Consequences of Illegality on Contracts in Contravention of Statutes

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Introduction[1]

The lives of individuals in a modern state are governed by a multitude of statutes passed by the parliament and by orders and regulations having the force of statutes promulgated by the various government departments. In *Shaw* v. *Groom,*[2] recently decided by the Court of Appeal, Sachs L.J. said: "[I]n 1923 the volume of orders and regulations, although already heavy, had not yet attained the present overwhelming proportions." We will discuss below the consequences of illegality on contracts for contravention of statutes under the following headings:[3] (1) consequences of illegality on contracts expressly prohibited by statute; (2) consequences of illegality on contracts impliedly prohibited by statute; (3) consequences of illegality on contracts contravening statutes in the course of performance; (4) contracts not rendered illegal where the object of the statute contravened is not prohibition.

Contracts may be prohibited by statute either expressly or impliedly. It appears that at present there is no clear criterion for determining whether the prohibition is express or implied. Some writers have suggested that very rarely is a contract expressly prohibited by a statute. In their opinions, a case like *Re Mahmoud and Ispahani,*[4] is not an illustration of express prohibition, but that of

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1. See Cheshire & Fifoot, *Law of Contract* (10th ed., Furmston, 1981), Ch. 11, pp. 308-15, 329-46; Treitel, *The Law of Contract* (6th ed., 1983), Ch. 11, pp. 321-29, 364-70; Ch. 12, pp. 387-88; *Chitty on Contracts* (25th ed., 1983), Vol. 1, Ch. 16; R.A. Buckley, "Implied Statutory Prohibition of Contracts", (1975) 38 *M.L.R.* 535; D.J. Harland, "Recent Developments in the Law of Contract", Committee for Post-Graduate Studies in the Department of Law, The University of Sydney (1972), pp. 159-67.
2. [1970] 2 Q.B. 504, at p. 522 (C.A.). His Lordship further said: "Today's generation is dominated by that ever mounting mass of legislative control . . . " (at p. 523). The bewilderment of a modern citizen passing his life through a maze of regulations was recognised by Devlin J. in *St. John Shipping Corpn.* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267, at p. 288, stating: "[I]n these times . . . so much of commercial life is governed by regulations of one sort or another, which may easily be broken without wicked intent." Also see *Cafferky* v. *Nepean Co-op. Dairy Society* (1960) 60 S.R. (N.S.W.) 57, at p. 64 (F.C.), per Herron J.
3. In *Yango Pastoral Company Pty Ltd* v. *First Chicago Australia Ltd.* (1978) 139 C.L.R. 410, at p. 413 (H.C. of A.), Gibbs A.C.J. suggested the following heads of study: "There are four main ways in which the enforceability of a contract may be affected by a statutory provision which renders particular conduct unlawful: (1) The contract may be to do something which the statute forbids; (2) The contract may be one which the statute expressly or impliedly prohibits; (3) The contract, although lawful on its face, may be made in order to effect a purpose which the statute renders unlawful; or (4) The contract, although lawful according to its own terms, may be performed in a manner which the statute prohibits".
4. [1921] 2 K.B. 716 (C.A.).

implied prohibition of a contract by statute.[5] From some judgments also we get the impression that a contract is impliedly prohibited where a court does not find express words of prohibition, but is convinced of prohibition by interpreting the language in the statute. For example in *Melliss* v. *Shirley Local Board of Health,*[6] the Court of Appeal held that the contract in question was prohibited by the statute. In this case, while Lord Esher M.R. said: "No doubt s.193 does not in express terms say that such a contract is to be void",[7] Cotton L.J. said that "there is an *implied* prohibition of the contract in the first part of s.193".[8] In *Dennis & Co. Ltd* v. *Munn,*[9] decided by the Court of Appeal, "the whole question [turned] on the interpretation to be given to Defence Regulation No. 56A."[10] Commenting on this case, Pearce L.J. said that "the core of [the contract] was the mischief expressly forbidden by the . . . statutory regulation",[11] while concluding that the "contract between these persons for carrying out an unlawful operation would be forbidden by *implication.*"[12]

It is respectfully suggested that such contracts should be explained as contracts expressly prohibited by statute on the basis of restriction put upon the court's power of interpretation of the language used therein. Authority for this kind of analysis can be found in the famous statement of Lord Wright in *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd,*[13] an important decision of the Privy Council on the question of determining prohibition of a contract by statute. His Lordship said: "Nor must it be forgotten that the rule by which contracts not *expressly forbidden* by statute or declared to be void are in proper cases nullified for disobedience to a statute is *a rule of public policy only,* and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds."[14] The expression, "expressly forbidden" in this statement was explained by Jacobs J. in *Yango Pastoral Co. Pty Ltd* v. *First Chicago Australia Ltd,*[15] a recent important decision of the High Court of Australia. His Honour said: "I would take the reference to '*expressly forbidden*' to comprehend the case of a *prohibition implied as a matter of construction of the statute* itself."[16] If the suggested criterion is accepted, then *George* v. *Greater Adelaide Land Development Co. Ltd,*[17] an oft-quoted case of the High Court of Australia, should be looked upon as a case of express prohibition of contract by statute and was so illustrated by Glass J.A. in *First Chicago Australia Ltd*

5. See R.A. Buckley, n.1, *ante,* at pp. 536-37; D.J. Harland, n.1, *ante,* at p. 159.
6. (1885) 16 Q.B.D. 446 (C.A.).
7. *Ibid.*, at p. 451.
8. *Ibid.*, at p. 453.
9. [1949] 2 K.B. 327 (C.A.).
10. *Ibid.*, at p. 331, per Bucknill L.J.
11. See *Archbolds (Freightage) Ltd* v. *S. Spanglett Ltd* [1961] 1 Q.B. 374, at pp. 384-85 (C.A.).
12. *Ibid.*, at p. 385.
13. [1939] A.C. 277 (P.C.).
14. *Ibid.*, at p. 293.
15. (1978) 139 C.L.R. 410 (H.C. of A.).
16. *Ibid.*, at p. 432.
17. (1929) 43 C.L.R. 91 (H.C. of A.).

v. *Yango Pastoral Co. Pty Ltd (No. 3).*[18] It should be noted, however, that in determining the nature of the prohibition of the contract in *George's* case itself, Knox C.J. concluded that it was *impliedly* prohibited by the statute. His Honour said: "It is true that neither in the Act nor in the Regulations is there any express prohibition against selling . . . but it seems to me that such a prohibition must be *implied* from the terms of regs. 17-46".[19]

There is little doubt that the well-known case, *Victorian Daylesford Syndicate Ltd* v. *Dott,*[20] was decided by Buckley J. (later Lord Wrenbury) as a case of implied prohibition of contract by statute, invoking the rule of public policy, viz., the protection of the public. His Lordship said: "The purpose is a public purpose, and therefore upon all the authorities the act for the doing of which a penalty is imposed is an act which is *impliedly prohibited* by the statute, and is consequently illegal."[21] It may seem strange that this case has been explained as a case of express prohibition of a contract by statute by Gibbs A.C.J., and as a case of implied prohibition by Jacobs J. in the same decision of the High Court of Australia. In *Yango Pastoral Co. Pty Ltd* v. *First Chicago Australia Ltd,*[22] Gibbs A.C.J. said: "A case of a similar kind is *Victorian Daylesford Syndicate Ltd* v. *Dott* . . . There, again, the contract held to be invalid was of a kind which the statute *expressly prohibited*" whereas Jacobs J. said: "Buckley J. held that the statute *impliedly prohibited* a money-lender from contracting in the course of his business."[23] It is suggested that we should confine ourselves in using the term implied prohibition of a contract by statute to analyse only those situations where a court fails to find express words of prohibition in the statute, but nonetheless finds an implied prohibition by invoking the rule of public policy, e.g., the protection of the public. In *Shaw* v. *Groom,*[24] Harman L.J. said: "The question whether a statute *impliedly prohibits* the contract in question is one of public policy."

