**ILLEGALITY AND TRUSTS: TRUSTS-CREATING PRIMARY TRANSACTIONS AND UNLAWFUL ULTERIOR PURPOSES**

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**Introduction**:

*Patel v Mirza* provides an interesting opportunity to re-examine the role of illegality in the enforcement of trusts.[[1]](#footnote-1) Though *Patel* was a case on unjust enrichment and contract, its ratio, to the effect that a restitutionary claim would not be necessarily undermined by an underlying illegality, would definitely resonate with a claim in trust that has an unlawful ulterior purpose.[[2]](#footnote-2)

I argue that the role illegality plays in the law of trusts is often exaggerated. I hypothesize that a properly constituted trust, which arises from the primary feature of a transaction between the parties, should be enforced despite some credible evidence that the trust has an illegal ulterior purpose.[[3]](#footnote-3) Similarly, a trust that arises by operation of law from a given primary feature of a transaction should be enforced notwithstanding an underlying illegality. I argue that pre-*Patel*, and potentially post-*Patel*, illegality obviated the enforcement of a trust only where the trust *directly* violated the law or public policy; it is only within this narrow sphere that the illegality principle is relevant in trusts law. In other words, the illegality principle or *Patel’s* trio of considerations can only be applied to trusts where a given trust is directly opposed to law or public policy, as distinct from the trust being merely impugned for having some ulterior unlawful motives. Even the cases on presumption of advancement are consistent with my hypothesis above. In advancement cases, the primary feature of the transaction delineates a trust, although this trust is opposed by the presumption of advancement. In the bid to dislodge the presumption of advancement the claimant ends up establishing a trust that directly violates the law or public policy. Since such a trust comes within the narrow sphere of the illegality principle in trusts law, the court is justified in rejecting a trust claim in such cases relating to the presumption of advancement. However, some advancement cases evince multiple transactions rather than a single transaction. For instance, a transfer to the transferor’s wife, to evade the transferor’s creditors, might be followed by a declaration of trust by the transferor’s wife in favour of the transferor. In such advancement cases, the supervening and valid declaration of trust by the transferee would constitute the critical primary transaction; accordingly, the trust embodied in such a declaration would be effectuated despite the underlying illegal purpose.

I argue that the hypothesis above provides a rational and consistent explanation of the relevant case law on the topic. Properly understood, therefore, illegal ulterior purposes are hardly ever relevant to the enforcement of trusts constituted by the primary transaction in a case.

**Illegal Purposes and Lawful Primary Transactions or Primary Features of Transactions**

I suggest that a critical distinction exists between the lawful and *primary feature* of a transaction that is constitutive of a valid trust and the tainted motivations or purposes of that transaction, which might be used to argue for the illegality of the trust that eventuated from the transaction.[[4]](#footnote-4) What qualifies as the *primary feature* of a transaction is fact-dependent and would vary from case to case, but the answer should be obvious in most cases. For instance, if X made a voluntary transfer of his property to Y, albeit with the intention of defrauding X’s creditors, the primary feature of that transaction is simply the voluntary transfer to Y; the transfer itself, without more, is constitutive of a valid resulting trust. The fact that the transfer to Y was done in order to accomplish an illegal purpose was just an incidental, but not a primary, feature of the transaction. In a situation where there are two or more transactions, the focus should turn on the *primary transaction*, and the question should be whether that primary transaction is, in itself, constitutive of a valid trust despite the presence of some ulterior unlawful motives. For instance, X makes a voluntary transfer of his property to Y, and the *transfer contains a term* which states that the objective is to defeat X’s creditors.[[5]](#footnote-5) Subsequently, Y declares a trust over that property in favour of X.[[6]](#footnote-6) Here, there are two transactions: the voluntary transfer by X to Y and the subsequent declaration of trust by Y. Since the voluntary transfer by X is expressly and directly contrary to law and public policy, and the trust is therefore illegal and generally unenforceable (subject to my discussion on *Patel* below), the primary transaction in this latter example should be taken to be the subsequent declaration of trust by Y. Y’s subsequent declaration of trust for X is ipso facto valid and enforceable.[[7]](#footnote-7)

Therefore, I argue that if the primary transaction or the primary feature of a transaction in any given case were constitutive of a valid trust, in the sense that the trust is properly constituted and complies with all the essential criteria of validity, then the trust would be enforced despite the illegality of its purpose. I argue that this proposition is supported by the cases on the subject discussed below. Illegality comes to the fore and potentially obviates the enforcement of a trust only when the trust, a disposition under it or an essential element for its validity *directly* violates a statute, common law or public policy,[[8]](#footnote-8) as opposed to the trust just being impugned for its tainted or illegal purpose.[[9]](#footnote-9) In essence, save for trusts that directly violate the law or public policy, a trust that arises from the primary transaction or from the critical and primary feature of a transaction between the parties cannot be denied judicial enforcement on the ground of its alleged illegal purpose. Properly understood, therefore, illegality operates within a narrow sphere of trusts law; and it is in this narrow sphere that *Patel’s* trio of considerations would be potentially engaged. For instance, in the two examples I gave above, the trusts arising from the primary feature of the transaction and from the primary transaction are ex facie valid and enforceable; thus, neither the illegality doctrine nor *Patel’s* trio of considerations are engaged.

Although the distinction above has not been explicitly explored in the cases and literature on the subject, it might be useful in explaining and rationalizing most of the reported cases on trusts relating to illegality. Even the cases on the presumption of advancement, which complicated a principled approach to the illegality doctrine in trusts, are consistent with the hypothesis above. As argued below, the critical and primary feature of the transaction in the cases relating to advancement evinced a trust, albeit a trust that directly violates the law or public policy. The illegality of the trust in such cases becomes apparent when the claimant attempts to dislodge the presumption of gift and ends up establishing a trust that directly violates the law;[[10]](#footnote-10) such a trust falls within the narrow remit of illegality in the law of trusts. Because the trust established by the claimant in advancement cases was directly illegal and unenforceable, at least before *Patel*, there was little to dislodge the presumption of advancement which had to prevail. However, in the cases of advancement where there was a subsequent transaction involving a declaration of trust by the transferee for the transferor, the valid declaration of trust (as the primary transaction) prevailed over the presumption of gift; this instantiates the driving force of a primary transaction, because the lawful and supervening declaration of trust would be enforced despite the illegality of the initial transfer.

I suggest that the proposition above provides an analytical framework for rationalizing the relevant cases on the subject. In *Haigh v Kaye*,[[11]](#footnote-11) for example, the claimant, worried about the possibility of an adverse decision in a suit which was then pending between him and another party, conveyed his land to the defendant during the pendency of that suit; there was no consideration for the conveyance, and transfer of property during the pendency of a suit is generally unlawful (as fraud against creditors). Although the defendant refused to re-convey the land to the claimant, he admitted that the parties entered into an oral express agreement, to the effect that he would hold the land on trust for the claimant. The claimant brought an action for a declaration of trust. The claimant appeared to have relied on two types of trust, although the judgment of James LJ did not make such a distinction – presumed resulting trust, arising from the voluntary transfer; and express trust, arising from the parol agreement between the parties.

