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1960
Nov. 4, 7, 8;
Dec. 15.

Sellers,
Pearce and
Devlin L.JJ.

ARCHBOLDS (FREIGHTAGE) LTD. *v.* S. SPANGLETT LTD.

RANDALL (THIRD PARTY).

[1957 A. No. 1131.]

Contract — Illegality — Contract prohibited by statute — Illegality in performance—Contract not ex facie illegal—Illegality known only to defendants—Whether plaintiffs entitled to recover for breach—Road and Rail Traffic Act, 1933 (23 & 24 *Geo.* 5, *c.* 53), *ss.* 1, 2.

Road Traffic—Licence—Carriage of goods for reward—Vehicles with "A" licence required—Contract performed by vehicles with "C" licence—Defect only known to one party—Effect on claim under contract—Road and Rail Traffic Act, 1933 (23 & 24 *Geo.* 5, *c.* 53), *ss.* 1, 2.

The defendants were furniture manufacturers in London and owned a number of vans with "C" licences under the Road and Rail Traffic Act, 1933,[1] which enabled them to carry their own goods, but did not allow them to carry for reward the goods of others. The plaintiffs were carriers with offices in London and Leeds, and their vehicles had "A" licences under the Act, which enabled them to carry the goods of others for reward. The plaintiffs' London office, as a result of a telephone conversation with some unidentified person from the defendants' office, believed that the defendants' vehicle had "A" licences, and employed the defendants to carry a part of a load for them on the defendants' van which was taking some of their (the defendants') furniture from London to Leeds.

The defendants' driver, having delivered those goods, spoke on the telephone to the traffic manager of the plaintiffs' office at Leeds to see if he could obtain a load for his empty van from Leeds to London, and said that he had just carried goods from the plaintiffs'

[1] Road and Rail Traffic Act, 1933, s. 1: "(1) . . . no person shall use "a goods vehicle on a road for the "carriage of goods . . . except under "a licence. . . ."

S. 2: "(1) Licences shall be of "the following classes:—(*a*) public "carriers' licences . . . (*c*) private "carriers' licences. (2) A public "carrier's licence (in this Part of "this Act referred to as 'an A "'licence') shall entitle the holder "thereof to use the authorised "vehicles for the carriage of goods "for hire or reward . . . (4) A "private carrier's licence (in this "Part of this Act referred to as 'a "'C licence') shall entitle the holder "thereof to use the authorised "vehicles for the carriage of goods "for or in connection with any trade "or business carried on by him, "subject to the condition that no "vehicle which is for the time being "an authorised vehicle shall be used "for the carriage of goods for hire "or reward."

S. 9: "(1) . . . any person who "fails to comply with any condition "of a licence held by him, shall be "guilty of an offence under this Part "of this Act."

London office to Leeds. The traffic manager replied that he had a load, which was in fact 200 cases of whisky, but he made no inquiries from the driver as to whether he had an "A" licence. The defendants' van was duly loaded with the whisky, which was stolen on the way to the London docks owing to the driver's negligence.

On a claim by the plaintiffs for damages for the loss of the whisky, the defendants pleaded the illegality of the contract, in that their van did not have an "A" licence as required by the Act of 1933:—

Held, (1) that there was no justification for any finding that the plaintiffs knew or should have known that the defendants' van had only a "C" licence (post, p. 383).

(2) That the plaintiffs could not assert a right of action without relying on the contract (post, p. 384).

(3) That the contract was not expressly forbidden by statute (post, pp. 385, 388, 389).

In re Mahmoud and Ispahani [1921] 1 K.B. 716; 37 T.L.R. 489 and *J. Dennis & Co. Ltd.* v. *Munn* [1949] 2 K.B. 327; 65 T.L.R. 251; [1949] 1 All E.R. 616, C.A. distinguished.

(4) That the contract was not prohibited by implication under the Act, since loading the van by the plaintiffs did not constitute a "use" of the vehicle within the meaning of section 1 of the Road and Rail Traffic Act, 1933, nor were they aiding or abetting the defendants' illegal act, since they were unaware of the true facts (post, pp. 385, 388, 390).

St. John Shipping Corporation v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267; [1957] 3 W.L.R. 870; [1956] 3 All E.R. 683 applied.

(5) That the contract was not ex facie illegal, and public policy did not constrain the court to refuse aid to the plaintiffs, who did not know that the contract would be performed illegally (post, p. 388).

Dictum of Lord Wright in *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.* [1939] A.C. 277, 293; 55 T.L.R. 402; [1939] 1 All E.R. 513, P.C. applied.

Per Devlin L.J. The fact that it may be known to one of the parties at the time of making the contract that he cannot perform it legally, and therefore that it will inevitably be broken, does not make the contract itself illegal (post, p. 392).

Decision of Slade J. affirmed.

APPEAL from Slade J.

The following statement of facts is taken from the judgment of Pearce L.J. Judgment was given for the plaintiffs, Archbolds (Freightage) Ltd., on December 3, 1959, for £3,674 18s. 3d. damages in respect of the loss of a consignment of whisky which was stolen from the defendants, S. Spanglett Ltd., owing to their negligence, while they were transporting it as carriers for the plaintiffs from Leeds to the London docks. Various matters raised in the defence were decided in the plaintiffs' favour, and

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the issue on this appeal was whether the judge should have held that the plaintiffs could not recover damages because the contract of carriage was illegal.

