PC
G13/63

Judgment
27, 1959

Uganda

IN THE PRIVY COUNCIL

No. 32 of 1958

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL
FOR EASTERN AFRICA

B E T W E E N :

KIRIRI COTTON COMPANY LIMITED (Defendants) Appellants

- and -

RANCHHODDAS KESHAVJI DEWANI (Plaintiff) Respondent

RECORD OF PROCEEDINGS

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Solicitors for the Appellants.

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IN THE PRIVY COUNCIL No. 32 of 1958

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B E T W E E N :

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- and -

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(Plaintiff) Respondent

RECORD OF PROCEEDINGS

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IN THE PRIVY COUNCIL No. 32 of 1958

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B E T W E E N :

KIRIRI COTTON COMPANY LIMITED
(Defendants) Appellants

- and -

RANCHHODDAS KESHAVJI DEWANI
(Plaintiff) Respondent

RECORD OF PROCEEDINGS

No. 1

PLAINT

In the High Court of Uganda

No. 1

Plaint, 21st September, 1956

B E T W E E N

RANCHHODDAS KESHAVJI DEWANI Indian Merchant, Kampala c/o Messrs. Baerlein & James Advocates, P.O.Box 2893, KAMPALA	Plaintiff	
AND		
THE KIRIRI COTTON COMPANY LIMITED a Limited liability company incorporated in Uganda whose registered office is at Kampala.	Defendants	

The Defendant is the registered proprietor of Plot No. 55 Salisbury Road, Kampala, comprised in Leasehold Register Volume 243 Folio 9.

2. On or about the 15th day of June 1953 the

In the High Court of Uganda

No. 1

Plaint, 21st September, 1956 - continued

Defendant, by a verbal agreement, agreed to sub-lease to the Plaintiff for a term of seven years and one day, one dwelling house being a residential flat No. 1 on the said Plot, the term commencing from the 1st June 1953 at a monthly rent of Shs.300/- payable in advance.

3. In consideration of the said sub-letting the Defendant asked for and did receive from the Plaintiff or on behalf of the Plaintiff from the Kampala Flour Mills Ltd. on or about the 15th day of June 1953 the sum of Shs.10,000/- by way of premium and other than by way of rent.

4. In pursuance of the said agreement and payment as aforesaid the plaintiff went into occupation of the said residential flat on the 15th day of June 1953.

5. The said agreement was reduced into writing in the form of a sub-lease, which was executed by the Plaintiff and the Defendant and dated the 17th day of September 1953 and which was registered in the Register of Titles as Instrument No. 132695 on the 25th April 1956. The Plaintiff will more particularly refer at the hearing of the suit to the terms of the said Instrument No. 132695, a copy of which is annexed hereto and marked "RKD". The Plaintiff has since the date of obtaining possession as aforesaid paid to the Defendant rent at the said rate of Shs.300/- per month up to and including the 30th September 1956.

6. By virtue of the provisions of Sub-section (2) of Section 3 of the Rent Restriction Ordinance the receipt of the said sum of Shs.10,000/- by the Defendant from the Plaintiff or on behalf of the Plaintiff from the Kampala Flour Mills Ltd. was illegal, but the Plaintiff is entitled to recover the same since he (the Plaintiff) was not in pari delicto with the Defendant.

7. The Plaintiff claims the sum of Shs.10,000/- as money received by the Defendant for the use of the Plaintiff. THEREFORE the Plaintiff prays the Honourable Court for judgment against the defendant for :-

(a) Shs. 10,000/-

(b) Interest thereon at the rate of 6% per

annum from date hereof till payment.

(c) Costs.

(d) Such further and/or other relief as to this Honourable Court may seem just.

DATED at Kampala this 21st day of September, 1956.

(Sgd.) A.J. JAMES

COUNSEL FOR THE PLAINTIFF.

In the High Court of Uganda

No. 1

Plaint, 21st September 1956 - continued

In the High Court of Uganda

No. 1

Sub-Lease annexed to Plaint 17th September, 1953

No. 1

SUB-LEASE annexed to Plaint

COPY OF ANNEXURE "RKD"

fee debited

Instrument No. 132695) Two Hundred Shillings Uganda) Forty shillings Uganda
Registered at 3 p.m. on 25.4.1956)
Register Vol. 243 Fol. 9)
SUBLEASE 20 1)

Office of Titles Passed for Registration at 3.00 on 25.4.56

sd.
Registrar of Titles, Uganda.

U G A N D A.

REGISTRATION OF TITLES ORDINANCE.

LEASEHOLD REGISTER

VOLUME 243 FOLIO 9

Plot No. 55 Salisbury Road, Kampala.

WE, THE KIRIRI COTTON COMPANY LIMITED a company incorporated in Uganda whose registered office is situated at Kampala, with postal address as P.O. Box 233, Kampala, Uganda (hereinafter called the Sub-lessor) being the registered proprietors of the Leasehold Estate in the Lands comprised in Volume 243 Folio 9 of the Leasehold Register above referred to in consideration of the sum of Shs.10,000/- (shillings ten thousand) paid by RANCHHODDAS KESHVJI DEWANI by way of premium (receipt whereof the sub-lessor hereby acknowledge) and at the rent and sub-lessee's covenants hereinafter reserved and contained HEREBY SUB-LEASE to the said Ranchhoddas Keshvji Dewani an Indian of Kampala Uganda having postal address as P.O. Box 196, Kampala, Uganda (hereinafter called the sub-lessee) ALL THAT part of premises namely one block of flats known as flat No. 1 on the 1st floor for residence only having three rooms, one kitchen, one bath room and one lavatory with right of access to the said flat from the Salisbury Road comprised in the building mentioned in the said Folio and shown on the plan edged red annexed hereto in common with other users of the building on the said land

and with the common use of the door way passage from the said Salisbury Road staircase providing access to the said flat and to the terrace on the top TO HOLD to the sub-lessee for a term of seven years and one day from 31st day of May 1953 at a clear monthly rental of Shs.300/- (shillings three hundred) payable in advance the first of such payment of Shs.300/- to be paid on the 31st day of May 1953 and thereafter in advance on the 1st day of every succeeding month and subject to the covenants and powers implied under the Registration of Titles Ordinance (unless hereby negatived or modified) AND ALSO to the covenants and conditions hereinafter contained.

1. The Sub-lessee hereby covenants with the sub-lessor as follows:-

(a) To pay the rent as aforesaid.

(b) To pay all Municipal rates and assessments including improvement and site values in respect of the premises hereby sub-leased.

(c) To pay all sanitary removal fees and/or conservancy fees and all rates for lights and water and other similar taxes which are normally paid by a tenant and are now or may hereafter be charged during the said term and upon the said premises or on the sub-lessor or sub-lessee in respect thereof

(d) Not to cut or injure the main walls of the demised premises PROVIDED HOWEVER the sub-lessee will be at liberty to make any alterations in or additions to the demised premises internally only at his own costs subject to the approval of the sub-lessor and the Municipal Authority if any required under any of its Regulations.

(e) To keep the interior and outside of the demised premises and all fixtures fittings and conveniences now belonging thereto in good and tenantable repair (reasonable wear and tear excepted) PROVIDED HOWEVER if there be any breakage damage or loss of any of the fixtures or fittings the sub-lessee shall replace the same at his own costs.

(f) To permit the Sub-lessor or its agents with or without workmen and others at all reasonable

In the High Court of Uganda

No. 1

Sub-Lease annexed to Plaint 17th September, 1953 - continued

time to enter upon the demised premises and view the condition thereof.

(g) To permit the Sub-lessor or its agents at all reasonable time to enter upon the demised premises to take inventories of the Sub-lessor's fixtures (if any) therein.

(h) Not to assign and/or sub-let the demised premises without the written consent of the Sub-lessor first had and obtained PROVIDED THAT Sub-lessor will not unreasonably withhold such consent in the case of a reputable and responsible tenant.

(i) Not to carry on any offensive trade on the demised premises.

(j) To provide at his own costs and expenses a dust bin of the approved type as required by the Municipal Authority and to keep the same in proper condition

(k) To permit the Sub-lessor and/or its workmen and/or its agents to commence and erect buildings on the back portion of the premises falling on the Rosebury Road, without any hindrance and obstruction.

(l) Not to use or permit to be used the demised premises in a way which would create nuisance or annoyance to the public neighbours or adjoining tenants.

(m) To observe and conform to the covenants entered into by the Sub-lessor under the Head Lease.

(n) To yield up the demised premises with any additions of a permanent nature thereto at the determination of the tenancy (fair wear and tear excepted) in accordance with the covenants hereinbefore contained.

2. The Sub-lessor hereby covenants with the Sub-lessee as follows :-

(a) To keep the demised premises insured against loss or damage by fire PROVIDED ALWAYS and it is hereby agreed that the Sub-lessee will not do or permit to be done anything whereby

the Policy or Policies of Insurance on the demised premises against damage by fire for the time being subsisting may become void or voidable or whereby the rate of premium thereon may be increased, and to pay the Sub-lessor all sum paid by way of premium increased by it in or about any renewal of such policy or policies rendered necessary by a breach of this covenant and all of which payments shall be included in the rent hereinbefore reserved PROVIDED FURTHER that if the premises or any part thereof shall at any time during the continuance of this sub-lease be destroyed or damaged by fire so as to become unfit for use or habitation and the policy or policies of insurance effected by the Sub-lessor should not have been vitiated or payment of the policy monies refused in whole or in part in consequence of any act or omission of the sub-lessee the rent hereby reserved or a fair and just proportion thereof according to the nature and extent of the damage sustained shall be suspended until the premises shall be again rendered fit for use and habitation and any dispute concerning this clause shall be determined by reference to Arbitration in accordance with the Arbitration Ordinance.

(b) To pay the Ground Rent in respect of the demised premises

(c) The Sub-lessee paying the rent hereby reserved and observing and performing the several covenants and stipulations herein on its part contained shall peaceably hold and enjoy the demised premises during the said term without any interruption by the Sub-lessor or any person rightfully claiming under it or in trust for it and any sale of the said premises or any part thereof shall be subject to this sub-lease.

3. The cost of preparation and engrossing these presents and the registration of the Sub-lease with the Registrar of Titles including stamp duty and advocates fees shall be borne by the sub-lessee.

4. AND IT IS HEREBY EXPRESSLY AGREED AND DECLARED by and between the parties hereto that if the said rent hereby reserved or any part thereof shall be

In the High Court of Uganda

No. 1

Sub-Lease annexed to Plaint 17th September, 1953 - continued

unpaid for thirty days becoming payable (whether formally demanded or not) or if any covenant on the part of the Sub-lessee herein contained shall not be performed or observed THEN and in any of the said cases it shall be lawful for the Sub-lessor or its agents in its name at any time thereafter to re-enter upon the demised premises or any part thereof in the name of the whole and thereupon this demise shall absolutely determine but without prejudice to any right of distress for rent accrued due to the sub-lessor by reason of such non-payment of rent.

DATED this 17th day of September One thousand nine hundred and fifty three.

