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1. *ST. JOHN SHIPPING CORPORATION v. JOSEPH RANK LTD. [1956 S. No. 24.] [1957] 1 Q.B. 267, [1957] 1 Q.B. 267*

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ST. JOHN SHIPPING CORPORATION v. JOSEPH RANK LTD. [1956 S. No. 24.] [1957] 1 Q.B. 267

[QUEEN'S BENCH DIVISION]

Devlin J.

1956 Oct. 11, 12, 29.

Shipping — Load line — Overloading — Contravention of statute — Effect on contract of carriage — Whether shipowner entitled to recover freight — Merchant Shipping (Safety and load Line Conventions) Act, 1932 (22 & 23 Geo. 5, c. 9), ss. 44, 57.

Contract — Illegality — Contract prohibited by statute.

By section 44 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, a British load line ship "shall not be so loaded as to submerge … the load line indicating or purporting to indicate the maximum depth to which the ship is for the time being entitled under the load line rules to be loaded." By section 57 the provisions of section 44 apply to load line ships not registered in the United Kingdom while they are within any port in the United Kingdom …"

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A ship, registered in Panama, carrying grain from a United States port to a port in The United Kingdom under a charterparty made between the shipowners and English charterers put in to a port in Florida and took on bunkers, overloading the ship and causing its load line to be submerged. The load line was still submerged when the ship arrived at its destination and the master was prosecuted for an offence under sections 44 and 57 of the Act of 1932,1 convicted and fined £1,200. The defendants, holders of a bill of lading in respect of part of the cargo, paid most of the freight due, but they (together with another cargo-owner) withheld a sum equivalent to the freight on overall additional cargo carried by the ship by which it was found to be overloaded. They contended, when sued for the balance of the freight, that the shipowners were not entitled to recover any part of it as they had performed the charter in an illegal manner:-

Held, (1) that the infringement of a statute in the performance of a contract which was legal when made did not render the contract illegal unless the contract, as performed, was one which the statute meant to prohibit, and that, on a true construction of the Act of 1932, having regard to its scope and purpose, contracts for the carriage of goods were not within the ambit of the statute at all so that the plaintiffs' infringement of sections 44 and 57 did not prevent them from suing on the contract.

Dicta of Parke B. in *Cope v. Rowlands* (1836) 2 M. & W. 149, 157, of Tenterden C.J. in *Wetherell v. Jones* (1832) 3 B. & Ad. 221, 225 and of Lord Wright in *Vita Food Products Inc. v. Unus Shipping Co.* [1939] A.C. 277, 293; 55 T.L.R. 402; [1939] 1 All E.R. 513 applied.

Anderson Ltd. v. Daniel [1924] 1 K.B. 138; 40 T.L.R. 61 explained.

(2) That in order to succeed in their claim for freight the plaintiffs need do no more than show that they had delivered the goods to the defendants in the same good order and condition in which they had received them, and it was not necessary for them to disclose that they had committed an illegality in the course of the voyage.

(3) That the principle that a right was unenforceable if it directly resulted from the crime of the person asserting it did not apply in the present case, for the plaintiffs' right to freight from the defendants was not a right which was brought into existence by their crime, which affected the total amount of freight earned by the ship, and no claim or part of a claim for freight could be clearly identified as being for the excess illegally earned; accordingly the plaintiffs' claim succeeded.

Beresford v. Royal Insurance Co. Ltd. [1938] A.C. 586; 54 T.L.R. 789; [1938] 2 All E.R. 602 distinguished.

Action.

The plaintiffs, St. John Shipping Corporation, were a body incorporated under the laws of Panama and owners of the vessel St. John, registered in Panama and a "load line vessel not

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registered in the United Kingdom" within the meaning of section 57 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932.1 The vessel's summer load line corresponded to a mean draft of 27 ft. 8 7/8 ins. and her winter load line to a mean draft of 27 ft. 1 7/8 ins. The vessel was chartered by a charterparty dated London, October 18, 1955, by the plaintiffs to Gilbert J. McCaul & Co. Ltd., English charterers, to load 9,700 tons of 2240 lbs. of heavy grain at one safe port, U.S. Gulf, for carriage to London, Avonmouth or Birkenhead, one port only, and deliver the same always afloat agreeable to bills of lading on being paid freight in cash in British sterling at discharging port.

The defendants, Joseph Rank Ltd., were holders of a bill of lading in respect of 28 parcels of wheat on which the freight due was £18,893 4*s.* 0*d.* They paid £16,893 4*s.* 0*d.* but withheld the balance of £2,000. The plaintiffs sued for the balance.

The following statement of facts was agreed between the parties.

The goods on which the plaintiffs claimed the balance of freight were loaded on the vessel at Mobile, Alabama, in November, 1955, and were carried by the vessel to Birkenhead pursuant to a bill of lading dated November 2, 1955, whereof the defendants were indorsees to whom the property in the goods passed upon or by reason of such indorsement. The vessel completed loading and sailed from Mobile at 9.30 a.m. on November 2, 1955. On completion of loading the vessel's mean draft, according to a certificate of inspection issued by National Cargo Bureau Inc., dated November 2, 1955, was 27 ft. 8½ ins.

1 Merchant Shipping (Safety and Load Line Conventions) Act, 1932, s. 44: "A British load line ship registered in the United Kingdom shall not be so loaded as to submerge in salt water, when the ship has no list, the appropriate load line on each side of the ship that is to say, the load line indicating or purporting to indicate the maximum depth to which the ship is for the time being entitled under the load line rules to be loaded. (2) If any such ship is loaded in contravention of this section, the owner or master of the ship shall for each offence be liable to a fine not exceeding one hundred pounds and to such additional fine, not exceeding the amount hereinafter specified, as the court thinks fit to impose having regard to the extent to which the earning capacity of the ship was, or would have been, increased by reason of the submersion. (3) The said additional fine shall not exceed one hundred pounds for every inch or fraction of an inch by which the appropriate load line on each side of the ship was submerged, or would have been submerged if the ship had been in salt water and had no list."

