

ILLEGALITY
AND
PUBLIC POLICY

SIXTH EDITION

R. A. BUCKLEY

SWEET & MAXWELL

As in the previous two editions, the chapters deal with the most important areas of law, which are: contract, tort, property, criminal law, public law, administrative law, and constitutional law. The book is written in a clear and concise style, and is suitable for use as a textbook or as a reference work. The book is written in a clear and concise style, and is suitable for use as a textbook or as a reference work. The book is written in a clear and concise style, and is suitable for use as a textbook or as a reference work.

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CHAPTER 3

UNLAWFUL PERFORMANCE

1. SCOPE OF THE CHAPTER

Where primary object lawful This chapter is concerned with the enforceability, or otherwise, of contracts in situations in which the primary objective of the contract is lawful, but one or both of the parties intends to commit, or does commit, an unlawful act in the course of performance. 3-01

2. EXECUTORY CONTRACTS AND IGNORANCE OF THE LAW

(a) Illegality Irrelevant

Abandonment of original intention In some cases one or both of the parties may intend that an otherwise lawful contract should be performed in a manner which would in fact involve contravention of the law. If this intention was formed through ignorance of the surrounding circumstances, and was abandoned immediately the true position was ascertained so that the agreement was performed lawfully, illegality as such should not, in principle, be relevant to the resolution of any dispute which might subsequently occur between the parties. 3-02

Waugh v Morris In the important nineteenth century case of *Waugh v Morris*¹ the Court of Queen's Bench held that this is indeed the position. Moreover, they did so in a situation in which the parties' initial ignorance had related not merely to factual circumstances but to the law itself. A charterparty provided that the ship under charter should carry a cargo of hay from France to London, where it was to be unloaded. Unknown to the parties, however, the unloading of French hay in the UK was illegal; having been recently prohibited by an Order in Council made under legislation to prevent the spread of contagious diseases among animals. Fortunately, the intention to unload the hay in London was not spelt out in the charterparty, which merely provided that the cargo should be taken from the ship "alongside". When the existence of the Order in Council was discovered the original intention was abandoned; the hay was taken from the ship into another vessel and exported. Although no violation of the Order in Council ever took place, relations between the parties became sour, and the claimant shipowners brought an action for demurrage. The defendants contended that the claim should fail, on the ground that the original intention to unload the hay in London had rendered the entire charterparty unenforceable for illegality. Blackburn J conceded "that a contract, lawful in itself, is illegal if it be entered into with the object that the law should be 3-03

¹ (1873) L.R. 8 Q.B. 202.

violated";² but emphasised that the law had never actually been violated in the case and that the intention to perform in a manner in fact unlawful had been abandoned immediately the Order in Council had been discovered. He continued³:

"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 is so, the knowledge of what the law is becomes of great importance."⁴

In the result, the defence of illegality was rejected. The reasoning, and the decision, in this case are surely unimpeachable.

(b) Illegality Confused With Other Concepts

(i) *Waugh v Morris* Lost Sight of

3-04

Failure to explore other avenues of escape Of course, disputes may still arise between the parties, as in *Waugh v Morris* itself, in principle unrelated to illegality; and it is important that the appropriate conceptual basis for the resolution of such disputes should be correctly identified. Unfortunately, however, this has not always been done in subsequent cases. As a result, illegality has occasionally been successfully relied on in order to escape from obligations from which more legitimate avenues of escape may or may not have existed. Failure to explore those avenues, and to deploy "illegality" instead, has sometimes resulted in the important principle embodied in *Waugh v Morris* being lost sight of. The confusion usually arises because it is the abandonment of the intended method of performance which has rendered the contract less attractive or profitable to the party who wishes to escape from it: so that illegality is perceived to be relevant when in truth it is not.

(ii) Mistake

3-05

Allan (Merchandising) v Cloke It is interesting to contrast *Waugh v Morris* with the much more recent decision of the Court of Appeal in *Allan (Merchandising) v Cloke*.⁵ A roulette wheel was let on hire for playing at a country club a particular form of roulette which in fact, but unknown to the parties, violated the provisions of the Betting and Gaming Act 1960. Although the wheel could have been used for playing ordinary, perfectly lawful, forms of roulette the hirers did not wish to use it in that way. Accordingly, as soon as they discovered that the original intention happened to be illegal, they returned the wheel to the owners. As in *Waugh v Morris* the law was therefore never actually contravened. The owners refused, however, to accept the termination of the contract and sued for rent. Despite the possibility

² (1873) L.R. 8 Q.B. 202 at 207.

³ (1873) L.R. 8 Q.B. 202 at 208. This passage was quoted with approval by Toulson LJ in *Anglo Petroleum v TFB (Mortgages)* [2007] EWCA Civ 456 who said (at [63]): "130 years later, this statement of the law has added importance because of the explosion in the number of statutory regulations of one kind or another under English and European law". See also the same judge (as a Justice of the Supreme Court) in *Patel v Mirza* [2016] UKSC 42 at [70]–[71].

⁴ See also *Cargo Ex Argos* (1873) L.R. 5 P.C. 134 in which a similar decision was reached; and in which Sir Montague E. Smith said (at 163): "It is admitted that both parties, when they made the contract, were ignorant of the prohibition against landing petroleum, and therefore no question of intentional infraction of the law of France arises".

⁵ [1963] 2 Q.B. 340.

that the wheel could have been used perfectly lawfully the action, unlike that in *Waugh v Morris*, failed. The hirers managed successfully to defeat the claim by relying on illegality. Lord Denning MR, in a passage which is in sharp contrast to that of Blackburn J quoted above, expressed himself as follows⁶:

"I desire to say that where two people together have the common design to use a subject-matter for an unlawful purpose, so that each participates in the unlawful purpose, then that contract is illegal in its formation: and it is no answer for them to say that they did not know the law on the matter."