THE COMMON SEAL OF THE KIRIRI COTTON COMPANY LIMITED was affixed hereto in the presence of:

THE KIRIRI COTTON COMPANY LIMITED
KAMPALA (UGANDA)

SIGNED by the said RANCHHODDAN KESHAVJI DEWANI in the presence of :

Sd. Ranchhoddas Keshavji
Dewani.

Sd. ..... ?

Advocate, Kampala.

No. 2

In the High Court of Uganda

No. 2

Defence 31st October, 1956.

DEFENCE

IN HER MAJESTY'S COURT OF UGANDA AT KAMPALA

CIVIL CASE NO. 883 of 1956.

RANCHHODDAS KESHAVJI DEWANI ... Plaintiff

vs.

THE KIRIRI COTTON COMPANY LIMITED Defendants

DEFENDANTS' WRITTEN STATEMENT OF DEFENCE

The above named Defendant Company states as under:-

1. Except as hereinafter specifically and categorically admitted the Defendants deny each and every allegations made in the plaint.

2. The Plaint discloses no cause of action and that the claim of the Plaintiff based and founded on the cause of action as disclosed in the plaint is not maintainable in law.

3. In the alternative and without prejudice to what has been stated in para 2 hereof the defendants state that the payment of premium made and received was legal.

4. In the further alternative and without prejudice to paragraphs 2 and 3 hereof the defendants admit para 1, 2, 4, 5 of the plaint and in respect of para 3 of the plaint state that the Plaintiff agreed to the payment of premium and he himself made the payment thereof voluntarily by cheque of Kampala Flour Mills Limited on or about the 15th day of June 1953.

5. With regard to para 6 of the plaint the defendants state that if the payment of premium of Shs.10,000/- was illegal then the Plaintiff being a party to the same cannot recover the same and the defendants deny that the plaintiff was not in pari delicto with the defendants. The defendants further contend that the plaintiff is estopped from claiming the said amount from the defendants

In the High Court of Uganda

No. 2

Defence
31st October, 1956.- continued

due to delay, acquiescence and laches.

WHEREFORE the defendants pray that the Plaintiff's suit be dismissed with costs.

DATED THIS 31st day of October, 1956.

(sd.) A.G. MEHTA

COUNSEL FOR THE DEFENDANTS.

No. 3

Notes of Lyon J. of Proceedings 18th September, 1957.

No. 3

NOTES OF LYON J. OF PROCEEDINGS.

PROCEEDINGS.

18.9.57. James for Plaintiff

C.B. Patel)
Mehta) for Defendant Co.

James: Premium.

Plaint read.

Defence.

Negotiations in May '53 not June.

Lease 31.5.53.

Agreed lease regd. Terms as in the deed RKD.

10,000/- paid by Plaintiff to Defendant.

Agreed Issues:-

(1) Has Pl. any cause of action as disclosed in the Plaint?

(2) Is the Pl. entitled to recover 10,000/- paid by him to Deft. as premium?

RANCHHODDAS KESHAVJI DEWANI (affd.)

Pl. in this case. I came to Kampala, Uganda,

in 1953 - March. I lived with a brother for 1½ months. I took a flat, but I had to pay key money. I was searching for some time.

I got a flat at Kololo but after 2-3 days I had to leave as I had trouble with a co-tenant. Then I got in touch with C.B. Patel, after having difficulty. I borrowed 10,000/- from the Co. as my brother was a director.

XXn I paid the money by borrowing the money.

(sd.) M.D. Lyon.

CASE.

MEHTA: I call no evidence. But I will address you after Mr. James.

JAMES: Sec. 3(2) Cap.115

Lease 7 years and 1 day.

"Premises" sec. 2 (1562)

2 proviso in force in 1953 but here no exception.

C.C. 722/56 Mehta Bros. v. R.L. Hampton Ltd.

Taking of premium illegal whether 7 years or less.

R.V. Norman Godhino. 1950 E.A.C.A. (XVII) 132.

Sec. 8 1920 Act.

C.A. 20/49

I adopt Edward's Judgment in that case.

C.J's reasoning incorrect.

In Kenya & U.K. express provision in the Stats.

No express provision needed for Pl. to recover

Premium is recoverable.

In the High Court of Uganda

No. 3

Notes of Lyon J. of Proceedings 18th September, 1957.- continued

Pl. here not with unclean hands.

Halsbury 3rd Edn. Vol. 8 p.150 Contract para 258.

Browning v. Morris 98 English Reports KB 1364 cited with Gray v. Southhouse 1949 (2) A.E.R. 1019 Smith v Cuff 1817 Vol. 12 English & Empire Digest 322 Case 2482.

Carey v. Thomson 1890 p. 318 (same Digest) 2453.

Pl. not in pari delicto.

Fact that nothing about recovery in the Uganda Ord. when there are provisions in Kenya U.K. is not conclusive at all.

Pl. recovered amounts in excess of the standard rent altho' no provision in the Ord.

Difficulty in getting accommodation.

Object of Rent Acts to protect tenants.

1943 Ord. illegal to charge more than standard rent.

1949 Ord.

1954 Amdt. Ord. 16.

Decisions based on Equity.

Pl. in a protected class - not in pari delicto.

Adjd. to 2.15 p.m.

(Sd.) M.D. Lyon.

2.15 Court as before

MEHTA: Facts not in dispute.

Lease.

Denied - Pl. was not in pari delicto -

Not important when Pl. took occupation para. 6 of Plaint.

Nothing in Plaint to show Pl. not in pari delicto.

No evidence by Pl. that he was not in pari delicto.

No evidence about negotiations with Deft. Co.

No pleading about difficulty, etc.

1953 A.E.R. (2) 104 & 5.

No facts to show he was not in pari delicto.

Presumption is he was in pari delicto in absence of facts to show the contrary.

English & Empire Digest Vol. 12. 287 para. 2359.

Chitty on Contracts 111.

470, 471 Chitty on Contracts 20 Edn.

Pl. trying to recover money paid under an illegal contract when offence is created by Stat.

He cannot.

Godinho - conviction under Uganda Rent Restn. Ord.

Dwelling House.

Lease for 5 yrs. and option for 2 held to be 7 yrs.

Godinho p. 133.

1940 (1) A.E.R. 241.

P.C.

Sec.3(2) 2nd proviso.

I rely on Godinho's case.

Premium for dwelling house for 7 years or more is legal.

Premium not recoverable.

In pari delicto.

Gray v. Southouse distinguished.

Con. to public policy.

Contract executory - not complete.

Green v Portsmouth Stadium Ltd. 1953 (2) A.E.R.102. (Bookmaker overcharged)

Failed to recover.

Denning J's Judgment.

In the High Court of Uganda

No. 3

Notes of Lyon J. of Proceedings 18th September, 1957 - continued

This case on all fours with the instant.

Cutler v Monmouth Stadium Ltd. 1949 (1) A.E.R. 549.

C.A.20/49 p.3 p.5.

Rent paid in excess of standard rent.

Tenant did not know for some years what the standard rent was. Mistake of fact.

Facts carefully enquired into.

722/56. Supported.

Present C.J.'s decision.

"Dwelling House" omitted in proviso (by mistake).

C.A.13/49.

Ghandi v Radio Electric Services Ltd.

Price Regns.

F.S. out.

No. marks on the invoices.

Claim for money irrecoverable.

25.2.49.

J. Rank Ltd. 1956 (3) A.E.R.683

Harry Parker Ltd. v. Mason 1940 (4) A.E.R. 199.

Parkinson v. College of Ambulance Ltd. 1925.

2 K.B.D.1.

Chitty on Contracts 469.

Laches.

Lease Sept. 1953.

Money paid June '53.

Suit filed 21.9.56.

3 years' delay.

Equitable Jurisn.

Halsbury 2 Edn. Vol.XIII 211,
Without undue delay.

No Stat. bar here.

Acquiescence.

Slept on his rights.

P.219

Court should not aid one who has slept on his rights.

Oppressed. No question of that here. No evidence of oppression.

Presumption a vol. payment.

Para. 4 of Defence.

Parties are in pari delicto - No evidence to the contrary.

Lease disclosed payment.

Deft. gave receipt in the lease.

Not under the counter.

Want thro' Defts. bank a/c.

Rent Res. Ord. not only for protection of Tenants.

Also for protection of Landlords, e.g. sec. 6.

Stockham v Easton 129 L.T.R.762.765.

In 1954 the legislature knew of the Godinho case.

James: Green v Portsmouth Stadium 104.

Nothing in Ord. about recovery.

'Not a bookmakers'

Stat. not to protect bookmakers.

Dwelling House read into proviso 2 of Sec.3(2).

Gray v Southouse.

Consn. for premium had failed. (even in case of conspiracy to evade the law).

Delay. Lease is valid.

Only payment of premium in issue.

No loss or damage to Deft. through delay here.

There was a stat. bar.

Payment of 10,000/- not voluntary.

In the High Court of Uganda

Inequality between tenant and landlord. otherwise no need for Rent Restriction Ord.

No. 3

Notes on Lyon J. of Proceedings 18th September, 1957 - continued

Adjt. for Judgment at 9.30 a.m.24/9.

Sgd. M.D.Lyon, J.
18/9.

No. 4

Judgment of Lyon, J. 24th September, 1957.

No. 4

JUDGMENT OF LYON, J.

IN HER MAJESTY'S HIGH COURT OF UGANDA AT KAMPALA.

CIVIL CASE No.883 of 1956

RANCHHODDAS KESHAVJI DEWANI PLAINTIFF

versus

THE KIRIRI COTTON COMPANY LIMITED DEFENDANT

Before - The Honourable Mr. Justice Lyon.

The Plaintiff in this case claims Shs.10,000/- money received by the defendant for the use of the plaintiff. The facts are brief and with minor exceptions are agreed. Plaintiff rented a flat from the defendant company. The agreed sub-lease was produced (annexure to the plaint "RKD"). After reciting that the defendant company were the proprietors of the leasehold estate, the sub-lease continues: "in consideration of the sum of Shs.10,000/- (shillings ten thousand) paid by RANCHHODDAS KESHAVJI DEWANI by way of premium (receipt whereof the Sub-lessor hereby acknowledge) (sic) and of the rent and sub-lessee's covenants hereinafter reserved and contained (the Proprietors) HEREBY SUB-LEASE to the said Ranchhoddas Keshavji Dewani..ALL THAT part of premises namely one block of flats known as Flat No.1 on the 1st floor for residence only .....". This sub-lease is dated

the 17th September, 1953; but the negotiations leading up to this letting took place in May, 1953.

It is that Shs.10,000/- described in the Sub-lease as a premium, which this plaintiff seeks to recover.

The issues agreed by counsel and approved by me are:

(1) Has plaintiff any cause of action as disclosed in the plaint?

(2) Is the plaintiff entitled to recover Shs.10,000/- paid by him to defendant as a premium?