S. 57: "The provisions of section 44 of this Act shall apply to load line ships not registered in the United Kingdom, while they are within any port in the United Kingdom, as they apply to British load line ships registered in the United Kingdom…:"

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The vessel then called at Port Everglades, Florida, for bunkers. She arrived at Port Everglades at 5.30 p.m. on November 5, and sailed at 1.30 a.m. on November 6, having taken on board 600 tons of bunkers. By virtue of the bunkers so taken on board the vessel's mean draft on her departure from Port Everglades was increased to about 28 ft. 7 ins. thereby causing the vessel's summer load line to become submerged by about 10 inches. On November 8 the vessel crossed latitude 36º north and thereby passed into the winter zone, having at all times previously been in the summer zone. The vessel was thereafter throughout in the winter zone and on November 22 she reached the River mersey. Upon entering the winter zone the vessel's winter load line was submerged by about 16 inches. In the course of the vessel's passage up the River Mersey the master caused the vessel's forepeak tank to be filled for the purpose of trimming the vessel. The capacity of the tank was about 140 tons and the effect of filling the same was to increase the vessel's arrival draft by about 2 ft. 8 ins. On arrival at Birkenhead the vessel's mean draft was about 28 ft. 1 in and the vessel was accordingly laden below her winter marks by about 11 inches. Proceedings were thereafter instituted against the master in a court of summary jurisdiction held at Wallasey wherein the master was charged with an offence under sections 44 and 57 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, in respect of the vessel being overloaded at Birkenhead, and on November 28, 1955, the master was fined the sum of £1,200. Evidence was tendered in the proceedings that the vessel's deadweight scale was out

of date. The vessel loaded in fresh water at Mobile and it was accordingly necessary to load by reference to the vessel's deadweight scale.
In the present action the plaintiffs claimed the amount of freight withheld by the defendants on their parcel. Another receiver also withheld freight to the amount of £295 8*s.* 10*d.* The total thus withheld was withheld in consultation with and at the request of the charterers and was the equivalent to freight on about 427 tons of cargo, which tonnage was equivalent to the overall additional cargo on board the vessel by reason whereof the vessel was found to be loaded below her winter marks on arrival at Birkenhead.
The Governments of the United States of America and of Panama ratified or acceded to the International Load Line Convention, 1930, in the years 1932 and 1936 respectively, and the United States of America and Panama are "countries to which

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the Load Line Convention applies" within the meaning of the Act of 1932 by virtue of declarations made by Order in Council pursuant to section 65 of the Act.
It was agreed that (a) in event of the parties agreeing the text of any material legislation of the U.S.A. and/or Panama the court should be free to construe the same and expert evidence as to the effect of such foreign law should be dispensed with; (b) in the event of the parties not having agreed the text of any such material legislation either party should be at liberty to adduce evidence at the trial with regard to the same.
By their defence the defendants alleged that the plaintiffs had performed the charter in an illegal manner, by so loading the ship as to submerge or allow to be submerged her load line by about 11 inches while in part of the United Kingdom, namely, Birkenhead, contrary to the provisions of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932. They accordingly claimed that the plaintiffs were not entitled to the sum claimed or any part thereof.
The plaintiffs, in reply, contended that the matters relied on by the defendants afforded no ground of defence in point of law to the claim made against them.

Ashton Roskill Q.C. and **Basil Eckersley** for the plaintiffs. The defendants agree that the onus is on them. They should therefore begin.
John Wilmers for the defendants. The plaintiffs admit that this ship was a "load line vessel not registered in the United Kingdom" within the meaning of section 57 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932. Therefore section 44 applies subject to certain modifications which are not material and the ship must not be so loaded as to submerge her load line. Section 44 (2) provides a penalty for overloading. It is clear from the preamble to the Act that its purpose is to promote safety of life and property at sea. It is therefore an Act designed for the protection of the public and the prohibition against overloading and the penalty therefor is not a mere revenue matter. The plaintiffs' claim is in respect of a contract of carriage by their ship. To succeed, they must show that they have carried by their ship. In so doing they must show, as is the case, that they have carried the goods in an illegal manner, that is to say, in a way prohibited by the Act. It is a principle of English law that if the way in which the contract is performed is illegal, that is a defence to an action upon the contract.

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[DEVLIN J. That is a very wide proposition. It means that if goods are carried by land and the consignee proves that at some stage the carrier exceeded the 30 miles per hour speed limit he will be unable to recover his freight.]
That is so if the carrier himself carries the goods. It might be different if the goods were carried by a servant, because in such a case there would be no intention on the part of the carrier himself to do anything illegal, and the illegality must be directly connected with the contract. Here an act was done wrongly by the shipowners. It must be right to impute knowledge of the wrong to them although the doctrine which is contended for does not depend upon knowledge. The width of the doctrine does not affect the matter at all. Reliance is placed on *Anderson Ltd. v. Daniel*2 and the principle stated therein by Atkin L.J.3 that a contract is unenforceable by the offending party where illegality arises from the fact that the mode of performance adopted by the party performing it is in violation of some statute, even though the contract as agreed between the parties was capable of being performed in a legal manner. The present case is indistinguishable from that case.
[DEVLIN J. The principle seems to be that if the law requires a contract to be performed in a particular way and it is performed in a different way, which is illegal, the contract is not enforceable. The contract under consideration here is that the goods shall be carried safely and the Act says in effect that for that purpose the ship must not be loaded beyond a certain point. Previous cases all appear either to have affected the goods themselves or the way in which they have been supplied. Here the goods are not affected.]
A contract for the carriage of goods is basically a contract for services to be rendered. In such a contract those services must be rendered lawfully. If the carriage is performed in a way that is unlawful, as in the present case, then the services are unlawful. Admittedly this involves that if any ship is overloaded by a fraction of an inch no one need pay any freight at all, subject to the de minimis rule.
[DEVLIN J. That rule cannot apply to a case of illegality.

In *Vita Food Products Inc. v. Unus Shipping Co*.4 Lord Wright5 seems to distinguish between doing an act knowingly and doing it unknowingly.]

2 ***[1924] 1 K.B. 138***; 40 T.L.R. 61.
3 ***[1924] 1 K.B. 138***, 149.
4 *[1939] A.C. 277*; 55 T.L.R. 402; [1939] 1 All E.R. 513.
5 *[1939] A.C. 277*, 301.

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If that be right, then clearly this is a case where the illegality was committed knowingly. *B. & B. Viennese Fashions v. Losane*6 is an application of *Anderson Ltd. v. Daniel*,7 which is applicable to the present case and is indistinguishable. In *Marles v. Philip Trant & Sons*8 Denning L.J.9 purports slightly to qualify *Anderson's case*,10 but the qualification does not affect the point because whether the contract is illegal or unenforceable by the person who has performed it in an illegal way the position is the same. [Reference was also made to *Bensley v. Bignold*.11]

[DEVLIN J. There are passages in some cases which say that the taint of illegality turns a legal contract into an illegal one. But a shipowner suing for his freight has only to show that he delivered the goods in the same condition that he received them. If the contract remains alive he can recover his money so long as he has not to lay the illegality before the court. Your proposition would mean that any incidental breach of contract of carriage would prevent him from recovering the contract price at all. Is there any authority for the proposition that carrying the goods safely is a condition precedent to recovery of the freight?]

This field appears to be quite free from authority. It is submitted that quite clearly the carrier cannot sue for the price except by setting up the contract. If he is to recover the full amount he must show that he has fully performed his contract and therefore must show that he has kept the goods properly.

[DEVLIN J. That means that every term of the contract is a condition precedent and obliterates the distinction in law between terms which are conditions precedent and those which are warranties.]

