1937 *Present :* **Poyser S.P.J. and Fernando A.J.**

HULL, BLYTH & CO. *v.* VALIAPPA CHETTIAR.

180—D. C. Colombo 2,839.

Contract for sale of rubber—Purchase without a licence under the Rubber Thefts Prevention Ordinance—Contract not illegal—Ordinance not applicable to forward contracts—Rubber Thefts Prevention Ordinance, No. 21 of 1908, s. 3.

The provisions of section 3 of the Rubber Thefts Prevention Ordinance which require a purchaser of rubber to take out a licence do not render a forward contract for the sale of rubber entered into with an unlicensed purchaser illegal.

The provisions of the Ordinance do not apply to forward contracts and a licence under the Ordinance is not necessary until delivery of rubber is taken by way of completion of the contract.

THIS was an action to recover damages for breach of a contract entered into between the plaintiff Company and the defendant under which the plaintiffs agreed to sell to the defendant 150 tons of rubber, delivery to be in equal quantities of 25 tons monthly from August, 1934, to December, 1935.

The defendant accepted and paid for all deliveries in respect of the months of August, September, and October, 1934, but refused to accept or pay for any rubber tendered thereafter.

The grounds on which the defendant denied liability were—

(1) that the contract was an agreement to gamble in differences and therefore unenforceable ;

(2) that the contract was illegal as the defendant had not at the date of the contract a licence to deal in rubber in accordance with the terms of section 3 of the Rubber Thefts Prevention Ordinance ;

(3) that the plaintiffs did not duly tender to the defendant the rubber in accordance with the terms of the contract.

The learned District Judge, having found in favour of the plaintiff on the issues (1) and (3), held that as the defendant was not a licensed dealer under the Rubber Thefts Prevention Ordinance, the contract was prohibited and unenforceable.

Hayley, K.C. (with him *N. E. Weerasooria* and *D. W. Fernando*), for plaintiff, appellant.—The provisions of the Rubber Thefts Ordinance do not apply to forward contracts but only to purchases for immediate delivery. To ascertain the meaning of the word purchase in section 3, it is necessary to examine very carefully the whole of the Ordinance. The preamble of this Ordinance commences—" Whereas it is expedient to make special provision to prevent thefts of rubber." The preamble of a statute may be legitimately consulted to find out its meaning and keep its effect within its real scope. (*Maxwell on the Interpretation of Statutes, 7th ed., p.* 37.) It follows therefore from the preamble that the scope of this Ordinance is to prevent the thefts of rubber and not to control all dealings in rubber. A careful reading of the various sections

brings one to the same conclusion. The word purchase in section 3 applies only to a purchase with immediate delivery. If the word purchase applied to a forward contract then it would be impossible to comply with the requirements of certain of the sections, *e.g.*, section 8 A (*b*). *In re Mahmoud and Ispahani* [1] is in fact an authority in favour of the appellant. The Supreme Court of the Straits Settlements in the case of *Syn Thong & Co. v. Tong Joo (Hoo) & Co.* [2] interpreted the word purchase in a similar enactment as not referring to a forward contract.

Even if the word does apply to forward contracts the appellant is still entitled to succeed. The Ordinance only prohibits a purchase without a licence and not a sale. The seller in this case is an innocent party. An unlawful act by the purchaser does not make the act of the seller *ipso facto* unlawful. It is not open to the purchaser to take advantage of his own wrong. "When a contract may be performed either in a lawful way or in an unlawful way and if a party in the performance of his part of the contract, without the knowledge of the other party, elects to perform it in an unlawful way, he cannot be heard to allege his own wrong."—Bankes L.J. in *In re Mahmoud and Ispahani* (*supra*). (*Bloxsome v. Williams* [3]). There was an implied obligation on the part of the respondent to use his best endeavours to obtain a licence and he made no such endeavour. The appellant is therefore entitled to succeed. (*In re Anglo-Russian Merchant Traders and John Batt & Co., London* [4]).