The following facts were material to this issue: the defendants were furniture manufacturers in London and owned five vans for use in their business. Those vans had "C" licences under the Road and Rail Traffic Act, 1933, which enabled them to carry the defendants' own goods but did not allow them to carry for reward the goods of others. The plaintiffs were carriers with offices at London and Leeds and also had a clearing house to assist with sub-contracting contracts of carriage. Their vehicles had "A" licences which enabled them to carry the goods of others for reward. When some other carrier was returning home with an empty van having made a delivery, he might ask the plaintiffs if they had a load available for him; and if they had one available, it was an economy for them to sub-contract that load to him instead of sending their own van with the risk of its having to return empty.

At the time of the Suez crisis there was a shortage of petrol and the Minister enlarged the scope of "C" licences to permit licensees to carry the goods of others which would normally be carried under [other persons' own] "C" licences. This limited extension was presumably designed to leave the trade of "A" licence-holders unaffected. Although it was not strictly proved, it was assumed that the whisky in question was not whisky that would normally be carried under a "C" licence. Therefore it could not legally be carried for reward on any of the defendants' vans.

The plaintiffs' London office, as a result of a telephone conversation on March 25, 1956, with some unidentified person who spoke from the defendants' office, believed that the defendants' vehicles had "A" licences and were entitled to carry general goods. They therefore employed the defendants to carry for them a part load of goods on the defendants' van which was taking some of the defendants' own furniture from London to the Leeds area.

On March 27, 1956, Randall, the defendants' driver, having delivered those goods, spoke on the telephone to one Field, the traffic manager at the plaintiffs' office in Leeds, in order to see if he could obtain a load for his empty van back from Leeds to London. Randall said who he was, that he was from the defendants and that he had just carried goods from the plaintiffs' London office to Leeds and "if possible would like a return

"load." He then said: "Have you anything for a covered "van?" Field replied that he had 3¾ tons. He left the telephone to make certain that the load was suitable for a covered van, returned to the telephone and told Randall to come to the plaintiffs' Leeds office. Field made no inquiry about Randall's licence because, to use his own words, "I knew he had been "loaded by our London office." Randall came to the office, the van was loaded with 3¾ tons, which was in fact 200 cases of whisky, and set off for the London docks. The whisky was stolen owing to Randall's negligence.

Slade J. held that the plaintiffs did not know that the contract was to be carried out in an illegal manner and that their claim for damages succeeded.

The defendants appealed.

David Karmel Q.C. and *Montague Waters* for the defendants. The short point of law is whether the transaction, in respect of which this contract was made, was prohibited by statute and thus illegal. Illegality of the contract is the only point. This contract was made in respect of one particular van—namely, Randall's covered van, which had only a "C" licence—and no other, and it was accordingly a contract for carriage for reward which was absolutely prohibited by statute: Road and Rail Traffic Act, 1933, ss. 1 and 2. The judge was wrong in holding that the contract was a general one which could be performed in any way the defendants chose.

Since this was a contract forbidden by statute, it was unenforceable by the plaintiffs: *In re an Arbitration between Mahmoud and Ispahani.*[2] It necessarily involved the commission of an illegality, as it could only be carried out in Randall's van, and was therefore void: *Nash* v. *Stevenson Transport Ltd.*[3] and *J. Dennis & Co. Ltd.* v. *Munn.*[4]

On the evidence it is clear that the plaintiffs could have easily discovered that this van was a furniture van, possessing only a "C" licence, and it was their negligence in failing to make any sort of inquiry which led to the mistake. But even assuming (as the judge held) that they were not negligent by that omission, they cannot recover because the contract could only be carried

[2] [1921] 1 K.B. 716; 37 T.L.R. 489.
[3] [1936] 2 K.B. 128; 52 T.L.R. 331.
[4] [1949] 2 K.B. 327; 65 T.L.R. 251; [1949] 1 All E.R. 616, C.A.

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out by this particular vehicle, it could not be performed in a legal manner and was therefore void.

Alternatively, if this was not a contract to carry in this particular vehicle, then it was a contract which Randall had no authority to make on behalf of the defendants.

Waters following. The judge was wrong in saying that this contract could have been carried out lawfully. It is implicit in the judgment that the moment when the contract was completed was when the documents were handed to the driver after the goods had been loaded, and it was, therefore, a contract which had to be performed in this vehicle: *Davies* v. *Collins* [5] and *Edwards* v. *Newland & Co. (E. Burchett Ltd., Third Party)*.[6] The contract involved not only the carriage but the safe custody of the goods.

J. C. Leonard and *H. K. Woolf* for the plaintiffs. If an ordinary road haulage contract has to be performed by a particular vehicle, then the plaintiffs would lose this case. This was a type of contract which could be vicariously performed: *Davies* v. *Collins* [7]; *Edwards* v. *Newland*.[8] The contract of carriage in itself was not illegal; it was only the defendants' method of performance of it which was illegal, but that should not prevent the plaintiffs, who were unaware of the illegality, from recovering: *St. John Shipping Corporation* v. *Joseph Rank Ltd.*[9] If the defendants did not have a valid licence in force for this vehicle, then the only offence which the plaintiffs could have committed would have been aiding and abetting.

[SELLERS L.J. If I know your vehicle has only a "C" licence and cannot lawfully take my goods, am I not "using" your vehicle?]

No, only aiding and abetting.