Incorrect proposition It is submitted that this proposition is incorrect, and that the principle stated by Blackburn J is to be preferred. A different approach to the problem in *Allan (Merchandising) v Cloke* might have been to consider whether the contract was void for mistake on the ground that its subject-matter was fundamentally different from that which the parties had assumed.⁷ Given the demise of relief in equity for mistakes insufficiently fundamental to render contracts void at common law,⁸ the chances of an avenue of escape emerging via the doctrine of "mistake" would probably not be very high if a similar case were to occur today.⁹ But, irrespective of the likely outcome via that approach, the crucial point is that the case should be perceived as having raised an issue on the law which applies when a state of affairs exists which is different from that which was in contemplation when the contract was made.¹⁰ To invoke "illegality" in such circumstances, with its focus upon the public interest rather than that of the parties, could potentially have quite inappropriate consequences. Difficulties might arise in a similar case, for example, in relation to recovery by the owner of goods transferred under the contract of hire.¹¹

(iii) Failure of Consideration

Reynolds v Kinsey The proposition that it is important carefully to distinguish illegality from mistake, and other branches of the law of contract governing the relationship of the parties with each other, was made expressly in a dissenting judgment in a case in the then Federal Supreme Court of Rhodesia and Nyasaland. In *Reynolds v Kinsey*¹² the claimant agreed to sell a mining business to the defendant. Both parties entered into the transaction on the assumption that it would be possible for the defendant to house the African labour force on the site of the business. Subsequent events were indeed to prove that this was the only way in which to render the business economically viable. Unfortunately, although neither party was aware of it at the time of making the contract, to house African employees in the manner contemplated was illegal as constituting an offence under the Southern Rhodesia Land Apportionment Act of 1941. When the defendant began to comply

⁶ [1963] 2 Q.B. 340 at 348.

⁷ See *Bell v Lever Bros* [1932] A.C. 161.

⁸ See *Great Peace Shipping v Tsavaliris Salvage* [2002] EWCA Civ 1407; [2002] 4 All E.R. 689 disapproving *Solle v Butcher* [1950] 1 K.B. 671.

⁹ The mistake had been one of law but, for what it is worth, this would no longer present a difficulty even if it might have done at the time when the case was actually decided: see now *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349; [1998] 4 All E.R. 513, HL.

¹⁰ Cf. *Streatham Cinema v John MacLauchlan* [1933] 2 K.B. 331.

¹¹ Cf. *Bowmakers v Barnett Instruments* [1945] K.B. 65, and see generally Ch.16, below.

¹² 1959 (4) S.A. 50; (1959) 2 R. & N. 289.

3-06

3-07

with the law he found that the Africans left his employment, and he resisted a claim by the claimant for an outstanding portion of the purchase-price by relying on illegality.

- 3-08 **Other remedies** By a majority the Court held that the defence, based on the ground that both parties had contemplated that the business was to be operated in a manner which turned out to be unlawful, would succeed; the parties' ignorance of the law being considered irrelevant. Tredgold CJ, expressing the majority view, observed that it "would obviously be unjust to enforce the contract" when "the establishment of the illegality might completely frustrate the contract from the point of view of the other party, who might well have been equally ignorant of the law".¹³ The fallacy in this reasoning was sharply expressed by the dissentient, Clayden FJ, who said¹⁴:

"... it is, I think necessary not to confuse failure of consideration with illegality of consideration. If the failure of the substantial consideration for the contract, the right to house employees on the claims, was such as to make performance of the contract impracticable, the [defendant] might have other remedies to rid himself of his obligations."

- 3-09 **Nash v Stevenson Transport** Traces of the confusion in the reasoning of the majority in *Reynolds v Kinsey* can also be detected in an earlier decision of the English Court of Appeal. In *Nash v Stevenson Transport*¹⁵ the claimant was entitled by statute to take out licences in respect of goods vehicles. Since he did not wish to use the licences himself he attempted to profit from his statutory right by contracting to allow the defendant company to use his name, for the purpose of operating goods vehicles under the licences. The agreement was made in the honest belief that this arrangement would be effective, in law, to enable the defendant company to enjoy the benefit of the licences. But the defendants refused to pay the sums due from them under the agreement, and the Court of Appeal held that they were entitled to do so. On the construction of the Road and Rail Traffic Act 1933, which conferred the right to the licences on the claimant, the Court held that the licences granted were personal to the licensee and that the claimant could not transfer the benefit of them by allowing the defendants to use his name.

- 3-10 **Incorrect analysis** The actual result is clearly correct, since if the defendants had operated vehicles in reliance on the licences they would have incurred criminal liability for putting unlicensed vehicles on the road.¹⁶ If the claimant had been allowed to recover from the defendants he would therefore have got his money for nothing. Nevertheless, the basis of the decision was not that the defendants succeeded on the ground of total failure of consideration, but that the contract was one which could not be legally performed. But this does not seem to have been a correct analysis. The defendants would only have committed an offence if they had put the vehicles on the road, and the agreement did not impose an obligation on them to use the vehicles in this or in any other way. The contract was simply one which, for reasons of law, lacked content. In the event of the contract having been fully executed, an attempt to recover back any money transferred in return for the "licences" might have faced difficulties if the transaction was treated as "illegal".

¹³ 1959 (4) S.A. 50 at 50-51; (1959) 2 R. & N. 289 at 295.
¹⁴ 1959 (4) S.A. 50 at 63; (1959) 2 R. & N. 289 at 313.
¹⁵ [1936] 2 K.B. 128.

¹⁶ Cf. *Browning v Floyd* [1946] K.B. 597.

But it is not obvious that such difficulties should face someone who, in good faith, had simply made a payment under a mistake of law.¹⁷

(iv) *Restitution to the Rescue?*

Relief despite misclassification In practice the possible adverse consequences of wrongly classifying situations, such as those in the cases just discussed, may be unlikely to occur. The expanding law of restitution might still enable relief to be granted, despite the inappropriate premise that the transactions in question had been unlawful. This should not, however, be taken for granted. The perceived presence of "illegality" can still be a complicating factor in restitution cases,¹⁸ as well as in those in which actual enforcement of the contract is sought.

3-11

3. POSITION OF THE PARTY RESPONSIBLE FOR UNLAWFUL PERFORMANCE

Relative positions of the parties What if a contract capable of lawful performance is, unlike the agreements considered above, actually performed unlawfully? It will often be important in such cases to differentiate carefully between the relative positions of the parties, and to avoid the conceptual approach reflected in the notion of the "illegal contract"; supposedly enforceable by neither party regardless of the circumstances. Failure to do this is apt to lead to curious propositions; ranging from the suggested forfeiture of contractual rights by wholly innocent parties, to the full validation of claims by parties implicated in deliberate law-breaking.