H. V. Perera, K.C. (with him *E. F. N. Gratiaen* and *J. A. T. Perera*).—The provisions of the Ordinance apply to forward contracts. The preamble cannot restrict the provisions of the Ordinance. Even if a forward contract is not prohibited as such, the delivery of rubber to an unlicensed person is an offence. The contract cannot be performed without a breach of the provisions of section 3 of the Ordinance. The contract will, therefore, not be enforced by a Court of law. Though section 3 specifically prohibits only a purchase, a sale is also inferentially prohibited. The contract of purchase cannot be severed from the corresponding contract of sale. The case of *Bloxsome v. Williams* (*supra*) does not apply to the present case. The necessity for the defendant to obtain a licence was not before the minds of the parties at the time the contract was entered into. There could, therefore, be no obligation express or implied on the part of the defendant to obtain or to endeavour to obtain a licence. The principle laid down in the case of *In re Anglo-Russian Merchant Traders and John Batt & Co., London* (*supra*) has, therefore, no application.

Hayley, K.C., in reply.

Cur. adv. vult.

June 29, 1937. POYSER S.P.J.—

The plaintiff company and the defendant entered into a contract on May 23, 1934 (P 1) under the terms of which the plaintiff company agreed to sell to the defendant 150 tons of rubber, delivery to be in equal

[1] (*1921*) *2 K. B. 731.*
[2] *Straits Sett. Law Rep.* (*1929*), *Part I., p. 39.*
[3] *3 B. & C. 232.*
[4] (*1917*) *2 K. B. 685.*

quantities of 25 tons monthly from August, 1934, to January, 1935, payment to be against tender in accordance with the Chamber of Commerce by-laws and conditions of sale of rubber.

The defendant accepted and paid for all claims in respect of the months of August, September, and October, 1934, but refused to accept or pay for any rubber tendered during the months of November and December, 1934, and January, 1935.

The plaintiff company claimed Rs. 15,960 for breach of the said contract, and it was agreed in the lower Court that they should be given judgment for this sum "in the event of their being found entitled to damages".

The principal grounds on which the defendant denied liability were :—

(1) That the contract in question was an agreement to gamble in differences and therefore unenforceable.

(2) That the defendant had not, at the date of the contract, or at any date, a licence to deal in rubber, the contract therefore was void and unenforceable, and no action could be maintained for the recovery of damages for the non-fulfilment thereof.

(3) That the plaintiff company did not duly tender to the defendant in accordance with the terms of the contract, the rubber, deliverable in November and December, 1934, and January, 1935.

The learned Judge, in a careful and exhaustive judgment, found in favour of the plaintiff company on all the issues framed with the exception of the issues in regard to the defendant not having a licence to deal in rubber, and on these issues he held that as the defendant was not a licensed dealer under the provisions of the Rubber Thefts Ordinance, 1908, the contract was therefore prohibited by law and unenforceable. He consequently dismissed the plaintiff's action.

On behalf of the appellant it was argued, firstly, that the provisions of the Rubber Thefts Ordinance were not applicable to forward contracts but only to purchases for immediate delivery, and that the object of the Ordinance was to prevent rubber dealers from receiving stolen property, secondly, that even if the Ordinance did apply to forward contracts, the contract in this case was not an unlawful or prohibited one as the Ordinance did not require sellers to have a licence.

Mr. H. V. Perera, for the respondent, relied on section 3 of the Ordinance and argued that the Ordinance was applicable to all purchases of rubber whether for immediate or future delivery, and that if the purchaser was unlicensed, the contract was unlawful and unenforceable.

To decide these questions, it is first necessary to carefully examine the precise terms of the Rubber Thefts Ordinance.

As Atkin L.J. said in the case of *In re Mahmoud and Ispahani*[1] :— "When the Court has to deal with the question whether a particular contract or class of contract is prohibited by statute, it may find an express prohibition in the statute, or it may have to infer the prohibition from the fact that the statute imposes a penalty upon the person entering into that class of contract. In the latter case, one has to examine very carefully the precise terms of the statute imposing the penalty

[1] *(1921) 2 K. B. 731.*

upon the individual. One may find that the statute imposes a penalty upon an individual, and yet does not prohibit the contract if it is made with a party who is innocent of the offence which is created by the statute."

The preamble of this Ordinance commences thus:—"Whereas it is expedient to make special provision to prevent thefts of rubber."

