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Contracts--Illegality--Illegality of Performance Held Good Defense in Action to Recover on a Valid Contract (McConnell v. Commonwealth Pictures Corp., 7 N.Y.2d 465 (1960))

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precise grounds for dismissal, the Court here has clarified several doubts that were cast by the *Slochower* case. It is evident also that the *Nelson* case will play a significant role in determining future cases in the area.[40] It is also significant that state courts, adhering to the *Slochower* doctrine, have already begun to distinguish the *Nelson* case on various grounds.[41]

It is often difficult to decide whether a statute is designed purposely to circumvent the constitutional privilege, to provide a procedural short cut for the dismissal of employees, to include a built-in inference of guilt or provide an actual punishment for taking the fifth amendment privilege. But in this area of 5-4 decisions and constantly shifting policies, the *Nelson* approach—an exact and deliberate investigation of the ultimate nature, intent, operation and practical effect of the relevant device of each case—is one answer to a difficult problem.

CONTRACTS—ILLEGALITY—ILLEGALITY OF PERFORMANCE HELD GOOD DEFENSE IN ACTION TO RECOVER ON A VALID CONTRACT.—Plaintiff was authorized by defendant corporation to secure distribution rights for motion pictures which he subsequently procured by bribing a producer's agent. Upon nonpayment of his commission, plaintiff brought an action for an accounting. The Court of Appeals, reversing a judgment of the Appellate Division, *held* that "consistent with public morality and settled public policy" [1] a party

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[40] See, *e.g.*, Matter of Cohen, 7 N.Y.2d 488, 166 N.E.2d 672, 199 N.Y.S.2d 658, *cert. granted*, 363 U.S. 810 (1960), in which a New York attorney availed himself of the constitutional privilege when questioned by a judicial inquiry concerning unethical legal practices in his own county. The New York court upheld his disbarment as validly based on the breach of professional duty and the duty to the court, rather than on the invocation itself. Since the investigating body was not federal and the scope of inquiry was obviously intimately associated with the plaintiff's fitness for practice, the case would appear to be within the holding of the *Nelson* case.

[41] See, *e.g.*, Board of Educ. v. Intille, — Pa. —, 163 A.2d 420 (1960), where school teachers were dismissed for incompetency on the basis of their refusal to answer questions before a congressional committee. In reversing the lower court and refusing to sustain the dismissal, the Pennsylvania Supreme Court held that the teachers were dismissed for invoking the fifth amendment, and incompetency had not been proved within the public school code. The case seems to follow an entire approach left open by Vitarelli v. Seaton, 359 U.S. 535 (1959), namely, that the dismissal must conform to the requirements of the administrative code of the employer or else it will be immediately overturned.

[1] McConnell v. Commonwealth Pictures Corp., 7 N.Y.2d 465, 471, 166 N.E.2d 494, 497, 199 N.Y.S.2d 483, 487 (1960).

will be denied recovery upon a contract valid upon its face, where immoral means were used to effect its purpose. *McConnell v. Commonwealth Pictures Corp.*, 7 N.Y.2d 465, 166 N.E.2d 494, 199 N.Y.S.2d 483 (1960).

It is the inherent right of every person to contract freely,[2] subject however, to "such reasonable conditions as may be imposed by the governing power of the State." [3] The state, therefore, may designate areas in which no contractual rights shall exist. In certain instances this prohibition is explicit,[4] in others it is to be judicially defined.[5]

Whenever the problem of illegality is placed in issue its resolution depends upon whether or not the questioned acts were subject to penal sanction or were contrary to public policy.[6] When the subject under consideration may possibly fall within the prohibitory ambit of a penal statute, illegality as a defense is largely a question of construction.[7] Absent a controlling penal statute the validity of the defense must be measured by public policy, a vague and variable concept capable of no concrete definition.[8]

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[2] "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution." Lochner v. New York, 198 U.S. 45, 53 (1905).

[3] Adair v. United States, 208 U.S. 161, 173 (1908). See also Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924).

[4] See, *e.g.*, N.Y. GEN. BUS. LAW § 373 (voiding usurious contracts); N.Y. CIV. PRAC. ACT § 61-f (declaring void any contract executed in compromise of any claim outlawed by the "Heart Balm Act"); N.Y. PEN. LAW § 992 (voiding gambling contracts); N.Y. DOM. REL. LAW § 51 (prohibiting certain contracts between husband and wife).

[5] The state through its judiciary has determined that many types of contracts shall be of no validity. See, *e.g.*, Ewing v. National Airport Corp., 115 F.2d 59 (4th Cir. 1940), *cert. denied*, 312 U.S. 705 (1941) (lobbying contract); Parish v. Schwartz, 344 Ill. 563, 176 N.E. 757 (1931) (contract in restraint of trade); Lowe v. Doremus, 84 N.J.L. 658, 87 Atl. 459 (1913) (contract in general restraint of marriage).

