This decision requires to be examined with some particularity.

Since an illegal contract is totally void, the inescapable conclusion would seem to be that the ownership of movables cannot pass by virtue of the contract itself if this arises \textit{ex turpi causa} and if both parties to it are in \textit{pari delicto}. \textit{Nil posse creari de nilo}.\textsuperscript{56}

If, therefore, the ownership is to pass at all, this must be effected by some independent rule of law extraneous to the so-called but abortive contract. It is true that in the case of a gift the ownership of goods may be transferred by delivery, provided that this is what the parties intend. But since this intention is one of the decisive elements of the transaction, it would seem logical to insist that it must be disregarded if it is tainted by illegality.\textsuperscript{57} In 1960, however, Lord Denning, giving the opinion of the Privy Council in \textit{Singh v. Ali}\textsuperscript{58} expressed a view which it is respectfully suggested goes beyond previous statements of the law.

There are many cases which show that when two persons agree together in a Conspiracy to effect a fraudulent or illegal purpose-and one of them transfers property to the other in pursuance of the conspiracy-then, so soon as the

\textsuperscript{53} \textit{A Smith & Son (Bognor Regis) Ltd. v. Walker} (1952) 2 QB 319, (1952) 1 All ER 1007.
\textsuperscript{54} \textit{J M Allan (Merchandise) Ltd. v. Cloke} (1963) 2 QB 340.
\textsuperscript{56} Lucretius De Rerum Natura i 155.
\textsuperscript{57} \textit{Simpson v. Nicholls} (1838) 3 M & W 240.
\textsuperscript{58} (1960) AC 167.
contract is executed and the fraudulent or illegal purpose is achieved, the property (be it absolute or special) which has been transferred by the one to the other remains vested in the transferee, its illegal origin ... The reason is because the transferor, having fully achieved his unworthy end, cannot be allowed to turn round and repudiate the means by which he did it-he cannot throw over the transfer.\footnote{69}  

8.4 Distinction between Illegal Contracts and Void Contracts

A void contract is one which has no legal effect. An illegal contract though resembling the void contract in that it also has no legal effect as between the immediate parties, has this further effect and even transactions collateral to it become tainted with illegality and are, therefore, in certain circumstances not enforceable.\footnote{60}  

Unless the statute specifically provides that a contract contrary to the provisions of the statute would be void the contract would remain binding between the parties and could be enforced between the parties themselves.\footnote{61}  

In the absence of any mandatory provisions obliging eviction in case of contravention of the provisions of an Act, a lease in violation thereof would not be void and the parties would be bound, as between themselves, to observe the conditions of the lease. The parties to such a lease cannot assail it in a proceeding between themselves.\footnote{62}  

8.5 Proof of Illegality

The rules of evidence that govern the proof of illegality, whether the contract is illegal by the statute or at common law, may be summarized as follows:

Firstly, where the contract is \textit{ex facie} illegal, the court takes judicial notice of the fact and refuses to enforce the contract, even though its illegality has not  

\footnotesize{\textsuperscript{59} Id at p. 176.  
\textsuperscript{60} Rajat Kumar Rath \textit{v.} Govt. \textit{of} India, \textit{AIR} 2000 Ori 32.  
\textsuperscript{61} Nutan Kumar \textit{v.} 2nd Additional District Judge, \textit{AIR} 2002 SC 3456.  
\textsuperscript{62} Nanakram \textit{v.} Kundalrai, \textit{AIR} 1986 SC 1194: (1986) 3 SCC 83.}
been pleaded by the defendant.

Secondly, where the contract is *ex facie* lawful, evidence of external circumstances showing that it is in fact illegal will not be admitted, unless those circumstances have been pleaded.

Thirdly, when the contract is *ex facie* lawful, but facts come to light in the course of the trial tending to show that it has an illegal purpose, the court takes judicial notice of the illegality notwithstanding that these facts have not been pleaded. But it must be clear that all the relevant circumstances are before the court.\(^63\)

### 8.5.1 The Effect of Illegality

There is, however, an important qualification which must be made to this general principle. A party to a contract will not be held to be innocent if he has full knowledge of the facts which constitute the illegality, but yet is ignorant of the law, for *ignorantia juris haud excusat*. In *J.M. Allan (Merchandising), Ltd. v. Cloke*,\(^64\) the plaintiffs sued the defendants for money payable in respect of a roulette table hired to the defendants and designed for the playing of ‘Roulette Royale’, a game which was unlawful by virtue of the Betting and Gaming Act 1960.\(^65\) At the time they entered into the hiring agreement, neither party knew that the game was illegal, and the plaintiffs pleaded that they had no ‘wicked intention to break the law’. The Court of Appeal rejected this plea and held that ignorance of the law was no answer to the charge of illegality.

In this case, the parties intended that the subject-matter of the contract should be used for an unlawful purpose (the playing of ‘Roulette Royale’) and this was the only purpose for which it could be used. But where the contract is capable of lawful performance and is in fact lawfully performed, although the

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\(^{63}\) *North Western Salt Co. Ltd. v. Electrolytic Alkali Co. Ltd.* (1914) AC 461.

\(^{64}\) (1963) 2 QB 340.

\(^{65}\) 8 & 9 Eliz. II, c. 60.
parties contemplated that it should be performed in an illegal manner, it will be material to inquire whether or not they were ignorant of the law. In *Waugh v. Morris*:66

The defendant chartered a ship belonging to the plaintiff to take a cargo of hay from Trouville to London. It was subsequently agreed that the bay should be unloaded alongside ship in the river, and landed at a wharf in Deptford Creek. Unknown to the parties an Order in Council (made before the charter-party was entered into) had forbidden the landing of French hay in order to prevent the spread of disease among animals. The defendant, on hearing this, took the cargo from alongside the ship without landing it, and exported it, thus avoiding a breach of the Order in Council. The return of the vessel was delayed, and the plaintiff sued for damages arising from the delay.

The defendant pleaded as a defence that the contract of charter-party contemplated an illegal act, the landing of French hay contrary to the Order in Council. This defence did not prevail:

Where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think, that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and if this be so, the knowledge of what the law is becomes of great importance.

Accordingly the contract was held to be valid and the plaintiff recovered damages for the delay.

### 8.5.2 Contracts Unlawful ‘*per se*’

If a contract is expressly or by implication forbidden by statute or by public policy, then it is void and unenforceable, though the parties may have been

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ignorant of the facts constituting the illegality and did not intend to break the law. Such contracts are unlawful *per se* and the intention of the parties is irrelevant.

An example of a contract forbidden by statute has been given in *Re Mahmoud and Ispahani*\(^67\) where the plaintiff, who was ignorant of the fact that the defendant had no licence to purchase linseed oil, was unable to recover damages for non-acceptance in face of a statutory prohibition. An example of a contract forbidden by public policy is one which necessarily involves intercourse with an alien enemy in time of war. No rights of action will arise, even though one party at the time of the agreement is ignorant of the fact that war has broken out or that the other party has the status of an enemy. \(^68\) The agreement itself is prohibited and cannot be enforced in any way.

