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Contract Made in Violation of Statute--Validity of Contract After Repeal of Prohibitory Provision--Eighteenth Amendment--Federal Rule--New York Rule (Fitzsimons v. Eagle Brewing Co., 107 F.2d 712 (3d Cir. 1939))

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to disseminate ideas could only be done after a submission to review and on obtaining of the approval of the police in the municipality. In this manner, a direct censorship might be imposed. The power of the city to regulate canvassing is not denied by this decision. The court merely declares that any attempt to control in the manner herein utilized will render the ordinance void and the courts will refuse to convict for a violation. The desire on the part of the municipality to protect its citizens from fraudulent appeals which might be made in the name of charity is in keeping with its function as a governing body and may be exercised in regard to regulation of hours and other details. But it cannot attempt to achieve this end by centering control in its own hands, of the ideas to be spread, even if this control is limited to one type of distribution—in this case canvassing, proven by our own history to be one of the most effective methods.

S. K.

CONTRACT MADE IN VIOLATION OF STATUTE—VALIDITY OF CONTRACT AFTER REPEAL OF PROHIBITORY PROVISION—EIGHTEENTH AMENDMENT—FEDERAL RULE—NEW YORK RULE.—While the Prohibition Amendment was in effect[1] defendant was engaged in the lawful manufacture of near beer. It had been deprived of its license for violating a statute passed pursuant to the Amendment. Plaintiff, a resident of Baltimore, operated the Camden Products Co. of New Jersey, which was engaged in the preparation of malt syrup, one of the essential ingredients in the brewing of beer. He had, with knowledge that defendant had lost its license, sold and delivered syrup to the latter to enable it to continue the manufacture of beer in violation of the statute. After the repeal of this statute and the Prohibition Amendment,[2] he brought an action in the District Court of the United States for the Eastern District of Pennsylvania, for the purpose of recovering the price of the malt syrup previously sold and delivered to the defendant. Judgment was in favor of the latter and plaintiff appealed to the Circuit Court of Appeals. *Held,* judgment affirmed. Where a contract is made in violation of a statute which is subsequently repealed, and the parties are in *pari delicto,* the invalidity of the original contract will not be changed. *Fitzsimons* v. *Eagle Brewing Co.,* 107 F. (2d) 712 (C. C. A. 3d, 1939).

Under the federal and majority rule a contract made in violation of a statutory provision is considered void *ab initio* as being based on an illegal consideration, and the removal of the prohibitory statute

[1] U. S. CONST. Amend. XVIII; 41 STAT. 307, 318 (1919), 27 U. S. C. A. §§ 4, 58 (1925).

[2] U. S. CONST. Amend. XXI, repealing Amend. XVIII.

cannot alter the fact that there is no contract.[3] No distinctions are made between contracts purely *mala prohibita* and those which are *mala in se* because of the nullity of a contract violating a statute.[4] Usurious contracts are exceptions to the general rule and are explained on the basis of the inclination of the judiciary to avoid the usury laws whenever legally possible. Such contracts will for this reason be enforced after the statute they violated is repealed, provided the Statute of Limitations has not yet run. Where the sale *per se* of liquor is the offense, recovery is denied on the ground that the court will refuse to aid a party who has wilfully committed the very offense prohibited.[5] The decision has been otherwise when, although the recovery of the selling price has also been prohibited by statute, the sale *per se* is not the offense.[6] It has been held as a matter of procedure that the court can *sua sponte* introduce into any case the question of illegality.[7]

The New York doctrine is contrary to the federal law on this subject, and is to the effect that where a contract is used as the basis of a civil action after a statute which made the contract *malum prohibitum* has been repealed, it will be enforced in view of the fact that the defense of illegality has disappeared with the repeal of the statute.[8] This is in harmony with the principles laid down in an-

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[3] Wilcox v. Edwards, 162 Cal. 455, 123 Pac. 276 (1912); Wood v. Imper. Irrig. Dist., 216 Cal. 748, 17 P. (2d) 128 (1932); Schaun v. Brandt, 116 Md. 560, 82 Atl. 551 (1911); Ludlow v. Hardy, 38 Mich. 690 (1878); Puckett v. Alexander, 102 N. C. 95, 8 S. E. 767 (1889); (1933) 46 HARV. L. REV. 1340; 6 WILLISTON, CONTRACTS (Rev. ed. 1938) p. 4992, § 1758; 12 AM. JUR. (1938) p. 660, § 105; 15 AM. & ENG. ENCY. OF LAW (2d ed. 1900) 942; 2 RESTATEMENT, CONTRACTS (1932) § 609. *Cf.* Woods & Co. v. Armstrong, 54 Ala. 150 (1875).

