

**Sales--Right of Plaintiff to Recover on Contracts Malum  
Prohibitum (Rosasco Creameries, Inc. v. Cohen, 276 N.Y. 274  
(1937))**

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SALES—RIGHT OF PLAINTIFF TO RECOVER ON CONTRACTS MALUM PROHIBITUM.—Plaintiff seeks to recover the reasonable value of milk sold and delivered to the defendant although he has not complied with the statutory licensing requirements.<sup>1</sup> The Appellate Division granted a motion to dismiss the complaint on the ground that a contract *malum prohibitum* would not be enforced in a court of law. On appeal, *held*, reversed. Where a statute does not provide that violation thereof deprives one of a right of action and the denial of relief would be inequitable under all the facts and circumstances, public policy demands that relief be granted.<sup>2</sup> The court further maintained that the licensing statute in question did not directly benefit the public and that the case should therefore be decided on its equities. *Rosasco Creameries, Inc. v. Cohen*, 276 N. Y. 274, 10 N. E. (2d) 555 (1937).

Without doubt the decision in this case commends itself to anyone with a sense of justice and fair dealing,<sup>3</sup> but at the same time the decision is hopelessly irreconcilable with the vast majority of judicial opinion in cases where the facts so closely approximate the facts of the instant case that they are almost identical, and which, on principle, cannot be distinguished at all.<sup>4</sup> Failure to obtain a dealer's license in accordance with the statute is not merely a civil offense but a penal offense as well.<sup>5</sup> In such cases it has been consistently held that one operating outside the law may not have the sanction and

<sup>1</sup> AGRICULTURE AND MARKETS LAW § 257: " \* \* \* no milk dealer shall buy milk from producers or others, or deal in, handle, sell or distribute milk, unless such dealer be duly licensed as provided in this article."

<sup>2</sup> 3 WILLISTON, CONTRACTS (1st ed. 1924) § 1789; RESTATEMENT, CONTRACTS §§ 548, 600; *Mahar v. Harrington Park Villa Sites*, 204 N. Y. 231, 97 N. E. 587 (1912); *Merchant's Line v. B. & O. Ry.*, 222 N. Y. 344, 118 N. E. 788 (1918); *Fosdick v. Investors Syndicate, Inc.*, 266 N. Y. 130, 194 N. E. 58 (1934); *Sajor v. Ampol, Inc.*, 275 N. Y. 125, 9 N. E. (2d) 803 (1937).

<sup>3</sup> *Holman v. Johnson*, 1 Cowp. 341, 343 (1774) ("The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times ill in the mouth of the defendant").

<sup>4</sup> *Sturm v. Truby*, 245 App. Div. 357, 282 N. Y. Supp. 433 (4th Dept. 1935) ("A contract made in violation of a criminal or prohibitory statute is an unlawful undertaking, and is void and unenforceable even though one of the parties has enjoyed the benefits of the agreement"); *Leonard v. Poole*, 114 N. Y. 371, 21 N. E. 707 (1889); *Goodrich v. Houghton*, 134 N. Y. 115, 31 N. E. 516 (1892); *Johnson v. Dahlgren*, 166 N. Y. 354, 59 N. E. 987 (1901); *Swing v. Dayton*, 196 N. Y. 503, 89 N. E. 1113 (1909); *Hart v. City Theaters Co.*, 215 N. Y. 322, 109 N. E. 497 (1915); *Morgan Munitions Supply Co. v. Studebaker Corp. of America*, 226 N. Y. 94, 173 N. E. 146 (1919); *Adler v. Zimmerman*, 233 N. Y. 431, 135 N. E. 840 (1922); *Bendell v. De Dominics*, 251 N. Y. 305, 167 N. E. 452 (1929); RESTATEMENT, CONTRACTS § 580: (1) Any bargain is illegal if either the formation or the performance thereof is prohibited by constitution or statute. (2) Legislative intent to prohibit the formation of a bargain, or an act essential for its performance, may be manifested by (a) express prohibition, or (b) making the formation of the bargain or the performance thereof a crime, or (c) imposing a penalty for the formation of a bargain or for doing an act that is essential for the performance thereof.

<sup>5</sup> AGRICULTURE AND MARKETS LAW §§ 21, 41.

protection of the law.<sup>6</sup> Obviously, no problem is presented where the legislature expressly disallows a suit on an illegal contract, but the courts have refused to rule as a matter of law that, where the legislature is silent as to that penalty, an action *can* be maintained. Thus it is imperative, in each case, to ascertain the legislative intention in order to determine whether or not the penalties provided are exclusive of all others.

