~~GI3.95~~

(22), 1963

IN THE PRIVY COUNCIL

No. 33 of 1961

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N

MISTRY AMAR SINGH (Defendant) Appellant

- and -

SERWANO WOFUNIRA KULUBYA (Plaintiff) Respondent

R E C O R D O F P R O C E E D I N G S

GOODMAN DERRICK & CO.,
30, Bouverie Street,
London, E.C.4.

Solicitors for the Appellant.

HUGH V. HARRAWAY & SON,
2, Field Court,
Gray's Inn,
London, W.C.1.
Solicitors for the Respondent.

IN THE PRIVY COUNCIL No. 33 of 1961

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N

MISTRY AMAR SINGH (Defendant) Appellant

- and -

SERWANO WOFUNIRA KULUBYA (Plaintiff) Respondent

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

LIST OF DOCUMENTS TRANSMITTED TO THE PRIVY COUNCIL BUT NOT PRINTED

IN THE PRIVY COUNCIL No. 33 of 1961

ON APPEAL
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N

MISTRY AMAR SINGH (Defendant) Appellant

- and -

SERWANO WOFUNIRA KULUBYA (Plaintiff) Respondent

RECORD OF PROCEEDINGS

In the High Court of Uganda

No. 1

Amended Plaint.

26th April, 1960.

No. 1

AMENDED PLAINT

IN HER MAJESTY'S HIGH COURT OF UGANDA AT KAMPALA

CIVIL CASE NO. 116 OF 1960

SERWANO WOFUNIRA KULUBYA Plaintiff

- Versus -

MISTRY AMAR SINGH Defendant

1. The Plaintiff is an African Landowner who is the registered proprietor of Plots Nos. 'H', 'S' and 'T' on the land near Nakivubo comprised in Mailo Register Volume 750 Folio 12 whose address for the purposes of this suit is C/o. Hunter & Greig, Advocates, P.O. Box 26, Kampala.

2. The Defendant is an Indian resident at Nakivubo, service on whom will be effected by the Plaintiff's advocates.

3. By an Agreement made the 21st day of November, 1946, the Plaintiff leased to the Defendant Plot No. 'T' being part of the land comprised in Mailo

In the High Court of Uganda

No. 1

Amended Plaint. 26th April, 1960 - continued.

Register Volume 750 Folio 12 for one year from the 1st day of November, 1946 at a rent of Shillings three hundred (Shs.300/-) such rent being payable in advance, (such lease to be renewable from year to year).

4. By an Agreement made the 29th day of March, 1946 the Plaintiff leased to the Defendant plot No. 'H' being part of the land comprised in Mailo Register Volume 750 Folios 12 for one year from the 1st day of March, 1946 at a rent of Shillings three hundred (Shs.300/-) such rent being payable in advance, (such lease to be renewable from year to year).

5. By an Agreement made the 1st day of October, 1947 the Plaintiff leased to the Defendant Plot No. 'S' being part of the land comprised in Mailo Register Volume 750 Folio 12 for one year from the 1st day of September 1947 at a rent of Shillings two hundred and forty (Shs.240/-) such rent being payable in advance.

6. On the termination of the tenancies above referred to the Defendant held over on each of them as a tenant from year to year at an increased rent of Shillings three hundred and fifty (Shs.350/-) in respect of the said plot 'T' and Shillings three hundred and Shillings two hundred and forty (Shs.300/- and Shs.240/-) respectively in respect of plots 'S' and 'H' in accordance with clause 5 of each of the tenancy agreements above referred to.

7. The consents necessary to any of the above leases were not obtained.

8. On the 12th day of November, 1959 notice to quit the said plots 'S', 'T' and 'H' was given to the Defendant, such notice to be effective on the 1st day of January, 1960. Copies of such notices were annexed to the original plaint herein and marked "A".

9. The Defendant has neither paid nor tendered any rent in respect of the said land subsequent to the 31st day of December, 1958 and remains illegally in occupation of the land.

10. During the month of October, 1954 the Plaintiff gave the Defendant orally permission to erect a C.I. Sheet fence and a shed on a small area of

land belonging to the Plaintiff immediately to the East of plot 'T', the said fence and shed to be erected a week before, and to be dismantled within a week after the marriage of the Defendant's daughter. The said daughter was married in 1954. The said fence and shed have not been removed although removal has been demanded. The Plaintiff has suffered damages by reason of the said trespass.

In the High Court of Uganda

No. 1

Amended Plaint.

26th April, 1960 - continued.

WHEREFORE the Plaintiff claims:-

(a) Possession of the said land and eviction of the Defendant therefrom;

(b) Mesne profits from the 1st day of January, 1959 at the rate of Shs.890/- per annum until possession is granted;

(c) An injunction perpetually restraining the Defendant from trespassing on the said land;

(d) Costs;

(e) Damages;

(f) Further or other relief.

DATED at Kampala this 26th day of April, 1960.

(Sd.) J.F.G. TROUGHTON

for HUNTER & GREIG
ADVOCATES FOR THE PLAINTIFF

No. 2

No. 2

ANNEXURES "A" to AMENDED PLAINT

Annexures "A" to Amended Plaint. Notices dated 12th November, 1959.

JV/AMBK/14752. 12th November, 59.

REGISTERED

Mistry Amar Singh,
P. O. Box 220,
KAMPALA.

Dear Sir,

Mailo Register Volume 750 Folio 12
Final Certificate No.15453 (Part)
3.67 acres at Kampala, Kyadondo.

THE UNDERSIGNED as Advocates of Mr. Serwano

In the High Court of Uganda

No. 2

Annexures "A" to Amended Plaint.

Notices dated 12th November, 1959 - continued.

Wofunira Kulubya hereby inform you that your statutory tenancy of Plot No. 'T' on the above land (ends on the 31st December, 1959) and you have no right to occupy the property after that day. You are therefore required to vacate and deliver up to him or to whom he may appoint possession of the said plot No. 'T' situate on the above land near Nakivubo Kampala not later than the 1st day of January, 1960.

Yours faithfully,

(Sgd.) HUNTER & GREIG.

JV/AMBK/14752 12th November, 59.

REGISTERED.

Mistry Amar Singh,
P. O. Box 220,
KAMPALA.

Dear Sir,

Mailo Register Volume 750 Folio 12
Final Certificate No. 15453 (Part)
3. 67 acres at Kampala, Kyadondo.

THE UNDERSIGNED as Advocates of Mr. Serwano Wofunira Kulubya hereby inform you that your statutory tenancy of plot No. 'H' on the above land (ends on the 31st December, 1959) and you have no right to occupy the property after that day. You are therefore required to vacate and deliver up to him or to whom he may appoint possession of the said plot No. 'H' situate on the above land near Nakivubo Kampala not later than the 1st day of January, 1960.

Yours faithfully,

(Sgd.) HUNTER & GREIG.

JV/AMBK/14752 12th November, 1959.

In the High Court of Uganda

No. 2

Annexures "A" to Amended Plaint.

Notices dated 12th November, 1959 - continued.

REGISTERED

Mistry Amar Singh,
P. O. Box 220,
KAMPALA.

Dear Sir,

Mailo Register Volume 750 Folio 12
Final Certificate No. 15453 (Part)
3.67 acres at Kampala, Kyadondo.

THE UNDERSIGNED as Advocates of Mr. Serwano Wofunira Kulubya hereby inform you that your (statutory tenancy) of plot No. 'S' on the above land (ends on the 31st December, 1959) and you have no right to occupy the property after that day. You are therefore required to vacate and deliver up to him or to whom he may appoint possession of the said plot No. 'S' situate on the above land near Nakivubo Kampala no later than the 1st day of January, 1960.

Yours faithfully,

(Sgd.) HUNTER & GREIG.

No. 3

No. 3

Written Statement of Defence.

20th April, 1960.

WRITTEN STATEMENT OF DEFENCE
(UNDER PROTEST)

(HEADING AS IN NO.1)

The above-named Defendant states as follows:-

1. Save as hereinafter admitted, the Defendant denies each and every allegation of facts contained in the plaint.

2. The defendant states that the plaint does not disclose cause of action, therefore the Honourable Court may be pleased to reject the plaint under Order 7 Rule 11 of Civil Procedure Rules.

3. In the alternative, the Defendant states that

In the High Court of Uganda

No. 3

Written Statement of Defence.

20th April, 1960

- continued.

the Plaintiff was party to illegal agreements. The said agreements are referred to in paragraphs 3, 4 and 5 of the plaint. Therefore the Plaintiff is not entitled to file any action on the said agreements.

4. AND in the further alternative, the Defendant states that an agreement was made between the plaintiff and the Defendant in the year 1947, whereby the plaintiff agreed to grant forty nine years lease in respect of each plot namely:- 'H', 'S' and 'T' and further agreed to obtain necessary consent which was required under the Land Transfer Ordinance, provided the defendant built houses of permanent materials on the said plots.

5. Pursuant to the said agreement the defendant built houses of permanent materials on the said plots but the defendant refused and/ or neglected to carry out his part of the contract.

6. COUNTERCLAIM.

The Defendant repeats para 4 of the defence and claims specific performance of the agreement referred in para 4 hereinbefore or in the alternative claims damages suffered by the defendant for non-performance of the said agreement.

WHEREFORE the Honourable Court may be pleased:-

(a) dismiss plaintiff's claim with costs; or

(b) in the alternative order specific performance of the contract referred in para 4 of the Written Statement of Defence.

DATED at Kampala this 20th day of April, 1960.

(Sgd.) SAT PAUL SINGH

for DALAL AND SINGH
ADVOCATES FOR THE DEFENDANT.

No. 4

In the High Court of Uganda

No. 4

Reply.

28th July, 1960.

R E P L Y

(HEADING AS IN NO. 1)

1. The plaintiff joins issue with the Defendant on his Written Statement of Defence and Counterclaim save in so far as the same consists of admissions.

2. The Plaintiff agrees that the Agreements referred to in paragraphs 3, 4 and 5 of the Plaint were illegal without consents of the Governor and the Lukiko and admits that such consents have not been given.

3. The Plaintiff asserts that the Defendant has at all material times occupied, and still occupies, the land referred to in the said Agreements illegally.

4. The Plaintiff denies that he made any agreement of the nature referred to in paragraph 4 of the Written Statement of Defence.

5. The Plaintiff abandons his claim for rent, mesne profits and damages.

DATED at Kampala this 28th day of July, 1960.

HUNTER & GREIG.

ADVOCATES FOR THE PLAINTIFF.

No. 5

No. 5

Proceedings. Statement of Agreed Facts and preliminary discussion.

2nd August, 1960.

PROCEEDINGS - 2nd August 1960.