In *Davies, Turner & Co. Ltd.* v. *Brodie* [10] the contract itself was not illegal, and the plaintiffs, who had acted in good faith and taken reasonable precautions, were held not to have aided and abetted the illegal performance. That case, which distinguished *Carter* v. *Mace* [11] as being a decision on its own facts, is applicable here. Even on the basis that the contract was itself illegal, the plaintiffs were completely innocent unless they had

[5] (1945) 61 T.L.R. 218; [1945] 1 All E.R. 247, C.A.
[6] [1950] 2 K.B. 534; 66 T.L.R. (Pt. 2) 321; [1950] 1 All E.R. 1072, C.A.
[7] 61 T.L.R. 218.
[8] [1950] 2 K.B. 534.
[9] [1957] 1 Q.B. 267; [1956] 3 W.L.R. 870; [1956] 3 All E.R. 683.
[10] [1954] 1 W.L.R. 1364; [1954] 3 All E.R. 283, D.C.
[11] [1949] 2 All E.R. 714, D.C.

such knowledge of the true facts that they could be said to be aiding and abetting.

[SELLERS L.J. The plaintiffs could have looked up the defendants to see whether they were "A" or "C" carriers.]

The judge held that the plaintiffs were subject to the most wilful deception. That is a most important aspect of this matter. The effect of taking a load from London to Leeds had the effect of putting the defendants amongst the plaintiffs' accepted customers.

It is contended: (1) The plaintiffs were innocent of any complicity in the infringement of any part of the law by the defendants. (2) The statute should not be construed as prohibiting contracts in any way but only as prohibiting the user of unlicensed vehicles contrary to the terms of the statute. (3) That being so, this case is entirely different from cases like building contracts. (4) This was a plain contract of carriage and not a contract which had to be performed in one vehicle, and therefore the judge was right in holding that the only illegality arose in the mode of its performance. The first three contentions are all based on his judgment.

Alternatively, if the court finds that the contract is illegal, nevertheless the plaintiffs are entitled to succeed on the ground of negligence. Even if they cannot rely on the contract they can plead that the defendants came into possession of the goods under a void contract, that the plaintiffs were entitled to recover their goods but that before they were able to do so they were lost by the defendants' negligence. The plaintiffs, therefore, are entitled to damages for breach of the defendants' duty to take care, such duty not being lower than that of voluntary bailees. Although the defendants were in possession of these goods with the plaintiffs' consent, there was no bargain between them which excused the defendants from their liability to exercise that reasonable care which a gratuitous bailee owed towards somebody else's goods which were in his possession. It is immaterial that the possession was under an illegal contract, and although the court will not enforce that contract it does not forbid the plaintiffs from referring to it. The defendants are therefore liable in negligence or conversion for breach of their duty to take reasonable care: *The Winkfield* [12]; *Bowmakers Ltd.* v. *Barnet Instruments Ltd.* [13];

[12] [1902] P. 42; 18 T.L.R. 178, C.A.

[13] [1945] K.B. 65; 61 T.L.R. 62; [1944] 2 All E.R. 579.

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Singh v. *Ali*.[14] [*Kiriri Cotton Co. Ltd.* v. *Dewani*[15] and *Strongman* v. *Sincock*[16] were also referred to.]

Karmel Q.C. in reply. In *St. John Shipping Corporation* v. *Joseph Rank Ltd.*[17] the facts were entirely different from this case. This was illegal not because the contract as such was illegal but because the whole transaction here was illegal. The position was considered in *Vinall* v. *Howard*.[18] One of the fallacies in the plaintiffs' argument was that the contract was not prohibited by statute; that is not denied; but that is not to say that this whole operation was not illegal: see Halsbury's Laws of England, 3rd ed., vol. 8, p. 140; *Waugh* v. *Morris*.[19]

This contract could only be carried out unlawfully and its performance was expressly forbidden by statute; the observations of Lord Roche in *Nash* v. *Stevenson*[20] are relied on. Whether or not both parties knew of it, the act to be performed was illegal. It was said that if the defendants refused to carry this load and were sued for damages for breach of contract, they could not plead the illegality of the contract, but on the authority of *Commercial Air Hire Ltd.* v. *Wrightways Ltd.*[21] the court could itself have taken the point.

On the evidence the judge should have come to the conclusion that the plaintiffs ought to be deemed to have knowledge that the defendants' van was a furniture van possessing only a "C" licence. It is wholly unrealistic that the plaintiffs should be considered innocent in the circumstances; they could not be said to be acting with any sort of diligence in not making any inquiry. What happened in London was irrelevant.

This case is based fairly and squarely on the contract, although it was also said by the plaintiffs that the defendants were guilty of negligence or conversion. For an elementary definition of the duty to take care, see Halsbury, vol. 28, p. 7. That argument is not maintainable; the duty in this case arose purely and simply from the parties' relationship under the contract.

Cur. adv. vult.

[14] [1960] A.C. 167; [1960] 2 W.L.R. 180, P.C.
[15] [1960] A.C. 192; [1960] 2 W.L.R. 127; [1960] 1 All E.R. 177, P.C.
[16] [1955] 2 Q.B. 525; [1955] 3 W.L.R. 360; [1955] 3 All E.R. 90, C.A.
[17] [1957] 1 Q.B. 267.
[18] [1954] 1 Q.B. 375; [1954] 2 W.L.R. 314; [1954] 1 All E.R. 458, C.A.
[19] (1873) L.R. 8 Q.B. 202, 208.
[20] [1936] 2 K.B. 128.
[21] [1938] 1 All E.R. 89.

December 15, 1960. SELLERS L.J. When the argument on this appeal was concluded I was inclined to view the facts differently from those accepted by Slade J., who tried the case.

[His Lordship stated an alternative view of the facts from that set out above, and continued:] However, I feel no regret in the circumstances of this case that both my brethren, whose judgments I have had the advantage of reading, are in accord with Slade J., at least to the extent that the plaintiffs did not know that the vehicle on which the goods were placed for carriage held only a "C" licence, nor did they deliberately shut their eyes to the matter. There are, therefore, concurrent findings of fact with which I do not feel justified in disagreeing, and that leaves the case open for argument.