3-12

Can performance ever preclude recovery? The view is expressed occasionally that the manner in which a contract is performed can have no effect upon its inherent validity, which must be determined, once and for all, at the time of its formation. In *Coral Leisure Group v Burnett*¹⁹ Browne-Wilkinson J, delivering the judgment of the Employment Appeal Tribunal, said²⁰:

3-13

"The fact that a party has in the course of performing a contract committed an unlawful or immoral act will not by itself prevent him from further enforcing that contract unless the contract was entered into with the purpose of doing that unlawful or immoral act or the contract itself (as opposed to the mode of his performance) is prohibited by law."

The authorities cited in support of this statement included *Wetherell v Jones*,²¹ in which Lord Tenterden CJ expressed himself in very similar terms²²; and *St John Shipping Corporation v Joseph Rank*,²³ in which Devlin J in turn referred to what

¹⁷ Cf. *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349; [1998] 4 All E.R. 513, HL.

¹⁸ But see now *Patel v Mirza* [2016] UKSC 42 which has greatly expanded the scope of recovery for unjust enrichment in cases involving illegality. See, generally, Chs 17 and 18 below.

¹⁹ (1981) I.C.R. 503.

²⁰ (1981) I.C.R. 503 at 509.

²¹ (1832) 3 B. & Ad. 221.

²² "... where the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law, not contemplated by the contract, in the performance of something to be done on his part." (1832) 3 B. & Ad. 221 at 226.

²³ [1957] 1 Q.B. 267. This case is discussed further below.

Lord Tenterden had said as "a clear and decisive statement of the law".²⁴ Nevertheless, the proposition cannot be right.²⁵ If a shipowner, realising that he would incur penalties for late delivery because a yachting regatta was blocking his vessel's entry to port, ordered the ship to plough through the regatta drowning many of the participants, it is difficult to believe that he would be permitted to enforce the contract. Rigid application of the conventional distinction between an agreement itself on the one hand, and its performance on the other, could soon lead to absurdity in the context of illegality.²⁶ The statement of Browne-Wilkinson J can conveniently be contrasted with the more cautious formulation of Waller LJ in *Coleen v Cebrian (UK) Ltd*²⁷:

"If at the date of the contract the contract was perfectly lawful and it was intended to perform it lawfully, the effect of some act of illegal performance is not automatically to render the contract unenforceable. If the contract is ultimately performed illegally and the party seeking to enforce takes part in the illegality, that *may* render the contract unenforceable at his instigation. But not every act of illegality in performance ... will have that effect."

- 3-14 **The St John Shipping case** In *St John Shipping Corporation v Joseph Rank*²⁸ the holders of bills of lading, representing part of a cargo carried by sea from the US to England, attempted to avoid paying a proportion of the freight demanded of them by pointing out that, during her crossing of the Atlantic, the ship in question had been submerged up to eleven inches over the load line. This overloading involved the commission of an offence under the Merchant Shipping (Safety and Load Line Conventions) Act 1932²⁹ for which the master of the ship was fined. This case really raised two separate questions. First, whether the shipowners were impliedly prohibited by the 1932 Act itself from enforcing the contract; and secondly, if they were not, whether they were nevertheless precluded by the common law from enforcing it by virtue of having committed an illegal act in the course of performance. The judge, Devlin J, answered the first question correctly in the negative. The statute did not refer to contractual situations, and it would have been artificial to have inferred from it that the legislature had had such situations in contemplation when the Act was passed. Unfortunately Devlin J failed to identify the second question as a separate issue. Indeed he assumed that a contract could only become unenforceable by virtue of the commission of a statutory offence committed in the course of its performance if the particular statute impliedly so

²⁴ [1957] 1 Q.B. 267 at 286.

²⁵ The actual decision in the *Bennett* case, that an employee who spent part of his time procuring prostitutes for his employer's customers did not forfeit his right to protection against unfair dismissal, can perhaps be supported on the ground that the conduct was not actually illegal and that, in the circumstances, contemporary public policy did not consider it sufficiently serious to warrant depriving the employee of his rights. But what if the employee's zeal had extended to hiring assassins to eliminate his employer's business rivals?

²⁶ See per Singh LJ in *Robinson v HRH Al-Qasimi* [2021] EWCA Civ 862; [2021] I.C.R. 1533 at [62] expressing the view that the passage quoted above from the *Coral Leisure Group* case "is not an entirely accurate statement of the relevant legal principle", since "the defence [of illegality] may also arise where one or both parties perform the contract illegally at a later date even if that was not their intention or purpose at the outset".

²⁷ See [2003] EWCA Civ 1676; [2004] I.C.R. 568 at [23] (the italics are in the original).

²⁸ [1957] 1 Q.B. 267.

²⁹ See now the Merchant Shipping (Load Lines) Act 1967.

provided.³⁰ Since the state of the parties' minds is normally irrelevant in statutory illegality,³¹ it seemed to follow that this factor was of no relevance in the *St John Shipping* case itself. Devlin J then pointed to the absurd consequences of holding that any infringement of a statute, however inadvertent, committed in the course of performing a contract, rendered it unenforceable by the party responsible.³² He concluded that the unlawful overloading in the course of performance did not render the contract statutorily prohibited, and the shipowners were able to recover. This reasoning is, with respect, unconvincing.

Sacrifice of safety for profit? If it had been proved that the ship-owners had taken a deliberate decision to subordinate safety to profit, it is at least arguable that they should have forfeited their contractual rights. The cargo-owners would have received a windfall, but the result would have been salutary in a case in which the deterrent value of the criminal law had been seriously eroded by the effect of inflation upon the level of fines which could be imposed.³³

Relevance of state of mind It is therefore important that the common law aspects of illegality in performance are not overlooked. Without them the courts will be unable to deal adequately with situations in which the illegality has no statutory foundation at all. If murder were committed in the course of performing a contract,³⁴ it is difficult to believe that this would be ignored by a court which found itself trying an action for breach of contract brought by the murderer, even though murder is a common law crime and there is therefore no statutory wording from which an intention to strike at contracts could be construed.³⁵ In so far as questions of unlawful performance can be approached from a common law standpoint, even when the offences concerned *are* statutory in origin, absurd results can be avoided because it is possible for all the surrounding circumstances to be taken into account. Unlike the position in statutory illegality properly so called, a technical infringement caused inadvertently will not result in contractual forfeiture.³⁶ On the other hand, a serious offence deliberately committed might well do so. In *Cunard v Hyde*

³⁰ "... whether it is the terms of the contract or the performance of it that is called in question, the test is just the same: is the contract, as made or as performed, a contract that is prohibited by the statute?" [1957] 1 Q.B. 267 at 284.