STATEMENT OF AGREED FACTS

Troughton

Khanna)
Dalal)

Troughton : We have agreed facts and issues, subject to all just exceptions on grounds of illegality. Plaintiff an African, registered proprietor of Mailo land.

In the High Court of Uganda

No. 5

Proceedings. Statement of Agreed Facts and preliminary discussion.

2nd August, 1960

- continued.

Defendant Indian

Plot 'T' leased for one year on 1st November, 1946 Agreement 21.3.46. Shs:300/- p.a., payment in advance and yearly.

Plot 'H'. leased for one year. November 1946. Agreement 29.3.46. Shs:300/- p.a., payable in advance and yearly.

Plot 'S'. leased for one year from 1st September, 1947. Shs:240/- p.a., payable in advance, and thereafter yearly.

After one year Plot T. rent increased to Shs:350/- p.a. Non-registered tenancy existed for Plots H. S. & T. Leases were void - Vol. III.

Consent of Governor and Lukiko never obtained although it was sought after the agreements. Lukiko refused 12.11.49. Notice to quit served on Defendant on 13/11/59 for the 31st day of December, 1959 for each of the plots. Rent was paid to the Plaintiff up to and including 31/12/59 for each of the plots.

The defendant entered into occupation of the three plots in 1946 and 1947, and has remained in occupation contrary to section 2 of the Land Transfer Ordinance. (Section 2, page 1559).

The next fact is really a statement of law that the Defendant in so doing is guilty of an offence under section 4. If he is guilty of an offence under section 4 of the Land Transfer Ordinance he is liable to a fine of Shs.2,000/- or imprisonment not exceeding 12 months, or to both such fine and imprisonment.

Next, the Plaintiff, in permitting the Defendant to take a lease, is guilty of an offence under the Land Law, Section 2(D), punishable under section 2(K) with a fine of quite a lot - of Shs:500/- or imprisonment not exceeding 6 months, or to both such fine and imprisonment. (The Buganda Land Law, Vol.VII, 1219.)

Next, mesne profits at Shs:890/- and damages were claimed in this action from the 1st January, 1959, until possession was granted, but the claim was withdrawn at the first hearing on 29/6/60.

Those are the only facts which my learned friend and I feel it is necessary to put before Your Lordship, and then there are four issues.

1. Are the parties not in pari delicto being each in turn guilty of an offence in permitting and taking a lease?

2. If yes, can the plaintiff recover possession on the strength of the illegality of the lease to which he was a party?

3. Has any possession or property been transferred by the illegal agreements?

4. Having pleaded illegality in order to support his claim and seeking to found his claim on the illegal contracts, can the Plaintiff recover possession or obtain an injunction to restrain the alleged trespass?

My Lord, that is the sum of the case, and I am not sure how we should proceed. Having put those facts before Your Lordship it is not the intention of either the plaintiff or the defendant to call any witnesses at all. We propose to leave the case to be decided on those facts. In the normal way I would open the case and my learned friend would open his defence, and then he would reply, and I as plaintiff would have the final right of reply, but I am not sure how this procedure should be adapted when we have no evidence to call. I am in Your Lordship's hands. I might suggest that it might be convenient if I were to address the Court on the various issues, then my learned friend could reply etc.

Khanna: I respectfully suggest that I should begin because I am saying this suit is not maintained. Then my learned friend answers, and I can reply. In the defence we are saying that plaint does not disclose a cause of action (para. 3). I am the one who is saying the action is not sustainable. I have got to establish the facts which normally my friend would have to prove ..... now the essential facts are admitted the issues are narrowed down. I am the one who asserts the positive of that.

Troughton: On that point I would respectfully submit that it can be the other way. Admission of the

In the High Court of Uganda

No. 5

Proceedings. Statement of Agreed Facts and preliminary discussion.

2nd August, 1960 - continued.

facts merely saves me the trouble of proving. I should begin this action, leaving my learned friend to reply.

Khanna: Order 16, rule 1 is in the way of my learned friend, which provides quite the opposite.

O R D E R

I rule that Mr. Khanna will open the case.

(Sgd.) M.D. LYON
Judge.
2. 8. 60.

No. 6

Judgment of The Honourable Mr. Justice Lyon.

3rd August, 1960.

No. 6

JUDGMENT of THE HONOURABLE MR. JUSTICE LYON

(HEADING AS IN NO. 1)

The Plaintiff in this case is an African Landlord and the Defendant is an Indian gentleman.

I must say a word or two about the pleadings. There were in fact a plaint, an amended plaint, a defence and counter claim and a reply. In the amended plaint there was a claim for possession of the land in dispute, an order for eviction of the defendant, mesne profits and an injunction restraining the defendant from trespassing on the land, costs, damages and other relief. The counterclaim, which was delivered with the written statement of defence, was withdrawn and in the course of the suit was dismissed with costs.

The reply is important, in my opinion -

"1. The Plaintiff joins issue with the Defendant on his Written Statement of Defence and Counterclaim save in so far as the same consists of admissions.

2. The Plaintiff agrees that the Agreements referred to in paragraphs 3, 4 and 5 of the Plaint were illegal without the consents of the Governor and the Lukiko and admits that such consents have not been given.

"3. The Plaintiff asserts that the Defendant has at all material times occupied, and still occupies, the land referred to in the said Agreements illegally.

4. The Plaintiff denies that he made any agreement of the nature referred to in paragraph 4 of the Written Statement of Defence.

5. The Plaintiff abandons his claim for rent, mesne profits and damages."

And on that paragraph 5 of the Reply and after hearing Counsel I gave judgment for the defendant with costs. In my opinion the whole contest here centres around paragraph 3 of the defence -

"3. In the alternative, the defendant states that the plaintiff was party to illegal agreements. The said agreements are referred to in paragraphs 3, 4 and 5 of the plaint. Therefore, the plaintiff is not entitled to file any action on the said agreements."

It follows, of course, that if the Defendant succeeds on that part of his defence, he wins what remains of the suit. I am grateful to Counsel for the Agreed Facts, which are attached separately to this judgment at page 15 of the record.

It is common ground that the Possession of Land Law, which is at page 154 of the Native Laws of Uganda, applies, and that subsection 2(K) is relevant to this suit:-

"2 (K) The owner of a mailo who contravenes any provision of paragraph (c) or (d) of this section shall be liable on conviction to a fine not exceeding Shs.500/- or to imprisonment not exceeding six months or to both such fine and imprisonment."

and (c) and (d) provide:-

"(c) The owner of a Mailo will not be permitted to hand over his mailo to one who is not of the Protectorate or to a church or to a religious or other society, except with the approval in writing of the Governor and the Lukiko.

(d) The owner of a Mailo shall not permit one who is not of the Protectorate to lease, occupy or use his Mailo except with the approval in writing of the Governor and the Lukiko.

In the High Court of Uganda

No. 6

Judgment of The Honourable Mr. Justice Lyon.

3rd August, 1960 - continued.

Provided that the owner of any mailo other than a mailo situate within the Gombolola of the Omukulu we Kibuga may, without such approval as aforesaid but with the approval in writing of the Ssaza Chief of the Ssaza in which such mailo is situated, permit one who is not of the Protectorate to occupy or use such mailo or any part thereof for a period of not more than one year or from year to year, but so that the area so occupied or used shall not exceed two acres in the case of any one tenant."

It is common ground also that the Land Transfer Ordinance, Cap.114, also applies - (Sections 2 and 4):

"2. No non-African or any person acting as his agent shall without the consent in writing of the Governor occupy or enter into possession of any land of which an African is registered as proprietor (otherwise than by receiving rents and profits payable by non-Africans who have gone into occupation or possession with the consent of the Governor) or make any contract to purchase or to take on lease or accept a gift inter vivos or a bequest of any such land or of any interest therein other than a security for money:

Provided that, in Buganda, nothing herein contained shall operate to prevent a non-African with the consent in writing of the African owner and of the Ssaza chief of the county in which the land is situate from occupying or entering into possession of any land not being within the Gombolola of the Omukulu we Kibuga of Buganda and not exceeding in area two Acres in any county for a period not exceeding one year or from year to year:

Provided further that, for the purposes of this section only, a company duly registered under the Companies Ordinance all the members of which are Africans and which contains in its articles of association a clause preventing the transfer of any of its shares to a non-African shall be deemed to be an African. No member of such company shall hold shares in trust for a non-African."

"4. (1) Any person who commits a breach of the provisions of this Ordinance or of any terms imposed by the Governor under section 3 shall be guilty of an offence and shall be liable on conviction to a fine not exceeding Shs.2,000/- or to imprisonment for a period not exceeding twelve months or to both such fine and imprisonment.

(2) If any company which has become the proprietor of any land or has acquired any interest in land by virtue of the provisions of the second proviso to section 2 of this Ordinance, while retaining such land or interest in land, permits any of its shares to become vested in a non-African or vested in trust in an African for a non-African such land or interest in land shall subject to the provisions of any law for the time being in force relating to land registration thereupon vest -

(a) In the case of mailo land, in Buganda, in the Governor and the Lukiko to hold and to deal with as trustees for the Baganda; and

(b) in any other case, in the Governor as Crown land."

It is common ground that both those Ordinances, and the sections to which I have referred, apply to the plots of land in dispute in this case, therefore it cannot be in dispute that both parties have committed offences punishable by fine and imprisonment.

The main contest here is, are the parties in pari delicto? And that is the crux of the case because, if so, as I understand the law, the defendant must win, as the plaintiff's case in those circumstances would not lie at all. This settled law rests upon the principle that no court will entertain any suit brought by a wrongdoer or one who does not come to court with clean hands. In Halsbury, 3rd Edn. Vol. 8, p.149, there is the following passage -

"Where the object of a contract is illegal the whole transaction is tainted with illegality, and no right of action exists in respect of anything arising out of the transaction. In such a case the maxim in pari delicto, potior

In the High Court of Uganda

No. 6

Judgment of The Honourable Mr. Justice Lyon.

3rd August, 1960 - continued.

est conditio defendantis applies, and the test for determining whether an action lies is to see whether the plaintiff can make out his claim without relying on the illegal transaction to which he was a party (h). As a general rule a person may recover property which has been transferred by reason of an illegal contract and which is being wrongfully detained by the transferee, provided he does not seek and is not forced either to found his claim on the illegal contract or to plead illegality in order to support his claim (i).

(I refer to the cases set out on that page at the footnote marked (h) and (i)).

I refer next to the very old case of Browning v. Morris recorded in English Reports 98, p.1364, and particularly to the following passage of Lord Mansfield's judgment -

" the rule is, in pari delicto, potior est conditio defendentis: and there are several other maxims of the same kind. Where the contract is executed, and the money paid in pari delicto, this rule, as Mr. Dunning contended, certainly holds: and the party who has paid it, bribery · if a man pays a sum of money by way of a bribe, he can never recover it in an action: because both plaintiff and defendant are equally criminal. But where contracts or transactions are prohibited by positive statutes for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not in pari delicto; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract."