In response to the resulting trust alleged by the claimant, the defendant argued that since the purpose of the conveyance was to put the land out of the reach of the potential judgment creditor in that pending suit, the conveyance was fraudulent and unenforceable for being contrary to public policy; and that the court should refuse its assistance to the claimant on the basis that *in pari delicto melior est condition possidentis*. As to the oral express trust claim, the defendant argued that it was unenforceable for being contrary to the Statute of Frauds. Granting the claimant’s claim, James LJ dismissed the illegality defence on the ground that the defendant had not clearly pleaded it: ‘If a defendant means to say that he claims to hold property given to him for an immoral purpose, in violation of all honour and honesty, he must say so in plain terms, and must clearly put forward his own scoundrelism if he means to reap the benefit of it’.[[12]](#footnote-12) The Statute of Frauds argument was dismissed on the basis that the statute did not apply to trusts arising from operation of law (including resulting trusts);[[13]](#footnote-13) and that the statute was ‘never intended to prevent the Court of Equity from giving relief in a case of a plain, clear, and deliberate fraud’.[[14]](#footnote-14) Thus, James LJ appears to have enforced the invalid oral express trust as a constructive trust.[[15]](#footnote-15) Although the illegality defence was dismissed on procedural grounds in *Haigh,* the outcome would not have been different had the defence been properly pleaded. The primary transaction in *Haigh* was simply the voluntary transfer to the defendant, which was constitutive of a valid and enforceable resulting trust. Alternatively, there was a supervening declaration of trust, which, albeit unenforceable for lack of writing, was enforceable as a constructive trust.[[16]](#footnote-16) Whichever way you look at it, therefore, there was a valid trust constituted by the primary transaction in *Haigh.* Thus, the court was right to enforce the trust despite its underlying tainted motive.

The analysis above is supported by *Ayerst v Jenkins*.[[17]](#footnote-17) There, William (a widower), by trust deed, transferred shares to trustees to hold on trust for the absolute benefit of Isabella, his deceased wife’s sister. Two days after the transfer, William married Isabella, but the marriage, to their knowledge, was void for being contrary to public policy and law, because the parties were within the statutorily prohibited degrees of consanguinity or affinity. William died intestate, and Isabella married Mr. Jenkins a few years later. The claimant, William’s legal personal representative, brought the action and sought a declaration that the trust constituted by the trust deed was void, on the ground that the trust deed was made in contemplation, and in consideration, of the intended unlawful marriage between William and Isabella. Thus, the claimant argued that there should be a resulting trust for William’s estate. Thus, in contrast to *Haigh,* illegality was properly pleaded in *Ayerst*, a point emphasized in Lord Selborne LC’s observation that the relief sought by the claimant was ‘on the naked ground of the illegality of his own intention and purpose’.[[18]](#footnote-18) More interestingly for this piece, the defendant argued that ‘in equity the transaction must be looked upon as complete; Mrs. Jenkins (Isabella) is as much mistress of the property as if it were money in her pocket, and she cannot be deprived of it’.[[19]](#footnote-19) This implies that since the completed primary transaction was constitutive of a valid express trust (transfer to trustees), the underlying illegal purpose was irrelevant. Lord Selborne LC accepted this argument, observing that the relief sought was against:

a completed transfer of specific chattels, by which the legal estate in those chattels was absolutely vested in trustees…for the sole benefit of the Defendant. I know no doctrine of public policy which requires, or authorizes, a Court of Equity to give assistance to such a Plaintiff under such circumstances.[[20]](#footnote-20)

Furthermore, Lord Selborne LC noted that the ‘voluntary gift of part of his own property by one *particeps criminis* to another, is in itself neither fraudulent nor prohibited by law’, implying that since the critical transaction effectuated a valid transfer to the trustees, on trust for Isabella, the court would not void that trust on the basis of its subterranean illegality. *Ayerst* is equally explicable on the basis of the public policy rule that a court would not allow a party to benefit from their own wrong, something Lord Selborne LC alluded to when he quoted from *Benyon v Nettlefold*,[[21]](#footnote-21) to the effect that ‘on the grounds of public policy…those who violate the law must not apply to the law for protection’.[[22]](#footnote-22)

Furthermore, while Lord Selborne LC observed, in passing, that ‘It is a maxim of law not opposed to any equity, that “*in pari delicto melior est condition possidentis*”’,[[23]](#footnote-23) it is not clear that he based his judgment on the ground of William’s illegality. I suggest that the main ground of the decision in *Ayerst* was that the primary transaction in that case clearly established an express and valid trust. This line of reasoning was captured in Lord Selborne LC’s observation that:

I think it consistent with all sound principle, and with all authority, to recognize the importance of the distinction between a completed voluntary gift, valid and irrevocable in law (as I hold the transfer of these shares to the Defendant’s trustees to be), and a bond or covenant for an illegal consideration, which has no effect whatever in law.[[24]](#footnote-24)

In other words, the trust having been properly constituted by the effective transfer of the shares to the trustees (the primary transaction), the court would enforce or uphold the trust despite the alleged unlawful cohabitation between the settlor and the beneficiary.

*Rider v Kidder* makes a useful comparison to *Ayerst*.[[25]](#footnote-25) In *Rider*, Rider, while lawfully married to Catharine, was involved in an adulterous and immoral cohabitation with the defendant, Anne Kidder. Rider had covenanted, in a marriage settlement, that certain sums should be paid to Catherine (his wife), twelve months after his death. Thereafter, Rider bought some stock/annuity and transferred it into the joint names of himself and the defendant; they both signed a power of attorney, which empowered an agent to receive the dividends and pay the proceeds to the defendant. Subsequently, Rider died and Catherine brought an action asking the court to declare the defendant a resulting trustee of the stock for Rider’s estate, of which Catherine was the legal personal representative. The defendant alleged that the stock was an absolute gift to her from Rider. If it was a gift, Catherine countered, it was unenforceable for being in fraud of creditors under the marriage settlement (that is, Catherine and trustees of the marriage settlement). Catherine further argued, though not in terms, that the gift was unenforceable because it was made for the purpose of nurturing an immoral cohabitation between Rider and the defendant.