The plaintiff was the only witness. He testified: "I came to Kampala, Uganda, in 1953,- March. I lived with a brother for 1½ months. I took a flat, but I had to pay key-money. I was searching for some time. I got a flat at Kololo but after 2-3 days I had to leave, as I had trouble with a co-tenant. Then I got in touch with C.B.Patel, after having difficulty. I borrowed Shs.10,000/- from the Company as my brother was a director. I paid the money by borrowing the money."

It will be noted that plaintiff was having difficulty in obtaining accommodation and had found it necessary to pay key-money before. He was not cross-examined on this. During the negotiations for the flat he was at a disadvantage.

The sub-lease was obviously drafted by a lawyer or lawyers. The clause which incorporated the term "7 years and day" was intended to bring the transaction within the protection of the second proviso of section 3. But it did not, because of the definition of "premises".

In these circumstances the tenant may have thought that the transaction did not constitute an offence.

To show the nature of the transaction, however, both as it affected the landlord and in relation to other provisions contained in the Ordinance, it should be noted that a premium of £500 represented nearly 3 years' rent. Section 3. Cap.115.Volume 111. page 1563 provides:

3(1) "No owner or lessee of a dwelling-house or

In the High Court of Uganda

No. 4

Judgment of Lyon, J. 24th September, 1957 - continued.

premises shall let or sub-let such dwelling-house or premises at a rent which exceeds the standard rent.

(2) Any person whether the owner of the property or not who in consideration of the letting or sub-letting of a dwelling-house or premises to a person asks for, solicits or receives any sum of money other than rent or any thing of value whether such asking, soliciting or receiving is made before or after the grant of a tenancy shall be guilty of an offence and liable to a fine not exceeding Shs.10,000/- or imprisonment for a period not exceeding six months or to both such fine and imprisonment:

Provided that a person acting bona fide as an agent for either party to an intended tenancy agreement shall be entitled to a reasonable commission for his services:

And provided further that nothing in this section shall be deemed to make unlawful the charging of a purchase price or premium on the sale, grant, assignment or renewal of a long lease of premises where the term or unexpired term is seven years or more."

Ordinance 16 of 1954 deleted the second proviso and added sub-section '2A', which provided that any person who stipulated for more than six months' rent to be paid in advance would be guilty of an offence; and added sub-section 4;

" Notwithstanding any rule of law or of practice to the contrary, in any prosecution for an offence under this section no person shall be deemed to be an accomplice or to be unworthy of credit, neither shall the uncorroborated evidence of any person be held to be insufficient to support a conviction, merely before or after the coming into force of the Rent Restriction (Amendment) Ordinance, 1954, paid, gave or offered, or agreed or attempted to pay or give, any such fine, premium, rent in advance or other like sum, or pecuniary consideration, as aforesaid to the person charged or to any other person."

when the negotiations were completed and the sub-lease made the law stood as in Cap.115. unamended.

For example, the second proviso was in force. But that proviso applied to a lease of "premises", where the term or unexpired term was seven years or more. "Premises" is defined in Section 2 (page 1562) and does not include a residential flat, which was the type of property sub-let in the instant case.

In my opinion, therefore, the receipt of Shs.10,000/- by the defendant company was illegal, although the term set out in the sub-lease was 7 years and a day.

The new sub-section 4 of 1954 was intended mainly to make it more easy to obtain convictions of landlords who had contravened sub-section 2 and to make the evidence of a tenant who had paid "key-money" acceptable without corroboration. But that sub-section contains the words: "no person shall be deemed to be an accomplice or to be unworthy of credit, etc."

This case has been well argued by both counsel. I am faced with decisions of this Court which are contradictory. There are also two decisions of E.A.C.A. which must be carefully considered: There are also numerous English decisions which, although they do not relate to Uganda Legislation, are authorities upon the difficult question - how far an illegal contract or a part of it may be enforceable by one party or the other. In the English decisions the maxim in pari delicto potio est conditio possidentis is discussed.

I propose to deal first with part of the judgment in Rex v Norman Godinho (Criminal Appeal 62/50) 1950 E.A.C.A. (Volume XVII) 134. In that case appellant had been convicted by a magistrate of offences contrary to Section 3(2). The learned Judge in this court upheld the convictions and sentences, one of which was the imposition of a fine of Shs.10,000/-. It has been ordered that from that fine, if paid, Sh.7,500/- should be paid to the Complainant (the man who paid "key-money" to the convicted landlord). The lower courts had invoked Section 175(1) Uganda C.P.C. in order to award that compensation. I am only concerned with the passage in the Court of Appeal judgment which follows :

"The learned Judge in the Court below expressed himself as being in doubt whether the sums paid by

In the High Court of Uganda

No. 4

Judgment of Lyon, J. 24th September, 1957 - continued.

the complainants were civilly recoverable. Nevertheless, he refrained from setting aside the orders made because he felt that it would be harsh to expose the appellant to the risk of civil proceedings for a very large amount of money in addition to his other punishment. With respect the learned Judge has proceeded on a wrong principle. If the learned Magistrate was wrong in his opinion that the sums paid were recoverable by civil suit the orders made for compensation were ultra vires. It was the duty of the Judge therefore, if he felt in doubt, to inquire into and to decide on the legality of the orders. For our part we are in no doubt - what the learned Magistrate has done, doubtless quite unwittingly, is to import into the Uganda Rent Restriction Ordinance something which is not there, namely, a right to the tenant to recover from the landlord any payment made in contravention of section 3(2). We do not know the reason, but the Uganda Legislature in its wisdom had included in the Ordinance no provision comparable to section 8(2) of the Rent Restriction Act of 1920. This sub-section provides that on summary conviction for an offence against the section the convicting Court may order the amount paid by way of illegal premium to be repaid to the person to whom the same was given. Without this statutory right of recovery, the giver of the illegal premium is left in the position of one, who although he himself has committed no substantive offence, has aided and abetted the commission of an offence by another. In these circumstances he could not go to a Civil Court with clean hands and the principle stated by Lord Ellenborough in Langton v. Hughes 1 M & S 593-596 would have application. "What is done in contravention of an Act of Parliament cannot be made the subject matter of an action". For this reason we are of the opinion that the sum paid by Mr. Fafek could not be recovered by him in a civil suit and that the learned Magistrate was wrong in holding a contrary view. It follows that his order of compensation to Mr. Fafek must be set aside".

Mr. James cited that decision in connection with a decision of the present learned Chief Justice in C.C. 722 of 1956, where it was decided that the plaintiff in a case similar to the instant case in most respects could not recover.

The learned Chief Justice continued, (as the second leg of his reasons) "nor can I regard the

passages in the judgment in the Norman Godinho case relating to the construction of section 3(2) as being merely obiter. As a result of the construction put upon that sub-section the Court set aside the order for compensation made by the lower court. In the result I am bound to follow the Norman Godinho case insofar as it decided that there is no right to recover a premium paid in contravention of Section 3(2)". And the learned Chief Justice entered judgment for the defendant.

The first point for consideration here is that the decision in the Godinho case was given in a criminal appeal. Further, a study of the judgment in that case makes it clear that the Court of Appeal had not the advantage of considering all the authorities and arguments - for example, the question of in pari delicto - which I have had. In my opinion all that was decided in the Godinho case was that in that particular criminal appeal that particular complainant ought not to be awarded compensation. All the rest was obiter dicta. Again, the Appeal Court in that case attached importance to the absence in the Uganda Ordinance of a provision expressly giving the right to a tenant to recover "key-money" from a landlord, whereas such express statutory provision had been made both in England and in Kenya. I find it difficult to follow that reasoning.

Very many remedies are open to a plaintiff without express statutory provision.

Moreover the Appeal Court held there that the tenant had committed no substantive offence, but that he had aided and abetted the commission of the offence. In this connection one must remember the new sub-section 4 of section 3. Further, the Appeal Court relied upon Langton v Hughes 1 M.& S. 593-596 a case decided in 1813, the principle of which has been greatly whittled down. I shall refer later to more recent English decisions.

With respect, then, I hold that this Court is not bound by the "decision" in the Godinho case. The decision in that case implies a finding that the tenant and the landlord were in pari delicto. This point was not fully argued before the learned Judges of Appeal. To say that a tenant who is only able to obtain accommodation by the payment of "key-money" is in pari delicto with a landlord who,

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merely to benefit himself, takes advantage of those difficulties, does not make sense.

The landlord and the tenant in those circumstances are not in the same class.

The other E.A.C.A. case (C.A. 13/49) does not assist me. Except that I note that the then Chief Justice of Zanzibar (Gray, C.J.) cites a slightly different version of the tag line about in pari delicto.

In that case the appellant himself had not complied with a Defence Regulation. That case is quite different from the instant case.

Although Mr. Mehta was able to indicate provisions in the Rent Restriction Ordinance which to a certain extent protect the rights of a landlord, the Ordinance as a whole was enacted almost entirely to protect the rights of tenants and to prevent a rapacious landlord from taking advantage of a tenant unable to obtain accommodation owing to the housing shortage caused by war. The English Legislation during and after both wars had the same purpose.

I hold that the tenant and the landlord in the instant case are not in pari delicto.

I now cite also part of the judgment of Edwards C.J. in Civil Appeal No. 20 of 1949 - Jamnadas Salabhai v. Haribhai Mangalbhai Patel:

I "come now to deal with the argument that because in England, Parliament specifically made provision for recovery by a tenant of excess rent paid and because the Uganda Legislature has passed no such enactment, then the tenant cannot recover. In my view, the U.K. Parliament merely wished to make it crystal clear that a tenant could recover. It declared the law. It by no means follows that present case, in England had sued in the Courts of England before it was specifically enacted that a tenant could recover, he would necessarily have lost his action. So I do not think that this fact should tell against the respondent. The combined effect upon my mind of Mr. Dickie's ruling, Mr. Justice Devlin's judgment and Mr.Virjee's argument on 20th May 1950 is to make me doubt whether I should allow this appeal. To revert, for a moment,

to the Godinho case, I do not think that the ratio decidendi was that the Court of Appeal were entirely satisfied that tenant could not recover in a civil action. But they set aside the astronomic fine imposed by the Magistrate, because it was so obvious that the fine had been imposed for the sole purpose of creating a fund from which compensation could be paid; and this reason for fining has, for the past half century, been universally disapproved by the courts in East Africa. The speech of Lord Simonds in the recent case of Jacobs v. L.C.C. (1950) 1 All E.R. 737 at the foot of page 740 is apposite regarding "obiter dicta". Moreover, I think that it would be very unfair to say to a litigant might well retort "I realise that; but I suggest that that judgment of the Court of Criminal Appeal effects only the convicted man and was delivered by the Court of Criminal Appeal because they were in some doubt and, it being a criminal case, they naturally resolved it in favour of the convicted man. In a civil court, other considerations must surely affect the position". I realise that H.M. Court of Appeal for Eastern Africa is both a Court of Civil and Criminal Appeal whereas in England the Court of Appeal is composed of the Master of the Rolls and Lords Justices while the Court of Criminal Appeal is composed of the Lord Chief Justice and Puisne Judges of the King's Bench Division. Nevertheless, I think that the principle is the same. I wish to sound a note of warning - I must not be taken as deciding in this judgment any thing more than the facts of this particular case fairly warrant".

