[HIGH COURT OF AUSTRALIA.]

LEONARD . . . . . APPELLANT;
DEFENDANT,

AND

BOOTH AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 21, 24, 25.

SYDNEY, *Nov.* 22.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

Contract — Deed — Illegality — Consideration — Companies (Vict.) — Registration —Syndicate consisting of more than twenty persons formed in Victoria for the purpose of acquiring options of purchase of mining rights in Northern Territory— Transfer of shares having effect of reducing number of members below twenty— Whether syndicate "formed for mining purposes"—Title to property acquired in the course of carrying on business unlawfully as consideration—Companies Act 1938 (*No.* 4602) (*Vict.*), *ss.* 358, 395.

Section 358 in Pt. I of the *Companies Act* 1938 (Vict.) provides that "No company association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any business . . . that has for its object the acquisition of gain by the company association or partnership or by the individual members thereof unless it is registered as a company under this Part or is formed in pursuance of some other part of this Act . . . " Section 395 in Pt. II of the same Act provides that "Notwithstanding anything in section three hundred and fifty-eight of this Act any company association or partnership formed for mining purposes may be formed, and, if incorporated as a company for mining purposes on the No-Liability System under this Part or any corresponding previous enactment, may carry on any mining business that has for its object the acquisition of gain to such company association or partnership or to the individual members thereof, without being registered as a company under Part I or formed in pursuance of any other Act of the Parliament of Victoria or of letters patent".

A syndicate was formed in Victoria for the purpose of acquiring an option of purchase of certain rights in mining leases in the Northern Territory. The trial judge found that from April 1951 until November 1951 the syndicate purported to carry on business in Victoria. After November the only business

carried on was a meeting, in December 1951, concerned with proposals for the buying out of the shareholders. During this period twenty-five persons were members of the syndicate. Uncertainty existed as to whether the last five persons to join did so in Victoria. In March 1952 twenty-three members respectively executed deeds agreeing to transfer their respective interests in the syndicate to L. in consideration of certain payments to be made by him. According to the terms of the deeds, each was deemed to be in escrow until each of the other named members had executed similar deeds. This condition was fulfilled. In actions brought against L. for payment of moneys due under the deeds L. claimed that the syndicate, having consisted of more than twenty members, was illegal under s. 358 of the *Companies Act* 1938 (Vict.) and, consequently, the deeds were tainted with illegality and members of the syndicate could not acquire or give legal title to property.

Held (1) that the defence of illegality failed: by *Dixon* C.J., *Webb*, *Kitto* and *Taylor* JJ., because even if s. 358 applied the respective agreements were not designed to carry out the purpose forbidden by the section, but to terminate the association, if it existed in disobedience to the section: by *Fullagar* J., because s. 358 did not apply to the syndicate, which was lawfully formed for mining purposes within s. 395 of the Act, and the fact that business may have been unlawfully carried on under the latter section was not relevant.

(2) that the defence of total failure of consideration failed even if s. 358 was applicable to the syndicate: by *Dixon* C.J. and *Kitto* J., because in any event it was not an essential condition of the covenants to pay the sums claimed that the respective assignors should have a good legal title to the shares transferred: by *Webb*, *Kitto* and *Taylor* JJ., because the promises being by deed there was no necessity for consideration; and even if it was required then, by *Webb* J., the purchaser had failed to prove that the property transferred to him had been acquired by the syndicate for the unlawful purpose of carrying on business in violation of the *Companies Act* and the interest of the respective transferors in the property constituted the consideration, by *Kitto* and *Taylor* JJ. the interest of the respective transferors in the property transferred, even if acquired in the course of business activities carried on unlawfully, constituted a good consideration.

Decision of the Supreme Court of Victoria (*Sholl* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

John William Booth, Arthur Rodwell Rawlinson, Arthur Douglas Alan Goldfinch, Clifford Raymond Vivian Fry, James Harris Hobbs, Alfred John Gore, Oliver Samuel James Maggs, Morris Merkel, Norman Walter Cook, George Alfred Prince, Sydney Alfred Baker and Cyril Arthur Asser respectively brought actions in the Supreme Court of Victoria against Hector Victor Leonard. The claim in each action was for moneys payable by the defendant under a number of identical deeds executed between each of the respective plaintiffs and the defendant. The action *Prince* v. *Leonard* may be

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considered representative of all the actions for the purposes of this report.

The deeds on which the plaintiff George Alfred Prince founded his claim were as follows: An agreement made 18th March 1952 between George Alfred Prince of 13 Cosham Street Brighton, Victoria (hereinafter referred to as "the assignor") of the one part and Hector Victor Leonard of 343 Little Collins Street Melbourne, Victoria, pastoralist, (hereinafter referred to as "the assignee") of the other part whereas the assignee procured an option to purchase from one H. J. Turner certain rights relating to mining leases numbered, *inter alia*, 211, 212, 242, 16F and 37 in the Northern Territory on the field known as Wauchope Wolfram Field upon certain terms and conditions and whereas the assignee offered to assign such rights to one Gordon Leonard upon certain terms and conditions and whereas the said Gordon Leonard agreed to purchase the said rights reserved to the assignee under the said option on the terms and conditions lastly hereinbefore referred to and whereas the said Gordon Leonard became registered in Victoria and in the Northern Territory under the *Business Names Act* 1928 (Vict.) and the *Business Names Ordinance* 1935 (N.T.) respectively as "Wauchope Wolfram Developments" and whereas the said Gordon Leonard formed a syndicate to take up the said rights with him and entered into agreements for that purpose with, *inter alia*, the assignor and the persons mentioned in cl. 2 hereof and whereas the assignor and those persons subscribed various amounts for the said purpose and whereas the said Gordon Leonard was appointed the manager of the syndicate and in that capacity received the amounts hereinbefore referred to from the subscribers and whereas out of the said amounts the said Gordon Leonard made a payment of one thousand pounds to the said H. J. Turner in the name of the assignee but failed to make all the payments provided for by the terms of the option hereinbefore referred to and whereas by reason of such failure the said H. J. Turner forfeited the sum of one thousand pounds which had been received by him as aforesaid from the said Gordon Leonard and cancelled the said option and whereas the assignee again procured from the said H. J. Turner an option to purchase his rights in, *inter alia*, the said leases for the sum of ten thousand pounds upon the condition that in the event of such option being exercised the assignee would pay certain royalties on the wolfram won from the field to the said H. J. Turner and to the Official Receiver for the State of South Australia such royalties amounting in the aggregate to fifteen per centum of the wolfram won and whereas the assignee offered to assign such rights

reserved to him under the option lastly hereinbefore referred to to the said syndicate for the sum of ten thousand pounds upon the condition, *inter alia*, that the assignee should receive a royalty equal to thirty-five per centum of the wolfram won by the said syndicate and whereas the said Gordon Leonard for and on behalf of the said syndicate agreed to purchase the said rights reserved to the assignee under the option lastly hereinbefore referred to and whereas the said Gordon Leonard paid to the assignee the said sum of ten thousand pounds hereinbefore referred to out of the funds of the said syndicate for and on its behalf and the assignee in turn paid such said sum of ten thousand pounds to the said H. J. Turner and whereas the assignor has subscribed to the funds of the syndicate the sum of ten thousand pounds for the purposes hereinbefore referred to and as a member thereof and in addition thereto has lent to the syndicate the sum of three thousand four hundred and thirty-six pounds seven shillings and ninepence and whereas disagreements have occurred among the members of the said syndicate by reason of which the assignee has offered by way of purchase money for their rights as members of the syndicate to return to the assignor and to the members of the syndicate referred to in cl. 2 hereof the whole of the moneys subscribed by them to the syndicate and to return to the assignor the sum of three thousand four hundred and thirty-six pounds seven shillings and ninepence lent by him to the syndicate in all cases together with a sum equivalent to four and one-half per centum per annum on such sums so subscribed and lent from the date or dates when same were paid over by the several members thereof to the said manager of the said syndicate to the date of payment of the purchase money hereinafter provided and whereas the assignor has accepted the offer to purchase the rights hereinbefore referred to provided that all of the members of the syndicate more particularly described in cl. 2 hereof other than himself do likewise now this agreement witnesseth :

1. The assignor hereby assigns and transfers to the assignee all the estate right title and interest acquired by him as a member of the Wauchope Wolfram Development Syndicate in and to firstly the said leases hereinbefore referred to secondly the said benefit of the contract subsisting between the assignee and the Official Receiver of the State of South Australia and all subsisting agreements with tributers on such said mining leases and thirdly all gear equipment stores buildings plant and other assets now on the land the subject of such said mining leases and fourthly the assets and rights to which the assignor is entitled by reason of his membership of the said syndicate known as Wauchope Wolfram

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Developments of 99 Queen Street Melbourne, Victoria to hold to the assignee for his own sole use and benefit absolutely.