A contract which is expressly or impliedly prohibited by a statute is void and unenforceable.[25] In such a situation no question of purpose, lawful or unlawful, arises and the law does not distinguish

18. See [1977] 2 N.S.W.L.R. 583, at p. 587 (C.A.), where his Honour said: "An express prohibition by statute may take many forms. The Act may provide that it is unlawful to sell, except in accordance with its provisions: *George* v. *Greater Adelaide Land Development Co. Ltd*".
19. (1929) 43 C.L.R. 91, at p. 98 (H.C. of A.).
20. [1905] 2 Ch. 624.
21. *Ibid.*, at p. 630.
22. (1978) 139 C.L.R. 410, at p. 416 (H.C. of A.).
23. *Ibid.*, at p. 431.
24. [1970] 2 Q.B. 504, at p. 516 (C.A.).
25. See *Yango Pastoral Co. Pty Ltd* v. *First Chicago Australia Ltd* (1978) 139 C.L.R. 410, at p. 413 (H.C. of A.), per Gibbs A.C.J. "The ordinary principle is that, in the absence of sufficient indication of intention to the contrary, a transaction which is made illegal by statute is void.": *O'Neill* v. *O'Connell* (1946) 72 C.L.R. 101, at p. 132 (H.C. of A.), per Williams J.; *Victorian Daylesford Syndicate Ltd.* v. *Dott* [1905] 2 Ch. 624, at p. 629, per Buckley J.; *Roach* v. *Bickle* (1915) 20 C.L.R. 663, at p. 671 (H.C. of A.), per Isaacs and Gavan Duffy J.J.; *George* v. *Greater Adelaide Land Development Co. Ltd* (1929) 43 C.L.R. 91, at p. 103 (H.C. of A.), per Starke J.

between the innocent[26] and the guilty, as in cases where the contract is lawful as formed but illegal as performed.[27] It has been established from a long line of authorities that a court will not allow the innocent party to such a contract to enforce it although he intends to rely upon false representation by the other party.[28] It does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to contravene the law or not. One has to consider not what acts the statute prohibits but what contracts it prohibits.[29] A party entangled with such an illegal contract cannot avoid the principle of unenforceability by bringing an action not upon an express contract but upon an implied one.[30]

1. Consequences of Illegality on Contracts Expressly Prohibited by Statute

Although express and implied prohibition of contract by statute have similar effects in nullifying the validity of a contract, there is a difference in the manner in which they are to be respectively determined. If, upon the proper construction of its language, the statute expressly forbids the contract, it is void.[31] In construing the statute, it is not permissible to go outside the language used therein and invoke the effect upon the public of the nullification of the contract as an indication of the intention of the legislature.[32] But if a court finds express prohibition of a contract by construing the language of the statute, it may strengthen itself by finding that the

26. See Cheshire & Fifoot, n.1, *ante*, at p. 329: "The position is the same if the parties have agreed to do something that is expressly or implicitly forbidden by statute. In both these cases, the contract is intrinsically and inevitably illegal, and, so far as consequences are concerned, no allowance is made for innocence".
27. See *Le Feuvre* v. *Haddin* (1969) 72 S.R. (N.S.W.) 68, at p. 76 (C.A.), per Wallace P.
28. See *Harse* v. *Pearl Life Assurance Co.* [1904] 1 K.B. 558 (C.A.).
29. See *St. John Shipping Corpn.* v. *Joseph Rank Ltd* [1957] 1 Q.B. 267, at p. 283, per Devlin J.
30. *Ibid.*, at pp. 283-84. Devlin J. said: "If, for example, an unlicensed broker sues for work and labour, it does not matter that no express contract is alleged and that the claim is based solely on the performance of the contract, that is to say, the work and labour done; it is as much unenforceable as an express contract made to fit the work done." See *Cope* v. *Rowlands* (1836) 150 E.R. 707.
31. "Contracts expressly prohibited by statute form a class of contract which cannot be enforced at law": *Cheers* v. *Pacific Acceptance Corpn.* (1960) 60 S.R. (N.S.W.) 1, at p. 7 (F.C.), per Herron J. "If the effect of the words used in the statute or instrument is expressly to prohibit the contract in question, then the contract becomes void and unenforceable": *Chitts* v. *Allaine* [1982] Qd. R. 319, at p. 326, per Macrossan J. "[A] contract expressly prohibited by a statute is illegal and . . . no rights under it can accrue to any party thereto.": *Wilson International Pty Ltd* v. *International House Pty Ltd* [1983] W.A.R. 243, at p. 254, per Smith J. "If the contract in fact made by the parties is expressly forbidden by the statute, its illegality is undoubted.": Cheshire & Fifoot, n.1, *ante*, at p. 308.
32. See *First Chicago Aust. Ltd* v. *Yango Pastoral Co. Pty Ltd* (No. 3) [1977] 2 N.S.W.L.R. 583, at p. 587 (C.A.), per Glass J.A. In *Stevens* v. *Gourley* (1859) 141 E.R. 752, at p. 756, Williams J. said: "But, on the other hand, it is equally clear that we ought not to put this construction upon the statute, however beneficial it may be to the public, if it be apparent from the language they have used that the legislature did not mean to point at such a structure as this."

prohibition is for the benefit of the public.[33] Illustrations of a contract being expressly prohibited by statute are not uncommon.[34]

A. Contracts for the Sale of Goods

If a contract for the sale of goods is expressly prohibited by statute, the seller will fail to recover the price of goods sold or damages. In the well-known case of *Re Mahmoud and Ispahani,*[35] the plaintiff sold to the defendant a quantity of linseed oil. At the time of the sale, there was an Order in force made under the Defence of the Realm Regulations (U.K.), prohibiting such a sale unless both the buyer and the seller had licences to deal with such a commodity. The plaintiff had a licence and the defendant falsely represented to the plaintiff that he had one. On the refusal by the buyer to take delivery of the oil, the seller brought an action against him for damages.

Although the Court of Appeal realized that the seller was the innocent party who was induced to enter into the contract by the false representations of the buyer, it refused to enforce the contract. This decision is looked upon as a typical example of a case where the contract was expressly[36] prohibited by statute. Atkin L.J. made it explicit by saying that the "contract was expressly prohibited by the terms of the Order"[37] which had the effect of a statute. In this case, the Court allowed the buyer to rely unscrupulously upon his own illegality in order to avoid his liability under the contract. Bankes L.J. said: "[A]s the language of the Order clearly prohibits the making of this contract, it is open to a party, however shabby it may appear to be, to say that the Legislature has prohibited this contract, and therefore it is a case in which the Court will not lend its aid to the enforcement of the contract."[38] It appears that if a

