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Tinsley (A.P.) (Appellant) v. Milligan (A.P.) (Respondent)

JUDGMENT

Die Jovis 24° Junii 1993

Upon Report from the Appellate Committee to whom was referred the Cause Tinsley against Milligan, That the Committee had heard Counsel as well on Wednesday the 25th as on Thursday the 26th and Monday the 30th days of November last upon the Petition and Appeal of Stella Ruth Tinsley of 141 Thomas Street Abertridwr in the County of Mid Glamorgan, praying that the matter of the Order set forth in the Schedule thereto, namely an Order of Her Majesty's Court of Appeal of the 30th day of July 1991, might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order might be reversed, varied or altered or that the Petitioner might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as upon the case of Kathleen Milligan lodged in answer to the said Appeal; and due consideration had this day of what was offered on either side in this Cause:

It is Ordered and Adjudged, by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of Her Majesty's Court of Appeal of the 30th day of July 1991 complained of in the said Appeal be, and the same is hereby, **Affirmed** and that the said Petition and Appeal be, and the same is hereby, dismissed this House: And it is further Ordered. That the costs of the appellant and the respondent be taxed in accordance with the Legal Aid Act 1988.

Cler: Parliamentor:

Judgment: 24.6.1993

HOUSE OF LORDS

TINSLEY (A.P.)
(APPELLANT)

v.

MILLIGAN (A.P.)
(RESPONDENT)

LORD KEITH OF KINKEL

Lord Keith
of Kinkel
Lord Goff
of Chieveley
Lord Jauncey
of Tullichettle
Lord Lowry
Lord Browne-
Wilkinson

My Lords,

I agree with the speech to be delivered by my noble and learned friend Lord Goff of Chieveley, which I have had the advantage of reading in draft. I would therefore allow this appeal.

LORD GOFF OF CHIEVELEY

My Lords,

There is before your Lordships an appeal by the appellant, Stella Ruth Tinsley, from an order by the Court of Appeal whereby the court, by a majority (Lloyd and Nicholls L.JJ., Ralph Gibson L.J. dissenting), dismissed the appellant's appeal from an order of Judge Hywed Ap Robert, sitting in the

Caerphilly County Court, ordering (inter alia) that the appellant's claim for possession of 141 Thomas Street, Abertridwr, Mid-Glamorgan, be dismissed, and that the appellant holds 141 Thomas Street on trust for the respondent, Kathleen Milligan, and herself in equal shares.

The appeal, which is brought by leave of the Court of Appeal, raises the question whether the claim of the respondent to an interest in the property in question is defeated by reason of frauds practised on the Department of Social Security. The facts of the case can be encapsulated in a few brief sentences. However it is desirable to obtain the full flavour of the case; and for that reason I propose to adopt the account given by Nicholls L.J. in the

report in [1992] Ch. 310, 315-317, which for convenience of reference I propose to set out in full.

> "The house in question is 141, Thomas Street, Abertridwr, Mid-Glamorgan. It is registered in the name of the plaintiff Miss Stella Tinsley. She is the sole legal owner. She and the defendant Miss Kathleen Milligan were, to use the judge's expression, lovers for about four years, from 1984 to 1988. In the discussions they had during the course of their relationship, both the plaintiff and the defendant expressly recognised they were running a lodging house first at 9, Fitzhamon Embankment, Cardiff, and subsequently at Thomas Street, as a joint business venture and that the ownership of the respective houses was also on a joint basis.
>
> The parties are intelligent and articulate. They met in 1984. The plaintiff was then 19, and the defendant 38. The defendant was the dominant character, but not such as to be able to impose her will on the plaintiff. The defendant was living at 9, Fitzhamon Embankment, which belonged to a Mr. Slater. She was running a bed-and-breakfast business. In 1983 a Miss Llewellyn began living in the house, and after a while she was treated as being the housekeeper in place of the defendant. The housekeeper was the person to whom the D.S.S. turned for verification that those to whom it was paying benefits were indeed resident there. In December 1984 the plaintiff moved in and Miss Llewellyn moved out. After a month or two the plaintiff took her place as the nominal housekeeper, although most of the physical work and much of the managerial work were done by the defendant.
>
> The bank and building society accounts used by the parties were put in the plaintiffs sole name, but they were regarded as joint property. Through these accounts the parties conducted most of their financial affairs: nearly all their money went into them, and nearly everything

they spent was paid from them. In July 1986 9, Fitzhamon Embankment was purchased in the plaintiffs name. The price was £29,000. A bank provided £24,000 by way of a mortgage loan to the plaintiff alone. The balance was provided principally from the sale proceeds of a car which belonged to them jointly.

Two years later this house was sold for £33,000, and the mortgage repaid. 141, Thomas Street was bought for £19,000, again in the sole name of the plaintiff. That was in August 1988. £12,000 was provided by a bank loan to the plaintiff alone, and the balance came from the proceeds of sale of 9, Fitzhamon Embankment. In this way all the money provided by the parties for 141, Thomas Street cam ultimately from their joint business. Shortly thereafter, the parties quarrelled. The plaintiff moved out, and the defendant remained in occupation. The plaintiff divided the money in her building society account between them in roughly equal shares. In February 1989 she

gave the defendant notice to quit. Six months later she brought this action, claiming possession and asserting ownership of the whole of the house. The defendant was willing that the house should be sold. Indeed she counterclaimed for an order for sale. She also sought a declaration that the property was held by the plaintiff upon trust for the two of them in equal shares.

I can now turn to the illegality. Over a period of years the defendant with the knowledge and assent of the plaintiff, made false claims to the D.S.S. for benefits of one kind or another. The money paid by the D.S.S. in response to those claims was paid into the bank or building society accounts I have mentioned. The defendant was not alone in perpetrating frauds upon the D.S.S. The plaintiff also did so. She was prosecuted, convicted and fined, and had to make some repayments to the D.S.S. As to 141, Thomas Street, the judge shied away from holding that the reason why the transfer of this house was in the plaintiff's sole name was to assist in a fraud on the D.S.S. Having the property in the plaintiffs sole name assisted with the fraud in the sense that it assisted in the concealment of the defendant's fraud. On the claim forms the defendant answered "No" to the question, "Do you own you own home?" and she named the plaintiff as her landlady, to whom she said she was paying rent. If the D.S.S., having received such claims, had made further inquiries, the falsity of the defendant's answers would be more likely to remain concealed with the title deeds in the plaintiffs sole name. The judge considered it was a great over-simplification to regard fraud as the sole or even main objective of the defendant in rendering herself invisible not only as to the legal title to the house but also as to the bank account and the accounts for

electricity, gas, rates and so forth. He seems to have regarded this as a 'psychological quirk'.

I do not think this conclusion can stand. At the outset of her cross-examination the defendant frankly accepted that the reason why the business and 9, Fitzhamon Embankment and 141, Thomas Street were in the plaintiffs sole name was so that she, the defendant, could misrepresent to the D.S.S. that she had no stake in the business or the properties and that she was simply a lodger. The defendant did not suggest any other reason for either property being put in the plaintiffs sole name. The case was fought on that footing. It should be decided on the same footing.

Two further features are to be noted. First, the money obtained from the D.S.S. helped the two of them meet their bills, but it was not a substantial part of their income. Their income consisted mostly of rent from their lodgers. The fraud perpetrated by them both on the D.S.S. played only a small financial part in the acquisition of the equity in the house which is now in dispute. Secondly, there is no continuing illegality. Late in 1988 the defendant made her peace with the D.S.S.

> She told the D.S.S. what she had done. Thereafter she continued to draw benefit, but on a lawful basis. Apparently the D.S.S. did not regard the situation with any alarm. The judge observed that no doubt this was because it had become inured by daily experience of much worse forms of fraud being practised upon it than any which could be laid at the door of these two women."

Before the Court of Appeal it was the submission of the appellant that there was a principle of law, binding on the Court of Appeal, that the court will not give effect to an equitable interest arising from a transaction which is unlawful by reason of a claimant's unlawful purpose; and that accordingly the respondent was unable to establish any equitable interest in 141, Thomas Street, or to defeat the appellant's claim to possession. This principle was said to be well recognised in a number of authorities; but reliance was placed in particular on *Gascoigne v. Gascoigne* [1918] 1 K.B. 223 and *Tinker v. Tinker* [1970] P. 136, both decisions of the Court of Appeal. It was this line of authority which ultimately persuaded Ralph Gibson L.J., in his dissenting judgment, that the appellant's appeal should be allowed. But Nicholls L.J. was not so persuaded. He first invoked a group of recent Court of Appeal decisions, which point to a more flexible approach than has been adopted in the past in cases of illegality under which, according to Nicholls L.J. (at p. 319H):

> ". . . the underlying principle is the so-called public conscience test. The court must weigh, or balance, the adverse consequences of

granting relief against the adverse consequences of refusing relief. The ultimate decision calls for a value judgment."