The facts which the court accepts are those stated by Pearce L.J., and on those facts I am in agreement with the views of my brethren that the contract so entered into was not prohibited by statute and was not ex facie illegal, and I do not wish to add to the reason and authority by which my brethren conclude this case in favour of the plaintiffs.

I would dismiss the appeal.

PEARCE L.J. stated the facts substantially as above set out and continued: On the issue of illegality the judge said this: "This case is one which falls within the class of case where the "contract is not ab initio illegal, or, indeed, illegal at all vis-à-vis "the plaintiffs in this action. In the contract of carriage, no "stipulation was made as to what form the carriage should take. "It was open to the defendants to carry the goods in any vehicle "they liked so far as the plaintiffs were concerned. It is, of "course, true that Field would contemplate that, as it was a "return load, it would in fact be taken back by Randall in the "vehicle in which he brought the goods to Leeds on the outward "journey, but Field never even saw the vehicle. As I have said, "no one whose knowledge could possibly be imputed to these "plaintiffs ever did see the vehicle, and I have already found as a "fact that they did not know that the vehicle in which Randall "intended to take the goods to the Royal Albert Docks had in "fact only a 'C' licence. In so far, therefore, as it is a "question of fact, and in so far as it is a question of law, I hold "as a matter of law that this contract was not of itself illegal, "and that any illegality arose only in the method of its performance by the defendant company. I therefore find that the plea "of illegality fails."

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Mr. Karmel, in a concise and powerful argument, contended that the judge should have found as a fact that the plaintiffs knew, or that they ought to have known, that the defendants' van had only a "C" licence and, therefore, could not legally carry the whisky. He also argues that even assuming that the plaintiffs were imposed on (as the judge found), and did not know of the "C" licence and were not negligent in failing to find out, yet the plaintiffs must fail because the contract of carriage was in fact unlawful, since it was a contract for carriage in that particular van (Randall's van) which could not be performed legally. The judge is in error, he contends, in saying: "It was "open to the defendants to carry the goods in any vehicle they "liked so far as the plaintiffs were concerned."

On the question of the plaintiffs' knowledge, the matters which were urged before us were urged before the trial judge, but he heard the witnesses and he decided otherwise. He said: "What "is clear is that the most wilful piece of deception was practised "upon Archbolds, London, by the defendants to persuade them "to be allowed to carry this load, and to carry this load, as I now "know it was carried, on a 'C' licence vehicle. That is material "only to the issue of illegality which is raised on the pleadings "in this case."

Later the judge said: "As to the words 'as the plaintiffs well "'knew,' I asked Mr. Waters, and he conceded that there was "no evidence at all that the plaintiffs well knew, and I find as a "fact that the plaintiffs did not know. I think the high-water "mark of what can be imputed to the plaintiffs or any servant "of theirs—and of this there is no evidence—is that during the "loading of the cases of whisky at Archbolds' Leeds warehouse, "somewhere about a mile or some distance away from their "offices, there was the vehicle as large as life, stamped all over "as what I may call a furniture van, and anyone who had taken "the trouble to look would have seen a "C" licence on its "windscreen. There is no evidence that anyone did look or that "the people whose sole task, having been instructed by their "foreman, who authorised the loading, was to load the cases on "to the lorry, directed their minds for one moment to the ques-"tion of whether it was a 'C' licence vehicle or a furniture van "or a Carter Paterson van, or anything of the kind. As I say, "I find as a fact that the plaintiffs did not know."

Again he says: "No one whose knowledge could possibly be "imputed to these plaintiffs ever did see the vehicle, and I have "already found as a fact that they did not know that the vehicle

" in which Randall intended to take the goods to the Royal Albert " Docks had in fact only a ' C ' licence." He also held that any suggestion that Field ought to have inquired what licence was held by Randall's vehicle was completely answered by the fact that Field knew that Randall had made the journey to Leeds with a load put on the lorry by the plaintiffs' London office.

The judge dealt very fully and carefully with the evidence, he heard the witnesses and he came to conclusions on their credibility. It is in just such a case as this, cases that turn on bona fides and knowledge and half-knowledge, that the trial judge has so great an advantage over a court that relies on the colourless, impersonal and sometimes misleading transcript. There were cogent arguments based on cross-examination of the witnesses that the plaintiffs must have known or suspected the true facts about the licence of Randall's vehicle, but in spite of them he came to the conclusion that the plaintiffs were imposed upon and did not know, and he acquitted them of any bad faith in the matter. I am not prepared to disturb that finding. In so many cases of deception it is hard even for the persons deceived to imagine in retrospect how they could have made such a mistake, yet the fact remains that people are misled into foolish errors. In my judgment, we should not be justified in making any finding that the plaintiffs knew or that they should have known that Randall's van had only a " C " licence.

It having been proved, therefore, that the plaintiffs were imposed on and believed that the goods could be lawfully carried on Randall's van, are they disentitled to sue?

Mr. Karmel argues that the goods had to be carried in Randall's van alone and no other, and that the judge was wrong in holding that this contract of carriage was a general one to be performed by the defendants in any way that they might choose. Mr. Leonard argues, on the other hand, that this contract, like many others, was made with a particular method of performance in mind, but was not restricted to that particular method of performance, and that haulage contracts are not so personal to the carrier that they cannot be vicariously performed. The point is not easy. I incline to the view held by the judge, but I do not find it necessary to express a concluded view on it.