In a contract of carriage the manner of carriage is so fundamental as to be a condition precedent. This comes back to cases like *Alexander v. Railway Executive*,12 which was a contract of bailment. In *Forster v. Taylor*13 the judge seemed to think it was important to decide whether the Act (36 Geo. 3, c. 88) was for the protection of the buyer or the seller. It is submitted that that is not relevant, but if it is, then the Act of 1932 was passed for the protection of the owners of goods shipped. [Reference was also made to *Cundell v. Dawson*.14] Here the entire performance of the contract was illegal and intentionally so. At the

6 [1952] 1 T.L.R. 750; [1952] 1 All E.R. 909.
7 ***[1924] 1 K.B. 138***.
8 *[1954] 1 Q.B. 29*; [1953] 1 All E.R. 651.
9 *[1954] 1 Q.B. 29*, 37.
10 ***[1924] 1 K.B. 138***.
11 (1822) 5 B. & Ald. 335.
12 *[1951] 2 K.B. 882*; [1951] 2 T.L.R. 69; [1951] 2 All E.R. 442.
13 (1834) 5 B. & Ad. 887.
14 (1847) 4 C.B. 376.

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outset the ship was subject to United States law and subject to the United States Load Line Act. It is clear that the plaintiffs were in breach of American law when the ship left the United States. During the voyage the law of her flag was Panama. On the high seas she was in breach of Panamanian law.

Ashton Roskill Q.C. and **Basil Eckersley** for the plaintiffs. On the facts it is difficult to see any merits in the defence and the only question is whether it is sustainable in law. It is submitted that the defence is misconceived. The Act of 1932 is not directed in any way to the performance of any contract. The present case is therefore distinguishable from those where illegal performance has been held to defeat a right of action upon a contract. As a matter of construction the statute itself provides a penalty for overloading and looks to the recoverability of the freight as the yardstick by which to measure the penalty. It would be a surprising consequence if, when a statute enjoins that the increased earning capacity of the ship shall be the yardstick of the penalty, the contract under which that earning capacity accrues should in law be illegal. That fact alone is sufficient tn explain why the legislature considered the contract of carriage to be a live contract. one must consider the circumstances in which the decisions in other cases came to be given. Every one of them concerned the terms upon which goods were to be supplied under a contract. The material statutory provisions struck at the manner in which a particular contract was to be performed. This statute is not concerned to strike at any contract at all. That distinguishes the present case from the *Anderson Ltd. v. Daniel*15 type of case.

If that submission be right the provision in the preamble to the Act can be ignored because section 57 is clear from its text. For the defendants to succeed the court must decide that canons of public policy require this particular contract to be declared illegal. From time to time in the books one finds warnings about extending the ambit of the doctrine of public policy: see the words of Lord Wright in *Vita Food Products Inc. v. Unus Shipping Co*.16 and the speech of Lord Atkin in *Fender v. St. John-Mildmay*.17

[DEVLIN J. I accept the view that public policy is not a doctrine which ought to be extended in the sense of making new heads, but this is not that sort of case. This

is an offence against

15 ***[1924] 1 K.B. 138***.

16 *[1939] A.C. 277*, 293.

17 *[1938] A.C. 1*, 14; 53 T.L.R. 885; sub nom. *Fender v. Mildmay* [1937] 3 All E.R. 402.

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the law. It is the consequences which flow from that offence which have to be considered.]

The defendants' submission is that public policy demands that this particular contract should be declared unenforceable because of the infringement of the Act. That involves an extension of the ambit of the doctrine of public policy, but it is submitted that no such extension is here justified some of the passages on which the defendants relied support this submission. The judgment of Scrutton L.J. in *Anderson. Ltd. v. Daniel*18 must be read in the light of the issue which was then before the court. In that case the contract necessitated compliance with certain statutory formalities, whereas in the present case it did not. If the view for which the plaintiffs contend on the construction of the statute and the true inference to be drawn therefrom be the correct view, that is the end of this case.

The defendants further contend that for the plaintiffs to recover their freight it is a condition precedent to establish that the goods were carried safely. That argument is erroneous. Conditions precedent involve mutual and concurrent obligations on each side. So far as the payment of freight is concerned, the obligation of the shipowner is to deliver the goods and that of the charterer to pay the freight on delivery. If all the goods are carried and delivered, but some are damaged, the full freight is still payable under the terms of the charter, though there might be a cross-action by the charterer for damages.

The facts do not support the defendants' contention that the plaintiffs deliberately intended to infringe the law. There can be nothing in that part of their case because the ship was not overloaded when she sailed. She only became so when she bunkered at Port Everglades.

No authority was cited by the defendants in support of the submission that an illegal act by the employer as distinct from an illegal act by his servant disentitled the employer to recover. Even if that proposition were sound it would carry the defendants no further because, on the facts, the overloading was clearly done by servants of the shipowner and not by the shipowner himself.

The defendants' submissions relating to United States and Panamanian law are irrelevant. If they are not, and if the other submissions for the plaintiffs are held to be wrong, then it is submitted that an illegality committed during part of the voyage is not sufficient to deprive the plaintiffs of their freight.

[DEVLIN J. The defendants submit that if part of the contract

18 ***[1924] 1 K.B. 138***, 146.

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has been performed illegally, that is enough, but if that is wrong they are prepared to show illegality existed throughout the greater part of the performance.]

There would be far-reaching consequences if the court were to hold that a contract of this kind were unenforceable by the shipowners by reason of the infringement of this statute, as not only would freight be irrecoverable but, for example, demurrage would be irrecoverable. This would be inequitable. Exactly the same legal consequences would flow from the breach of other statutory provisions, e.g., the Regulations with regard to the Carriage of Grain made under section 24 (2) of the Merchant Shipping Act, 1949, and the Timber Regulations made under section 61 of the Act of 1932. This is a defence by consignees of part only of the cargo. Their claim presupposes that part of their particular cargo caused the vessel to be overloaded. They are seeking to take almost the whole benefit of the overloading for themselves when their cargo represented only a small part of the total. It is not for the defendants to take upon themselves the punishment of the shipowners. If the legislature considers that the penalties provided by the Act are insufficient it is for the legislature to amend the Act.

Wilmers in reply. It was conceded in opening that the defendants' main proposition is far-reaching. All cases of illegality are. Shipowners are in no special position. It is not true to say that in all the cases where this doctrine has been applied the statute strikes at the way in which goods are to be supplied under a contract: see *Taylor v. Crowland Gas and Coke Co*.,19 where it was held that an unqualified person who had acted as a conveyancer could not recover for conveyances drawn by him, and *Cope v. Rowlands*,20 where a broker who was not licensed under 6 Anne, c. 16, could not maintain an action for work and labour and commission for buying and selling stock.