In that case the plaintiff was successful in recovering rent paid by him in excess of the standard rent.

To return to the question whether the parties in the instant case were in pari delicto, I refer to a passage in Broom's Legal Maxims Ninth Edition page 465: "Not only in aequali jure, but likewise in pari delicto, is it true that potior est conditio possidentis; where each party is equally in fault, the law favours him who is actually in possession; a well-known rule, which is, in fact, included in that more comprehensive maxim to which the present remarks are appended. "If", said Buller, J., "a party come into a Court of Justice to enforce an illegal contract, two answers may be given to his demand: the one, that he must draw justice from

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a pure fountain, and the other, that potior est conditio possidentis". Where money is paid by one of two parties to such a contract to the other, in a case where both may be considered as participes criminis, an action will not lie after the contract is executed to recover the money".

Now, in the Godinho case the learned Judges of Appeal held that the complainant aided and abetted the appellant in the commission of the offence. In the instant case the plaintiff could not in my opinion be considered particeps criminis created by Section 3 sub-section 2 of the Ordinance.

Langton v. Hughes was considered in the Falmouth Boat Construction Company Limited v. Howell 1950 2 K.B. I referred to this case during the hearing. The defendant had contended that, as the repairs to a ship were carried out in contravention of a statute, this could not be made the subject matter of an action: This contention was rejected, though not in circumstances similar to the instant case. It appears that the Admiralty's agent had given orders which were in excess of authority. The plaintiffs had no sure means of knowing this. On page 25, Denning, L.J., observed: "they could only rely in what they were told by the licensing officer. Can it be seriously suggested that having relied on him they had been guilty of an offence? In my judgment there is a principle of law which protects them from such an injustice".

In Gray v. Southouse 1949 (2) A.E.R.1019, the plaintiffs recovered money paid as illegal premiums. But this was a case in England, where there is statutory provision for the recovery of such payments - Rent and Mortgage Interests (Restrictions) Act 1920, s.8, as amended by the Rent & Mortgage Restrictions Act 1939. Schedule 1. That is one ground on which that case can be distinguished from the instant case. In addition to that the plaintiffs there knew that in paying a premium they were doing something which the law forbade. Also the contract was executory and could not be fulfilled by the defendants. That case, however, bears upon the instant case because there it was held that it was not contrary to public policy that a person who had paid an illegal premium should recover it. And at page 1020, Devlin, J. observed: "The Rent Acts are Acts for the protection of tenants; and Parliament might very well have had it in mind that,

unless it altered the common law rules, the result would be that the landlord, who would generally be for the more guilty party of the two, would be left in possession of the fruits of his illegality. That is the proper view of the statute and it is reinforced by Browning v. Morris 2 Cowp.790, where Lord Mansfield, C.J., in his judgment says (792): "But where contracts or transactions are prohibited by positive statutes for the sake of protecting one set of men from another set of men, the one from their situation and condition being liable to be oppressed or imposed upon the other, there the parties are not in pari delicto and in furtherance of these statutes, the person injured after the transaction is finished and completed, may bring his action and defeat the contract". "And Devlin, J., concluded: "I am satisfied that public policy puts no impediment in the way of these plaintiffs obtaining judgment".

In Green v.Portsmouth Stadium Ltd. 1953 (2) A.E.R.102 a bookmaker who had been charged excessively for admission to a Greyhound Racing Track failed to recover any of the excess charges. Denning, L.J., cited the passage of Lord Mansfield's judgment in Browning v. Morris, but commented "Those observations of Lord Mansfield apply only to cases where the statute on its true construction contemplates the possibility of a civil action". That case also is distinguished from the instant case in that the Betting & Lotteries Act 1934 was not enacted for the protection of bookmakers. On this point Denning, L.J., observed: "Some rich bookmakers might willingly pay more than the statutory amount to get a privileged position for themselves as against their poorer brethren. Such people could not recover the over-payments".

In Kearley v.Thomson 1890, 24 Q.B.D. 742, Fry, L.J., observed: "There are undoubtedly several exceptions to the general rule "that a Plaintiff cannot recover money paid in performance of an illegal contract. One of these is the case of oppresser and oppressed, in which case usually the oppressed party may recover the money back from the oppressor. In that class of cases the delictum is not par, and therefore the maxim does not apply. Again, there are other illegalities which arise where a statute has been intended to protect a class of persons, "(in the instant case - tenants)" and the person seeking to recover is a member of

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the protected class. Instances of that description are familiar in the case of contracts void for usury under the old statutes ..... In these cases of oppressor and oppressed, or of a class protected by statute, the one may recover from the other, notwithstanding that both have been parties to the illegal contract. In an earlier case - Smith v. Cuff 1817 6 M. & S. 160 the short facts of which are reported in English and Empire Digest. Volume 12. Case 2482. Lord Ellenborough observed: "this is not a case of par delictum. It is oppression on one side and submission on the other. It never can be predicated as par delictum when one holds the rod and the other bows to it. There was an inequality of situation between these parties; one was creditor, the other debtor, who was driven to comply with the terms which the former chose to enforce".

When there is a shortage of housing accommodation, the landlord holds the rod and the tenant has to bow to it.

In my opinion the plaintiff and the defendant Company in the instant case were certainly neither in pari delicto, nor in the same class.

Further, I am disposed to follow the finding of Edwards, C.J., in Civil Appeal No. 20 of 1949 - Jamnadas Samlabhai v. Haribhai Mangalbhai Patel, where a plaintiff recovered amounts paid in excess of the standard rent, although there was no statutory provision to that effect. I also follow the finding that this Court in a Civil case is not bound by the decision in the Godinho case. It may be that the learned Judges of Appeal had facts before them which showed, for example, that the complainant here knew full well that what he was doing was wrong. In the instant case there is no conclusive evidence on that point one way or the other.

Finally, Mr. Mehta argued that in this case the plaintiff should not succeed because he is guilty of laches. There was some delay in the filing of this suit; but I am not in agreement with Mr. Mehta when he asserts that there is no statutory bar in this type of action. The plaint was filed in September, 1956. The case was not listed because, Mr. James informed the Court, the parties were awaiting a decision in this Court in a similar case.

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I answer both questions contained in the Issues in the affirmative.

For all the reasons given I am of opinion that this plaintiff is entitled to recover Shs.10,000/- from the defendant company. Judgment is entered for the plaintiff for that amount with costs.

M.D. Lyon

Judge.

24/9/57.

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Decree. 24th September, 1957.

D E C R E E

IN HER MAJESTY'S HIGH COURT OF UGANDA AT KAMPALA

CIVIL CASE No.883 of 1956.

RANCHHODDAS KESHAVJI DEWANI PLAINTIFF

v e r s u s

THE KIRIRI COTTON COMPANY LIMITED DEFENDANTS

CLAIM for Shs.10,000/- with interest and costs.

This suit coming on this day for final disposal before the Honourable Mr. Justice Lyon in the presence of Mr. James, Advocate for the plaintiff and Mr. C.B. Patel, Advocate for the Defendants, IT IS ORDERED AND DECREED that Judgment be entered for the Plaintiff for Shs.10,000/- with costs to be taxed.

GIVEN under my hand and the Seal of the Court this 24th day of September 1957.

(Sgd.) K.G. BENNETT
Judge.
(O.18 r.8)

In the Court of Appeal for Eastern Africa

No. 6

Memorandum of Appeal. 27th November, 1957.

No. 6

MEMORANDUM OF APPEAL.

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA HELD AT KAMPALA

CIVIL APPEAL NO. 85 OF 1957.

THE KIRIRI COTTON COMPANY LIMITED — APPELLANT (Original Defendants)

vs.

RANCHHODDAS KESHAVJI DEWANI — RESPONDENT (Original Plaintiff)

APPEAL from the judgment and decree of the High Court of Uganda at Kampala - Before Mr. Justice Lyon dated the 24th day of September 1957 in Civil Case No. 883 of 1956.

Ranchhoddas Keshavji Dewani — Plaintiff
vs.
The Kiriri Cotton Company Ltd. — Defendants

THE KIRIRI COTTON COMPANY LIMITED, the Appellant above named APPEAL to Her Majesty's Court of Appeal for Eastern Africa against the whole of the decision mentioned on the following grounds namely:-

1. The learned Judge in deciding this case erred in law in regarding as facts matters which are not pleaded or supported by evidence and in particular in holding that the Plaintiff was at a disadvantage in the transaction of leasing the premises.

2. The learned Judge erred in law in taking into consideration Ordinance 16 of 1954 and particularly sub-section 4 thereof which was not applicable to the case before him.

3. The decision in the case of Rex v. Norman Godhino impliedly decided that the word "dwellinghouse" be added to the word "premises" in the interpretation of the proviso to Section 3 of the Rent Restriction Ordinance Volume 3 Chapter 105

Laws of Uganda Revised Edition and that being the decision of the Court of Appeal, is binding upon the trial court and therefore the learned Judge was bound to put the same interpretation therein and ought to have held that the lease in question being for 7 years and one day the acceptance of the premium was legal.

4. The learned Judge erred in holding that in Rex v Norman Godhino the consideration of Section 3 of the Rent Restriction Ordinance by the Appellate Court was obiter dicta. Even if it be obiter dicta, the trial learned Judge ought to have followed the considered views of the higher court which has interpreted Section 3 of the Rent Restriction Ordinance in the said case and in not doing so the learned Judge has acted contrary to law and practice.

5. The learned Judge erred in holding that the Court of Appeal had not the advantage of considering all the authorities and arguments which were raised in this suit.

6. The learned Judge erred in law and fact in stating that "in my opinion all that was decided in the Godhino case was that in that particular Criminal Appeal that particular complainant ought not to be awarded compensation" and in failing to consider the reasons given by the Court for its finding in that appeal.

7. The learned Judge has erred in failing to apply his mind to the principles of the law of interpretation of statutes, correctly applied by the Court in the said case of Rex v Godhino.

8. The learned Judge erred in directing his mind to sub-section 4 of Section 3 of Rent Restriction (Amendment) Ordinance 1954 as it did not apply to the instant case. Moreover it applied only to the case of a prosecution and not for other matters.

9. The learned Judge erred in law in considering that the principles laid down in Langton v. Hughes have been modified without considering whether any such modification affects the principles to be applied to this case.

10. The learned Judge erred in law in not holding that both the parties were in pari delicto in

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Memorandum of Appeal. 27th November, 1957 - continued.

making the contract of lease and erred in holding that the Respondent could not be considered particeps criminis in view of Section 3 of subsection 2 of the Rent Restriction Ordinance.

11. The learned Judge failed to consider that the interpretation put on Section 3 of the Rent Restriction Ordinance by the Appellate Court has been relied upon by the public for many years and that therefore that interpretation ought to be followed.

12. The learned Judge failed to consider that the Respondent's claim was in equity and that his delay in asserting his alleged rights disentitled him to the relief claimed.

