

# Contracts--Joint Ventures--Enforcing Legal Part of Agreement (Rosenblum v. Frankel, 279 App. Div. 66 (1st Dep't 1951))

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seeable future, barring legislative activity. Therefore, it would seem that the instant case pronounces a *technically* correct statement of the applicable law. Although the dissent is in closer harmony with the spirit of the Bankruptcy Act, its acceptance as the governing rule would necessitate a change in the existing statute<sup>32</sup> or in the substantive law of corporations.



CONTRACTS — JOINT VENTURES — ENFORCING LEGAL PART OF AGREEMENT.—Plaintiff, formerly sole proprietor of a New York liquor business, entered upon a joint venture with defendants to sell alcohol for industrial use and for beverage purposes in New York and in international trade. Renewals of plaintiff's liquor license were thereafter granted upon admittedly false statements that he was sole owner of the business. In an action brought for an accounting, defendants' motion to dismiss the complaint was granted because of the resulting illegality<sup>1</sup> to that part of the business which encompassed the selling of alcohol in New York. *Held*, reversed. Dismissal of

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corporations involved were engaged in separate businesses and the claims attempted to be voted did not arise out of a course of dealings between them as in the *Loewer's* case.

<sup>32</sup> Compare Section 44(a), *supra* note 17, with the standards of impartiality set out elsewhere in the Act for a trustee in corporate reorganization. BANKRUPTCY ACT § 158(4), 52 STAT. 888 (1938), 11 U. S. C. § 558(4) (1946), declares that a person shall not be deemed disinterested for the purposes of selection as a trustee in corporate reorganization if ". . . it appears that he has, by reason of any other *direct or indirect relationship to, connection with, or interest in the debtor* or such underwriter, or for any reason an interest materially adverse to the interests of any class of creditors or stockholders." (Emphasis supplied.) See also *Consolidated Realty Co. v. Dyers, Finishers & Bleachers Federation*, 137 N. J. Eq. 413, 45 A. 2d 132 (Ch. 1946). The court ruled that a corporation, owned and controlled by the same persons as another corporation then involved in a labor dispute, was deemed to be an interested party in said labor dispute despite the separate entities of both corporations. The statute applicable (R. S. 2: 29-77.8 N. J. S. A.) read, "A person or association shall be held to be a person participating or interested in a labor dispute . . . if he or it is engaged in the industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein. . . ."

<sup>1</sup> N. Y. ALCO. BEV. CO. LAW § 110. ". . . [I]n any application for a license under this chapter, the following information shall be given under oath:

1. The name . . . of each applicant and, if there be more than one and they be partners, the partnership name . . . of the several persons so applying.

2. The name . . . of each person interested, or to become interested, in the business covered by license for which application is made, together with the nature of such interests. . . . N. Y. ALCO. BEV. CO. LAW § 130. "Any person who shall make any false statement in the application for a license or permit under this chapter shall be guilty of a misdemeanor. . . ."

the complaint was unwarranted unless the legal part of the venture was so interwoven with the illegal part that it would be impossible to sever them. *Rosenblum v. Frankel*, 279 App. Div. 66, 108 N. Y. S. 2d 6 (1st Dep't 1951).

Courts have generally refused to affirmatively enforce an illegal contract or to aid one guilty party to the contract against the other.<sup>2</sup> This broad rule has given way to two major exceptions: (1) where the plaintiff is not in *pari delicto* with the defendant,<sup>3</sup> and (2) where the plaintiff repents before the contract is fully executed and seeks to rescind.<sup>4</sup> Another recognized exception is made, however, where the parties enter into a contract in violation of a statute with full knowledge of the illegality of the transaction. One party may there avail himself of judicial aid if he can show himself to be a member of the class meant to be protected by the statute.<sup>5</sup> Thus, a borrower of money at a usurious rate may recover excessive interest paid, since the usury laws were intended to penalize the reprehensible money lender and not the needy borrower.<sup>6</sup>

Similarly, where the denial of a remedy will effectuate the very evil the statute was intended to prevent, another modification results. Hence, where a bank loaned money to one of its directors in violation of a statute prohibiting such loans, the bank was allowed to recover the money, since the very purpose of the statute was to prevent the impairment of depositors' funds.<sup>7</sup>