 The Chancellor, Lord Eldon, held that the transaction, the transfer of the stock into the joint names of Rider and the defendant, did not create a gift, because the parties were not in a gift-giving relationship that could give rise to the presumption of advancement, and there was no evidence that Rider intended to part with his beneficial interest in the stock. Consequently, Lord Eldon held that the transaction gave rise to a resulting trust in favour of Rider’s estate, and therefore, ordered the defendant to transfer the stock to Catherine. The point of *Rider* is that the primary transaction therein triggered a valid trust by operation of law (that is, the resulting trust, which arose from Rider’s payment for the stock); thus, the enforcement of this (resulting) trust was unaffected by the illicit or illegitimate intentions that motivated its creation. Lord Eldon hinted at this when he suggested that if a complete and valid trust had emerged from the transaction in favour of the defendant, it would have been enforced despite being motivated by the unlawful and immoral cohabitation between Rider and the defendant.[[26]](#footnote-26) This suggestion was made in response to the argument made on behalf of the claimant, to the effect that any trust (or gift) arising from the transaction in favour of the defendant would be practically ‘a provision for a criminal and adulterous intercourse. The distinction between a recompence for past, and a provision for future, cohabitation, has never been made in the instance of a married man’.[[27]](#footnote-27) In response to the submission above, Lord Eldon asked:

Has there been any case upon that distinction, where the Court finding the woman in actual possession of the property has upon that ground taken it out of her hands? The distinction upon the doctrine of *praemium pudicitae* has prevailed in the case of restraining her from enforcing a security. But I doubt, whether there is any instance of taking the property out of her hands, except as to creditors.[[28]](#footnote-28)

Thus, Lord Eldon implied that if the completed primary transaction in *Rider* had given rise to a trust in favour of the defendant-paramour, the trust would have been enforced (as in *Ayerst)*, notwithstanding its immoral or unlawful purpose.

*Symes v Hughes* is another relevant and important case, though it is, more often, rather used to support the view that an unexecuted illegal purpose would not impair the enforcement of a trust;[[29]](#footnote-29) that is, the so-called withdrawal exception to the illegality doctrine, which allows a claimant, who is a party to an illegality, to enforce a claim grounded in the illegal transaction, provided the illegality was not executed.[[30]](#footnote-30) Apart from this exception, *Symes* could be used to reinforce my proposition above. In *Symes*, the claimant was in financial difficulties and, consequently, he allowed a pecuniary default judgment to be entered and executed against him. In order to secure his leasehold property against his creditors, the claimant made a voluntary conveyance of the property to his lover, Mrs. Maddox; they both intended that Mrs. Maddox would hold the property on trust for the claimant. A few months later, Mrs. Maddox denied the claimant’s request to re-assign the property to him, and instead, she conveyed the property to the defendant, her son-in-law, who had knowledge of the claimant’s beneficial entitlement. The claimant sought a declaration that the defendant was a trustee of the property for the claimant, and an order for a re-transfer of the property to the claimant. The defendant argued that since the trust alleged by the claimant was illegal, its manifest purpose being to defraud the claimant’s creditors, the court should not entertain the claimant’s action on the basis of the maxim that *in pari delicto potior est condition possidentis*.[[31]](#footnote-31) Lord Romilly MR agreed with the claimant’s answer to this defence, to the effect that the illegal purpose was of no consequence because it had not been executed. More interestingly, however, Lord Romilly MR observed that ‘the mere intention to effect an illegal object when the assignment was executed does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it’.[[32]](#footnote-32) Thus, an illegal intention would not impair a trust constituted by the primary facts.

*In re Great Berlin Steamboat Co*. provides a good challenge to my hypothesis above.[[33]](#footnote-33) There, the claimant agreed to deposit £1000 into a company’s bank account. The purpose of the deposit was to give the company a positive, but fictitious, credit profile, which might help to attract investors to the company. The resolution of the company authorizing the transaction expressly stated that the money was to be held on trust for the claimant, and that no part of it would be spent without the claimant’s consent; it further provided that the money would be paid back to the claimant at the expiration of one month from the date of receipt. However, the expected investment did not materialize and an order was made for the compulsory winding-up of the company. In the winding-up proceeding, the claimant argued that the remainder of the £1000 pounds (that is, £99.15, the rest having been spent by the company with the consent of the claimant) was held on trust for him. The defence was that the alleged trust was unenforceable, because it amounted to a fraud against potential investors and the general public. The Court of Appeal appeared to have accepted this argument, and held that it was too late for the claimant to withdraw from the transaction.

I argue, however, that the primary and critical transaction in *In re Great Berlin Steamboat Co.* actually evinced a contractual or debtor-creditor relationship, rather than a trust; it is immaterial that the resolution of the company described the transaction as a trust. If *In re Great Berlin Steamboat Co.* was a case of debt, as I contend here, then the court’s acknowledgment of the relevance of the fraudulent purpose of the loan could not have meant that an illegal purpose would also impair the enforcement of a properly constituted trust. This rendition of *In re Great Berlin Steamboat Co*. finds support in the pertinent observation of Cotton LJ, in which he cast some doubt on the claimant’s cause of action grounded in trust: ‘But that declaration of trust (contained in the company’s resolution) *is coupled with a statement that the* *advance* is made in order that the company may appear to have a creditable balance at their bankers’.[[34]](#footnote-34) The italicized part of the quotation above, particularly the use of the word ‘advance’, clearly shows that Cotton LJ thought that the transaction was a loan, not a trust. Lindley LJ put the matter beyond peradventure when he observed: ‘I am not satisfied that this was not a case of loan as distinguished from trust, and if that is the true view it is fatal to the Appellant’s (claimant) case’.[[35]](#footnote-35) Basically, therefore, *In re Great Berlin Steamboat Co.* was a case of fraudulent loan, where a non-secured lender attempted to be paid in full.

Even if the primary and critical transaction in *In re Great Berlin Steamboat Co.* were regarded as giving rise to a trust (instead of a loan), I would argue that the relevant trust directly infringed the law, and therefore, falls within what I consider to be the legitimate and narrow sphere of illegality in trusts law. Notice that the alleged trust in *In re Great Berlin Steamboat Co.* was wholly and expressly created to give the company a misleading credit balance; thus, the trust was tantamount to fraud directly practiced on members of the public who dealt with the company. Much of this was evident in the observation of Lindley LJ, that ‘if it was a case of trust…He (claimant/appellant)…shews an illegal trust, since the purpose of the advance was to give a fictitious credit to the company’.[[36]](#footnote-36) Thus, *In re Great Berlin Steamboat Co.* does really not depart from my proposition above.

*Cottington v Fletcher* is equally relevant.[[37]](#footnote-37) There, the claimant, at a time he was a Roman Catholic, purchased an advowson,[[38]](#footnote-38) which was a recognized property right. Because an advowson could only be owned by a Protestant, and was liable to forfeiture under certain statutes if acquired by a non-Protestant, the claimant assigned his advowson to the defendant; the claimant intended that the defendant would hold the property on trust for the claimant. The purpose of the arrangement was to conceal the claimant’s beneficial interest in the property, and to protect it from forfeiture under the relevant statutes. Afterwards, the claimant became a Protestant and requested a reassignment of the property to him, but the defendant refused, hence the claimant’s action for a declaration of trust. The defendant admitted that he held the property on trust, but he pleaded the Statute of Frauds. On the basis of that admission, Lord Hardwicke held that the trust was enforceable. Although Lord Hardwicke implied that the decision might have been different if the defendant had denied the trust,[[39]](#footnote-39) the actual ratio of that case should not be easily dismissed, that is, the court clearly upheld or enforced a trust, which, albeit created for an illegal purpose, was validly constituted by the primary feature of the transaction in that case.