It is clear that considerable difficulty may be experienced in deciding whether a particular statute or head of public policy renders the contract unlawful per se or merely prevents a guilty party from suing on it. But the modern tendency is to hold that a contracting party cannot be cast from the seat of judgment unless he participated in the unlawful intention. The state of mind of the parties is the crucial factor. Unless it is clear that the legislature intended, or public policy demands, that the contract be prohibited altogether, the innocent party can sue on the agreement. Moreover, even if the contract is one which is unlawful per se, the innocent party is not necessarily without remedy. If he has been induced to enter into the contract by the representation or promise of the other that it is lawful, then he can recover damages for fraud if there is fraud,\(^69\) or for breach of a collateral warranty if he prove such to have been given,\(^70\) provided that he himself has not been guilty of culpable

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\(^{67}\) (1921) 2 KB 716, at p. 305; *Chai Sau Yin v. Liew Kwee Sam*, (1962) AC 304; *Harse v. Pearl Life Assurance Co.* (1904) 1 KB 558.

\(^{68}\) *Sovfracht (v/o) v. Van Uldens Scheepvaart en Argentuur Maatschappij (N.V. Gebr.)* (1943) A.C. 203.

\(^{69}\) *Burrows v. Rhodes*, (1899) 1 Q.B. 816.

\(^{70}\) *Strongman (1945) Ltd. v. Sincock*, (1955) 2 QB 525, at pp. 536, 539.
conduct on his part disabling him from that remedy.\textsuperscript{71} So in \textit{Strongman Ltd. v. Sincock}\textsuperscript{72} a builder recovered damages for the breach of a collateral assurance by his client that he would obtain the necessary licenses to enable the work to be carried out, even though a contract to build without a licence was absolutely prohibited by statute.

\textbf{8.5.3 Benefit from Illegal Contract}

It is sometimes said to be a rule of law that no person can take any benefit from a contract, either directly or through his personal representatives, when that benefit results from the performance by him of an illegal act.\textsuperscript{73} In \textit{Beresford v. Royal Insurance Co., Ltd.}\textsuperscript{74}

R insured his life with the defendant Company for £ 50,000. A few minutes before the policy was due to lapse, he committed suicide. The policy contained a term avoiding it in the event of suicide within a year of its commencement, but the suicide occurred after the policy had run for some years.

The House of Lords held that the insurance company had agreed to pay in this event, but that the claim was contrary to public policy as the deceased’s personal representatives could not obtain any benefit from the assured’s illegal act. This case would certainly not be followed at the present day, for suicide is no longer a crime,\textsuperscript{75} and the rule itself is probably too widely stated. It is submitted that it will only apply where the statute or head of public policy is such as to require that the offender be deprived of the fruits of his illegal act,\textsuperscript{76} and even then the benefit will be recoverable unless it is something to which, but for the illegality, he would have had no right or

\textsuperscript{71} \textit{Askey v. Golden Wine Co., Ltd.}, (1948) 2 All ER 35.
\textsuperscript{72} (1955) 2 QB 525.
\textsuperscript{73} \textit{Re the Estate of Crippen}, (1911) p. 108, at p. 112; \textit{Archbolds (Freightage), Ltd. v. Spanglett, Ltd.} (1961) 1 QB 374, at p. 388.
\textsuperscript{74} (1938) AC 586.
\textsuperscript{75} Suicide Act, 1961 (9 & 10 Eliz. II, c. 60).
\textsuperscript{76} \textit{Marles v. Philip Trant & Sons, Ltd.} (1954) 1 QB 29, at p. 39.
8.6 Recovery of Money or Property transferred under an Illegal Contract

It is scarcely surprising that the Courts will refuse to enforce an illegal agreement at the suit of a person who is himself implicated in the illegality. But it is also a rule of English law that money or property transferred by such a person cannot be recovered. In the colourful words of Wilmot C.J.: ‘All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again.’

This principle is expressed in the maxim in pari delicto potior est conditio defendentis and it may be illustrated by the case of Parkinson v. College of Ambulance, Ltd.:

The secretary of a charitable organization promised the plaintiff that lie would secure for him a knighthood if he would make a sufficient donation to the organization’s funds, in consideration of this promise, the plaintiff paid over £3,000 and promised more when he should receive the honour. The knighthood never materialized, and the plaintiff sued for time return of his money.

It was held that the action must fail as it was founded upon a transaction which was illegal at common law.

But there are exceptional cases in which a man will be relieved of the consequences of an illegal contract into which he has entered-cases to which the maxim just quoted does not apply. They fall into three classes: (a) where the illegal purpose has not yet been carried into effect before it is sought to

79 (1925) 2 KB 1
recover the money paid or goods delivered in furtherance of it; (b) where the plaintiff is not in pari delicto with the defendant; (c) where the plaintiff does not have to rely on the illegality to make out his claim.

8.7 The Concept of Public Policy

The concept of public policy is illusive, varying and uncertain. It has also been described as ‘untrustworthy guide’, ‘unruly horse’ etc. The term ‘public policy’ is not capable of a precise definition and whatever tends to injustice of operation, restraint of liberty, commerce and natural or legal rights: whatever tends to the obstruction of justice or to the violation of a statute and whatever is against good morals can be said to be against public policy. The concept of public policy is capable of expansion and modification.80

In Gherulal Pathak v. Mahadeodas Maiya,81 the Supreme Court observed:

“Public Policy’ is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses it may, and best for the common good of the community; and in that sense there may be every variety of opinion, according to education habits, talents and dispositions of each person, who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion. It is the province of the statesman and not the lawyer, to discuss, and of the legislature to determine what is best or public good and to provide for it by proper enactments. It is of the province of the judge to expound the law only; the written from the statutes, the unwritten or common law from the decision of our predecessors and of our existing Courts, from text writers of acknowledged authority, and upon the principles to be clearly deducted from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decision may have no doubt been founded upon the prevailing and just opinions of the public good; for instance, the illegality of the covenants in restraint

81 AIR 1959 SC 781.
of marriage or trade. They have became a part of the recognized law, and we are therefore bound by them, but are not thereby authorised to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise.”

Prof. Winfield in his Essay on Public Policy in the English Common Law stated:

“Public policy is necessarily variable. It may be variable not only from one century to another, not only from one generation to another but even in the same generation. Further it may vary not merely with respect to the particular topics which may be included in it, but also with respect in the rules relating to any two particular topic... This variability of public policy is a stone in the edifice of the doctrine and not admissible to be flung at it. Public policy would be almost useless without it.”

In Pandeleton v. Greener, it had been held that:

“Public policy’ is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and usage of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the Court, but has been let loose and free from definition in the same manner as fraud.”

8.8 Agreements Opposed to Public Policy

A corporation and a shipping company entered into a contract for three years for manning, running, operating, repairing and maintenance on hire of three vehicles. One of the clauses of the contract gave right to the corporation to terminate the contract after expiry of one year without assigning any reasons. On being challenged the termination of the contract by the company, it was held that the stipulation was not unconscionable or opposed to public policy.