³¹ "... the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class 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 break the law or not" [1957] 1 Q.B. 267 at 283. See also *Re Mahmoud and Ispahani* [1921] 2 K.B. 716; *Sheridan v Dickson* [1970] 1 W.L.R. 1328. For discussion see generally Ch.2, above.

³² See [1957] 1 Q.B. 267 at 281.

³³ See [1957] 1 Q.B. 267 at 279. The maximum penalties for overloading have been increased since the case was decided: see now the Merchant Shipping Act 1995 s.98 (£50,000 fine and two years' imprisonment).

³⁴ I.e. as distinct from an agreement actually to commit murder, which is obviously unenforceable: see Ch.1, above.

³⁵ Invocation of the vague maxim that "no person may benefit from a crime" is not a viable alternative approach to the problem of unlawful performance of contracts. The maxim proves too much since not every offence committed in the course of performance will deprive the party responsible of his rights under the agreement, cf. *St John Shipping Corporation v Joseph Rank* (1957) 1 Q.B. 267 at 293. See further Ch.5, below.

³⁶ See *Fitzgerald v F. J. Leonard* (1997) 189 C.L.R. 215 at 249, per Kirby J: "It would be ... absurd if the courts closed their doors to a party seeking to enforce its contractual rights without having regard to the degree of that party's transgression, the deliberateness or otherwise of its breach of the law and its state of mind generally relevant to the illegality". See also per Etherton LJ in *Les*

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"If at the date of the contract the contract was perfectly lawful and it was intended to perform it lawfully, the effect of some act of illegal performance is not automatically to render the contract unenforceable. If the contract is ultimately performed illegally and the party seeking to enforce takes part in the illegality, that may render the contract unenforceable at his instigation. But not every act of illegality in performance ... will have that effect."

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²⁴ [1957] 1 Q.B. 267 at 286.

²⁵ The actual decision in the *Bennett* case, that an employee who spent part of his time procuring prostitutes for his employer's customers did not forfeit his right to protection against unfair dismissal, can perhaps be supported on the ground that the conduct was not actually illegal and that, in the circumstances, contemporary public policy did not consider it sufficiently serious to warrant depriving the employee of his rights. But what if the employee's zeal had extended to hiring assassins to eliminate his employer's business rivals?

²⁶ See per Singh LJ in *Robinson v HRH Al-Qasimi* [2021] EWCA Civ 862; [2021] I.C.R. 1533 at [62] expressing the view that the passage quoted above from the *Coral Leisure Group* case "is not an entirely accurate statement of the relevant legal principle", since "the defence [of illegality] may also arise where one or both parties perform the contract illegally at a later date even if that was not their intention or purpose at the outset".

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³¹ "... the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class 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 break the law or not" [1957] 1 Q.B. 267 at 283. See also *Re Mahmoud and Ispahani* [1921] 2 K.B. 716; *Sheridan v Dickson* [1970] 1 W.L.R. 1328. For discussion see generally Ch.2, above.

³² See [1957] 1 Q.B. 267 at 281.

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³⁵ Invocation of the vague maxim that "no person may benefit from a crime" is not a viable alternative approach to the problem of unlawful performance of contracts. The maxim proves too much since not every offence committed in the course of performance will deprive the party responsible of his rights under the agreement, cf. *St John Shipping Corporation v Joseph Rank* (1957) 1 Q.B. 267 at 293. See further Ch.5, below.

³⁶ See *Fitzgerald v F. J. Leonardi* (1997) 189 C.L.R. 215 at 249, per Kirby J: "It would be ... absurd if the courts closed their doors to a party seeking to enforce its contractual rights without having regard to the degree of that party's transgression, the deliberateness or otherwise of its breach of the law and its state of mind generally relevant to the illegality". See also per Etherton LJ in *Les*

(No.2)³⁷ underwriters succeeded in avoiding liability on a policy covering cargo and freight which had been carried on the deck of the ship contrary to the Customs Consolidation Act 1853. This legislation, which was intended to protect life and property at sea,³⁸ made it a criminal offence for a ship wholly or partly laden with timber to leave any British port in North America or the Honduras during the winter months, unless the whole of the cargo was carried below deck. The case was expressly decided on the basis that the illegality had not been merely a unilateral act on the part of the master of the ship but, on the contrary, "that the insured knew of the master's act, in the sense of consenting to it and wanting it to be done".³⁹

3-17 Formidable task Although the decision concerned insurance, it would seem to follow from it that the contract for the carriage of the cargo, which the policy was intended to cover, would also have been unenforceable for illegality. This case appears to have been overlooked when *St John Shipping Corporation v Joseph Rank* was decided. Those who seek to profit from deliberate contravention of provisions governing safety or similar matters should, it is submitted, be liable to forfeiture of their contractual rights. The number of cases involving such forfeiture is never likely to be large. The formidable task of proving the necessary degree of knowledge and deliberation should deter the majority of parties from seeking to escape from their contractual obligations by relying upon the other party's unlawful performance.⁴⁰

3-18 Parkingeye Ltd v Somerfield Stores Ltd The reluctance of the courts to decline enforcement of a contract even by the party responsible for illegal performance is illustrated by the case of *Parkingeye Ltd v Somerfield Stores Ltd*.⁴¹ The defendants entered into a contract with the claimants, Parkingeye, whereby the latter operated a parking scheme at the defendants' stores. The defendants repudiated the contract several months early. The scheme involved charging motorists who parked for longer than a stipulated period, with the claimants benefiting from the resultant income. The claimants planned to send various inaccurate letters of a threatening nature to motorists who had overstayed, the wording of which sought to deceive the recipients as to the legal proceedings which could be taken against them, and which allegedly involved the claimants in various breaches of the criminal law, as well as commission of the tort of deceit. Although the trial judge held that no criminal offences had ultimately been committed, the defendants argued that the claimant's plans constituted an intention to perform the contract unlawfully, which rendered it unenforceable. The defendants' contention failed and Parkingeye were

Laboratoires Servier v Apotex [2012] EWCA Civ 593 at [74]: "... the illegality defence does not or may not arise where the unlawful act is merely trivial or where the illegality is the result of an inadvertent breach of some law or regulation."

