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Esther L. Koppelman

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that the opinion was arrived at by the use of reasonable care. Immunity cannot be purchased by the use of a word or phrase.²⁰

Suppose, however, that the auditor had no knowledge of the intended use of his balance sheet,²¹ other than the cognizance that such statements are often used to obtain loans. Would he, in such case, be bound to another who has relied on it? Definite knowledge is wanting. In fact, his balance sheet might never be shown to another. All he is aware of is a custom of practice that such statements are, and have been, so used in business. In this case it seems that there can be no recovery because it cannot be said that he knows the purpose for which it is desired.²² One could as easily infer that the client desired it to analyze his business, and since one view can be taken as readily as the other, proof of actual knowledge would be required.

THOMAS M. McDADE.

THE VALIDITY OF A COVENANT OF INDEMNITY IN AN ILLEGAL LEASE.

It is an ancient principle of the common law that no cause of action may be predicated upon an illegal or immoral contract.¹ While this may, and often does, result in allowing a culpable person to escape liability, the theory behind it is not designed to accomplish this result, but rather to discourage the making of such contracts, by rendering them futile.²

²⁰ Montgomery, *Auditing—Theory and Practice* (4th ed.), p. 466: "As a general principle of law, an accountant's responsibility for his certificate is not affected by the inclusion or omission of the phrase 'in our opinion.' The language of an auditor's certificate cannot excuse breach of contract or negligence." Plender, *supra* Note 2 at 259; Smith, *supra* Note 17 at 197.

²¹ In the instant case the jury found that the defendant had actual notice of the use to which the balance sheet was to be put. This they may have concluded from the submission of the thirty-two copies of the statement, or from the auditor's knowledge gleaned from former audits.

²² *Landell v. Lybrand*, 264 Pa. 406, 107 Atl. 783 (1919).

¹ *Peck v. Burr*, 10 N. Y. 294 (1851); *Tracy v. Talmage*, 14 N. Y. 162 (1856); *Saratoga County Savings Bank v. King*, 44 N. Y. 87 (1870); *Knowlton v. Spring Co.*, 57 N. Y. 534 (1874); *Smith v. City of Albany*, 61 N. Y. 444 (1875); *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y. 558 (1877); *Materne v. Horwitz*, 101 N. Y. 469, 5 N. E. 331 (1886); *Hart v. City Theatres*, 215 N. Y. 322, 109 N. E. 497 (1915); *Burger v. Koelsch*, 77 Hun 44 (N. Y., 5th Dept., 1894); *Doherty v. Eckstein Brewing Co.*, 198 App. Div. 708, 191 N. Y. Supp. 59 (1st Dept., 1921); *Security Mortgage Co. v. Thompson*, 66 Misc. 151, 121 N. Y. Supp. 326 (1910).

² 3 Williston, *Contracts* (1920), sec. 1630.

Lord Mansfield, in a frequently quoted passage, says :

"The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an unmoral or an illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa* or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."³

But the rule that follows from this principle is by no means universally applied to all contracts tainted with illegality. It is an equally well-settled general rule that where a covenant contains both legal and illegal parts, and they can be severed without the destruction of the whole, "whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."⁴ This principle has been applied to divers types of cases.⁵ Typical of its application is the Iowa case of Conklin v. Silver,⁶ decided a decade ago, which involved the leasing of premises for the double purpose of conducting a restaurant and saloon. After the passing of the Volstead Act, it was held that leases for the *exclusive* purpose of selling liquor were at an end when that Act went into effect,⁷ there being "no distinction in principle on this point between a contract the execution of which is unlawful at the time it is made * * * and one where, by a subsequent change of law, further performance of the contract becomes unlawful."⁸

³ *Supra* Note 2; Holman v. Johnson, Cowp. 341, 343, quoted in sec. 1630.

⁴ Mr. Justice Willes in Pickering v. Ilfracombe Ry. Co. L. Rep., 3 C. P. 250, cited in Central New York Tel. & Tel. Co. v. Averill, 199 N. Y. 128, 92 N. E. 206 (1910).

⁵ Where the Court has separated valid from invalid portions of a statute, and enforced the valid: Dollar Co. v. Canadian, etc., 220 N. Y. 270, 115 N. E. 711 (1917); People v. Beakes Dairy Co., 222 N. Y. 416, 119 N. E. 115 (1918); People *ex rel.* Penn. Gas Co. v. Saxe, 229 N. Y. 446, 123 N. E. 673 (1920); People *ex rel.* Alpha P. C. Co. v. Knapp, 230 N. Y. 48, 132 N. E. 870 (1920).