And not unnaturally I have the Kiriri Cotton case in mind, and I refer first to a passage of Lord Denning's judgment (1960) 1 All E.R., p.177 at p.181 -

" The true proposition is that money paid under a mistake of law, by itself and without more, cannot be recovered back. James, L.J., pointed that out in Rogers v. Ingham (14). If there is something more in addition to a

mistake of law - if there is something in the defendant's conduct which shows that, of the two of them he is the one primarily responsible for the mistake - then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other - it being imposed on him specially for the protection of the other - then they are not in pari delicto and the money can be recovered back: see Browning v. Morris (15) by Lord Mansfield ..... Seeing, then, that the parties are not in pari delicto, the tenant is entitled to recover the premium by the common law: .....

And the headnote is -

'Held: the duty of observing the law being placed by s.3(2) on the shoulders of the landlord for the protection of the tenant, the parties were not in pari delicto, and therefore, though the illegal transaction was an executed transaction, the tenant was entitled at common law to recover the premium as money had and received to the use of the tenant."

But that case is easily distinguished from the instant case, for in the Kiriri Cotton Company case only the landlord was guilty of an offence and the parties did not know of the illegality; and in Taylor v. Chester where the illegality came to be known and pleaded at a very late stage, yet plaintiff failed to recover half a bank note, and the reference to that case will be set out at the foot of this judgment, In a recent case in this court my learned brother, Bennett, held -

" It is common ground that on the 30th December, 1953, the plaintiff and the defendant executed a tenancy agreement whereby the defendant agreed to let certain residential premises to the plaintiff for a term of 7 years from the 1st January, 1954. The agreement provided for the payment of monthly rent of Shs:370/- and was expressed to be made "in consideration of the sum of Shs:14,000/- (i.e. Shillings fourteen thousand only) paid by the lessee to the lessor on or before the execution of this agreement (the receipt whereof the lessor hereby acknowledges) as premium." The

In the High Court of Uganda

No. 6

Judgment of The Honourable Mr. Justice Lyon.

3rd August, 1960 - continued.

Shs:14,000/- was, in fact, paid by the plaintiff to the defendant on the 23rd December, 1953.

That receipt of the premium was illegal and a contravention of Section 3(2) of the Rent Restriction Ordinance, Cap.115, is apparent from the decision of the Privy Council in Kiriri Cotton Company Limited V. Dewani (1960) 1, All E.R. 177. It is also plain from that decision that the parties were not in pari-delicto, and that the premium is recoverable as money had and received. The only defence raised on behalf of the defendant is that the suit is barred by Section 4 of the Limitation Ordinance, 1958, the suit having been instiuted more than 6 years after the premium was paid.

The premium was paid on 23rd December, 1953, but the suit was not filed until 29th December, 1959."

And for the reasons the learned judge gave towards the end of the judgment, after referring to the Limitation of Actions by Frank, page 206, "a mistake was disclosed in the plaint and relief was prayed from its consequence," and the learned judge continued -

" Moreover, mistake is relied upon as an alternative ground in support of the plaintiff's claim for money had and received and not merely for the purpose of taking the claim out of the operation of Section 4 of the Limitation Ordinance.

For these reasons I am of opinion that the claim is not time-barred and I give judgment for the plaintiff as prayed."

Mr. Troughton's argument was mercifully short, the main point - as I understood him - was that the parties here are not of the same class and he cited a very old case of Lord Mansfield's and a Rent Board case from Nairobi, to which reference will be set out at the foot of this judgment. I need only say that I do not think those authorities apply to the parties in this case.

On the issues as framed and agreed by Counsel I find that the parties in the instant case are in pari delicto. Both parties knew all their transactions were illegal, both of them knew that consent,

the necessary consents, had been refused, yet the Plaintiff allowed the Defendant to occupy the plots in dispute for over thirteen years, and accepted rent for many years, and now seeks an order for eviction in circumstances where even if the so-called lease were valid no proper notice to quit has been given. The Plaintiff's claim has no merit; and I am surprised that the Court was ever troubled with it. All the transactions were illegal, and certainly the plaintiff does not come to this Court with clean hands.

On the agreed facts as framed by Counsel, I find that the parties are in pari-delicto. I answer the second issue - can the plaintiff recover possession - in the negative, and I answer issues 3 and 4 in the negative.

On the whole case I hold that the parties were, and are, in pari delicto, and that the Plaintiff's remaining claims cannot therefore be entertained. The Plaintiff's claims for possession and for an order of eviction of the Defendant are dismissed with costs.

M. D. LYON.
JUDGE.
3. 8. 60.

Authorities referred to -

Section 23, Indian Contract Act.

Bowmakers v. Barnet Instruments Ltd., (1944) 2 All E.R. at p.582.

Taylor v. Chester, (1869) (38) L.J. Q.B. 224, 226, 227 and 228.

3rd Edn. VIII Halsbury, 149

Browning v. Morris, Vol. 98, English Reports, 1364.

Kiriri Cotton Co. Ltd. v. Dewani.

Shantilal Nathabhai Patel v. Registrar of Titles. 16 E.A.C.A. 46 at pp.49 and 50.

Motibai Manji v. Khursid Begum (1957) E.A. 101-103.

In the High Court of Uganda

No. 7

Decree in Original Suit.

3rd August, 1960.

No. 7

DECREE IN ORIGINAL SUIT

(HEADING AS IN NO. 1)

Claim for possession of the land, mesne profits and damages and counterclaim for specific performance. This suit coming on this day for final disposal before the Honourable Mr. Justice M.D. Lyon in the presence of Mr. J.F.G. Troughton for the Plaintiff and of Mr. S.H. Dalal for the Defendant it is ordered and decreed that the Plaintiff's suit be dismissed with costs and that the costs of this suit be paid by the Plaintiff to the Defendant and that the Defendant's counterclaim be dismissed and that the costs of the counterclaim be paid by the defendant to the plaintiff. Given under my hand and the seal of the Court this 3rd day of August, 1960.

R. W. Cannon.

R E G I S T R A R.

In Her Majesty's Court of Appeal for Eastern Africa

No. 8

Memorandum of Appeal.

13th September, 1960.

No. 8

MEMORANDUM OF APPEAL

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA

HOLDEN AT KAMPALA

CIVIL APPEAL NO. 74 OF 1960

BETWEEN

SERWANO WOFUNIRA KULUBYA — Appellant

- and -

MISTRY AMAR SINGH — Respondent

Appeal from a judgment and a decree of the High Court of Uganda at Kampala (Mr. Justice LYON) dated the 3rd day of August, 1960 in

CIVIL CASE NO.116 OF 1960

SERWANO WOFUNIRA KULUBYA — Plaintiff

versus

MISTRY AMAR SINGH — Defendant

SERWANO WOFUNIRA KULUBYA the Appellant above

named appeals to Her Majesty's Court of Appeal for Eastern Africa against that part of the decree in the above suit which relates to the dismissal of the Plaintiff's suit with costs on the following grounds:-

(a) That the learned judge erred in holding that the parties were in pari delicto in that he failed to take into account that

(i) The maximum fine and period of imprisonment permitted for a breach of the Land Transfer Ordinance are respectively four times and twice those permitted by the Possession of Land Law;

(ii) the object of the Land Transfer Ordinance and the possession of Land Law was, and is, to protect African landowners against non-African tenants;

(b) That if (which is denied) the parties were in pari delicto, the learned judge erred in holding that the doctrine in Browning v. Morris 98 E.R. 1364 did not apply:

(c) That the learned Judge erred in not holding that the Plaintiff was entitled to possession as against the Defendant as (i) the latter had no estate or interest in the land concerned of which the Plaintiff was the Registered Proprietor, and (ii) the Plaintiff had withdrawn his consent to the occupation by the Defendant of the land concerned with effect from the 1st day of January, 1959;

(d) That the learned judge erred in holding that the Plaintiff was suing on an illegal contract.

WHEREFORE the Appellant prays that this appeal be allowed with costs, that the decree be set aside in so far as the dismissal of the Plaintiff's claim with costs is concerned and that an order be made awarding the Plaintiff possession of the land concerned, evicting the Defendant therefrom and perpetually restraining the Defendant from trespassing on the said land

DATED at Kampala this 13th day of September, 1960.

(Sgd.) Troughton
for Hunter & Greig
ADVOCATES FOR THE APPELLANT.

In Her Majesty's Court of Appeal for Eastern Africa

No. 9

Proceedings before the Court.

12th December, 1960.

No. 9

PROCEEDINGS BEFORE THE COURT OF APPEAL FOR EASTERN AFRICA

NOTES TAKEN BY THE HON. THE VICE PRESIDENT, SIR ALASTAIR FORBES

12.12.60. CORAM: FORBES V.P.
CRAWSHAW J.A.
CORRIE Ag. J.A.

Troughton for appellant.
D.N. Khanna for respondent.

TROUGHTON opens:

T. errors in record - p. 12.11.59 should read 12.11.49. p. line "legal" should read "illegal".
Facts: Were agreed and no evidence called.

v. p.

1st. Q. which arises: On facts were parties in pari delicto?

Cap.114 Land Tr. Ord., Vol.3 of Laws of Uganda, p.1559.

Offence for non-A. to occupy African land without consent of Governor (s.2)

Native Land Law (p. of record) - Owner of mailo not permitted to hand over mailo without consent.

Not disputed that here land handed over without consent. Punishments for which offender liable are different.

Owner of mailo - fine of 500/- or 6 months imprisonment or both - i.e. on owner.

Non-A: Penalty is fine of 2000/- or 12 months imprisonment or both - i.e. on occupier.

Suggest that on those penalties parties are not in pari delicto.

But object of legislation.

(1949) 16 E.A.C.A. 46 at p.49.

S.N. Patel v. Reg. of Titles

Assignment of non-expired term of lease of mailo held by non-A.

p.49: Object of legislation discussed - stress p.50. That judgment endorsed by other members.

Motibai Manji v. Khursid Begum. (1957) E.A.101; 103B.

Submit decisions binding and apply to this case. If object of this legislation is to protect the African Landowner, then I must refer to Browning v. Morris 98 E.R. 1364.

Referred to in Kiriri Cotton case (1958)E.A. at p.247: Also Kearly v. Thompson.

Both those cases held to be binding on the court.

That judgment approved by P.C. - (1960) E.A. at p.193 F. Trial judge dismissed this argument of mine at p. of judgment (p. of record).

Rent Board case - not quoted by me but by respondent. Submit that on authorities I've cited I'm entitled to succeed.

Parties either not in pari delicto or deemed not be in pari delicto.

Refer Limitation Ord., 1958 (No.46 of 1958).