³⁷ (1859) 2 El. & Bl. 1.

³⁸ See, per Lord Campbell CJ in *Cunard v Hyde (No.1)* (1858) El. & Bl. 1 at 676.

³⁹ The insurer's plea was originally held defective precisely because it did not allege knowledge and involvement in the illegality on the part of the insured: see *Cunard v Hyde (No.1)* (1858) El. & Bl. 670 from which the quotation in the text is in fact taken (per Coleridge J at 677). Cf. *Wilson v Rorlin* (1865) L.R. 1 Q.B. 162. See also, per Talbot J in *Geismar v Sun Alliance* [1978] Q.B. 383 at 395, distinguishing situations involving "a deliberate breach of the law" from those involving unintentional illegality or innocence.

⁴⁰ In *St John Shipping Corporation v Joseph Rank* itself no attempt was made to establish that the overloading had been deliberate, but Devlin J appears to have believed that it might well have been: see [1957] 1 Q.B. 267 at 280 ("not at all improbable").

⁴¹ [2012] EWCA Civ 1338.

awarded damages for breach of contract. Sir Robin Jacob said that to have allowed the defence to succeed "would be unduly sanctimonious" and would have produced a "disproportionate result".⁴² Toulson LJ said that "the illegality was incidental to part of the performance of the contract but far from central to it".⁴³ This reasoning clearly leaves open the possibility that in other circumstances, especially where the illegality was central to the contract, and especially if matters such as health and safety were involved, the courts will refuse enforceability on the ground of deliberate unlawful performance.⁴⁴

4. POSITION OF THE "INNOCENT" PARTY

Archbold's case If a contract capable at the outset of legal performance was nevertheless performed by one of the parties to it in an unlawful manner, this should not affect the rights of the other party unless he was in some way implicated in the illegality. In *Archbold's (Freightage) v S. Spanglett*⁴⁵ the defendants had undertaken to carry the claimants' cargo of whisky from Leeds to London when it was stolen en route. To an action for breach of contract the defendants argued that since the contract had been performed by them in an unlicensed vehicle even the innocent claimants were precluded from suing on it. The trial judge and the Court of Appeal held that the contract itself did not implicitly identify a particular van for use in its performance and that the agreement was therefore not one which, contrary to the submission of the defendants, was incapable from the outset of legal performance. This was sufficient, once a separate point concerning statutory illegality had been disposed of,⁴⁶ to conclude the case in favour of the claimants. The Court differentiated specifically between the positions of the parties, by emphasising that the carrier could not have sued for payment if the whisky had not been lost.⁴⁷ But to have rejected the claimants' claim would perversely have provided an incentive to illegality: carriers would only have had to risk the fines payable for not licensing their vehicles in order to earn immunity from liability to their customers for breach of contract.

Shared guilt *Archbold's (Freightage) v S. Spanglett* should be contrasted with a later decision of the Court of Appeal, decided in a somewhat similar fact situation, but in which the carriers succeeded in relying on a defence of illegality to a claim by a customer whose property they had damaged in transit. The decision was

⁴² See *Parkingeye Ltd v Somerfield Stores Ltd* [2012] EWCA Civ 1338 at [38].

⁴³ See [2012] EWCA Civ at [75], and the same judge (as a Justice of the Supreme Court) in *Patel v Mirza* [2016] UKSC 42 at [67]–[69]. See also *Dowling & Rutter v Abacus Frozen Foods Ltd* [2002] SLT 491 at [19] per Lord Johnston: "... just because illegality enters into a contract, that does not necessarily make it unenforceable ... there has to be some scope for considerations of inadvertence, irrelevance, immateriality, innocence and so on ...".

⁴⁴ "*ParkingEye* is a good example of a case where denial of claim would have been disproportionate. The claimant did not set out to break the law. If it had realised that the letters which it was proposing to send were legally objectionable, the text would have been changed": per Lord Toulson in *Patel v Mirza* [2016] UKSC 42 at [108] (italics supplied).

⁴⁵ [1961] 1 Q.B. 374. See also Ch.4, below.

⁴⁶ See [1961] 1 Q.B. 374 at 384–387 (Pearce LJ), and at 389–390 (Devlin LJ).

⁴⁷ "[the defendants] cannot themselves enforce the contract because they intended to perform it unlawfully with a van they knew was not properly licensed for the purpose": [1961] 1 Q.B. 374 at 388, per Devlin J. For a Canadian case in which a claim for payment brought by an unlicensed carrier failed for illegality see *Wasel Bros v Laskin* [1934] 2 D.L.R. 798. (The case is more fully reported in [1934] 2 W.W.R. 577.)

CHAPTER 6

POLICY AND MORALITY

1. INTRODUCTION

Fundamental questions The doctrine whereby the court may refuse to enforce a contract solely on the ground of “public policy” raises a number of interwoven issues. The most fundamental concerns the legitimacy, from a separation of powers standpoint, of essentially legislative activity on the part of the judges. Furthermore, once a particular aspect of public policy has assumed a settled form, does it have to be applied with the rigidity customarily associated with rules of law? If not, do different branches of the doctrine enjoy a greater, or lesser, degree of flexibility in this respect than others? A related issue concerns the ease, or otherwise, with which particular aspects of public policy can be *changed* by the courts to reflect changing social conditions or attitudes. Can “new heads” of public policy be created? If so, is it appropriate for the court to stigmatise contracts not only on the basis of proven harm, but also on that of a mere “tendency” to facilitate undesirable social consequences? These issues will be examined in this chapter, along with the approach of the courts to moral questions surrounding sexual matters and the institution of marriage. Such questions are particularly sensitive with respect to the role of the judiciary in society, and it is therefore appropriate that they should feature prominently in any general discussion of the functioning of the doctrine of public policy.