[DEVLIN J. In *Cope v. Rowlands*20 the contract was void from its inception, even if nothing was done under it. The same may apply to *Taylor v. Crowland Gas and Coke Co*.21]

It is difficult to see any distinction between the words of the Acts considered in those cases and section 44 of the Act of 1932. It is true that there is nothing in the section which prohibits the making of a contract for the carriage of grain, and it is conceded that in the two earlier cases the contracts concerned were prohibited, but the Act of 1932 regulates contracts of carriage by sea

19 (1854) 10 Exch. 293.

20 (1836) 8 M. & W. 149.

21 10 Exch. 293.

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by regulating the way in which shipowners may use their ships for the carriage of goods. There is no principle of law whereby these matters should be confined to questions concerning the sale of goods. [Reference was made to *Berg v. Sadler and Moore*22 and *In re National Benefit Insurance Co. Ltd*.23]

[DEVLIN J. I agree. What impressed me more is the plaintiffs' submission that in other cases the statutes impliedly prohibited the making of a particular contract: see, for example, *B. & B. Viennese Fashions v. Losane*.24]

In *Bensley v. Bignold*,25 which concerned an offence by a printer against section 27 of 39 Geo. 3, c. 79, in failing to print his name on a pamphlet, and where it was held that the printer could not recover the cost of labour or materials, there is a clear statement of the principle, cited in many other cases as the fountain head, that one cannot sue for work and labour done in direct contravention of an Act of Parliament: see the judgment of Abbott C.J.26 and the judgments of Best and Bailey JJ.27

[DEVLIN J. That comes very near this case, but there the Act is striking at the particular contract. These plaintiffs argue here that you cannot point to the carriage of these particular goods as being illegal. All you can say is that these goods were part of the cargo which was carried illegally.]

Either there is an illegality or there is not. These particular goods were carried in this particular ship. Reliance is placed on the words of Best J. in *Bensley v. Bignold*27 that a man "should not be allowed to take advantage of what the law says he ought not to do whether the thing be prohibited, because it is against good morals, or whether it be prohibited, because it is against the interests of the State." There is no distinction between *Forster v. Taylor*,28 where butter was put into unmarked firkins, which was unlawful, and the present case where goods were put into a ship about which something was unlawful. The principle must be the same.

As to the plaintiffs' submissions on public policy, it is a matter of public policy that a person should not get a benefit from his crime: see *In the Estate of Crippen*29 and *Beresford v. Royal Insurance Co. Ltd*.30

22 *[1937] 2 K.B. 158*; 53 T.L.R. 430; [1937] 1 All E.R. 637.
23 *[1931] 1 Ch. 46*.
24 [1952] 1 T.L.R. 750.
25 5 B. & Ald. 335.
26 Ibid 340.
27 Ibid. 340, 341.
28 5 B. & Ad. 887.
29 ***[1911] P. 108***; 27 T.L.R. 258.
30 *[1938] A.C. 586*; 54 T.L.R. 789; [1938] 2 All E.R. 602.

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[DEVLIN J. All the cases say that a person cannot benefit from the fruits of his crime. You go further, and say that a person cannot benefit from carrying out a lawful act in an unlawful way. To deprive a man of 10 times as much as he would have received as benefit from his crime seems to me to be a very wide proposition. You are entitled to say about *Beresford's case*30 that not all to which the plaintiff was entitled was benefit from his crime. This comes back to section 44 of the Act. If what the Act prohibits is a contract of loading, that is different from prohibiting a contract of carriage of goods in an overloaded ship.]

Here the contracts of carriage and of loading are the same. It is submitted that on the construction of section 44 the ship must comply with the regulations throughout.

As to the condition precedent, the plaintiffs submit that the argument for the defendants as to the safe carriage being a condition precedent is erroneous, that freight is expressed in the charter to be payable on delivery, and that therefore however the shipowner carries the goods, whether safely or not, he is still entitled to be paid full freight. All that that means is that delivery can be withheld if freight is not paid, but if the shipowner is in breach of a condition he could be sued in detinue. If he then sought to set up that clause in his defence, he could not do so if he had to show that in carrying the goods he was in breach of section 44. It is not sought to argue that any unsafe carriage makes it impossible to demand the freight if the goods are not carried unlawfully; what is said is that in his claim for freight the carrier cannot recover if the carriage was illegal. Finally, it is submitted that this court is bound by *Anderson Ltd. v. Daniel*.31 That case was rightly decided and the principle stated by Atkin L.J. is sound in law and inescapable in the present case.

Roskill Q.C. The judgments in *Bensley v. Bignold*32 carry the matter no further. On the question of public policy, where an Act expressly provides that a person shall not profit by his wrong there is no room for public policy to intervene because the machinery of the Act may be economically out of date. The defendants' proposition based on *Beresford v. Royal Insurance Co. Ltd*.33 is too wide, as shown by Lord Wright M.R.34 in the same case. See also Lord Atkin's speech.35 On the true view

30 *[1938] A.C. 586*.
31 ***[1924] 1 K.B. 138***.
32 5 B. & Ald. 335.
33 *[1938] A.C. 586*.
34 *[1937] 2 K.B. 197*, 219.
35 *[1938] A.C. 586*, 598.

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of section 44 no right directly results from the fact that the section was infringed and the defendants cannot succeed on that point.

Cur. adv. vult.

Oct. 29. DEVLIN J. read the following judgment: The continued depreciation of the pound is beginning to take effect on the criminal law. A maximum fine which at the time when Parliament fixed it would have been regarded as a sharp disincentive (if the word was then in use) may now prove to be little or no deterrent. In 1932 Parliament enacted the Merchant Shipping (Safety and Loadline Conventions) Act, 1932, which, inter alia, by sections 44 and 57, made it an offence to load a ship so that her loadline was submerged. The temptation to overload a freighter and so to submerge her marks is, of course, that the more she carries the more she will earn for the same expenditure on the voyage. So Parliament, when prescribing a fine as the punishment for an offence against section 44 related it to the earning capacity of the ship. The maximum fine was not to exceed the court's estimate of the extent to which the earning capacity of the ship was, or would have been, increased by reason of the submersion; and was also not to exceed £100 for every inch or fraction of an inch by which the loadline was submerged. I suppose that in 1932 £100 was considered an outside figure of earning capacity per inch, but freights now are very different from what they were then.

When the master of the plaintiffs' ship *St. John* was prosecuted at Birkenhead under the Act and, on November 28, 1955, found to have overloaded his ship by more than 11 inches, he was fined the maximum of £1,200; but the amount of cargo by which the ship was overloaded was 427 tons and the extra freight earned was £2,295. So the ship came very well out of this situation; and she and other ships will doubtless continue to come very well out of similar situations until the Act of 1932 is amended.