2. This agreement shall be deemed to be in escrow until all of the members of the said syndicate namely J. Griffin, C. Asser, A. Rawlinson, S. Baker, J. Booth, N. Cook, N. D. Davey, Dr. Formby, T. Joshua, A. Goldfinch, R. Rothfield, F. Sharples, G. Prince, C. Fry, A. J. Gore, J. H. Hobbs, O. Maggs and M. Merkel, A. A. Murray, R. Bolwell, G. Leonard have executed assignments and transfers in terms similar hereto of their estate right and title to such aforesaid assets and things. In the event of all such assignments and transfers not being duly executed within seven days from the date hereof this agreement shall be deemed to be void and of no effect and in that event nothing herein contained shall be deemed to prejudice or affect any of the legal rights or liabilities of either party hereto.

3. Nothing herein contained shall have the effect of making the assignee responsible for any of the debts or liabilities of the assignor or of the said syndicate other than such payments as by the various assignments hereinbefore referred to and by the said leases provided to be made by the assignor but not otherwise.

4. The assignee shall on or before 1st June 1952 pay to the assignor in consideration of the transfer and assignment aforesaid the sum of thirteen thousand four hundred and thirty-six pounds seven shillings and nine pence together with such sums as equals four and one-half per centum per annum on such aforesaid sum of thirteen thousand four hundred and thirty-six pounds seven shillings and nine pence calculated from the date the assignor paid such sum to the credit of the said syndicate until the date such sum is paid pursuant hereto by the assignee to the assignor. Any benefits accruing to the aforementioned assets and things after the date this agreement becomes operative however shall be the property of the assignee.

5. Each party hereto shall do all such further acts deeds and things as may reasonably be required by him fully to give to the other the benefit hereof.

6. Possession of the assets and things hereinbefore mentioned shall be deemed to have been given and taken forthwith upon the completion of all the assignments and transfers in cl. 2 aforementioned.

7. Any minerals won by or payments due or to become due or other profits accruing to the assignor or the said syndicate prior to the date hereof shall become the property of the assignee and

shall be accounted for by the assignor and the said syndicate to the assignee. In witness etc.

An agreement made 18th March 1952 between George Alfred Prince of 13 Cosham St. Brighton Victoria (hereinafter called the assignor) of the one part and Hector Victor Leonard of 343 Little Collins Street Melbourne, Victoria pastoralist (hereinafter referred to as the assignee) of the other part. Whereas the parties hereto executed an agreement between themselves on 18th March 1952 pursuant whereto the assignor agreed, *inter alia*, to sell and transfer to the assignee the share and interest of the assignor in the syndicate known as the Wauchope Wolfram Development Syndicate and the assets thereof for the consideration and subject to the terms and conditions more particularly therein set out and whereas the parties hereto are desirous of varying the terms of such aforesaid agreement now this agreement witnesseth :

1. The provisions of cl. 4 of the above-recited agreement are hereby and by the mutual request and consent of the parties hereto cancelled.

2. The following shall be read and construed as cl. 4 of such said agreement in the place and stead of the clause which was cancelled pursuant to cl. 1 hereof. " 4. The assignee shall on or before 1st June 1952 pay to the assignor in consideration of the transfer and assignment aforesaid a sum equivalent to fifty per centum of the whole of the monies subscribed by him to the said syndicate together with such sum as equals four and one half per centum per annum calculated from the date the assignor paid such sum to the credit of the said syndicate until 1st June 1952 and shall on or before 1st September 1952 pay to the assignor in further consideration of the transfer and assignment aforesaid the balance of the monies subscribed by him to the syndicate together with such sum as equals four and one half per centum per annum calculated from the date the assignor paid such sum to the credit of the said syndicate until 1st September 1952. Any benefits accruing to the aforementioned assets and things after the date this agreement becomes operative however shall be the property of the assignee ".

3. The aforementioned agreement and this agreement shall henceforth be read and construed as the one agreement. In witness etc.

By letters dated 4th, 6th June 1952 it was agreed that the time for payment of the moneys due from the defendant to the plaintiff be extended from 1st June 1952 to 1st July 1952 and that interest at the agreed rate be paid in respect of such extended period.

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The plaintiff's claim indorsed on the writ dated 9th July 1952 was as follows :

The plaintiff's claim is for principal and interest due under a covenant in a deed dated 18th March 1952 made between the parties hereto as varied by agreement in writing constituted by letter dated 4th June 1952 from Messrs. Cleary Ross & Doherty as solicitors and agents of defendant to Messrs. Davis, Cook & Cussen as solicitors and agents of plaintiff and reply thereto dated 6th June 1952.

Particulars.

Principal	£6,718 3 10
Interest at four pounds ten shillings per centum per annum thereon to date as provided in deed	693 2 0
	£7,411 5 10
And the plaintiff claims	£7,411 5 10

By his defence dated 5th December 1952 the defendant pleaded as follows :

1. Subject to the production at the trial of the documents referred to in the statement of claim and to reference to the full terms thereof (and more particularly to cll. 2 and 3 of the deed) the defendant admits that he signed the deed dated 18th March 1952 and that the same was varied by the letters therein referred to. He does not admit that he has failed to pay to the plaintiff or that he is indebted to the plaintiff in the sum of seven thousand four hundred and eleven pounds five shillings and tenpence therein claimed or any part thereof. The said deed was varied by a further deed made on the date aforesaid between the plaintiff and the defendant whereby the defendant agreed to pay to the plaintiff in consideration of the transfer and assignment to the defendant of the plaintiff's share and interest in the syndicate hereinafter mentioned the sum of six thousand seven hundred and eighteen pounds three shillings and tenpence on 1st June 1952 and a further sum of six thousand seven hundred and eighteen pounds three shillings and tenpence on 1st September 1952 together with interest as therein provided. 2. The plaintiff is and was at all material times a member of an unincorporated association or partnership known as " Wauchope Wolfram Development " (hereinafter called " the said syndicate "), which is the syndicate referred to under that name in the deed referred to in the statement

of claim. 3. (a) By the provisions of the deed referred to in the statement of claim the consideration for the payment by the defendant of the sum of five thousand pounds being part of the amount claimed in this action was the assignment and transfer by the plaintiff to the defendant of, *inter alia*, all the estate, right, title and interest acquired by the plaintiff as a member of the said syndicate in certain mining leases, contracts, personal chattels and other assets to which the plaintiff claimed to be entitled by reason of his membership of the said syndicate. (b) The claim for the balance of the principal sum claimed in the action namely one thousand seven hundred and eighteen pounds three shillings and tenpence is for one-half of the sum of three thousand four hundred and thirty-six pounds seven shillings and ninepence being for moneys lent by the plaintiff to the said syndicate. (c) If, as is not admitted, the plaintiff lent the said sum of three thousand four hundred and thirty-six pounds seven shillings and ninepence or any other sum to the said syndicate, at the time of the making of the said loan the said syndicate, as the plaintiff was well aware, consisted of more than twenty members and was not registered as required by s. 358 of the *Companies Act* 1938 (Vict.) or at all. The said moneys, if lent at all, were lent to the said syndicate as aforesaid for the purpose of enabling it to carry on mining operations and make profits. 4. At the date of the making of the deed in the statement of claim mentioned and at all material times prior thereto (as the plaintiff at the date of the making of the deed was well aware) the said syndicate consisted of more than twenty persons. 5. The said syndicate was an association or partnership within the meaning of s. 358 of the *Companies Act* 1938 (Vict.) and the same was formed in the State of Victoria in or about the month of October 1950 for the purpose of carrying on the business of mining and of making profits therefrom and distributing the said profits between the members of the said syndicate. It in fact carried on the business of mining in the Northern Territory of Australia and it was doing so (as the plaintiff was well aware) at the date of the making of the deed referred to in the statement of claim. 6. The said syndicate was not registered as a company pursuant to Pt. I of the *Companies Act* 1938 (Vict.); nor was the same formed in pursuance of any other part of the said Act or any other Act of Parliament or letters patent. 7. The defendant will contend that by reason of the matters hereinbefore alleged the deeds referred to in par. 1 hereof were illegal and void. He will rely on the provisions of s. 358 of the *Companies Act* 1938 (Vict.). 8. In the month of March 1951 the mining leases (as to one-half

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share), the contracts, personal chattels and other assets referred to in the deeds aforesaid belonged to one Turner but the defendant was the holder of an option from the said Turner to purchase such one-half share in the said leases and also the benefit of the said contracts, the said personal chattels, and the other assets as aforesaid for the sum of ten thousand pounds. 9. By an agreement made on March 15th 1951 between the defendant of the one part and one Gordon Leonard of the other part (acting as agent for and on behalf of all the members of the said syndicate) the defendant agreed to sell and the said Gordon Leonard (as agent as aforesaid) agreed to purchase all the right, title and interest of the defendant in the said leases, contracts, personal chattels and other assets for the sum of ten thousand pounds. 10. The title (if any) and the only title of the said syndicate and the members thereof to the said leases, contracts, personal chattels and other assets is derived from the said agreement. 11. At the date of the making of the said agreement the said syndicate (as the said Gordon Leonard was well aware) consisted of more than twenty persons. 12. The defendant will contend that by reason of the matters hereinbefore alleged the plaintiff had no right, title or interest in the said leases, contracts, personal chattels, or other assets as aforesaid and accordingly that the consideration upon which the defendant was to pay the amount claimed in this action has wholly failed.