33. In *Re Mahmoud and Ispahani* [1921] 2 K.B. 716, at p. 729 (C.A.), Scrutton L.J. said: "The contract was absolutely prohibited; and in my view, if an act is prohibited by statute for the public benefit, the Court must enforce the prohibition, even though the person breaking the law relies upon his own illegality . . . in this case it is clear that the prohibition is for the benefit of the public." The Privy Council decision, *Chai Sau Yin* v. *Liew Kwee Sam* [1962] A.C. 304, at p. 311, quoted this statement explaining: "If . . . the contracts were prohibited by law and the prohibition was made in the public interest, no claim can be entertained." In *George* v. *Greater Adelaide Land Development Co. Ltd* (1929) 43 C.L.R. 91, at p. 101, (H.C. of A.), Isaacs J., after holding that the effect of the relevant sections of the statute was to prohibit the making of the contract, said: "The purpose of the legislation . . . extends to the promotion of public interests, convenience and safety."
34. See Cheshire & Fifoot, n.1, *ante,* at p. 308.
35. [1921] 2 K.B. 716 (C.A.). See G.L. Williams, "The Legal Effect of Illegal Contracts", (1942) 8 *C.L.J.* 51.
36. See *Archbolds (Freightage) Ltd* v. *S. Spanglett Ltd* [1961] 1 Q.B. 374, at p. 385 (C.A.), where Pearce L.J. said that the core of the contract was "the mischief expressly forbidden by the statutory order." His Lordship further said: "A contract of sale between those persons was therefore expressly forbidden".
37. [1921] 2 K.B. 716, at p. 731 (C.A.).
38. *Ibid.*, at p. 724. Scrutton L.J. said that "the court must enforce the prohibition even though the person breaking the law relies upon his own illegality". (at p. 729). This dictum was applied in *Chai Sau Yin* v. *Liew Kwee Sam* [1962] A.C. 304, at p. 311 (P.C.) Cf. *Fielding and Platt Ltd* v. *Najjar* [1969] 2 All.E.R. 150 (C.A.), where the Court of Appeal, dealing with illegality of contract under foreign law, did not allow the defendant to pray in aid his own illegality.

contract is absolutely prohibited by a statute, the innocence of the plaintiff regarding the illegality is not relevant. In a stringent statement, Scrutton L.J. said: "If this contract is prohibited by what is equivalent to a statute, the fact that the person who entered into the contract honestly believed that he was not breaking the statute, because he was told by the other party that he had a licence, is no defence."[39]

It should be noted that in this case both buying and selling the commodity without licences were prohibited, whereas, in the Privy Council case of *Chai Sau Yin* v. *Liew Kwee Sam,*[40] only purchasing the commodity without a licence was prohibited by the statute. Nonetheless, the court allowed the purchaser in the latter case to rely upon his own illegality, holding that the contract was expressly prohibited by the statute.[41] Lord Hodson said: "[T]he appellant is entitled to rely upon his own illegality in respect of the purchase of rubber from the respondent in view of the prohibition imposed by section 5(i) of the enactment which forbids the purchase of rubber without a licence."[42] It should be remembered that the court in *Re Mahmoud and Ispahani*[43] did not decide whether there was an action for fraud or breach of promise of warranty.[44] Scrutton L.J. said: "Whether the plaintiff has a remedy against the defendant who, on the finding of the umpire, has fraudulently deceived him, is a matter on which I express no opinion."[45]

In *Bradshaw* v. *Gilbert's (Australasian) Agency (Vic.) Pty Ltd,*[46] the respondent sold a certain quantity of scrap battery lead to the appellant in excess of the maximum price fixed by the Prices Regulation Act 1948 (Vict.). On refusal by the purchaser to go on with the contract, contending that it was illegal, the vendor brought an action against the purchaser to recover damages for breach of the contract. The High Court of Australia dismissed the action, holding that the contract was expressly[47] prohibited by the statute. The majority judgment of Dixon C.J. and Taylor J. stated: "The prohibition imposed by s.25 is in express terms . . . , a sale or contract of sale made in breach of s.25 must be regarded as void and as being incapable of giving rise to an action for damages".[48] Their Honours further emphasized that it was "beyond doubt that the terms of the section preclude a party to an agreement for the sale of declared goods at a price in excess of the maximum price from seeking in a court of law to enforce his contract, or to recover damages

39. *Ibid.*, at p. 728.
40. [1962] A.C. 304 (P.C.).
41. See Halsbury's Laws of England, 4th ed., Vol. 9, para 425, n.3.
42. [1962] A.C. 304, at p. 313 (P.C.).
43. [1921] 2 K.B. 716 (C.A.).
44. See *Strongman (1945) Ltd* v. *Sincock* [1955] 2 Q.B. 525, at p. 536 (C.A.), per Denning L.J.; *Hatcher* v. *White* (1953) 53 S.R. (N.S.W.) 285, at p. 288 (F.C.), per Street C.J.
45. [1921] 2 K.B. 716, at p. 730 (C.A.).
46. (1952) 86 C.L.R. 209 (H.C. of A.).
47. See *First Chicago Australia Ltd* v. *Yango Pastoral Co. Pty Ltd (No.3)* [1977] 2 N.S.W.L.R. 583, at p. 587 (C.A.), where Glass J.A. cited this case as an illustration of express prohibition of contract by statute.
48. (1952) 86 C.L.R. 209, at p. 219 (H.C. of A.).

for a breach thereof."[49] In *Le Feuvre* v. *Haddin,*[50] the defendant, a registered dairyman and milk vendor, leased dairy premises to the plaintiff, who was not registered as a dairyman or milk vendor as required by the Milk Act 1931 (N.S.W.). Under the terms of the lease, the plaintiff sold milk to the defendant. The plaintiff later brought an action to recover the outstanding balance of the price owed to him by the defendant. By interpreting the language of the statute, the Court of Appeal of the Supreme Court of New South Wales was of the opinion that the contract was expressly prohibited by the statute and refused to enforce the claim of the plaintiff. Wallace P. stated: "[It] does not seem to me possible so to construe s.36 as to justify the court recognizing such a cause of action."[51] His Honour further said that "the contract here sued upon was prohibited, and it was illegal *as formed.*"[52]

B. Hire-Purchase Transactions

A hire-purchase contract may be illegal for contravening a statute.[53] In *Cheers* v. *Pacific Acceptance Corpn. Ltd,*[54] the plaintiff purchased a motor car by a hire-purchase agreement, but did not pay the minimum deposit as required by the Hire Purchase Agreements Act 1941 (N.S.W.). He fell into arrears, whereupon the hire purchase company repossessed the car. In an action brought by the purchaser to recover the deposit and instalments paid by him, the Full Court of the Supreme Court of New South Wales construed s.32 of the statute and reached the opinion that the contract was prohibited by the statute, disentitling the purchaser to recover the moneys paid by him. Owen J. said: "I am of opinion that the plaintiff was not entitled to be repaid the deposit and instalments paid by him. The general rule is that where money is paid under contract the making of which is prohibited by law and [sic] payer cannot recover the money paid."[55] The Court also held that although s.32 preserved certain rights in favour of the purchaser, they did not extend to recovery of moneys paid in the absence of total failure of consideration.[56]

C. Loan Transactions

In company law, a company is prohibited, subject to certain exceptions, not presently relevant, from giving financial assistance for

49. *Ibid.*
50. (1969) 72 S.R. (N.S.W.) 68 (C.A.).
51. *Ibid.*, at p. 76.
52. *Ibid.*
53. 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 per cent of the cash price is paid by way of an initial payment. See Cheshire & Fifoot, n.1, *ante*, at p. 308.
54. (1960) 60 S.R. (N.S.W.) 1 (F.C.).
55. *Ibid.*, at 3-4.
56. *Ibid.*, at p. 6. See also *Roberts* v. *Roberts* [1957] Tas. S.R. 84, where the Full Court of the Supreme Court of Tasmania allowed the purchaser to recover damages for breach of statutory duty committed by the defendant in not giving the purchaser an opportunity of paying up the arrears. See *Quin* v. *Mutual Acceptance Co. Ltd* [1968] 1 N.S.W.R. 122 (C.A.), discussed *post*.

the acquisition of its shares.[57] In *Dressy Frocks Pty Ltd* v. *Bock,*[58] the plaintiff company lent money to the defendant to purchase its own shares in contravention of the Companies Act 1936 (N.S.W.). The Full Court of the Supreme Court of New South Wales dismissed the claim of the plaintiff to recover the money lent, holding that the contract was illegal and void, being prohibited by s.148[59] of the statute.[60] Street C.J. felt himself bound by "the clear language of the section",[61] stating: "It is true that the section does not expressly say that such contracts by way of loan are void, but this necessarily follows from the fact that the contract itself is made illegal by the terms of the section."[62]