I can see that it is a situation that must cause some concern to cargo owners whose property is at risk. The ship was carrying a cargo of about 10,000 tons of grain from Mobile, Alabama, U.S.A., to Birkenhead. The defendants held a bill of lading for about 3,500 tons of this quantity on which the freight due was nearly £19,000. The defendants, apparently in association with the charterers, decided that some additional punishment should be inflicted on the plaintiffs, and that it should take the form of

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withholding the £2,295 extra freight. The defendants have withheld £2,000, for which sum they are being sued in this action; and another cargo owner has withheld £295 and is being sued for it in an action that depends on this one.

This is the explanation of how this dispute has arisen. But I, of course, have not got to decide whether the defendants are morally justified in trying to make good deficiencies in the criminal law; nor is any justification of that sort put forward in the case. The defendants' case in law is that since the plaintiffs performed the contract of carriage, evidenced by the bill of lading, in such a way as to infringe the Act of 1932, they committed an illegality which prevents them from enforcing the contract at all; the defendants say they were not obliged to pay any freight, and so cannot be sued for the unpaid balance. If this is right, and if all the consignees had exerted to the full their legal powers, the effective penalty for the plaintiffs' misdeed would have been the loss of the whole freight of more than £50,000.

I do not, of course, regard an offence against the Act of 1932 as a trivial matter, particularly if it is committed deliberately, and if the safety of lives at sea is involved. It is an offence for which the master of a British ship (the plaintiffs' ship was registered in Panama) could be imprisoned. The agreed statement of facts, on which this case is being tried, does not say that the overloading in the U.S.A. was deliberate; for the purposes of the defendants' argument that finding is not required. But there is material in the agreed case which would make such a finding not at all improbable. The vessel was not overloaded when she left her loading port on November 2, 1955; she had then three-eighths of an inch to spare. But it seems plain that she was not then sufficiently bunkered to take her across the Atlantic. On November 5 she called at Port Everglades, Florida, for bunkers, and the 600 tons which she then took on caused her loadline to become submerged by about 10 inches. It is hard to believe that that fact was not appreciated at the time. As she went across the Atlantic her load was, of course, lightened by the consumption of bunkers, but, on the other hand, she passed into the winter zone and the net result was that when she arrived in the Mersey her loadline, as I have said, was submerged by more than 11 inches.

It is a misfortune for the defendants that the legal weapon which they are wielding is so much more potent than it need be to achieve their purpose. Believing, rightly or wrongly, that the plaintiffs have deliberately committed a serious infraction of the

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Act and one which has placed their property in jeopardy, the defendants wish to do no more than to take the profit out of the plaintiffs' dealing. But the principle which they invoke for this purpose cares not at all for the element of deliberation or for the gravity of the infraction, and does not adjust the penalty to the profits unjustifiably earned. The defendants cannot succeed unless they claim the right to retain the whole freight and to keep it whether the offence was accidental or deliberate, serious or trivial. The application of this principle to a case such as this is bound to lead to startling results. Mr. Wilmers does not seek to avert his

gaze from the wide consequences. A shipowner who accidentally overloads by a fraction of an inch will not be able to recover from any of the shippers or consignees a penny of the freight. There are numerous other illegalities which a ship might commit in the course of the voyage which would have the same effect; Mr. Roskill has referred me by way of example to section 24 of the Merchant Shipping (Safety Conventions) Act, 1949, which makes it an offence to send a ship to sea laden with grain if all necessary and reasonable precautions have not been taken to prevent the grain from shifting. He has referred me also to the detailed regulations for the carriage of timber - similar in character to regulations under the Factories Acts - which must be complied with if an offence is not to be committed under section 61 of the Act of 1932. If Mr. Wilmers is right, the consequences to shipowners of a breach of the Act of 1932 would be as serious as if owners of factories were unable to recover from their customers the cost of any articles manufactured in a factory which did not in all respects comply with the Acts. Carriers by land are in no better position; again Mr. Wilmers does not shrink from saying that the owner of a lorry could not recover against the consignees the cost of goods transported in it if in the course of the journey it was driven a mile an hour over its permitted speed. If this is really the law, it is very unenterprising of cargo owners and consignees to wait until a criminal conviction has been secured before denying their liabilities. A service of trained observers on all our main roads would soon pay for itself. An effective patrol of the high seas would probably prove too expensive, but the maintenance of a corps of vigilantes in all principal ports would be well worth while when one considers that the smallest infringement of the statute or a regulation made thereunder would relieve all the cargo owners on the ship from all liability for freight.

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Of course, as Mr. Wilmers says, one must not be deterred from enunciating the correct principle of law because it may have startling or even calamitous results. But I confess I approach the investigation of a legal proposition which has results of this character with a prejudice in favour of the idea that there may be a flaw in the argument somewhere.

Mr. Wilmers puts his case under three main heads. In the first place he submits that, notwithstanding that the contract of carriage between the parties was legal when made, the plaintiffs have performed it in an illegal manner by carrying the goods in a ship which was overloaded in violation of the statute. He submits as a general proposition that a person who performs a legal contract in an illegal manner cannot sue upon it, and he relies upon a line of authorities of which *Anderson Ltd. v. Daniel*1 is probably the best known. He referred particularly to the formulation of the principle by Atkin L.J.2 in the following passage: "The question of illegality in a contract generally arises in connexion with its formation, but it may also arise, as it does here, in connexion with its performance. In the former case, where the parties have agreed to something which is prohibited by Act of Parliament, it is indisputable that the contract is unenforceable by either party. And I think that it is equally unenforceable by the offending party where the illegality arises from the fact that the mode of performance adopted by the party performing it is in violation of some statute, even though the contract as agreed upon between the parties was capable of being performed in a perfectly legal manner."

As an alternative to this general proposition and as a modification of it, Mr. Wilmers submits that a plaintiff cannot recover if, in the course of carrying out a legal contract made with a person of a class which it is the policy of a particular statute to protect, he commits a violation of that statute.

Secondly, he relies upon the well-known principle - most recently considered, I think, in *Marles v. Philip Trant & Sons*3 - that a plaintiff cannot recover money if in order to establish his claim to it, he has to disclose that he committed an illegal act. These plaintiffs, he submits, cannot obtain their freight unless they prove that they carried the goods safely to their destination, and they cannot prove that without disclosing that they carried them illegally in an overloaded ship.

1 ***[1924] 1 K.B. 138***.
2 Ibid. 149.
3 *[1954] 1 Q.B. 29*; [1953] 1 All E.R. 651.

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Thirdly, he relies upon the principle that a person cannot enforce rights which result to him from his own crime. He submits that the criminal offence committed in this case secured to the plaintiffs a larger freight than they would have earned if they had kept within the law. A part of the freight claimed in this case is therefore a benefit resulting from the crime and in such circumstances the plaintiff cannot recover any part of it.