The object of assignment of the Government land in favour of the lessee is to

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82 42 Harvard Law Policy 76.
83 17 ALR 317.
84 Oil and Natural Gas Corp. Ltd. v. Streamline Shipping Co., AIR 2002 Born 420.
provide him right to residence. If any such transfer is made contrary to the policy, it would be defeating the public purpose. Thus when there is no express prohibition in indenture of lease for such bequest without prior permission of Government, such a bequest cannot be held to be illegal though it was against public policy as object of assignment of Government law in favour of lessee was to provide him right of residence.85

It is correct that any person or company is lawfully entitled to purchase shares of another company in open market, but if the transaction is done surreptitiously with a malafide intention by making use of some public financial institutions as a conduit in a clandestine manner, such deal or transaction would be contrary to public policy and illegal.86

Where A and B arrived at an agreement that though both of them would submit tenders, the tender which A would submit would be for a higher amount and B would draw a cheque for Rs.15,000 in favour of A for not competing with it, held that the agreement was not void nor was opposed to public policy.87 If the Court finds that the parties were acting together with a view to perpetrate fraud and did not in fact perpetrate that fraud, and that there is no difference in the degree of the plaintiff and defendant’s guilt, the duty of the Court is to dismiss the claim.88

When the object of the agreement to postpone the registration of the deed of lease is obvious enough from the circumstances and to conceal the actual savai amdani of the village and so as to reduce the assessment of the Land Revenue, it was held that this would defeat the provisions of the Registration Act, Transfer of Property Act and Stamp Act and was thus opposed to public policy.89

88 Vilayat Hussain v. Misran, AIR 1923 All 504: 21 ALJ 303 (DB).
89 Chagan Lal v. Kashiram, AIR 1923 Nag 76: 71 IC 33.
Where a case put forward in the trial Court was that the agreement in question was void as being opposed public policy, it was held that in revision the contention that the revision was void as being fraudulent on the same facts could be raised as the other party was not misled.\(^{90}\)

The defendant under the terms of his licence was forbidden to sell his rice to other wholesale merchants in the port on entry than those who were approved by the Collector. The plaintiff, a wholesale merchant, contracted to purchase rice and paid the price. The rates agreed upon were much higher than the controlled rates. Held that plaintiff who was a merchant must have known that he could not purchase the rice except by permission from Government. The contract was void and the plaintiff can base no claim upon it.\(^{91}\)

It is a paramount public policy that Courts are not lightly to interfere with freedom of contract.\(^{92}\) The Court cannot invent a new head of public policy.\(^{93}\) Public policy is a vague and perhaps unsatisfactory term, a treacherous ground for legal decision and a very unsuitable and treacherous foundation on which to build. At the same time, it has been and will be a just ground for it legal decision and the Court has to give a decision whether a particular contract militates against public policy.\(^{94}\)

A threat to prosecute of itself is not illegal. Where there is a just and bona fide debt actually existing, and there is a good consideration for giving a security and the transaction between the parties involves a civil liability as well as possibly a criminal act, a threat to prosecute does riot necessarily vitiate a subsequent agreement by the debtor to give security for a debt which he justly owes to his creditor.\(^{95}\)

Though the object of the contract is lawful in itself it would be unlawful if it

\(^{90}\) Atumal Ramoomal v. Dipchand Kessumal, AIR 1939 Sind 33.
\(^{91}\) Janu Sait v. Ramaswami Naidu, AIR 1923 Mad 626.
\(^{92}\) Bansi Dhar v. Ajudhia Prasad, AIR 1925 Oudh 120: 82 IC 333 (DB).
\(^{93}\) Bhagwan Genuji Girme v. Gangabisan Ramgopal, AIR 1940 Bom 369: 42 BLR 750 (DB).
cannot be achieved without violation of law or without doing something immoral or opposed to public policy. A contract to do a thing which cannot be performed without violation of law is void, whether the parties knew the law or not. Likewise the object of the contract may be lawful in law but its fulfillment may offend against the well-settled notions of public policy. The Courts must not invent a new head of public policy. The Courts ought to be very cautious in deciding a question of public policy. With the development of public opinion and morality the doctrine must be applied with necessary variation.

Agreements tending to injure the public service are always considered to be opposed to public policy. Therefore, any agreement which is in conflict with the public good or public policy in respect of public service is illegal and void. Public Policy does not remain static in any given community. Public policy would be almost useless if it were to remain in fixed moulds for all time.

When the delimitation of municipal area was to be done, the State Government agreed to keep certain area leased to a company excluded from limits of the municipality, it was held that the agreement with the company could not be enforced since it was opposed to public policy.

The appointment of a servant for a term or laying down the terms of service and conditions under which he could be discharged cannot be said to be applicable by the doctrine of public policy. Where a party admits that he has made a fictitious transfer of his property to another, with a view to effect fraud, but asks to have his act undone, the Court would refuse relief and would leave the party to the consequence of their misconduct dismissing the

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97 Abdul Rahim v. Raghunath Sukul, AIR 1931 Pat 22: 12 PLT 614 (DB).
100 Rederiaktiebolaget Amphirite v. King, (1921) 3 KB 587.
claim when the suit was brought by the real owner to get back possession of his property and refusing to listen to the defence when he set it up in opposition to the person whom he has invested with the legal title.\textsuperscript{102}

An agreement was entered into between the parties whereby one party was required to use his influence with the minister. Such an agreement is void because it tends to corrupt or influence the decision-making machinery.\textsuperscript{103} In \textit{Montesfoire v. Menday Motor Components Co. Ltd.},\textsuperscript{104} it was stated:

“A contract may be against public policy either from the nature of the acts to be performed or from the nature of the considerations. In my judgment it is contrary to public policy that a person should be hired for money or valuable consideration when he has access to persons of influence to use his position and interest to procure a benefit from the Government.”

In the same case, it was further held:

“While I do not go the length of holding that the defendants were bargaining with the plaintiff that they should receive an office under the Crown, I agree with the remarks of Coltman J., in the case of Hopkins v. Prescott,\textsuperscript{105} that where a person undertakes for money to use his influence with the Commissioner of Taxes to procure for another party the rights to sell stamps, if the contract were not void for statute, it would be void at common law as contrary to public policy. It is well settled that in judging the question one has to look at the tendency of the acts contemplated by the contract to see whether they tend to be injurious to the public interest. In my judgment, a contract of the kind has a most pernicious tendency. At a time when public money is being advanced to private firms for objects of national safety it would tend to corrupt the public service and to bring into existence a class of persons somewhat like those who in ancient times of corrupt politics were described as ‘Carriers’, men who undertook for money to get titles and honours for those who agreed to pay them for their influence.”