By his reply dated 31st July 1953 the plaintiff pleaded as follows: 1. Subject to production at the hearing, of the further deed referred to in par. 1 of the defence and to the full terms thereof, the plaintiff admits that the deed referred to in the statement of claim was varied by such further deed made on 18th March 1952 between him and the defendant. 2. Save as aforesaid and save as to the admissions contained in the said defence he joins issue thereon. 2 (A). If the syndicate referred to in pars. 4, 5 and 6 of the defence herein was an association or partnership consisting of more than twenty persons and was formed in the State of Victoria (which is denied) then it was so formed for mining purposes within the meaning of ss. 395 and 399 of the *Companies Act* 1938 (Vict.). 3. If, on 15th March 1951, or on 18th March 1952 or at any material time prior thereto, the syndicate referred to in the defence was an association or partnership within the meaning of s. 358 of the *Companies Act* 1938 consisting of more than twenty persons and was formed in the State of Victoria for the purpose of carrying on the business of mining and of making profits therefrom and distributing the said profits between the members of the said syndicate and was not registered as alleged in the said defence

(all and every part of which is denied) (a) the defendant at all material times was well aware of the said facts ; and (b) after the deed referred to in the statement of claim was in operation the defendant agreed to pay the moneys due thereunder, in the manner and for the consideration set out in the letter dated 4th June 1952 referred to in the statement of claim. 4. Upon the execution of the deed referred to in the statement of claim the defendant in or about the month of March 1952 accepted from the plaintiff and the other persons specified in cl. 2 thereof, and took and thereafter retained and still retains the benefit of possession of the assets and things mentioned in the said deed pursuant to the provisions thereof and thereby acted under and affirmed the said deed.

By leave the defendant delivered a rejoinder dated 31st July 1953 as follows :

1. Save as to the admissions contained in the reply the defendant joins issue. 2. As to par. 2A he says—If (as is not admitted) the said syndicate was formed for mining purposes as therein alleged or at all (a) it was not formed (either within the meaning of s. 358 of the *Companies Act* 1938 (Vict.) or at all) under or in pursuance of Pt. II or any other Part of the said Act ; (b) it was not " formed " within the meaning of that expression as used in s. 395 of the said Act ; (c) it was not incorporated or registered as a company under Pt. II of the said Act ; (d) notwithstanding the matters hereinbefore alleged, from 23rd October 1950 until 18th February 1952, inclusive, it continuously carried on mining business that had for its object the acquisition of gain to the said syndicate or to the individual members thereof and for that purpose it purported to acquire the interest of the defendant in the mining leases specified in the deed in the pleadings mentioned.

The actions were tried before *Sholl* J., who in a written judgment delivered on 2nd September 1953 held, *inter alia*, (a) that at all material times after 21st March 1951 the syndicate consisted of twenty-five persons, one of whom held her shares as trustee for the defendant ; (b) that, while all the persons, who joined after the number of members had reached twenty, were Victorian residents, the signing of their joining agreements, their payments and their acceptance as members of the syndicate were not proved beyond reasonable doubt to have taken place in Victoria ; (c) that the syndicate was originally formed for mining purposes within the meaning of s. 399 (2) of the *Companies Act* 1938 (Vict.) and at all material times retained that character ; (d) that between April

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1951 and March 1952 the only activities of the syndicate in Victoria were the keeping of an office, the keeping of accounts and a share register, some meetings of shareholders, the carrying on of correspondence with shareholders or prospective or supposed shareholders, and the sending of moneys to an engineer in the field in the Northern Territory. Even if this amounted to a carrying on of business in Victoria there was no evidence that any of it went on after 19th November 1951 except a meeting of shareholders on 5th December 1951 concerned with proposals for the buying out of the shareholders by the defendant; (e) that the effect of s. 358 of the *Companies Act* 1938 (Vict.) was not to invalidate joining agreements made after the syndicate numbered twenty members, so as to leave the syndicate in existence as a lawful association of twenty members; (f) that ss. 358 and 395 of the *Companies Act* 1938 (Vict.) refer only to the formation of associations in Victoria. If members in excess of the statutory maximum joined outside Victoria, no offence would be committed under the Act, at least until the body purported to carry on business in Victoria; (g) that members of an illegal association may acquire rights of property, at all events in personal property, notwithstanding that such acquisition is the result of transactions conducted for the purpose of the business of the association; (h) that the syndicate was validly formed as a body exceeding twenty persons under s. 395 of the *Companies Act* 1938 (Vict.); (i) that the deeds dated 18th March 1952 were not made by parties to any current illegality, nor were they designed to effectuate any of the purposes of an illegal association. Accordingly judgment was entered in each case for the plaintiff for the amount claimed.

From these decisions the defendant appealed to the High Court.

L. Voumard Q.C. (with him *J. A. Lewis*), for the appellant in each appeal. The true construction of s. 358 of the *Companies Act* 1938 is not arrived at by reading the words " in Victoria " into the section after the words " shall be formed ". The section applies to any partnership which has a real connection with Victoria so that the proper law under the rules of private international law is that of Victoria. The place of formation is irrelevant. The *obiter dictum* of Lord *Wrenbury* in *Russian Commercial & Industrial Bank* v. *Comptoir D'Escompte De Mulhouse* (1) to the opposite effect should not be followed. In order to discover the law applicable to a transaction it must be examined to find the place with which it is

(1) (1925) A.C. 112, at p. 149.

connected. [He referred to *Barcelo* v. *Electrolytic Zinc Co. of Australasia Ltd.*, per *Rich* J. (1), per *Starke* J. (2), per *Dixon* J. (3), per *McTiernan* J. (4).].

[DIXON C.J. referred to *Macleod* v. *Attorney-General for New South Wales* (5).]

On its proper construction s. 395 of the *Companies Act* applies only to syndicates formed with a view to incorporation under Pt. II of the Act as no-liability mining companies. Unless the documents show that a syndicate is formed with such a view it is not "formed" within the meaning of the word in the third line of the section. Section 399 furnishes support for this construction by its use of the phrase "formed . . . and incorporated". Section 395, on this construction, does not become redundant. Under s. 403 of the Act, incorporation is not permitted unless twenty-five per cent of capital has been subscribed and five per cent actually paid. It is necessary that subscribers should be associated while the capital is being subscribed and paid and during this period s. 395 renders their association lawful. It was never intended that the syndicate in the present case should be incorporated under the *Companies Act* and consequently, since it was not "formed" within the meaning of s. 395, it was not within the exception in s. 358. The invalidating effect of s. 358 is shown in *In re Padstow Total Loss & Collision Assurance Association*, per *Jessel* M.R. (6), per *Brett* L.J. (7), per *Lindley* L.J. (8). The principle has, however, not been carried to its full logical extent for reasons of justice and convenience. For example, property vested in members of an illegal association as tenants in common or joint tenants is capable of being stolen. [He referred to *Reg.* v. *Tankard* (9).]

[DIXON C.J. Larceny is an interference with possessory rights, not rights of ownership.]

There is also authority for the view that a creditor who has a contract with the members of an illegal syndicate without knowledge that the number of members exceeds twenty may enforce his claim. [He referred to *Shaw* v. *Simmons* (10).] Under the deed in the present case it is irrelevant where the twenty-first member joined the syndicate. [He referred to *In re Thomas*; *Ex parte Poppleton* (11).] Section 358 applies to any company, association or partnership

(1) (1932) 48 C.L.R. 391, at pp. 406, 408.
(2) (1932) 48 C.L.R., at pp. 409, 415.
(3) (1932) 48 C.L.R., at pp. 422, 427, 428.
(4) (1932) 48 C.L.R., at p. 446.
(5) (1891) A.C. 455.
(6) (1882) 20 Ch. D. 137, at pp. 143, 145.
(7) (1882) 20 Ch. D., at p. 148.
(8) (1882) 20 Ch. D., at p. 149.
(9) (1894) 1 Q.B. 548.
(10) (1883) 12 Q.B.D. 117, at p. 120.
(11) (1884) 14 Q.B.D. 379, at pp. 382, 383.