Let us assume (although I am far from satisfied on this point) that the judge was in error in holding that the haulage contract could have been performed by the defendants in any way they liked (that is to say, lawfully as well as unlawfully). Let us assume first that it was a contract for carriage in Randall's van

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only and, secondly, that it was not by the nature of the contract one which could be performed vicariously. It must then inevitably be carried out unlawfully if (but only if) one adds the fact that Randall's van had a "C" licence and therefore could not lawfully carry the goods in question. But that fact, though known to the defendants, was unknown to the plaintiffs.

This is not a case where the plaintiffs can assert a cause of action without relying on the contract. Mr. Leonard put forward an ingenious alternative argument based on the plaintiffs' rights against the defendants as voluntary bailees of the plaintiffs' property: see *Bowmakers Ltd.* v. *Barnet Instruments Ltd.*,[1] so that he might claim in negligence or conversion without having any recourse to the contract or exposing to the court as part of his cause of action its alleged illegality. But I do not think that he can make good that argument. His cause of action comes from the contract, and if the contract is such that the court must refuse its aid, the plaintiffs cannot recover their damages.

If a contract is expressly or by necessary implication forbidden by statute, or if it is ex facie illegal, or if both parties know that though ex facie legal it can only be performed by illegality or is intended to be performed illegally, the law will not help the plaintiffs in any way that is a direct or indirect enforcement of rights under the contract. And for this purpose both parties are presumed to know the law.

The first question, therefore, is whether this contract of carriage was forbidden by statute. The two cases on which the defendants mainly rely are *In re an Arbitration between Mahmoud and Ispahani*[2] and *J. Dennis & Co. Ltd.* v. *Munn*.[3] In both those cases the plaintiffs were unable to enforce their rights under contracts forbidden by statute. In the former case the statutory order said[4]: "a person shall not . . . buy or sell . . . [certain] "articles . . . except under and in accordance with the terms of "a licence." In the latter case the statutory regulation provided[5]: "subject to the provisions of this regulation . . . the "execution . . . of any operation specified . . . shall be unlawful "except in so far as authorised." In neither case could the plaintiff bring his contract within the exception that alone would have made its subject-matter lawful, namely, by showing the existence of a licence. Therefore, the core of both contracts was

[1] [1945] K.B. 65; 61 T.L.R. 62; [1944] 2 All E.R. 579.

[2] [1921] 2 K.B. 716; 37 T.L.R. 489.

[3] [1949] 2 K.B. 327; 65 T.L.R. 251; [1949] 1 All E.R. 616, C.A.

[4] [1921] 2 K.B. 716.

[5] [1949] 2 K.B. 327, 329.

the mischief expressly forbidden by the statutory order and the statutory regulation respectively.

In *Mahmoud's* case [6] the object of the order was to prevent (except under licence) a person buying and a person selling, and both parties were liable to penalties. A contract of sale between those persons was therefore expressly forbidden. In *Dennis's* case [7] the object of the regulation was to prevent (except under licence) owners from performing building operations, and builders from carrying out the work for them. Both parties were liable to penalties and a contract between these persons for carrying out an unlawful operation would be forbidden by implication.

The case before us is somewhat different. The carriage of the plaintiffs' whisky was not as such prohibited; the statute merely regulated the means by which carriers should carry goods. Therefore this contract was not expressly forbidden by the statute.

Was it then forbidden by implication? The Road and Rail Traffic Act, 1933, section 1, says: "no person shall use a goods "vehicle on a road for the carriage of goods . . . except under "licence," and provides that such use shall be an offence. Did the statute thereby intend to forbid by implication all contracts whose performance must on all the facts (whether known or not) result in a contravention of that section?

The plaintiffs' part of the contract could not constitute an illegal use of the vehicle by them since they were not "using" the vehicle. If they were aware of the true facts they would, of course, be guilty of aiding and abetting the defendants, but if they acted in good faith they would not be guilty of any offence under the statute: see *Davies, Turner & Co. Ltd.* v. *Brodie* [8] and *Carter* v. *Mace*.[9] In this case, therefore, the plaintiffs were not committing any offence.

In *St. John Shipping Corporation* v. *Rank* [10] Devlin J. held that the plaintiffs were entitled to recover although there had been an infringement of a statute in the performance of a contract, but in that case the contract was legal when made. Though not directly applicable to the present case, it contains an observation (with which I entirely agree) on the point which arises here. He said [11]: "For example, a person is forbidden by statute "from using an unlicensed vehicle on the highway. If one asks "oneself whether there is in such an enactment an implied

[6] [1921] 2 K.B. 716.
[7] [1949] 2 K.B. 327.
[8] [1954] 1 W.L.R. 1364; [1954] 3 All E.R. 283, D.C.
[9] [1949] 2 All E.R. 714, D.C.
[10] [1957] 1 Q.B. 267; [1956] 3 W.L.R. 870; [1956] 3 All E.R. 683.
[11] [1957] 1 Q.B. 267, 287.

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" prohibition of all contracts for the use of unlicensed vehicles, " the answer may well be that there is, and that contracts of " hire would be unenforceable. But if one asks oneself whether " there is an implied prohibition of contracts for the carriage of " goods by unlicensed vehicles or for the repairing of unlicensed " vehicles or for the garaging of unlicensed vehicles, the answer " may well be different. The answer might be that collateral " contracts of this sort are not within the ambit of the statute." In my judgment that distinction is valid.

The object of the Road and Rail Traffic Act, 1933, was not (in this connection) to interfere with the owner of goods or his facilities for transport, but to control those who provided the transport, with a view to promoting its efficiency. Transport of goods was not made illegal but the various licence holders were prohibited from encroaching on one another's territory, the intention of the Act being to provide an orderly and comprehensive service. Penalties were provided for those licence holders who went outside the bounds of their allotted spheres. These penalties apply to those using the vehicle but not to the goods owner. Though the latter could be convicted of aiding and abetting any breach, the restrictions were not aimed at him. Thus a contract of carriage was, in the sense used by Devlin J., " collateral," and it was not impliedly forbidden by the statute.