\textsuperscript{102} \textit{Dhirendra Kumar Bose v. Chandra Kanta Roy}, AIR 1923 Cal 151.
\textsuperscript{103} \textit{Ratanchand Hirachand v. Askar Nawaz Jung}, AIR 1972 AP 112.
\textsuperscript{104} (1918) 2 KB 241: 87 LJKB 907.
\textsuperscript{105} (1847) 4 CB 578.
A contract which had been entered into with the obvious purpose of influencing the authorities to procure a verdict in favour of was a “carrier” contract. To enforce such a contract although it tends to injure public weal is not only to abdicate one’s public duty but to assist in the promotion of a pernicious practice of procuring decisions by influencing authorities when they should abide by law.\(^\text{106}\)

An auction sale was conducted by the corporation. One of the clauses of the auction empowered the corporation to charge interest of balance amount of consideration from date of auction. It was held that as contracts entered into by Government corporations are subject to fundamental rights and are in furtherance of directive principles of State Policy, the clause was unlawful.\(^\text{107}\)

A person who asks an agreement or conveyance to be declared invalid on account of its being opposed to public policy must prove the grounds which would bring it within the meaning of this section.\(^\text{108}\) If it is shown that there was an agreement between the parties that a certain consideration should proceed from the accused person to the complainant in return for the promise of the complainant to discontinue the criminal proceedings that dearly is a transaction which is opposed to public policy.\(^\text{109}\)

If in a given subject it is patent that public policy is likely to make indelible dents on it, then the Courts themselves ought to raise the questions touching on public policy, even if none of the parties does so. Public policy which is often described as unruly horse should be carefully handled lest any improper riding of it should take the Courts to difficult and unexplored heights and regions.\(^\text{110}\) The plea that agreement is a nullity being opposed to public policy can be raised even by a person who had earlier consented to the agreement.\(^\text{111}\)

\(^{109}\) Ouseph Poulo v. Catholic Union Bank Ltd., AIR 1965 SC 166: (1964) 7 SCR 745.
\(^{111}\) Union Carbide Corp. v. Union of India, AIR 1992 SC 248.
In Corpus Juris Scandum,\textsuperscript{112} it is stated:

\begin{quote}
\textit{An illegal contract or agreement, such as one involving illegality of the subject matter, one invoking the unlawful sale or exchange of intoxicating liquors or a subletting, subleasing or hiring out of convicts, held under lease from the State, in violation of statute, or stifling a prosecution for public offence, or one which is opposed to public policy, cannot constitute or effect an accord and satisfaction.}
\end{quote}

After all, by consent or agreement parties cannot achieve what is contrary to law and a decree merely based on such agreement cannot furnish a judicial amulet against statutory violation The true rule is that the contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is super added the command of the Judge.\textsuperscript{113}

Under section 20 of the Civil Procedure Code, the Courts in India have jurisdiction to entertain the suit and if the agreement provides that they would submit to the jurisdiction of the English Court the agreement itself would be void under section 23 of the Contract Act and would also be void being opposed to public policy.\textsuperscript{114}

An agreement by which a man binds himself to associate for the whole of his life only with a certain body of is fellow-men and to abstain completely from associating with another body is one which ought not to be enforced and for the breach of which no penalty can be claimed.\textsuperscript{115}

Where an agreement to purchase agricultural land, before the commencement of the Land Ceiling Act came into being, was entered into, and the suit for specific performance was filed and the said Act was repealed before judgment was rendered in suit, it was held that specific performance could not be refused since the agreement was not against public policy. It was further held

\textsuperscript{112} Vol. 1, at p. 473.
\textsuperscript{115} Lal Khan v. Kimman Khan, AIR 1924 Oudh 404: 80 IC 560.
that the Act did not prohibit purchase of land by surplus holder.\textsuperscript{116}

In the field of private International law, Courts refuse to apply a rule of
government or recognize a foreign judgment or a foreign arbitral award if it is
found that the same is contrary to the public policy of the country in which it
is sought to be invoked or enforced.\textsuperscript{117} The defence of public policy which is
permissible under section 7(1)(b)(ii) of the Foreign Awards (Recognition and
Enforcement) Act should be construed narrowly. To the same effect is the
provision of the Protocol & Convention Act of 1937 which requires that the
enforcement of the foreign award must not be contrary’ to public policy or the
law of India.\textsuperscript{118}

When an employee though promoted in a stop-gap arrangement was
continued in the said post, he was entitled to salary of promotional post and to
be considered for regular promotion and the agreement that he would not
claim higher salary’ on being promoted by stop-gap arrangement is not valid
and cannot be enforced under the provisions of this section.\textsuperscript{119}

A contract for manning, running, operating, repairing and maintenance on
hire for three vehicles was entered into between the parties. The contract \textit{inter
alia} provided that the employer shall have the right to terminate the contract
after expiry of one year without assigning any reasons. It was held that such a
stipulation was not unconscionable or opposed to public policy.\textsuperscript{120}

It would be contrary to public policy to allow a husband to contract a
marriage with the wife to consummate the marriage, beget a child from her
and then turn round to argue- that the respondent was not his wife but the wife
of ‘R’ because the divorce granted to her was bad for want of jurisdiction of

\begin{footnotes}
\item\textsuperscript{116} \textit{Neiyam Venkataramanna v. Mahankali Narsimhan}, AIR 1994 AP 244.
\item\textsuperscript{117} \textit{Renusagar Power Co. Ltd. v. General Electric Co.}, AIR 1994 SC 860.
\item\textsuperscript{118} Ibid.
\item\textsuperscript{119} \textit{Secretary-cum-Chief Engineer, Chandigarh v. Hari Om Sharma}, AIR 1998 SC 2909.
\item\textsuperscript{120} \textit{Oil and Natural Gas Co. Ltd. a. Streamline Shipping Co.}, AIR 2002 Born 420 (DB).
\end{footnotes}
the Court granting the same.\textsuperscript{121}

The House of Lords in \textit{G v. M} relying upon the book Law Relating to Estoppel by Representation by Spencer and Bower, stated.\textsuperscript{122}

\begin{quote}
\textit{“I think I perceive that phraseology is like this, and nothing more than this, that there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it, as for instance, any part from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them to treat as if no such, relation had ever existed.”}
\end{quote}

\textbf{8.8.1 Agreement opposed to Public Policy}

An agreement shall be held to be against public policy if:

\begin{itemize}
\item Judgment-debtor is required to pay a part of his salary to decree-holder.\textsuperscript{123}
\item Amount had been paid for securing-seat in medical college and not as loan.\textsuperscript{124}
\item It is for influencing ministers of the Government.\textsuperscript{125}
\item The father is required to give up entirely-the custody and control of his child to mother.\textsuperscript{126}
\item It relates to transfer of decree with object to defraud other creditors.\textsuperscript{127}
\item It is for alienation of swastivachanam service inam lands.\textsuperscript{128}
\item The partner who holds the non-transferable contract for carrying mails to transfer it to the other partner or to continue the contract for the
\end{itemize}

\begin{footnotes}
\item[122] (1885) 10 App Cas 171.
\item[123] \textit{Post Master General, Bombay v. Chenmal Mayachand}, AIR 1941 Bom 389.
\item[124] \textit{N.V.P. Pandian v. M.M. Roy}, AIR 1979 Mad 42.
\item[125] \textit{Ratanchand Hirachand v. Askar Nawaz Jung}, AIR 1976 AP 112.
\item[127] \textit{K. Shrirama Row v. K. Bapayya}, AIR 1924 Mad 189.
\item[128] \textit{Neti Anjaneyalu v. Verugopal Rice Mills}, AIR 1922 Mad 197.
\end{footnotes}
other after dissolution of partnership.\textsuperscript{129}

- It involves transfer of ration documents in contravention of the Act.\textsuperscript{130}

- It is to alienate that which is in the nature of personal grant and without permission of the Tehsildar as required by the term of that grant.\textsuperscript{131}

- It confers exclusive perpetual right to perform religious services for the whole village.\textsuperscript{132}

- The purpose is to waive the benefit conferred by section 60(i), Civil Procedure Code.\textsuperscript{133}

- It is of service which in substance amounts to nothing but serfdom.\textsuperscript{134}

- It is a contract of insurance effected by a person on the life of another when he has no insurable interest in the life.\textsuperscript{135}