Finally, in *Davies v Otty*,[[40]](#footnote-40) the claimant married a woman ten years after his wife had deserted him, in the belief that his wife, whom he had not heard from in all those years, was dead. Later, the claimant learned that his wife was still alive. Concerned that he might be charged for bigamy, the claimant transferred his property to the defendant (his step-son) on the understanding that the defendant was to hold it on trust, which was ‘to be done away with when the unpleasantness was over’.[[41]](#footnote-41) As the claimant’s concern about bigamy turned out to be legally unfounded, he asked for the re-conveyance of the property to him. The defendant refused to reassign the property to the claimant and pleaded the Statute of Frauds in relation to the fact that the trust was not evidenced in writing. The court held that the defendant was a trustee of the property for the claimant. Surely, the court’s decision was motivated by the honesty and consistency of the claimant’s action.[[42]](#footnote-42) For instance, Romilly MR emphasized that ‘there was no illegality in the transaction, and that the Plaintiff was quite justified, morally and legally, in marrying the second wife’.[[43]](#footnote-43) Nevertheless, the claimant’s original intention in making the transfer was dishonest, although it turned out that he was labouring under a legal misconception. The point is that, despite that initial dishonesty, the court rightly enforced the trust arising from the primary feature of the transaction in that case.

**Position of Modern Cases**

More modern cases support the proposition above. In *Tinsley v Milligan*,[[44]](#footnote-44) the claimant and defendant-counter-claimant cohabited as same sex partners, and contributed equally to the purchase of property. To achieve their purpose of defrauding the Department of Social Security, through false claims for welfare benefits, they arranged for the property to be conveyed into the name of Ms Tinsley alone. Their common intention and understanding was that they shared the beneficial interest in the property equally. When their relationship broke up, Tinsley, the legal owner, filed a claim for possession of the property. Ms Milligan counter-claimed for a declaration that Tinsley held the property on trust for the two of them in equal shares. The trust alleged by Milligan was a resulting trust, arising from her contribution to the purchase price of the property. In reply to the counter-claim, Tinsley argued that the purpose of the trust was illegal, and therefore, the court should not give its assistance to, nor enforce, Milligan’s counter-claim. The majority of the House of Lords gave judgment in favour of Milligan, on the basis that she had not relied on the illegal transaction in order to prove her claim.

Obviously, the majority in *Tinsley* anchored its decision on the reliance principle, the idea that a party to an executed illegal transaction can acquire and enforce property rights arising from that transaction, provided their claim does not rely on the illegal transaction itself. In short, a claim in trust would be judicially enforced so long as the claimant does not rely on his or her own underlying illegality. Thus, since Milligan relied on her equitable proprietary interest under a resulting trust (rather than on the underlying illegality), the majority held that her claim was entitled to succeed. The majority of the Supreme Court in *Patel* has overruled *Tinsley* in relation to the reliance principle. The point, however, is that *Tinsley* could be perfectly explained on the basis of my proposition above. The primary feature of the transaction in *Tinsley* was clearly the contribution to the purchase price of the property; this effectively created a resulting trust in favour of both women. Thus, the majority of the House of Lords justifiably enforced the trust, notwithstanding that it had an unlawful ulterior purpose.[[45]](#footnote-45) Put differently, the illegal purpose in *Tinsley* was not a critical or primary feature of the transaction in that case.

Furthermore, in *MacDonald v Myerson*,[[46]](#footnote-46) the claimant instructed the defendant (a solicitor) to sell the claimant’s two properties; after the sale, the proceeds were paid into the defendant’s client (trust) account. Thus, the defendant held the money in the trust account on (express) trust for the claimant. The defendant failed to transfer the proceeds of sale to the claimant, hence the claimant’s action seeking an order for account of the proceeds of sale, and payment to him of the ascertained net proceeds. The defendant argued that the claimant was not entitled to the court’s assistance, because the claimant had acquired ownership of the two properties in question through fraudulent mortgage applications. Earlier, the claimant had pleaded guilty to various charges relating to obtaining mortgages by deception, including the mortgages on the two properties in question. Accordingly, the claimant was sentenced to 18 months imprisonment, but no confiscation order was made.

The Court of Appeal upheld the claimant’s claim on the ground that he was the owner of the two properties (despite the illegality involved in their acquisition), and was therefore, entitled to the net proceeds of their sale. On the specific issue of illegality alleged by the defendant, the Court of Appeal, following *Tinsley’s* reliance principle, held that the claimant (being owner of the two properties) relied on his proprietary interest in the proceeds of sale, rather than on the illegal transactions underpinning the acquisition of the two properties.[[47]](#footnote-47) Surely, *MacDonald* could also be explained on the simple ground that the primary features of the transaction therein, that is, the instruction to sell the two properties and payment of the proceeds into the client trust-account, created an express trust in favour of the claimant. Thus, the trust was rightly enforced notwithstanding the illegality involved in the original acquisition of the two properties.

*Patel* is the most recent case relevant to the topic. There, the claimant transferred £620,000 to the defendant. The purpose of the transfer was for the defendant to use the money to bet on the price of shares of the Royal Bank of Scotland based on some advance insider information anticipated by the defendant. The anticipated information did not materialize and the contract was not executed. The defendant, however, refused to return the claimant’s money. In answer to the claimant’s action for unjust enrichment (and in contract), the defendant argued that the contract amounted to a criminal offence involving a conspiracy to commit an offence under s.52 of the Criminal Justice Act 1993, and was therefore, unenforceable for being illegal. There was no doubt in *Patel* that the claimant needed to rely on the illegal contract in order to prove his claim for unjust enrichment.[[48]](#footnote-48) Thus, the claimant would have failed under the reliance principle. The majority, however, criticized and overruled the reliance principle for adopting ‘a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate’.[[49]](#footnote-49) Deciding for the claimant, the majority held that a claim should not fail merely because it was tainted by an illegal purpose.

The minority, which also allowed the claimant’s claim on restitutionary grounds, was more faithful to the reliance doctrine, but it argued for an expansive interpretation of the withdrawal and other exceptions to the illegality principle. For the majority, Lord Toulson suggested that a flexible analytic framework should undergird the court’s approach to illegality. Thus, he identified a trio of considerations that should inform a decision whether or not to enforce a claim tainted by illegality.[[50]](#footnote-50) While *Patel* is obviously not a case on trust, it has some important resonances.[[51]](#footnote-51) If anything, *Pate*l suggests that illegality has ceased to have a determinative effect on tainted claims.[[52]](#footnote-52) In that sense, *Patel* is less intense than my hypothesis above. Nonetheless, *Patel’s* cautious view of illegality reinforces my argument that a trust, validly constituted by the primary feature of a transaction, would be enforced despite being tainted by an illegal purpose.