D. Contracts for the Sale of Land

The High Court of Australia had an early opportunity to examine the consequences of illegality on contract contravening a statute in *George* v. *Greater Adelaide Land Development Co. Ltd,*[63] where the respondent company entered into a contract with the appellant to sell certain allotments of land "subject to the provisions of the Town Planning and Development Act 1920 (S.A.) being complied with." The Act and regulations made thereunder were not fully complied with until some months after the execution of the contract. In an action brought by the vendor company to recover the balance of the purchase money, the High Court not only dismissed its action but also rejected the counterclaim of the purchaser to recover the instalment money paid by him. In the opinion of Knox C.J., "the contract . . . contravened the provisions of the [statute] and was therefore illegal and invalid."[64] Isaacs J. said: "In my opinion the effect of secs. 23 and 44 is to prohibit the making of the contract, either absolutely or conditionally."[65]

In the following cases,[66] contracts for the sale of land were held to be prohibited by statute for not obtaining the approval of the authorities. In *Classified Pre-mixed Concrete Pty Ltd* v. *Oil Tool*

57. See Companies Act 1981, s.129; Ford, *Principles of Company Law,* 3rd ed., 1982, para 827; *Gower's Principles of Modern Company Law,* 4th ed., 1979, at p. 227.
58. (1951) 51 S.R. (N.S.W.) 390 (F.C.). The principle established in this case has been followed in *Shearer Transport Co. Pty Ltd* v. *McGrath* [1956] V.L.R. 316; *Dey (E.H.) Pty Ltd* v. *Dey* [1966] V.R. 464; *Re Ferguson: Ex parte Thorne & Co. Pty Ltd* (1969) 14 F.L.R. 311; *In re Pinkster (J & H) & Co. Pty Ltd* [1968] Tas S.R. 77. Also see *Juniper Pty Ltd* v. *Grausom* 7 A.C.L.R. 335.
59. Cf. Uniform Companies Act 1961, s.67; Companies Act 1981, s. 129.
60. See (1951) 51 S.R. (N.S.W.) 390, at p. 400 (F.C.), where Herron J. said: "[O]nce it is established that the contract under which the money was lent was in contravention of the prohibition contained in s.148 the contract is illegal, as the statute prohibits the making of the contract, and hence the money paid pursuant to it cannot be recovered."
61. *Ibid.*, at p. 395.
62. *Ibid.*, at p. 393.
63. (1929) 43 C.L.R. 91 (H.C. of A.).
64. *Ibid.*, at p. 98.
65. *Ibid.*, at p. 101.
66. Also see *Subdivisions Ltd* v. *Payne* [1934] S.A.S.R. 214, at p. 219, where the original contract was found to be illegal for not obtaining the approval of the Town Planner to the plan of sub-division as required by the Town Planning and Development Act 1920 (S.A.).

Sales Pty Ltd,[67] and in *Vella* v. *Altadonna,*[68] the required approvals were not obtained, while in *Wilson International Pty Ltd* v. *International House Pty Ltd*[69] the approval was obtained four years after entering into the contract. But in all three cases, the courts dismissed the action of the purchaser claiming specific performance of the contract. Construing the Dairy Produce Act 1920–1974 (Qld.) in *Vella* v. *Altadonna,* Connolly J. said:[70] "I am of the opinion that s6(5)(e) has a similar effect to the legislation considered in *George* v. *Greater Adelaide Land Development Co. Ltd". In Wilson International Pty Ltd* v. *International House Pty Ltd,*[71] while interpreting the Town Planning and Development Act 1928–1979 (W.A.), Smith J. said that "the legislative intent was to stamp with illegality and to render void an agreement in contravention of s20(1)(a)". His Honour later concluded: "I am bound to hold that the agreement in this case is prohibited by the Act and therefore void."[72]

George's Case was distinguished in *Braham* v. *Walker*[73] and in *Landall Construction and Development Co. Pty Ltd* v. *Bogaers.*[74] In both cases, the contract in question was for the sale of land requiring the approval of the authorities to the plan of subdivision. In the former case, the approval was granted "not long after the option was given", while in the latter, the approval was not obtained altogether. In *Braham,* the High Court of Australia allowed the purchasers to exercise the option to purchase land granted by the vendor and in *Landall,* the Full Court of the Supreme Court of Western Australia allowed the purchaser to recover the deposit paid to the vendor. By construing the relevant statutes, the Court in each case held that the contract was not prohibited by the statute. In *Braham,* Dixon C.J. said:[75] " . . . there is no ground for construing [s.568 of the Local Government Act 1946 (Vict.)] by reference to the statutory provisions of South Australia which governed *George's Case*", while in *Landall,* Wickham J. expressed: "In my opinion . . . this contract is not a contract to sell land other than as a lot or lots and it does not infringe the [Town Planning and Development Act 1928 (W.A.)]."[76]

In *Chitts* v. *Allaine,*[77] the vendors did not tender to the purchasers, a certificate of fitness for registration prior to entering into the contract of sale of land, thus contravening the By-Laws of the Council of the City of Redcliffe. The Supreme Court of Queensland dismissed an action brought by the purchasers for specific performance of the contract, holding that the contract was expressly prohibited by the By-laws. Macrossan J. said: "The by-law is

67. [1966] Qd. R. 388.
68. [1980] Qd. R. 606.
69. [1983] W.A.R. 243.
70. [1980] Qd. R. 606, at p. 609.
71. [1983] W.A.R. 243, at p. 253.
72. *Ibid.*, at p. 254.
73. (1961) 104 C.L.R. 366 (H.C. of A.).
74. [1980] W.A.R. 33 (F.C.).
75. (1961) 104 C.L.R. 366, at p. 380 (H.C. of A.).
76. [1980] W.A.R. 33, at p. 38 (F.C.).
77. [1982] Qd. R. 319.

framed in words which expressly forbid the making of the contract without the prior tender of a certificate."[78] In order to protect the interests of certain sections of the community, legislation is sometimes passed prohibiting contracts affecting such interests adversely. In *Chapman* v. *Wade,*[79] the applicant, a mortgagee, entered into a contract with the respondent to sell farming land under a power of sale contained in a mortgage. The Full Court of the Supreme Court of South Australia declared that the contract was illegal and void, being prohibited by the Farmers Assistance Act 1933 (S.A.). Cleland J. said: "Sub-sec. 2 of [sec. 31] applies and prohibits such a transaction which is in consequence illegal and void."[80]

E. Tenancy Agreements

In *Montague* v. *Pooley*[81] the defendant, a licensee of a hotel, let a portion of his licensed premises to the plaintiff without obtaining the permission of the Licensing Commission, thus contravening the Liquor Acts 1912–1948 (Qld.). The defendant terminated the agreement upon a conviction of stealing being recorded against the plaintiff, who thereupon sued him for damages for breach of contract. The Full Court of the Supreme Court of Queensland held that the contract was clearly illegal, being prohibited by s.62(5A) of the Act. Macrossan C.J. said that "the plaintiff was not entitled to recover any damages for the breach of what was an illegal contract between him and the defendant".[82]

F. Building Contracts

Building contracts are not infrequently regulated by statutes containing express prohibition. In *Stevens* v. *Gourley,*[83] a builder failed to recover for work done and materials supplied under a contract which "was entered into and carried into effect in express violation of the Metropolitan Building Act" 1855 (U.K.).[84] A builder will fail to recover his expenses in carrying out building works if he knows that no licence has been obtained authorizing such works to be done as required by the statute. In *Brightman & Co. Ltd* v. *Tate,*[85] although the defendants' architect admitted that the duty lay upon the defendants or himself rather than upon the plaintiffs to procure the necessary licence",[86] the builders failed to