Submit supports proposition that action for recovery lies. (p.689) - s.32 (1) (g).

Person could not have entered into possession except illegally. He could do so with connivance of App. landlord. Submit fortifies by argument that Browning v. Morris applies.

If Court agrees, that is end of case.

If not: necessary to go into other matters with which I did not deal in ct. below - though dealt with by respondent and court.

p.12 - reply - para 8.

Claim for rent, mesne profits and damages abandoned. I could not recover those save by suing on illegal contracts.

My claim reduced to an action to recovering possession and occupation of lands, which had changed as result of the illegal contracts.

Taylor v. Chester (1869) 38 L.J. 227 (Col.2). That considered in 1944.

Bowmakers v. Barnet Instrument Ltd. (1944) 2 A.E.R. 579 at p.582A.

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Proceedings before the Court.

12th December, 1960 -- continued.

I am not suing on an illegal contract I am suing for something which as a matter of history has changed hands in consequence of an illegal contract.

Very simple series of facts arise from pleadings and agreed facts which entitle me to my land.

(a) This is my land (para 1 of plaint - p.) - admitted at p.

(b) Defendant is on my land without my consent since 1st January 1960 (para 8 of plaint) - admitted in agreed facts.

(c) I am not statute-barred: s.32 of Limitation Ord. 1958. In any case 12 years from start of adverse possession. That began only this year.

Submit on dicta in Bowmaker - form of pleadings not conclusive - claim not founded on illegality - I am entitled to raise these arguments on pleadings.

If court takes different view, will need leave even at this stage to amend plaint by amendment in accord with agreed facts.

(Amendment handed in)

This is covered by agreed facts. Do not think necessary, but apply ex abundante cautela.

Submit I should succeed either on Browning v. Morris or on claim in trespass.

Bowmakers case: No rule of law to compel court to dismiss claim etc.

Submit appeal should succeed.

Costs. If succeed submit should have costs of action though concede respondent should have any costs arising from abandoned claim.

KHANNA: Main argument founded on q. whether parties in pari delicto.

Delictum equated with penalty.

Novel proposition.

Delictum means not penalty but liability.

Browning v. Morris. Answer comes from Lord Mansfield himself.

p. 1365 of report - 1.19.25.

Main distinction is who is marked criminal.

Q. is, are all penalties one way?

That is basis of case in assessing equality.

Kiriri Cotton case: Penalties are all one way. African is not favoured by legislature.

All legislation is to be read together.

African also subject to penalties.

Appellant's argument founded on isolated sentence taken out of context.

Patel v. Reg. of Titles 16 E.A.C.A. 46.

On narrow ground there is issue, the dicta is relevant to that only.

No application to present question.

Takes two to make a lease. Duty to obtain consents is on both parties. Act of neither is valid without necessary consents.

Both punished. Object is to rest effective control in Governor and Lukiko.

Both are to be marked as criminals.

To say app. is to be protected is to fly in teeth of legislation.

Patel case cannot be said to say that object of legislation was to protect Africans.

Only using language to say informal transactions will not be effective.

No non-native was involved.

Cannot found general proposition on narrow facts in that case. General proposition never thought of in that case.

Motibhai Manji's case.

Again no African was directly involved. Only non-Africans involved. Court held necessary consents necessary before agreement could be enforced.

Does not relate to case of transfer of land from African to non-African.

Patel case used for limited purpose.

Cases must be understood in relation to their own narrow facts.

In Her Majesty's Court of Appeal for Eastern Africa

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Proceedings before the Court.

12th December, 1960
- continued.

Object is to protect African community as a whole - not the individual.

Different matter whether court will lend its aid in case where both parties are guilty. Other methods of recovery - administration methods.

Submit matter is res integra

Submit judge quite right in saying legislature has marked both as criminals.

Most important aspect of Browning v. Morris is that penalties are all one way.

Kiriri Cotton case: This court was re-affirming principles in terms of culpability - not punishment. How can it be said a criminal comes with clean hands. Limitation Ord. 1958.

Where does it take one? Because no limitation cannot say there is a cause of action which cannot be defeated on ground of illegality. Must be subject to legality of claim.

Refer

Charan Kaur v. Mistry Makanji Vanmali (1956) 23 E.A.C.A. 14, 15.

Submit that is a case exactly in point.

Cheshire 4th ed. p. 297.

Year to year tenancy - can only be terminated by 6 months notice terminating at end of yearly tenancy. Not case here.

p. - no proper notice to quit.

I plead tenancy from year to year. Then plaintiff is driven to rely on illegality of lease.

Not entitled to do so.

It is part of his own pleadings that he is party to illegal agreement.

Short adjournment taken.

(Intd.) A.G.F.

On resumption: KHANNA continues:

(a) Submit if plaintiff pleads a notice to quit either in plaint or reply, he is then trying to base claim on illegal tenancy.

(b) Difference between fixed term illegal lease and one from year to year.

Here plaintiff obliged to refer to tenancy in his pleading.

Moment year to year tenancy pleaded, under signature of plaintiff then plaintiff is obliged to rely on the illegality by reference to law.

If he frames claim without reference to lease defendant pleads possession by virtue of lease.

Plaintiff then bound to say either illegal or lease terminated.

Cause of action before and after expiry of lease should not be confused.

Gaslight & Coke Co. v. Turner (1840) 6 Bing (N.C.) 324.

Alexander v. Grayson (1936) I.K.B. 186-7

Here present claim is not so formed as not to refer to any illegal transactions
p.

Q. is, can plaintiff steer clear of the taint of illegality. If court has to put out of the way the illegal lease in order to put him in, he is relying on the illegal lease.

So this possession being sought in connection with a contract entered into in violation of law.

p. of record: Again refers to illegal agreements - para. 2

Cannot come to court without relying on illegality of his own.

Bowmakers case.

Did not concern an illegality between immediate parties.

Sarjun Singh v.
(1960) 1 A.E.R. 269 at p. 273.

If relying on rights as owner, fact that ownership was acquired illegally does not matter.

Bowmaker not parallel on facts.

Taylor v. Chester.

Distinguished in Bowmakers case. Illegal transaction between immediate parties.

p. 227: Illegality not in a collateral matter.

Said occupation without consent from 1st January 1960.

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Proceedings before the Court.

12th December, 1960 - continued.

Presupposes consent to occupation prior to that - by virtue of certain agreements - and these agreements illegal - therefore I can withdraw my consent at short notice. So he is relying on illegality.
Amendment:
Cannot at this stage be allowed to amend and turn claim into one of different character. But still does not get rid of illegality.

Rarely amendments allowed in C. of A. and then only subject to drastic terms. Would have to be re-heard and does not put case any higher.

In plaint is saying that in 1946 there was in case of 2 plots and thereafter from year to year. Year to year tenancy continued to 1959.

Says he gave notice to quit because agreements were illegal.

Separate issues as regards possession, mesne profits, damages.

Latter withdrawn and so dismissed with costs. Not subject of appeal.

P. of record: Notices to quit: Peculiar.

Ref. to statutory tenancy". There was none.

p. Issues settled:

1st Q: Were parties in p.d.

Other issues.

p. Order as to costs.

Pre-1929 English practice.

p. Follows H of L. case.

Only subject of appeal and can carry only costs of an issue and no more than an issue.

S.27, 1st Proviso of Civil Appeal Ord.

Issue of possession only one subject to appeal.

Reid Hewitt (1918) A.C.717.

Got costs of 2 counsel below. Does not require variation as regards other issues. If appellant succeeds, may require variation in Ct. below.

I adopt judge's reasoning fully.

Draw attention only to
p. 1. No argument addressed to judge on disparity of fines and imprisonment.

p. 1. Have explained how impossible for

plaintiff to steer clear of illegality.

p. 1. Adopt as a good statement of the law.

p. 1. That is the test.

p. 1. Duty here placed on both parties.

Both legislative enactments are part of laws of Buganda and are equally part of law of the land.

Submit the two laws must be read together as being in pari materia.

In assessing the object of legislature one has got to read the legislation together.

Guardian is Governor plus Chiefs.

Both African and non-African punished.

Act of both African and non-African prohibited.

Law of Buganda cannot be ignored for this purpose.

All placed on same plane as Protectorate laws.

If read together and then criminality the test, then judge right at p. 1.

p. 1. Finding unassailable.

Findings accepted. Now putting forward argument based on disparity of punishment.

(V.P. But gr. a (ii)?)

Has not submitted that appellant in favoured class.

Half-hearted argument.

No authority to show favoured class guilty of offence is to get benefit.

Here both are declared criminals.

Browning v. Morris was rightly applied.

Submit appeal should be dismissed.

TROUGHTON (in reply):

Object of legislation:

History is helpful and is set out in judgment of Gray C.J. in Patel v. Reg. of Titles 16 E.A.C.A. 49.

Native Land Law applies only to natives in Buganda.

Land Transfer Ord. applies throughout Protectorate.

Object of Native Land Law: v. foot of p. 48.

1st enactment of Land Tr. Ord. was 1906. Object

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clearly to protect African landlord. Concede that point about sentences is new. Not one I rely on very strongly. Submit equality of fault is what is meant. Here peculiarity of one law applying to whole Protectorate to non-African.

Another law by different legislature applying to minority of Africans.

Alleged notice to quit did not relate to agreement.

Consider that notice to quit must be related to lease. But here no lease whatever.

We have agreements pleaded as arguments.

Did say in agreed facts that plot leased for 1 year. We state an agreement in each case.

S.23 of Ind. Contract Act each of these agreements is void. Submit the lease being void you cannot have a notice to quit related to a nullity and only effect in law of notice to quit is to withdraw consent to occupation as from given date.

Agreements gave no estate or interest in land to the tenant.

S.51 of Reg. of Titles Ord.

Sarjan Singh case:

Refers to possession of a lorry.

Property can pass by transfer.

Refer to last words of judgment.

In present case, if plaintiff not allowed to recover possession respondent would have land and also money for rents.

CHARAN KAUR case.

Distinguish. Plaintiff was seeking possession as against a tenant - in protected class.

Therefore pari delicto point did not arise.

I have submitted that on pleadings and admitted facts without mention of illegal contract it is possible for me to establish my claim.

I am owner.

Defendant occupies without my consent.

If an amendment to my plaint is necessary then submit I should be allowed to make it to determine real question. If covered by existing pleadings I am happy without it.

Facts are fully covered in agreed facts. Costs:

In main this action was action for possession.

Subsidiary claims have been dropped; Court has full power to determine costs "prescribed" means provided by rules under Ord. No limitation on discretion.

Ask if appeal succeeds I should have costs here and below less any costs attributable to subsidiary issues.

KHANNA: Just been handed judgment in civil case 244/1955. Hand in without comment.

C. A. V.

Attendance by Mr. Khanna on reading of judgment excused.