WHEREFORE the Appellant prays that judgment of the learned Judge be set aside and this Appeal be allowed with costs in this Appeal and costs in the High Court to the Appellant.

DATED this 27th day of November 1957.

Sgd. A.G. MEHTA.

PATEL & MEHTA

ADVOCATES FOR THE APPELLANT

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In the Court of Appeal for Eastern Africa

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Judgment of the Court of Appeal 18th April, 1958

JUDGMENT OF COURT OF APPEAL

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA AT KAMPALA

CIVIL APPEAL NO. 85 OF 1957

BETWEEN

THE KIRIRI COTTON COMPANY LIMITED APPELLANTS

and

RANCHHODDAS KESHAVJI DEWANI RESPONDENT

(Appeal from the judgment and decree of the High Court of Uganda at Kampala (Mr. Justice Lyon) dated 24th September, 1957.)

in

Civil Case No. 883 of 1956

Between

Ranchhoddas Keshavji Dewani Plaintiff
and
The Kiriri Cotton Company Limited Defendants

JUDGMENT OF O'CONNOR P.

This was a claim by a tenant to recover from a landlord a sum of Shs.10,000/- illegally paid by the tenant to the landlord by way of premium for the grant of a sub-lease of a residential flat in Kampala. Negotiations leading up to the letting took place in May, 1953. The respondent (Plaintiff) deposed that he came to Kampala in March 1953: he lived with a brother for one and a half months: he took a flat but had to pay key money: he had been searching for some time and got a flat at Kololo; but, after two or three days, had to leave as he had trouble with a co-tenant. Then, after having difficulty, he got in touch with one V.C. Patel (who was apparently the representative

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of the Appellant Company). A premium of Shs.10,000/- for the letting of the flat was agreed to be paid by the respondent. The appellant testified that he raised the Shs.10,000/- by borrowing from a company (the Kampala Flour Mills) of which his brother was a director. The respondent's evidence was not challenged at the trial. The learned trial Judge stressed the fact that the respondent was having difficulty in obtaining accommodation and had found it necessary to pay key money before. The learned Judge found as a fact that during the negotiations for the flat the respondent was at a disadvantage vis a vis the appellant.

On the 17th September, 1953, a sub-lease was executed. This was expressed to be made between the appellant company (therein called the sub-lessor) as registered proprietor of the leasehold land therein mentioned, and the respondent. This document witnessed that in consideration of the sum of Shs.10,000/- paid by the respondent by way of premium (the receipt whereof was acknowledged) and of the rent and sub-lessee's covenants therein reserved and contained the appellant thereby sub-leased to the respondent all that part of premises ..... known as flat No. 1 ..... to hold to the respondent for a term of seven years and one day from the 31st day of May, 1953, at a clear monthly rental of Shs.300/- payable in advance ..... It will be observed that the sub-lease was expressed to be made in consideration of the sum of Shs.10,000/- paid by the respondent by way of premium, as well as of a monthly rent and sub-lessee's covenants; and that the term of the sub-lease was seven years and one day. Clearly, the sub-lease was drawn by a lawyer, and, as the learned trial Judge has found, the intention in making the term seven years and one day was to bring the document within the second proviso to Section 3(2) of the Rent Restriction Ordinance (Cap. 115 of the Laws of Uganda). That sub-section reads as follows:

"(2) Any person whether the owner of the property or not who in consideration of the letting or sub-letting of a dwelling-house or premises to a person asks for, solicits or receives any sum of money other than rent or anything of value whether such asking, soliciting or receiving is made before or after the grant of a tenancy shall be guilty of an offence and liable to a fine not

exceeding Shs.10,000/- or imprisonment for a period not exceeding six months or to both such fine and imprisonment.

Provided that a person acting bona fide as an agent for either party to an intended tenancy agreement shall be entitled to a reasonable commission for his services:

And provided further that nothing in this section shall be deemed to make unlawful the charging of a purchase price or premium on the sale, grant, assignment or renewal of a long lease of premises where the term or unexpired term is seven years or more."

The Second proviso was deleted by the Rent Restriction (Amendment) Ordinance, 1954 which added to Section 3 a new sub-section (2A). This provided that any person who stipulated for more than six months' rent to be paid in advance would be guilty of an offence. This amending Ordinance also added to Section 3 a new sub-section (4) reading as follows :-

"(4) Notwithstanding any rule of law or of practice to the contrary, in any prosecution for an offence under this section no person shall be deemed to be an accomplice or to be unworthy of credit, neither shall the uncorroborated evidence of any person be held to be insufficient to support a conviction, merely by reason of the fact that such person, whether before or after the coming into force of the Rent Restriction (Amendment) Ordinance, 1954, paid, gave or offered, or attempted to pay or give, any such fine, premium, rent in advance or other like sum, or pecuniary consideration, as aforesaid to the person charged or to any other person."

When the sub-lease was executed, the law stood as in the Rent Restriction Ordinance unamended by the 1954 Ordinance, that is to say, the second proviso to sub-section (2) of section 3 was still in force. But that proviso applied to a lease of "premises". "Premises" is defined in section 2 of the Rent Restriction Ordinance to include business premises, but does not include residential flat which was the type of property sub-let in the

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present case. Accordingly, it was alleged by the respondent that, notwithstanding that the term set out in the sub-lease was more than seven years, the payment of the premium was illegal.

The respondent in paragraph 6 of his plaint pleaded as follows :-

> "By virtue of the provisions of sub-section (2) of section 3 of the Rent Restriction Ordinance, the receipt of the said sum of Shs.10,000/- by the defendant from the plaintiff from the Kampala Flour Mills was illegal, but the plaintiff is entitled to recover the same since he (the plaintiff) was not in pari delicto with the defendant".

Accordingly, the respondent claimed the said Shs.10,000/- as money received by the appellant for his use.

The appellant company in its defence pleaded that the plaint disclosed no cause of action and was not maintainable in law: alternatively, that the payment of the premium was legal: it denied that the plaintiff was not in pari delicto with the defendant company and set up estoppel, delay, acquiescence and laches.

The learned trial Judge found that the payment of the premium was illegal. This conclusion is accepted by both parties to the appeal. He held that there was no estoppel, delay, acquiescence or laches, and that finding is not appealed against. He also held that the respondent was 'oppressed' in that he had encountered difficulty in obtaining housing accommodation, and, therefore, that he and the appellant were not in pari delicto. He further held that the respondent was a member of a class, namely tenants, for whose benefit the Rent Restriction legislation had been passed, and that he could, therefore, recover money illegally paid to his landlord or prospective landlord. In reaching this conclusion, the learned Judge, for the reasons he gave, declined to follow the judgment of this Court in Rex v Norman Godinho (1950) 17 E.A.C.A. 134, which is referred to below. The learned Judge accordingly gave judgment for the respondent for the Shs.10,000/- claimed, with costs. Against this decision the appellant appeals to this court.

The first point for decision is whether this

court is bound, to follow the decision in the above-mentioned appeal, Rex v. Norman Godinho. That was a criminal appeal. Godinho had been convicted on four counts of obtaining key-money contrary to sub-section (2) of Section 3 of the Uganda Rent Restriction Ordinance, 1949, which was identical with section 3(2) of the Rent Restriction Ordinance (Cap.115) set out above. The first count related to a lease of premises for a term of three years. Godinho was sentenced to imprisonment and large fines, and it was ordered that part of the fines should be paid to the complainants on the various counts. He appealed against his conviction on the first count on a ground not material to this case. His appeal against conviction on that count failed. His convictions on the other three counts were quashed because the term of the relevant lease was equivalent to seven years and Godinho, therefore, came within the second proviso to section 3 (2) of the Rent Restriction Ordinance, 1949. It was also held that the order for payment of part of the fines as compensation to the complainant on the first count was illegal and that section 175 (1) of the Uganda Criminal Procedure Code had been wrongly applied by the Magistrate. The part of the judgment of this court dealing with this point is material to the present appeal and is at page 134. It reads :

"This is a second appeal and we are no way concerned with the question as to whether the sentence imposed on the appellant in respect of count one is too severe. We are, however, concerned with the legality of the Magistrate's order. In this respect we feel bound to say that the judgment of the learned Judge in the court below is open to criticism. The learned Magistrate when imposing a fine of Shs.10,000/- in addition to imprisonment ordered that from the fine, if paid, the sum of Shs. 7,500/- should be paid to the complainant Mr. Fafek. The Magistrate, although he does not say so, in making this order must have purported to act under section 175 (1) of the Uganda Criminal Procedure Code which is as follows :-

> 'Wherever any court imposes a fine or confirms on appeal, revision or otherwise a sentence of fine....the court may when passing judgment, order the whole or any part of the fine recovered to be applied -
>
> (a) in defraying the expenses properly

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incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence when substantial compensation is in the opinion of the court recoverable by a civil suit.'

The learned Judge in the court below expressed himself as being in doubt whether the sum (? sums) paid by the complainants were civilly recoverable. Nevertheless, he refrained from setting aside the orders made because he felt that it would be harsh to expose the appellant to the risk of civil proceedings for a very large amount of money in addition to his other punishment. With respect the learned Judge had proceeded on a wrong principle. If the learned Magistrate was wrong in his opinion that the sums paid were recoverable by civil suit the orders made for compensation were ultra vires. It was the duty of the Judge therefore, if he felt in doubt, to inquire into and to decide on the legality of the orders. For our part we are in no doubt - what the learned Magistrate has done, doubtless quite unwittingly, is to import into Uganda Rent Restriction Ordinance something which is not there, namely, a right to the tenant to recover from the landlord any payment made in contravention of section 3 (2). We do not know the reason but the Uganda Legislature in its wisdom has included in the Ordinance no provision comparable to section 8 (2) of the Rent Restriction Act of 1920. This sub-section provides that on summary conviction for an offence against the section the convicting court may order the amount paid by way of illegal premium to be repaid to the person to whom the same was given. Without this statutory right of recovery, the giver of the illegal premium is left in the position of one, who although he himself had committed no substantive offence, has aided and abetted the commission of an offence by another. In these circumstances he could not go to a Civil Court with clean hands and the principle stated by Lord Ellenborough in Langton v. Hughes, 1 M. & S. 593-596, would have application. What is done in contravention of an Act of Parliament cannot be made the subject matter of an action. For this reason we are of opinion that the sum paid by Mr. Fafek could not be recovered by him in a civil suit and that the learned Magistrate was wrong in holding a contrary view. It follows that his order

of compensation to Mr. Fafek must be set aside.

We have some further observations to make on the matter of sentence in respect of count one. It seems manifest to us that the learned Magistrate would not have imposed a maximum fine in addition to imprisonment except to provide a fund out of which compensation could be paid to Mr. Fafek. This is a practice which there is authority for saying has always been discouraged in these territories."