Illegal ventures present a novel problem. Will a court compel an accounting of the fruits of an illegal enterprise? It has been said that a suit for an accounting is essentially based on a new implied contract to divide profits and is thus not tainted with the illegality of the original undertaking. It is asserted that it would be inequitable to allow one joint venturer to keep all of the profits, though the underlying agreement be illegal.<sup>8</sup> This view was questioned at an early date by Sir George Jessel in the oft cited case of *Sykes v. Beadon*.<sup>9</sup>

<sup>2</sup> *Veazey v. Allen*, 173 N. Y. 359, 66 N. E. 103 (1903); *Attridge v. Pembroke*, 235 App. Div. 101, 256 N. Y. Supp. 257 (4th Dep't 1932); *Coverly v. Terminal Warehouse Co.*, 85 App. Div. 488, 83 N. Y. Supp. 369 (1st Dep't 1903).

<sup>3</sup> *Rogers v. Samples*, 207 Ky. 150, 268 S. W. 799 (1925); *Tracy v. Talmadge*, 14 N. Y. 162 (1856); *Budd v. Morning Telegraph, Inc.*, 241 App. Div. 142, 271 N. Y. Supp. 538 (1st Dep't), *aff'd mem.*, 265 N. Y. 639, 193 N. E. 430 (1934); *Barna v. Clifford Country Estates, Inc.*, 143 Misc. 813, 258 N. Y. Supp. 671 (N. Y. City Ct. 1932).

<sup>4</sup> *Spring Co. v. Knowlton*, 103 U. S. 49 (1880).

<sup>5</sup> *Fergus County v. Osweiler*, 107 Mont. 466, 86 P. 2d 410 (1938).

<sup>6</sup> *Smith v. Bryant*, 209 N. C. 213, 183 S. E. 276 (1936); *Taylor v. Budd*, 217 Cal. 262, 18 P. 2d 333 (1933).

<sup>7</sup> *Lester v. Howard Bank*, 33 Md. 558 (1871).

<sup>8</sup> *Brooks v. Martin*, 2 Wall. 70, 84 (U. S. 1864); *Sharp v. Taylor*, 2 Ph. 801, 41 Eng. Rep. 1153 (1849).

<sup>9</sup> 11 Ch. D. 170 (1879). Said the Master of the Rolls: ". . . [T]he principle is clear that you cannot directly enforce an illegal contract, and you can-

The view that an accounting action is free from the illegality of the original venture was expressly rejected by the United States Supreme Court in *McMullen v. Hoffman*,<sup>10</sup> where it was held that a plaintiff should not be entitled to relief if the illegal agreement must be pleaded as a basis of recovery. However, if the plaintiff can assert a claim based on a new and independent contract such as an agreement contemplating the reinvestment of the illegally obtained funds,<sup>11</sup> or a promissory note given to the plaintiff in consideration of his share of the proceeds,<sup>12</sup> he may be entitled to relief for, in such cases, the illegal contract is not before the court.<sup>13</sup>

The plaintiff has been granted relief where the contract is severable; that is, where the legal part may be effectively separated from the illegal. The Restatement rule exemplifies the severability doctrine. It proposes that where any part of a bilateral agreement is illegal, no legal promise therein can be enforced unless a separate legal consideration is apportioned therefor.<sup>14</sup> Separate consideration, in one form or another, was prerequisite to recovery in New York before the Restatement. In *Foley v. Speir*,<sup>15</sup> the agreement pleaded was founded in part upon a consideration which contemplated certain acts in violation of an election law. The Court of Appeals, in holding that the whole agreement was tainted with illegality, said: "Here is but one promise upon a consideration which is in part unlawful both by statute and against good morals."<sup>16</sup>

A majority of the courts in the United States have denied recovery on facts analogous to those in the principal case,<sup>17</sup> either following the view of the *McMullen* decision, or upon a finding that the particular agreement in suit was not severable.<sup>18</sup> The contract in the

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not ask the Court to assist you in carrying it out. You cannot enforce it indirectly; that is, by claiming damages or compensation for the breach of it, or contribution from the persons making the profits realized from it." *Id.* at 197.

<sup>10</sup> 174 U. S. 639, 668 (1898).

<sup>11</sup> *Johnson v. Davidson*, 54 Cal. App. 251, 202 Pac. 159 (1921).

<sup>12</sup> *Brady v. Horvath*, 167 Ill. 610, 47 N. E. 757 (1897).