- It concerns partnership agreement authorizing one partner having licence to sell country liquor to sell English wine.\textsuperscript{136}

- It tends to injure the public service.\textsuperscript{137}

- A formation of dealership is made by dealer in cloth with license under Madras (Dealers) Control Order.\textsuperscript{138}

- It is for child marriage.\textsuperscript{139}

- Execution of decree of divorce is obtained from foreign Court by husband whose marriage was solemnized in Goa.\textsuperscript{140}

- It provides for a premium over and above the standard rent.\textsuperscript{141}

- Comprised in a suit between landlord and tenant in contravention of

\textsuperscript{129} Bhurmal Ramkaran v. Goduram Mangalchand Jat AIR 1943 Nag 260.
\textsuperscript{130} Pisupati Rama Rao v. Tadepalli Papayya, AIR 1954 Andhra 51.
\textsuperscript{131} Ganesa Naicken v. Arumugha Naicken, AIR 1954 Mad 811 (DB).
\textsuperscript{132} Revashanker Shamji v. Velji Jagjivan Kukama, AIR 1951 Kutch 56.
\textsuperscript{134} Sitaram Deokaran v. Baldeo Jairam, AIR 1958 MP 367.
\textsuperscript{135} Mani Shanker Someshwar Pandya v. Allianza Und Stuttgarter Labens Versicherungs
   Bank, AIR 1941 Lah 33.
\textsuperscript{137} Venkatareddi v. Peda Venkatachalam, AIR 1964 AP 465.
\textsuperscript{138} V. Basavayya v. N. Kottayya, AIR 1964 AP 145.
\textsuperscript{139} Maheswar Das v. Sukhi Dei, AIR 1978 Ori 84.
\textsuperscript{140} Joao Gloria Pires v. Ana Joaquina Rodrigues e Pires, AIR 1967 Goa 113 (DB).
\textsuperscript{141} Baboolal v. Prem Lata, AIR 1974 Raj 93.
rules and curtailing the powers of District Magistrate.\textsuperscript{142}

- Tenant contracting himself out of rights conferred by statute solemnly enacted for benefit of tenants.\textsuperscript{143}
- Public corporations enter into contracts whereby performance of their duties to public is prevented or unduly restricted.\textsuperscript{144}
- It is sub-letting of phone in contravention of conditions.\textsuperscript{145}
- The compromise decree divides amount of pension between parties to suit.\textsuperscript{146}
- It is a contract to serve on Rs. 2 per month for 112 months.\textsuperscript{147}
- Certain area leased to a company is excluded from limits of the Municipality.\textsuperscript{148}
- A firm had its only business of running a school and that school was handed over by one of the partners illegally to another society without consent of other parties.\textsuperscript{149}
- A person belonging to scheduled caste was granted distributorship of cooking gas under special quota which was his only source of livelihood and as such was not in a bargaining position in respect of the clause about termination of agency on 30 days’ notice.\textsuperscript{150}
- Waiver of protection to agriculturist under section 60(1), Civil Procedure Code.\textsuperscript{151}
- If it lends to injure public interest or public welfare.\textsuperscript{152}

Even fit is permissible for Courts to evolve a new head of public policy under extra-ordinary circumstances giving rise to incontestable harm to the society,

\textsuperscript{142} Krishna Khanna v. Addl. District Magistrate, AIR 1975 SC 1525.
\textsuperscript{143} Varada Bongar Raju v. Kirthali Avatharam, AIR 1965 AP 86.
\textsuperscript{144} UPSEB v. Lakshmi Devi Sehgal, AIR 1977 All 499 (DB).
\textsuperscript{145} Maaladi Seetharama Sastry v. Naganath Kawlwar, AIR 1968 AP 315.
\textsuperscript{146} Baldeo Jha v. Ganga Prasad Jha, AIR 1959 Pat 17.
\textsuperscript{147} Sitaram Deokaran v. Baldeo Jairam, AIR 1958 MP 367.
\textsuperscript{148} Associated Cement Companies Ltd. v. State of Rajasthan, AIR 1981 Raj 133.
\textsuperscript{149} Abhai Singh v. Sanjay Singh, AIR 1989 All 214.
\textsuperscript{150} Syam Gas Co. v. State of U.P., AIR 1991 All 129 (DB).
wager is not one of such instances of exceptional gravity, for it has been recognized for centuries and has been tolerated by the public and the State alike.\textsuperscript{153}

A Court is not bound to pass a decree on the basis of a mere admission of claim by the defendant Order 12 Rule 6, Civil Procedure Code is only an enabling provision. It is the duty of the Court to see whether the plaintiff is entitled to a decree on the basis of the averments in the plaint and admission of defendant and as to whether the suit is meant to defeat the provisions of Stamps Act, Registration Act, Transfer of Property Act or any other law concerning public revenue or is against the public policy.\textsuperscript{154}

### 8.8.2 Opposed to Public Policy: What is Not

An agreement of lease between landlord and tenant for letting and occupation of building in contravention of the provisions of U.P. Urban Buildings Act is not void and is enforceable. A decree for ejectment of the tenant can be passed in favour of the landlord on the basis thereof. Further, section 13 of the said Act provides that a person who occupies, without any allotment letter shall be deemed to be an unauthorized occupant of sub premises. Such a suit would not be on the agreement between the parties and thus would not be hit by principles of public policy.\textsuperscript{155}

Sub-letting is not an act forbidden or prohibited by law. The tenant may sub-let the premises depending on the term of the contract between him and the landlord or the consent of the landlord to the tenant to sub-let the premises. It is only the absence in writing of the consent of the landlord which makes the subletting by tenant a ground for ejectment.\textsuperscript{156}

A lease for life created in favour of the lessee or tenant is not inconsistent

\textsuperscript{153} Gherulal Parakh v. Makadeodas Maiya, AIR 1959 SC 781.


\textsuperscript{155} Nutan Kumar v. 2nd Additional District Judge, AIR 2002 SC 3456.

\textsuperscript{156} Mohar Singh v. Deen Dayal Gupta, 1996 (3) DRJ 760.
with the provisions of the Bombay Rent Act. Lease for life or condition of the life tenancy of the lease deed or a tenancy cannot be said to be contrary to the provisions of law.\textsuperscript{157}

When it was merely an agreement between two parties under which the defendant assigned certain copyrights in favour of the plaintiff and there was not obligation towards the public, then such an agreement could not be said to be violate of public policy since the assignment of copyright was permissible under Copyrights Act.\textsuperscript{158}

When an agreement between the landlord and tenants i.e., the plaintiffs provided that the petition for eviction brought against the tenant and substances of whom the plaintiffs are included would not be contested, and that nevertheless, even if an order of eviction is obtained in that proceeding, no effort would be made to evict the tenant, it cannot be said that there was anything illegal or against public policy in the matter of that agreement. There is no law prohibiting the landlord to allow his tenant to continue in possession even after getting an order for eviction, may it be on higher rent.\textsuperscript{159}

An agreement between A and B to purchase property at an auction sale jointly and not be bid against each other at the auction is perfectly legal, though the object may be to avoid competition between the two. But if there is an agreement between all the competing bidders at the auction sale, be it of the Court sale or revenue sale or sale by the Government of its property or privilege to peg down the price and purchase property and the knock out price, it will be unlawful and opposed to public policy.\textsuperscript{160}