It will be observed that though Godinho's case was a criminal case, the learned Judges in this part of the case were purporting to decide a civil matter, namely, whether compensation would be recoverable by a civil suit; for upon the question of whether 'substantial compensation is in the opinion of the court recoverable by a civil suit' depended the question of whether part of the fine could be ordered to be paid as compensation under section 195 of the Criminal Procedure Code. With deference, it may be doubted whether the learned Judges were correct in saying that 'if the learned Magistrate was wrong in his opinion that the sums paid were recoverable by civil suit the orders made for compensation were ultra vires.' I think that an erroneous opinion genuinely and reasonably held by a Magistrate that substantial compensation would be recoverable in a civil suit would found an order for compensation, at least until the order was set aside by an appellate court. But the point is not important in the present case.

As already stated, the learned trial Judge in the present case declined to follow Godinho's case. The relevant passage in his judgment reads as follows:-

"The first point for consideration here is that the decision in the Godinho case was given in a Criminal Appeal. Further, a study of the judgment in that case makes it clear that the court of Appeal, had not the advantage of considering all the authorities and arguments - for example, the question of in pari delicto - which I have had. In my opinion all that was decided in the Godinho case was that in that particular Criminal Appeal that particular complainant ought not to be awarded compensation. All the rest was obiter dicta.

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Again, the Appeal Court in that case attached importance to the absence in the Uganda Ordinance of a provision expressly giving the right to a tenant to recover key-money from a landlord, whereas such express statutory provision had been made both in England and in Kenya. I find it difficult to follow that reasoning.

Very many remedies are open to a plaintiff without express statutory provision.

Moreover the Appeal Court held there that the tenant had committed no substantive offence but that he had aided and abetted the commission of the offence. In this connection one must remember the new sub-section 4 of section 3. Further, the Appeal Court relied upon Langton v Hughes 1 M. & S. 593-596, a case decided in 1813, the principle of which has been greatly whittled down. I shall refer later to more recent English decisions.

With respect, then, I hold that this Court is not bound by the 'decision' in the Godinho case. The decision in that case implies a finding that the tenant and the landlord were in pari delicto. This point was not fully argued before the learned Judges of Appeal. To say that a tenant who is only, able to obtain accommodation by the payment of 'key-money' is in pari delicto with a landlord who, merely to benefit himself, takes advantage of those difficulties, does not make sense.

The landlord and the tenant in those circumstances are not in the same class."

The learned trial Judge in support of his view that Godinho's case could be disregarded cited an extract from a judgment of Edwards C.J. in the High Court of Uganda in Civil Appeal No. 20 of 1949, Jamnadas Salabhai v. Haribhai Mangalbhai Patel. This was decided shortly after Godinho's appeal and is particularly interesting, because Edwards C.J. had been a member of the Court of Appeal which decided the Godinho appeal. An extract from his judgment reads:

"To revert, for a moment, to the Godinho case, I do not think that the ratio decidendi was

that the Court of Appeal were entirely satisfied that a tenant could not recover in a civil action. But they set aside the astronomic fine imposed by the Magistrate because it was so obvious that the fine had been imposed for the sole purpose of creating a fund from which compensation could be paid; and this reason for fining has, for the past half century, been universally disapproved by the courts in East Africa. The speech of Lord Simonds in the recent case of Jacobs v L.C.C. (1950) 1 All E.R. 737 at the foot of page 740 is apposite regarding 'obiter dicta'. Moreover, I think that it would be very unfair to say to a litigant in a civil court 'You cannot now raise that argument here; the matter has already been decided against you by a court of Criminal Appeal'. The litigant might well retort 'I realise that; but I suggest that that judgment of the Court of Criminal Appeal affects only the convicted man and was delivered by the court of Criminal Appeal because they were in some doubt and, it being a criminal case, they naturally resolved it in favour of the convicted man. In a civil court, other considerations must surely affect the position'. I realise that H.M. Court of Appeal for Eastern Africa is both a Court of Civil and Criminal Appeal whereas in England the Court of Appeal is composed of the Master of the Rolls and Lords Justices while the Court of Criminal Appeal is composed of the Lord Chief Justice and Puisne Judges of the King's Bench Division. Nevertheless, I think that the principle is the same. I wish to sound a note of warning - I must not be taken as deciding in this judgment anything more than the facts of this particular case fairly warrant."

With deference, I find it very difficult to follow the suggestion of Edwards C. J. that the ratio decidendi of the Court of Appeal in the compensation part of Godinho's case was not that that Court were entirely satisfied that a tenant could not recover in a Civil Action. The Court said (rightly or wrongly) that the order for compensation made by the Magistrate was ultra vires unless the sum was recoverable in a civil suit; they said that it was the duty of the Judge in the High Court to decide the legality of the Magistrate's order.

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The Court then itself expressed the opinion that the sum paid by the tenant 'could not be recovered by him in a civil suit and that the learned Magistrate was wrong in holding the contrary view' and said that it followed that his order of compensation to Mr. Fafek must be set aside. The learned Judges had earlier said that they were in no doubt. It is difficult to see how the opinion that the sum paid could not be recovered in a civil suit was not the ratio decidendi of this part of the case, or that the Court was otherwise than entirely satisfied that the tenant could not recover in a civil suit.

I doubt whether it is correct that this court when sitting to hear a civil appeal is not bound to follow a previous decision of the court upon a question of the validity of a potential claim in a civil case because it arose in the course of the hearing of a criminal appeal. It must be rare indeed for an opinion on a civil matter to be part of the ratio decidendi in a criminal case; but, owing to the wording of section 175 (b) of the Criminal Procedure Code, the question of whether or not a civil claim could succeed does become relevant where compensation is to be awarded, and in Godinho's case that question was decided by this Court. This court has both criminal and civil jurisdiction, but it is one court. This was a point of law and no different standard of proof was involved. However, as I have come to the conclusion for another reason that this Court is not bound to follow Godinho's case, that point is not of importance and I need not decide it.

In Joseph Kabui v Reg. (1954) 21 E.A.C.A.260, it was held that the principle of stare decisis is followed by this Court, unless it is of opinion that to follow its earlier decision which is considered to be erroneous, involves supporting an improper conviction, The principle of Stare decisis as applied to its own decisions by the court of appeal in England is summarised by Lord Greene, M.R. in Young v Bristol Aeroplane Co. (1944) 2 All E.R. 293, 300 (C.A.) as follows :

> "On a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions

to this rule (two of them apparent only) are those already mentioned which for convenience we here summarise: (i) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (ii) The court is bound to refuse to follow a decision of its own which, though not expressly over-ruled, cannot in its opinion stand with a decision of the House of Lords. (iii) The court is not bound to refuse to follow a decision of its own if it is satisfied that the decision was given per incuriam."

This was approved by Lord Simon on appeal to the House of Lords (1946) A.C. 163, 169. Category (ii) above must be amplified when applied to this court. For instance, this court would be bound to refuse to follow a decision of its own, which, though not expressly over-ruled, cannot, in its opinion, stand with a decision of the Privy Council; or of the House of Lords, Robins v National Trust Co. (1927) A.C. 515, 519; or probably with a decision of the court of appeal in England on a Colonial statute which is 'a like enactment' to an English Act (Trimble v Hill (1879) 5 A.C.342 (P.C.); Nadarajan Chettiar v Walawa Mahatma (1950) A.C.481 (P.C.); but see Robins v National Trust Co. (supra) at p.519. I think also that decisions of any of the old appellate courts now treated as having similar authority to decisions of the Court of Appeal would be on the same footing as regards statutes in pari materia. And, in my opinion, established decisions on the common law or doctrines of equity of the superior Courts in England, given before the date of reception of the common law and doctrines of equity into the relevant Colony or Protectorate within the Court's jurisdiction are binding on this Court as well as on the Supreme Court or High Court of that Territory. By 'established decisions' I mean decisions which must be taken to have correctly declared the common law or the doctrines of equity at the date of reception because such decisions are either unreversed decisions of an appellate court; or being decisions of a superior court other than an appellate court, stand unreversed and have either been affirmed or approved by an appellate court or have been accepted as correct in principle by other superior courts in England. This enumeration does not exhaust the subject. For instance, I have not mentioned the effect of a colonial codification of

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the common law, or of a provision in a colonial Ordinance applying the current law of England or current procedure of English courts, as these matters do not arise in this case. I should perhaps mention that in applying English decisions dating from before the date of reception, any proviso in the relevant order in Council limiting the application of the common law and doctrines of equity to the circumstances of the territory and its inhabitants must, of course, be borne in mind.

In Morelle v Wakeling, (1955) 1 All E.R. 708 (C.A.) the Court of Appeal considered what classes of decisions should be held to have been given per incuriam. Sir Raymond Evershed, M.R., at p. 718, said:

> "As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene, M.R., of the rarest occurrence."

I am of opinion that the decision of this Court in Godinho's case was given in ignorance or forgetfulness of authorities binding on the court. By Section 15(2) of the Uganda Order in Council, 1902, it was directed inter alia that the civil jurisdiction of the High Court should be exercised in conformity with the substance of the common law and the doctrines of equity in force in England on the 11th day of August 1902. As I have already said I think that established decisions of the superior courts in England which declared the substance of the common law or the doctrines of equity which were decided before that date are binding on the courts of Uganda and on this Court.

The learned Judges of this Court who decided

Godinho's case seem to have assumed that because Godhino had, in Uganda, no statutory right to recover an illegal premium, he could not recover at all. They treated the rule, enunciated by Lord Ellenborough in Langton v Hughes (supra), that what is done in contravention of an Act of Parliament cannot be made the subject matter of an action as the rule which in the absence of such a statutory right must apply to the giver of an illegal premium. But that rule is subject to several exceptions; for instance where the parties are not in pari delicto, or where the contract is made illegal by statute with the object of protecting a particular class of persons to which the plaintiff belongs. In Browning v Morris (1778) 2 Cowp. 790. Lord Mansfield said:

> "But, where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not in pari delicto; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring this action and defeat the contract."

In Kearley v Thomson (1890) 24 Q.B.D.742 C.A. Lord Justice Fry, at page 745, having quoted the general rule, that is: "you shall not have a right of action when you go into a court of justice in this unclean manner to recover it back", said:

> "To that general rule there are undoubtedly several exceptions or apparent exceptions. One of those is the case of the oppressor and oppressed, in which case usually the oppressed party may recover the money back from the oppressor. In that class of case the delictum is not par, and therefore the maxim does not apply. Again, there are other illegalities which arise when a statute has been intended to protect a class of persons, and the person seeking to recover is a member of the protected class."

Both Browning v. Morris (supra) and Kearley v. Thomson were decided before the 11th August, 1902, the date of reception into Uganda of the English Common Law and the doctrines of equity. Kearley

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v. Thomson is a decision of the Court of Appeal. Browning v. Morris must, in my view, be regarded as an established decision correctly declaring the common law or doctrines of equity at the date of reception. Its principle is enunciated in Kearley v. Thomson and it was followed and applied as lately as 1949 by Devlin J. in Gray v. Southouse (1949) 2 All E.R. 1019. In my opinion both Kearley v. Thomson and Browning v. Morris are authorities binding on this Court. In my view, the part of Godinho's case referred to was inconsistent with those authorities and was, on that account, demonstrably wrong. It seems clear that Godinho's case was decided in ignorance or forgetfulness of those decisions. I, therefore hold that it was decided per incuriam within the explanation of that expression given by the Master of the Rolls in Morelle v. Wakeling (supra). If I am correct, this court is not bound to follow the decision in the latter part of Godinho's case.