[6] See 6 CORBIN, CONTRACTS § 1374 (1951), for a discussion of what elements are needed to make a bargain illegal.

[7] The question whether the legislature has forbidden the formation of a contract depends largely upon the interpretation of the statute. Where the statute clearly defines a certain type of transaction as illegal there is no problem. See N.Y. PEN. LAW § 992. In other cases the legislative intent must be ascertained in view of the evil which the statute aims to prevent. *Compare* Mitchell v. Flintkote Co., 185 F.2d 1008 (2d Cir. 1951), *cert. denied*, 341 U.S. 931 (1951), *with* John E. Rosasco Creameries, Inc. v. Cohen, 276 N.Y. 274, 11 N.E.2d 908 (1937).

[8] Public Policy has been loosely defined as "the principle of law that no one can lawfully do that which has a tendency to be injurious to the public or against the public good." Cahill v. Gilman, 84 Misc. 372, 377, 146 N.Y. Supp. 224, 227 (Sup. Ct. 1914). It has also been characterized as "one of the great preservative principles of a state." Stanton v. Allen, 5 Denio 434, 441 (N.Y. 1848), as well as "an unruly horse," 6 CORBIN, CONTRACTS § 1375 n.9 (1951).

New York courts have traditionally allowed illegality as a defense in cases where the contract, by its terms, contemplates illegal ends,[9] requires illegal means [10] or induces illegal action.[11] The plea has also been sustained where the circumstances under which the contract was executed were tainted with illegality [12] or where the contract could only be performed in an illegal manner.[13] In *McConnell,* however, the Court is not concerned with the validity of the contract nor the manner in which it was executed but rather with the determination of "whether the unlawful acts imputed to the plaintiff *in performance* are fatal to recovery under a lawful contract." [14] In answering this question in the affirmative the Court has determined that a plea of illegality shall extend to the illegal performance of a valid contract.

In foreclosing the plaintiff from recovery the Court has decided that New York courts are forbidden "to honor claims founded on commercial bribery." [15] For this proposition it relies heavily upon *Sirkin v. Fourteenth Street Store.*[16] There, however, the plaintiff was precluded from recovery not upon grounds relating to the performance of the contract but upon the fact that he had *procured* the contract by bribing the defendant's agent in direct violation of section 439 of the New York Penal Law prohibiting the corrupt influencing of agents.[17]

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[9] Sayres v. Decker Auto. Co., 239 N.Y. 73, 145 N.E. 744 (1924) (agreement to defraud an insurance company held invalid); Manson v. Curtis, 223 N.Y. 313, 119 N.E. 559 (1918) (agreement to secure a passive corporate directorate held invalid).

[10] Reiner v. North Am. Newspaper Alliance, 259 N.Y. 250, 181 N.E. 561 (1932) (contract requiring the breach of an already existing agreement); McCraith v. Buss, 198 App. Div. 524, 190 N.Y. Supp. 597 (1st Dep't 1921) (agreement to use illegal means to obtain government contract).

[11] See Mills v. Mills, 40 N.Y. 543 (1869), where a contract in which it was stipulated that the plaintiff was to use his utmost influence to procure passage of legislation was held void because "it furnishes a temptation to the plaintiff, to resort to corrupt means or improper devices, to influence legislative action." *Id.* at 546.

[12] Morgan Munitions Supply Co. v. Studebaker Corp. of America, 226 N.Y. 94, 123 N.E. 146 (1919) (a contract obtained by impersonation in violation of a penal statute held to be invalid).

[13] See Reiner v. North Am. Newspaper Alliance, *supra* note 10, where the only way in which the contract could be performed was by violating a pre-existing agreement.

[14] McConnell v. Commonwealth Pictures Corp., 1 Misc.2d 751, 753, 147 N.Y.S.2d 77, 80 (Sup. Ct. 1955) (emphasis added).

[15] McConnell v. Commonwealth Pictures Corp., 7 N.Y.2d 465, 470, 166 N.E.2d 494, 497, 199 N.Y.S.2d 483, 486 (1960).

[16] 124 App. Div. 384, 108 N.Y. Supp. 830 (1st Dep't 1908). The Court said: "So far as precedent is necessary, we can rely on *Sirkin v. Fourteenth St. Store . . . Sirkin* is the case closest to ours. . . ." McConnell v. Commonwealth Pictures Corp., *supra* note 15.