78. *Ibid.*, at p. 325.
79. [1939] S.A.S.R. 298.
80. *Ibid.*, at p. 304.
81. [1951] Q.S.R. 291 (F.C.) Noted, 25 *A.L.J.* 728.
82. *Ibid.*, at p. 297.
83. (1859) 141 E.R. 752.
84. *Ibid.*, at p. 756, per Crowder J.
85. [1919] 1 K.B. 463.
86 *Ibid.*, at p. 471, per McCardie J. Cf. *Knowles* v. *Fuller* (1948) 48 S.R. (N.S.W.) 243, at p. 245, where Jordan C.J. said: "It was just as much his [the builder's] responsibility as it was that of the building owner to see that the necessary consent had been obtained before he began operations." In *Strongman (1945) Ltd* v. *Sincock* [1955] 2 Q.B. 525, at p. 537 (C.A.), Denning L.J. stated: "When a builder is doing work for a lay owner . . . the primary obligation is on the builder to see that there is a licence." Also see *Smith & Son (Bognor Regis) Ltd* v. *Walker* [1952] 2 Q.B. 319, at p. 327 (C.A.), per Denning L.J.

recover the cost of labour and materials supplied, as the court found that the builders knowingly took part in an illegal transaction. McCardie J. said: "In the present case, however, the contract has been wholly executed, a violation of the Defence of the Realm Order has in fact been committed; and the plaintiffs seek to recover for work done in disregard of an express prohibition."[87] In *Varley* v. *Spatt,*[88] a builder sought to recover from the building owner the sum of £3,171 in respect of work and labour done and materials provided. Herring C.J. held that the carrying out of alterations by the builder without the consent in writing of the building surveyor as required by the Uniform Building Regulations was "undoubtedly an illegal act."[89]

Where a licence is necessary under a statute to carry out building work, if a builder performs work in excess of the cost granted by the licence, he is not entitled to recover the excess payment if it directly contravenes the provisions of the statute.[90] It has been suggested that builders, when they undertake building work, ought to see the licence before they start work. It is no use their relying on the word of the owner that he has obtained a licence, because if it should turn out that he has not got one, the work will be illegal and they will be unable to recover payment for it.[91] In *Dennis & Co. Ltd* v. *Munn,*[92] the Court of Appeal decided that where a licence had been granted for a certain amount on a specification and that amount had been exceeded, the builder could not claim that the amount of the free allowance should be added to the amount covered by the licence.[93] The fact that the excessive work was done unintentionally by the builders did not put them in any better position.[94] If the employer knowingly deceived the builders, they might have an action for fraud on that account.[95] This case[96] seems to show that where under statutory regulations work is licensed to cost a certain figure but work is, in fact, carried out in excess of that amount, the illegality only attaches to the excess; in other words, the contract is only illegal in so far as it involves a claim for a payment of a larger figure than that for which the licence was granted.[97]

87. [1919] 1 K.B. 463, at p. 471.
88. [1955] V.L.R. 403.
89. *Ibid.*, at p. 406.
90. *Brightman & Co. Ltd* v. *Tate* [1919] 1 K.B. 463; *Bostel Bros. Ltd* v. *Hurlock* [1949] 1 K.B. 74 (C.A.); *Jackson Stansfield & Sons* v. *Butterworth* [1948] 2 All E.R. 558 (C.A.); *Dennis & Co. Ltd* v. *Munn* [1949] 2 K.B. 327 (C.A.); cf. *Strongman (1945) Ltd* v. *Sincock* [1955] 2 Q.B. 525 (C.A.), where the builder was allowed to recover the value of work done on the ground of a collateral warranty.
91. See *Smith & Son (Bognor Regis) Ltd* v. *Walker* [1952] 2 Q.B. 319, at p. 327 (C.A.), per Denning L.J.; *Dennis & Co. Ltd* v. *Munn* [1949] 2 K.B. 327, at pp. 331-32 (C.A.), per Denning L.J.
92. [1949] 2 K.B. 327 (C.A.).
93. See *Brewer Street Investments Ltd* v. *Barclays Woollen Co. Ltd* [1954] 1 Q.B. 428, at p. 434 (C.A.), per Somervell L.J.
94. See *Dennis & Co. Ltd* v. *Munn* [1949] 2 K.B. 327, at p. 332 (C.A.), per Denning L.J.
95. See *Hatcher* v. *White* (1953) 53 S.R. (N.S.W.) (F.C.) 285, discussed *post.*
96. Also see *Jamieson* v. *Watt's Trustee* [1950] S.C. 265; *Young* v. *Buckles* [1952] 1 K.B. 220 (C.A.).
97. See *Young* v. *Buckles* [1952] 1 K.B. 220, at p. 225 (C.A.), per Evershed M.R.

In a contract of such a nature where the work to be done and the final cost cannot be foreseen, nothing unlawful occurs until the free limit is exceeded. Construing the Defence (General) Regulations 1939, reg. 56A (U.K.), the Court of Appeal in *Clifford (Frank W.) Ltd* v. *Garth,*[98] allowed the builders to recover the amount within the free limit. On the other hand, it appears that an entire contract to execute for a lump sum a single and indivisible work without obtaining a licence would be wholly illegal.[99]

Where one part of a work is unlicensed and the other part is licensed, any payments made by the owner generally on account of the work must be allocated to the lawful part of it; it is not permissible for the builder to appropriate them to the unlawful part. But if the owner himself specifically appropriates a particular payment to the unlawful part, then it remains where it is. He cannot turn round afterwards and appropriate it to the lawful part.[100]

G. *Action to Recover Sums for Work Done and Materials Supplied*

A contractor will fail to recover his expenses for work done and materials supplied in carrying out a contract which has been expressly prohibited by a statute. For example, in *Bensley* v. *Bignold,*[101] a printer failed to recover for labour and materials used in printing a book, having omitted to affix his name to it, in direct violation of the provisions of a statute.[102] There was no express prohibition in the statute against the act of printing without adding the printer's name, but the court held that there was no sound distinction between those cases where a statute required a thing to be done and where it prohibited it being done.[103] Holroyd J. said: "[I]n this case it is not merely prohibited under a penalty, for here the Act expressly requires, that the printer's name shall be printed, which is the same thing as if it had expressly prohibited him from printing a work without doing so."[104] In *Melliss* v. *Shirley Local Board of Health,*[105] the plaintiffs, who were civil engineers, brought an action against the defendants, a local authority, to recover the cost of preparation of certain maps and plans. The defendants maintained that the fact that one of the plaintiffs was their employee rendered the contract illegal by the provision of the Public Health Act 1875 (U.K.) which said that an employee of a local authority should not be interested in any contract with such authority. The Court of Appeal rejected the claim of the plaintiffs

98. [1956] 2 All E.R. 323 (C.A.).
99. *Ibid.*, at p. 325 (C.A.), per Denning L.J.
100. See *Smith & Son (Bognor Regis) Ltd* v. *Walker* [1952] 2 Q.B. 319, at p. 328 (C.A.), per Denning L.J.; *Varley* v. *Spatt* [1955] V.L.R. 403, at p. 407.
101. (1822) 106 E.R. 1214.
102. 39 Geo. 3, c.79 (U.K.).
103. See *Re National Benefit Assurance Co. Ltd* [1931] 1 Ch. 46, at pp. 56-57, per Maugham J.
104. (1822) 106 E.R. 1214, at p. 1216. See *Yango Pastoral Co. Pty Ltd* v. *First Chicago Australia Ltd* (1978) 139 C.L.R. 410, at p. 431 (H.C. of A.), where Jacobs J. said: "If a statute imposes a positive obligation to make contracts in a certain way, a prohibition against making contracts in another way can be implied as a matter of construction."
105. (1885) 16 Q.B.D. 446 (C.A.).

with regret.[106] It is submitted that in this case Cotton L.J. used the expression implied prohibition[107] of the contract by the statute when he meant express prohibition, as the term has been used in this work.