On that approach he concluded (at p. 321D) that "... far from it being an affront to the public conscience to grant relief in this case, it would be an affront to the public conscience not to do so." Furthermore, Nicholls L.J. rejected (at p. 323G) the inflexible approach embodied in the earlier authorities as according ill "with the underlying considerations of public policy the court is seeking to discern and apply in this field"; the approach would, he considered, also mean that equity was taking a less flexible attitude to illegality than the common law, which would constitute a remarkable reversal of the traditional functions of law and equity. He accordingly sought to rationalise the older authorities in which relief was denied as cases in which, in particular circumstances, the court considered that to have granted relief would have been an affront to the public conscience. In answer to the proposition that the legal estate must lie where it falls, Nicholls L.J. regarded the proposition as being as apt to equitable estates as it is to legal estates. Lloyd L.J., while agreeing with Nicholls L.J. that the appellant's claim must fail, adopted a rather different approach. First he considered that in the present case it was the appellant, and not the respondent, who was pleading illegality; and that the illegality did not taint the respondent's claim, but was purely collateral and incidental to it. Accordingly, the principle embodied in the maxim ex turpi causa non oritur actio did not operate to bar the

respondent's claim. Nor did he consider that the court should refuse to bar her claim on grounds of public policy, since (on the test recently applied in the Court of Appeal, which Lloyd LJ. with some reluctance held to be binding on him) it would not shock the ordinary citizen that the respondent should recover her half share in the property. Finally, Lloyd L.J. rejected the argument, founded on the line of cases culminating in *Gascoigne* v. *Gascoigne* [1918] 1 K.B. 223 and *Tinker* v. *Tinker* [1970] p. 136, that the court would not assist a claimant such as the respondent who was seeking the aid of equity, because she did not come to equity with clean hands; he distinguished these authorities as cases in which the equitable balance came down against the plaintiff, whereas in the present case it came down firmly in favour of the respondent who was seeking the assistance of equity.

This brief summary of the judgments in the Court of Appeal reveals a considerable difference of opinion among the members of the court. Faced with this variety of reasoning it is, I consider, essential for your Lordships to return to first principle; and, having identified the applicable principles of law, to consider to what extent the opinions expressed by the members of the Court of Appeal are consistent with them. If not, it will be necessary to consider whether it was open to them, and if not open to them, whether it is now open to your Lordships' House, to develop those principles along the lines now suggested; and, if so, whether it is desirable to do so.

I turn then to the established principles; and I wish at once to express my indebtedness to the scholarly argument of Mr. James Munby Q.C., who appeared for the appellant in your Lordships' House. The basic principle was stated long ago by Lord Mansfield C.J. in *Holman v. Johnson* (1775) 1 Cowp. 341, 343, in the context of the law of contract, when he said:

> "The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiffs own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are *equally* in fault, potior est conditio defendentis."

That principle has been applied again and again, for over two hundred years. It is applicable in courts of equity as well as courts of law: see e.g., the notes to *Roberts v. Roberts* (1818) Dan. 143, 150-151, and *Ayerst v. Jenkins* (1873) L.R. 16 Eq. 275, 283, per Lord Selborne L.C. In 1869 Mellor J. said that the maxim in pari delicto potior est conditio possidentis "is as thoroughly settled as any proposition of law can be": see *Taylor* v. *Chester* (1869) L.R. 4 Q.B. 309, 313. It is important to observe that, as Lord Mansfield made clear, the principle is not a principle of justice; it is a principle of policy, whose application is indiscriminate and so can lead to unfair consequences as between the parties to litigation. Moreover the principle allows no room for the exercise of any discretion by the court in favour of one party or the other.

Even so, the mere fact that a transaction is illegal does not have the effect of preventing property, whether general or special, from passing under it. In *Scarfe* v. *Morgan* (1838) 4 M. & W. 270, 281, Parke B. said that "if the [illegal] contract is executed, and a property either special or general has passed thereby, the property must remain; . . . ". This principle has been applied on numerous occasions. Notable examples are to be found in *Taylor* v. *Chester* L.R. 4 Q.B. 309; *Alexander v. Rayson* [1936] 1 K.B. 169; and

Singh v. Ali [1960] AC 167. In *Singh v. Ali,* the principle was explained by Lord Denning in the following passage, at pp. 176-177:

> "There are many cases which show that when two persons agree together in a conspiracy to effect a fraudulent or illegal purpose - and one of them transfers property to the other in pursuance of the conspiracy - then, so soon as the contract is executed and the fraudulent or illegal purpose is achieved, the property (be it absolute or special) which has been transferred by the one to the other remains vested in the transferee, notwithstanding its illegal origin . . . The reason is because the transferor, having fully achieved his unworthy end, cannot be allowed to turn round and repudiate the means by which he did it - he cannot throw over the transfer. And the transferee, having obtained the property, can assert his title to it against all the world, not because he has any merit of his own, but because there is no one who can assert a better title to it. The court does not confiscate the property because of the illegality - it has no power to do so - so it says, in the words of Lord Eldon: 'Let the estate lie where it falls'; see *Muckleston* v. *Brown* 6 Ves. 52, 69."

Likewise a court of equity will not, at the instance of the settlor or his personal representative, set aside a settlement which has been made for an illegal consideration: see *Ayerst v. Jenkins* L.R. 16 Eq. 275. The effect in that case was that the legal estate remained absolutely vested in the trustees and (implicitly) that the beneficial interest vested in the beneficiary. (There was however in that case no contest between the trustees and the beneficiary; and in any event the case was not one in which (as in the present case) A puts

his property in the name of B in order to conceal his (A's) interest in it for a fraudulent purpose. In such a case, it is most unlikely that A will have constituted B an express trustee of the property.)

From these two principles there is to be derived the principle invoked by the appellant in the present case, viz. that if A puts property in the name of B intending to conceal his (A's) interest in the property for a fraudulent or illegal purpose, neither law nor equity will allow A to recover the property, and equity will not assist him in asserting an equitable interest in it. This principle applies whether the transaction takes the form of a transfer of property by A to B, or the purchase by A of property in the name of B.

The principle appears first to have been recognised by Lord Hardwicke L.C. in two cases decided before *Holman v. Johnson* 1 Cowp. 341, viz. *Cottington v. Fletcher* (1740) 2 Atk. 155, and *Birch v. Blagrave* (1755) 1 Amb. 265. But the case which has for nearly two hundred years been regarded as the authoritative source of the principle is *Muckleston v. Brown*

(1801) 6 Ves. 53, in which Lord Eldon L.C. said in a much-quoted passage, at pp. 68-69:

> ". . . the plaintiff stating, he had been guilty of a fraud upon the law, to evade, to disappoint, the provision of the legislature, to which he is bound to submit, and coming to equity to be relieved against his own act, and the defence being dishonest, between the two species of dishonesty the court would not act; but would say, 'Let the estate lie, where it falls'."

There followed a consistent line of authority in which the principle has been applied. The cases include: *Curtis v. Perry* (1802) 6 Ves. 739; *Ex parte Yallop* (1808) 15 Ves. 60; *Roberts v. Roberts* Dan. 143; *Groves v. Groves* (1828) 3 Y. & J. 163; *Childers v. Childers* (1857) 3 K. & J. 310; *In re Great Berlin Steamboat Co.* (1884) 26 Ch. D. 616; *Crichton v. Crichton* (1895) 13 R. 770; *Gascoigne* v. *Gascoigne* [1918] 1 K.B. 223; *McEvoy v. Belfast Banking Co. Ltd.* [1934] N.I. 67; *In re Emery's Investments Trusts, Emery v. Emery* [1959] Ch. 410; *Preston v. Preston* [1960] N.Z.L.R. 385; *Palaniappa Chettiar* v. *Arunasalam Chettiar* [1962] A.C. 294; *Tinker v. Tinker* [1970] P. 136; and *Cantor v. Cox* (1976) 239 E.G. 121.

Furthermore, the existence of the principle has been recognised on numerous occasions, even where it has not been given effect to on the facts of the case in question. In particular, an exception to the principle is to be found in cases in which the illegal purpose has not been carried into effect; but all those cases in which that exception has been recognised have proceeded on the basis that, absent those exceptional circumstances, the principle would have applied. It is not necessary to examine the nature of this exception for present purposes. It is often said to derive from *Taylor v. Bowers* (1876) 1

Q.B.D. 291, which was in fact a case at law. However, the exception was foreshadowed in a number of earlier cases in equity, notably *Platamone v. Staple* (1815) G. Coop. 250; *Cecil v. Butcher* (1821) 2 Jac. & W. 565, and *Symes v. Hughes* (1870) L.R. 9 Eq. Cas. 475; and it has since been applied in, for example, *Petherpermal Chetty* v. *Muniandi Servai* (1908) L.R. 35 Ind. App. 78, and *Perpetual Executors and Trustees Association of Australia Ltd. v. Wright* (1917) 23 C.L.R. 185. Likewise *Haigh* v. *Kaye* (1872) L.R. 7 Ch. App. 469, in which the defendant failed successfully to invoke the in pan delicto principle because he did not specify the illegality in plain terms (he "must clearly put forward his own scoundrelism if he means to reap the

benefit of it" per James L.J. at p. 473), proceeded on the assumption that, if the defendant had done so, it would have been possible for him to succeed.