[17] N.Y. PEN. LAW § 439 (formerly N.Y. PEN. CODE § 384r) provides: "A person who gives, offers or promises to an agent . . . of another . . .

In the instant case the procurement of the contract concerned no statutory violation though it appears that section 439 was violated in performance. However, what is of moment to the Court is not the alleged statutory violation but the determination that, in essence, both *Sirkin* and *McConnell* involve commercial bribery. The principle of the former, defining New York's public policy against bribery, closes the courts to those "who sue to collect the rewards of corruption." [18] Thus the Court has ruled that bribery, whether in procurement or performance, will vitiate a contract otherwise valid, a decision which the Court feels may be beyond precedent.[19]

Prior to the decision in *McConnell* the rule as announced in *Chesebrough v. Conover* [20] and *Dunham v. Hastings Pavement Co.*[21] was thought to be that illegality in performance would not vitiate a valid contract.[22] It was upon this holding that the lower courts relied in awarding plaintiff judgment. This rule was apparently based upon the premise that illegality in performance was to be relevant only "upon the question whether the tendency of the contract necessarily was to induce the doing of . . . [illegal] things." [23] The paramount issue, therefore, was the nature of the contract and not the demeanor of the acts performed under it.[24] In the instant case, however, the Court rejects this view and states that recovery will be denied where there is "a direct connection between the illegal

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any gift or gratuity whatever, without the knowledge and consent of the principal . . . with intent to influence such agent's . . . action in relation to his principal's . . . business . . . is guilty of a misdemeanor. . . ."

[18] McConnell v. Commonwealth Pictures Corp., *supra* note 15 at 469, 166 N.E.2d at 496, 199 N.Y.S.2d at 485.

[19] "Perhaps this application of the principle represents a *distinct* step beyond . . . [precedent] in the sense that we are here barring recovery under a contract which in itself is entirely legal. But if this be an extension, public policy supports it." *Id.* at 471, 166 N.E.2d at 497, 199 N.Y.S.2d at 487 (emphasis added).

[20] 140 N.Y. 382, 35 N.E. 633 (1893).

[21] 56 App. Div. 244, 67 N.Y.Supp. 632 (1st Dep't 1900).

[22] Dodge v. Richmond, 10 App. Div.2d 4, 196 N.Y.S.2d 477 (1st Dep't 1960). "It appears to be the rule, in this State at least, that an agreement which is lawful on its face and which does not contemplate or necessarily entail unlawful conduct in its performance is enforceable by the promisee even though he engages in unlawful activity in the agreement's performance." *Id.* at 14, 196 N.Y.S.2d at 486. It is of note that the *McConnell* case was decided approximately six weeks after the court made the above statement in the *Dodge* case.

[23] Barry v. Capen, 15 Mass. 99, —, 23 N.E. 735, 736 (1890) (Holmes, J.). *But see* Tocci v. Lembo, 325 Mass. 707, 92 N.E.2d 254 (1950), where the illegal nature of the performance was considered apart from the nature of the contract in denying recovery to the plaintiff.

[24] See Veazey v. Allen, 61 App. Div. 119, 70 N.Y. Supp. 457 (1st Dep't 1901), *aff'd*, 173 N.Y. 359, 66 N.E. 103 (1903), wherein the *Chesebrough* and *Dunham* cases are discussed in this light.

transaction and the obligation sued upon." [25] In such a case the plaintiff's "right" to recovery stems only from his illegal act, and "no court should be required to serve as paymaster of the wages of crime." [26] However, the Court's decision does not preclude recovery where the illegality is merely incidental to the contract sued upon.[27]

In determining that the performance of the contract shall be the basic issue in awarding or denying recovery, the Court seems to have adopted the view of Professor Williston that "not the illegality of the contract but the illegality of the plaintiff's conduct either in entering into or *in performing* the contract is the true ground for denying recovery." [28]

It appears, therefore, that *McConnell* has expanded New York law in the area of contract illegality. However, by making the nature of the performance the deciding factor in awarding recovery the Court has added a measure of uncertainty to the area under consideration. The uncertainty stems from the fact that the test to determine whether a certain performance will vitiate a contract is a fluid one which depends upon the nature and proximity of the illegality to the end accomplished.[29] The Court admits that not every illegality in performance will preclude recovery. What standard of right conduct, then, shall be used to determine a plaintiff's rights? [30]

Upon a plea of illegality there are two competing forces which must always be considered. One is a desire to enforce the contract lest the defendant be unjustly enriched and the other is the probability of giving validity, by enforcement, to activities considered against public policy.[31] The resolution of this problem is difficult enough when the nature of the contract is under attack; a much more formidable task presents itself when the acts of the contracting

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[25] McConnell v. Commonwealth Pictures Corp., 7 N.Y.2d 465, 471, 166 N.E.2d 494, 497, 199 N.Y.S.2d 483, 487 (1960).