(Sgd.) A. G. FORBES.
V. P.
12.12.60.

NOTES TAKEN BY THE HON. JUSTICE OF APPEAL II, MR. JUSTICE CRAWSHAW.

12.12.60 Coram: Forbes V. P.
Crawshaw J. A.
Corrie Ag. J.A.

Troughton for appellant.
D.N. Khanna for respondent.

TROUGHTON opens: 2 typing errors.

Facts were agreed - no evidence.

Judge erred whether on the facts parties were in pari delicto.

p. 1559, Vol.III. Laws - Land Transfer Ordinance, r.2. Necessary consents not obtained - punishable offences by both parties. In Cap.114 only occupier punishable - and in greater amount.

In these penalties it is common sense not in pari delicto, but it goes deeper than this.

In (1949) 16 E.A.C.A. 46 - S. N. Patel v. Reg. of Titles.

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12th December, 1960 - continued.

Assignment of non-expired lease to non-African. p. of case,

Motibhai Manji v. Khurshed Begum (1957) E.A.L.R. 101.
103 top 13 - "protecting the African owner".

Browning v. Morris - 98 E.R. 1364.
cited in (1958) E.A.L.R. 247
approved by P.C. in 1960 E.A.L.R.193.

Submit not in pari delicto or on basis of Browning v. Morris, deemed not to be

Limitation Ord. No. 46 of 1958, p.689. s.32 (1) (g). Ord. envisages action to recover possession in present instance and that Browning v. Morris applies.

If Court agrees agreements so far submitted, that is sufficient to allow appeal.

Reply - para. 5. Appellant abandoned claim for rent etc. as only recoverable by suing on illegal contract, which could not succeed. Claim is reduced to one for possession.

Taylor v. Chester (1869) Vol.38 L.J. 227 - foot of 2nd column - test of in pari delicto.

Considered in (1944) 2 All E.R. 579, 82. Bowmakers v. - right to possession of own chattels.

Instant case not resting on illegal contract, merely for possession of land which has changed hands by virtue of illegal contract - illegal contract appears in pleadings merely for historical reasons.

Ownership of land pleaded and admitted p.

Dft. on land since 1.1.60 without appellant's consent - para 8 plaint.

Not statute - barred - s.32 Limitation Ord. Anyway adverse possession did not start until 1.1.60.

Submits above arguments open to him on pleadings as they stand, but otherwise asks leave to amend in keeping with facts as approved. (Is this

Not covered by para 9 of the plaint?)

Manifest injustice if appeal dismissed - Bowmaker case.

Asks for costs here and in ct.below, apart from any costs arising from abandoned part of claim.

KHANNA: Appellant equates delictum with quantum of penalty - submits this wrong approach.

Browning v. Morris - Question is whether each party in delictum.

10 1365 -

Question is who is the marked criminal - are the penalties all one way.

Kiriri Cotton Co. case - penalty all one way. Admits no penalty on African under Land Transfer Ord., but that and the Possession of Land Law are in pari materia.

S.N. Patel v. Reg. of Titles - narrow question there involved - ratio decidendi different to instant case.

20 Duty of obtaining consent is on both parties - object is not to protect African but to punish both parties. When saying "To protect African owner" it was only obiter and was not necessary for the decision - the question there was transfer by legal occupying non-African to another non-African.

In Motibai Manji's case, Africans not directly involved - is concerned exchange between 2 non-Africans. In Motibai, the ct. used the S.N. Patel for limited use only.

30 Each of above cases depended on its narrow facts.

Object of legislation is to protect the African community as a whole, not an individual African.

J. in instant case correct in finding both parties criminal.

Equality of culpability is independent of severity of sentences.

Appellant did not come to ct. with clean hands.

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Not a case of ignorant African subject to no penalty asking for relief.

Many causes of action for which no period of limitation presented.

Chanan Kaur v. Mistry (1956)23 E.A.C.A., 14,15. Submits this case directly in point.

Submits appellant has been unable to differentiate between claims abandoned because of illegality of contract and claims for possession resulting from illegal contract.

Cheshire on Contract 4th edn. 297.

Submits that plaint does not say that there is any special terms of notice, and therefore no need for defendant in written statement to plead notice invalid.

If plaintiff pleads notice to quit, then he is trying to recover under terms of illegal contract invalid ab initio.

Difference between fixed term illegal lease and one from year to year, for in latter case notice must be given.

It should appear on face of lease whether consents obtained or not.

If plaintiff merely pleads possession without reference to lease, then defendant pleads lease then in reply plaintiff has to say it is illegal and hear them barred by its provisions.

Submits that in case of tenancy from year to year it is therefore impossible for landlord ever to recover.

Gaslight & Coke Co. v. Turner (1840) 6 Bing (M.P. 24
(1936) 1 K.B. 169, 186, 2.

Submits no distinction between statutory illegality on the face of the document, and lease for illegal purposes.

Plaint refers to illegal transaction.

In case of lease which has expired, the landlord can claim possession without reference to lease.

The appellants reply makes it clear that he relies on illegality of lease - in other words on the illegal instrument.

(1960) 1 All E.R. 269. Taylor v. Chester 227 - illegality not in respect of collateral matter.

Appellant consented to renewals of lease and now tries to recover at short notice by virtue of illegal agreement.

Oppose amendment bases on different ground omitting reference to illegality.

Does not know what statutory tenancy is alleged.

Issues.

Re 1929 decisions apply here. Ruling not subject of appeal.

s.27, C.P.C.

1918 App. C. 717

Costs of 2 counsel below, would not require variation below but might require reconsideration should appellant succeed.

Both parties committed offences - no argument as to disparity in sentences.

Test for determining if action lies. In instant case blame is equally on both. Test is criminality, not penalty.

Favoured class, guilty of offence, no case to show not in pari delicto.

TROUGHTON: Object of legislation. History set out in judgment of Sir John Gray in S.N. Patel v. Reg. of Titles.

Land Transfer Ord. applies to whole.

Protectorate and Possession of Land Law to Buganda alone.

Laws introduced beginning of century when Africans very simple and were for their protection.

Concede point about sentences is new, but does

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12th December, 1960 - continued.

not place much reliance on it, but part means equal. Point not decided before because the two laws introduced by 2 different legislation.

Notice to quit must be related to lease, but here no lease whatever. There are agreements pleaded as such, and in agreed facts, but under s.23, Indian Contract Act each agreement is void as matter of law - "defeat the provisions of any law". Lease being void, there cannot be notice to quit related to nullity. Effect of notice in instant case is merely to say that after certain date you are not on land with consent.

Tenant has no estate or interest in land s. 21 of Reg. of Land Ord.

Sarjan Singh case - lorry can pass as moveable property, and different to land. If appellant not allowed to gain possession to land, respondent would have land and rent.

Charan Kaur case - brought under Rent R. Ord. Held in Kiriri case to protect tenants. In Charan Kaur case landlord was seeking relief against tenant, and therefore not relevant to instant circumstances.

Appellant is owner, respondent occupies without consent, and if amendment to plaint necessary, then should be allowed to amend.

Costs: Action essentially one for possession; other claims for rent etc. were dropped. Ct. has full power as to costs. 'Rules' means rules made by rules committee. No restriction on ct. Ask for all costs here and in ct. below except on points withdrawn.

Uganda Civ. C. 244 of 1955.

Judgment reserved.

(Sgd.) E. D. W. Crawshaw.
J. A.
12.12.60.

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No. 9

Proceedings before the Court.

12th December, 1960 - continued.

NOTES TAKEN BY THE HON. AG. JUSTICE OF APPEAL, SIR OWEN CORRIE.

12.12.60 Coram: Forbes V. P.
Crawshaw J.A.
Corrie Ag. J.A.

Troughton for appellant.
D.N. Khanna for respondent.

TROUGHTON opens:

Facts agreed p.

Land Transfer Ord. p.1559, vol.3, sec. 2.

Record p. 1.

No requisite consent in this case.

Owner: Maximum penalty fine 500/-. Imprisonment 6 months or both.

Occupier: fine 2,000/- or imprisonment for 12 months or both

(1949) E.A.C.A. Vol. 16, p.46.

S.N. Patel v. Regr. of Titles (Shantilal's case)

Gray C.J. p.49, 50.

(1957) E.A.C.A. p.101.

Motibhai Manji v. Khurshed Begum.

Worley P. p.103 (b).

Browning v. Morris 98 Eng. R. 1364.
(1958) E.A.C.A. p.247.

O'Connor P.
(1960) E.A.C.A. p.193.

Parties not deemed to be in pari delicto.

1958 Limitation Ord. No.46 p.689, s.32.
sub-section (g) at p.690.

Reply to defence - s.5. Claim to rent withdrawn.

Merely claim to recover possession.

Taylor v. Chester (1869) 38 L.J. p.227.

Mellor J.
(1944) 2 All E.R. p.579 at 582.

Bowmakers v. Barnett Instruments Ltd.

Du Parcq L.J.

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Here something has changed hands in consequence of an illegal contract.

I am not suing on the contract.

Plaint para 1 admitted p.

Defendant on my land without my consent since 1st Jan. 1960.

para. 8.

Ct. refers to plaint para 9.

Du Parcq L.J. in Bowmakers.

KHANNA: Delictum is not proportionate to penalty.

Browning v. Morris.

Lord Mansfield p.1365, l.19.25.

Main distinction is who is marked criminal.

(1960) pt. 1. E.A.C.A. p.188.

Kiriri Cotton Co. Ltd. v. R.K. Dewani.

Motibai Manji's case (Supra)

Object of legislation is to protect the African community as a whole.

O'Connor p.246 in Kiriri Cotton.

Charan Kaur v. Mistry Makanji (1956) 23 E.A.C.A.14, 15.

Cheshire p.297 L. of Contract.

Here original yearly tenancy and followed by tenancy from year to year.

Tenancy can only be terminated by notice, 6 months expiring at end of year.

Judgment p.27.

I plead my tenancy from year to year then appellant must plead that tenancy is illegal.

Appellant in p/q must rely on illegal contract.

difference between fixed term illegal and one from year to year.

The moment defendant pleads year to year contract owner can only recover after expiry of the lease.

Cheshire p.

Gaslight and Coke v. Turner.

(1840) 6 Bing (N.C.)324.

Alexander v.

(1936) 1 K.B. 1867.

(Pearce v. Brooks (1866) L.R.1. Exch. 12 Digest 264)

Record p.12.

Bowmakers case. H.P. was not breach of order but previous transaction was illegal.

Sarjan Singh.

(1960) 1 All E.R. 269.

Lorry illegally transferred. Once ownership passes new owner can assert title.

p.272-3.

Taylor v. Chester distinguished in Bowmakers case.

Before 1st January 1960 Resp. was in possession with consent of App. under the illegal contract.