I am satisfied that Mr. Wilmers's chief argument is based on a misconception of the principle applied in *Anderson Ltd. v. Daniel*,4 which I have already cited. In order to expose that misconception I must state briefly how that principle fits in with other principles relating to illegal contracts. There are two general principles. The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends upon proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it. This principle is not involved here. Whether or not the overloading was deliberate when it was done, there is no proof that it was

contemplated when the contract of carriage was made.
The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not. A significant distinction between the two classes is this. In the former class you have only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, you have to consider not what acts the statute prohibits, but what contracts it prohibits; but you are not concerned at all with the intent of the parties; if the parties enter into a prohibited contract, that contract is unenforceable.
The principle enunciated by Atkin L.J.5 and cited above is an offshoot of the second principle that a prohibited contract will not be enforced. If the prohibited contract is an express one, it falls directly within the principle. It must likewise fall within it if the contract is implied. If, for example, an unlicensed broker sues for work and labour, it does not matter that no express contract is alleged and that the claim is based solely on the performance of

4 ***[1924] 1 K.B. 138***.
5 Ibid. 149.

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the contract, that is to say, the work and labour done; it is as much unenforceable as an express contract made to fit the work done. The same reasoning must be applied to a contract which, though legal in form, is performed unlawfully. Jenkins L.J. in his illuminating judgment in *B. and B. Viennese Fashions v. Losane*6 has shown how illogical it would be if the law were otherwise. In that case the regulations required that the seller of utility goods should furnish to the buyer an invoice containing certain particulars. The plaintiff made a contract of sale for non-utility goods, to which the regulations did not apply; but he purported to perform it by delivering to the buyer without objection utility garments to which the regulations did apply; and he did not furnish the invoice. If the court enforced his claim for the price of the garments, it would have, in effect, been enforcing a contract for the supply of utility garments without furnishing an invoice, which, had it originally been made in that form, would have been prohibited.
But whether it is the terms of the contract or the performance of it that is called in question, the test is just the same: is the contract, as made or as performed, a contract that is prohibited by the statute?
Mr. Wilmers's proposition ignores this test. On a superficial reading of *Anderson Ltd. v. Daniel*7 and the cases that followed and preceded it, judges may appear to be saying that it does not matter that the contract is itself legal, if something illegal is done under it. But that is an unconsidered interpretation of the cases. When fully considered, it is plain that they do not proceed upon the basis that in the course of performing a legal contract an illegality was committed; but on the narrower basis that the way in which the contract was performed turned it into the sort of contract that was prohibited by the statute.
All the cases which Mr. Wilmers cited in support of his submission show, I think, that this is the true basis. Some of the earlier cases on which he relied - those in which the principle was first being formulated - show this most clearly; and I take as an example of them *Cope v. Rowlands*.8 In that case the plaintiff brought an action for work and labour done by him as a broker and the plea was that he was not duly licensed to act as a stockbroker pursuant to the statute. The statute imposed a penalty on any unlicensed person acting as a broker. Parke B.9 (the italics below are those in the report) declared the law to be

6 [1952] 1 T.L.R. 750; [1952] 1 All E.R. 909, 913.
7 ***[1924] 1 K.B. 138***.
8 (1836) 2 M. & W. 149.
9 Ibid. 157.

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as follows: "It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition. … And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if *the contract* be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute *means to prohibit the contract?*" After considering the language of the Act Parke B. went on to say10 that the language "shows clearly that the legislature had in view, as *one object*, the benefit and security of the public in those important transactions which are negotiated by brokers. The clause, therefore, which imposes a penalty, must be taken … to imply a prohibition of all unadmitted persons to act as brokers, and consequently to prohibit, by necessary inference, all contracts which such persons make for compensation to themselves for so acting; and this is the contract on which this action is … brought."
Now this language - and the same sort of language is used in all the cases - shows that the question always is whether the statute meant to prohibit the contract which is sued upon. One of the tests commonly used, and

frequently mentioned in the later cases, in order to ascertain the true meaning of the statute is to inquire whether or not the object of the statute was to protect the public or a class of persons, that is, to protect the public from claims for services by unqualified persons or to protect licensed persons from competition. Mr. Wilmers (while saying that, if necessary, he would submit that the Act of 1932 was passed, inter alia, to protect those who had property at sea) was unable to explain the relevance of this consideration to his view of the law. If in considering the effect of the statute the only inquiry that you have to make is whether an act is illegal, it cannot matter for whose benefit the statute was passed; the fact that the statute makes the act illegal is of itself enough. But if you are considering whether a contract not expressly prohibited by the Act is impliedly prohibited, such considerations are relevant in order to determine the scope of the statute.

10 2 M. & W. 159.

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This, then, is the principle which I think is to be derived from the class of cases which Mr. Wilmers cited. Not unnaturally, he cited those cases in which the result at least was consistent with the proposition for which he was contending. Had he cited those cases in which the claim succeeded because the statute was held not to imply a prohibition of any contract, he would, I think, have seen the fallacy in his argument. For that submits the point to the crucial test. The plaintiff does an illegal act, being one prohibited by the statute, but he does it in performance of a legal contract, since the statute is construed as prohibiting the act merely and not prohibiting the contract under which it is done. If in such a case it had been held that it did not matter whether the contract was legal or not since the mode of performing it was illegal, Mr. Wilmers's argument would be well supported. But in fact the contrary has been held. I take as an example of cases of this type, *Wetherell v. Jones*.11 The plaintiff sued for the price of spirits sold and delivered. A statute of George IV provided that no spirits should be sent out of stock without a permit. The court held that the permit obtained by the plaintiff was irregular because of his own fault and that he was therefore guilty of a violation of the law, but that the statute did not prohibit the contract. Tenterden C.J. stated the law as follows12: "Where a contract which a plaintiff seeks to enforce is expressly, or by implication, forbidden by the statute or common law, no court will lend its assistance to give it effect: and there are numerous cases in the books where an action on the contract has failed, because either the consideration for the promise or the act to be done was illegal, as being against the express provisions of the law, or contrary to justice, morality, and sound policy. But where the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law, not contemplated by the contract, in the performance of something to be done on his part."

The last sentence in this judgment is a clear and decisive statement of the law; it is directly contrary to the contention which Mr. Wilmers advances, which I therefore reject both on principle and on authority.

So Mr. Wilmers's wider proposition fails. Mr. Roskill is right in his submission that the determining factor is the true effect and meaning of the statute, and I turn therefore to consider Mr. Wilmers's alternative proposition that the contract

11 (1832) 3 B. & Ad. 221.

12 Ibid. 225.

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evidenced by the bill of lading is one that is made illegal by the Act of 1932. I have already indicated the basis of this argument, namely, that the statute being one which according to its preamble is passed to give effect to a convention "for promoting the safety of life and property at sea," it is therefore passed for the benefit of cargo owners among others. That this is an important consideration is certainly established by the authorities. But I follow the view of Parke B. in *Cope v. Rowlands*,13 which I have already cited, that it is one only of the tests. The fundamental question is whether the statute means to prohibit the contract. The statute is to be construed in the ordinary way; one must have regard to all relevant considerations and no single consideration, however important, is conclusive.