The reason why the court of equity will not assist the claimant to recover his property or to assert his interest in it has been variously stated. It is sometimes said that it is because he has not come to equity with clean hands. This was the reason given by the Lord Chief Baron in *Groves v. Groves* (1829) 3 Y. & J. 163, 174, and by Salmon L.J. (with whom Cross L.J. agreed) in *Tinker v. Tinker* [1970] P. 136, 143. Sometimes it is said that the claimant cannot be heard or allowed to assert his claim to an equitable interest, as in *Curtis v. Perry* 6 Ves. 739, 746, per Lord Eldon L.C.; *Childers* v. *Childers* (1857) 3 K. & J. 310, 315 per Page Wood V.-C.; and *Cantor v. Cox* (1976) 239 E.G. 121, 122, per Plowman V.-C. But this is, as I see it, another way of saying that the claimant must fail because he has not come to the court with clean hands. It follows that in these cases the requirements necessary to give rise to an equitable interest are present; it is simply that the claimant is precluded from asserting them. This explains why, in cases where the unlawful purpose has not been carried into effect, the court is able to hold that, despite the illegality, there is an equitable interest to which the claimant is entitled.

Another conclusion follows from the identification of the basis upon which equity refuses its assistance in these cases. This is that the circumstances in which the court refuses to assist the claimant in asserting his equitable interest are not limited to cases in which there is a presumption of advancement in favour of the transferee. If that was the case, the principle could be said to be limited to those cases in which the transferor has to rely upon the illegal transaction in order to rebut the presumption; in other words the cases could be said to fall within what is sometimes called the *Bowmakers* rule, under which a claimant's claim is unenforceable when he has either to found his claim on an illegal transaction, or to plead its illegality in order to support his claim: *Bowmakers Ltd. v. Barnet Instruments Ltd.* [1945] K.B. 65. Of course, in a number of cases of this kind, especially in modern times, the presumption of advancement does apply, because many cases are concerned with a man hiding away his assets in order to escape his creditors or for some other similar purpose, by transferring them to his wife or to one of his children. But there are cases in which the principle has been applied, or has

been recognised, where there was no presumption of advancement. Examples are *Curtis v. Perry* 6 Ves. 739; *Ex parte Yallop* 15 Ves. 60; *Roberts v. Roberts* Dan. 14; *Groves v. Groves* 3 Y.& J. 163; *Haigh v. Kaye* L.R. 7 Ch. App. 469; *In re Great Berlin Steamboat Co.* 26 Ch. D. 616; and *Cantor v. Cox* 239 E.G. 121. Of course, where the presumption of advancement does apply, and the illegality is not established from another source, for example by the defendant, the claimant will be in the particular

difficulty that, in order to rebut the presumption, he will have to rely upon the underlying transaction and so will of necessity have to disclose his own illegality. This is what happened in *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] AC 294, where the property in question had been transferred by the claimant to his son who, having fallen ill, took no part in the hearing and so himself gave no evidence of the illegality; even so, the father's claim failed because he was unable to rebut the presumption of advancement without relying upon the illegal transaction. But the case does not decide that the principle only applies where it is necessary to rebut the presumption of advancement; and, as I have already stated, there are many cases in which the principle has been recognised or applied where there was no such presumption. Furthermore, if for example the defendant proves that the property was transferred to him for a fraudulent or illegal purpose, a court of equity will refuse to assist the claimant when asserting his interest in it, even though the claimant's case can be, and was, advanced, without reference to the underlying legal purpose, for example on the simple basis that the transfer of the property to the defendant was without consideration. This conclusion follows inevitably from the nature of the principle, and the grounds upon which equity refuses its assistance; it is at least implicit in a number of cases, such as *Platamone v. Staple* G. Coop. 250, *Groves v. Groves* 3 Y. & J. 163; and *Haigh v. Kaye* L.R. 7 Ch. App. 469. It follows that the so-called *Bowmakers* rule [1945] K.B. 65 does not apply in cases concerned with the principle under discussion, because once it comes to the attention of a court of equity that the claimant has not come to the court with clean hands, the court will refuse to assist the claimant, even though the claimant can prima facie establish his claim without recourse to the underlying fraudulent or illegal purpose. This is a point to which I will return when I come to consider the judgment of Lloyd L.J. in the present case.

It is against the background of these established principles that I turn to consider the judgments of the majority of the Court of Appeal. As I have recorded, Nicholls L.J. in particular invoked a line of recent cases, largely developed in the Court of Appeal, from which he deduced the proposition that, in cases of illegality, the underlying principle is the so-called public conscience test, under which the court must weigh, or balance, the adverse consequences of respectively granting or refusing relief. This is little different, if at all, from stating that the court has a discretion whether to grant or refuse relief. It is very difficult to reconcile such a test with the principle of policy stated by Lord Mansfield C.J. in *Holman v. Johnson* 1 Cowp. 341, 343, or with the established principles to which I have referred. It is

necessary therefore to examine with some care the authorities relied upon by Nicholls L.J. in support of his statement of the applicable law.

The first case is *Thackwell* v. *Barclays Bank Plc* [1986] 1 All E.R. 676. In that case the plaintiff claimed damages from the defendant bank for negligence and conversion of a cheque by the bank. The point was taken that the cheque formed part of a fraudulent financing scheme, to which the plaintiff was a party; and the bank (whose defence under section 4 of the Cheques Act 1957 failed, because the judge (Hutchison J.) held that the bank ought to have been put on enquiry) pleaded that the plaintiffs claim must fail by reason of the maxim ex turpi causa non oritur actio. It was conceded on behalf of the plaintiff that, if he knew at the time that there was such a scheme, his claim must fail. Hutchison J. held that the plaintiff knew from the outset that the scheme was fraudulent and willingly participated in it. Accordingly the plaintiff's claim failed. However, the defendant had advanced an alternative argument on the basis of which he submitted that, even if the plaintiff was innocent, his claim should fail. The judge accepted this alternative argument, and indicated that, even if he had held the plaintiff to be innocent, he would have denied him recovery. In this argument, we find the origin of the so-called public conscience test, which involved (see p. 687d) -

"... the court looking at the quality of the illegality relied on by the defendant and all the surrounding circumstances, without fine distinctions, and seeking to answer two questions: first, whether there had been illegality of which the court should take notice and, second, whether in all the circumstances it would be an affront to the public conscience if by affording him the relief sought the court was seen to be indirectly assisting or encouraging the plaintiff in his criminal act."

It is to be observed that the test is not stated as a general principle, but as a limited principle under which the court may deny relief in certain specific circumstances, even though the claimant is not implicated in the illegality. Furthermore, the test does not as stated involve any balancing exercise of the kind described by Nicholls L.J. in the present case. It is unnecessary for your Lordships' House to consider for present purposes whether the test accepted by Hutchison J. is good law or not. I wish only to refer to the fact that of the four cases relied upon as providing support for it, the first *(Burns v. Edman* [1970] 2 Q.B. 541) was concerned with a claim under the Fatal Accidents Acts founded upon the income from the deceased as a burglar; the second *(Murphy v. Culhane* [1977] QB 94) was concerned with a claim for damages by the deceased's widow, the deceased having been killed by the defendant during a criminal affray initiated by the deceased); the third *(Shelley v. Paddock* [1980] Q.B. 348) was concerned with a claim for damages for fraud, where the defendant had swindled the plaintiff out of the price paid by her for property in Spain, the plaintiff having innocently paid the money in breach of the Exchange Control Act 1947; and the fourth *(Geismar v. Sun Alliance and London Insurance Ltd* [1978] Q.B. 383) was a

case in which the plaintiffs claim to an indemnity under a contract of insurance, in respect of the loss of jewellery deliberately imported in breach of the Customs and Excise Act 1952, failed because recovery of such an indemnity would indirectly enable the plaintiff to profit from his deliberate breach of the law. It is by no means easy to see how any broadly applicable public conscience test could be derived from these authorities.

However, in three subsequent cases the principle so accepted by Hutchison J. was adopted and expanded by the Court of Appeal. The first was *Saunders* v. *Edwards* [1987] 1 W.L.R. 1116. The case was concerned with a claim by the

purchasers of the lease of a flat against the vendor for damages for fraudulently misrepresenting that the flat included a roof terrace. In answer, the defendant pleaded illegality, on the ground that the respective values of the flat and certain chattels in it had been distorted in the contract at the suggestion of the plaintiffs by exaggerating the value of the chattels and so diminishing the value of the flat, in order to reduce the stamp duty payable on the transaction. The plaintiffs succeeded in their claim, having an unassailable claim for damages for fraud which did not involve any reliance on the contract of sale itself; but reference was made to Hutchison J.'s judgment in *Thackwell* [1986] 1 All E.R. 676, and Nicholls L.J. in particular adopted and applied the public conscience test as being applicable in a case concerned with a claim in tort arising out of fraudulent activities.