Where wills have contained both legal and illegal provisions, and the Court has retained the legal and expunged the illegal: Kalish v. Kalish, 166 N. Y. 368, 59 N. E. 917 (1901); Matter of Horner, 237 N. Y. 489, 143 N. E. 655 (1924); Matter of Colegrove, 221 N. Y. 455, 117 N. E. 813 (1917); Matter of Trevor, 239 N. Y. 6, 147 N. E. 203 (1924); *In re* Murphy's Will, 213 App. Div. 319, 210 N. Y. Supp. 531 (2nd Dept., 1925).

See also Price v. Green, 16 M. & W. 346 (1847); Oregon Steam Navigating Co. v. Windsor, 20 Wall. 64 (U. S., 1873) (where effect was given to the legal portion of a contract which also contained a provision in illegal restraint of trade); Leavitt v. Palmer, 3 N. Y. 19 (1849) (which involved a statute prohibiting banks from issuing any bill or note unless payable on demand with interest); Conklin v. Silver, *infra* Note 6.

⁶ 187 Iowa 819, 174 N. W. 573 (1919).

⁷ Doherty v. Eckstein Brewing Co., *supra* Note 1.

⁸ *Ibid.* at 712, 191 N. Y. Supp. at 62.

But where as in the Conklin case, *supra*, the use of the premises was not restricted by the contract to a *single* purpose, the subsequent enactment of prohibitory statutes affecting less than all of the purposes contemplated by the contract did not invalidate the instrument, and a good cause of action might be predicated thereon.

A cause of action may also be based upon a contract, valid on its face, which under certain circumstances may not be lawfully performed.⁹ Speaking of such a lease, which was shown to be impossible of performance because of an ordinance prohibiting the use of premises for the sale of intoxicating liquors within a certain distance from an elementary school, the Court said:¹⁰

"It is a generally accepted rule that when a contract is to do a thing, which cannot be performed without violation of the law, it is valid; in the *absence*, at least, of proof that the intention of both parties was that the law should be violated. The construction of a contract should be, when it is possible, in favor of its legality. Co. Litt. 42, 83, *Shore v. Wilson*, 9 Clark & Fin. at 397."¹¹ (Italics ours.)

And in the case of *Raner v. Goldberg*,¹² the Court held that a lease of certain premises to be used as a dance hall was not unlawful, as the parties did not intend to violate the law, but to use the premises for that purpose only when the lessee had obtained the necessary license to conduct such an enterprise. But since the sole use contemplated by the parties required such license, and it was refused by the public officer in charge, the lease became illegal, and the plaintiff could not recover rent paid in advance in the absence of an agreement to that effect, should the license be refused.

In the recent case of *Municipal Metallic Bed Manufacturing Corporation v. Dobbs*,¹³ the plaintiff leased from the defendant certain premises in Brooklyn, said premises to be used by it for the purpose of manufacturing metal beds and the retail selling of beds, bedding and furniture. The lease contained a provision

"That said landlords warrant that the manufacture of metal beds under leased premises is not in violation of any federal, city or state ordinance or statute or any restriction imposed against such leased premises, and that said landlords will indemnify said tenant for any loss sustained by said tenant

⁹ *Shedlinsky v. Budweiser*, 163 N. Y. 438, 57 N. E. 620 (1900).

¹⁰ *Ibid.* at 439, 57 N. E. at 620.

¹¹ That contracts should be construed wherever possible in favor of their legality, see *Security Mortgage Co. v. Thompson*, *supra* Note 1; *Curtis v. Gokey*, 68 N. Y. 300 (1877); *Lorillard v. Clyde*, 86 N. Y. 384 (1881); *Manson v. Curtis*, 223 N. Y. 324, 119 N. E. 559 (1918); *Cohen v. Berlin & Jones*, 9 App. Div. 425, 41 N. Y. Supp. 345 (1st Dept., 1896).

¹² 244 N. Y. 438, 155 N. E. 497 (1915).

¹³ 253 N. Y. 313, 171 N. E. 75 (1930).

as a result of the existence of such restriction, ordinance or statute." ¹⁴

There is no implied covenant in a lease that the premises are fit for the contemplated purpose of the tenant, the general rule of *caveat emptor* applying. ¹⁵

The contemplated use, in the instant case, was in fact contrary to the Zoning Laws of the City of New York, ¹⁶ the Building Code of the Bureau of Buildings, ¹⁷ and the charter of the City of New York, ¹⁸ and the plaintiff was forced to vacate the premises by an order of a city magistrate, for violation of the law.

In an action brought on the warranty to recover damages sustained by reason of its inability to use the premises for any of the contemplated purposes of the lease, the trial Court denied a motion to dismiss the complaint on the ground of legal insufficiency, but was reversed by the Appellate Division, by a divided court, ¹⁹ on the grounds

- (1) that the complaint was based upon an illegal lease, and hence no recovery could be predicated thereon, and
- (2) that the alleged misrepresentations of the law could not be considered fraudulent, but merely an expression of opinion in regard thereto.