Two questions are involved. The first - and the one which hitherto has usually settled the matter - is: does the statute mean to prohibit contracts at all? But if this be answered in the affirmative, then one must ask: does this contract belong to the class which the statute intends to prohibit? For example, a person is forbidden by statute from using an unlicensed vehicle on the highway. If one asks oneself whether there is in such an enactment an implied prohibition of all contracts for the use of unlicensed vehicles, the answer may well be that there is, and that contracts of hire would be unenforceable. But if one asks oneself whether there is an implied prohibition of contracts for the carriage of goods by unlicensed vehicles or for the repairing of unlicensed vehicles or for the garaging of unlicensed vehicles, the answer may well be different. The answer might be that collateral contracts of this sort are not within the ambit of the statute.

The relevant section of the Act of 1932, section 44, provides that the ship "shall not be so loaded as to submerge" the appropriate loadline. It may be that a contract for the loading of the ship which necessarily has this effect would be unenforceable. It might be, for example, that the contract for bunkering at Port

Everglades which had the effect of submerging the loadline, if governed by English law, would have been unenforceable. But an implied prohibition of contracts of loading does not necessarily extend to contracts for the carriage of goods by improperly loaded vessels. Of course, if the parties knowingly agree to ship goods by an overloaded vessel, such a contract would be illegal; but its illegality does not depend on whether it is impliedly prohibited by the statute, since it falls within the first

13 2 M. & W. 149.

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of the two general heads of illegality I noted above where there is an intent to break the law. The way to test the question whether a particular class of contract is prohibited by the statute is to test it in relation to a contract made in ignorance of its effect.

In my judgment, contracts for the carriage of goods are not within the ambit of this statute at all. A court should not hold that any contract or class of contracts is prohibited by statute unless there is a clear implication, or "necessary inference," as Parke B. put it,14 that the statute so intended. If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication. But unless you get a clear implication of that sort, I think that a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract. Caution in this respect is, I think, especially necessary in these times when so much of commercial life is governed by regulations of one sort or another, which may easily be broken without wicked intent. Persons who deliberately set out to break the law cannot expect to be aided in a court of justice, but it is a different matter when the law is unwittingly broken. To nullify a bargain in such circumstances frequently means that in a case - perhaps of such triviality that no authority would have felt it worth while to prosecute - a seller, because he cannot enforce his civil rights, may forfeit a sum vastly in excess of any penalty that a criminal court would impose; and the sum forfeited will not go into the public purse but into the pockets of someone who is lucky enough to pick up the windfall or astute enough to have contrived to get it. It is questionable how far this contributes to public morality. In *Vita Food Products Inc. v. Unus Shipping Co*.15 Lord Wright said16: "Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds." It may be questionable also whether public policy is well served by driving from the seat of judgment everyone who has been

14 2 M. & W. 159.

15 [1939] A.C. 277; 55 T.L.R. 402; [1939] 1 All E.R. 513.

16 [1939] A.C. 277, 293.

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guilty of a minor transgression. Commercial men who have unwittingly offended against one of a multiplicity of regulations may nevertheless feel that they have not thereby forfeited all right to justice, and may go elsewhere for it if courts of law will not give it to them. In the last resort they will, if necessary, set up their own machinery for dealing with their own disputes in the way that those whom the law puts beyond the pale, such as gamblers, have done. I have said enough, and perhaps more than enough, to show how important it is that the courts should be slow to imply the statutory prohibition of contracts, and should do so only when the implication is quite clear. I have felt justified in saying as much because, to any judge who sits in what is called the Commercial Court, it must be a matter of special concern. This court was instituted more than half a century ago so that it might solve the disputes of commercial men in a way which they understood and appreciated, and it is a particular misfortune for it if it has to deny that service to any except those who are clearly undeserving of it.

I think also that it is proper, in determining the scope of the statute, to have regard to the consequences I have already described and to the inconveniences and injury to maritime business which would follow from upholding the defendants' contention in this case. In the light of all these considerations I should not be prepared to treat this statute as nullifying contracts for the carriage of goods unless I found myself clearly compelled by authority to do so. I can find no such authority in the cases which Mr. Wilmers has cited, nor even any analogous cases in which the law has been stretched as far. Of course, the construction of each Act depends upon its own terms, but I can find no authority in which any Act has been given anything like so wide an effect as Mr. Wilmers wants the Act of 1932 to be given. In the statutes to which the principle has been applied, what was prohibited was a contract which had at its centre - indeed often filling the whole space within its circumference - the prohibited act; contracts for the sale of prohibited goods, contracts for the sale of goods without accompanying documents when the statute specifically said there must be accompanying documents; contracts for work and labour done by persons who were prohibited from doing the whole of the work and labour for which they demanded recompense. It is going a long way further to say that contracts which depend for their performance upon the

use of an instrument which has been treated in a forbidden ay should also be forbidden. In the only case I have seen

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where the contention appeared to go as far as that the claim failed. The relevant facts in *Smith v. Mawhood*17 appear sufficiently from the judgment of Alderson B.,18 where he also dealt with the contention: "But here the legislature has merely said, that where a party carries on the trade or business of a dealer in or seller of tobacco, he shall be liable to a certain penalty, if the house in which he carries on the business shall not have his name, etc., painted on it, in letters publicly visible and legible, and at least an inch long, and so forth. He is liable to the penalty, therefore, by carrying on the trade in a house in which these requisites are not complied with; and there is no addition to his criminality if he makes fifty contracts for the sale of tobacco in such a house. It seems to me, therefore, that there is nothing in the Act of Parliament to prohibit every act of sale, but that its only effect is to impose a penalty, for the purpose of the revenue, on the carrying on of the trade without complying with its requisites."

A contract for the sale of tobacco was therefore not to be considered void merely because the premises in which the tobacco was sold did not comply with the law. So it might be said that a contract for carriage of goods is not to be considered void merely because the ship in which they are carried does not comply with the law. But I recognize that each case must be determined by reference to the relevant statute and not by comparison with other cases. I reach my conclusion - in the words of Lord Wright in *Vita Food Products Inc. v. Unus Shipping Co*.19 - on "the true construction of the statute, having regard to its scope and its purpose and to the inconvenience which would follow from any other conclusion."

In view of the importance of this question, I have thought it right to determine it upon general grounds rather than upon the particular wording of section 44. But I must note that Mr. Roskill also particularly relies upon the wording of subsection (2) of that section. This subsection, to which I have already referred, is the one which says that the fine is to be such "as the court thinks fit to impose having regard to the extent to which the earning capacity of the ship was, or would have been, increased by reason of the submersion." Mr. Roskill submits that this shows that the statute contemplated that, notwithstanding the breach of it, there would be an "earning capacity" and, therefore, that contracts for the payment of

17 (1845) 14 M. & W. 452.
18 Ibid. 464.
19 [*[1939] A.C. 277*](), 295.