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originally projected in Victoria by more than twenty persons, or by less than twenty persons provided that the number is increased thereafter to more than twenty persons, and which carries on business in Victoria. Alternatively, it applies to any company association or partnership which is in existence and which carries on business in Victoria irrespective of the place of formation. The ultimate policy behind the section is the public interest that a person dealing with an association will know with whom he is contracting. [He referred to *Smith* v. *Anderson*, per *James* L.J. (1).] There is nothing in Div. 12 of the Act which militates against the last alternative. That division is concerned only with bodies actually incorporated or given recognition short of incorporation by foreign law. [He referred to ss. 343, 344 (1) (a), 347 (5), 351, 353.] In this case, the twenty-first and subsequent members must be deemed to have become members in accordance with the terms of the original constituent documents. The syndicate was originally formed as an association in Victoria. As part of his proof the plaintiff had to set up that he was a member of an illegal association. [He referred to *Bowmakers Ltd.* v. *Barnet Instruments Ltd.* (2); *Newcastle District Fishermen's Co-operative Society* v. *Neal*, per *Street* C.J. (3), per *Owen* J. (4).]

[FULLAGAR J. The plaintiff had to tender the deed, but the only part of it relevant to his cause of action was the covenant to pay.]

[KITTO J. When the deed was tendered there was no necessary illegality because the partnership might have been formed under s. 395.]

That section constitutes an exception to a general rule. It was for the plaintiff to bring himself within it. [He referred to *Taylor* v. *Bowers*, per *James* L.J. (5), per *Mellish* L.J. (6).] It is not contended that the action was brought to enforce an illegal transaction. But that is only one aspect of illegality. [He referred to *In re South Wales Atlantic Steamship Co.*, per *Mellish* L.J. (7); *Farmers' Mart Ltd.* v. *Milne*, per Lord *Dunedin* (8); *Nicholls* v. *Stanton* (9).]

R. V. Monahan Q.C. and *Gregory Gowans* Q.C. (with them *T. B. Shillito*), for the respondent in each appeal.

Gregory Gowans Q.C. There was no contravention of s. 358 of the *Companies Act* because only associations formed in Victoria

(1) (1880) 15 Ch. D. 247, at p. 273.
(2) (1945) K.B. 65, at p. 69.
(3) (1950) 50 S.R. (N.S.W.) 237, at pp. 239, 240; 67 W.N. 191.
(4) (1950) 50 S.R. (N.S.W.), at pp. 246, 247; 67 W.N. 191.
(5) (1876) 1 Q.B.D. 291, at p. 298.
(6) (1876) 1 Q.B.D., at p. 299.
(7) (1876) 2 Ch. D. 763, at p. 780.
(8) (1915) A.C. 106, at pp. 113, 114.
(9) (1915) 15 S.R. (N.S.W.) 337; 32 W.N. 102.

for the purpose of carrying on business in Victoria are within that section. It is not to be assumed that the Victorian Parliament is legislating to prevent the formation of associations outside Victoria. [He referred to *Buckley* on the *Companies Acts*, 11th ed. (1930), p. 649.] There was no finding or proper proof of either the joining of the excess numbers in Victoria or that the association had as its purpose the carrying on of business in Victoria. In the case of successive "joinings" of members there can be no effective "joining on to" a permissible association, so as to turn it into a prohibited association. *Shaw* v. *Simmons* (1) and *In re Thomas*; *Ex parte Poppleton* (2) are in conflict on this matter. In any event an association for mining purposes may be constituted by any number of persons under s. 395 whether or not that association is intended to be or is capable of being incorporated as a no-liability company. The words "formed in pursuance of some other part of this Act" in s. 358 embrace an association recognized by s. 395. The requirement of s. 395 is that before business is commenced a no-liability company must be formed, not that the syndicate must turn itself into such a company. [He referred to *Marrs* v. *Thompson* (3).] Even if the syndicate was formed in contravention of the *Companies Act*, its members were owners of interests in the assets which could be disposed of by sale and the contracts of sale enforced, so long as they were not in furtherance of its prohibited objects. These contracts were a retreat from, and not in pursuance of, such objects. The promise to pay and the non-payment contained no ingredient of illegality. The proof of the promise, by the deed being put in evidence, disclosed, on the face of it, no contravention of s. 358. When all the evidence was admitted neither the subject matter nor the consideration was exposed as illegal, so as to infect the promise. The illegality appeared as a mere matter of the contracts' antecedents. [He referred to *Ex parte Longworth's Executors* (4); *Sharp* v. *Taylor* (5); *Scarfe* v. *Morgan* (6); *Gordon* v. *Chief Commissioner of Metropolitan Police* (7); *Strang* v. *Owens* (8); *Neal* v. *Ayers*, per *Dixon* and *Evatt* JJ. (9); *Jack* v. *Peters* (10).]

L. Voumard Q.C., in reply.

Cur. adv. vult.

(1) (1883) 12 Q.B.D. 117.
(2) (1884) 14 Q.B.D. 379.
(3) (1902) 86 L.T. 759.
(4) (1859) Johns. 465 [70 E.R. 504].
(5) (1849) 2 Ph. 801 [41 E.R. 1153].
(6) (1838) 4 M. & W. 270, at pp. 274, 281 [150 E.R. 1430, at pp. 1432, 1435].
(7) (1910) 2 K.B. 1080.
(8) (1925) 42 W.N. (N.S.W.) 183.
(9) (1940) 63 C.L.R. 524, at p. 531.
(10) (1941) N.Z.L.R. 153, at pp. 161, 162.

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The following written judgments were delivered :—

DIXON C.J. There are before us twelve appeals from judgments given in as many actions by *Sholl* J. by which the respective plaintiffs recovered various sums of money. The appellant is the defendant in each of these twelve actions. The relevant circumstances are the same in each of the cases and they give rise to the same questions. It is best, however, to consider one of the cases separately and apply the result to the other eleven. It is convenient to take the appeal arising out of the action of the respondent John William Booth against the appellant Henry Victor Leonard.

The action, like the other eleven actions, is brought upon a covenant in a deed as varied by a deed of the same date. Each of the two deeds on which Booth's cause of action is founded is expressed as an agreement made on 18th March 1952 between the respondent Booth, thereinafter referred to as the assignor, of the one part, and the appellant Leonard, thereinafter referred to as the assignee, of the other part. The principal deed contains a number of recitals tracing the transactions between the parties leading up to the actual agreement. In effect the recitals describe the formation of a syndicate named Wauchope Wolfram Developments for the purpose of acquiring from the appellant an option of purchase of certain rights in mining leases in the Northern Territory. The document goes on to recite that the respondent had subscribed to the funds of the syndicate the sum of £1,250 for the purposes referred to and as a member thereof. Finally it recites that disagreements have occurred among the members of the syndicate and that the appellant has offered by way of purchase money for their rights as members of the syndicate to return to the respondent and to the members of the syndicate referred to in the body of the agreement the whole of the moneys subscribed by them in all cases together with a sum equivalent to four and one-half per cent per annum on such sums from the dates when they were paid over to the manager of the syndicate, and that the respondent has accepted the offer to purchase the rights provided that all the members of the syndicate so described other than himself do likewise.

The operative part of the instrument consists of several clauses. The first clause assigns and transfers to the appellant all the estate, right, title and interest acquired by the respondent as a member of the Wauchope Wolfram Development Syndicate in the mining leases, certain agreements and certain equipment, stores and other assets. The second clause states that the agreement is to be deemed an escrow until all the members of the syndicate, which it proceeds

to name, have executed assignments and transfers, in terms similar to the document, of their estate, right, title and interest to the aforesaid assets and things; otherwise the agreement is to be void. The clause mentions twenty-one names, so that with the appellant and the respondent there would be twenty-three syndicators. Of the other clauses that which is material is the fourth and that was replaced by another clause so numbered. This was done by a separate agreement, the second of the two deeds executed on the same day. It is on this clause that the respondent has recovered judgment before *Sholl* J. It provides that the appellant shall on or before 1st June 1952 pay to the respondent in consideration of the transfer and assignment aforesaid a sum equal to fifty per cent of the whole of the moneys subscribed by him to the syndicate, together with such sum as equals four and a half per cent per annum calculated from the date when the respondent paid the sum to the credit of the syndicate until 1st June 1952 and so on, and before 1st September 1952 pay to the respondent in further consideration of the transfer and assignment aforesaid the balance of the moneys subscribed by him to the syndicate, together with a sum for interest calculated in the manner already stated. As the writ was issued on 10th July 1952 when the second of these two sums had not accrued due it could not be included in the claim. The principal sum sued for was £625, being half of £1,250 already mentioned as the amount subscribed by the respondent; a claim for interest was added.

The appellant set up the defence of illegality. He said that the syndicate was a company or association consisting of more than twenty persons formed for the purpose of carrying on a business that had for its object the acquisition of gain by the company or association or by the individual members thereof and that it had not been registered as a company under Pt. I of the *Companies Act* 1938 (Vict.) and had not been formed under any other part of the Act or any other Act of Parliament or of letters patent. Consequently the syndicate was illegal under s. 358 of the *Companies Act* 1938 and the formation of the syndicate was an offence under s. 382, penalized by s. 383. The appellant's case is that the covenant upon which the respondent has sued is tainted with illegality, that in order to make out the respondent's cause of action the latter had necessarily to rely upon an illegal transaction or matter, the formation and existence of the syndicate. The appellant says alternatively that the respondent can make no title to the share which by the deed he professes to assign. He cannot do so by reason of the illegality. The moneys sued for are payable in consideration of the assignment of the share and therefore they are not recoverable.