Amendment of pleadings cannot be allowed now.

Plaint para. 6.

Claim for rents etc. was withdrawn.

Record p. "statutory tenancy"

p. para 5.

p. para 1.

p. costs.

re Hewitt.

Costs of 2 counsel.

Record

TROUGHTON in reply: Gray C.J. Shantilal's case.

Native Land L. applies only in Buganda.

Object p.48.

1906 Land Transfer Ord. p. 48, l.20.

n/q cannot be related to the lease there is no lease only agreements.

s.23, Indian Contract Act.

Lease being void: n/q cannot be related to it.

Registration of Titles Ord. s.51.

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12th December, 1960 - continued.

Sarjan Singh's case.

Property in lorry can pass.

Charan Kaur. Rent Restriction Ord. was to protect tenant.

L. Transfer Ord. is to protect African.

Here I am owner; Resp. occupies without my consent:

Costs, action for possession.

No limitation on discretion.

Ask for costs here and below.

Less those in connection with rent claim.

J.R.

KHANNA: 244 of 1955 of Uganda.

O. Corrie.

No. 10

Judgments.

(a) The Honourable Vice President Sir Alastair Forbes.

25th January, 1961.

No. 10

J U D G M E N T S

(HEADING AS IN NO.9)

JUDGMENT OF FORBES, V-P.

This is an appeal from a judgment and decree of the High Court of Uganda whereby the appellant's suit for possession of certain land was dismissed with costs.

The Appellant is an African and the respondent is an Asian, and the suit concerned three plots of land, of the class of land known as "mailo", being plots Nos. H, S and T, part of land near Nakivubo, comprised in Mailo Register Volume 750, Folio 12, of which the appellant is the registered proprietor.

In his amended plaint the appellant, after pleading that he was the registered proprietor of the land in question, continued:

"3. By an Agreement made the 21st day of November, 1946, the plaintiff leased to the Defendant plot No. 'T' being part of the land

comprised in Mailo Register Volume 750 Folio 12 for one year from the 1st day of November, 1946 at a rent of Shillings three hundred (shs.300/-) such rent being payable in advance, such lease to be renewable from year to year.

4. By an Agreement made the 29th day of March, 1946 the Plaintiff leased to the Defendant Plot No. 'H' being part of the land comprised in Mailo Register Volume 750 Folio 12 for one year from the 1st day of March, 1946 at a rent of Shillings three hundred (shs.300/-) such rent being payable in advance, such lease to be renewable from year to year.

5. By an Agreement made the 1st day of October, 1947 the Plaintiff leased to the Defendant Plot No. 'S' being part of the land comprised in Mailo Register Volume 750 Folio 12 for one year from the 1st day of September 1947 at a rent of Shillings Two hundred and forty (shs.240/-) such rent being payable in advance.

6. On the termination of the tenancies above referred to the Defendant held over on each of them as a tenant from year to year at an increased rent of Shillings three hundred and fifty (shs.350/-) in respect of the said plot 'T' and Shillings three hundred and Shillings two hundred and forty (shs.300/- and shs.240/-) respectively in respect of plots 'S' and 'H' in accordance with clause 5 of each of the tenancy agreements above referred to.

7. The consents necessary to any of the above leases were not obtained.

8. On the 12th day of November, 1959 notice to quit the said plots 'S', 'T' and 'H' was given to the Defendant, such notice to be effective on the 1st day of January, 1960. Copies of such notices were annexed to the original Plaint herein and marked 'A'.

9. The Defendant has neither paid nor tendered any rent in respect of the said land subsequent to the 31st day of December, 1958 and remains illegally in occupation of the land."

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The Plaint included claims for rent, mesne profits and damages, which were subsequently abandoned by the reply to the written statement of defence.

By his written statement of defence the respondent pleaded, inter alia, that:-

> " the plaintiff was party to illegal agreements. The said agreements are referred to in paragraphs 3, 4 and 5 of the plaint. Therefore the plaintiff is not entitled to file any action on the said agreements".

The written statement of defence included a counterclaim for specific performance, but this also was withdrawn at a later stage. The learned trial judge, relying on Reid Hewitt & Co. V. Joseph (1918) A.C. 717, at the commencement of the case ordered that the appellant's claims for rent, mesne profits and damages be dismissed with costs, and subsequently ordered that the counterclaim be dismissed with costs. These orders are not challenged on the appeal.

It is convenient at this point to set out the relevant statutory provisions. These are contained in the Land Transfer Ordinance (Cap.114 of the 1951 Edition of the Laws of Uganda), and the Possession of Land Law (Cap.25 of the 1957 Revised Edition of the Native Laws of Buganda). Sections 2, 3 and 4 (i) of the Land Transfer Ordinance, omitting the provisos to section 2 which are not relevant to this case, read as follows:-

> "2. No non-African or any person acting as his agent shall without the consent in writing of the Governor occupy or enter into possession of any land of which an African is registered as proprietor (otherwise than by receiving rents and profits payable by non-Africans who have gone into occupation or possession with the consent of the Governor) or make any contract to purchase or to take on lease or accept a gift inter vivos or a bequest of any such land or of any interest therein other than a security for money: .....
> .....
>
> 3. The Governor may refuse the consent mentioned in section 2 of this Ordinance without assigning any reason or may specify terms upon which such consent is conditional.

4. (1) Any person who commits a breach of the provisions of this Ordinance or of any terms imposed by the Governor under section 3 shall be guilty of an offence and shall be liable on conviction to a fine not exceeding Shs.2,000/- or to imprisonment for a period not exceeding twelve months or to both such fine and imprisonment."

Paragraphs (d) and (k) of section 2 of the Possession of Land Law, omitting the proviso to sub-section (d) which again is not relevant, read as follows:-

"2. (d) The owner of a mailo shall not permit one who is not of the Protectorate to lease, occupy or use his mailo except with the approval in writing of the Governor and the Lukiko:

.....

(k) The owner of a mailo who contravenes any provision of paragraph (c) or (d) of this section shall be liable on conviction to a fine not exceeding Shs.500/- or to imprisonment not exceeding six months or to both such fine and imprisonment."

The statutory force of laws such as the Possession of Land Law made by the Kabaka and Lukiko of Buganda is recognised by the Buganda Native Laws (Declaratory) Ordinance (Cap.71 of the 1951 Edition of the Laws of Uganda), sections 3 and 4 of which read as follows:-

"3. For removing doubts it is hereby declared that as from the date and by virtue of the terms of the Uganda Agreement, 1900, and by virtue of the terms of the Buganda Agreement (Native Laws), 1910, and the Agreement set out in the Schedule to this Ordinance, the Kabaka of Buganda has had power to make laws binding upon all natives in Buganda, and the right of the Kabaka hereafter to exercise such power is hereby expressly confirmed for so long as the said Agreements shall continue to be of full force and effect but subject always to the terms of the said Agreements and to any amendments which may hereafter be made thereto.

4. All laws heretofore lawfully enacted by the Kabaka since the date of the execution of the said Uganda Agreement, 1900, are hereby declared to be, or, for the period of their validity, to have been, binding upon all natives in Buganda."

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It may be noted that such laws are expressed only to be "binding upon all natives in Buganda"; though, as was said by this Court in Shantilal Nathabhai Patel v. Registrar of Titles (1949) 16 E.A.C.A. 46 at p.49, "the effect of such a law may be .... indirectly to bind non-natives in their dealings with natives."

There was no dispute between the parties as to the facts, the agreed facts being stated in the High Court as follows:-

"Plaintiff an African, registered proprietor of Mailo land.

Defendant Indian.

Plot T. leased for one year on 1st November, 1946. Agreement 21.3.46 Shs.300/- p.a., payment in advance and yearly.

Plot H. leased for one year. November 1946. Agreement 29.3.46. Shs.300/- p.a., payable in advance and yearly.,

Plot S. leased for one year from 1st September, 1947. Shs.240/- p.a., payable in advance, and thereafter yearly.

After one year Plot T. rent increased to Shs.350/- p.a. Non-registered tenancy existed for Plots H. S. & T. Leases were void - Vol. III.

Consent of Governor and Lukiko never obtained although it was sought after the agreements. Lukiko refused 12.11.49. Notice to quit served on defendant on 13.11.59 for the 31st day of December, 1959 for each of the plots. Rent was paid to the Plaintiff up to and including 31.12.59 for each of the plots. The Defendant entered into occupation of the three plots in 1946 and 1947, and has remained in occupation contrary to Section 2 of the Land Transfer Ordinance."

It was also conceded that the respondent had been guilty of an offence under section 4 of the Land Transfer Ordinance, and that the appellant had been guilty of an offence under section 2(k) of the Possession of Land law.

The issues for trial by the High Court were agreed and were as follows:-

"1. Are the parties not in pari delicto being each in turn guilty of an offence in permitting and taking a lease?

2. If yes, can the Plaintiff recover possession on the strength of the illegality of the lease to which he was a party?

3. Has any possession or property been transferred by the illegal agreements?

4. Having pleaded illegality in order to support its claim and seeking to found his claim on the illegal contracts, can the Plaintiff recover possession or obtain an injunction to restrain the alleged trespass?"

The learned trial judge's conclusions on these issues were as follows:-

"On the issues as framed and agreed by Counsel I find that the parties in the instant case are in pari delicto. Both parties knew all their transactions were illegal, both of them knew that consent, the necessary consents, had been refused, yet the Plaintiff allowed the Defendant to occupy the plots in dispute for over thirteen years, and accepted rent for many years, and now seeks an order for eviction in circumstances where even if the so-called lease were valid no proper notice to quit has been given. The Plaintiff's claim has no merit; and I am surprised that the court was ever troubled with it. All the transactions were illegal, and certainly the Plaintiff does not come to this court with clean hands.

On the agreed facts as framed by Counsel, I find that the parties are in pari delicto.

I answer the second issue - can the plaintiff recover possession - in the negative, and I answer issues 3 and 4 in the negative.

On the whole case I hold that the parties were, and are, in pari delicto, and that the plaintiff's remaining claims cannot therefore be entertained."

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The appellant now appeals on the following grounds:

"(a) That the learned Judge erred in holding that the parties were in pari delicto in that he failed to take into account that

(i) The maximum fine and period of imprisonment permitted for a breach of the Land Transfer Ordinance are respectively four times and twice those permitted by the Possession of Land Law;

(ii) The object of the Land Transfer Ordinance and the Possession of Land Law was, and is, to protect African landowners against non-African tenants:

(b) That if (which is denied) the parties were in pari delicto, the learned Judge erred in holding that the doctrine in Browning v.Morris 98 E.R. 1364 did not apply.