This view is supported by common sense and convenience. If the other view were held it would have far-reaching effects. For instance, if a carrier induces me (who am in fact ignorant of any illegality) to entrust goods to him and negligently destroys them, he would only have to show that (though unknown to me) his licence had expired, or did not properly cover the transportation, or that he was uninsured, and I should then be without a remedy against him. Or, again, if I ride in a taxicab and the driver leaves me stranded in some deserted spot, he would only have to show that he was (though unknown to me) unlicensed or uninsured, and I should be without remedy. This appears to me an undesirable extension of the implications of a statute.

Lord Wright said in *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.*[12]: " Each case has to be considered on its merits. Nor " must it be forgotten that the rule by which contracts not express- " ly forbidden by statute or declared to be void are in proper cases " nullified for disobedience to a statute is a rule of public policy " only, and public policy understood in a wider sense may at

[12] [1939] A.C. 277, 293; 55 T.L.R. 402; [1939] 1 All E.R. 513.

" times be better served by refusing to nullify a bargain save on " serious and sufficient grounds." If the court too readily implies that a contract is forbidden by statute, it takes it out of its own power (so far as that contract is concerned) to discriminate between guilt and innocence. But if the court makes no such implication, it still leaves itself with the general power, based on public policy, to hold those contracts unenforceable which are ex facie unlawful, and also to refuse its aid to guilty parties in respect of contracts which to the knowledge of both can only be performed by a contravention of the statute: see *Nash* v. *Stevenson Transport Ltd.*,[13] or which though apparently lawful are intended to be performed illegally or for an illegal purpose, for example, *Pearce* v. *Brooks*.[14]

It is for the defendants to show that contracts by the owner for the carriage of goods are within the ambit of the implied prohibition of the Road and Rail Traffic Act, 1933. In my judgment they have not done so.

The next question is whether this contract though not forbidden by statute was ex facie illegal. Must any reasonable person on hearing the terms of the contract (which presumed knowledge of the law) realise that it was illegal? There is nothing illegal in its terms. Further knowledge, namely, knowledge of the fact that Randall's van was not properly licensed, would show that it could only be performed by contravention of the statute, but that does not make the contract ex facie illegal.

However, if both parties had that knowledge the contract would be unenforceable as being a contract which to their knowledge could not be carried out without a violation of the law: see *per* Lord Blackburn in *Waugh* v. *Morris*.[15] But where one party is ignorant of the fact that will make the performance illegal, is it established that the innocent party cannot obtain relief against the guilty party? The case has been argued with skill and care on both sides, and yet no case has been cited to us establishing the proposition that where a contract is on the face of it legal and is not forbidden by statute, but must in fact produce illegality by reason of a circumstance known to one party only, it should be held illegal so as to debar the innocent party from relief. In the absence of such a case I do not feel compelled to so unsatisfactory a conclusion, which would injure the innocent, benefit the guilty, and put a premium on deceit.

[13] [1936] 2 K.B. 128; 52 T.L.R. 331.

[14] (1866) L.R. 1 Ex. 213.

[15] (1873) L.R. 8 Q.B. 202, 208.

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Such a conclusion (in cases like this where a contract is not forbidden by statute) can only derive from public policy. For the reasons given by Lord Wright above, an extension of the law in this direction would be more harmful than beneficial. No question of moral turpitude arises here. The alleged illegality is, so far as the plaintiffs were concerned, the permitting of their goods to be carried by the wrong carrier, namely, a carrier who unknown to them was not allowed by his licence to carry that particular class of goods. The plaintiffs were never in delicto since they did not know the vital fact that would make the performance of the contract illegal.

In my view, therefore, public policy does not constrain us to refuse our aid to the plaintiffs and they are therefore entitled to succeed. I would dismiss the appeal.

DEVLIN L.J. The effect of illegality upon a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know that what he was doing was illegal. The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy.

The defendants do not seek to bring this case under either of the first two heads. They cannot themselves enforce the contract because they intended to perform it unlawfully with a van that they knew was not properly licensed for the purpose: but that does not prevent the plaintiffs, who had no such intent and were not privy to it, from enforcing the contract. Nor can it be said that the plaintiffs committed any illegal act. To load a vehicle is not to use it on the road, which is what is forbidden; no doubt loading would be enough to constitute aiding and abetting if the plaintiffs knew of the defendants' purpose (*National Coal Board* v. *Gamble* [16]), but they did not.

[16] [1959] 1 Q.B. 11; [1958] 3 W.L.R. 434; [1958] 3 All E.R. 203, D.C.

So what the defendants say is that the contract is prohibited by the Road and Rail Traffic Act, 1933, s. 1. In order to see whether the contract falls within the prohibition it is necessary to ascertain the exact terms of the contract and the exact terms of the prohibition. For reasons which I shall explain later, I shall begin by ascertaining the latter. Section 1 of the Act provides that no person shall use a goods vehicle on a road for the carriage of goods for hire or reward except under a licence. Section 2 provides for various classes of licences, "A," "B" and "C." It is agreed that the carriage of the goods which were the subject-matter of this contract required an "A" licence. The fact that the van had a "C" licence does not therefore help one way or the other; and it is admitted that the defendants' use of this van for the carriage of these goods was prohibited. As I have noted, the plaintiffs are not to be treated as using the van because they supplied the load. Section 1 (3) provides that the driver of the vehicle or, if he is an agent or servant, his principal, shall be deemed to be the person by whom the vehicle is being used.