The Court of Appeals reversed the decision, holding that the complaint stated a cause of action, and the plaintiff could recover on the warranty.

Stating the general rules cited above, the Court distinguishes this case from actions brought to recover rent paid on an unlawful lease, and also from those cases in which it was sought to recover indemnity for a violation of the law. One cannot indemnify another against the consequences of his illegal acts, ²⁰ but where the indemnitee has no knowledge of the illegality of the contemplated acts, he may recover on a promise to indemnify. ²¹ The distinction is made between

¹⁴ *Ibid.* at 315, 171 N. E. at 75.

¹⁵ *Jaffe v. Harteau*, 56 N. Y. 398 (1874); *Franklin v. Brown*, 118 N. Y. 110, 23 N. E. 126 (1889); *Daly v. Wise*, 132 N. Y. 837 (Mem. Op., 1892); *Carey v. Kreizer*, 26 Misc. 755, 57 N. Y. Supp. 79 (1899). For exceptions to rule, see (1930) 44 Harv. L. Rev. 132.

¹⁶ Amended Building Zone Resolution, City of New York (1924), art. II, sec. 4, par. a.

¹⁷ Building Code of the Bureau of Buildings, art. I, sec. b.

¹⁸ Charter of the City of New York, sec. 719b.

¹⁹ 228 App. Div. 659, 239 N. Y. Supp. 881 (2nd Dept., 1930).

²⁰ *Burger v. Koelsch*, *supra* Note 1; *Knelland Rogers*, 2 N. Y. Sup. Ct. 579 (1829).

²¹ *Coventry v. Barton*, 17 John. 142 (N. Y., 1818); *Stone v. Hooker*, 9 Cow. 153 (N. Y., 1826); *Appleton v. Warbasse*, 92 Misc. 42, 155 N. Y. Supp. 987 (1915); *Cf. Jewett Publishing Co. v. Butler*, 159 Mass. 517, 34 N. E. 1087 (1893); *Peterson v. Chicago Ry. Co.*, 119 Wis. 197, 96 N. W. 532 (1903);

indemnification against the existence of certain facts, and indemnification against the existence of certain laws: in the latter case, prior knowledge of the law will preclude recovery, while knowledge of the facts is immaterial thereto. If this were not the rule, it would be a simple matter to protect oneself from the consequences of one's illegal acts, and such immunity would incite rather than discourage unlawfulness.

Contracts of indemnity, where the indemnitee had no knowledge of illegality, have often been upheld in this and other jurisdictions.²² An excellent example of this is to be found in *Appleton v. Warbasse*,²³ where a recovery was allowed on a contract of indemnity between an author and publisher, the author agreeing to save harmless the publisher from the consequences of the publication of illegal or libellous matter, no such unlawful publication being actually intended by the parties. Here, too, as the Court points out, no violation of the law was intended by the parties, but "the complaint looks to compliance with the law rather than non-compliance."²⁴ The Court says:

" * * * the covenant or guaranty of indemnity sued on is not an illegal contract, and it may be enforced without any violation of law by the tenant. The fact that the lease may not lawfully be performed does not make the guaranty illegal. It stands on its own footing."²⁵

The root of this principle was authoritatively enunciated over a century ago. Reviewing the English cases in *Armstrong v. Toller*,²⁶ Marshall, *Ch. J.*, deduced the rule "that where a contract grows immediately out of, and is connected with, an illegal or immoral act, it cannot be enforced. But if the promise is entirely disconnected with the illegal act, and is founded on a new consideration, it is not affected by the illegality of the act, although it was known to the party to whom the promise was made."²⁷ The Court of Appeals in the *Municipal* case puts the contract of indemnity there on the same footing as if it were entirely disconnected with the lease, which is the original contract, and as though founded on a different consideration.

Nor is the second ground of the Appellate Division for dismissing the complaint in this action tenable. The action is not based, as the Court of Appeals points out, on false representation, but on

²² *Supra* Note 21.

²³ 92 Misc. 42, 155 N. Y. Supp. 987 (1915). See also *Jewett v. Butler*, *supra* Note 21.

²⁴ *Supra* Note 13 at 318, 171 N. E. at 76.

²⁵ *Ibid.* at 316, 171 N. E. at 76.

²⁶ 11 Wheat. 258 (U. S., 1826), cited in *Leavitt v. Blatchford*, 5 Barb. 9 (N. Y., 1848).