(c) That the learned Judge erred in not holding that the plaintiff was entitled to possession as against the Defendant as (i) the latter had no estate or interest in the land concerned of which the Plaintiff was the Registered Proprietor, and (ii) the Plaintiff had withdrawn his consent to the occupation by the Defendant of the land concerned with effect from the 1st day of January, 1959;

(d) That the learned judge erred in holding that the Plaintiff was suing on an illegal contract."

As regards ground (a), I do not think that the mere fact that a different penalty is incurred by the different parties to an illegal transaction is itself a reason for saying that the parties are not in pari delicto. In general, the fact that a statute imposes penalties on both parties to a transaction, albeit penalties of different severity, would seem to me to be a strong indication that the legislature intended the respective penalties to be the only consequence of a breach of the statute, that each party should be regarded as being as much a party to the breach of the statute as the other, and that no right to a civil action should arise. In Pasmore v. Oswaldtwistle Urban Council (1898)

A.C. 387 at p.394, the Earl of Halsbury L.C. said:

> "The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle in the case of Doe v. Bridges (1831) 1 B. & Ad. 847, 859. He says: 'where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.'"

And in Cutler v. Wandsworth Stadium Ltd. (1949) A.C.398 at p.411, Lord Du Parcq, after referring to the Oswaldtwistle case, and the "general rule" stated by Lord Tenterden in Doe v. Bridges, said:

> "I do not agree with Mr. Pritt's submission that it is heretical to regard criminal proceedings which may be followed by fine and imprisonment as a 'specified manner' of enforcing a duty. I think that it is both orthodox and right so to regard them."

In Cutler's case, the statutory penalty was incurred by one party only. In a case where both parties incur penalties it seems to me that the presumption in favour of the "general rule" must necessarily be very strong. Nevertheless, I do not think that it is conclusive. In the Oswaldtwistle case at p.397 Lord Macnaghton, referring to the passage cited above from the judgment of the Earl of Halsbury, said:

> "The law is stated nowhere more clearly or, I think, more accurately, than by Lord Tenterden in the passage cited by my noble and learned friend on the woolsack. Whether the general rule is to prevail, or an exception to the general rule is to be admitted, must depend on the scope and language of the Act which creates the obligation and on considerations of policy and convenience."

In Cutler's case, at p.413, Lord Normand said:

> "If there is no penalty and no other special

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means of enforcement provided by the statute, it may be presumed that those who have an interest to enforce one of the statutory duties have an individual right of action. Otherwise the duty might never be performed. But if there is a penalty clause the right to a civil action must be established by a consideration of the scope and purpose of the statute as a whole."

The principle thus stated was applied by this court in Kiriri Cotton Co. Ltd., v. Ranchhoddas K. Dewani (1958) E.A. 239, and that decision was subsequently approved by their Lordships of the Privy Council - see (1960) E.A.188. The instant case does, in fact, present some special features.

In the first place, the position is unusual in that the relevant legislation is contained, not in one enactment, but in two enactments enacted by different legislative bodies. The Protectorate legislature had enacted the Land Transfer Ordinance which, on the face of it, is clearly for the protection of a class of persons, that is to say, Africans. This Court has, in fact, already held the Ordinance to be for protection of Africans - see Motibhai Manji v. Khursid Begum (1957) E.A. 101. The Ordinance applies throughout the territory and could, had the Protectorate legislature so intended, have been framed so as to impose a penalty on Africans who permitted the occupation of land by non-Africans. As was remarked in the case just cited, the wording of the Ordinance is very wide. I think it is clearly to be gathered from the scope and language of the Ordinance that the legislature regarded it as an important matter of policy that non-Africans should not be allowed, without the necessary consents, to occupy African owned land, and so framed the Ordinance as to prevent informal as well as formal transactions.

In addition to this legislation, which is clearly intended for the benefit of Africans as a class, the legislature of Buganda has enacted the Possession of Land Law which, within Buganda, imposes a penalty on the African owner of land who permits "one who is not of the Protectorate" to occupy his land. I have no doubt that, if the Land Transfer Ordinance stood alone, it must be held that an African permitting a non-African to occupy his land was not in pari delicto with the non-African,

and that he could properly invoke the aid of the courts to recover his land. To hold otherwise would be to defeat the very purpose for which the legislation was enacted. Does the enactment of the Possession of Land Law alter the position in Buganda? I think not. In my view the enactment of the Possession of Land Law merely stresses the importance with which the matter is regarded, not only by the Protectorate legislature, but by the Buganda legislature, as a matter of public policy. The Possession of Land Law is certainly not a law enacted for the protection of persons "not of the Protectorate". The intention of the Law is clearly to preserve mailo land from unauthorised occupation by non-natives of the Protectorate: that is to say, the object is the same as the object of the Land Transfer Ordinance, though here, of necessity, enforced by penalty on the African owner of the land, non-natives being outside the jurisdiction of the Buganda legislature. Reading the two enactments as a whole, and bearing in mind the limitations governing the scope of Buganda Laws, it does not appear to me that the enactment of the Possession of Land Law should be construed as derogating from the African landowner's position as a member of a protected class, a position which he undoubtedly enjoys under the Land Transfer Ordinance. Notwithstanding the enactment of the Possession of Land Law with its penalty upon the African landowner in default, I think the object of the legislation as a whole is clearly to protect Africans and to preserve African land for use by Africans, and that, in so far as the recovery of land which is unlawfully occupied is concerned, the African landowner is to be regarded as a member of a protected class, and so, as not being in pari delicto with the non-African occupier. The position is unusual, but it seems clear that it would be contrary to public policy for the courts to refuse to assist an African to eject a non-African in illegal occupation of the former's land, even though the African may have committed an illegal act in permitting the non-African to enter on the land.

The principle applicable is that expressed by Lord Mansfield in Browning v. Morris, 2 Cowp.790; 98 E.R. 1364:

> "where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the

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one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not in pari delicto; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract."

It is true that in the instant case the plaintiff can hardly claim that he himself has been either oppressed or imposed upon. But, as I have already said, the legislation is clearly intended to protect Africans as a whole from being imposed upon by non-Africans, and I think therefore the principle applies. Further, this is a suit for the recovery, not of money, as was the case in Browning v. Morris, but of possession of land as to which the legislature has made it abundantly clear that public policy requires that the non-African respondent should not be in occupation of the land. This means that the existence of a right of action to recover possession is not merely not contrary to public policy, but is positively required by public policy. In the circumstances, can it be doubted that the action lies?

I derive some support for the view I have taken from subsection (1) of S.32 of the Limitation Ordinance 1958 (No.46 of 1958), to which Mr. Troughton, who appeared for the appellant, drew attention. The relevant part of that sub-section reads as follows:-

"32(1) Nothing in this Ordinance shall -

.....

(g) prejudice the operation of the Land Transfer Ordinance, or apply to an action to recover possession of land if the defendant has entered into or is in possession or occupation of the land in contravention of or without having complied with the provisions of the Land Transfer Ordinance".

If I should be wrong as to the foregoing conclusion, I still think the appellant is entitled to succeed on the basis of the principle that an owner is entitled to recover his own property so long as his claim is not founded on an illegal contract. In Bowmakers Ltd. v. Barnet Instruments

Ltd. (1944) 2 All E.R. 579, Du Parcq L.J., delivering the judgment of the Court of Appeal in England, said:

> "Prima facie, a man is entitled to his own property, and it is not a general principle of our law (as was suggested) that when one man's goods have got into another's possession in consequence of some unlawful dealings between them, the true owner can never be allowed to recover those goods by an action. The necessity of such a principle to the interest and advancement of public policy is certainly not obvious. The suggestion that it exists is not, in our opinion, supported by authority. It would indeed be astonishing if (to take one instance) a person in the position of the defendant in Pearce v. Brooks (1866) L.R.1 Exch. 213, supposing that she had converted the Plaintiff's brougham to her own use, were to be permitted, in the supposed interests of public policy, to keep it or the proceeds of its sale for her own benefit. The principle which is in truth followed by the Court is that stated by Lord Mansfield, that no claim founded on an illegal contract will be enforced, and for this purpose the words 'illegal contract' must now be understood in the wide sense which we have already indicated, and no technical meaning must be ascribed to the words 'founded on an illegal contract'"

In Sajan Singh v. Sardara Ali (1960) 1 All E.R. 269 the Privy Council applied this principle where recovery of a lorry was sought, though the property in the lorry had been acquired as the result of an illegal contract.

Mr. Khanna, for the respondent, referred to the Gas Light and Coke Company v. Samuel Turner, 6 Bing. (N.C.) 324; 133 E.R.127; Alexander v. Rayson (1936) 1 K.B. 169; and Charan Kaur and anor. v. Mistry Makanji Vanmali (1956) 23 E.A.C.A.14, but I do not think those cases assist him. Charan Kaur's case merely reaffirmed the principle that a suitor cannot found his case upon an illegal contract. The case originated in an application by the head tenant of a plot in Nairobi to the Kenya Central Rent Control Board for an ejectment order against his subtenants under certain sections of the Kenya Rent Restriction Ordinance, 1949, and for payment to him

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of rent in arrears. The premises in question had been unlawfully erected and occupied, and the Rent Control Board dismissed the application saying they would not lend themselves to any attempt to recover rent on such premises. This court supported the decision of the Rent Control Board, saying, inter alia:

> "..... not only must the Board be satisfied that the premises are premises within the scope of the Ordinance but also they must be satisfied that the premises have been let under a lawful contract of tenancy which has been determined.
>
> The difficulty in the respondent's case was that he could not establish his claim either to possession or to the rent in arrears without proving a contract which, as we have said, was unlawful ab initio."

It will be noted that the ratio decidendi was that the applicant/respondent in the appeal had to rely upon a contract which was unlawful. The relevance of the Gas Light and Coke Company case is a passage in the judgment of Tindal, C.J., not in the report cited above, but in the report of the hearing of the case in the first instance in the Court of Common Pleas, 5 Bing. (N.C.) 666; 132 E.R. 1257, which is quoted in the passage set out below from the judgment of the court of Appeal in England in Alexander v. Rayson (supra). The facts of the case in Alexander v. Rayson are not material, but the passage in question of which Mr. Khanna relies, which is at p.186 of the report, reads as follows:

> "In view of these various authorities it seems plain that, if the plaintiff had let the flat to the defendant to be used by her for an illegal purpose, he could not have successfully sued her for the rent, but the leasehold interest in the flat purporting to be granted by the lease would nevertheless have been legally vested in her. The result would have been that the defendant would be entitled to remain in possession of the flat without payment of rent until and unless the plaintiff could eject her without having to rely upon the lease or agreement. This curious aspect of the matter was alluded to by Tindal C.J. in Gas Light & Coke Co. v. Turner. 'It was observed', he said, 'in the course of argument

for the plaintiffs, that, as they had granted a lease for twenty-one years, such term was vested in the defendant, and that he would be able to hold himself in for the remainder of it without payment of any rent. That point is not now before us; but, without giving any opinion how far the position is maintainable it is obvious that, if an ejectment should be brought upon the breach of any condition of the lease, the action of the ejectment would, at all events, be free from the objection that the court was lending its aid to enforce a contract in violation of law.' In the present case the defendant does not, as a matter of fact, desire to remain in possession of the flat. She is, and has for some time been, anxious to leave it. But, if the plaintiff has by his conduct placed himself in the same position in law as though he had let the flat with the intention of its being used for an illegal purpose, he has no one but himself to thank for any loss that he may suffer in consequence."