H. Remedy to a Party to an Illegal Contract Under Collateral Warranty or Fraud

An innocent party to an illegal contract may seek relief under a collateral contract although he cannot enforce the main contract which has been expressly prohibited by a statute. In *Strongman (1945) Ltd* v. *Sincock,*[108] the contract for building without a proper licence was absolutely prohibited under Defence Regulation 56A (U.K.). The Court of Appeal, however, allowed the innocent plaintiff, a builder, to recover the value of work done in an action for breach of a collateral promise[109] given by the defendant, an architect, that he would procure the necessary licence. However, *Sheridan* v. *Dickson*[110] illustrates that in different circumstances, a court may not feel encouraged to find a collateral warranty in order to grant relief to a party entering into a contract forbidden by a statute. In that case, a promise made by the prospective purchaser of a house to pay £400 to the plaintiff, a statutory tenant, was held to be in "direct contravention"[111] of the statute.[112] Although the Court of Appeal found that the purchaser was a "disreputable person"[113] who "unblushingly admitted"[114] that he had not performed his promise, it dismissed the action of the statutory tenant to recover the money promised by the purchaser in consideration of surrendering his tenancy. Unlike *Strongman (1945) Ltd* v. *Sincock,*[115] the Court refused on the facts to find any warranty.

An innocent party to a contract expressly prohibited by a statute is also entitled to seek relief on the ground of fraud. In *Hatcher* v. *White,*[116] the plaintiff entered into a contract with the defendant to carry out certain building work on the fraudulent misrepresentation made by the defendant that he was the holder of a permit as required by the Building Operations and Building Materials Control Act 1945, s.5 (N.S.W.). Although the performance of a building contract without a permit was forbidden by the statute, the Full Court of the Supreme Court of New South Wales allowed the plaintiff, "an innocent victim of a most dishonest and calculating man",[117] to recover the expenses incurred by him on the ground of

106. See (1885) 16 Q.B.D. 446, at p. 452 (C.A.), per Lord Esher M.R. Cf. *Ashe* v. *Wypow* [1961] Qd. R 225 (discussed *post*), where the contract was held not to be prohibited by the statute.
107. See Introduction, *ante.*
108. [1955] 2 Q.B. 525 (C.A.).
109. See Shand, [1927A] *C.L.J.* 144, at pp. 158, 166.
110. [1970] 1 W.L.R. 1328 (C.A.).
111. *Ibid.*, at p. 1331, per Harman L.J.
112. Increases of Rent and Mortgage Interest (Restrictions) Act 1920 (U.K.), s. 15.
113. [1970] 1 W.L.R. 1328, at p. 1330 (C.A.), per Harman L.J.
114. *Ibid.*
115. [1955] 2 Q.B. 525 (C.A.).
116. (1953) 53 S.R. (N.S.W.) (F.C.) 285.
117. *Ibid.*, at p. 297, per Herron J.

fraud practised by the defendant. *Hatcher* v. *White* and *Strongman (1945) Ltd* v. *Sincock* were followed in *Quin* v. *Mutual Acceptance Co. Ltd,*[118] where the hirer of a second-hand motor car in collusion with a motor car dealer did not pay the minimum deposit, thereby contravening the Hire-Purchase Act 1960 (N.S.W.). The hirer elected to avoid the agreement under s.30 of the Act whereupon the agreement became void entitling him to recover the amount paid by him. In an action brought by the hirer to recover the amount, the Court of Appeal of the Supreme Court of New South Wales held that the defendant hire-purchase company was not precluded from claiming damages from the hirer for fraud.

Summary

From the above discussion, it appears that if a contract is expressly prohibited by the terms of a statute, the court will not allow a party to such a contract to enforce it although he may be totally innocent of such illegality. On such occasions, however, the court may allow the innocent party to bring an action on a collateral contract which itself is not illegal and derive the same benefit which he would have derived by enforcing the main contract.[119] If the innocent party has been induced to enter into a contract by fraudulent misrepresentation of the other party, he is entitled to seek relief from the court on the ground of fraud.[120]

2. Consequences of Illegality on Contracts Impliedly Prohibited by Statute

A court dealing with a contract contravening a statute may not find any express prohibition by construing the language of the statute. The court then asks itself whether the contract is impliedly prohibited by the statute. A typical approach is: "The statute does not expressly prohibit the making of any contract. The question is therefore whether a prohibition arises as a matter of necessary implication."[121] It is proper in ascertaining the intention of the legislature to have regard to what the statute says to such matters as penalties, protection of the public, innocence of one party to the

118. [1968] 1 N.S.W.R. 122 (C.A.).
119. See *Strongman (1945) Ltd* v. *Sincock* [1955] 2 Q.B. 525, at p. 539 (C.A.), per Birkett L.J.; cf. *Sheridan* v. *Dickson* [1970] 1 W.L.R. 1328.
120. See *Hughes* v. *Liverpool Victoria Legal Friendly Society* [1916] 2 K.B. 482 (C.A.); *British Workman's and General Assurance Co.* v. *Cunliffe* (1902) 18 T.L.R. 502 (C.A.); *Harse* v. *Pearl Life Assurance Co.* [1904] 1 K.B. 558, at p. 563 (C.A.), per Collins M.R.; *Hatcher* v. *White* (1953) 53 S.R. (N.S.W.) 285 (F.C.).
121. See *Archbolds (Freightage) Ltd* v. *S. Spanglett Ltd* [1961] 1 Q.B. 374, at p. 389 (C.A.), per Devlin L.J. In *First Chicago Aust. Ltd* v. *Yango Pastoral Co. Pty Ltd* (No. 3) [1977] 2 N.S.W.L.R. 583, at p. 589 (C.A.), Glass J.A. said: "For these reasons I decline to hold that the section expressly prohibits the making of a contract of loan. It remains to consider whether the statute, on its proper construction, impliedly prohibits a contract of loan by an unauthorized bank." See also *Credit Lyonnais* v. *Barnard & Associates Ltd* [1976] 1 Lloyd's Rep. 557, at p. 562, per Mocatta J.

transaction, and for whose benefit the statute was passed.[122] A test which has been applied by the courts in some cases is to enquire whether or not the object of the statute is to protect the public from claims for services performed by unqualified persons,[123] or to protect the licensed persons from competition.

A court may infer prohibition from the fact that the statute imposes a penalty upon the person entering into a class of contract. In an early case, Parke B. said: "[A] contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition."[124] In an analysis of prohibition of contracts by statute, statutes have been grouped under two heads — those in which a penalty is imposed against doing an act for the purposes only of the protection of revenue, and those in which a penalty is imposed upon an act not merely for revenue purposes, but also for the protection of the public.[125] If the intention is only to protect the revenue, the statutes were not construed as imposing prohibition on contracts,[126] whereas if the intention is to protect