²⁷ *Leavitt v. Blatchford*, *supra* Note 26 at 22.

express warranty. It is true, as Professor Williston says,²⁸ that as a general rule

"A representation of what the law will or will not permit to be done is one on which the party to whom it is made has no right to rely; and if he does so it is his folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such."²⁹

He also suggests that in every case the test to be applied is whether the reliance of the injured party was justified by the relation between the parties, or the expert knowledge which the maker of the statement purported to have.³⁰ While it cannot be said, perhaps, that the landlord in the instant case had "expert knowledge" within the meaning of Professor Williston's proposed test, he has taken it upon himself to warrant the existing law applicable to his property, and we fully agree with the Court's statement that

"There is no implied guaranty that an opinion is sound, but *no reason exists why an express guaranty as to the law applicable to the facts may not be made.*" (Italics ours.)³¹

On this aspect of the case, it was urged by the defendant that as every man is presumed to know the law, the plaintiff had no right to rely even on an express warranty. Knowing, by presumption, that he is contravening the law, he cannot be indemnified against the consequences of such an act, within the rule stated above. In answer to this, the Court says:

"No presumption exists that all men know the law. The maxim 'a man is presumed to know the law' is a trite, sententious saying, 'by no means universally true.' Ignorance of the law does not excuse persons so as to exempt them from the consequences of their acts, such as punishment for criminal offenses. * * * Speaking broadly, we may say that all persons are treated as if they knew the law in passing on the character of their acts. In that qualified sense is knowledge of the law imputed to every one."³²

The maxim has often been applied in many jurisdictions to civil actions, in which the character of the acts of the parties has not been

²⁸ Williston, Contracts, *supra* Note 2, sec. 1495.

²⁹ Fish v. Clelland, 33 Ill. 238, 243 (1864), quoted with approval in Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203 (1875).

³⁰ *Supra* Note 28.

³¹ *Supra* Note 13 at 317, 171 N. E. at 76.

³² *Ibid.*

in issue,³³ and we venture to state that it has been assumed to be the law by its practitioners as well as its scholars, however palpable a legal fiction it has seemed. While it may in some cases be fairly simple to discover the law applicable to a given state of facts, no one is more aware than lawyers and judges how difficult it sometimes is to find the law applicable to others, as in the case of titles to real property, the validity of which are constantly being guaranteed by Title Companies. The Court, in making this analogy with the right to occupy a building for factory purposes in New York City, suggests that thus they may often "guarantee the application of real estate law to difficult and baffling problems, to be finally settled only by the courts of last resort."³⁴

Should the Court decide that the occupation of the assured was illegal, the maxim would not preclude the plaintiff from recovering under his contract of insurance. Just as here the landlord warrants that the contemplated use of his premises is legal, and if illegal he must answer in damages, so the title company must answer to the assured if the title it has guaranteed is illegal. Neither can now be heard to say that since "every man is presumed to know the law," the indemnitee had no right to rely on the express warranty of legality. We submit that this decision of the Court of Appeals is sound in its refusal to apply an ancient and unwieldy maxim of the law to a modern commercial problem, and is in accordance with modern legal tendencies.

ESTHER L. KOPPELMAN.

A LIMITATION OF THE RULE AFFECTING INJURIES ARISING OUT OF
AND IN THE COURSE OF EMPLOYMENT.

The courts have repeatedly stated that the Workmen's Compensation Law should be construed broadly and liberally¹ because it is the expression of what was regarded by the Legislature as a wise public policy concerning injured employees.² The Law was adopted

³³ North Birmingham St. Ry. Co. v. Calderwood, 89 Ala. 247, 7 So. 360 (1890); Central R. & B. Co. v. Brunswick R. Co., 87 Ga. 386, 13 S. E. 520 (1891); Palmyra v. Morton, 25 Mo. 593 (1857); Buffalo v. Webster, 10 Wend. 99, N. Y. (1833); Hope v. Alton, 214 Ill. 102, 73 N. E. 406 (1905); Burger v. Koelsch, *supra* Note 1; Markowitz v. Arrow Cons. Co., 102 Misc. 532, 169 N. Y. Supp. 159 (1918); Rockwell v. Eiler's Music House, 67 Wash. 478 (1912); Anson, Contracts (6th ed., 1907), 260.

³⁴ *Supra* Note 13 at 317, 171 N. E. at 76.

¹ Matter of Petrie, 215 N. Y. 335, 109 N. E. 549 (1915); Costello v. Taylor, 217 N. Y. 179, 111 N. E. 755 (1916); Winfield v. N. Y. C. & H. R. R. Co., 216 N. Y. 284, 110 N. E. 614 (1915); Moore v. Lehigh Valley R. R. Co., 217 N. Y. 627, 111 N. E. 1097 (1916).

² Matter of Petrie, *supra* Note 1.