Where residential plots were agreed to be allotted at reserve price by the Improvement Trust and according to the scheme of the rules, the price of the plots could not be less than the cost price of the land to the Trust, the clause in

\begin{itemize}
\item[\textsuperscript{157}] Manharlal Mohalal Zuberi v. Indulal Vadilal Mehta, 1996 (1) Guj LR 82.
\item[\textsuperscript{158}] Prentice Hall India Pvt. Ltd. v. Prentice Hall Inc., AIR 2003 Del 236.
\item[\textsuperscript{159}] M.K. Usman Koya v. C.S. Santha, AIR 2003 Ker 191.
\item[\textsuperscript{160}] Gurmuk Singh v. Amar Singh, (1991) 3 SCC 79.
\end{itemize}
the agreement for enhancement of price on account of enhanced compensation awarded to the original owners as a result of reference made by the Trust under section 18 of the Land Acquisition Act, was not contrary to the rules nor was opposed to public policy.\textsuperscript{161}

An entrepreneur after having availed benefit of rebate for initial period of five years on the ground of its being an expanding unit, is not entitled to further rebate on the ground of being a new undertaking. It was held that granting of further rebate would be against public interest and it would also be against public policy as no Government department can run without funds.\textsuperscript{162}

If the creditor lays down certain conditions with a view to secure his debt in accordance with law, then it cannot be said that the same are opposed to public policy.\textsuperscript{163} The demand of higher charges/tariff for electricity consumed beyond legally fixed limit is reasonable deterrent measure providing appropriate sanction not as harsh as disconnection of supply of energy altogether and cannot be opposed on the ground of public policy.\textsuperscript{164}

The petitioner received a certain sum of money from the respondent, for securing admission of the respondent’s son in a M.B.A. course, on the representation that the sum had to be paid by way of capitation fees. The petitioner was unable to secure admission for the respondent’s son and issued a cheque for the amount received. The cheque was dishonoured. Held that the sum in question was given by the respondent to the petitioner for the payment of capitation fees, and the transaction could not be declared void as contrary to public policy.\textsuperscript{165}

8.9 Defences

Illegality will generally prevent both parties from enforcing a tainted

\begin{footnotesize}
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\item \textsuperscript{161} Vipul Rai Sharma v. Ludhiana Improvement Trust, AIR 1992 P & H 42.
\item \textsuperscript{162} Rathi Gases Ltd. v. Rajasthan State Electricity Board, AIR 1995 Raj 139.
\item \textsuperscript{163} Central Bank of India v. Multi-Block Pvt. Ltd., AIR 1997 Bom 109.
\item \textsuperscript{164} Jiyajeerao Cotton Mills Ltd. v. M.P. Electricity Board, AIR 1989 SC 788.
\item \textsuperscript{165} R. Siwaraj v. Loganathan, 1996 (85) Com Cas 71.
\end{itemize}
\end{footnotesize}
transaction or seeking other relief, including restitution of benefits transferred under it.

A contract or other transaction may be illegal in three ways. First, statute may expressly prohibit both the formation and the performance of the contract. This will be the case where, for example, the statute provides: ‘No action shall lie…’ Secondly, statute might impliedly prohibit enforcement of the contract. In Phoenix General Insurance Co. of Greece SA v. Halvanon Insurance Co. Ltd.¹⁶⁶

(i) Where a statute prohibits both parties from concluding or performing a contract when both or either of them have no authority to do so, the contract is impliedly prohibited. (ii) But where a statute merely prohibits one party from entering into a contract without authority, and/or imposes a penalty upon him if he does so (i.e. a unilateral prohibition) it does not follow that the contract itself is impliedly prohibited so as to render it illegal and void. Whether or not this statute has this effect depends upon 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.

Thirdly, the transaction may be illegal where it contemplates the commission of a crime at common law, or another act which the common law deems to be contrary to public policy.

8.9.1 The Scope of the Prohibition of Restitutionary Claims

The true scope of the in pari delicto principle in relation to restitutionary claims is difficult to state. The question is, when does illegality preclude the restitutionary claim? In identifying exception to the in pari delicto principle, does this create a new ground for restitution? Birks argues that where the

parties are held not be *in pari delicto*, the ground for restitution can usually be found elsewhere in the law of restitution, usually in case of vitiated voluntariness such as mistake or compulsion.

### 8.9.2 Mistake

In *Oom v. Bruce*,\(^{167}\) the plaintiff entered into an insurance policy for goods to be carried from Russia to England. The contract was made after the commencement of hostilities between the two countries but before the plaintiff had knowledge of the fact, and after the ship had sailed and been seized and made to return to Russia. The plaintiff sought to recover the premium paid. The contract was presumably illegal at common law on the basis that it involved trading with the enemy. The Court of King’s Bench stressed that the plaintiff had no knowledge of the circumstances giving rise to the illegality. Accordingly, Lord Ellenborough CJ held ‘there is no reason why they should not recover back the premiums which they have paid for an insurance from which, without any fault imputable to themselves, they could never have derived any benefit.’

Induced mistake caused the transfer in *Hughes v. Liverpool Victoria Legal Friendly Society*,\(^ {168}\) where the plaintiff was fraudulently persuaded by a representative of the insurer that a life insurance policy, in which he had no insurable interest, was valid. Upon the plaintiff discovering the policy was illegal and void, she claimed recovery of the premiums paid. Phillimore LJ stated the principle:

> Where an illegal contract of insurance is entered into, and the assured is ignorant of the law and is induced to enter into it by the fraudulent misrepresentation of the law by the agent of the assurance company, the parties are not in *pari delicto* and the assured may recover the premiums paid.

\(^{167}\) (1810) 12 East 255, 104 ER 87.  
\(^{168}\) (1916) 2 KB 482.
The unsatisfactory earlier decision of *Harse v. Pearl Life Assurance Co.*\(^{169}\) insists that an innocent misrepresentation would not suffice. This is probably not good law. The leading case is *Kiriri Cotton Co. Ltd. v. Dewani.*\(^{170}\) This case requires reinterpretation in the light of *Kleinwort Benson Ltd. v. Lincoln City Council.*\(^{171}\)

### 8.9.3 Duress and Imposition

The facts of *Smith v. Bromley,*\(^{172}\) are reminiscent of the fiction of Fanny Burney. A lady was imposed upon by her brother’s chief creditor to pay an extra sum to him, before he would sign a certificate of discharge releasing the brother from bankruptcy. The money was paid and the defendant creditor signed the discharge. The lady then sought recovery of the £40 she had paid. The Court of King’s Bench awarded her restitution. Lord Mansfield stated:

“If the act is in itself immoral, or a violation of the general laws of public policy, there, the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is, potior est condito defendentis. But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit & c. If such laws are violated, and the defendant takes advantage of the plaintiff’s condition or situation, there the plaintiff shall recover.”

That case was followed in *Smith v. Cuff,*\(^{173}\) on similar facts. Lord Ellenborough CJ commented that the parties were never equally guilty ‘when one holds the rod, and the other bows to it’.