I have set this out with a view to appreciating the real scope of the Ordinance. "The preamble of a statute may be legitimately consulted to find out its meaning and keep its effect within its real scope." (*Maxwell on Interpretation of Statutes, 7th ed., p. 37,* and cases cited therein.)

The sections of the Ordinance to which reference is necessary are as follows. Section 3 upon which the respondent relied, is as follows:—

> "From and after the commencement of this Ordinance, it shall be unlawful for any person to purchase rubber or to take delivery of rubber for sale or shipment, unless he has been licensed under this Ordinance to deal in rubber, or has received from the Government Agent a permit authorizing him to do so. Any person who purchases rubber or takes delivery of rubber for sale or shipment without being so licensed, or without such permit, shall be guilty of an offence against this Ordinance."

In connection with this section it is to be noted that it is only unlawful to purchase rubber or to take delivery of rubber for sale or shipment. The sale of rubber by an unlicensed person is not prohibited.

Sections 4 and 5 deal with the issue of licences, section 4 (2) requiring the premises to be stated at which the business of a dealer in rubber is to be carried on, and section 4 (4) permits the issue of licences to Superintendents and Assistant Superintendents of estates to purchase rubber.

Section 6 requires a licensed dealer to have the words "Licensed Dealer in Rubber" painted in conspicuous letters upon his licensed premises.

Section 7 makes provision with regard to partners, and it will be seen that only one licence is required in respect of the same premises.

Section 8 (1) (*a*) makes it an offence for any person to sell or to deliver rubber or for a licensed dealer to purchase or take delivery of rubber except between sunrise and unset.

Section 8 (1) (*b*) makes it an offence for any licensed dealer to purchase or take delivery of rubber from any person not personally known to him, under twelve years of age, or from any estate labourer.

Section 8A (*b*) requires, *inter alia*, the seller of rubber to fill up a declaration specifying the lands from which the rubber was produced.

Section 9 requires a book to be kept by licensed dealers in which certain particulars are to be entered. These particulars all deal with the purchase and delivery of rubber, amount bought, from whom, day of delivery, price, and similar matters. A seller, unless a licensed dealer, is not required to keep books.

Section 10 provides for the inspection of licensed premises and books.

Section 13 imposes a duty on licensed dealers to keep scales on the licensed premises.

From the above it will be seen that the object of the Ordinance, as it states, is to prevent thefts of rubber and to carry out this object not

only are dealers licensed but the places where they are authorized to deal and receive the rubber they purchase are controlled and open to inspection. The Ordinance also appears to have been framed in regard to the purchase of rubber with immediate delivery and not in regard to forward contracts.

In regard to the latter class of contract many of its provisions are inapplicable and some could not be carried out.

Section 8A (*b*), *e.g.*, could not be complied with in the case of a forward contract by a firm of brokers for they would in all probability be unable to specify the lands of which the rubber to be delivered was the produce.

Section 9 also indicates that the expression "purchase" does not refer to forward contracts as the various entries in the books are required to be made only when the rubber is delivered.

Having considered this Ordinance as a whole I am of opinion that its provisions do not apply to forward contracts and that a licence under this Ordinance is not necessary until delivery of rubber is taken by way of completion of a contract.

The object of this Ordinance is, clearly, to prevent the purchase of stolen rubber, not to control all dealings in rubber, and to carry out these objects provisions are made that persons who purchase rubber and such rubber is delivered to them have to comply with certain regulations and to furnish information as to the origin of every lot of rubber they purchase. All these requirements are obviously to prevent the purchase of and to trace stolen property.

The Ordinance does not and was never intended, in my opinion, to prohibit, *e.g.*, a forward contract entered into between two brokers after sunset, and if the respondent's contention is correct, such a contract would be unlawful.

The Supreme Court of the Straits Settlements have come to a similar conclusion. The case of *Syn Thong & Co. v. Tong Joo (Hoo) & Co.*[1] depended on the interpretation of section 3 of the Rubber Dealers Ordinance (Laws of the Straits Settlements, Vol. V., Cap. 212) which is as follows :—

> "No person shall purchase, treat, or store rubber unless he shall have been duly licensed in that behalf by the licensing officer."