Learned Counsel for the appellant relied on Williams v. Glasbrook (1947) 2 All. E.R. 884 as an authority for the proposition that this court is bound by Godinho's case. Williams v. Glasbrook, however, is distinguishable. In that case the Court of Appeal was being asked to say that the Court of Appeal had wrongly interpreted a previous decision of the House of Lords of which the first Court had been aware. There is nothing of that kind here. This Court decided the latter part of Godinho's case in ignorance or forgetfulness of inconsistent authorities binding on the court, which is quite a different matter. I may mention, in passing, that the fact that a previous case may not have been fully argued was not accepted in Morelle's case, as a reason for not following it.

It was argued for the appellant that the interpretation put upon the law by this Court in Godinho's case had been relied upon by the public for years and should not now be disturbed, whether it was right or wrong. Having regard to the fact that, within a few weeks of the decision in Godinho's case, the learned Chief Justice of Uganda (Edwards, C.J.) refused to follow Godinho's case in a civil suit (Jamnadas Salabhai v. Haribhai M. Patel) (supra) and indicated that Godinho's case was an authority only in Criminal Cases, I do not think that the relevant part of Godinho's case was so firmly established as a guide to practice in civil

cases as to make it necessary for us to follow it now that it appears to have been decided wrongly and per incuriam.

In deciding that this Court is not bound to follow the decision in the latter part of Godinho's case, I do not wish to be taken to decide that the Court below was not bound to follow it.

Having held that this Court is not bound by the latter part of Godinho's case, I must now, untramelled by that case, consider whether or not the respondent is entitled to recover his premium. The absence in the Uganda Ordinance of a provision comparable to Section 8(2) of the English Rent Restriction Act, 1920, is not conclusive that the legislature did not intend that there should be a right of recovery at common law or in equity. I do not propose to embark upon what their Lordships of the Privy Council described in Commissioner of Stamps for the Straits Settlements v. Oei Tjong Swan (1933) A.C. 378, 389 as the 'perilous course' of instituting a textual comparison between the Ordinance and the English Rent Acts and relying on conjectures as to the intention of the draftsman in selecting some and rejecting other provisions of his presumed model. The question must be answered from an examination of the Ordinance as it stood at the date of the giving of the premium and of the common law and doctrines of equity. I do not think that the amendments made by the Rent Restriction (Amendment) Ordinance, 1954, are material. The new sub-section (4) (upon which the learned trial judge seems to have relied to some extent) came into force after the sub-lease was made and is merely a procedural sub-section designed to make it easer to secure a conviction in a criminal prosecution. It has no bearing on the question whether or not there is a right to recover a premium by civil action.

The learned trial judge found, and I agree, that the transaction between the sub-lessee and sub-lessor was intended to fall within the second proviso to section 3 (2) of the Rent Restriction Ordinance. I think it is clear that neither party intended to enter upon an illegal transaction : there was no intentional delictum on either side. It was only because the flat did not come within the definition of "premises" that the contract was illegal. What then are the rights of the parties?

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The ordinary rule is that the court will not assist any party who comes before it to recover money if it is necessary for the party presenting the cause of action to rely on the commission by him of an illegal act. Gray v Southouse (1949) 2 All E.R. 1019; Scott v Brown (1892) 2 Q.B. 724, 734. But there is an exception to this rule where the contract is made illegal by statute with the object of protecting a particular class of persons to whom the plaintiff belongs. Halsbury 3rd edition Volume 8 p.951; Browning v Morris and Kearley v Thomson supra.

The Uganda Rent Restriction Ordinance was (as were the Rent Restriction Acts in England see Gray v Southouse supra at page 1020) passed for the protection of tenants, and clearly, sub-section (2) of section 3 was passed for the protection of prospective tenants liable, owing to their condition and the scarcity of housing accommodation, to be imposed upon by landlords. In my opinion, the respondent falls within a protected class. The learned trial Judge found this as a fact and I agree. It follows that the respondent and the appellant were not in pari delicto. Then is it, in Lord Mansfield's words, "in furtherance of the statute" (i.e. of the Rent Restriction Ordinance) that an illegal premium given by a prospective tenant for a sub-lease of a flat should be recoverable? The object of section 3(2) was clearly to prevent premiums being demanded or taken for the letting of dwelling houses and a maximum fine of Shs.10,000/- and imprisonment was imposed. It would certainly not be contrary to the policy there disclosed that an illegal premium should be recoverable. In my opinion, it is consistent with, and I think, "in furtherance of", the policy of the Rent Restriction Ordinance, that illegal premiums should be recoverable. It would restore the parties to the status quo ante, and would make it not worth while for landlords to transgress. Gray v Southouse supra is an authority for the proposition that it is not contrary to public policy for a tenant to recover an illegal premium even when he knows the transaction is illegal. That case depended to a large extent on the fact that in England Parliament had enacted that the premium should be recoverable. But even without such a provision I feel that it cannot be contrary to public policy in Uganda for a tenant who is an innocent party and intended no illegality to recover a premium paid in contravention

of the Ordinance. In Gray v. Southouse supra a prospective sub-tenant paid a premium to the tenant notwithstanding the prohibition of such payments contained in section 8 (1) of the Increase of Rent and Mortgage (Restrictions) Act, 1920. The sub-tenant was aware that he was doing something which was prohibited by law. The tenant was unable to grant the tenancy. In an action by the sub-tenant for recovery of the sums paid, on the ground that they had been paid for a consideration which had failed, it was held that although, in general, as a matter of public policy, the court would not assist a party to recover money paid by him in the course of an illegal act, it was not contrary to public policy in this particular class of case for a person who had paid a premium to recover it: and the sub-tenant was entitled to recover the premium as money paid for a consideration which had wholly failed.

A fortiori where the giver of the premium is an innocent party.

In the instant case, the consideration for the transaction did not, as in Gray v Southouse, wholly fail. The tenant got his sub-lease and occupied the premises. Nevertheless I think that he is entitled to recover the premium which was taken in contravention of the Ordinance, "after the transaction is finished and completed". Browning v. Morris supra; Barclay v. Pearson (1893) 2 Ch. 154 167. I have already held that it is in furtherance of the statute that he should do so. In Kearley v. Thomson supra it was held that part performance prevented recovery of the money illegally paid. But the plaintiff in that case was not member of a protected class and was claiming to recover only on the ground that the contract had not been wholly executed.

The question whether, where a statutory obligation enforceable by a penalty is placed on A., and B. is dammified by A's breach of it, B has a right of action against him without express provision was considered in Cutler v Wandsworth Stadium Ltd. (1949) A.C. 398. That was a case in which a book-maker sued the occupier of a licensed dog-racing track, on which a totalisator was lawfully in operation, for failure to provide him with "space on the track where he could conveniently carry on book-making", in accordance with section

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11 (2) (b) of the Betting and Lotteries Act, 1934. The obligation imposed by that section is enforceable only by criminal proceedings for specified penalties. It was held that no action lay. Section 11 (2) of the Act provided that the occupier of a licensed track "(a) shall not, so long as a totalisator is being lawfully operated on the track, exclude any person from the track by reason only that he proposes to carry on book-making on the track; and (b) shall take such steps as are necessary to secure that, so long as a totalisator is being lawfully operated on the track, there is available for book-makers space on the track where they can conveniently carry on book-making ...." The defendants excluded a book-maker and did not provide him with space on the track. He sued for a declaration of his rights, an injunction restraining the defendants from excluding him, and a mandatory order to secure for him on the track a space on which he could conveniently carry on book-making, and he asked for damages. Lord Simonds said at p.407:

> "It is, I think, true that it is often a difficult question whether, where a statutory obligation is placed on A., B. who conceives himself to be damnified by A's breach of it has a right of action against him. But on the present case I cannot entertain any doubt. I do not propose to try to formulate any rules by reference to which such a question can infallibly be answered. The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole act and the circumstances, including the pre-existing law, in which it was enacted. But that there are indications which point with more or less force to the one answer or the other is clear from authorities which, even where they do not bind, will have great weight with the House. For instance, if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration. But 'where an act' (I cite now from a judgment of Lord Tenderden C.J. in Doe v. Bridges 1 B & Ad. 847, 859) 'creates an

obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner'. This passage was cited with approval by the Earl of Halsbury L.C. in Pasmore v. Oswaldtwistle Urban District Council (1898) A.C. 387, 394. But this general rule is subject to exceptions. It may be that, though a specific remedy is provided by the Act, yet the person injured has a personal right of action in addition. I cannot state that proposition more happily, or indeed more favourably to the appellant, than in the words of Lord Kinnear in Black v. Fife Coal Co.Ltd. (1912) A.C. 149, 165: 'If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by Lord Cairns in Atkinson v. Newcastle Waterworks Co. (1877) 2 Ex. D. 441, 448 and by Lord Herschell in Cowley v. Newmarket Local Board (1892) A.C. 345, 352, solves the question. We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention."

His Lordship held that the Betting and Lotteries Act had not been passed for the benefit of book-makers, but for the benefit of the public who resorted to the stadium and that, accordingly, there was nothing to take that case out of the general rule that where an Act creates an obligation and enforces its performance in a specified manner, that performance cannot be enforced in any other manner. He, therefore, concluded that no civil action lay. The other noble and learned Lords came to the same conclusion. Lord du Parcq said at page 410;

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"To a person universed in the science or art of leglislation it may well seem strange that Parliament has not by now made it a rule to state explicitly what its intention is in a matter which is often of no little importance, instead of leaving it to the courts to discover, by a careful examination and analysis of what is expressly said, what that intention may be supposed probably to be. There are no doubt reasons which inhibit the legislature from revealing its intention in plain words. I do not know, and must not speculate, what those reasons may be. I trust, however, that it will not be thought impertinent, in any sense of that word, to suggest respectfully that those who are responsible for framing legislation might consider whether the traditional practice, which obscures, if it does not conceal, the intention which Parliament has, or must be presumed to have, might not safely be abandoned. The questions which this traditional legislative reticence so often brings before the courts are sometimes difficult, but that raised by the present appeal seems to me, assisted as I have been by the convincing judgments of the Court of Appeal, to be comparatively simple".

and at page 411:

"Whether the general rule is to prevail" (said Lord Macnaghten) "or an exception to the general rule is to be admitted, must depend on the scope and language of the Act which creates the obligation and on considerations of policy and conveniences. I do not find in the present case any indication that Parliament sought to manifest an intention that an exception to the general rule should be created. On the contrary, whether the question is approached with, or without, such guidance as principles of construction can afford, I am clearly of opinion in agreement with the Court of Appeal that the language of the Act points to the opposite conclusion".