### 8.9.4 Failure of Consideration

In *Parkinson v. College of Ambulance Ltd.,*\(^{174}\) the plaintiff somewhat foolishly paid £3,000 foolishly paid £3,000 to the defendant charity, relying

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169 (1904) 1 LB 558.  
170 (1960) AC 192.  
172 (1760) 2 Doug 696, 99 ER 441.  
173 (1817) 6 M & S 160, 105 ER 1203.  
174 (1925) 2 KB 1.
upon a representation by the secretary of the charity that a knighthood would be forthcoming in return. Unsurprisingly, the representation turned out to be fraudulent and Mr. Parkinson sought restitution from the charity. This was held to be a case where the parties were in pan delicto, because even if the secretary of the charity was more at fault, the plaintiff had made a contract which he ought never have entered into. One can have more sympathy for the plaintiff in *Berg v Sadler & Moore.*\(^{175}\) The plaintiff was on the stop list of the Tobacco Trade Association as a result of a breach of their price-fixing rules. He attempted to obtain cigarettes using the name of a friend. The money was paid, but when the defendant suppliers discovered the true purchaser they refused to supply the cigarettes or return the purchase price. The plaintiff’s claim for restitution was rejected by the Court of Appeal. The Court stridently held that it amounted to an attempt to obtain goods by false pretences, and accordingly the Court refused to lend its aid to the plaintiff (but happily lent its aid to the anti-competitive practice of the trade association).

There is a paucity of authority of situations where a party has recovered on the ground of failure of consideration on the basis that he was not equally guilty in respect of the illegal transaction. Perhaps an example is *Hermann v Charlesworth,*\(^ {176}\) in which the plaintiff was a single lady desirous of getting married. She agreed to pay the defendant marriage advertising agent £250 if an introduction arranged by the defendant led to matrimony. The plaintiff paid £52, of which £47 would be returned if no marriage followed within nine months. Various introductions led to nothing, and the plaintiff claimed the return of her money. The Court of Appeal held that the transaction was illegal (which must be of interest to the numerous dating agencies which rolliferate these days). Collins MR acknowledged that the plaintiff had had the benefit of a number of introductions, but was prepared to treat these as actions taken by the defendant in his own interest in order to improve his chances of winning

\(^{175}\) (1937) 2 KB 158.
\(^{176}\) (1905) 2 KB 123.
what was characterized as a wager. Collins MR felt that equity was not precluded from ordering the recovery of money under an illegal transaction simply because the defendant had incurred and taken some steps towards performance in carrying out his side of the contract. The case is explicable either on the ground of failure of consideration (and a very beneficial interpretation of failure of consideration at that), or on the basis that the plaintiff fell within the protected class of vulnerable people, whom the policy of outlawing marriage-brokering contracts was aimed at protecting. Compare Birks, 210.

8.9.5 Restitution Prohibited if it is Tantamount to Contractual Enforcement

An important principle is that restitution is impermissible where an award would be equivalent to the enforcement of the illegal contract. In *Taylor v Bhail*, the headmaster of a school which had suffered storm damage, agreed to award a contract to the plaintiff builder on the basis that the builder would inflate his estimate by £1,000 in order that the defendant could pocket the additional £1,000 recouped from the school’s insurers. The work being done, the plaintiff claimed alternatively upon the contract, or for a quantum meruit in respect of work done. The ground of restitution was not identified, but was presumably failure of consideration or free acceptance. The Court of Appeal refused to enforce either the contractual or the restitutionary claim.

Millett LJ held that the transaction was illegal. Whereas the defendant was enriched at the plaintiff’s expense, it could not be said to be unjust because of the illegality of the transaction into which both entered. Further, the existence of the illegal contract excluded recourse to the law of restitution. This is an application of the primacy of contract principle. To have succeeded, the plaintiff should have repudiated the contract. But this could have been done only if there had been no partial performance of the illegal purpose. It was

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now too late to withdraw (at 383). This decision may take the primary of contract argument too far.

More recently, in *Mohamed v. Alaga & Co.*\(^\text{178}\) the plaintiff entered into a fee-sharing agreement with the defendant solicitor, whereby the plaintiff would refer asylum-seekers to the solicitor in return for a proportion of the fees contrary to the Solicitors’ Practice Rules. The plaintiff again claimed alternatively under the contract or in restitution. The Court of Appeal would not enforce the illegal contract. However, the plaintiff was allowed to pursue a quantum meruit claim, sounding in restitution, as he was apparently unaware of the illegality of the transaction. These recent decisions of the Court of Appeal are difficult to reconcile. Presumably in the latter case the award of reasonable remuneration would not have been equivalent to contractual enforcement.

### 8.9.6 Proprietary Claims under Illegal Transactions

This is the province of the law of property, but will be briefly discussed here. The leading cases are *Tinsley v Milligan*\(^\text{179}\) (1994) 1 AC 340 and *Tribe v Tribe*.\(^\text{180}\) In *Tinsley v Milligan*, the plaintiff, aged 19, and the defendant, aged 38, were lesbian lovers. They purchased a property in the sole name of the plaintiff, but on a common understanding that they would be joint beneficial owners. The house was in the plaintiff's name in order to enable the defendant to make fraudulent claims upon the Department of Social Security (DSS). The money obtained by the fraud contributed only in a small way to the acquisition of the equity in the home. Subsequently the defendant repented of the fraud and disclosed this to the DSS. The parties quarreled and the plaintiff moved out. The plaintiff claimed possession of the property, asserting sole ownership. The defendant counterclaimed for a declaration that the property was held in equal shares. The House of Lords by a majority held for the

\(^{178}\) (1999) 3 All ER 699.  
\(^{179}\) (1994) 1 AC 340.  
defendant. The claimant was entitled to vindicate her interest in the property, whether legal or equitable, if she was not forced to plead or rely on any illegality, even though it transpired that the title relied upon was acquired in the course of carrying through an illegal transaction. On the facts there was no evidence to rebut the presumption of the resulting trust over the property.

Lord Goff of Chieveley and Lord Keith of Kinkel dissented. Lord Goff, with Lord Keith agreeing, insisted that a court of equity would not assist a claimant who does not come with clean hands. Lord Browne-Wilkinson gave the main speech of the majority. It was clearly established at law that property in goods or land can pass under or pursuant to an illegal contract.\textsuperscript{181} The same should apply in equity given that there was now a single law of property. All that was necessary in this case was for the defendant to plead the common intention that the property should be shared between them and that she had contributed to the purchase price. Only in the reply, and during cross-examination of the defendant, would any illegality emerge. This did not preclude the claim. The party claiming title could recover as long as she did not need to plead or rely upon the illegal acts.

In \textit{Tribe v. Tribe}, the plaintiff transferred shares to his son with the intention of deceiving his creditors. The illegal purpose was never carried into effect, but the son refused to re-transfer the share. The Court of Appeal held that the father was entitled to lead evidence to rebut the presumption of advancement, without relying upon illegality. Millett LJ, in the leading judgment, pointed out that if the transfer had been to a nephew or friend the presumption of resulting trust would have arisen. There the burden of proof that the transfer was intended to be by way of gift was upon the transferee. Given that the transferee was the son the presumption of advancement applied placing the burden of proving that the transfer of shares was not intended as a gift upon the father. Millett LJ relied upon \textit{Tinsley v Milligan},\textsuperscript{182} and in particular on

\textsuperscript{181} \textit{Bowmakers Ltd. v Barnet Instruments Ltd.} (1945) KB 65.
\textsuperscript{182} (1994) 1 AC 340.
Lord Browne-Wilkinson’s recognition of the existence of the doctrine of locus poenitentiae. Millett U concluded:

The locus poenitentiae is not therefore an exclusively contractual doctrine with no place in the law of restitution. It follows that it cannot be excluded by the mere fact that the legal ownership of property has become lawfully vested in the transferee. It would be unfortunate if the rule in equity were different. It would constitute a further obstacle to the development of a coherent and unified law of restitution.