Mr. Khanna argued, on the basis of this passage, that in the instant case the respondent had a year to year tenancy; that no proper notice to quit had been given; and that therefore the appellant was driven to rely on the illegality of the tenancy. I do not think, however, that that is the position. As I understand the passage cited from Alexander v. Rayson, the situation envisaged is a special application of the principle affirmed in Sajan Singh v. Sardara Ali (supra) that, where the property in something has passed, even though in pursuance of an illegal contract, the courts will uphold the title of the person actually having the property in such thing; the "property" in Alexander v. Rayson being the leasehold interest in the premises, which had passed to the tenant. In the instant case, however, in view of the relevant legislation, there could be no leasehold interest vested in the respondent, who never acquired any form of property in the suit premises. In these circumstances, I think the appellant is entitled to rely upon his registered ownership of the premises and recover them from the respondent as from a trespasser.

It is true that in his pleadings the appellant sets out the illegal agreement and in fact sought at first to base his claim for ejectment and claims

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for rent and mesne profits on the agreement. Such a claim, based on the illegal agreement, could not of course, be supported, and the claims for rent and mesne profits were in fact abandoned when the reply to the written statement of defence was filed. However, it was said in Bowmakers Ltd. v. Barnet Instruments Ltd. (supra) at p.582:

> ".....the form of the pleadings is by no means conclusive. More mosern illustrations of the principle on which the courts act are Scott v. Brown, Doering, McNab & Co. (1892) 2 Q.B. 724 and Alexander v. Rayson. But, as Lindley, L.J. said, at p.729, in the former of the cases just cited:
>
> > 'Any rights which he' (plaintiff) 'may have irrespective of his illegal contract will, of course, be recognised and enforced.
>
> In our opinion a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract, or to plead its illegality in order to support his claim."

In the instant case the appellant has pleaded that he is the registered proprietor of the land in question. The respondent can only seek to set up, in defence, a lease which is prohibited by express legislation, that is, a non-existent lease. I do not think the courts can recognise such a purported lease as passing any property in the land to the respondent, and consequently the whole property in the land remains vested in the appellant who need do no more than rely on his registered title. The respondent, indeed, is seeking to set up a right of occupation which is illegal by statute.

For the reasons I have given I think the appeal should be allowed with costs, that the judgment and decree of the High Court should be set aside in so far as it relates to the appellant's claim for

possession, and that a decree for possession of the land and eviction of the respondent therefrom be substituted. As regards costs in the High Court, I think the appellant should have the costs of the suit in so far as his claim for possession of the land and eviction of the respondent is concerned. As I have already mentioned, there was no appeal against the dismissal with costs of the appellant's claim for rent, mesne profits and damages, so that order should stand.

Dated at Kampala this 25th day of January 1961.

A. G. FORBES
VICE-PRESIDENT.

(a) The Honourable Vice President Sir Alastair Forbes.

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(b) JUDGMENT OF CRAWSHAW J.A.

(b) The Honourable Justice of Appeal II Mr. Justice Crawshaw.

I agree with the application by the Hon. Vice-President of the principles expressed both in the case of Browning v. Morris and in the case of Bowmakers Ltd. v. Barnet Instruments Ltd., and that in the circumstances of the present case the appellant was entitled to recovery of his land. As I understand Mr. Khanna, he argues that the respondent is entitled to rely on the terms of the lease but not the appellant and, the lease being from year to year, there is no definite date of termination and it is impossible for the appellant ever to recover the land. It seems to me that this would create a most astonishing situation, and not one which is supported by the authorities. I agree that the appeal should be allowed on the terms stated by the Hon. Vice-President.

E.D.W. CRAWSHAW.
JUSTICE OF APPEAL.

(c) JUDGMENT OF CORRIE AG. J.A.

(c) The Honourable A.G. Justice of Appeal Sir Owen Corrie.

By this amended plaint, the appellant, an African who is the registered proprietor of Mailo land in Buganda claimed against the respondent, an Asian, (a) the possession of the said land and eviction of the respondent therefrom; (b) mesne profits from the 1st January, 1959 at the rate of Shs.890/- per annum until possession is granted;

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(c) an injunction perpetually restraining the respondent from trespassing on the said land with costs and damages.

The respondent counter-claimed seeking specific performance of certain agreements between the parties or in the alternative damages for non-performance.

It was common ground that by agreements dated respectively the 29th March, 1946, the 21st November, 1946 and the 1st October, 1947, the appellant agreed to lease to the respondent three plots of land referred to in the pleadings as plots H, T and S. These agreements required for their validity the consent of the Governor and of the Lukiko. Application was made to the latter for consent which was refused. The parties nevertheless appear to have treated the agreements as though they were valid. The respondent remained in possession of the three plots and paid the appellant what is described as "rent" until the 31st December, 1958. On the 12th November, 1959 the appellant gave the respondent notice to quit the plots, to be effective on the 1st January, 1960.

In his reply to the respondent's defence the appellant abandoned his claim for rent, mesne profits and damages, and during the hearing in the High Court the respondent withdrew his counter-claim. The appellant's claim thus became simply a claim by a registered owner for recovery of possession from an occupier whose only title to possession rested upon the appellant's permission, which had been terminated by the notice to quit. In Bowmakers Ltd. v. Barnet Instruments Ltd. (1944) 2 All E.R. 579, du Parcq L.J. delivering the judgment of the Court, said (at pages 582-3):-

> "In our opinion a man's right to possess his own chattels will as a general rule be enforced against anyone who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came in to the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the Plaintiff does not seek, and is not forced, either to found his claim on the illegal contract, or to plead its illegality to support his claim."

I know of no reason why a different rule should apply to possession of land.

It follows, in my view, that the appellant is bound to succeed notwithstanding that the respondent's possession was founded upon illegal transactions between the parties; and whether, in relation to those illegal transactions, the parties were or were not in pari delicto. Accordingly, I do not find it necessary to express any view upon this aspect of the case. Rejection of the appellant's claim would have the result that the respondent, a non-African, would be entitled to remain permanently in possession of African land, to the exclusion of the registered African owner, without payment of any nature whatsoever.

I agree that the appeal should be allowed; that the judgment and decree of the High Court should be set aside in so far as it relates to the appellant's claim for possession; and that a decree be substituted for possession of plots H, T and S and for eviction of the respondent therefrom.

I see no reason to grant an injunction against the respondent and the appellant's claim in that respect should be dismissed.

The Appellant should have the costs of this appeal and his costs in the High Court in respect of his claim for possession and for eviction of the respondent.

Dated at Kampala this 25th day of January 1961.

O.C.K. CORRIE

AG. JUSTICE OF APPEAL.

DELIVERED by the Dy. Registrar, E.A.C.A., Kampala.

In Her Majesty's Court of Appeal for Eastern Africa

No. 11

Formal Order.

25th January, 1961.

No. 11

FORMAL ORDER

(HEADING AS IN NO. 9)

IN COURT before the Honourable Sir Alastair Forbes, Vice-President; the Honourable Mr. Justice Crawshaw, Justice of Appeal: and the Honourable Mr. Justice Corrie, Acting Justice of Appeal.

This appeal coming up for hearing on the 13th day of December, 1960 in the presence of Mr. J.F.G. Troughton, Counsel for the Appellant and Mr. D.M. Khanna and Mr. S.H. Dalal, Counsel for the Respondent when the Appeal was stood over for judgment and this appeal standing for judgment this day

IT IS ORDERED that the Appeal be allowed and that the Respondent do pay to the Appellant his taxed costs of this appeal

IT IS FURTHER ORDERED that the decree of Her Majesty's High Court of Uganda in Civil Case No.74 of 1960 dated the third day of August One thousand nine hundred and sixty be set aside in so far as it relates to the Plaintiff's claim for possession and that a decree should be substituted providing (a) that the Defendant do grant to the Plaintiff possession of the lands referred to in paragraphs 3, 4 and 5 of the amended Plaint and that the Defendant should be evicted therefrom; (b) that the Defendant should pay to the Plaintiff the costs of the suit in so far as his claim for possession of the land and eviction of the Defendant therefrom is concerned; and (c) that any costs in the High Court which may have been paid by the Plaintiff in respect of the said claim for possession of the land and eviction of the Defendant should be refunded.

DATED this 25th day of January One thousand nine hundred and sixty-one.

(Sgd.) R.W. CANNON

DEPUTY REGISTRAR.
EAST AFRICAN COURT OF APPEAL.

We approve
S.H. Dalal
for M/s. Haque, Dalal & Singh.

No. 12

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

In Her Majesty's Court of Appeal for Eastern Africa

No. 12

Order granting Final Leave to Appeal to Her Majesty in Council.

5th July, 1961.

(HEADING AS IN NO.9)

Application for final leave to appeal to Her Majesty in Council from judgment and order of Her Majesty's Court of Appeal for Eastern Africa at Kampala delivered on 25th January, 1961, in Civil Appeal No.74 of 1960).

UPON APPLICATION made to this court by Counsel for the above-named Applicant on the 14th day of June, 1961 for final leave to appeal to Her Majesty in Council after conditional leave to appeal having been granted on the 2nd day of March, 1961 as a matter of right under subsection (a) of section 3 of the East African (Appeal to Privy Council) Order in Council 1951 AND UPON HEARING Counsel for the Applicant and Counsel for the Respondent AND UPON being satisfied that all conditions subject to which conditional leave to appeal AND ALSO UPON being satisfied that Notice for final leave to appeal has been given to the Respondent as required under section 12(1) of the said order in council THIS COURT DOTH ORDER that the applicant do have final leave to enter and prosecute his appeal to Her Majesty in Council from the judgment and order above-mentioned AND it is further ordered that the costs of and incidental to this application be costs in the intended appeal.

DATED at Kampala this 5th day of July, One thousand nine hundred and sixty one.

Dy. REGISTRAR
H.M. COURT OF APPEAL FOR EASTERN AFRICA.

IN THE PRIVY COUNCIL No. 33 of 1961

ON APPEAL
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N

MISTRY AMAR SINGH (Defendant) Appellant

- and -

SERWANO WOFUNIRA KULUBYA
(Plaintiff) Respondent

R E C O R D O F P R O C E E D I N G S

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