6-01

Change and transparency This Chapter is clearly concerned with contracts which the common law declines to enforce in order to promote “policies” which are of its own making. Accordingly, the question which now arises in other contexts, following the decision of the Supreme Court in *Patel v Mirza*,² of whether denial of enforceability would “enhance”³ the underlying policy of a specific rule of the (usually) criminal law will seldom arise directly.⁴ Nevertheless, the emphasis in *Patel*’s case upon transparency and flexibility could influence indirectly the way in which the courts approach the common law’s own policies. They may be readier to ask not merely whether deciding a case in a particular way would help to promote a given policy, but also whether that policy is one which should be pursued at all. A degree of scepticism is therefore appropriate when evaluating the older decisions in which contracts have been held to be “contrary to public policy”. Neverthe-

6-02

¹ For a wide-ranging discussion of the nature of the judicial function in relation to policy questions see John Bell, *Policy Arguments in Judicial Decisions* (Oxford: Oxford University Press, 1983).
² [2016] UKSC 42.
³ See *Patel v Mirza* [2016] UKSC 42 at [120] per Lord Toulson.
⁴ But see *Rodriguez v Speyer Bros* [1919] A.C. 59 discussed in para.6-06, below.

less, as has been indicated in the previous paragraph, the question how far it is permissible for the courts to change the common law in this special area was debated well before the recent developments elsewhere in illegality, so that issue is by no means a new one.

2. PUBLIC POLICY IN THE COURTS

(a) Nature of Public Policy

6-03

Courts and the legislature A classic statement of the need for judicial caution in the public policy area is to be found in the early nineteenth century case of *Richardson v Mellish*.⁵ An unsuccessful attempt was made to persuade the court that an agreement whereby the claimant had been promised command of a ship, if certain eventualities should occur, was contrary to public policy. Various grounds were suggested, including corruption and an analogy with the statutorily prohibited sale of certain "offices" of profit. All failed. The court found nothing "corrupt, illegal, or impolitic" in the agreement. It was in this case that Burrough J famously protested "against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you".⁶ But a more reasoned explanation for judicial reticence is to be found in the judgment of Best CJ. He said:⁷

"I am not much disposed to yield to arguments of public policy: I think the courts... have gone much further than they were warranted in going in questions of policy; and they are always in danger of so doing, because courts of law look only at the particular case, and have not the means of bringing before them all those considerations which ought to enter into the judgment of those who decide on questions of policy. I therefore say, it is not a doubtful matter of policy that will decide this, or that will prevent the party from recovering: if once you bring it to that, the plaintiff is entitled to recover; and let the doubtful question of policy be settled by that high tribunal, namely, the legislature, which has the means of bringing before it all the considerations that bear on the question, and can settle it on its true and broad principles."

6-04

Ambiguity of "public policy" There is a decidedly modern ring to this insistence upon the importance of respecting the differing functions and capacities of the legislature on the one hand, and the courts on the other.⁸ It also serves, incidentally, to highlight part of the ambiguity inherent in the notion of "public policy" itself. Developments which might have a widespread, and possibly controversial, impact on commercial or social life generally should certainly be left to the legislature, especially if much information needs to be obtained and analysed before that impact

⁵ (1824) 2 Bing. 229.

⁶ (1824) 2 Bing. 229 at 252.

⁷ (1824) 2 Bing. 229 at 242-243.

⁸ See also, per Browne-Wilkinson J in *Multiservice Bookbinding v Marden* [1979] Ch. 84 at 104: "It would, in my judgment, be wrong for the courts to declare that a particular class of transaction is against the public interest even though there is a body of better-informed opinion that takes the view that no harm is caused. It is for Parliament, with all its facilities for weighing the complex issues involved, to make a policy decision of this kind". In this case the Court rejected a submission that an index-linked repayment obligation in a mortgage should be held contrary to public policy on the belief that such obligations might help to cause inflation.

can be predicted.⁹ On the other hand, however, not all considerations of "public policy" as applied in the courts fall into this category. Some are questions of moral intuition which are unlikely to yield to analysis, except of the never-ending philosophical variety. The common law has, for example, always refused to allow prostitutes to sue for services rendered¹⁰; although the legislature has never made prostitution as such into a criminal offence. There is nothing incongruous or inappropriate in this dichotomy. The fundamental libertarian and practical objections to the criminalisation of consensual sexual activity do not apply to the mere denial of contractual enforceability. Many would find it just as repugnant for the civil courts to legitimise the commercialisation of such activity, as they would find it offensive for the criminal courts to stigmatise and punish it.

Flexible or rigid? The lack of any clearly defined doctrinal basis for declining to enforce contracts on public policy grounds can give rise to difficult questions, when application of an established principle of public policy would produce a result at variance with the underlying rationale of that principle. In *Janson v Driefontein Mines*¹¹ the government of the South African Republic, known as the Transvaal, seized a quantity of gold belonging to one of its subjects. The seizure took place very shortly before the outbreak of hostilities between the Republic and the UK, which came to be known as the Boer War, and was clearly intended to help the Republic to finance the war. The gold had been insured in the UK, and the question arose whether the underwriters were liable for the loss. They would clearly *not* have been liable if the seizure had taken place after war had actually been declared, since enforcement of the policy in those circumstances would have become illegal under familiar principles of public policy relating to trading with the enemy.¹² Should enforcement be permitted at any time up to the actual outbreak of hostilities, even though it would render just as much assistance to the eventual "enemy" as would enforcement afterwards? Vaughan Williams LJ, in the Court of Appeal, believed that the claim against the British underwriters should fail: "if it is made out", he said,¹³ "that it would be injurious generally to the State to allow such a contract by a British subject to be valid, the principle must be applied, although there may be no previous instance of its application to this particular case". Vaughan Williams LJ was, however, a lone voice. A unanimous House of Lords, along with the majority in the Court of Appeal, held that the formal declaration of war was decisive in drawing a clear line between contracts made before it which were valid, and those made after it which were not.¹⁴ Lord Lindley said that "public policy is a very unstable and dangerous foundation on which to build until made safe by decision".¹⁵

Where rigidity would result in unenforceability What if, conversely to the situation in *Janson v Driefontein Mines*, insistence upon the letter, rather than the spirit, of the relevant principle of public policy would result in a contract being held to

6-05

6-06

⁹ Cf. *Morgans v Launchbury* [1973] A.C. 127.