Similarly, in *Collier*,[[53]](#footnote-53) a father granted leases over two properties, with an option to purchase the freehold reversion, which was eventually exercised, to his daughter. The transaction did not raise the presumption of advancement (nor of resulting trust) because the daughter provided some consideration for the transfers.[[54]](#footnote-54) However, the father alleged that the leases, and the freehold interests acquired consequent upon the exercise of the option, were held by the daughter on express trust for the father pursuant to a prior agreement between father and daughter. It was established in evidence that the father transferred the properties to the daughter in order to defeat the claims of his creditors; this unlawful purpose was clearly executed, in that the security of mortgages secured on the properties by the father was significantly reduced in value when the father transferred his freehold reversion to the daughter upon the exercise of the option. The daughter denied the trust alleged by the father and sought possession of one of the properties, the other having been compulsorily acquired and compensation paid to her. The father counter-claimed for a declaration that the daughter held the properties on trust for him.

The Court of Appeal rejected the father’s claim. Quite apart from the justice of the outcome of *Collier*,[[55]](#footnote-55) I suggest that the Court of Appeal’s decision in that case is justifiable based on the analysis above. The primary features of the transaction in *Collier* (grant of the leases and exercise of the option to pur*c*hase the freehold reversion) postulated an absolute title in favour of the daughter. Thus, Mance LJ (as he then was) observed that the daughter acquired an ‘ostensible leasehold and freehold interests (which are) objective “legal facts”’.[[56]](#footnote-56) It would have been unjustifiable to treat as nugatory the daughter’s proprietary interest arising from the critical and primary features of that transaction. The trust alleged by the father does not arise, and could not have arisen, from the primary features of that transaction. Alternatively, as argued below, the trust alleged by the father directly violates the law, and thus, comes within the narrow confines of illegality delineated by this author.

In *Barrett v Barrett*,[[57]](#footnote-57) after the claimant (Thomas) was declared bankrupt, his trustee in bankruptcy sold his property to the claimant’s brother (John). John purchased the property with a loan from a lender (building society), which was secured upon the property. Years later, John sold the property, but Thomas claimed that John held the net proceeds of sale on trust for him. The trust alleged by Thomas was a common intention constructive trust, on the basis that, at the time the property was acquired by John, there was an express agreement, arrangement or understanding between Thomas and John that John would purchase the property and hold it on trust for Thomas absolutely. The purpose of the agreement was to enable Thomas re-gain ownership of the property, without it being repossessed by the trustee in bankruptcy. Thus, the intention was to conceal the property from the trustee in bankruptcy. Thomas undertook to repay John all the expenses that John incurred in connection with the house and, in reliance on the said agreement, Thomas took the sole responsibility for the payment of John’s mortgage instalments out of Thomas’ personal resources. John argued that the claim was not maintainable because the purpose of the trust was illegal. Richards J accepted John’s argument, and affirmed the striking out of Thomas’ claim by the lower court.

The decision in *Barrett* is justifiable because, as in *Collier*, the primary feature of the transaction was John’s purchase of the property with his own money, which (ordinarily) did not give rise to a trust. Since the common intention constructive trust alleged by Thomas did not emanate from the primary feature of that transaction (but was incidental to it), it was unsurprising that the court refused to enforce the trust on account of its illegal purpose.

**Primary Transactions That Give Rise to Gifts – Presumption of Advancement**

 Where a voluntary transfer is made to a person in a legally recognized gift-giving relationship with the transferor,[[58]](#footnote-58) such as the transferor’s wife, child or person in loco parentis, equity presumes that the transfer is a gift to the transferee;[[59]](#footnote-59) this is known as the presumption of advancement. However, a similar transfer to a stranger would be presumed a trust in favour of the transferor, even if created for a fraudulent purpose. Why this disparity of outcome? I suggest that the reason has to do with what is identified as the critical and primary feature of the transaction in the two hypothetical transfers above. In the case of gift, the primary feature of the transaction is the voluntary transfer to a person in a gift-giving relationship; this actually gives rise to a trust, albeit countered by a presumption of advancement. To dislodge this presumption of advancement the claimant needs to prove the trust but, as highlighted above, he or she ends up proving a trust that directly violates the law or public policy; such a trust comes within the narrow confines of the illegality principle. Once you remove the parties’ gift-giving relationship from that transaction, the resulting trust arising from the primary feature of that transaction prevails, because the illegality surrounding it does not directly come to the fore, something the presumption of advancement would have entailed. The same result obviating the illegality doctrine would be achieved if the transferee in a gift-giving relationship subsequently declared a trust in favour of the transferor. *Tribe v Tribe* alluded to this sort of reasoning.[[60]](#footnote-60) There, the claimant-father, after being served with schedules of dilapidations, in relation to two leasehold properties, transferred his shares in a private company to his son, the defendant, without consideration. The claimant made the transfer for the fraudulent purpose of protecting the shares against his potential liability on the schedules of dilapidations. In the end, however, the schedules of dilapidations were settled without the need to consider whether or not the claimant owned any property, so no creditor was defrauded. However, the defendant refused to re-transfer the shares to the claimant, arguing that the shares were a gift to him, on the basis of the presumption of advancement. Consequently, the claimant sought an order declaring the defendant a trustee for the claimant.

As no creditor was actually defrauded by the voluntary transfer in *Tribe*, the Court of Appeal granted the claimant’s claim on the ground that he had withdrawn from the illegal transaction before its execution. More interestingly, Millett LJ (as he then was) hypothesized that ‘Had the plaintiff transferred the shares to a stranger or distant relative whom he trusted, albeit for the same dishonest purpose, it cannot be doubted that he would have succeeded in his claim’.[[61]](#footnote-61) I suggest that the reason, why that would have been the case, is that the primary feature of the transaction in that hypothetical scenario would have been constitutive of a resulting trust; that trust, as Millett LJ suggested above, would have been enforced despite being created for a dishonest purpose, a view that I have expounded all along.

However, the reliance principle established in *Tinsley* resolved the sorts of issues above purely on the basis of whether or not the claimant needed to rely on the illegality underlying the transaction in order to prove his or her claim. Thus, in the case of voluntary transfer to a person in a gift-giving relationship with the transferor, the application of the reliance principle entailed that the court would uphold a gift for the transferee, because the transferor would need to rely on the illegal purpose behind the transaction in order to rebut the presumption of advancement. On the other hand, in the case of voluntary transfer to a person outside a gift-giving relationship, application of the reliance principle meant that the court would uphold a trust for the transferor, because the transferor would rely on his proprietary right (emanating from the resulting trust) to establish his claim; he or she has no need to rely on the underlying illegality. Unfortunately, therefore, the reliance principle in *Tinsley* detracted attention from the analytic framework (above) centred on the critical and primary feature of the transaction in any given case. Thus, the application of the reliance principle made the outcome of a case to depend ‘on the adventitious location of the burden of proof in any given case’,[[62]](#footnote-62) or on the fortuitous matter of whether or not the parties are in a gift-giving relationship. Partly because of this sort of difficulty, which was perceived to be responsible for the arbitrary outcomes in advancement cases, the reliance principle was overruled in *Patel*.