The Court held "that the fact that plaintiffs were not the holders of a licence to purchase rubber under section 3 of the Rubber Dealers Ordinance, did not render the contracts illegal as the words 'purchase rubber' in section 3 do not refer to a forward contract. A licence under the section does not become necessary until delivery is taken. Where a contract is executory, the circumstance that one party is bound to fulfil a certain condition before he can legally perform the contract, and has not yet done so, does not render the contract itself illegal".

I also agree with Mr. Hayley's argument that even if the Ordinance did apply to forward contracts, the plaintiff company are still entitled to succeed.

The Judge has held that the contract was a prohibited one, and applying the principles set out in *In re Mahmoud and Ispahani* (*supra*) held that it was unenforceable. That case depended on the true construction

[1] *Straits Sett. Law Rep. (1929) Part I., p. 39.*

of an order of statutory effect made under the Defence of the Realm Regulations. This order prohibited any person from buying, selling or otherwise dealing in certain articles whether situated within or without the United Kingdom, except under and in accordance with the terms of a licence issued by the Food Controller. The seller had a licence, the purchaser had not. The Court held that as the contract was prohibited, they would not enforce it even on behalf of an innocent party.

"The sole question is whether the statute means to prohibit the contract. If the contract is prohibited by statute, the Court is bound not to render assistance in enforcing an illegal contract."—Scrutton L.J., p. 729.

In this case the contract was not prohibited—the wording of section 3 of the Ordinance is very different to the wording of the Order above referred to.

It was argued that the following words in this section—"it shall be unlawful for any person to purchase rubber or to take delivery of rubber for sale or shipment unless he has been licensed"—had the effect of making the contract between the parties a prohibited one if the purchaser was unlicensed.

I do not agree that if the purchaser commits an unlawful act the seller also *ipso facto* does. One cannot read into a penal statute, as into a contract, words necessary to give it what has been called business efficacy.

This case, in my opinion, falls within the class of case referred to by Bankes L.J. in his judgment in *In re Mahmoud and Ispahani* (*supra*), viz., "the class of cases which say that when a contract may be performed either in a lawful way or in an unlawful way and if a party in the performance of his part of the contract, without the knowledge of the other party, elects to perform it in an unlawful way. he cannot be heard to allege his own wrong".

Of this class of case *Bloxome v. Williams*[1] is an example. This case was not overruled by *In re Mahmoud and Ispahani* (*supra*) although in the latter case the Court did disapprove of a dictum of McCardie J. (*Brightman v. Tate*[2]) to the effect that there is some qualification admissible to the established rule of law that the Court will never lend its aid in the enforcement of a contract which is *ab initio* illegal.

There is not the slightest doubt in this case that the plaintiff was an innocent party and not a *particeps criminis*.

The evidence of Mr. Shand on this point, and the Judge accepts his evidence "on this and every other point" is "I did not know that the defendant was not qualified to buy rubber because he had no licence. I regarded him as a gentleman of standing who would observe all provisions of the law. He never told me nor did I have any information that he had no licence to deal in rubber. I did not inquire if he had a licence or not".

On the other hand the defendant made no effort to obtain a licence, and if this appeal could not be decided on other grounds it might be

[1] *3 B. & C. 232.*

[2] *(1919) I. K. B. 463.*

decided against the respondent on the ground that there was an implied obligation on his part to use his best endeavours to obtain a licence and he made no such endeavour. (See *In re Anglo-Russian Merchant Traders and John Batt & Co., London*[1].)

For these reasons I do not consider it is competent for the defendant to rely on his own breach of the law, assuming there was such a breach, and I think the Judge was wrong in holding that the principles enunciated in *In re Mahmoud and Ispahani* (*supra*) are applicable to this case.

There is only one other point to which I need briefly refer, viz., that the plaintiffs did not duly tender to the defendant the rubber deliverable from November, 1934, to December, 1935.

In connection with this argument reference was made to the Sale of Goods Act but as the Judge points out, tender, according to the contract, was to be made in accordance with the Chamber of Commerce by-laws and this the plaintiff company duly did.

Further the Judge finds, and the evidence amply supports his finding, that the defendant never intended to take delivery of the rubber tendered during these months.

I would allow the appeal and direct that decree be entered for the plaintiff company as prayed for with costs both here and below.

FERNANDO A.J.—I agree.

Appeal allowed.