A further step was taken by the Court of Appeal in *Euro-Diam Ltd v. Bat hurst* [1990] 1 Q.B. 1, a case concerned with a claim under an insurance policy in respect of a consignment of precious stones exported to West Germany which was stolen from a German company's warehouse. The defendant raised an issue of illegality, which was rejected both at first instance and by the Court of Appeal. It is enough for present purposes to record that Kerr L.J., citing *Saunders* v. *Edwards* [1987] 1 W.L.R. 1116, stated the principles relating to illegality in a series of numbered paragraphs, in the first of which he stated, at p. 35, that "the ex turpi causa defence . . . . applies if in all the circumstances it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts. . . ." This broad general statement appears to have been qualified in a later paragraph in Kerr L.J. 's statement of the law; even so,, we can here see the limited principle accepted by Hutchison J. being given a new and wider role, apparently with the purpose of softening the rigour of the principle of policy established in the older authorities.

A more decisive step was taken in the third case, *Howard* v. *Shirlstar Container Transport Ltd* [1990] 1 W.L.R. 1292. The case was concerned with a contract for the recovery from Nigeria of an aircraft owned by the defendants which was being detained by the Nigerian authorities at Lagos.

Under the contract, the plaintiff was entitled to recover a fee of £25,000 if he "successfully" removed the aircraft from Nigerian airspace. He succeeded

in so doing, in so far as he, at some risk to his life, flew the aircraft out of Lagos as far as the Ivory Coast, where however the aircraft was impounded by the authorities and returned by them to Nigeria. The plaintiffs claim for the balance of his fee was met by the defence of illegality, on the ground that he took off without obtaining the necessary clearance in breach of air traffic control regulations at Lagos; in fact he had left in a hurry, without obtaining clearance, because he had been warned that his and his wireless operator's lives were in danger and that he would not be given permission to take off. The Court of Appeal, deciding that the defence of illegality failed, relied explicitly on the public conscience test, holding that the conscience of the court would not be affronted by enforcing the plaintiffs claim under the contract for the balance of his fee. This appears to have been a case concerned not so much with an illegal contract as such, but with illegality committed in the performance of the contract. In normal circumstances, one would have expected it to be decided on the principle stated by Devlin. J. in *St. John Shipping Corporation v. Joseph Rank Ltd* [1957] 1 Q.B. 267. In any event, there was evidence that the plaintiffs and his companion's lives were in danger, and that this might well have provided a defence to the alleged breach of Nigerian law - a point left open by the Court of Appeal.

Finally there came the explicit reliance on the public conscience test by Nicholls L.J. in the present case, in the manner I have described.

I feel driven to say that what appears to have happened is that a principle, developed by counsel for the defendant bank in *Thackwell* [1986] 1 All E.R. 676 for a limited purpose in the context of a claim in tort, has been allowed to expand, both in its terms and in its range of application, so that it is now suggested that it operates as a broad qualifying principle, modifying and indeed transforming the long established principles applicable in cases of illegality, and in particular in relation to the principle established as applicable in cases such as the present. Furthermore, this development has been allowed to occur without addressing the questions (1) whether the test is consistent with earlier authority; (2) if it was not so consistent, whether such a development could take place consistently with the doctrine of precedent as applied in the Court of Appeal; or (3) whether the resulting change in the law, if permissible, was desirable. It is unnecessary for your Lordships to decide whether any such test is applicable in the limited context in which it originally emerged before Hutchison J. It is sufficient for present purposes to say, with the greatest respect, that to apply the public conscience test as qualifying the principle established for nearly 200 years as applicable in cases such as the present is, for reasons I have already stated, inconsistent with numerous authorities binding on the Court of Appeal. In expressing this opinion, I wish to stress that, as can so often happen, your Lordships have had the benefit of a far fuller citation of authority than was available to the

Court of Appeal, which has revealed that (contrary to the view expressed by Nicholls L.J. [1992] Ch. 310, 322 E) the decision in *Curtis v. Perry* 6 Ves. 739 was not followed by "a surprising dearth of authority, for over a century." On the contrary, there were numerous cases decided during that

period, many of which I have already cited, in which the principle was recognised or applied. Nor in my opinion can it be said (as stated by Nicholls L.J. at p.324 C-D) that the authorities in this line in which equity refuses its assistance can properly be regarded as examples of cases in which, in particular circumstances, the court considered that to have granted relief would have been "an affront to the public conscience," or (as suggested by Lloyd L.J. at p. 341 H) as cases "where the equitable balance came down against the plaintiff." There is no trace of any such principle forming part of the decisions in any of the cases in question. It follows that in my opinion, on the authorities, it was not open to the majority of the Court of Appeal to dismiss the appellant's claim on the basis of the public conscience test invoked by Nicholls L.J., or indeed on the basis of the flexible approach adopted by Lloyd L.J., to whose judgment I now turn.

Lloyd L.J. held that it was not the respondent, but the appellant, who had relied on the illegality in the present case; and that accordingly, on the *Bowmakers* rule [1949] K.B. 65, the respondent was entitled to succeed in her claim for an equitable interest in the house. This theme is developed in the speech of my noble and learned friend Lord Browne-Wilkinson, who has discerned a development in the law since the late nineteenth century which supports this approach.

For reasons which I have already given, I have been unable to discover any such development in the law. As I read the authorities, they reveal a consistent application of the principle, subject only to the recognition of a locus poenitentiae for the claimant where the illegal, purpose has not been carried into effect. Furthermore, the invocation by Lloyd L.J. of the *Bowmakers* rule is, as I have already indicated, inconsistent with principle and authority. This conclusion flows from the nature of the principle itself, which is that a court of equity will not assist a claimant who does not come to equity with clean hands. This equitable maxim is more broadly based than the *Bowmakers* rule. It is founded on the principle that he who has committed iniquity shall not have equity; and what is required to invoke the maxim is no more than that the alleged misconduct has "an immediate and necessary relation to the equity sued for": see *Dering v. Earl of Winchelsea* (1787) 1 Cox Eq. 318, 319-320, and *Snell's Equity,* 29th ed., (1990), p. 32.

I have already expressed my respectful disagreement with the view expressed by my noble and learned friend Lord Browne-Wilkinson that the law has already developed at least in the direction of the conclusion which he

favours. I have nevertheless considered whether your Lordships' House should in the present case develop the law, with a view to qualifying the principle by the application to it of the *Bowmakers* rule. I can see the temptation of doing so, if one focuses only on the facts of the present case in which it seems particularly harsh not to assist the respondent to establish her equitable interest in the house where not only was the appellant implicated in precisely the same fraud on the Department of Social Security, but the fraud in question can be regarded as relatively minor and indeed all too prevalent,

and the respondent has readily confessed her wrongdoing to the Department and has made amends to them. Furthermore it is probable that, if the appeal should be allowed, the effect will be that she will lose all her capital. But it is not to be forgotten that other cases in this category will not evoke the same sympathy on the part of the court. There may be cases in which the fraud is far more serious than that in the present case, and is uncovered not as a result of a confession but only after a lengthy police investigation and a prolonged criminal trial. Again there may be cases in which a group of terrorists, or armed robbers, secure a base for their criminal activities by buying a house in the name of a third party not directly implicated in those activities. In cases such as these there will almost certainly be no presumption of advancement. Is it really to be said that criminals such as these, or their personal representatives, are entitled to invoke the assistance of a court of equity in order to establish an equitable interest in property? It may be said that these are extreme cases; but I find it difficult to see how, in this context at least, it is possible to distinguish between degrees of iniquity. At all events, I cannot think that the harsh consequences which will arise from the application of the established principle in a case such as the present provide a satisfactory basis for developing the law in a manner which will open the door to far more unmeritorious cases, especially as the proposed development in the law appears to me to be contrary to the established principle underlying the authorities.

Finally, I wish to revert to the public conscience test favoured by Nicholls L.J. in the Court of Appeal. Despite the fact that I have concluded that on the authorities it was not open to the Court of Appeal to apply the public conscience test to a case such as the present, I have considered whether it is open to your Lordships' House to do so and, if so, whether it would be desirable to take this course. Among the authorities cited to your Lordships, there was no decision of this House; technically, therefore, it may be said that this House is free to depart from the line of authority to which I have referred. But the fact remains that the principle invoked by the appellant has been consistently applied for about two centuries. Furthermore the adoption of the public conscience test, as stated by Nicholls L.J., would constitute a revolution in this branch of the law, under which what is in effect a discretion would become vested in the court to deal with the matter by the process of a balancing operation, in place of a system of rules, ultimately derived from the

principle of public policy enunciated by Lord Mansfield C.J. in *Holman v. Johnson* 1 Cowp. 341, which lies at the root of the law relating to claims which are, in one way or another, tainted by illegality. Furthermore, the principle of public policy so stated by Lord Mansfield cannot be disregarded as having no basis in principle. In his dissenting judgment in the present case [1992] Ch. 310, Ralph Gibson L.J. pointed out, at p. 334 E-G:

> "In so far as the basis of the ex turpi causa defence, as founded on public policy, is directed at deterrence it seems to me that the force of the deterrent effect is in the existence of the known rule and in its stern application. Lawyers have long known of the rule and must

> have advised many people of its existence. It does not stop people making arrangements to defraud creditors, or the revenue, or the D.S.S. Such arrangements as are under consideration in this case are usually made between married couples as in *Tinker* v. *Tinker,* or between unmarried lovers as in this case or in *Cantor v. Cox* 239 E.G. 121. If they do not fall out, no one will know. If they do fall out, one side may reveal the fraud. It is an ugly situation when that is done. I think that the law has upheld the principle on the simple ground that, ugly though its working may be, it is better than permitting the fraudulent an avenue of escape if the fraud is revealed".