I suggest that the decisions engendered by advancement cases should not be seen as some sort of quirky or arbitrary outcomes. In contrast, the outcomes of cases on the presumption of advancement are consistent with my proposition above. A voluntary transfer made to a person in a gift-giving relationship with the transferor evinces a transaction whose primary feature is constitutive of trust, albeit a trust that turns out to be directly illegal and is generally unenforceable. Put differently, in advancement cases, claimants who attempted to rebut the presumption of gift with evidence of trust ended up establishing a trust that *directly* violates the law. Since this sort of trust comes within the accepted and narrowly operative sphere of illegality in trusts law, as highlighted above and further discussed below, the courts were justified to refuse to enforce such trusts. From an analytic perspective, therefore, there is nothing untoward about the outcome of advancement cases, in comparison to the enforcement of trusts arising from voluntary transfers to persons outside the legally accepted gift-giving relationships.

Notice that even in advancement cases where the trust alleged by the transferor is directly illegal, as highlighted above, a subsequent and valid declaration of trust by the transferee would effectively constitute the primary transaction, and such a trust would be enforced despite being tainted by the initial illegality. This can happen, for instance, where a man voluntarily transfers his property to his wife, in order to defeat his creditors, and the wife, subsequently, declares a trust of that property for the husband. In such a case, the interposition of the declaration of trust would loom large as the relevant primary transaction. Ex hypothesi, the declaration of trust (if valid) would be enforced notwithstanding the fraudulent purpose it was intended to achieve.

Some important cases support this line of reasoning. In *Tribe*, for example, Millett LJ pertinently observed that the claimant-father ‘would also have succeeded if he had given them (the shares in dispute) to the defendant (the son) and procured him to sign a declaration of trust in his favour’.[[63]](#footnote-63) Why is it that this outcome would have been reached, in the hypothetical scenario posited by Millett LJ, in *Tribe*? Of course, Millett LJ did not address this question because he was not concerned with this sort of inquiry. However, the answer must be that, in such a hypothetical scenario, the critical primary transaction would have been the subsequent declaration of trust by the son for the father. More interestingly, the Australian High Court decision in *Perpetual Executors and Trustees Association of Australia Ltd. v Wright* puts the matter beyond conjecture.[[64]](#footnote-64)

In *Perpetual Executors*, the husband-claimant purchased a piece of land (upon which he built a family house) in the name of his wife. According to the husband, the purchase was made in the name of his wife, and with his wife’s consent, out of convenience, and not as a gift to her. The purpose was to secure the property as a family home in case the husband’s business failed. About two days before she died, the wife signed a document in which she declared that she held the property on trust for the husband. In her will, which was prior to that date, she gave her husband only a life interest in the property. The husband claimed against the defendant, the executors of the wife’s will, a declaration that he was absolutely beneficially entitled to the property, on the ground that his deceased wife held the property on trust for him. The court found that although the husband and wife’s arrangement or agreement was intended to defeat the husband’s creditors, no creditor was actually defrauded. Therefore, the court upheld the husband’s claims. True, the decision mainly rested on the non-execution of the illegal agreement between the husband and wife, but Barton ACJ suggested that the subsequent written declaration of trust by the wife might be an alternative basis of the judgment; he observed that ‘the fact that the wife was all along the husband’s trustee is evidenced by her declaration of that fact’.[[65]](#footnote-65) Thus, a trust analysis prevailed in *Perpetual Executors* despite the parties’ gift-giving relationship. This was only possible because the subsequent declaration of trust by the wife established a primary transaction that was constitutive of a valid trust.

**Trusts that Directly Violate the Law or Public Policy**

A trust, or a provision thereof, that directly violates the law or public policy is illegal, and might be judicially unenforceable.[[66]](#footnote-66)I suggest that it is this sort of trust that clearly delineates the proper scope of the illegality principle in trusts law; in other words, the illegality principle operates within a narrow sphere of trusts law. It follows, therefore, that where the primary transaction or the primary feature of a transaction in a given case posits a trust that directly violates the law or public policy, not just a trust that has an illegal purpose, the trust would, generally, be declared illegal and unenforceable. More importantly, as mentioned in the introduction, this is the sort of trust that would most clearly engage the trio of considerations enunciated by Lord Toulson in *Patel*. Thus, if a trust were illegal because it directly violates the law or public policy, its enforceability would depend on the assessment and application of *Patel’s* trio of considerations to the facts of the case.

In *Thrupp v Collett*,[[67]](#footnote-67) the trust was to procure or purchase the discharge of poachers committed to prison, under the then Game Laws, for non-payment of fines, fees or expenses. Sir John Romilly MR held that the trust was illegal and unenforceable for being contrary to public policy, in that it was ‘obviously calculated to encourage offences prohibited by the Legislature’;[[68]](#footnote-68) and the ‘effect of it would be to give immunity and protect persons in the commission of acts, which are treated by the Legislature as offences, and for which penalties by fine are imposed’.[[69]](#footnote-69)

In *Ex parte Yallop*,[[70]](#footnote-70) a ship was bought with partnership money, and managed as partnership property, but was conveyed and registered in the name of only one of the partners. On the bankruptcy of the partners, a creditor of the partnership claimed that the ship was the property of the partnership (and, therefore, ought to be available for payment of the partnership’s debt) despite being registered in the name of only one of the partners. In other words, the partner who was the registered owner of the ship held it on trust for the partners. However, the alleged trust gave rise to a beneficial interest that was in direct conflict with an Act relating to the registration of ships; the statute stipulated that the registration of a ship must be taken as the conclusive evidence of its ownership. Accordingly, the court refused to uphold the trust alleged by the creditor of the partnership. Obviously, the trust in *Yallop* was rejected for being illegal, because it *directly* violated the law on ship registration, something the Lord Chancellor noted severally in his judgment. For instance, he observed that ‘it is obvious, that, if, where the title arises by act of the parties, the doctrine of implied trust in this Court is to be applied, the whole policy of these Acts may be defeated’,[[71]](#footnote-71) and that enforcement of the trust ‘is *directly* inconsistent with the Act of Parliament’.[[72]](#footnote-72) Finally, the Lord Chancellor observed that the ship was not ‘partnership property (under the alleged trust) as between the partners; as that would be a *direct* infringement of the Act of parliament’.[[73]](#footnote-73) The italicizations above prove my point.

Similarly, in *Curtis v Perry*,[[74]](#footnote-74) a ship, commercially employed in the service of the government, was bought with partnership money, but was registered in the name of only one partner, Mr Nantes. The other partner, Mr Chiswell, was a Member of Parliament at the time the ship was acquired. As the relevant statute prohibited a Member of Parliament from having commercial dealings with the government, Chiswell would have been liable to penalties if he had claimed a proprietary interest in the ship. After Chiswell’s death, and Nantes’ bankruptcy, separate creditors of Nantes claimed the ship (in payment of their debt) as the sole property of Nantes. In opposition, the joint creditors of the partners argued that Nantes held the ship on trust for the partners, and that the ship was, therefore, the beneficial property of the partnership. As in *Yallop*, Lord Eldon dismissed the claim of the joint creditors grounded in trust, because such a trust would have defeated the statute (Contract Act), which prohibited Chiswell, as a Member of Parliament, from engaging in commercial dealings with the government.