[4] "As the interest of the state and not the quality of the act is important, questions of *mala in se* and *mala prohibita*, moral turpitude, etc., are irrelevant and have been so declared by the great weight of authority." Instant case at 713. See *Moral Turpitude and the 18th Amendment* (1931) 17 IOWA L. REV. 76.

[5] Hathaway v. Moran, 44 Me. 67 (1857); Ludlow v. Hardy, 38 Mich. 690 (1878).

[6] Gorsuth v. Butterfield, 2 Wis. 237 (1849).

[7] 5 WILLISTON, CONTRACTS (Rev. ed. 1937) p. 4565, § 1630A.

[8] Washburn v. Franklin, 35 Barb. 599 (N. Y. 1864); Goodrich v. Houghton, 134 N. Y. 115, 31 N. E. 516 (1892); Segal v. Chem. Impor. & Mfg. Co., 205 App. Div. 220, 199 N. Y. Supp. 250 (1st Dept. 1928); Reiner v. North Am. Newspaper Alliance, 259 N. Y. 250, 181 N. E. 501 (1932); Lido Capital Corp. v. Vogel, 161 Misc. 48, 291 N. Y. Supp. 92 (1936); Lido Capital Corp. v. Ekelsen, 162 Misc. 323, 295 N. Y. Supp. 163 (1937); RESTATEMENT, CONTRACTS (1932) § 598. For a discussion of these cases, see (1937) 6 BROOKLYN L. REV. 470; (1937) 14 N. Y. U. L. Q. REV. 536; (1937) 85 U. OF PA. L. REV. 535, 536. Compare Note (1913) 26 HARV. L. REV. 738; (1937) 50 HARV. L. REV. 834. *Contra:* Bailey v. Mogg, 4 Denio 60 (N. Y. 1847); N. Y. & O. R. R. v. Van Horn, 57 N. Y. 473 (1874). The court stated in Lido Capital Corp. v. Vogel: "Where an act is prohibited in order to establish some reform, either social or economic, and said activity is not inherently bad, when the prohibition statute is removed the illegality falls and contracts made during the time of said prohibition become valid and enforcible." The *Washburn* case similarly pronounces: "The principle in all these cases is, that a cause of action or defense given by a statute founded on grounds of public policy, confers no vested right which could

other branch of the law of illegal contracts, namely, *ultra vires* contracts of corporations. Where a corporation has made a *malum prohibitum* contract which is subsequently partially executed, both the New York and federal jurisdictions have permitted recovery after the repeal of the statute making the contract illegal; the proper remedy in the former courts being an action on the contract, while in the latter it is in *quasi*-contract.[9] In New York there is a distinction between a *malum prohibitum* contract and one which is *malum in se*, recovery only being permitted in the former case after the repeal of the violated statute. In the case under consideration, the Prohibition Amendment was repealed which prohibited such acts as the sale and transportation of liquor, which activities are not inherently immoral and are not *mala in se*.[10] For this reason recovery though denied in the federal courts would have been permitted in New York State. The case of *Bloch* v. *Frankfort Distillery* is directly in point.[11] There plaintiff sued to recover damages for breach of contract for the sale of 470 cases of whiskey made when the Eighteenth Amendment was still in force. On motion for summary judgment, the defense of illegality based on the Prohibition Amendment was held invalid in view of the repeal of this Amendment. This interpretation is a satisfactory one, for when a prohibitory statute is repealed, it is usually due to one of two reasons, either its accomplishments have been unsatisfactory or there is no longer any need for it. Since the interests of the state no longer require the enforcement of the repealed statute, it is wise to hold the parties to the bargain which they made.

M. M. S.

CRIMINAL CONTEMPT—WITNESSES—GRAND JURY.—Appellant was served by the district attorney with a subpoena *duces tecum* to appear *forthwith* before the New York County Grand Jury in a John Doe proceeding, and to produce a considerable list of enumerated account books, ledgers, etc., bearing on the business of the appellant. The appellant, unfamiliar with the nature of the matter under investigation, appeared forthwith at the office of the district

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not be taken away by a similar statute, and that a repeal of a law which gave such right of action or defense, terminated all claim to such defense, although the contract was made previously.

"This rule is applicable to the present case. The defense to the contract was given by the statute against stockjobbing. That statute was repealed after the contract was made. The repeal of the statute has taken away the defense of illegality, the same as if such statute had never existed."

[9] PRASHKER, CASES AND MATERIALS ON PRIVATE CORPORATIONS (1937) 401.

[10] Matter of Birner v. Santa Lucia Wineries, Inc., 155 Misc. 722, 282 N. Y. Supp. 257 (1935).

[11] Bloch v. Frankfort Distillery, 247 App. Div. 864, 288 N. Y. Supp. 749 (1st Dept. 1936).