The locus poenitentiae operated to mitigate the harshness of a primary rule prohibiting enforcement of illegal transactions. However, the plaintiff must have withdrawn from the transaction before any further steps were taken. Millett LJ concluded by summarizing the present law:

(1) Title to property passes both at law and in equity even if the transfer is made for an illegal purpose. The fact the title has passed to the transferee does not preclude the transferor from bringing an action for restitution.

(2) The transferor’s action will fail if it would be illegal for him to retain any interest in the property.

(3) Subject to (2) the transferor can recover the property if he can do so without relying on the illegal purpose. This will normally be the case where the property was transferred without consideration in circumstances where the transferor can rely on an express declaration of trust, or a resulting trust in his favour.

(4) It will almost invariably be so where the illegal purpose has not been carried out. It may he otherwise where the illegal purpose has been carried out and the transferee can rely on the transferor’s conduct as inconsistent with his retention of a beneficial interest.
The transferor can lead evidence of the illegal purpose whenever, it is necessary for him to do so provided that he has withdrawn from the transaction before the illegal purpose has been wholly or partly carried into effect.

8.10 Public Policy Precluding a Restitutionary Claim

Public policy may preclude a restitutionary claim. This is a distinct question, short of a finding that a transaction is illegal. The source of the public policy may be statute, or common law. Gaff and Jones argue for a general principle that public policy may bar a restitutionary claim: 183 There is a general principle that restitution will not be allowed if it would in effect enforce a transaction which statute or common law prohibits. This is one explanation of the failure of the common law claim in *Sinclair v Brougham*.184 The House of Lords held that the policy of ultra vires prohibited the depositors’ claims at common law. To allow the common law claim would be indirectly to sanction the ultra vires borrowings by the building society. This was the explanation given by *Lord Goff of Chieveley of Sinclair v Brougham in Westdeutsche Landesbank Girozentrale v Islington Landon Borough Council*.185 In contrast, the majority of the House of Lords held that the decision on the common law claim in *Sinclair v Brougham* was wrong, and that the money could be recovered in restitution. Presumably the majority of the House of Lords in Westdeutsche did not think that the allowance of a restitutionary remedy would have the indirect effect of enforcing an ultra vires contract.

The question also arises in respect of contracts which are unenforceable for want of formality. The leading modern discussion is that of the High Court of Australia in *Pavey & Matthews Ply Ltd v Paul*.186 The High Court held that the enforcement of a restitutionary quantum meruit would not frustrate the

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184 (1914) AC 398.
186 (1987) 162 CLR 211.
policy of a statute prohibiting enforcement of a binding contract not reduced to writing, by the builder. Where the work had been completed the claim was maintainable. Mason and Wilson JJ attempted to identify the purpose behind the statutory provision. It protected the building owner against claims where the contract failed properly to identify the work, even where the building was completed. However, the statutory protection did not extend to a case where the building owner requested and accepted work but declined to pay for it purely on the grounds of non-compliance with the statutory formalities. Such a contention was ‘Draconian’, and could not have been the intention of the legislature. Deane J, delivering the leading judgment, could identify no statutory intention to penalise the builder. It is submitted that the dissenting judgment of Brennan J is to be preferred. Recourse to restitution would frustrate the policy of the statute which was to render such obligations unenforceable, This was particularly soon the facts of Pavey, where the oral unenforceable contract was to pay a reasonable rate. The enforcement of the restitutionary quantum meruit exactly imitated the enforcement of the contract. In the case, Ibbetson has observed:187

“The more profitable approach - in reality the whole crux of the problem - is to determine whether the purpose at the base of the statutory prohibition of the contractual action would be frustrated by the allowance of the restitutionary remedy.”

A different problem has arisen in the context of industrial action, where statute confers an immunity from actions in respect of civil wrongs. In Universe Tankships Inc. of Monrovia v. International Transport Workers’ Federation, The Universe Sentinel, the ITF had blacked a vessel flying under a flag of convenience at Milford Haven. Causes of action in tort against the ITF were within the scope of the immunity granted by sections 13 and 14 of the Trade Union and Labour Relations Act, 1974. A claim in restitution for the return of a contribution to the UFF’s welfare fund under duress was

188 (1983) 1 AC 366.
allowed by a majority of the House of Lords. Lord Diplock, in the leading
majority speech, stressed the autonomy of the claim for money had and
received on the basis of illegitimate pressure. It was not dependent upon the
existence of any tort. Accordingly the statutory immunities were not directly
applicable to the claim in restitution. However, that was not the end of the
statute’s role in the dispute. Lord Diplock observed:

“Nevertheless, these sections ... afford an indication, which
your Lordships should respect, of where public policy requires
the line should be drawn between what kind of commercial
pressure by a trade union upon an employer in the field of
industrial relations ought to be treated as legitimized despite the
fact that the will of the employer is thereby coerced, and what
kind of commercial pressure in that field does amount to
economic duress that entitles the employer victim to
restitutionary remedies.”

The majority held that there was no public policy bar to recovering restitution,
by analogy with the Trade Unions and Labour Relations Act, 1974, because
on the facts of a particular dispute the pressure complained of was
insufficiently connected with the terms and conditions of the employment of
the crew under section 29.

The Universe Sentinel was replayed in Sweden in *Dimskal Shipping Co. SA v
International Transport Workers’ Federation*.189 The blacking of the ship was
lawful by Swedish law. However, the majority of the House of Lords held
that the governing law was a proper law of contract which was English law.
Accordingly, sums paid were recoverable in restitution on the grounds of
economic duress.

It is not necessary for present purposes to explore the basis of this decision. It
appears to bear some affinity to the principle underlying those cases in which
the courts have given effect to the inferred purpose of the legislature by
holding a person entitled to sue for damages for breach of statutory duty,

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189 Evia Luck (No. 2) (1992) 2 AC 152.
though no such right of suit has been expressly created by the statute imposing the duty. It is enough to state that, by parity of reasoning, not only may an action of restitution be rejected as inconsistent with the policy of a statute such as that under consideration in The Universe Sentinel,\textsuperscript{190} but in my opinion the claim that a contract is voidable for duress by reason of pressure legitimized by such a statute may likewise be rejected on the same ground.

It is submitted that the approaches of Lords Diplock and Goff provide model guidance on how judges should reason by analogy from statutory prohibitions and statutory immunities. The immaturity of the law of restitution has had the unfortunate consequence that, whereas statute often provides for the consequence of certain transactions or acts, the question of the recovery of benefits transferred is not explicitly addressed. The courts will need to be sensitive to whether recovery in restitution is consistent with the scheme of the legislation, and that allowing recovery does not frustrate the policy behind the statute.

\textsuperscript{190} (1983) 1 AC 366.