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freight must be intended to remain alive. I note that a similar point was taken in *Forster v. Taylor*,20 but it was not necessary for the court to deal with it.

I turn now to Mr. Wilmers's second point. He submitted that the plaintiffs could not succeed in a claim for freight without disclosing that they had committed an illegality in the course of the voyage; or, put another way, that part of the consideration for the payment of freight was the safe carriage of the goods, and therefore they must show that they carried the goods safely. In the passage I have quoted from the judgment in *Wetherell v. Jones*,21 Tenterden C.J.22 carefully distinguished between an infringement of the law in the performance of the contract and a case where "the consideration and the matter to be performed" were illegal. There is a distinction there - of the sort I have just been considering - between a contract which has as its object the doing of the very act forbidden by the statute, and a contract whose performance involves an illegality only incidentally. It may be, therefore, that the second point is the first point looked at from another angle. However that may be, there is no doubt that if the plaintiffs cannot succeed in their claim for freight without showing that they carried the goods in an overloaded ship, they must fail.

But, in my judgment, the plaintiffs need show no more in order to recover their freight than that they delivered to the defendants the goods they received in the same good order and condition as that in which they received them. Indeed, they are entitled to recover their freight without deduction (but subject to counterclaim) if the goods they delivered were substantially the same as when loaded: see Scrutton on Charterparties, 16th ed., p. 391, art. 144. It may be true that it is a term of the contract of carriage that the goods should be carried safely. Article III of the Hague Rules provides, for example, in rule 2, "that the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." But no one has ever heard of a claim for freight being supported by a string of witnesses describing the loading, handling, stowing, keeping, caring for and discharging the goods. The truth is that if the goods have been delivered safely, it must follow that they have been carried safely. If, therefore, they are proved to have been delivered undamaged, the shipowner need prove no more. The law is that they shall be carried safely - not that they should

20 (1834) 5 B. & Ad. 887, 889.
21 3 B. & Ad. 221.
22 Ibid 225.

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not be exposed to danger on the voyage. If the plaintiffs had to prove that they were not exposed to danger on the voyage, then no doubt they would also have to prove that the ship complied with all the safety

regulations affecting her; but in the claim for freight they need only prove safe delivery. This point fails.
On Mr. Wilmers's third point I take the law from the dictum in *Beresford v. Royal Insurance Co. Ltd*.23 that was adopted and applied by Lord Atkin24: "no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person." I observe in the first place that in the Court of Appeal in the same case Lord Wright25 doubted whether this principle applied to all statutory offences. His doubt was referred to by Denning L.J. in *Marles v. Philip Trant & Sons*26 which I have already cited. The distinction is much to the point here. The Act of 1932 imposes a penalty which is itself designed to deprive the offender of the benefits of his crime. It would be a curious thing if the operation could be performed twice - once by the criminal law and then again by the civil. It would be curious, too, if in a case in which the magistrates had thought fit to impose only a nominal fine, their decision could, in effect, be overridden in a civil action. But the question whether the rule applies to statutory offences is an important one which I do not wish to decide in the present case. The dicta of Lord Wright27 and Denning L.J.28 suggest that there are cases where its application would be morally unjustifiable; but it is not clear that they go as far as saying that the application would not be justified in law. I prefer, therefore, to deal with Mr. Wilmers's submission in another way.
The rights which cannot be enforced must be those "directly resulting" from the crime. That means, I think, that for a right to money or to property to be unenforceable the property or money must be identifiable as something to which, but for the crime, the plaintiff would have had no right or title. That cannot be said in this case. The amount of the profit which the plaintiffs made from the crime, that is to say, the amount of freight which, but for the overloading, they could not have earned on this voyage, was, as I have said, £2,295. The quantity of cargo consigned to the defendants was approximately 35 per cent.

23 *[1938] A.C. 586*; 54 T.L.R. 789; [1938] 2 All E.R. 602.
24 *[1938] A.C. 586*, 596.
25 *[1937] 2 K.B. 197*, 220; 53 T.L.R. 583; [1937] 2 All E.R. 243.
26 *[1954] 1 Q.B. 29*, 37.
27 *[1937] 2 K.B. 197*, 220.
28 *[1954] 1 Q.B. 29*, 37.

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of the whole and, therefore, even if it were permissible to treat the benefit as being divisible pro rata over the whole of the cargo, the amount embodied in the claim against the defendants would not be more than 35 per cent. of £2,300. That would not justify the withholding of £2,000. The fact is that the defendants and another cargo owner have between them withheld money, not on a basis that is proportionate to the claim against them, but so as to wipe out the improper profit on the whole of the cargo. I do not, however, think that the defendants' position would be any better if they had deducted no more than the sum attributable to their freight on a pro rata basis. There is no warrant under the principle for a pro rata division; it would be just as reasonable to say that the excess freight should be deemed to attach entirely to the last 427 tons loaded, leaving the freight claim on all the rest unaffected. But in truth there is no warrant for any particular form of division. The fact is that in this type of case no claim or part of a claim for freight can be clearly identified as being the excess illegally earned.
In *Beresford v. Royal Insurance Co. Ltd*.29 the court dismissed the claim of a personal representative who claimed on policies of life insurance which had matured owing to the assured committing suicide in circumstances that amounted to a crime. Mr. Wilmers submitted that the only benefit which the assured or his estate derived from the claim was the acceleration of the policies and that notwithstanding that some of the policies had been in force for a considerable time and therefore, I suppose, had a surrender value before the suicide was committed, the plaintiff was not allowed to recover anything. So in the present case, he submits, the commission of the crime defeats the whole claim to freight notwithstanding that the earning of the greater part of it was irrespective of the crime.
The comparison does not seem to me to be just. In *Beresford v. Royal Insurance Co. Ltd*.,29 but for the crime committed by the assured, no part of the policy moneys could have been claimed in that form, that is to say, as money repayable on the happening of the event insured against, or at that time. That does not necessarily mean that, so far as public policy was concerned, the plaintiff could recover nothing. If the plaintiff, for example, had sued for the return of premiums, assuming the contract permitted it, I have not been referred to any observation in the case which would suggest that an action in that form would fail on the grounds of public policy. The claim which the

29 *[1938] A.C. 586*.

*[*294]*

court was considering under the policy depended entirely upon proof of death and the death was a crime. In the present case the right to claim freight from the defendants was not brought into existence by a crime; the crime affected only the total amount of freight earned by the ship.
The result is that there must be judgment for the plaintiffs for £2,000. But the defendants will not have fought the action altogether in vain if it brings to the attention of the competent authorities the fact that

section 44 of the Act of 1932 is out of date and ought to be amended. I have already noted that for a similar offence a British master can be imprisoned and it must be very galling for those concerned to see a foreign master do the same thing without the law providing any effective deterrent.
Judgment for plaintiffs.

E. M. W.