[26] Stone v. Freeman, 298 N.Y. 268, 271, 82 N.E.2d 571, 572 (1948).

[27] "[T]hus, if a carpenter in building a legal fence commits a trespass, this will not preclude recovery for the fence." 6 WILLISTON, CONTRACTS § 1761 (Rev. ed. 1938); *cf.* 6 CORBIN, CONTRACTS § 1529 (1951).

[28] 6 WILLISTON, CONTRACTS § 1761 (Rev. ed. 1938) (emphasis added). See also Interstate Constr. Co. v. Lakeview Canal Co., 224 Pac. 850 (Wyo. 1924); RESTATEMENT, CONTRACTS § 512 (1932).

[29] See Fidelity & Deposit Co. v. Grand Nat'l Bank, 2 F. Supp. 666 (E.D. Mo. 1933) (dictum), *rev'd on other grounds*, 69 F.2d 177 (8th Cir. 1934). "The question of how close illegality must be woven into a transaction in order to taint it is often difficult to determine." *Id.* at 668.

[30] Judge Froessel assails as neither workable nor sanctioned by precedent the majority's attempt at "'nice' distinctions between degrees of illegality and immorality in the performance of lawful contracts . . . ." McConnell v. Commonwealth Pictures Corp., *supra* note 25 at 474, 166 N.E.2d at 499, 199 N.Y.S.2d at 490 (dissenting opinion).

[31] For a consideration of the arguments pro and con on this question see Wade, *Restitution of Benefits Acquired Through Illegal Transactions*, 95 U. PA. L. REV. 261 (1947); Wade, *Benefits Obtained Under Illegal Transactions—Reasons For and Against Allowing Restitution*, 25 TEXAS L. REV. 31 (1946).

parties must be evaluated by the quantum of illegality test proposed by the Court.

Moreover, the Court in the instant case has determined that *Sirkin* establishes a public policy which precludes a plaintiff from recovery when his claim is founded upon commercial bribery. But an analysis of the facts of that case draws into question whether such a public policy was actually established by *Sirkin*. The agreement in *Sirkin* was invalidated upon the long established principle that a contract made in violation of a penal statute is void although not expressly declared void.[32] In *McConnell*, however, the contract under consideration was not made in violation of a penal statute. Yet the Court has determined that a precedent in which a penal violation was the dominant consideration shall, upon grounds of public policy, invalidate a performance in which such violation, even if proven,[33] was at best peripheral. Query, therefore, should the defendant be vicariously benefited by setting up the illegality of an action by the plaintiff with regard to a contract other than that in issue and under which he benefited?[34]

In the last analysis, therefore, the *McConnell* decision, though here limited to actions founded upon commercial bribery, may, by virtue of the quantum of illegality test proposed therein, lead to an unwarranted extension of the doctrine of illegality.

CRIMINAL LAW—EVIDENCE—ADMISSIONS MADE AFTER INDICTMENT IN ABSENCE OF COUNSEL HELD INADMISSIBLE.—Defendant, during his absence from New York, was indicted for murder in the

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[32] Sirkin v. Fourteenth St. Store, 124 App. Div. 384, 388, 108 N.Y. Supp. 830, 833 (1st Dep't 1908).

[33] Though it appears that the plaintiff's act of performance has violated the statute this was not in issue. McConnell v. Commonwealth Pictures Corp., 7 N.Y.2d 465, 470, 166 N.E.2d 494, 496, 199 N.Y.S.2d 483, 486 (1960). It has been held that if a plaintiff can make out his case without relying on the illegal transaction he will be given recovery. See Ballin v. Fourteenth St. Store, 54 Misc. 359, 361, 105 N.Y. Supp. 1028, 1030 (Sup. Ct. 1908). But the Court, relying on the validity of the defenses, determined that this holding did not apply. McConnell v. Commonwealth Pictures Corp., *supra* at 471, 166 N.E.2d at 497, 199 N.Y.S.2d at 487.

[34] The illegal act of the plaintiff in performance is in effect a different transaction from the one sued upon. See Southwestern Shipping Corp. v. National City Bank, 6 N.Y.2d 454, 160 N.E.2d 836, 190 N.Y.S.2d 352 (1959), which stands for "the broad proposition . . . that a party unconnected with an illegal agreement should not be permitted to reap a windfall by pleading the illegality of that agreement, to which he was a stranger." McConnell v. Commonwealth Pictures Corp., *supra* note 33 at 474, 166 N.E.2d at 499, 199 N.Y.S.2d at 490 (Froessel, J., dissenting).