Lord Normand said at page 413:

"If there is no penalty and no other special means of enforcement provided by the statute, it may be presumed that those who have an interest to enforce one of the statutory duties have an individual right of action.

> Otherwise the duty might never be performed. But if there is a penalty clause the right to a civil action must be established by a consideration of the scope and purpose of the statute as a whole".

He also pointed out (at page 414) that the statute had not the single general object of guarding the livelihood of book-makers.

The Act considered in Cutler's case was very different from the Ordinance under consideration in the present case. The Act was not passed with the general object of benefiting book-makers: the Ordinance clearly was passed for the benefit of tenants and prospective tenants.

Green v. Portsmouth Stadium Ltd. (1953) 2 All E.R. 102 is another case of a book-maker suing under the Betting and Lotteries Act 1934, this time to recover arrears of admission overcharged. It was held that as penalties for a breach of section 13 of that Act were provided and that as the Act contained no provision that an amount paid in excess of that permitted by Section 13(1) should be recoverable, a civil action would not lie for breach of the section. Cutler v Wandsworth Stadium Ltd. supra was followed. Denning L.J. (as he then was) drew attention to the fact that the plaintiff in that case did not allege that he was oppressed or imposed on in any way. The learned Lord Justice continued:

> "The question of whether a breach of a statute can be made the foundation of an action depends on the interpretation of the statute itself"....
>
> "It is most significant that the Act does not say that the overcharge shall be recoverable. In modern statutes, such as the Rent Restriction Acts, dealing with such things as premiums, if it is intended that an overcharge shall be recoverable the Act says so".

It is not altogether easy to reconcile this with Lord du Parcq's remarks in Cutler's case that 'legislative reticence' on this point as 'the traditional practice'. Denning L. J. continued: "Section 13 of the Act of 1934 only says that the person responsible shall be guilty of an offence..

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The presumption is that, where the statute provides those consequences for a breach no other remedy is available. It was sought to say, however, that by implication an action would lie to recover the overpayments. The decision of the House of Lords in Cutler v Wandsworth Stadium Ltd. seems to me to make that proposition almost unarguable". I respectfully agree. The Betting and Lottery Act considered in Cutler's case and in Green's case was not an Act passed for the protection of book-makers. Both cases are distinguishable from the present case on that ground. Denning L.J., however, went on to cite the above quoted passage from Browning v Morris supra and continued :-

> "In my judgment, those observations of Lord Mansfield apply only to cases where the statute, on its true construction contemplates that possibility of a civil action. He said that it was "in furtherance of these statutes" that the action for money had and received could be brought. Just as in an action for damages, so, also, in an action for money had and received, it is a question of the true interpretation of the statute whether an action lies so as to recover the overcharge. I see nothing in the Act of 1934 to authorise such an action. I can conceive of cases where book-makers might themselves aid and abet a breach of the statute. Some rich book-makers might willingly pay more than the statutory amount to get a privileged position for themselves as against their poorer brethren. Clearly, such people could not recover the over-payments. Nor can the plaintiff here. The breach of s.13, standing by itself, does not give rise to a claim for repayment".

This passage was relied upon by learned Counsel for the appellant who argued that the respondent was a rich and privileged person because he was able to pay the premium demanded. It will be remembered, however, that he had to borrow the money in order to pay it, and I think that I am bound on this point by the finding of the learned Judge that this was a case where the landlord held the rod and the tenant had to bow to it. It has not, so far as I am aware, been suggested in any of the other cases in which Lord Mansfield's observations in Browning v Morris are considered or referred to (e.g. Kearley v Thomson and Barclay v.

Pearson supra Williams v Hedley (1807) 8 East 378; 103 E.R. 388; Atkinson v Denby 6 H. & N. 778) that those words apply only to cases where the statute on its true construction 'contemplates the possibility of a civil action' if by that is meant that a civil action to recover sums illegally paid is referred to either expressly or impliedly. So far as I know, in none of the cases in which Lord Mansfield's observations have been applied does the statute give an express right to recover by civil action. If it did, it would be unnecessary to apply those observations. In the Statutes available here I have been unable to find that any such right is implied. I have read the summary of the statute 17 Geo 3 C.46 in Vol.31 of the Statutes at Large, page 408 which is all that is available here. This was the statute considered by Lord Mansfield in Browning v. Morris. I can find no hint in that statute that a civil action for the return of money illegally paid as a premium for insuring lottery tickets is contemplated by it. Neither does there seem to be any indication in the Gaming Act 1802 (42 Geo 3 C.119) the statute considered in Barclay v Pearson supra that that statute expressly or impliedly authorised the recovery by civil action of sums paid as entrance fees to an illegal competition. Yet, in Barclay v Pearson supra the fees were held to be recoverable on the ground (inter alia) that the competitors were a class protected by statute. Green's case was decided on the same Act as Cutler's case. supra; but the words of Denning L.J. quoted above seem to go further than Lord Normand's statement in Cutler's case: 'But if there is a penalty clause the right to a civil action must be established by a consideration of the scope and purpose of the statute as a whole'; or Lord MacNaghten's statement in Passmore v Oswaldtwistle U.D.C. cited in Cutler's case:' must depend on the scope and language of the Act.... and on considerations of policy and convenience'; or Lord Herschell's words in Cowley v Newmarket Local Board (supra) quoted by Lord Kinnear in Black v Fife Coal Co. Ltd. (1912) A.C. 149, 165 (cited in Cutler's case) 'we are to consider the scope and purpose of the statute and in particular for whose benefit it is intended'. Lord Justice Hodson in Green's case (supra) based his judgment on the fact that the plaintiff in that case had not pleaded any facts tending to show that he was not in pari delicto with the defendants: if the defendant had broken the law he had been as

In the Court of Appeal for Eastern Africa

No. 7

Judgment of the Court of Appeal 18th April, 1958 - continued.

much a party to the breach as they. That does not apply to the present case. The facts pleaded by the respondent and the sub-lease produced establish that he was not in pari delicto with the appellant, and he so pleaded. There was no intentional delictum on either side and the tenant was a member of a protected class. The second ground of the judgment of Hodson L.J. in Green's case is that the Betting and Lotteries Act, 1934, was not passed for the benefit of book-makers per contra the Uganda Rent Restriction Ordinance was passed for the benefit of tenants and prospective tenants. In my opinion Green's case is distinguishable.

I have reached the conclusion that, on the facts of this case, the respondent is entitled to recover his premium.

The learned Judge found that the respondent had not been guilty of laches and no sufficient reason has been shown for interfering with that finding. He must also have found against the allegations of estoppel and acquiescence and those matters have not been raised on the appeal.

The learned trial Judge did not give judgment for the interest claimed and there is no cross-appeal against that decision.

I would dismiss the appeal with costs.

Dated the eleventh day of April 1958.

K.K. O'CONNOR

P R E S I D E N T

11/4/58

JUDGMENT OF FORBES J.A.

I agree and have nothing to add.

Sgd. A.G. FORBES Justice of Appeal

I agree and have nothing to add.

Sgd. R.H. KEATINGE A Judge of the Court

Kampala,
Judgment delivered on 18th April 1958.

Sgd. J.McWHINNIE Dy. Registrar.

No. 8

In the Court of Appeal for Eastern Africa

No. 8

Formal Order Dismissing Appeal 18th April, 1958

FORMAL ORDER DISMISSING APPEAL

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA

Civil Appeal No. 85 of 1957

Between

THE KIRIRI COTTON COMPANY LIMITED Appellants

and

RANCHHODDAS KESHAVJI DEWANI Respondent

(Appeal from a judgment and decree of the High Court of Uganda at Kampala (Mr. Justice Lyon) dated 24th September 1957.

in

Civil Case No. 883 of 1956

Between

Ranchhoddas Keshavji Dewani Plaintiff

and

The Kiriri Cotton Company Limited Defendants)

In Court

Before

The Honourable The President (Sir Kenneth O'Connor)
The Honourable Mr. Justice Forbes
(a Justice of Appeal)
The Honourable Mr. Justice Keatinge
(A Judge of the Court)

This Appeal coming on 17th day of March, 1958 for hearing in the presence of Mr. P. J. Wilkinson and Mr. A. G. Mehta, counsel for the Appellants and Mr. A.I. James, counsel for the Respondent, when the appeal was stood over for judgment and this appeal standing for judgment this day

IT IS ORDERED that this appeal be dismissed.

In the Court of Appeal for Eastern Africa

AND IT IS FURTHER ORDERED that the Appellants do pay the Respondent his taxed costs of this appeal.

Given under my hand and the Seal of the Court this 18th day of April, 1958.

Sgd. R.W. CANNON Dy. Registrar
H.M. Court of Appeal for Eastern Africa.

No. 8

Formal Order Dismissing Appeal 18th April, 1958 - continued.

No. 9

Order granting final leave to Appeal to Her Majesty in Council 16th September, 1958.

No. 9

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL.

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA AT KAMPALA

CIVIL APPLICATION No.12 of 1958

(IN THE MATTER of an intended Appeal to Her Majesty in Council)

Between

THE KIRIRI COTTON COMPANY LIMITED — APPELLANT/APPLICANT

and

RANCHHODDAS KESHAVJI DEWANI — RESPONDENT

(Application for Final Leave to Appeal to Her Majesty in Council from a judgment and order of Her Majesty's Court of Appeal for Eastern Africa at Kampala dated the 11th day of April 1958 in Civil Appeal No. 85 of 1957)

Between

The Kiriri Cotton Company Limited — Appellant/Applicant

and

Ranchhoddas Keshavji Dewani — Respondent

O R D E R

UPON APPLICATION made to this Court by Counsel for the above named Applicant on the 28th day of

In the Court of Appeal for Eastern Africa

No. 9

Order granting final leave to Appeal to Her Majesty in Council 16th September, 1958.

August 1958 for final leave to appeal to Her Majesty in Council after conditional leave to appeal having been granted on the 11th day of June 1958 as a matter of discretion under sub-section (b) of Section 3 of the East African (Appeal to Privy Council) Order in Council 1951 AND UPON HEARING Counsel for the Applicant and Counsel for the Respondent AND UPON being satisfied that all conditions subject to which conditional leave to appeal was granted have been complied with by the Applicant AND ALSO UPON being satisfied that Notice for final leave to appeal has been given to the Respondent as required under section 12 (1) of the said Order in Council THIS COURT DOTH ORDER that the Applicants do have final leave to enter and prosecute their Appeal to Her Majesty in Council from the judgment and order above mentioned AND it is further ordered that the costs of and incidental to this application be costs in the intended Appeal.

DATED at Kampala this 16th day of September One thousand nine hundred and fifty eight.

Sgd. J. McWHINNIE

Deputy Registrar.

H.M. Court of Appeal for Eastern Africa.

IN THE PRIVY COUNCIL

No. 32 of 1958

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL
FOR EASTERN AFRICA

B E T W E E N :

KIRIRI COTTON COMPANY LIMITED
(Defendants)
Appellants

- and -

RANCHHODDAS KESHAVJI DEWANI
(Plaintiff)
Respondent

RECORD OF PROCEEDINGS

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