In *Collier*, as highlighted above, the express trust alleged by the father, in opposition to the absolute ownership obtained by the daughter pursuant to the transfers, was rejected by the court, in part because, the father had already executed the illegal purpose. An alternative basis for the decision is that the trust alleged by the father contained express terms that were in direct conflict with law or public policy.[[75]](#footnote-75) Much of this was captured in the pertinent observation of Aldous LJ: ‘Thus the trusts included terms which were illegal. In effect the terms of the trust were that the leases and the property were to be held in trust so as to defraud the Inland Revenue and the father’s creditors. To establish that trust the father had to prove its terms. They included illegal terms’.[[76]](#footnote-76)

 In addition to an entire trust being illegal, most of the cases concern a provision in a trust or testamentary document, which imposed a condition for entitlement to a gift, and it was argued that the relevant condition was illegal or contrary to public policy.[[77]](#footnote-77) If the court accepted the argument that the impugned condition was illegal for being contrary to law or public policy, it would declare it void. But the effect of such a declaration, or the avoidance of the condition, on the relevant gift depends on whether the condition was characterized as a condition precedent or condition subsequent. The characterization of a condition as being a precedent or subsequent is a serious and difficult matter of interpretation.[[78]](#footnote-78) As there are numerous cases on the point, and their decisions are irreconcilable, it is difficult to posit a clear legal principle on the matter. At any rate, this is not the proper place for a detailed examination of such a specific, albeit relevant, issue. Fortunately, the matter has been covered in some of the leading works on the subject.[[79]](#footnote-79) The point here, however, is that a provision of a trust which contains a condition that directly violates the law or public policy would come within the narrow sphere of the illegality principle in trusts law, and therefore, the impugned condition would be declared void and unenforceable.

Where a condition held to be a condition precedent is avoided for being contrary to law or public policy the relevant gift fails along with the condition. While this is certainly true of a gift of real property, there is a further distinction, in relation to chattels, between a condition precedent void for *malum in se* and *malum prohibitum*.[[80]](#footnote-80) If the void condition precedent was characterized as *malum in se,* the gift is void, but if *malum prohibitum,* the void condition is struck out and the gift is valid, thereby taking effect as a gift without a condition. Though the meaning and distinction between *malum in se* and *malum prohibitum* are not altogether clear,[[81]](#footnote-81) it can be generally said that *malum in se* refers to a wrong that is fundamentally or intrinsically immoral, in the sense that it is likely to be condemned by every civilized society. In contrast, *malum prohibitum* involves a wrong that is relatively minor on the moral scale, although it is contrary to public interest or statute. It has been suggested that the distinction between *malum in se* and *malum prohibitum* now applies to realty as well.[[82]](#footnote-82) On the other hand, if a void condition were regarded as a condition subsequent, the relevant gift would survive the avoidance of the condition. In other words, the gift would run its natural course under the relevant instrument, as if it was not subject to such a condition. Examples of conditions that might be directly contrary to law or public policy include those that prohibit or restrain marriage altogether, or interfere with marital relationships; conditions that interfere with the discharge of parental duties;[[83]](#footnote-83) or racially discriminatory conditions.[[84]](#footnote-84)

All of the above is to say that a provision or condition in a trust instrument, which directly violates the law or public policy comes within the narrow confines of the illegality principle in trusts, and might be declared void and unenforceable depending on the result of applying *Patel’s* trio of considerations to the facts. As I argued above, these are the only sorts of trusts that come clearly within the illegality principle.

**Conclusion**

While the Supreme Court’s recent and landmark decision in *Patel* relates to the application of the illegality principle to an action for unjust enrichment, it has created an opportunity for re-examining the relevance and scope of the illegality principle in the specific area of trusts law. In this piece, I have argued that the remit of the illegality principle in the law of trusts is very narrow, and that this becomes obvious when attention is focused, as it should be, on the critical feature of a transaction or on the primary transaction in any given case. Where the primary transaction or the primary feature of a transaction engages a validly constituted trust, whether it is an express trust or one that arises by operation of law, the illegality doctrine is not engaged, and the trust would be enforced despite some underlying illegality. I have argued that most of the reported trust cases relating to the illegality principle support my hypothesis above. Furthermore, I argued that the illegality doctrine is engaged in trusts law only where the trust, or a provision thereof, directly violates the law or public policy. Even in these sorts of cases, where the trusts directly violate the law or public policy, illegality will not in itself obviate the enforcement of the trusts, unless such an outcome is ordained by the application of *Patel’s* trio of considerations.