I recognise, of course, the hardship which the application of the present law imposes upon the respondent in this case; and I do not disguise my own unhappiness at the result. But, bearing in mind the passage from the judgment of Ralph Gibson L.J. which I have just quoted, I have to say that it is by no means self-evident that the public conscience text is preferable to the present strict rules. Certainly, I do not feel able to say that it would be appropriate for your Lordships House, in the face of a long line of unbroken authority stretching back over two hundred years, now by judicial decision to replace the principles established in those authorities by a wholly different discretionary system.

In saying this, I have well in mind the reform introduced in New Zealand by the New Zealand Illegal Contracts Act 1970, which in section 6 provides that "... every illegal contract shall be of no effect and no person shall become entitled to any property under a disposition made by or pursuant to any such contract: . . . "; and in section 7 confers on the court the power to grant relief "by way of restitution, compensation, variation of the contract, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the court in its discretion thinks just". These provisions of the Act demonstrate how sweeping a reform was considered necessary by the New Zealand legislature in order to substitute a system of discretionary relief for the present system of rules founded upon the in pan

delicto principle; and even then the Act is restricted to cases concerned with illegal contracts. Your Lordships have no means of ascertaining how successful the Act has proved to be in practice; or whether, for example, it is considered that the scope of the Act should be extended to embrace other types of illegality. In truth, everything points to the conclusion that, if there is to be a reform aimed at substituting a system of discretionary relief for the present rules, the reform is one which should only be instituted by the legislature, after a full inquiry into the matter by the Law Commission, such inquiry to embrace not only the perceived advantages and disadvantages of the present law, but also the likely advantages and disadvantages of a system of discretionary relief, no doubt with particular reference to the New Zealand experience. The real criticism of the present rules is not that they are unprincipled, but rather that they are indiscriminate in their effect, and are capable therefore of producing injustice. It is this effect which no doubt prompted the reform of the law in New Zealand, embodied in the Act of

1970; and it prompts me to say that, speaking for myself, I would welcome an investigation by the Law Commission, if this is considered desirable and practicable by the authorities concerned; and that I would be more than happy if a new system could be evolved which was both satisfactory in its effect and capable of avoiding the kind of result which flows from the established rules of law in cases such as the present.

For these reasons, which are substantially the same as those expressed by Ralph Gibson L.J. in his dissenting judgment in the Court of Appeal, I would allow the appeal.

LORD JAUNCEY OF TULLICHETTLE

My Lords,

The parties to this appeal lived together for some years in a house in mid-Glamorgan which they ran as a lodging-house. The purchase price of the house was provided by a mortgage loan from the bank and a sum of money which was provided jointly by the parties. It was, however, agreed between them that the title should be taken in the sole name of the appellant in order to facilitate the making by the respondent of false claims upon the D.S.S. In 1988 the parties fell out and the appellant moved out of the house. She subsequently raised the present action claiming possession of the property and the respondent counter-claimed for a declaration to the effect that the appellant held the property on trust for the respondent and the appellant in equal shares. The County Court judge dismissed the claim and found for the defendant on the counter-claim and the Court of Appeal by a majority (Ralph Gibson L.J.

dissenting) dismissed the appellant's appeal. The issues in the courts below and before this House revolved round the illegal purpose of taking the title of the house in the name of the appellant alone.

Had the case been heard by Lord Eldon in the early years of the 19th century there could be no doubt as to what the results would have been. In *Muckleston v. Brown* (1801) 6 Ves. 53, Lord Eldon L.C. said, at p. 69:

> ". . . the plaintiff stating, he had been guilty of a fraud upon the law, to evade, to disappoint, the provision of the legislature, to which he is bound to submit, and coming to equity to be relieved against his own act, and the defence being dishonest, between the two species of dishonesty the court would not act; but would say, 'Let the estate lie, where it falls.'"

In the following year in *Curtis v. Perry* (1802) 6 Ves. 739, the Lord Chancellor had to consider whether a deceased Member of Parliament could have claimed an equitable interest in a ship which had been registered in the

sole name of his partner in order to evade a statutory provision which would have imposed penalties on the Member of Parliament had the ship been employed in the service of the Government while he was a Member. It appears to have argued, inter alia, that there was an implied trust by operation of law since the purchase had been made of joint properties. The Lord Chancellor rejected this argument saying that as between the two partners, Chiswell, the Member of Parliament, could not be heard to say that he had any interest in the ship. He went on the say, at p 744:

> "The reason for waiving any right Chiswell had in consequence of the manner, in which Nantes made this purchase, the object of keeping the ships registered in the name of Nantes, was, that a profit might be made by the employment of them in contracts with Government; and Chiswell was a Member of Parliament; who, the law says , shall not be a contractor. The moment the purpose to defeat the policy of the law by fraudulently concealing, that this was his property, is admitted, it is very clear, he ought not to be heard in this Court to say, that is his property."

Curtis v. Perry was commented on by Lord Eldon in *Ex parte Yallop* (1808) 15 Ves. 60, in which it was held that the registry of ship was conclusive evidence of ownership. The Lord Chancellor, after referring to Chiswell's conduct, said, at p. 70:

> "Two principles therefore stood in his way: first, that he had broken in upon the policy of the Act of Parliament; and could not be permitted

> to say, he had property of this nature, not subject to the regulations of the Act; and farther, that he had done so for the purpose of defeating another law; meaning to hold himself out not to be owner of those ships; as they were bound by contracts, of which he, being a Member of Parliament, could not have the benefit. Under those circumstances it could not possibly be contended, that he had that character of owner, which for his own private and fraudulent purpose he had disclaimed."

The Act of Parliament was of court the Act providing for registration of ownership of ships. I do not understand the Lord Chancellor to be there saying that Chiswell's claim to an equitable interest was defeated only because of a combination of two grounds but rather that it would have been defeated on either ground. It seems probable that the second ground would have been decisive of the present appeal. The question in 1993 is whether the law remains the same or whether in the intervening 180 or more years the very broad principles enunciated by Lord Eldon have been to any extent modified.

At the outset it seems to me to be important to distinguish between the enforcement of executory provisions arising under an illegal contract or other transaction and the enforcement of rights already acquired under the completed provisions of such a contract or transaction. Your Lordships were referred

to a very considerable number of authorities, both ancient an modern, from which certain propositions may be derived.

First: it is trite law that the court will not give its assistance to the enforcement of executory provisions of an unlawful contract whether the illegality is apparent ex facie the document or whether the illegality of purpose of what would otherwise be a lawful contract emerges during the course of the trial. *(Holman v. Johnson* (1775) 1 Cowp. 341, 343, per Lord Mansfield C.J.; *Pearce* v. *Brooks* (1866) L.R. 1 Exch. 213, 217-218, per Pollock C.B.; *Alexander v. Rayson* [1936] 1 K.B. 169, 182; *Bowmakers Ltd. v. Barnet Instruments Ltd.* [1945] K.B. 65, 70).

Second: it is well established that a party is not entitled to rely on his own fraud or illegality in order to assist a claim or rebut a presumption. Thus when money or property has been transferred by a man to his wife or children for the purpose of defrauding creditors and the transferee resists his claim for recovery he cannot be heard to rely on his illegal purpose in order to rebut the presumption of advancement. *(Gascoigne v. Gascoigne* [1918] 1 K.B. 223, 226; *Palaniappa Chettiar* v. *Arunasalam Chettiar* [1962] AC 294, 302; *Tinker v. Tinker* [1970] P. 136, Salmon LJ. 143.)

Third: it has, however, for some years been recognised that a completely executed transfer of property or of an interest in property made in pursuance of an unlawful agreement is valid and the court will assist the transferee in the protection of his interest provided that he does not require to found on the unlawful agreement *(Ayerst v. Jenkins* (1873) L.R. 16 Eq. 275, 283, *Alexander v. Rayson* [1936] 1 K.B. 169, 184-185, *Bowmakers Ltd. v. Barnet Instruments Ltd.* [1945] K.B. 65, *Singh v. Ali* [1960] AC 167, 176). To the extent, at least, of his third proposition it would appear that there has been some modification over the years of Lord Eldon's principles.

The ultimate question in this appeal is, in my view, whether the respondent is claiming the existence of a resulting trust in her favour is seeking to enforce unperformed provisions of an unlawful transaction or whether she is simply relying on an equitable proprietary interest that she has already acquired under such a transaction. The nature of a resulting trust was described by Lord Diplock in *Gissing v. Gissing* [1971] AC 886, 905B as follows:

> "A resulting, implied or constructive trust - and it is unnecessary for present purposes to distinguish between these three classes of trust - is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui

> que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land."