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Section 395, contained in Pt. II of the *Companies Act*, provides that notwithstanding anything in s. 358 any company, association or partnership formed for mining purposes may be formed and, if incorporated as a company for mining purposes on the no-liability system under Pt. II, may carry on any mining business that has for its object the acquisition of gain to such company, association or partnership or to the individual members thereof, without being registered as a company under Pt. I or formed in pursuance of any other Act of the Parliament of Victoria or of letters patent. It is, of course, a necessary part of the appellant's defence that the syndicate was not incorporated as a company for mining purposes on the no-liability system under Pt. II and was not registered or incorporated as a company pursuant to Pt. I of the Act or registered as a company for mining purposes on the no-liability system under Pt. II and was not formed in pursuance of any part of the Act other than Pts. I or II or in pursuance of any other Act of Parliament or of letters patent. But all this occasions the defendant appellant no difficulty for it is so in fact. Further, it may readily be conceded that a contract is illegal and unenforceable if it has the design or effect of carrying out any of the purposes of a company or association of more than twenty members which, though falling within s. 358, is not registered : cf. *In re South Wales Atlantic Steamship Co.* (1) ; *Jennings* v. *Hammond* (2) ; *Shaw* v. *Benson* (3) ; *In re Padstow Total Loss & Collision Assurance Association* (4).

The facts of the present case may, for the purposes of this judgment, be stated quite briefly. Early in the year 1951 a syndicate was formed and called Wauchope Wolfram Developments and by the end of March it had come to consist of more than twenty persons. By an agreement dated 1st November 1950 and amended by another agreement made three days later, the basis of the syndicate was laid down. These agreements were expressed to be made between a lady who was in the position of a nominee and the appellant's brother and such further persons as might become parties or subscribers with the consent of the two foregoing persons. It seems plain, in spite of a confusion in the text of the document, that it was intended to limit the number of syndicators to twenty in all. The recitals of this agreement were to the effect that the parties had obtained an option to purchase and operate an area in the Northern Territory called the Wauchope Wolfram Field and that they had agreed to form a syndicate on terms which appear to mean that there should be a capital equivalent to 35,000

(1) (1876) 2 Ch. D. 763.
(2) (1882) 9 Q.B.D. 225.
(3) (1883) 11 Q.B.D. 563.
(4) (1882) 20 Ch. D. 137.

units of £1 and 25,000 units of 1s. 0d. which were to be disposed of. The clauses of the agreement declared that the syndicate should be called Wauchope Wolfram Developments, that it should have the capital described, that the two named parties should respectively have a certain number of units, that holders for the time being of units of the syndicate should be members of the syndicate, and that the units should be transferable. Provisions were also included for the appointment of a trustee and manager and for the custody of documents and moneys. Each of the persons who became a member of the syndicate signed a separate agreement. The respondent signed such an agreement on 2nd November 1950. All the agreements were in the same form. After reciting the formation of the syndicate and its nominal capital the agreement provided that the subscriber, in this case the respondent Booth, should become a member of the syndicate, giving its name. The agreement then set out the objects of the syndicate. The objects were, stated shortly, to acquire the options already mentioned (plant, equipment and machinery belonging to the vendors), to negotiate for the formation of the syndicate into a company with a nominal capital of £60,000, to acquire further options and equipment and to do all other things necessary to develop the mines. The document concluded with an obligation on the part of the respondent to subscribe the sum of £1,250. The respondent in fact paid his subscription in three instalments, £50 on 2nd November 1950, £950 on 10th April 1951 and £250 on 19th July 1951. At the date when the respondent signed the agreement to become a member of the syndicate less than twenty members had joined, but by 21st March 1951 twenty-five persons had become members. It seems probable that the five who joined after the number had reached twenty became members in Victoria, but on this point there may be a little uncertainty.

Clearly enough the parties to the syndicate wished to mine for wolfram and that is an object which would fall within s. 395 of the *Companies Act*. No actual mining was done, however, and it is denied on behalf of the respondent that the syndicate did in fact carry on business. Probably the activities of the company in Melbourne eventually did amount to a carrying on of business. *Sholl* J. found that, at all events from some time after April 1951, the syndicate did purport to carry on business to some extent in Victoria.

By November 1951 some dissension seems to have occurred in the syndicate and on 27th November an offer was made in the name of the appellant's brother to buy out the syndicate. The

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offer was first conveyed in a letter from his solicitor in the following words :—" If the syndicate as a whole is not satisfied with my client's conduct of its affairs, he is quite willing to buy it out. He has been able to arrange the necessary backing and finance, and therefore can now offer to the members of the syndicate the whole of the moneys invested by them, plus interest thereon at 4½% from the date of their investment to date of payment, in exchange for their holdings. My client stipulates, however, that all members of the syndicate must accept his offer, or it is of no effect. He will not purchase individual holdings piecemeal ". A meeting of the syndicators was called early in December 1951 and after some negotiations the offer was accepted. In the end all the syndicators signed or assented to agreements in the form of that made between the appellant and respondent upon which the respondent has recovered judgment. At all events it may be assumed that the document ceased to be an escrow and took effect and that the condition that all syndicators should assign their shares to the appellant was fulfilled. The recitals in the agreement of 18th March 1952 give a full narrative of the steps by which the transaction came about, but it is only in the body of the agreement, namely in cl. 2, that it is disclosed that more than twenty persons were members of the syndicate and that appears simply from the number of names mentioned. If s. 358 be considered apart from s. 395, there can be little doubt that the syndicate fell within the scope of the provision. It was suggested, however, that the syndicate was not formed wholly in Victoria and that the five members who joined latest and so brought the numbers beyond twenty became parties outside Victoria, or at all events were not shown to have become parties within Victoria. Further, it was said that as the foundation instrument intended that the syndicate should consist of no more than twenty and as to increase it beyond twenty would be contrary to s. 358, the agreements by which the additional persons joined were void and of no effect, so that the syndicate remained an association of twenty persons. The respondent's chief reliance, however, for the purpose of taking the syndicate out of the operation of s. 358, was upon s. 395. Clearly enough the object for which the syndicate was formed was mining purposes and it was said for the respondent that under s. 395 a syndicate of more than twenty might be formed for mining purposes without registration although it was not denied that before it carried on any mining business it was necessary that it should be registered on the no-liability system under Pt. II of the *Companies Act*. To this the appellant answered first that the syndicate was not so constituted

as to be capable of registration without adopting articles or regulations of a different type and that s. 395 allowed only of the formation of a company, association or partnership which was capable of being registered; and second that in fact the syndicate did carry on business and thus took itself outside any protection afforded by s. 395.

For the purposes of this judgment it is unnecessary to discuss these points. Let it be assumed that the syndicate was formed wholly in Victoria, that the agreements by which the numbers were increased beyond twenty were not void and that the result was that the syndicate fell within s. 358. Let it be assumed that it did carry on business and was not saved by s. 395 from being an illegal company or association. Adopting all these hypotheses in favour of the appellant, the question remains whether it follows that the covenant or promise upon which he is sued is illegal and void or unenforceable. In the first place it seems clear enough that instruments which contain this covenant are not agreements for the purpose of furthering the objects of the syndicate or of carrying on any part of its business. They formed no part of the constitution of the syndicate. Each such agreement is, according to its terms, dependent on the making of each and every other of the contemplated agreements with the syndicators and their combined effect is to dissolve the syndicate and transfer the assets to the appellant. The appellant, however, maintains that the covenant on which he is sued forms part of an agreement which springs from the formation of the syndicate and is subsidiary thereto or consequential thereon. Further, it is contended that before the respondent can establish his case he must set up a state of facts which discloses the illegality. It is impossible according to the appellant's contention for the respondent to enforce his claim by a proceeding at law without reliance upon the illegal formation of the syndicate in order to establish his case. He could not, so the appellant says, make out his cause of action without setting up the illegality: see *Simpson* v. *Bloss* (1); *Fivaz* v. *Nicholls* (2); *Montefiori* v. *Montefiori* (3); *Doe, d. Roberts* v. *Roberts* (4).

It may at once be conceded in favour of the appellant's argument that all contracts made directly for the purpose of carrying on the business of an unregistered association falling within s. 358 are illegal and unenforceable: cf. *Jennings* v. *Hammond* (5). But the

(1) (1816) 7 Taunt. 246 [129 E.R. 99].
(2) (1846) 2 C.B. 501, at p. 512 [135 E.R. 1042, at pp. 1046-1047].
(3) (1762) 1 Black. W. 363 [96 E.R. 203].
(4) (1819) 2 B. & Ald. 367 [106 E.R. 401].
(5) (1882) 9 Q.B.D. 225, at p. 229.