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 *Patel v Mirza* [2016] UKSC 42. J Goudkamp, ‘The end of an era? Illegality in private law in the Supreme Court’ (2017) 133 LQR 14. [↑](#footnote-ref-1)
2. G Virgo, ‘*Patel v Mirza*: one step forward and two steps back’ (2016) 22 Trusts & Trustees 1090. [↑](#footnote-ref-2)
3. Similarly, if a property right was validly created under an executed illegal contract, ‘the court simply ignores the illegality’: The Law Commission, *The Illegality Defence: A Consultative Report*, at paras. 5.6.; 5.11 (Consultation Paper No 189). [↑](#footnote-ref-3)
4. This distinction was anticipated by Mance LJ in *Collier v Collier* [2002] EWCA Civ 1095, at 97. [↑](#footnote-ref-4)
5. An example of such a trust that is expressly illegal is *Thrupp v Collett* [1858] 26 Beav 125. [↑](#footnote-ref-5)
6. Adapted from *Perpetual Executors and Trustees Association of Australia Ltd. v Wright* [1917] 23 C.L.R. 185. [↑](#footnote-ref-6)
7. Ibid. [↑](#footnote-ref-7)
8. As in the first transaction of the second example above – the trust expressly contains an illegal term. [↑](#footnote-ref-8)
9. As in the first example above. [↑](#footnote-ref-9)
10. *Collier* (n4). [↑](#footnote-ref-10)
11. *Haigh v Kaye* [1872] LR 7 Ch 469. [↑](#footnote-ref-11)
12. Ibid., at 473. [↑](#footnote-ref-12)
13. Ibid., at 474. [↑](#footnote-ref-13)
14. Ibid. [↑](#footnote-ref-14)
15. *Rochefoucauld v Boustead* [1897] 1 Ch 196; *Bannister v Bannister* [1948] 2 All ER 133. [↑](#footnote-ref-15)
16. *Bannister* (n15). [↑](#footnote-ref-16)
17. *Ayerst v Jenkins* [1873] LR 16 Eq. 275. [↑](#footnote-ref-17)
18. Ibid, at 283. [↑](#footnote-ref-18)
19. Ibid., at 279. [↑](#footnote-ref-19)
20. Ibid, at 283. [↑](#footnote-ref-20)
21. *Benyon v Nettlefold* [1850] 3 Mac. & G. 102 [↑](#footnote-ref-21)
22. *Ayerst* (n17), at 283. [↑](#footnote-ref-22)
23. Ibid. [↑](#footnote-ref-23)
24. Ibd, at 284. [↑](#footnote-ref-24)
25. *Rider v Kidder* [1806] 10 Ves. Jun. 360, [1806] 3 ER 77. [↑](#footnote-ref-25)
26. Ibid., at 364. [↑](#footnote-ref-26)
27. Ibid. [↑](#footnote-ref-27)
28. Ibid. [↑](#footnote-ref-28)
29. *Symes v Hughes* [1870] LR 9 Eq. 475 [↑](#footnote-ref-29)
30. *Tribe v Tribe* [1996] Ch. 107. [↑](#footnote-ref-30)
31. *Symes* (n29), at 478. [↑](#footnote-ref-31)
32. Ibid., at 479. [↑](#footnote-ref-32)
33. *In re Great Berlin Steamboat Co.* [1884] 26 Ch. D 616. [↑](#footnote-ref-33)
34. Ibid.,at 619 – italics mine. [↑](#footnote-ref-34)
35. Ibid, at 620. [↑](#footnote-ref-35)
36. Ibid. [↑](#footnote-ref-36)
37. *Cottington v Fletcher* [1740] 2 Atk. 156. [↑](#footnote-ref-37)
38. Advowson is a right to nominate a clergy to a vacant benefice. [↑](#footnote-ref-38)
39. Emphasized in *Muckleston v Brown* [1801] 6 Ves 52 at 68. [↑](#footnote-ref-39)
40. *Davies v Otty (No. 2)* [1865] 35 Beav. 208. [↑](#footnote-ref-40)
41. Ibid., at 210. [↑](#footnote-ref-41)
42. Underscored in *Tinker v Tinker* [1970] P. 136 at 141. [↑](#footnote-ref-42)
43. Davies (n40), at 213. [↑](#footnote-ref-43)
44. *Tinsley v Milligan* [1994] 1 A.C. 340. [↑](#footnote-ref-44)
45. Also, *Silverwood v Silverwood* [1997] 74 P & CR 453. [↑](#footnote-ref-45)
46. *MacDonald v Myerson* [2001] EWCA Civ 66. [↑](#footnote-ref-46)
47. Also, *Mortgage Express v MacDonnell* [2001] EWCA Civ 887. [↑](#footnote-ref-47)
48. That is, the claimant needed to rely on the fact that the contract was illegal and so void, thus making the way for the claim in unjust enrichment. [↑](#footnote-ref-48)
49. *Patel* (n1), at para. 120. This echoes the Law Commission’s criticism of the reliance principle: Law Commission, Paper No 189 (n3), at para. 5.15. [↑](#footnote-ref-49)
50. *Patel* (n1), at 120. [↑](#footnote-ref-50)
51. Virgo (n2); *Anzal v Ellahi* [1999] WL 819140. [↑](#footnote-ref-51)
52. Goudkamp (n1), at 16. [↑](#footnote-ref-52)
53. *Collier* (n4) [↑](#footnote-ref-53)
54. Ibid., at para. 64 (Chadwick LJ). [↑](#footnote-ref-54)
55. The outcome in *Collier* was disapproved in *Patel*. [↑](#footnote-ref-55)
56. *Collier* (n4), at para. 99. [↑](#footnote-ref-56)
57. *Barrett v Barrett* [2008] EWHC 1061. [↑](#footnote-ref-57)
58. ‘Legally recognised gift-giving relationship’ is used pejoratively here to indicate relationships that attract the presumption of advancement. Otherwise, gift-giving potentially takes place in every relationship. [↑](#footnote-ref-58)
59. Collier (n4); *SMQ v RFQ & MJQ* [2008] EWHC 1874 (Fam); *Chettier v Chettier* [1962] AC 294; Tinker (n42); *Gascoigne v Gascoigne* [1918] 1 K.B. 223. [↑](#footnote-ref-59)
60. *Tribe* (n30). [↑](#footnote-ref-60)
61. Ibid, at 134. [↑](#footnote-ref-61)
62. Ibid. [↑](#footnote-ref-62)
63. Ibid. [↑](#footnote-ref-63)
64. *Perpetual Executors* (n6). [↑](#footnote-ref-64)
65. Ibid., at 194. [↑](#footnote-ref-65)
66. For instance, a provision that is subversive of all religion or all morality: *Thornton v Howe* [1862] 31 Beav. 14; *Re Watson* [1973] 1 W.L.R. 1472. [↑](#footnote-ref-66)
67. *Thrupp* (n5). [↑](#footnote-ref-67)
68. Ibid., at 128. [↑](#footnote-ref-68)
69. Ibid., at 127-128. [↑](#footnote-ref-69)
70. *Ex parte Yallop* [1808] 15 VES. JUN. 58. [↑](#footnote-ref-70)
71. Ibid., at 66. [↑](#footnote-ref-71)
72. Ibid., at 69. Italics mine. [↑](#footnote-ref-72)
73. Ibid., at 72. Italics mine. [↑](#footnote-ref-73)
74. *Curtis v Perry* [1802] 6 VES. JUN. 740. [↑](#footnote-ref-74)
75. *Halley v The Law Society* [2003] EWCA Civ 97. [↑](#footnote-ref-75)
76. *Collier* (n4), at para. 37. [↑](#footnote-ref-76)
77. Law Commission, Paper No 189 (n3), at paras. 6.40. [↑](#footnote-ref-77)
78. There is the further difficulty of determining whether the provision is a void condition, or just a determinable limitation, which is valid: *Re Lovell* [1920] 1 Ch. 122. [↑](#footnote-ref-78)
79. L Tucker, et al. *Lewin on Trusts, 19th ed.* (London: Sweet & Maxwell, 2015), ch. 5; D.W.M. Waters, et al. *Waters’ Law of trusts in Canada, 4th ed*. (Toronto, Carswell, 2012), at ch. 8. [↑](#footnote-ref-79)
80. Lewin on Trusts (n80), at 167. [↑](#footnote-ref-80)
81. *Re Riper* [1946] 2 All ER 503; *Re Moore* [1888] 39 Ch. D 116. [↑](#footnote-ref-81)
82. Waters (n80), at 330. [↑](#footnote-ref-82)
83. *In re Sandbrook* [1912] 2 Ch. 471; *Blathwayt v Cawley* [1976] AC 397; *In re Boulter* [1922] 1 Ch 75. [↑](#footnote-ref-83)
84. *Canada Trust Co. v Ontario* [1990] 69 D.L.R. (4th) 321 (Ont. C.A.). [↑](#footnote-ref-84)