<sup>13</sup> Where the suit for accounting can be based *only* on the illegal agreement itself, relief is denied. *Carlisle v. Smith*, 234 Fed. 759 (N. D. Ga. 1916) (quantum meruit allowed, however); *Central Trust & Safe Deposit Co. v. Respass*, 112 Ky. 606, 66 S. W. 421 (1902) (gambling); *Snell v. Dwight*, 120 Mass. 9 (1876); *Dunham v. Presby*, 120 Mass. 285 (1876) (trading with the enemy); *Morrison v. Bennett*, 20 Mont. 560, 52 Pac. 553 (1898).

<sup>14</sup> RESTATEMENT, CONTRACTS § 607 (1932).

<sup>15</sup> 100 N. Y. 552, 3 N. E. 477 (1885) (the illegal part of the contract encompassed the procurement of voters at the polls); *Parthey v. Beyer*, 228 App. Div. 308, 238 N. Y. Supp. 412 (2d Dep't 1930); *Coffey v. Burke*, 132 App. Div. 128, 116 N. Y. Supp. 514 (2d Dep't 1909).

<sup>16</sup> *Foley v. Speir*, 100 N. Y. 552, 558, 3 N. E. 477, 479 (1885).

<sup>17</sup> *McMullen v. Hoffman*, 174 U. S. 639 (1898); *Northrup v. Phillips*, 99 Ill. 449 (1881); *Dunham v. Presby*, 120 Mass. 285 (1876); *Morrison v. Bennett*, 20 Mont. 560, 52 Pac. 553 (1898); *King v. Winants*, 71 N. C. 410 (1874).

<sup>18</sup> *Sheppy v. Stevens*, 177 Fed. 484 (N. D. N. Y. 1910); *Foley v. Speir*, 100 N. Y. 552, 3 N. E. 477 (1885).

instant case would be unenforceable under the *McMullen* decision because of the necessity of pleading the illegal contract. Nor does the severability rule apply, since there was no separate consideration shown to be apportioned for the legal part of the venture.

There is persuasive authority in New York for denying an accounting to a partner in an illegal venture. In *Leonard v. Poole*,<sup>19</sup> a number of firms agreed to advance the price of lard, in violation of the penal law. An action for an accounting was brought against a broker who had participated in the scheme as an agent only. The court, treating *all* parties to the illegal agreement as *principals*,<sup>20</sup> held that an action would not lie against the broker.

The underlying purpose of denying enforcement of illegal agreements, not always expressed in the decisions, is the discouragement of their formation.<sup>21</sup> It is submitted that a decision in conformity with the rule in the *McMullen* case would more adequately serve this purpose than does the ruling in the instant case.



CONSTITUTIONAL LAW — DUE PROCESS — ILLEGALLY SECURED EVIDENCE.—Antonio Rochin was convicted in the Superior Court of Los Angeles County on a charge of possessing narcotics.<sup>1</sup> Three deputy sheriffs, without either a warrant of arrest or search warrant, forced their way into petitioner's bedroom. As they entered, petitioner swallowed two capsules that were lying on a table next to the bed. The sheriffs forcibly attempted to extract these capsules from petitioner's mouth. This effort proving futile, they then removed him to a nearby hospital, where the capsules were recovered by forcing a rubber tube down his throat and pouring an emetic solution down this tube. The capsules thus obtained were found to contain morphine and were the chief evidence used against him on the trial. *Held*, conviction reversed. The methods employed to elicit evidence in this case were so brutal and offensive to human dignity as to render the evidence inadmissible under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Rochin v. People of California*, 72 Sup. Ct. 205 (1952).

<sup>19</sup> 114 N. Y. 371, 21 N. E. 707 (1889).

<sup>20</sup> *Id.* at 378, 21 N. E. at 709.

<sup>21</sup> 5 WILLISTON, CONTRACTS § 1630 (Rev. ed. 1937); see *Attridge v. Pembroke*, 235 App. Div. 101, 102, 256 N. Y. Supp. 257, 258 (4th Dep't 1932); *Sirkin v. Fourteenth St. Store*, 124 App. Div. 384, 389, 108 N. Y. Supp. 830, 834 (1st Dep't 1908).

<sup>1</sup> A petition for a rehearing was denied. *People v. Rochin*, 101 Cal. App. 2d 140, 225 P. 2d 1 (1950), *hearing denied*, 225 P. 2d 913 (Cal. 1951).