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question is whether the agreement sued upon can be brought within the principle. Clearly enough its object is not contrary to the policy or purpose of s. 358. Its operation, considered in conjunction and combination with the contracts with which it is interdependent, is to terminate the condition of illegality. The whole transaction by which the appellant undertook to purchase the interests of the syndicators, provided they all concurred, brought the syndicate to an end and thus made legal whatever further operations might be carried on. It is not a case where the contract it is sought to enforce is directly within the statutory prohibition. The argument for the appellant cannot be put higher than a claim that the covenant arises out of a transaction which is within the statutory prohibition of s. 358 and that the share in the syndicate which the agreement purports to assign is itself a share in an illegal association. The contention was advanced that, upon the form of the promise expressed in the covenant or clause, membership of the syndicate was a necessary part of the respondent's title. The respondent, it was said, is so described, the share is described as a share in the syndicate, and the consideration expressed in the fourth clause, on which the cause of action rests, is the transfer and assignment of that share. This argument overlooks the fact that the purpose and effect of assigning the share in the syndicate is not that the assignee may become a member of the syndicate. It is assigned for the purpose of terminating the syndicate. The argument that the assignor could have nothing to assign because his title was unlawful and void depends on a dubious premise. But in any case, having regard to the recitals, it would be wrong to construe cl. 4 as meaning that it should be an essential condition of the covenant to pay the two sums referred to, amounting to £1,250, that the assignor the respondent should have a good legal title to the share which he transferred. A short answer to the appellant's case is that the agreement which he says is tainted with illegality is not an agreement which is either designed to carry out or further the forbidden purpose or would operate to do so but, that on the other hand, it contributes its part to terminating the association which existed in disobedience to the statutory provision. In his reasons for judgment *Sholl* J. said that the transactions constituted by the instruments of assignment were not entered into by persons who were then parties to any current illegality: "The deeds they executed were not designed to effectuate any of the purposes of an illegal association. For they were not designed to enable an unregistered and unincorporated association of more than twenty persons, which, even if legally formed, could not

legally carry on business in Victoria, to carry on business, either in Victoria or anywhere else. They were indeed such that their effect must necessarily be to prevent the association from continuing to exceed twenty persons, and from being in a position unlawfully to recommence the carrying on of business. The carrying out of the transaction which the deeds embodied would result in the syndicate consisting at most of the defendant and two or three other persons". I agree in this conclusion.

For the foregoing reasons the appeal in the case of the respondent Booth should be dismissed with costs. The same reasoning applies to the eleven other appeals, each of which should be dismissed with costs.

WEBB J. This is an appeal against an order of the Supreme Court of Victoria (*Sholl* J.) made in an action brought by the respondent against the appellant to recover principal moneys and interest thereon alleged to be due under a deed made between the parties on 18th March 1952, as varied by letters between their solicitors, by which deed the appellant acquired the interest of the respondent in a mining syndicate consisting of the appellant, the respondent and fourteen others who made similar contracts with the appellant and brought similar actions against him. The amount directly involved in this action is £7,411 5s. 10d. and in all fifteen actions £16,734 9s. 11d. The amounts directly involved are respectively twice those amounts. In three actions *Sholl* J. reserved judgment. In the others he gave judgment for the plaintiffs.

The claim in this action was for (1) the purchase money on the sale of the interest of the respondent in the syndicate; and (2) money lent by the respondent to the syndicate, the obligation to repay having been assumed by the appellant when he acquired the interest of the respondent in the syndicate. There has been no appeal against the judgment for money lent.

The defence was that, when the syndicate acquired its property in March 1951, and again when the appellant purchased the respondent's interest in the syndicate in March 1952, it consisted of more than twenty members and still carried on business unregistered or unincorporated, and, therefore, contrary to ss. 358 and 395 of the *Companies Act* 1938 (Vict.); so that both transactions were unlawful and unenforceable.

The position as I see it may be stated as follows:—the onus was on the appellant to prove that the respondent's contract with him was (1) illegal; or, if not, then (2) without consideration.

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As to (1): whatever may have appeared in the recitals in the contract sued on or elsewhere indicating illegality in earlier transactions, there was nothing illegal in this contract, seeing that it did not tend to promote but to terminate any unlawful state of affairs that might have existed while the syndicate carried on business with a membership that exceeded twenty. But in any event the evidence did not establish that the syndicate was carrying on business at the date of the contract sued on. As pointed out by *Sholl* J. nothing took place in Victoria between April 1951 and March 1952 except the keeping of an office, the keeping of accounts and of a share register, meetings of shareholders, correspondence with shareholders and prospective shareholders, and the sending of money to the engineer in the field in the Northern Territory; and all those things occurred during 1951. Thereafter the operations of the syndicate were confined to the negotiations that led to the contract sued on: no business was carried on by the syndicate during 1952. Infringement, if any, of the *Companies Act* had ceased: it was a thing of the past. The making of a contract of which the necessary effect was to put an end to an illegal state of affairs could not have amounted to the carrying on of the business contrary to the Act.

As to (2): consideration was not required to be shown as the respondent sued on a deed. But if it were required the interest of the respondent in the syndicate constituted the consideration, unless the applicant showed that the syndicate did not become the owner of the property it purported to buy in March 1951, as it was on the ownership of that property by the syndicate that the value of the interest of the respondent depended. The onus of proof that the syndicate did not become the owner was on the appellant. It could have been that the syndicate did not become the owner if the purported sale to the syndicate in March 1951 was unlawful. Now it is true that the appellant was the vendor in that sale; but even if he knew of the illegality when he made the sale, as, having regard to the part he played in initiating and carrying through the various transactions up to and including the contract sued on, he is likely to have known if it were the fact, still I think that did not preclude him from raising the defence of illegality, and so setting up and proving his own wrong doing, as the illegality he alleged arose from the breach of a public statute. However, the appellant had to prove that the syndicate at the time of the purported sale to it was operating in violation of the law and intended to continue to do so and to use the property for the unlawful purpose, i.e. in carrying on the business. Now it had an

office, made "joining" agreements with its members, and made the contract of purchase, and so may be said to have carried on business: see *In re "Otto" Electrical Manufacturing Co.* (1905) *Ltd., Jenkins' Claim*, per *Buckley* J. (1). Then if this was all that had to be considered it might be that the onus of proof that the acquisition of the property by the syndicate was unlawful had been discharged. But this was not all. The acquisition by the syndicate would, I think, have been invalid only as to property shown to have been acquired by it for an unlawful purpose, i.e. for the carrying on of the business in violation of the *Companies Act*, that is to say, unregistered or unincorporated. But that was not proved as regards any part of the property: it was not proved that the syndicate bought the property to use in its business while continuing unregistered or unincorporated. If when the syndicate acquired the property it had the intention of not using the property in its business, or had the intention of becoming registered or incorporated before so using it, then there was no unlawful purpose in the acquisition. But neither intention was negatived. The syndicate's intentions at the time of acquisition were not a matter peculiarly within the knowledge of its members other than the appellant; and so it could not properly be said that the onus of proof of those intentions rested on them and not on him. There was, of course, no presumption of illegality, but the contrary presumption. Moreover, as *Sholl* J. points out, the appellant accepted payment from the syndicate for the assets he sold to it in March 1951 and the syndicate took possession of the assets as its property. Again, the appellant took possession of the assets of the syndicate under the contract of March 1952, that is to say, the contract sued on. So that the appellant's attitude throughout was inconsistent with his defence that the syndicate did not lawfully acquire the property from him in March 1951. I do not say that this attitude was conclusive as a matter of law; but it was, I think, an important fact to be considered with other facts, more particularly in view of the appellant's probable knowledge of the circumstances attending each transaction, including the purpose for which the property was acquired by the syndicate and the intention of the syndicate in the matter of the use of the property in the business, or of the registration or incorporation of the syndicate before so using it. Then the property could have been lawfully acquired; and the appellant's attitude, in the absence of any explanation by him, was consistent only with its lawful acquisition.

(1) (1906) 2 Ch. 390, at p. 392.

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In the circumstances I am unable to hold that, whatever may have been the standard of proof, whether beyond reasonable doubt or according to the balance of probabilities, the appellant discharged this onus of proof and established that there was no consideration for the contract sued on.

It becomes unnecessary to decide the questions (1) whether s. 358 is confined to associations formed in Victoria for carrying on business there; (2) whether a lawful association can be turned into an unlawful one by later "joinings" in excess of twenty; and (3) whether an association for mining purposes may consist of any number of persons whether it is intended to be or is capable of being incorporated as a no-liability company; but I see no reason to take a different view from that taken by *Sholl* J. on these questions.

I would dismiss the appeal.

FULLAGAR J. The facts of this case have been stated in the judgment of the Chief Justice, and I need not repeat them.

Section 358 of the *Companies Act* 1938 (Vict.) is in the following terms:—"No company association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any business other than the business of banking that has for its object the acquisition of gain by the company association or partnership or by the individual members thereof unless it is registered as a company under this Part, or is formed in pursuance of some other Part of this Act or of some other Act of Parliament or of letters patent". This section occurs in Pt. I of the Act, which deals with "trading companies" generally. It is in terms identical with those of s. 9 of the *Companies Act* 1928. It is only indirectly relevant to the present case.