I find this a very narrow question but I have come to the conclusion that the transaction whereby the claimed resulting trust in favour of the respondent was created was the agreement between the parties that although funds were to be provided by both of them, nevertheless the title to the house was to be in the sole name of the appellant for the unlawful purpose of defrauding the D.S.S. So long as that agreement remained unperformed neither party could have enforced it against the other. However, as soon as the agreement was implemented by the sale to the appellant alone she became trustee for the respondent who can now rely on the equitable proprietary interest which has thereby been presumed to have been created in her favour and has no need to rely on the illegal transaction which led to its creation.

My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Browne-Wilkinson. I agree with it and

for the reasons contained therein as well as for the reasons in this speech I would dismiss the appeal.

LORD LOWRY

My Lords,

I have had the advantage of reading in draft the speeches prepared by your Lordships and find myself in agreement with the conclusions reached by my noble and learned friends Lord Jauncey of Tullichettle and Lord Browne-Wilkinson. I acknowledge the persuasive force which has informed both the speech of my noble and learned friend Lord Goff of Chieveley and the judgment of Ralph Gibson L.J. in the Court of Appeal, but I am unable to accept and act upon Lord Eldon's wide principle despite its eminent authorship and its impressive antiquity.

The advancement cases belong to a class in relation to which the rule seems to me to conform with equitable principles. The ostensible donor makes a gift with a fraudulent purpose in view; when he tries to assert his equitable title, he is obliged to rely on his own fraud in order to rebut the presumption of advancement. Equity, through the mouth of the court, then says, "We will not assist you to recover your property, because you have to give evidence of your own wrongdoing in order to succeed." On the other hand, under the wide principle, someone in the position of Miss Milligan, who has only to show a trust, resulting from the fact (which he must prove or which may be admitted) that the property was acquired wholly or partly by the use of his money, is said to be defeated by the maxim that he who comes into equity must come with clean hands, on the ground that the original transaction

was undertaken for a fraudulent purpose. But in the latter case the claimant is not relying on his own fraud in order to succeed and is merely said to be defeated by a rule of policy, despite the fact that he already has an equitable interest, as the locus poenitentiae rule confirms.

In *Curtis v. Perry* (1802) 6 Ves. Jun. 740, as to which I happily adopt the analysis of my noble and learned friend Lord Jauncey, Lord Eldon gave two reasons for defeating the creditors of Chiswell's estate, but much the more important and just reason to my mind, as I think - the report of the judgment indicates, was the fact that Nantes had registered the ships in his name under the relevant Acts and that both he and Chiswell had led the trading world to believe that they were Nantes's sole property. Of course, as my noble and learned friend Lord Goff has illustrated, *Curtis v. Perry* is by no means a unique example of the application of Lord Eldon's wide principle

to cases in which there was no presumption of advancement, but even a plurality of examples does not in my opinion endow the wide principle with validity.

The rule of policy which is said to justify the wide principle should be closely examined. A and B buy property in equal shares and by agreement B acquires the legal title. A, either by himself or in conspiracy with B (who may or may not stand to benefit from the fraud), plans to obtain a financial advantage by falsely pretending that he owns no property: if A goes through with the scheme, the wide principle applies, although, in order to assert his rights against B, A does not need to rely on his own fraud. Indeed, where the presumption of advancement does not apply, it is B who will have to rely on the fraud (to which in some cases he has been privy) as a defence. If, on the other hand, the property has been innocently acquired and A later takes advantage of his lack of a legal title to make the same false pretence, his claim against B on foot of a resulting trust cannot be defeated. The criminal sanction against A is the same in either case.

I am not impressed by the argument that the wide principle acts as a deterrent to persons in A's position. In the first place, they may not be aware of the principle and are unlikely to consult a reputable solicitor. Secondly, if they commit a fraud, they will not have been deterred by the possibility of being found out and prosecuted. Furthermore, the wide principle could be a positive encouragement to B, if he is aware of the principle, because by means of his complicity, he may become not only the legal owner but the beneficial owner.

For A to take proceedings in order to vindicate his equitable rights as sole or joint beneficial owner is not an example of the maxim ex turpi causa non oritur actio because his equitable title and his cause of action do not arise out of his illegal or immoral act. It is B who must rely on the turpis causa as a defence.

The foregoing considerations render me all the more convinced that the right view is that a party cannot rely on his own illegality in order to prove his equitable right, and not that a party cannot recover if his illegality is proved as a defence to his claim. I consider that the wide principle is not well founded and, since it is not binding on your Lordships, that your Lordships should not follow it.

While the *Bowmaker* rule could not unaided overturn a sound and established principle of equity, I find it satisfactory that the course preferred by my noble and learned friends Lord Jauncey and Lord Browne-Wilkinson will promote harmony between equity and the common law. Accordingly, for

the reasons which they have given, and also for the further reasons which I have mentioned, I would dismiss the appeal.

LORD BROWNE-WILKINSON

My Lords,

I agree with the speech of my noble and learned friend Lord Goff of Chieveley that the consequences of being a party to an illegal transaction cannot depend, as the majority in the Court of Appeal held, on such an imponderable factor as the extent to which the public conscience would be affronted by recognising rights created by illegal transactions. However, I have the misfortune to disagree with him as to the correct principle to be applied in a case where equitable property rights are acquired as a result of an illegal transaction.

Neither at law nor in equity will the court enforce an illegal contract which has been partially, but not fully, performed. However, it does not follow that all acts done under a partially performed contract are of no effect. In particular it is now clearly established that at law (as opposed to in equity), property in goods or land can pass under, or pursuant to, such a contract. If so, the rights of the owner of the legal title thereby acquired will be enforced, provided that the plaintiff can establish such title without pleading or leading evidence of the illegality. It is said that the property lies where it falls, even though legal title to the property was acquired as a result of the property passing under the illegal contract itself. I will first consider the modern authorities laying down the circumstances under which an illegal transaction will be enforced by the courts. I will then consider whether the courts adopt a different attitude to equitable proprietary interests so acquired.

The position at law is well illustrated by the decision in *Bowmakers Ltd.* v. *Barnet Instruments Ltd* [1945] K.B. 65. In that case Barnet acquired three parcels of machine tools which had previously belonged to Smith. The transaction was carried through by three hire-purchase agreements under

which Smith sold the goods to Bowmakers who then hired them to Barnet. All three agreements were unlawful as being in breach of Defence Regulations: it is important to note that in the case of at least two of the parcels the illegality lay in the contract under which Bowmakers acquired the machine tools from Smith: see p. 69. Bowmakers succeeded in an action for conversion against Barnet. Even though it appeared from the pleadings and the evidence that the contract under which Bowmakers acquired the goods was illegal, such contract was effective to pass the property in the goods to

Bowmakers who could therefore found their claim on the property right so acquired.

The position at law is further illustrated by *Ferret v. Hill* (1854) 15 C.B. 207 where A, with intent to use premises as a brothel, took a lease from B. B, having discovered that the premises were being used as a brothel, ejected A. A was held entitled to maintain ejectment against B notwithstanding that A entered into the lease for an illegal purpose.

In *Taylor v. Chester* (1869) L.R. 4 Q.B. 309 the plaintiff had deposited with the defendant half a £50 note as security for payment due under an illegal contract with the defendant. The plaintiff was held unable to recover the half note as a special property in it (i.e. the security interest) had passed to the defendant.

In *Alexander v. Rayson* [1936] 1 K.B. 169 the plaintiff had leased a property to the defendant. For the purpose of defrauding the rating authorities, the plaintiff had carried through the transaction by two documents, one a lease which expressed a low rent the other a service agreement providing for additional payments sufficient to bring up the annual payment to the actual rent agreed. The plaintiff failed in an action to recover rent due under the agreements but the Court of Appeal (at p. 186) said that if the plaintiff had let the flat to be used for an illegal purpose, the leasehold interest in the flat would have vested in the defendant who would have been entitled to remain in possession of the flat until and unless the plaintiff could eject her without relying on the unlawful agreement.

From these authorities the following propositions emerge:

1. Property in chattels and land can pass under a contract which is illegal and therefore would have been unenforceable as a contract;

2. A plaintiff can at law enforce property rights so acquired provided that he does not need to rely on the illegal contract for any purpose other than providing the basis of his claim to a property right;

3. It is irrelevant that the illegality of the underlying agreement was either pleaded or emerged in evidence: if the plaintiff has acquired legal title under the illegal contract that is enough.

I have stressed the common law rules as to the impact of illegality on the acquisition and enforcement of property rights because it is the appellant's contention that different principles apply in equity. In particular it is said that equity will not aid Miss Milligan to assert, establish or enforce an equitable, as opposed to a legal, proprietary interest since she was a party to the fraud

on the D.H.S.S. The house was put in the name of Miss Tinsley alone (instead of joint names) to facilitate the fraud. Therefore, it is said, Miss Milligan does not come to equity with clean hands: consequently, equity will not aid her.