The statute does not expressly prohibit the making of any contract. The question is therefore whether a prohibition arises as a matter of necessary implication. It follows from the decision of this court in *Nash* v. *Stevenson Transport Ltd.*[17] that a contract for the use of unlicensed vehicles is prohibited. In that case the plaintiff held "A" licences which the defendant wanted to purchase. But the Act of 1933 provides that licences may not be transferred or assigned, and it was therefore agreed that the defendant should run the vehicles in the plaintiff's name so that they might obtain the benefit of his licences. It was held by the court that that was an illegal agreement because the defendant was the person who was using the vehicles and the plaintiff the person who was licensed to use them; thus the user was not the licensee. In the present case there was no contract for the use of the vehicle.

On the other hand, it does not follow that because it is an offence for one party to enter into a contract, the contract itself is void. In *In re Mahmoud and Ispahani*[18] Scrutton L.J. said: "In "*Bloxsome* v. *Williams*[19] the position was that the defendant, a "horse dealer, was prohibited from trading on Sunday, but "there was nothing illegal in another person making a contract

[17] [1936] 2 K.B. 128; 52 T.L.R. 331; [1936] 1 All E.R. 906, C.A.
[18] [1921] 2 K.B. 716, 730.
[19] (1824) 3 B. & C. 232.

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" with a horse dealer, except that if he knew that the person " with whom he was dealing was a horse dealer and was guilty " of breaking the law he might be aiding and abetting him to " break the law. But merely to make a contract with a horse " dealer, without knowing he was a horse dealer, was not " illegal."

The general considerations which arise on this question were examined at length in *St. John Shipping Corporation* v. *Joseph Rank Ltd.*[20] and Pearce L.J. has set them out so clearly in his judgment in this case that I need add little to them. Fundamentally they are the same as those that arise on the construction of every statute; one must have regard to the language used and to the scope and purpose of the statute. I think that the purpose of this statute is sufficiently served by the penalties prescribed for the offender; the avoidance of the contract would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute. Moreover, the value of the relief given to the wrongdoer if he could escape what would otherwise have been his legal obligation might, as it would in this case, greatly outweigh the punishment that could be imposed upon him, and thus undo the penal effect of the statute.

I conclude, therefore, that this contract was not illegal for the reason that the statute does not prohibit the making of a contract for the carriage of goods in unlicensed vehicles and this contract belongs to this class. I am able, therefore, to arrive at my judgment without an examination of the exact terms of the contract. It would have been natural to have begun by looking at the contract; I have not done so because it is doubtful whether the state of the pleadings permits a thorough examination. But as Mr. Karmel's argument before us turned upon its terms, I think that I should deal with them.

The defendants contend that this was a contract of carriage by a specified vehicle, namely, the van SXY902 then being driven by Randall. The plaintiffs agree that it was contemplated that the van SXY902 should be used for the contract but dispute that the contract was so limited. The words used in the contract were " a covered van " and the plaintiffs submit, and the judge has so held, that " it was open to the defendants to carry " the goods in any vehicle they liked."

I have reached no final conclusion on this point. Assuming,

[20] [1957] 1 Q.B. 267, 285.

as for the purposes of this argument I do, that the statute prohibits every contract for the carriage of goods in an unlicensed vehicle, I do not think that the question whether this contract falls within the statute depends on whether it was limited to the use of the vehicle SXY902. According to the defendants' argument, the significance of the point lies in the fact that they have to accept the burden of proving that there was no way in which they could have performed the contract legally. If only the one van could have been used under the contract, they claim to have discharged that burden; otherwise they concede that they cannot prove that they could not, if they had tried, have got hold of some other licensed van. In my judgment, this is not the decisive test.

It is a familiar principle of law that if a contract can be performed in one of two ways, that is, legally or illegally, it is not an illegal contract, though it may be unenforceable at the suit of a party who chooses to perform it illegally. That statement of the law is meaningful if the contract is one which is by its terms open to two modes of performance; otherwise it is meaningless. Almost any contract—certainly any contract for the carriage of goods by road—can be performed illegally; any contract of carriage by road can be performed illegally simply by exceeding the appropriate speed limit. The error in the defendants' argument, I think, is that they are looking at the facts which determine their capacity to perform and not at the terms of the contract. Suppose that the contract were for a vehicle with an "A" licence, or—what is substantially the same thing—for a specified vehicle warranted as holding an "A" licence. That would not be an illegal contract for it would be a contract for the use of a licensed vehicle and not an unlicensed one. If those were the express terms of the contract, it would not be made illegal because all the carrier's vehicles, or the specified vehicle as the case might be, had "C" licences. The most that that could show would be that the carrier might well be unable to perform his contract. Or suppose that the contract were for any "A" vehicle owned by the defendant and the defendant had a fleet of five "A" vehicles and five "C" vehicles. That would be a legal contract and it would not be made illegal because, at the time when it was made, it was physically impossible for the defendant to get any of his "A" vehicles to the loading place in time. If the contract is for a specified vehicle with an "A" licence, loading to begin within a week, it is not illegal because when the contract was made the

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vehicle had no " A " licence; one might be obtained in time and the court will not decide the question of legality by inquiring whether an " A " licence could or could not have been obtained for it within the week. So in this case it is irrelevant to say that the van SXY902 had in fact not got an " A " licence and could not conceivably have got one in time. The error in the defendants' argument is that they assume that because the parties were contracting about a specified vehicle and because that specified vehicle had in fact (a fact known to one party and not to the other) only a " C " licence, therefore they were contracting about a vehicle with a " C " licence. It is the terms of the contract that matter; the surrounding facts are irrelevant, save in so far as, being known to both parties, they throw light on the meaning and effect of the contract. The question is not whether the vehicle was in fact properly licensed but whether it was expressly or by implication in the contract described or warranted as properly licensed. If it was so described or warranted, then the legal position is, not that the contract could only be performed by a violation of the law, but that unless it could be performed legally, it could not be performed at all. The fact that, as in this case, it may be known to one of the parties at the time of making the contract that he cannot perform it legally and therefore that it will inevitably be broken, does not make the contract itself illegal.