Section 295 of the *Companies Act* 1928 (which appeared in Pt. II, under the heading "Mining Companies") was in the following terms:—"Notwithstanding anything in section nine of this Act any company association or partnership formed for mining purposes may be formed and may carry on any mining business that has for its object the acquisition of gain to such company association or partnership or to the individual members thereof, without being registered as a company under Part I of this Act or formed in pursuance of any other Act of the Parliament of Victoria or of letters patent". The "association" or "partnership", with which we are concerned in the present case, was formed for mining purposes. It is obvious, therefore, that if s. 295 had been in force today, no question of illegality could have arisen in this case.

The *Companies Act* 1928, however, was repealed by the consolidating Act of 1938. Part II of the Act of 1938, like Pt. II of the Act of 1928, dealt with mining companies, but it made certain changes, which are briefly referred to in *Tongkah Compound N.L.* v. *Meagher* (1). Unlike Pt. II of the Act of 1928, it dealt only with companies incorporated on "the no-liability system". Section 395 reproduced s. 295 of the Act of 1928, but in modified terms. It provides :—"Notwithstanding anything in section three hundred and fifty-eight of this Act any company association or partnership formed for mining purposes may be formed, and, if incorporated as a company for mining purposes on the No-Liability System under this Part or any corresponding previous enactment, may carry on any mining business that has for its object the acquisition of gain to such company association or partnership or to the individual members thereof, without being registered as a company under Part I or formed in pursuance of any other Act of the Parliament of Victoria or of letters patent".

Under s. 395—which is the relevant section, and which expressly excludes s. 358—the *formation* of a company or association or partnership consisting of more than twenty persons for mining purposes is perfectly lawful. It appears to me to follow that none of the English or Australian decisions on statutory provisions corresponding with s. 358 has any direct relevance in the present case.

The reason for the particular change made in the law when s. 395 of the Act of 1938 took the place of s. 295 of the Act of 1928 is not apparent at first sight. It is clear, of course, that it was decided, as a matter of policy, that there should henceforth be a restriction on the numbers of unincorporated mining partnerships, which had hitherto been free from any such restriction. But, this being decided, why was not the old s. 295 simply omitted, and s. 358 thus left to operate with general application? The reason, I think, is to be found in s. 403 (1), which requires that, before a company formed for mining purposes can be incorporated under Pt. II, at least twenty-five per cent of its share capital must be subscribed and at least five per cent of its subscribed capital paid up. It was unnecessary in s. 358 to refer at all to the carrying on of business by an unincorporated association of more than twenty persons. The very formation of such an association was prohibited, and such an association could not carry on business without being "formed". If such an association were formed de facto, not only would its members be liable to penalties under ss. 382 and 383,

(1) (1951) 83 C.L.R. 489, at pp. 503-504.

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but, because it was an illegal association, its very existence could not be recognized by the law, and, generally speaking, contracts could not be enforced either by or against it: see *Palmer's Company Precedents* (1931) 14th ed., Pt. I, p. 92, and cases there cited. When, however, the legislature came to deal with associations for mining purposes, it could hardly, consistently with the scheme which it was establishing, prohibit the *formation* of associations consisting of more than twenty persons. For it was requiring, as a condition of incorporation under the " no-liability system ", that a percentage of share capital should be subscribed and a percentage of subscribed capital paid up. Those requirements could not practically be met unless there were something in the nature of a formation of an association before steps were taken to obtain incorporation. And, this being so, there was no real reason for limiting the number of members of an association which might be thus *formed*, and there was a reason for not doing so, inasmuch as it might be found difficult to obtain the necessary subscriptions and payments without enlisting more than twenty persons. On the other hand, the very reason which suggested that there should be no limitation on the number of members of an association which might be formed would suggest that an association, whose numbers exceeded the maximum dictated by general policy, ought not to be allowed to carry on business without complying with the conditions as to minimum subscription and payment up, and becoming incorporated.

Section 395 presents difficulties of construction. Read literally, it is a merely permissive enactment. It is expressed as a qualification of the general prohibition contained in s. 358. Its true effect, in my opinion, is to be ascertained by reference to the considerations mentioned above, and it means, in my opinion, that an association of more than twenty persons may be formed for mining purposes, but no such association may carry on business without becoming incorporated under Pt. II—unless, of course, it has become lawfully incorporated otherwise. In other words, s. 395 expressly permits, notwithstanding s. 358, the *formation* of certain associations, but impliedly prohibits the *carrying on of business* by any such association unless certain conditions are complied with. The important point for present purposes is, of course, that the Wauchope Wolfram Development Syndicate was not, in its inception or in its nature, an illegal association, as was, for example, the Padstow Total Loss & Collision Assurance Association in the case (1) which bears that association's name.

(1) (1882) 20 Ch. D. 137.

If this is, as I believe it to be, the true effect of s. 395, the question whether the Wauchope Wolfram Development Syndicate ever "carried on business" is a question of no importance whatever in the present case. Whatever effect s. 395 might have upon contracts made by the syndicate in carrying on business, or upon the position of members in relation to such contracts, the fact that a business had been unlawfully carried on could, in my opinion, have no relevance to the plaintiff's claim in this case. The position might perhaps be different—I say nothing as to this—if the business were an unlawful business, but it is not.

Mr. *Voumard* advanced two arguments against the view which I have expressed above. He said, in the first place, that s. 395, on its true construction, permitted only the formation of an association which complied with the requirements of the Act in respect of rules and other matters so as to be capable of registration and incorporation under Pt. II. In other words, he said, s. 395 relieved from the prohibition of s. 358 only such "formations" as were necessary to put things in train, so to speak, for registration. It seems to me a sufficient answer to this argument to say that this is not what s. 395 says. It is impossible, in my opinion, to read any such limitation into it, nor do I think that any limitation so inconvenient and possibly difficult of application would be in the least degree likely to be intended, though it would doubtless be contemplated that the ultimate purpose of any "formation" would be to carry on business, which would necessitate registration.

Mr. *Voumard* said, in the second place, that the syndicate in this case had in fact carried on business, and that this brought it within s. 358. Again it seems to me quite impossible to give the suggested effect to the language of s. 395. It simply does not say that an association of more than twenty persons formed for mining purposes falls within s. 358 if it begins to carry on business. If it carries on business, a liability to penalties under ss. 514 and 515 is incurred, and that is all.

Mr. *Voumard's* whole argument was ingenious and clearly put, but it breaks down, in my opinion, on the threshold. I am far from saying that I think he would have succeeded if he had established that the syndicate fell within the terms of s. 358, but I am satisfied to rest the case on the ground that that section has no application.

The appeal should, in my opinion, be dismissed.

KITTO J. In these cases I have had the advantage of reading the reasons of the Chief Justice and of my brother *Taylor*. I agree with their Honours' judgments and have nothing to add.

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TAYLOR J. The respondent in these appeals was the plaintiff in an action against the appellant in which the Supreme Court of Victoria directed that judgment for a sum of money including interest to the date of judgment should be entered for the plaintiff. The claim of the respondent was made pursuant to the provisions of two agreements made between him and the appellant on 18th March 1952. By the first agreement the respondent purported to assign and transfer to the appellant all the estate right title and interest acquired by him as a member of a syndicate known as Wauchope Wolfram Developments in and to certain mining leases, the benefit of certain contracts which had been entered into for and on behalf of the syndicate and all gear, equipment, stores, buildings, plant and other assets then on the land the subject of the mining leases and, finally, the assets and rights to which the respondent was entitled by reason of his membership of the syndicate. In consideration of the assignment the appellant agreed that he would on or before 1st June 1952 pay to the respondent the sum of £13,436 7s. 9d. together with interest thereon calculated in accordance with the provisions of the deed.

It is of importance to observe that by cl. 2 the agreement was deemed to be in escrow until all members of the syndicate named by the agreement and twenty-one in number should have executed assignments and transfers in similar terms. The clause went on to provide that in the event of all such assignments and transfers not being duly executed within seven days the agreement should be deemed void and of no effect.

The effect of the second agreement was to postpone for a period of six months the due date for payment of half the stipulated amount of £13,436 7s. 9d. The respondent's action was instituted in July 1952 and he sought thereby to recover the sum of £6,718 3s. 10d. then said to be due and owing together with the stipulated interest.

It was established at the trial that each of the named members of the syndicate entered into similar agreements within the prescribed time and, indeed, a number of actions against the appellant, in each of which one of such members was the plaintiff, were heard together with that of the first named respondent. Apart from the first respondent's action fourteen other actions claiming similar relief were instituted in the Supreme Court and six were instituted in the County Court. In eleven of the fourteen Supreme Court actions judgment has been entered for the plaintiff whilst the remaining three have been adjourned for further consideration on particular questions which arise in them. The issues in the eleven

actions which have been so concluded, however, are similar to those which arose in the first respondent's action and, the appellant having appealed also in those other cases, the appeals in the twelve cases which have been decided in the Supreme Court were heard in this Court together.

