STUDY UNIT 17

THE CONSEQUENCES OF ILLEGALITY.

Instance where contract is void with reference to:
- severability; redress, parties not equally guilty,
- relaxation of pari delictum rule; application of
- principle of simple justice.

Contract void - 1st consequence of illegality

1. Severability - courts have in certain cases allowed 1
   illegal part of a contract to be severed from 1 rest of
   contract where one part of 1 contract is illegal. 1
   part can be severed from 1 rest. Some instances
   courts refused to do so even when severance is
   possible, because public policy requires 1 whole
   contract to be void.

2. Redress or RELIEF

   when an agreement is void, restitution should be granted.
   another rule of law prevents B from claiming 1 return of
   I purchase price, e.g. in pari delicto potior est
   conditio possidentis (e.g. in effect, where 2 parties
   are equally guilty; 1 one who is in possession is in
   stronger position).

   This applies only to actions based on unjustified enrichment
   B sues to court & says A was received £40 from me &
   did not deliver anything & I was enriched at
   my expense. I request court to even my unequal
   position between us. The court says since both of you
are guilty of this unlawful transaction, we not going to help you, we leave you in position you are in other words A is in stranger position.

1) par delictum rule is founded on considerations of public policy, I court will do everything in its power to discourage unlawful contracts

3) where I parties are not equally guilty

Underlying thought of par delictum rule - he who has acted disgracefully by making performance should not be allowed to recover such performance. Were a party to an unlawful agreement has performed but performance by him was not disgraceful, he can recover from other party to which he has performed.

Minister of Justice v Van Heerden - court held the state can recover performance itself or, where this no longer exists, I value thereof, together with fruits & whatever has accrued to it with I conditio ob turpem causam (enrichment action).

In all cases where an innocent party has performed can recover value of performance from guilty party if latter is unable to return performance itself.
Par delictum rule applies only to cases where 1 party is equally guilty.

Relaxation of 1 par delictum rule

Before 1939 courts applied 1 par delictum rule rigorously & made no exceptions. In 1939, 1 Appellate Division reconsidered 1 law & formulated new principle. Jaybhay case 1 A.D argued 1 par delictum rule is founded on principles of public policy, but public policy also demands 1 justice shall be done. It cannot be in 1 public interest to enforce 1 par delictum rule where this will be unjust towards 1 plaintiff. 1 par delictum rule is 1 to be applied as a general rule, to which an exception must be made whenever "simple justice bet a man & man" demands it. 1 to be answered is 1 WHAT IS MOST IN ACCORDANCE WITH PUBLIC POLICY?"

App of 1 principle of simple justice whether 1 court will be prepared to relax 1 par delictum rule in a case will depend entirely on 1 circumstances of each case.
Formalities prescribed by law: see w/s

Formalities stipulated by the parties:

a) Parties agree that their agreement must be in writing.
   - Parties agreed an oral contract entered into between them must be reduced to writing & signed. In such case it may be 1 intention of 1 parties & 1 agreement will acquire legal effect only when it has been reduced to writing & signed by 1 parties. Contract also becomes binding when this is done (Goldblatt case).

Parties cannot unilaterally depart from a clause of agreement will be effective only if it is reduced to writing. Neither of them will be able to sue other on 1 oral contract (Goldblatt case).

Non-Variation Clause

Can parties depart bilaterally from a clause contained in a contract, either orally or in writing, stipulating 1 contract can be terminated or varied only in a particular way (non-variation clause).

If 1 written contract contains a clause stipulating 1 contract can be terminated or varied only in writing i.e. 1 parties include a clause to affect any variation of 1 contract 1 clause of clause must be in writing. 1 parties cannot later vary 1 clause or any other orally.
In the Shifren case, A.D. held 1 such an agreement cannot be varied orally. A non-variation clause will only effectively protect a contract against oral variation if the non-variation (entrenching) clause is itself entrenched against oral variation. The decision in the Shifren case can be explained as part a policy decision which is based on preference of commercial certainty and avoidance of litigation above sanctity of contract.

May the parties cancel the whole contract orally where they have previously agreed? Dissolution will only take place in writing. In Impala Distributors v Taunus Chem Manuf, it was held in conformity with the Shifren case, if the contract contains a further provision entrenching restriction, oral dissolution will not be possible.

Would an oral waiver be valid? A waiver by one party does not amount to an oral agreement to dissolve a contract.