In the writer's opinion, the legislature has been quite specific here, declaring the Agriculture and Markets Law to be enacted in the exercise of the police powers of the state and to protect public health and safety.<sup>7</sup> Subsequent to the enactment of the statute the Court of Appeals upheld its constitutionality and ruled that the legislature had validly exercised its police power for the promotion of the public welfare.<sup>8</sup> Thus, even if we agree with Judge Finch when he states, "Where the wrong committed by the violation of the statute is merely *malum prohibitum* and does not endanger health or morals" additional punishment should not be imposed, how can we reconcile the classification of this case with cases *not endangering* health or morals when the legislature and the Court of Appeals have already agreed that the police power of the state has been validly exercised in the public interest?<sup>9</sup>

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<sup>6</sup> *Swing v. Dayton*, 196 N. Y. 503, 89 N. E. 1113 (1909) ("The general rule is that illegal and prohibited contracts are void, without being so expressly declared by statute"); *Bendell v. De Dominics*, 251 N. Y. 305, 167 N. E. 452 (1929) ("\* \* \* his claim for compensation is outlawed by the criminal nature of such services \* \* \* otherwise an unlicensed broker might negotiate sales with impunity up to the point of a complete agreement and then obtain his license for the purpose of recovering his commissions on the execution of a formal contract. *The law is not so toothless.*"); *Griffith v. Wells*, 3 Denio 226 (N. Y. 1843) ("Where a statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful for it cannot be intended that a statute would inflict a penalty for a lawful act."); *Accetta v. Zuppa*, 54 App. Div. 33, 66 N. Y. Supp. 303 (2d Dept. 1900) ("Where the statute expressly provides that a violation thereof shall be a misdemeanor, it would seem clear that it was the intention of the legislature to render illegal contracts violating such statute"); *Fox v. Dixon*, 58 Hun 605, 12 N. Y. Supp. 267 (1890) ("It is a settled principle that one cannot recover compensation for doing an act, to do which is forbidden by law, and is a misdemeanor").

<sup>7</sup> AGRICULTURE AND MARKETS LAW §300: "This article is enacted in the exercise of the police power of the state \* \* \* that in order to protect the well-being of our citizens and promote the public welfare, and in order to preserve the strength and vigor of the race, the production, manufacture, storage, distribution and sale of milk in the State of New York is hereby declared to be a business affecting public health and interest."

<sup>8</sup> *People v. Perretta*, 253 N. Y. 305, 171 N. E. 72 (1930); *People v. Nebbia*, 262 N. Y. 258, 186 N. E. 694 (1933).

<sup>9</sup> *Mayflower Farms, Inc. v. Baldwin*, 267 N. Y. 9, 195 N. E. 532 (1935); *Elite Dairy Products, Inc. v. Ten Eyck*, 271 N. Y. 488, 3 N. E. (2d) 606 (1936) ("The statute forbids any person from engaging in business as a milk dealer without a license. That business is subject to reasonable regulation to promote the public welfare and the power of the State to require that all persons who engage in that business shall be licensed is not now challenged").

To substantiate its ruling, the court relies to a great extent on the case of *Sajor v. Ampol, Inc.*<sup>10</sup> wherein plaintiff, a dealer in securities, was permitted to recover for stocks sold and delivered although at the time he had not complied with the Martin Act<sup>11</sup> which required all such dealers to file a "state notice." It is almost patent that the Agriculture and Markets Law and the Martin Act are totally dissimilar in purpose, the object of the latter being to prevent deception upon the investing public by compelling the dealer to make a full and fair disclosure of the proposed security issue and providing for a *specific* penalty for a violation thereof. Taken as a whole, the Martin Act and similar Blue Sky laws have been construed to provide but *one* penalty and no others.<sup>12</sup> The Martin Act is not a licensing statute whereas the Milk Control Law is a statute providing for the granting of a license by a state department, upon specifying requirements as to character, experience, equipment, financial responsibility, previous good conduct, public utility and necessity.

It appears then that neither upon fact nor principle can the instant case be differentiated from those cases whose holdings are diametrically opposed so that even if the decision is favorably viewed, the rule laid down must be looked upon with dissatisfaction.

R. J. M.

SALES — WARRANTIES — THIRD PERSONS. — This action was brought to recover for the wrongful death of plaintiff's intestate.<sup>1</sup> It is alleged that, relying upon defendant's express warranty that a pair of shoes were perfectly constructed and perfectly fitted to the intestate, a child of eight, her mother purchased them. A week later it was discovered that, due to faulty construction of the shoe, a blister had developed. Upon returning to the store, the mother was reassured of the perfection of the shoes, and a dressing was placed upon the blister, which, by this time, had broken. Later, an infection developed, as a result of which the child died. There was evidence of faulty construction, misfit, and of the fact that the defects were apparent to one who understood such merchandise. Recovery was sought upon the grounds of negligence and of breach of warranty. On appeal from a judgment affirming the dismissal of the complaint, *held*, reversed. Without passing upon the question of breach of warranty, there may have been a recovery on the ground of negligence,

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<sup>10</sup> *Sajor v. Ampol, Inc.*, 275 N. Y. 125, 9 N. E. (2d) 803 (1937).

<sup>11</sup> N. Y. GEN. BUS. LAW § 359.

<sup>12</sup> *Miller v. Ammon*, 145 U. S. 421, 12 Sup. Ct. 884 (1892); *Pangborn v. Westlake*, 36 Iowa 546 (1860); *Watters & Martin, Inc. v. Homes Corp.*, 136 Va. 114, 116 S. E. 366 (1923).

<sup>1</sup> N. Y. DECEDENT ESTATE LAW § 130.