¹⁰ Cf. *Pearce v Brooks* (1866) L.R. 1 Exch. 213. See also *Shaw v D.P.P.* [1962] A.C. 220.

¹¹ [1902] A.C. 484.

¹² See Ch.10, below.

¹³ See [1901] 2 K.B. 419 at 432.

¹⁴ "It is war, and war alone, that makes trading illegal": per Lord Halsbury LC in [1902] A.C. 484 at 494.

¹⁵ [1902] A.C. 484 at 507. See also, per Lord Davey at 500: "Public policy appears to me to be always unsafe and treacherous ground of legal decision".

be unenforceable rather than the reverse? In a sense this is a truer test of whether public policy, once established, yields firm rules which leave no room for judicial subjectivity; since a positive answer will result in claims actually failing rather than, as in *Janson's* case, normal enforcement taking place by default. The question arose in another case concerning the public policy against trading with the enemy, but this time it found the House of Lords sharply divided. In *Rodriguez v Speyer Bros*¹⁶, a claim by a partnership to recover a debt during the First World War was met with the essentially technical defence that the action was not competently constituted, since one of the six partners happened to be an enemy alien. Enforcement would not have directly benefited the enemy, but its denial would have caused loss to the British claimant. Lord Atkinson and Lord Sumner would nevertheless have refused the claim, on the ground that the incapacity of an enemy alien was an inescapable barrier. The former considered that it would be "wholly illegitimate for any judicial tribunal which may disapprove of the principles of public policy so embodied in the rigid rule to disregard that rule in any particular case and base its decision on other principles of public policy of which it more approves". For a court to act in that way would, in his view, "usurp the prerogative and powers of the legislature".

6-07 Three classes Lord Atkinson and Lord Sumner were, however, dissenting. Lord Haldane, who was one of those in the majority, divided public policy cases into three classes.¹⁸ First, those in which "the law, although originally based on public policy, has become so crystallised that only a statute can alter it": he gave the rule against perpetuities as an example. Secondly, those "in which the principle of public policy has never crystallised into a definitive or exhaustive set of propositions", such as the common law relating to wagers. Thirdly, cases "in which public policy has partially precipitated itself into recognised rules which belong to law properly so called, but where these rules have remained subject to the moulding influence of the real reasons of public policy from which they proceeded". Trading with the enemy fell into the third category, enabling the "balance of public convenience" to be invoked, and the claim to be enforced, notwithstanding the technical objection.

6-08 Where existing doctrine has been relied on It is submitted that Lord Haldane's approach is to be preferred to that of the minority, and that his analysis is instructive. Leaving aside his second category, into which few situations nowadays are likely to fall, the critical distinction is between those areas of existing public policy which can only be altered by statute, and those which can still be "moulded" by the court. The application of the distinction probably depends primarily upon the extent to which the particular doctrine in question has been relied upon in transactions over the years, especially transactions of an on-going nature. In the nature of things such reliance is likely to be in marginal cases, and to be in respect of what is *not* regarded as contrary to public policy rather than what is so regarded. Parties rarely make contracts with the intention that they should fail, but sometimes find it necessary to stay only just within the limits of what the law will allow.

6-09 Reliance and restraint of trade One of the few areas of public policy which

¹⁶ [1919] A.C. 59.

¹⁷ [1919] A.C. 59 at 90.

¹⁸ [1919] A.C. 59 at 81.

¹⁹ The refusal of the majority to allow rigidity to prevail over the underlying purpose of the rule against trading with the enemy could be said to anticipate the flexibility now introduced into illegality in general by the decision of the Supreme Court in *Patel v Mirza* [2016] UKSC 42.

might be thought to fall into this "reliance" category is that of restraint of trade. In practice, however, the freedom of manoeuvre enjoyed by the courts, in construing the actual wording of the covenant in any given case, means that the assumption that there is a high degree of reliance on supposedly clear rules in this context is perhaps rather misleading.²⁰ Moreover, in the leading case of *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co*,²¹ Lord Watson expounded eloquently upon the power of the court to develop the law in this area as follows²²:

"A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. The course of policy pursued by any country, in relation to and for promoting the interest of its commerce, must, as time advances, and as its commerce thrives, undergo change and development from various causes which are altogether independent of the action of its courts. In England at least it is beyond the jurisdiction of her tribunals to mould and stereotype national policy. Their function when a case like the present is brought before them is, in my opinion, not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time. When that rule has been ascertained, it becomes their duty to refuse to give effect to a private contract which violates the rule, and would, if judicially enforced, prove injurious to the community."

Fluidity or novelty? In his dissenting speech in *Rodriguez v Speyer Bros*²³ Lord Atkinson argued vehemently, and at length, that the *Nordenfelt* case was not, as he put it, an example of "the adoption and application of new principles". On the contrary, it was "a conspicuous example of the adherence to and application of the principles established by old authorities to the new and peculiar facts of the particular case". There was "not a syllable in any of the judgments delivered to suggest that their Lordships were applying any new rule or principle of public policy to these new facts". Lord Atkinson's argument was based on the use of the fluid concept of "reasonableness" in both the *Nordenfelt* formulation, and in the older authorities. In a different context, but in a similar vein, Lord Halsbury LC denied, in *Janson v Driefontein Mines*,²⁴ "that any court can invent a new head of public policy".²⁵

(b) Factors to be Taken into Account

Question of degree In a sense, of course, the debate whether a particular case developed new principles, or merely applied old ones in a new context, is always a sterile one; it is apt to depend upon differing perceptions of matters which are, in themselves, usually questions of degree. A more helpful approach is to try and identify some of the factors which a court should, or should not, take into account

²⁰ See Ch.13, below.

²¹ [1894] A.C. 535.

²² [1894] A.C. 535 at 553-554.

²³ [1919] A.C. 59 at 107.

²⁴ [1902] A.C. 484 at 491.