Most authorities to which we were referred deal with enforcing proprietary rights under a trust: I will deal with them in due course. But before turning to them, I must point out that if Miss Tinsley's argument is correct, the results would be far reaching and, I suggest, very surprising. There are many proprietary rights, apart from trusts, which are only enforceable in equity. For example, an agreement for a lease under which the tenant has entered is normally said to be as good as a lease, since under such an agreement equity treats the lease as having been granted and the "lessee" as having a proprietary interest enforceable against the whole world except the bona fide purchaser for value without notice. Would the result in *Ferret v. Hill* 15 C.B. 207 have been different if there had only been an agreement for a lease? Say that in *Taylor v. Chester* L.R. 4 Q.B. 309 the plaintiff had deposited by way of security share certificates instead of half a bank note (thereby producing only an equitable security): would the outcome have been different? Similarly, if the plaintiff were relying on ah assignment of a chose in action would he succeed if the assignment was a legal assignment but fail if it were equitable?

In my judgment to draw such distinctions between property rights enforceable at law and those which require the intervention of equity would be surprising. More than 100 years has elapsed since law and equity became fused. The reality of the matter is that, in 1993, English law has one single law of property made up of legal and equitable interests. Although for historical reasons legal estates and equitable estates have differing incidents, the person owning either type of estate has a right of property, a right in rem not merely a right in personam. If the law is that a party is entitled to enforce a property right acquired under an illegal transaction, in my judgment the same rule ought to apply to any property right so acquired, whether such right is legal or equitable.

In the present case, Miss Milligan claims under a resulting or implied trust. The court below have found, and it is not now disputed, that apart from the question of illegality Miss Milligan would have been entitled in equity to a half share in the house in accordance with the principles exemplified in *Gissing* v. *Gissing* [1971] AC 886; *Grant v. Edwards* [1986] Ch 638 and *Lloyds Bank Plc. v. Rosset* [1991] AC 107. The creation of such an equitable interest does not depend upon a contractual obligation but on a common intention acted upon by the parties to their detriment. It is a

development of the old law of resulting trust under which, where two parties have provided the purchase money to buy a property which is conveyed into the name of one of them alone, the latter is presumed to hold the property on a resulting trust for both parties in shares proportionate to their contributions to the purchase price. In arguments, no distinction was drawn between strict resulting trusts and a *Gissing v. Gissing* type of trust.

A presumption of resulting trust also arises in equity when A transfers personalty or money to B: see *Snell's Equity* 29th ed. (1990) pp. 183-184; *Standing v. Bowring* (1885) 31 Ch. D. 282, 287, per Cotton L.J.; *Dewar v. Dewar* [1975] 1 W.L.R. 1532, 1537d. Before 1925, there was also a presumption of resulting trust when land was voluntarily transferred by A to B: it is arguable, however, that the position has been altered by the 1925 property legislation: see *Snell* 29th ed. p. 182. The presumption of a resulting trust is, in my view, crucial in considering the authorities. On that presumption (and on the contrary presumption of advancement) hinges the answer to the crucial question "does a plaintiff claiming under a resulting trust have to rely on the underlying illegality?". Where the presumption of resulting trust applies, the plaintiff does not have to rely on the illegality. If he proves that the property is vested in the defendant alone but that the plaintiff provided part of the purchase money, or voluntarily transferred the property' to the defendant, the plaintiff establishes his claim under a resulting trust unless either the contrary presumption of advancement displaces the presumption of resulting trust or the defendant leads evidence to rebut the presumption of resulting trust. Therefore, in cases where the presumption of advancement does not apply, a plaintiff can establish his equitable interest in the property without relying in any way on the underlying illegal transaction. In this case Miss Milligan as defendant simply pleaded the common intention that the property should belong to both of them and that she contributed to the purchase price: she claimed that in consequence the property belonged to them equally. To the same effect was her evidence in chief. Therefore Miss Milligan was not forced to rely on the illegality to prove her equitable interest. Only in the reply and the course of Miss Milligan's cross-examination did such illegality emerge: it was Miss Tinsley who had to rely on that illegality.

Although the presumption of advancement does not directly arise for consideration in this case, it is important when considering the decided cases to understand its operation. On a transfer from a man to his wife, children or others to whom he stands in loco parentis, equity presumes an intention to make a gift. Therefore in such a case, unlike the case where the presumption of resulting trust applies, in order to establish any claim the plaintiff has himself to lead evidence sufficient to rebut the presumption of gift and in so doing will normally have to plead, and give evidence of, the underlying illegal purpose.

Against this background, I turn to consider the authorities dealing with the position in equity where A transferred property to B for an illegal purpose. The earlier authorities, primarily Lord Eldon, support the appellant's

proposition that equity will not aid a plaintiff who has transferred property to another for an illegal purpose. In *Cottington* v. *Fletcher* (1740) 2 Atk. 155 a Roman Catholic had assigned an advowson to the defendant for a term of 99 years for the purpose of avoiding a statutory prohibition. On subsequently becoming a Protestant, he sought to recover the advowson from the defendant. The defendant pleaded the Statute of Frauds but also admitted that the advowson was assigned to him as trustee. On what appears to have been an interlocutory hearing, Lord Hardwicke, L.C., held, that in view of the admission of trust, the plea of the Statute of Frauds was bad. However he said (p. 156) that as the assignment was done in fraud of statute "I doubt at the hearing whether the plaintiff could be relieved, such fraudulent conveyances being make absolute against the grantor".

In *Muckeston v. Brown* (1801) 6 Ves. 53 (a case concerning secret trusts) Lord Eldon, at p. 69, ... cast doubt on Lord Hardwicke's view, possibly misunderstanding that Lord Hardwicke was dealing with the question whether the Statute of Frauds provided a defence and not directly with the question of illegality. Lord Eldon said, at pp. 68-69:

> "Lord Hardwicke means to say, that, if the defendant admits the trust, though against the policy of the law, he would relieve: but if he does not admit the trust, but demurs, he would do, what does not apply in the least to this case; the plaintiff stating, he had been guilty of a fraud upon the law, to evade, to disappoint, the provision of the Legislature, to which he is bound to submit, and coming to equity to be relieved against his own act, and the defence being dishonest, between the two species of dishonesty the court would not act; but would say, 'Let the estate lie, where it falls.'"

Those remarks were obiter. But in *Curtis* v. *Perry* (1802) 6 Ves. 739 Lord Eldon founded his decision on the same principle. In that case Nantes and Chiswell (who was a Member of Parliament) were partners. Ships had been purchased by Nantes out of partnership assets but registered in the sole name of Nantes. When Chiswell discovered the position, the ships were shown in the partnership books as being partnership property. However with Chiswell's connivance the ships remained registered in the sole name of Nantes so as to evade a statutory prohibition against the ships being used for Government contracts if owned by a Member of Parliament. In a dispute between the partnership creditors and Nantes' separate creditors, Lord Eldon held in flavour of the latter. He said, at p. 747:

> "The moment the purpose to defeat the policy of the law by fraudulently concealing, that this was his property, is admitted, it is very clear, he ought not to be heard in this Court to say, that is his property. In the case of a bill filed to have a reconveyance of a qualification given by the plaintiff to his son to enable him to sit in

Parliament, the purpose being answered, the Bill was very properly dismissed by Lord Kenyon with costs."

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See also *Ex parte Yallop* (1808) 15 Ves. 60.

The same broad principle was applied by the Exchequer Chamber in Equity in *Groves v. Groves* (1829) 3 Y. & J. 163. In that case the plaintiff had purchased land in the name of his brother so as to give the brother a necessary qualification to vote. The plaintiff claimed to recover the land under a resulting trust. His claim was dismissed on the grounds (p. 172), inter alia, "... that the illegal purpose for which this conveyance was made bars that equity". There are many other cases in the first half of the 19th century where the same principle was applied.

However, in my view, the law was not so firmly established as at first sight it appears to have been. The law on the effect of illegality was developing throughout the 19th century. In particular, if Lord Eldon's principle were to apply in its full vigour it would apply as much to claims by a guilty party to enforce an express trust as to enforce an implied or resulting trust: equity would not aid the plaintiff to enforce equitable claims against the holder of the legal estate. Yet in *Ayerst v. Jenkins* (1873) L.R. 16 Eq. 275 Lord Selborne L.C. apparently treated a party to the illegality as being entitled to enforce express trusts against trustees. In that case, the settlor transferred investments to trustees and executed a settlement for the sole benefit of the defendant with whom he was about to go through a ceremony of marriage which, to the knowledge of both, was illegal i.e. the settlement was made in contemplation of unlawful cohabitation. After the death of the settlor, his personal representative sought to recover the investments from the trustees claiming that the express trusts were invalid and that there was therefore a resulting trust to the senior. The claim failed, partly on the ground that there was no equity' in the senior to recover from the trustees in whom the legal title was vested, but also on the ground that there was a fully executed trust vesting in the defendant "the immediate and absolute beneficial interest": see the explanation, at pp. 284-285, *of Rider v. Kidder* (1805) 10 Ves. 361, 366. The whole case proceeded on the footing that the defendant, even if a party to the illegality, was entitled to enforce against the trustees her equitable rights as beneficiary under the express trusts against the trustees. This view would be quite inconsistent with a general rule such as that propounded by Lord Eldon that a court of equity will never enforce equitable proprietary interests as the suit of a party to an illegality.