122. See *Maurice* v. *Lyons* [1969] 1 N.S.W.R. 307, at p. 315, per Helsham J.; *St. John Shipping Corpn.* v. *Joseph Rank Ltd* [1957] 1 Q.B. 267 , at p. 285, per Devlin J.
123. See e.g., *Taylor* v. *Crowland Gas & Coke Co.* (1854) 156 E.R. 455, discussed *post*.
124. See *Cope* v. *Rowlands* (1836) 150 E.R. 707, at p. 710, quoted by Scrutton L.J. and Atkin L.J. respectively in *Re Mahmoud and Ispahani* [1921] 2 K.B. 716, at pp. 728, 731 (C.A.). Holt C.J. in *Bartlett* v. *Vinor* (1692) 89 E.R. 750 said: "[E]very contract made for or about any matter or thing, which is prohibited and made unlawful by any statute, is a void contract, tho' the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, tho' there are no prohibitory words in the statute". The statement of Holt C.J. was quoted by Lord Ellenborough C.J. in *Langton* v. *Hughes* (1813) 105 E.R. 222. This doctrine was upheld by Mansfield C.J. in *Drury* v. *Defontaine* (1808) 127 E.R. 781, at p. 784, stating: "if any act is forbidden under a penalty, a contract to do it is now held void". See *Ritchie* v. *Smith* (1848) 136 E.R. 1329, at p. 1335, per Maule J.; *In re National Benefit Assurance Co. Ltd* [1931] 1 Ch. 46. In *Shaw* v. *Groom* [1970] 2 Q.B. 504, at p. 521 (C.A.), Sachs L.J. said: "Upon examining the provisions of a statute to ascertain whether its object was to vitiate the performance of a contract as [sic] to preclude a plaintiff suing on the contract itself, there may be more than one aspect of public policy to be taken into account. One important aspect is, of course, the desirability of the courts assisting to enforce a statute and not allowing their process to be used by a plaintiff who has broken the penal provisions of that statute."
125. See *Victorian Daylesford Syndicate Ltd* v. *Dott* [1905] 2 Ch. 624, at p. 629, per Lord Wrenbury, then Buckley J.; *Anderson Ltd* v. *Daniel* [1924] 1 K.B. 138, at p. 144 (C.A.), per Bankes L.J.; In *Cope* v. *Rowlands* (1836) 150 E.R. 707, at p. 710, Parke B. said: "[T]he question for us now to determine is, whether the enactment of the statute . . . is meant merely to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to a penalty if he does not pay it? or whether one of its objects be the protection of the public, and the prevention of improper persons acting as brokers?". In *Brightman & Co. Ltd* v. *Tate* [1919] 1 K.B. 463, at p. 469, McCardie J. said: "In every case it is a question of construction as to whether the object of a revenue statute is merely to protect and increase the revenue by enforcing penalties against a trader who does not comply with the rules or to render the contracts entered into by the trader illegal."
126. See, e.g., *Smith* v. *Mawhood* (1845) 153 E.R. 552, where the court was of the opinion that the statute imposed a penalty upon the offender for the purposes of revenue only.

the public, the contracts were held to be prohibited.[127] However in *Cope* v. *Rowlands,*[128] Parke B. said: "[I]f the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract?" The modern approach of examining the consequences of illegality on a contract for contravention of a statute containing penal provisions can be seen from a statement made by the High Court of Australia: "Where a statute imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed."[129] A careful observation of the rules of construction of statutes is necessary before a court should declare a contract to be void on the ground of implied prohibition by statute. Lord Campbell in *Liverpool Borough Bank* v. *Turner,*[130] said: "No universal rule can be laid

127. In *Victorian Daylesford Syndicate* v. *Dott* [1905] 2 Ch. 624, at p. 630, Buckley J. said: "If I arrive at the conclusion that one of the objects is the protection of the public, then the act is impliedly prohibited by the statute, and is illegal." See *Anderson Ltd* v. *Daniel* [1924] 1 K.B. 138, at p. 144 (C.A.), per Bankes L.J.; *Shaw* v. *Groom* [1970] 2 Q.B. 504, at p. 515 (C.A.), per Harman L.J.; *Chitts* v. *Allaine* [1982] Qd. R. 319, at p. 326, per Macrossan J. Bayley J. in *Bensley* v. *Bignold* (1822) 106 E.R. 1214, at p. 1216 said: "Where a provision is enacted for public purposes, I think that it makes no difference whether the thing be prohibited absolutely, or only under a penalty."

128. (1836) 150 E.R. 707, at p. 710. This statement has been quoted in many important cases, e.g., *Re Mahmoud and Ispahani* [1921] 2 K.B. 716, at p. 729 (C.A.), per Scrutton L.J.; *St. John Shipping Corpn.* v. *Joseph Rank Ltd* [1957] 1 Q.B. 267, at p. 285, per Devlin J.; see *Yango Pastoral Co. Pty Ltd* v. *First Chicago Australia Ltd* (1978) 139 C.L.R. 410, at p. 413 (H.C. of A.), per Gibbs A.C.J.; Treitel, n.1, *ante,* at p. 325, when the learned author said:

> Even where the object of the statute is to protect the public (or a section of it) a contract involving a breach of it is not invariably illegal . . . On the other hand, a contract may be illegal although it only violates a statute passed for the protection of the revenue .

129. See *Yango Pastoral Co. Pty Ltd* v. *First Chicago Australia Ltd* (1978) 139 C.L.R. 410, at p. 413 (H.C. of A.), per Gibbs A.C.J. In *Melliss* v. *Shirley Local Board of Health* (1885) 16 Q.B.D. 446, at p. 451 (C.A.), Lord Esher M.R. said: "[A]lthough a statute contains no express words making void a contract which it prohibits, yet, when it inflicts a penalty for the breach of the prohibition, you must consider the whole Act as well as the particular enactment in question, and come to a decision, either from the context or the subject matter, whether the penalty is imposed with intent merely to deter persons from entering into the contract, or for the purposes of revenue, or whether it is intended that the contract shall not be entered into so as to be valid at law."

130. (1860) 45 E.R. 715, at p. 718; quoted by Lord Wright in *Vita Food Products Inc.* v. *Unus Shipping Co.* [1939] A.C. 277, at p. 293 (P.C.). Also see *Shaw* v. *Groom* [1970] 2 Q.B. 504, at p. 523 (C.A.), per Sachs L.J.; *Cutler* v. *Wandsworth Stadium Ltd* [1949] A.C. 398, at p. 407 (H.L.), per Lord Simonds. "One must have regard to the language used and to the scope and purpose of the statute": *Archbolds (Freightage) Ltd* v. *S. Spanglett Ltd* [1961] 1 Q.B. 374, at p. 390 (C.A.), per Devlin L.J. "The question whether a statute, on its proper construction, intends to vitiate a contract made in breach of its provisions, is one which must be determined in accordance with the ordinary principles that govern the construction of statutes.": *Yango Pastoral Co. Pty Ltd* v. *First Chicago Australia Ltd* (1978) 139 C.L.R. 410, at p. 413, (H.C. of A.), per Gibbs A.C.J.

down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."

A. Contracts for the Sale of Goods

In an early case dealing with contract for the sale of goods, contravening statute, Littledale J. said: "Where Acts have been passed, containing regulations as to articles which are the subject of sale, and the policy of the Acts is for the security of the buyers, and to protect them against the frauds of the seller, it has been held that the seller cannot recover the price."[131] For example, in *Forster* v. *Taylor,*[132] the court did not allow a farmer to recover the price of butter sold by him, which was supplied in firkins not branded as required by a statute.[133] Rejecting the argument that the violation of the statute subjected the offender to a penalty only, the court said: "[H]ere the Acts of Parliament are made for the protection of the public against frauds . . . that the sale of [butter] was prohibited by Act of Parliament".[134] Similarly, in *Law* v. *Hodson,*[135] a vendor of bricks which were not of the dimensions as required by statute[136] was held unable to recover their value. Bayley J. said: "The policy of the Act was to protect the buyer against the fraud of the seller, and this can only be done by holding that the latter shall not recover the value of such bricks so sold."[137] In *Ambassador Refrigeration Pty Ltd* v. *Trocadero Building and Investment Co. Pty Ltd,*[138] the plaintiff sold a refrigerator to the defendant which was not so constructed as to comply with the requirements of the Factories, Shops and Industries Act 1962 (N.S.W.). Dismissing an action brought by the seller to recover the balance of the price, the Court of Appeal of the Supreme Court of New South Wales said: "It is unacceptable to say that s.142 merely creates an offence without imposing a prohibition . . . The delivery of this refrigerator, in our opinion, falls within the implied prohibition and made it impossible for the respondent to succeed in an action for goods sold and delivered."[139]