²⁵ Cf. *J. v S-T* [1997] 1 F.L.R. 402 at 441, per Ward LJ: "... we must reflect, not form, public policy". See also *Fender v Mildmay* [1937] 3 All E.R. 402 at 425-426, per Lord Wright: "What is, I think, now clear is that public policy is not a branch of the law to be extended ... I find it difficult to conceive that, in these days, any new head of public policy could be discovered".

when assessing the merits, or otherwise, of an argument based upon public policy. The fullest attempts at such an exercise are to be found in two decisions of the House of Lords nearly a century apart: *Egerton v Earl Brownlow*²⁶ and *Fender v St John Mildmay*.²⁷ Both were concerned, in different contexts, with the question whether a stipulation could be contrary to public policy; not because its performance would in itself have adverse consequences, but merely because it might "tend" to encourage or promote such consequences as an indirect result.

6-12

Dangerous "tendencies"? *Egerton v Earl Brownlow* was not, strictly speaking, a contract case. Nevertheless, the general judicial discussion of the principles of public policy to which it gave rise is equally relevant to such cases. By his will the Earl of Bridgewater devised his estates to his heir, but did so subject to the condition that the estates would only devolve in turn to the heirs of the recipient if the latter, before his own death, succeeded in obtaining from the Crown the title of Duke of Bridgewater. The question arose whether this condition was valid, or whether it was void as contrary to public policy. All the common law judges were consulted by the House of Lords, before the House gave its decision, and a majority of them advised in favour of the condition's validity. But the House rejected that view and held that the condition was contrary to public policy. A variety of reasons were given, but most were based on the fear that the condition would tend to encourage undesirable behaviour. It was suggested that the recipient, being already a member of the peerage, might be tempted to discharge his legislative and other duties in that role in such a manner as to avoid jeopardising his chances of preferment; thus compromising his independence. It was also thought that the condition could embarrass the Crown itself, when the latter became aware that the refusal of a title could have such dire consequences for the aspirant.

6-13

Decision unfavourably received The central ground of decision, however, was that in order to gain his dukedom, the recipient would be tempted to bribe, or otherwise corrupt, those public servants who advised the Crown on the grant of honours. Lord Brougham said²⁸:

"The tendency is alone to be considered; and unless the possibility is so remote as to justify us in affirming that there is no tendency at all ... gifts, bequests, conditions, contracts, are illegal from their tendency to promote unlawful acts, without regard to the amount of the inducements held out or interest created, the position of the parties, or any other circumstances which go to affect the probability of the unlawful act being done."

The reasoning and decision in *Egerton's* case have not, on the whole, been favourably received by subsequent generations of judges. The opinion of Park B., one of the judges consulted, whose view was rejected by the House of Lords, has more often been quoted with approval in later cases. His Lordship castigated an earlier decision as "ridiculous" for the far-fetched basis upon which it detected the possibility of harm arising out of one particular contract, and continued²⁹:

"in short, there are few contracts in which a suspicious mind might not find a tendency to produce evil; and to hold all such contracts to be void would, indeed, be an intolerable mischief."

²⁶ (1853) 4 H.L. Cas. 1.

²⁷ [1938] A.C. 1.

²⁸ (1853) 4 H.L. Cas. 1 at 174.

²⁹ (1853) 4 H.L. Cas. 1 at 128.

6-14

Fender v Mildmay The question of mere undesirable "tendencies", as a basis for illegality on the ground of public policy, was again explored by the House of Lords in *Fender v Mildmay*.³⁰ The defendant, who was in the process of getting divorced, proposed marriage to the claimant before the pronouncement of the decree absolute, but after the grant of the decree nisi. The defendant in fact went on to marry someone else, and was sued by the claimant for breach of promise; such actions having yet to be abolished. This time the House of Lords itself was sharply divided. By a bare majority it held that the promise was not invalidated by public policy, and that the defendant was therefore liable. The latter had argued that enforceability would discourage reconciliation, and also promote "immorality", by encouraging parties to commit what would, prior to the actual dissolution of the claimant's marriage, be adultery. These arguments were forcefully rejected by the majority.³¹ Lord Atkin said³²:

"... assuming, as we must, that the harmful tendency of a contract must be examined, what is meant by tendency? It can only mean, I venture to think, that, taking that class of contract as a whole, the contracting parties will generally, in a majority of cases, at any rate in a considerable number of cases, be exposed to real temptation, by reason of the promises to do something harmful, i.e. contrary to public policy, and that it is likely that they will yield to it. All kinds of contracts provide motives for improper actions, e.g. benefits deferred until the death of a third party, and contracts of insurance. To avoid a contract, it is not enough that it affords a motive to do wrong: it must be shown that such a contract generally affords a motive, and that it is likely to be effective."³³

The dissentients, Lord Russell and Lord Roche, placed emphasis not so much on the "tendency" aspect of the case as on a priori considerations relating to the status of marriage. The approach which the public policy doctrine has adopted towards marriage, and more generally to sexual matters, is of special interest in view both of the importance of the issues and of the changing attitudes of society towards them.

3. MARRIAGE AND SEXUAL MORALITY

(a) Marriage

6-15

Anticipating death of spouse In his speech in *Fender v Mildmay*³⁴ Lord Russell of Killowen said that "it is in the interest of the State that, if possible, the marriage tie should remain stable and be maintained". He deplored the extent to which the institution of marriage had "long been on a slippery slope", and was "steadily assuming the characteristics of a contract for a tenancy at will". He placed great emphasis, as did Lord Roche, upon the 1908 decision of the Court of Appeal in

³⁰ [1938] A.C. 1.

³¹ See, especially, per Lord Atkin reacting as follows "with some indignation" to the adultery argument: "No doubt a promise to marry is one of the weapons of the seducer, but no one has yet sought to invalidate on this ground a promise to marry made by unmarried persons, and I am quite unable to see why any different view should be taken of promises to marry which differ only in respect of the short period, six months or less, which must elapse between promise and performance" [1938] A.C. 1 at 17-18.

³² [1938] A.C. 1 at 13.

³³ See also [1938] A.C. 1 at 25, per Lord Thankerton: "Public policy is not concerned with tendencies that may exist in a very limited number of cases".

³⁴ [1938] A.C. 1 at 33.