So the correct line of inquiry into the terms of the contract in this case should have been not as to whether it provided for performance by a specified vehicle or by any vehicle that the defendants chose to nominate, but as to whether the defendants warranted or agreed that the vehicle which was to do the work, whether a specified vehicle or any other, was legally fit for the service which it had to undertake, that is, that it had an " A " licence.

I think there is much to be said for the argument that in a case of this sort there is, unless the circumstances exclude it, an implied warranty that the van is properly licensed for the service for which it is required. It would be unreasonable to expect a man when he is getting into a taxicab to ask for an express warranty from the driver that his cab was licensed; the answer, if it took any intelligible form at all, would be to the effect that it would not be on the streets if it were not. The same applies to a person who delivers goods for carriage by a particular vehicle; he cannot be expected to examine the road licence to see if it is in order. But the issue of warranty was

not raised in the pleadings or at the trial and so I think it is preferable to decide this case on the broad ground which Pearce L.J. has adopted and with which, for the reasons I have given, I agree.

There are many pitfalls in this branch of the law. If, for example, Mr. Field had observed that the van had a "C" licence and said nothing, he might be said to have accepted a mode of performance different from that contracted for and so varied the contract and turned it into an illegal one: see *St. John Shipping Corporation* v. *Joseph Rank Ltd.*[21] where that sort of point was considered. Or, to take another example, if a statute prohibits the sale of goods to an alien, a warranty by the buyer that he is not an alien will not save the contract. That is because the terms of the prohibition expressly forbid a sale to an alien; consequently, the question to be asked in order to see whether the contract comes within the prohibition is whether the buyer is in fact an alien, not whether he represented himself as one. *In re Mahmoud*[22] is that sort of case. The statute forbade the buying and selling of certain goods between unlicensed persons. The buyer falsely represented himself as having a licence. It is not said that he so warranted but, if he had, it could have made no difference. Once the fact was established that he was an unlicensed person the contract was brought within the category of those that were prohibited. *Strongman* v. *Sincock*[23] exemplifies another sort of difficulty. It was an action brought by a builder against a building owner to recover the price of building work done. The statute forbade the execution of building operations without a licence. The building owner expressly undertook to obtain the necessary licence and failed to do so; and it was held that the builder could not recover. The builder, I dare say, might have contended that, having regard to the undertaking, the contract he made was for licensed operations and therefore legal. But unfortunately he had himself performed it illegally by building without a licence and he could not recover without relying on his illegal act because he was suing for money for work done. The undertaking might make the contract legal but not the operations. All these cases are distinguishable from the present one, where the contract is not within the prohibition and the plaintiffs themselves committed no illegal act and did not aid or abet the defendants. Apart from

[21] [1957] 1 Q.B. 267, 283, 284.
[22] [1921] 2 K.B. 716.
[23] [1955] 2 Q.B. 525; [1955] 3 W.L.R. 360; [1955] 3 All E.R. 90, C.A.

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the pleading point, it might not matter if the last two cases were not distinguishable, since the plaintiffs could obtain damages for breach of the warranty as in *Strongman* v. *Sincock*.[24]

Appeal dismissed with costs.

Solicitors: *Hart-Leverton & Co.; Herbert Baron & Co.*

I. G. R. M.

[24] [1955] 2 Q.B. 525.

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Lord Parker C.J., Ashworth and Elwes JJ.

FISHER *v.* BELL.

Crime—Offensive weapon—"Offers for sale"—"Flick knife" displayed in shop window with ticket bearing description and price—Whether an offence committed—Restriction of Offensive Weapons Act, 1959 (7 & 8 *Eliz.* 2, *c.* 37), *s.* 1 (1).

Statute—Construction—Omission—Interpretation of words used—No power in court to fill in gaps.

A shopkeeper displayed in his shop window a knife of the type commonly known as a "flick knife" with a ticket behind it bearing the words "Ejector knife—4s." An information was preferred against him by the police alleging that he had offered the knife for sale contrary to section 1 (1) of the Restriction of Offensive Weapons Act, 1959,[1] but the justices concluded that no offence had been committed under the section and dismissed the information. On appeal by the prosecutor:—

Held, that in the absence of any definition in the Act extending the meaning of "offer for sale," that term must be given the meaning attributed to it in the ordinary law of contract, and as thereunder the display of goods in a shop window with a price ticket attached was merely an invitation to treat and not an offer

[1] Restriction of Offensive Weapons Act, 1959, s. 1 (1): "Any person "who manufactures, sells or hires or "offers for sale or hire, or lends or "gives to any other person—(*a*) any "knife which has a blade which opens "automatically by hand pressure "applied to a button, spring or other "device in or attached to the handle "of the knife, sometimes known as a "'flick knife' or 'flick gun'; . . . "shall be guilty of an offence and "shall be liable on summary convic-"tion in the case of a first offence to "imprisonment for a term not ex-"ceeding three months or to a fine "not exceeding fifty pounds or to "both such imprisonment and fine, "..."