Statutes sometimes require that no person should sell certain goods mentioned in the statutes without obtaining a licence. In *Pretorius Pty Ltd* v. *Muir & Neil Pty Ltd,*[140] the plaintiff sold goods listed in the Therapeutic Goods and Cosmetics Act 1972 (N.S.W.) to the defendant without holding a licence as required by the statute. In an action brought by the seller to recover the price of

131. See *Forster* v. *Taylor* (1834) 110 E.R. 1019, at p. 1023.
132. *Ibid.*
133. 36 Geo. 3, c.86 (U.K.).
134. (1834) 110 E.R. 1019, at p. 1024, per Littledale J.
135. (1809) 103 E.R. 1019.
136. 17 Geo. 3, c.42 (U.K.).
137. (1809) 103 E.R. 1019, at p. 1020.
138. [1968] 1 N.S.W.R. 75 (C.A.).
139. *Ibid.*, at p. 77.
140. [1976] 1 N.S.W.L.R. 213.

the goods sold, the Supreme Court of New South Wales held that the contract was illegal and unenforceable, being impliedly prohibited by the statute. Construing the relevant sections of the statute, Yeldham J. said: "[T]hese sections do not in express terms invalidate transactions",[141] but His Honour had no doubt in concluding: "In my opinion, the whole Act, . . . is directed to the implementation of a policy designed to protect consumers in relation to such goods."[142]

When the policy of a statute is to protect the general public or a class of persons by requiring that a contract shall be accompanied by certain formalities or conditions, and a penalty is imposed on the person omitting those formalities or conditions, the contract and its performance without those formalities or conditions is illegal and cannot be enforced by the person liable to the penalties.[143] In *Anderson Ltd* v. *Daniel,*[144] the plaintiff sold and delivered a quantity of artificial fertilisers to the defendant. When the plaintiff brought an action to recover the price, the defendant contended that the contract was illegal as the plaintiff did not give him an invoice stating the percentages of the ingredients of the fertiliser as required by a statute.[145] The Court of Appeal was of the opinion that the statute was passed to protect a particular class of the public, viz., the purchasers of artificial manures and non-compliance with such a statute would render the contract illegal disentitling the vendor to recover the price of the fertilisers sold.[146]

B. Hire-Purchase Transactions

In *Electrical Acceptance Pty Ltd* v. *Doug Thorley Caravans (Aust.) Pty Ltd,*[147] the court declared that the payments of commission made by a finance company to a dealer in caravans were illegal for violation of the Hire-Purchase Act 1959 (Vict.). Brooking J. said: "I consider that the contract is prohibited by the statute having regard to the object of the statute."[148] Interpreting the Act His

141. *Ibid.*, at p. 215.
142. *Ibid.*, at p. 219.
143. See *Anderson Ltd* v. *Daniel* [1924] 1 K.B. 138, at p. 147 (C.A.), per Scrutton L.J.; *B. and B. Viennese Fashions* v. *Losane* [1952] 1 All E.R. 909, at p. 914 (C.A.), per Hodson L.J.
144. [1924] 1 K.B. 138 (C.A.). The actual decision was reversed by the Fertilisers and Feeding Stuffs Act 1926, s. 1(2) (U.K.). In *Shaw* v. *Groom* [1970] 2 Q.B. 504, at p. 526 (C.A.), Sachs L.J. suggested that the case might be decided differently today.
145. Fertilisers and Feeding Stuffs Act 1906 (U.K.).
146. Commenting on this case in *B. and B. Viennese Fashions* v. *Losane* [1952] 1 All E.R. 909, at p. 912 (C.A.), Evershed M.R. said: "This court came to the conclusion that the words of the Act were compelling in their effect and that there was a duty imposed by the statute in the clearest terms (and subject to a penalty in case of breach) to provide such an invoice, that the object of that provision was to protect the public, and that failure to comply with the section was an illegality which tainted the contract and prevented the plaintiff suing on it".
147. [1981] V.R. 799.
148. *Ibid.*, at p. 812. His Honour preferred to classify this case under common law illegality stating: "I view this case as one of common law illegality, the common law regarding as illegal a contract to commit a criminal offence, whether the offence is created by the common law or by statute."

Honour said that "s.29 must be viewed as directed to the protection of the public".[149]

C. Loan Transactions

In order to protect helpless borrowers from the clutches of unscrupulous money-lenders, statutes have been passed requiring the money-lenders to be registered. In *Victorian Daylesford Syndicate Limited* v. *Dott,*[150] the plaintiff borrowed a sum of money from the defendant, who carried on business as a money-lender, but had not registered his name under the Money-Lenders Act 1900 (U.K.). The statute imposed a penalty upon a person carrying on business of money-lending without being registered under the Act. The question before the court was expressed by Buckley J.: "I have to see whether the contract is in this case prohibited expressly or by implication."[151] After construing the statute, His Lordship was of the opinion that the contract was illegal, being impliedly prohibited by the statute. His Lordship said: "The whole purpose is the protection of the public . . . the act for the doing of which a penalty is imposed is an act which is impliedly prohibited by the statute, and is consequently illegal."[152]

D. Remuneration for Services Rendered

In *Cope* v. *Rowlands,*[153] an unlicensed broker brought an action for work and labour in buying and selling stock. Parke B. was of the opinion that one of the objects of the statute[154] governing such transactions was to protect the public and prevent improper persons acting as brokers. He said: "The clause . . . which imposes a penalty, must be taken . . . to imply a prohibition of all unadmitted persons to act as brokers, and consequently to prohibit by necessary inference, all contracts which such persons make for compensation to themselves for so acting."[155] In *Taylor* v. *Crowland Gas & Coke Co.,*[156] the court disallowed the claim of the plaintiff to recover his fees as a conveyancer on the ground that the statute[157] prohibited acts of conveyancing by unqualified persons. In this case, the object of the legislature was to confine the practice of drawing the instruments specified in the statute to a certain class supposed to have a competent knowledge of the subject and to protect the public against the mistakes of inexperienced persons in matters of this kind; with that view, the legislature had prohibited these acts being done except by a particular class of persons.[158]

149. *Ibid.*, at p. 811.
150. [1905] 2 Ch 624.
151. *Ibid.*, at p. 629.
152. *Ibid.*, at p. 630.
153. (1836) 150 E.R. 707.
154. 6 Ann. c.16 (U.K.).
155. (1836) 150 E.R. 707, at p. 711. Commenting on this case in *Yango Pastoral Company Pty Ltd* v. *First Chicago Australia Ltd* (1978) 139 C.L.R. 410, at p. 424 (H.C. of A.), Mason J. said: "It was held that the statute impliedly, though not expressly, prohibited a brokerage contract entered into by an unauthorized person and made it illegal and void."
156. (1854) 156 E.R. 455.
157. 44 Geo. 3, c.98, s.14 (U.K.).
158. (1854) 156 E.R. 455, at p. 457, per Parke B.

Summary

A court dealing with the question whether a contract is prohibited by statute may not find any express prohibition by interpreting the language of the statute. The next step the court embarks upon is to find out whether the contract is impliedly prohibited by the statute. Courts on occasion inferred prohibition of contracts from the penal provisions in statutes. By looking into the objectives of a statute, if the court finds that the statute was passed for the protection and benefit of the public, it may conclude that the contract in question is impliedly prohibited and, as such, illegal and void, disentitling a plaintiff from enforcing his claim. But the criterion of the protection of the public has not been looked upon as the sole test of implied prohibition of a contract by statute. The ultimate question seems to be: does the statute mean to prohibit the contract?

To be continued