The law was developing in another direction during the 19th century. There was originally a difference of view as to whether a transaction entered into for an illegal purpose would be enforced at law or in equity if the party had repented of his illegal purpose before it had been put into operation i.e. the doctrine of locus poenitentiae. It was eventually recognised both at law and in equity that if the plaintiff had repented before the illegal purpose was carried through, he could recover his property: see *Taylor v. Bowers* (1876)

I Q.B.D. 291; *Symes v. Hughes* (1870) L.R. 9 Eq. 475. The principle of locus poenitentiae is in my judgment irreconcilable with any rule that where property is transferred for an illegal purpose no equitable proprietary right

exists. The equitable right, if any, must arise at the time at which the property was voluntarily transferred to the third party or purchased in the name of the third party. The existence of the equitable interest cannot depend upon events occurring after that date. Therefore if, under the principle of locus poenitentiae, the courts recognise that an equitable interest did arise out of the underlying transaction, the same must be true where the illegal purpose was carried through. The carrying out of the illegal purpose cannot, by itself, destroy the pre-existing equitable interest. The doctrine of locus poenitentiae therefore demonstrates that the effect of illegality is not to prevent a proprietary interest in equity from arising or to produce a forfeiture of such right: the effect is to render the equitable interest unenforceable in certain circumstances. The effect of illegality is not substantive but procedural. The question therefore is, "In what circumstances will equity refuse to enforce equitable rights which undoubtedly exist".

It is against this background that one has to assess the more recent law. Although in the cases decided during the last one hundred years there are frequent references to Lord Eldon's wide principle, with one exception *(Cantor v. Cox* (1976) 239 E.G. 121) none of the English decisions are decided by simply applying that principle. They are all cases where the unsuccessful party was held to be precluded from leading evidence of an illegal situation in order to rebut the presumption of advancement. Lord Eldon's rule would have provided a complete answer whether the transfer was made to a wife or child (where the presumption of advancement would apply) or to a stanger. Yet with one exception none of the cases in this century has been decided on that simple basis.

The majority of cases have been those in which the presumption of advancement applied: in those authorities the rule has been stated as being that a plaintiff cannot rely on evidence of his own illegality to rebut the presumption applicable in such cases that the plaintiff intended to make a gift of the property to the transferee. Thus in *Gascoigne v. Gascoigne* [1918] 1 K.B. 223, *McEvoy v. Belfast Banking Co. Ltd.* [1934] N.I. 67; *In re Emery's Investments Trusts* [1959] Ch. 410; *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] AC 294 and *Tinker v. Tinker* [1970] P. 136, 141H, 142c the crucial point was said to be the inability of the plaintiff to lead evidence rebutting the presumption of advancement. In each case the plaintiff was claiming to recover property voluntarily transferred to, or purchased in the name of, a wife or child, for an illegal purpose. Although reference was made to Lord Eldon's principle, none of those cases was decided on the simple ground (if it were good law) that equity would not in any

circumstances enforce a resulting trust in such circumstances. On the contrary in each case the rule was stated to be that the plaintiff could not recover because he had to rely on the illegality to rebut the presumption of advancement.

In my judgment, the explanation for this departure from Lord Eldon's absolute rule is that the fusion of law and equity has led the courts to adopt

a single rule (application both at law and in equity) as to the circumstances in which the court will enforce property interests acquired in pursuance of an illegal transaction viz. the *Bowmaker* rule [1945] K.B. 65. A party to an illegality can recover by virtue of a legal or equitable property interest if, but only if, he can establish his title without relying on his own illegality. In cases where the presumption of advancement applies, the plaintiff is faced with the presumption of gift and therefore cannot claim under a resulting trust unless and until he has rebutted that presumption of gift: for those purposes the plaintiff does have to rely on the underlying illegality and therefore fails.

The position is well illustrated by two decisions in the Privy Council. In the first, *Singh v. Ali* [1960] AC 167 a plaintiff who had acquired legal title to a lorry under an illegal transaction was held entitled to succeed against the other party to the illegality in detinue and trespass. The Board approved the *Bowmaker* test. Two years later in *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] AC 294 the Board had to consider the case where a father, who had transferred land to his son for an illegal purpose, sought to recover it under a resulting trust. It was held that he could not, since he had to rely on his illegal purpose in order to rebut the presumption of advancement. The Board distinguished, at p. 301, the decision in *Haigh v. Kaye* (1872) L.R. 7 Ch. 469 on the following grounds:

> "It appears to their Lordships, however, that there is a clear distinction between *Haigh v. Kaye* and the present case. In *Haigh v. Kaye* the plaintiff conveyed a freehold estate to the defendant. In the conveyance it was stated that a sum of £850 had been paid by the defendant for it. The plaintiff proved that no such sum was paid and claimed that the defendant was a trustee for him. Now in that case the plaintiff had no reason to disclose any illegality and did not do so. It was the defendant who suggested that the transaction was entered into for a fraudulent purpose. He sought to drag it in without pleading it distinctly and he was not allowed to do so. But in the present case the plaintiff had of necessity to disclose his own illegality to the court and for this reason: He had not only to get over the fact that the transfer stated that the son paid $7,000 for the land, he also had to get over the presumption of advancement, for, whenever a father transfers property' to his son, there is a presumption that he intended it as a gift to his son; and if he wishes to rebut that presumption and to say that

his son took as trustee for him, he must prove the trust clearly and distinctly, by evidence properly admissible for the purposes, and not leave it to be inferred from slight circumstances: see *Shepherd v. Cartwright* [1955] AC 431, 445."

Further, the Board distinguished *Singh v. Ali* [1960] AC 167. It was pointed out that in *Singh v. Ali* the plaintiff founded his claim on a right of property in the lorry and his possession of it. The Board continued, at p 303:

"[The plaintiff] did not have to found his cause of action on an immoral or illegal act. He was held entitled to recover. But in the present case the father has of necessity to put forward, and indeed, assert, his own fraudulent purpose, which he has fully achieved. He is met therefore by the principle stated long ago by Lord Mansfield 'No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act' see *Holman v. Johnson* (1775) 1 Cowp. 341, 343"

In my judgment these two cases show that the Privy Council was applying exactly the same principle in both cases although in one case the plaintiffs claim rested on a legal title and in the other on an equitable title. The claim based on the equitable title did not fail simply because the plaintiff was a party to the illegal transaction; it only failed because the plaintiff was bound to disclose and rely upon his own illegal purpose in order to rebut the presumption of advancement. The Privy Council was plainly treating the principle applicable both at law and in equity as being that a man can recover property provided that he is not forced to rely on his own illegality.

I therefore reach the conclusion that, although there is no case overruling the wide principle stated by Lord Eldon, as the law has developed the equitable principle has become elided into the common law rule. In my judgment the time has come to decide clearly that the rule is the same whether a plaintiff founds himself on a legal or equitable title: he is entitled to recover if he is not forced to plead or rely on the illegality, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction.

As applied in the present case, that principle would operate as follows. Miss Milligan established a resulting trust by showing that she had contributed to the purchase price of the house and that there was common understanding between her and Miss Tinsley that they owned the house equally. She had no need to allege or prove why the house was conveyed into the name of Miss Tinsley alone, since that fact was irrelevant to her claim: it was enough to show that the house was in fact vested in Miss Tinsley alone. The illegality

only emerged at all because Miss Tinsley sought to raise it. Having proved these facts, Miss Milligan had raised a presumption of resulting trust. There was no evidence to rebut that presumption. Therefore Miss Milligan should succeed. This is exactly the process of reasoning adopted by the Ontario Court of Appeal in *Gorog v. Kiss* (1977) 78 D.L.R. (3d) 690 which in my judgment was rightly decided.

Finally, I should mention a further point which was relied on by Miss Tinsley. It is said that once the illegality of the transaction emerges, the court must refuse to enforce the transaction and all claims under it whether pleaded or not: see *Scon v. Brown, Doering, McNab & Co.* [1892] 2 Q.B. 724. Therefore, it is said, it does not matter whether a plaintiff relies on or gives evidence of the illegality: the court will not enforce the plaintiffs rights. In

my judgment, this submission is plainly ill founded. There are many cases where a plaintiff has succeeded, notwithstanding that the illegality of the transaction under which she acquired the property has emerged: see, for example, *Bowmakers Ltd. v. Barnet Instruments Ltd.* [1945] K.B. 65 and *Singh v. Ali* [1960] AC 167. In my judgment the court is only entitled and bound to dismiss a claim on the basis that it is founded on an illegality in those cases where the illegality is of a kind which would have provided a good defence if raised by the defendant. In a case where the plaintiff is not seeking to enforce an unlawful contract but founds his case on collateral rights acquired under the contract (such as a right of property) the court is neither bound nor entitled to reject the claim unless the illegality of necessity forms pan of the plaintiffs case.

I would therefore dismiss the appeal.