It having been established that the conditions prescribed by cl. 2 of the first agreement referred to were fulfilled, the appellant, subject to the effect of the matters hereinafter referred to, became bound according to the tenor of the two agreements and liable to make the specified payment on 1st June 1952. But the case for the appellant is that at no time did the agreements operate to impose any legally enforceable liability upon him. This submission was made upon a number of grounds and its examination requires some further statement of the circumstances in which those agreements, and each pair of agreements relevant to the other eleven appeals, were executed.

The syndicate Wauchope Wolfram Developments was originally formed on 1st November 1950. By an agreement of that date purporting to be made between one Merle Thomas and Gordon Leonard, a brother of the appellant, " and such further persons (not exceeding in addition to the parties hereto twenty (20) persons) as may from time to time with the consent of the abovenamed parties become parties or subscribers hereto ", it was recited that the parties thereto had agreed to form a syndicate having as its object the proving and mining of wolfram and similar objects, the purchase, sale or lease of areas and the formation of any company or companies for the furtherance of the said objects and, thereafter, it was agreed that " a new syndicate is hereby declared to be established called Wauchope Wolfram Developments ". The capital of the syndicate was fixed by a somewhat curious and inaccurate formula and Gordon Leonard was appointed the trustee and paid manager of the syndicate. Provision was made for the allotment of units to other persons and it was provided that the holders of units for the time being should be members of the syndicate. The agreement has a number of curious features but they are not material to the present case and no purpose would be served by adverting to them. But notwithstanding the presence of these features a number of persons became members of the syndicate and by March 1951 it had at least twenty-one members. Indeed, the learned trial judge found that at a later stage there were twenty-five members and that, in all, twenty-three pairs of deeds, similar to those above referred to, were executed. There appears to be some doubt as to who was the twenty-first member or, indeed,

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whether the twenty-first member was a resident of Victoria or of some other State, or, whether the agreement by which he became a member was made in Victoria or elsewhere. But it is clear that at this stage of its career the syndicate had at least twenty-one members and this is a circumstance upon which the appellant relies. At this stage it was, according to the submission made on his behalf, a " company association or partnership consisting of more than twenty persons . . . formed for the purpose of carrying on any business other than the business of banking . . . having for its object the acquisition of gain by the company association or partnership or by the individual members thereof . . . " (*Companies Act* 1938 s. 358) and as such, from March 1951 onwards, an unlawful body incapable, in law, of acquiring or disposing of property. Accordingly, it was said, none of the members of the syndicate as such acquired any interest in the assets which the trustee for the syndicate purported to acquire on behalf of its members and for that reason the consideration upon which the appellant undertook to pay each amount claimed had wholly failed. The alternative submission was also made during the course of argument that the agreements upon which each action was founded were given for an illegal consideration and were therefore void and of no effect.

To these submissions the respondent made a number of answers. In the first place, it was said that the syndicate was a company, association or partnership formed for mining purposes and that its formation with more than twenty members was lawfully permissible by reason of the provisions of s. 395 of the *Companies Act* though it was conceded that it could not lawfully have proceeded to carry on its mining business until incorporated under Div. I of Pt. II of the Act. Secondly, it was said that s. 358 applies only to partnerships or associations formed in Victoria for the purpose of carrying on business in that State and it was asserted that the evidence did not establish either of these conditions. Alternatively to this argument it was contended that where a partnership is lawfully formed in the first place the admission of new members with a consequential increase of the number of existing members beyond twenty does not render the partnership or its activities unlawful.

Upon the view which I have formed concerning what I regard as the principal point discussed in the case I find it unnecessary to discuss or decide the other questions involved in the respondent's submissions. On the assumption, which I am prepared to make for the purposes of this case, that the syndicate had no lawful standing as an association or company it is incontestable that its de

facto members might have acquired proprietary rights as a result of the activities of those who purported to act for the syndicate either in the acquisition of property preparatory to the commencement of business or thereafter in the course of business activities carried on unlawfully. There is abundant authority that title to property may be acquired in the course of dealings or activities which are unlawful and that, in many cases, the transfer or assignment of property in the course of such activities confers an indefeasible title (see for instance *Scarfe* v. *Morgan* (1); *Alexander* v. *Rayson* (2) and cases there referred to: *Bowmakers Ltd.* v. *Barnet Instruments Ltd.* (3)). Accordingly it is no answer to a claim for the recovery of money seized by a member of the police force that the plaintiff had acquired the money in the course of conducting an unlawful business (*Gordon* v. *Chief Commissioner of Metropolitan Police* (4)). And if one person may acquire property in the course of carrying on a business which is illegal I see no reason why a similar result should not follow where several persons are concerned and where the illegality alleged is the formation of an association of more than twenty persons for the purpose of carrying on business with the object of the acquisition of gain by the company, association or partnership or by the individual members thereof, or the carrying on of business by such an association where the normal legal effect of the transactions involved in the business carried on would be to vest property in its de facto members. Indeed, this consequence has been recognized in a number of cases. *In re Thomas*; *Ex parte Poppleton* (5) is some authority for the proposition that the property of an unincorporated association of more than twenty persons may devolve upon an incorporated association formed for the purpose of acquiring and taking over the business assets and liabilities of the unincorporated association whilst in *In re South Wales Atlantic Steamship Co.* (6) the facts showed that a similar sequence of events had occurred. *Reg.* v. *Tankard* (7) is clear authority for the proposition that the de facto members may acquire proprietary interests whilst the majority of the court in *Marrs* v. *Thompson* (8) considered that the trustees of such an association might maintain an action for money had and received against an officer of the association. It is, I should think, not only much too late but contrary to principle to suggest that the members of such an association will not be the beneficial owners of

(1) (1838) 4 M. & W. 270 [150 E.R. 1430].
(2) (1936) 1 K.B. 169.
(3) (1945) 1 K.B. 65.
(4) (1910) 2 K.B. 1080.
(5) (1884) 14 Q.B.D. 379.
(6) (1876) 2 Ch. D. 763.
(7) (1894) 1 Q.B. 548.
(8) (1902) 86 L.T. 759; 18 T.L.R. 565.

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property which, apart from any question of the legality of the association, would otherwise vest in them or in trustees on their behalf though, no doubt, it may be contended that where proceedings against a trustee or any other person or persons are necessary to secure the enjoyment of a beneficial interest such proceedings may be defeated if it necessarily appears or is alleged and proved that the interest was created by an agreement which itself was illegal. This, however, is not such a case. The syndicate was not originally formed in breach of the statute nor does it necessarily follow that its later assumption of unlawful character was permanent or enduring. Whilst the increase of the number of its members beyond twenty may have constituted a contravention of s. 358, I see no reason why a decrease below that number should not restore its earlier character. This being so, it by no means follows that, even if the rights of members might be defeated at some stage by the circumstance that the association *is* unlawful, this must always be so. Indeed, the effect of the agreement sued upon was to remove the taint of illegality. The several respondents are not now members of the association; their rights are vested in the appellant and there can be no answer to any claim made by him against the trustee to enforce his rights against the syndicate property. Any defence based on the allegation that the property was acquired in the course of carrying on business contrary to the provisions of the statute is now a matter of past history just as much as was the substance of the defence in *Gordon* v. *Chief Commissioner of Metropolitan Police* (1).

But there is, I think, a much more direct approach to the problem which has been raised. The claim of each respondent was based upon an absolute and unconditional promise under seal to pay to each respondent a specified sum upon a specified date. Accordingly the argument that there has been or may be a total failure of consideration is no answer to these claims though the appellant might avoid them if it appeared that the consideration, if any, given for those promises was illegal. There is nothing in the evidence to suggest that any of the respondents became members of the syndicate either knowingly or at all after it had assumed an unlawful character. The relevant agreements, however, were made after it had assumed that character, but it is clear that the purpose and effect of the agreements were to secure the return to each of the syndicate members, so far as, apparently, they were discoverable, of their original subscriptions together with interest in return for their several, but interdependent, assignments of their respective

(1) (1910) 2 K.B. 1080.

interests in the syndicate assets. The appellant, who had been a principal actor in the formation of the syndicate assumed the burden of making these payments and the benefit of the respective assignments. I am quite unable to see how in these circumstances the agreements can be said to be given for an illegal consideration whether or not the syndicate members acquired any interest in what may be called the syndicate assets, or, how it may be said that the agreements were made for an unlawful purpose or were otherwise tainted with illegality. Accordingly I am of the opinion that the appeal and the other eleven appeals should be dismissed.

In each case appeal dismissed with costs.

Solicitors for the appellant in each appeal, *Cleary, Ross & Doherty.*

Solicitors for the respondent in each appeal, *Davis, Cooke & Cussen.*

R. D. B.