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CONTRACTS - ILLEGALITY - RECOVERY BY PARTY NOT LICENSED AS STATUTE REQUIRES

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CONTRACTS — ILLEGALITY — RECOVERY BY PARTY NOT LICENSED AS STATUTE REQUIRES — *P*, an unlicensed milk dealer, sold milk to *D*, also a milk dealer. By statute it was made unlawful for a milk dealer “to buy milk or sell milk to a milk dealer who is unlicensed,” and violations were made a misdemeanor punishable by fine and/or imprisonment. *P* sued to recover the contract price of milk delivered and *D* set up counterclaims for breach of contract and overpayment, and asserted that *P* was barred from recovery, since he had failed to obtain a license. *Held*, *P* was not barred from recovery by failure to obtain license. *Rosasco Creameries, Inc. v. Cohen*, 276 N. Y. 274, 11 N. E. (2d) 908 (1937), reversing 249 App. Div. 228, 292 N. Y. S. 1 (1936).

It is generally stated that contracts expressly forbidden by statute are illegal and that there can be no recovery either in an action on the contract¹ or in quasi-contract.² However, where the statute imposes a penalty for doing the act or requires a license, the enforceability of a contract in violation of the statute is not so predictable. The courts are faced with the problem whether the imposition of a penalty for doing the forbidden act or for doing the act without a license is to be exclusive, or whether the further civil sanction of unenforceability of

¹ 2 CONTRACTS RESTATEMENT, § 580 (1932); 3 WILLISTON, CONTRACTS, § 1765 (1931). The common law maxim is “*Ex dolo malo non oritur actio*.” (No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.)

² Nor will a party be allowed to recover in quasi-contract for benefits conferred if the contract is expressly prohibited and unenforceable where the parties are in *pari delicto*. KEENER, QUASI-CONTRACTS 267-277 (1893).

contracts in violation of the statute shall be imposed.³ A few courts deny recovery categorically where the statute forbids the act without a license or where a penalty is imposed for doing the act without a license.⁴ However, most courts look to the legislative intent in both types of cases, applying varied techniques to arrive at this intent.⁵ Thus, where the sole purpose of the statutory requirement is to secure revenue, the courts generally deem the penalty imposed to be sufficient without the added sanction of unenforceability.⁶ But where the purpose of the statute is deemed to be for the protection of the public health or morals, a contract in violation of the statute is generally unenforceable.⁷ The "public protection-revenue" classification does not always lead to an adequate or legitimate conclusion as to statutory intent.⁸ Where, as in the principal case, economic stability within the particular business is the chief purpose of the statute, to hold unenforceable contracts in violation of the licensing statute may lead to unjustifiably harsh results.⁹ A better approach would seem to be that employed by the court in the instant case in considering for whose protection the statute was designed,¹⁰ the imminence of injury to the public, and the severity of the penalty imposed.¹¹ Though courts generally, as stated above,

³ Gellhorn, "Contracts and Public Policy," 35 *COL. L. REV.* 679 (1935). Where an act is made criminal the question of whether or not tort liability will arise on committing the crime presents an analogous problem.

⁴ *Douthart v. Congdon*, 197 Ill. 349, 64 N. E. 348 (1902); *Milton Schnaier & Co. v. Grigsby*, 61 Misc. 325, 113 N. Y. S. 548 (1908); *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230 (1888); *Wickes-Nease v. Watts*, (Tex. Civ. App. 1902) 70 S. W. 1001; *Covington v. Threadgill*, 88 N. C. 186 (1883); *Holt v. Green*, 73 Pa. 198 (1873); *Yount v. Denning*, 52 Kan. 629, 35 P. 207 (1894).

⁵ *Miller v. Ammon*, 145 U. S. 421, 12 S. Ct. 884 (1892) (contract unenforceable in absence of opposite intent to be gathered from purpose of statute); *Barriere v. Depatie*, 219 Mass. 33, 106 N. E. 572 (1914) (not to hold contract void unless necessary to legislative purpose).

⁶ *Gann v. Long*, 2 Ala. App. 274, 56 So. 606 (1911) (cotton buyer failed to pay license fee); *Toole v. Wiregrass Development Co.*, 142 Ga. 57, 82 S. E. 514 (1914) (real estate agent did not pay license tax); *Banks v. McCosker*, 82 Md. 518, 34 A. 539 (1896) (peddler without license); *Hughes v. Snell*, 28 Okla. 828, 115 P. 1105 (1911) (real estate agent failed to pay license tax); *Vermont Loan & Trust Co. v. Hoffman*, 5 Idaho 376, 49 P. 314 (1897) (banker failed to procure license); *Howard v. Lebbey*, 197 Ky. 324, 246 S. W. 828 (1923) (painter failed to secure license); 30 A. L. R. 834 (1924); 42 A. L. R. 1226 (1926); 3 *WILLISTON, CONTRACTS*, § 1768 (1931).

⁷ 3 *WILLISTON, CONTRACTS*, § 1766 (1931).

⁸ Gellhorn, "Contracts and Public Policy," 35 *COL. L. REV.* 679 (1935).

⁹ The primary purpose of the Milk Control Law [18A N. Y. Consol. Laws (McKinney, Supp. 1937)] was not the protection of public health, but to prevent unlimited cut-throat competition within the milk business. See dissenting opinion, *Rosasco Creameries v. Cohen*, 249 App. Div. 228, 292 N. Y. S. 1 (1936); 32 *ILL. L. REV.* 102 (1937); 50 *HARV. L. REV.* 1320 (1937).

¹⁰ *Oklahoma Portland Cement Co. v. Pollock*, (Okla. 1937) 73 P. (2d) 427; 36 *MICH. L. REV.* 837 (1938).

¹¹ Similar reasoning was used by the court in *Fosdick v. Investors' Syndicate, Inc.*, 266 N. Y. 130, 194 N. E. 58 (1934), where a vendee of an unlicensed foreign cor-

refer to legislative intent as the criterion for determining whether or not contracts in violation of a statute imposing a penalty or requiring a license shall be enforceable or not,¹² the frequent absence of any evidence of legislative intent would indicate that public policy should be the prime consideration.¹³

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poration was not permitted to recover money paid, though the foreign corporation had failed to obtain a license before doing business as the statute required. The result has been recognized as unusual in light of authority to the contrary. 21 CORN. L. Q. 331 (1936).

¹² Cases cited *supra*, notes 5, 6.

¹³ Gellhorn, "Contracts and Public Policy," 35 COL. L. REV. 679 (1935).