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CONTRACTS - ILLEGALITY - EFFECT OF PARTIAL ILLEGALITY

CONTRACTS — ILLEGALITY — EFFECT OF PARTIAL ILLEGALITY[1] —It has long been accepted[2] that the illegality of part of a contract does not necessarily make the entire contract unenforceable. However, it is difficult to predict in a given case whether or not the court will hold that recovery may be had upon the lawful part of the contract. It is often said that such recovery will be allowed when the illegal portion of the contract can be clearly separated from the lawful part, but even when stated in such broad terms — so broad in fact that it is of little help in solving the problem — the rule is, perhaps, not without exception.[3]

Professor Williston has taken the position that, except where the whole transaction is for an illegal purpose or the illegal part is grossly immoral, any legal promise in a contract can be enforced if it rests entirely upon legal consideration.[4] Thus, if *A's* legal consideration is the exchange for two promises by *B*, one legal and the other illegal,

[1] "A bargain is illegal . . . if either its formation or its performance is criminal, tortious, or otherwise opposed to public policy." 2 AM. L. INST. REST. CONTRACTS, sec. 512 (1932). Although there are some exceptions, most of the courts use the term "illegal" in the sense here defined.

[2] Pigot's Case, 11 Co. Rep. 26b, 77 Eng. Repr. 1177 (1614).

[3] Pulpwood Co. v. Green Bay Paper & Fiber Co., 168 Wis. 400, 170 N. W. 230 (1919).

[4] 3 WILLISTON, CONTRACTS, sec. 1779 *et seq.* (1920). It seems that the word "consideration" as used in this connection means the agreed exchange for the promise.

A can recover upon the legal promise.[5] Even if *A's* consideration is partly illegal he may recover upon that promise which rests entirely upon legal consideration. This view has been adopted by most of the courts which have made any attempt to analyze the problem. It is a good working rule and is certainly based upon criteria which should always be considered in determining whether the remainder should or should not be enforced. It is submitted, however, that this test should not be conclusive. An analysis of the problem, which, as suggested by such test, is twofold, will perhaps reveal that other factors ought also to be considered.

When a court is called upon to enforce a contract which is illegal in one or more of its parts it must decide, (1) whether the same public policy which makes the part or parts illegal also requires that the plaintiff be denied recovery upon the rest of the contract, and, if not, (2) whether it is fair to the parties themselves to enforce the rest of the contract after having already declared that part of it — often an important part — is illegal and consequently unenforceable. Of course, the same criteria will often be involved in determining both questions, and this perhaps explains the fact that very few cases have recognized these two questions as being separate and distinct. However, very often in the application of general rules the courts indicate the factors which influence them in deciding one way or the other, and, in order to be better able to predict what effect partial illegality will and should have, it is well to attempt to discover just what these factors are.

I.

There is certainly a definite public interest in diminishing the number of illegal agreements. The courts have always felt that this interest is sufficiently strong to justify their refusal to enforce any bargain where the entire consideration on one side is illegal, at least unless the plaintiff is justifiably innocent.[6] When they are faced with a contract where only part of the consideration is illegal, they have an equal opportunity to promote the public interest mentioned above by holding that the entire contract is unenforceable. In such a case, however, they should balance the interest of the public against the meritorious interest of the plaintiff and make their decision accordingly. They are con-

[5] However, Mr. Williston points out that if *A's* side is executory there can be no recovery, since his promise, resting partially upon illegal consideration, is unenforceable, and hence insufficient to support *B's* legal promise. 3 WILLISTON, CONTRACTS, sec. 1782 (1920). The courts have not always made this distinction. See Poultry Producers, Inc. v. Barlow, 189 Cal. 278, 208 Pac. 93 (1922); Erie Ry. v. Union Locomotive & Express Co., 35 N. J. L. 240 (1871).

[6] 3 WILLISTON, CONTRACTS, secs. 1630, 1631 (1920).

stantly doing just this, and in so doing they take account of several factors which are of great weight in reaching a correct conclusion in the particular case.

The first of these is the importance of the public interest which has been jeopardized. The numerous dicta to the effect that when part of a contract is *malum in se* or grossly immoral the entire contract is illegal show that this question is always in the courts' minds. It has often been one of the reasons for refusing to allow the plaintiff any relief.[7] The decision in the case of *Town of Meredith v. Fullerton*[8] turned on the answer to this very question. There the town selectmen leased a town building to be used as a theater, and promised not to grant to anyone else in the town a license to operate a theater. The court held that such a promise was "clearly a renunciation of judicial duties vested in them as a licensing board," was to that extent immoral, and that consequently it vitiated the entire lease.

The second factor of importance is the extent to which the public interest has been jeopardized. To illustrate the importance of this factor one can cite a group of cases which have held that the entire contract is illegal when both the illegal and legal parts are part of one unlawful purpose or combination.[9] These cases involved attempts to create monopolies or unreasonable restraints of trade on a large scale. In such cases the widespread economic detriment caused by such purpose or combination is of sufficient importance to the public to justify the courts in holding any part of such a scheme illegal.

Another factor to be considered is the relative responsibility of the parties for the illegal part — was the plaintiff more responsible for its inclusion in the contract than the defendant? [10] The case of *Mason v. Provident Clothing Co.*[11] amply illustrates the importance of the answer to this question. In that case the defendant had entered the employ of the plaintiff, a powerful distributing company, and had contracted that if he should leave their employ he would not engage in

[7] Hanauer v. Doane, 12 Wall. (79 U. S.) 342, 20 L. ed. 439 (1871); Bick v. Seal, 45 Mo. App. 475 (1891); McLane's Adm'r v. Dixon, 30 Ky. L. Rep. 683, 99 S. W. 601 (1907).

[8] 83 N. H. 124, 139 Atl. 359 (1927).

[9] Santa Clara Valley Mill & Lumber Co. v. Hayes, 76 Cal. 387, 18 Pac. 391 (1888); Pulpwood Co. v. Green Bay Paper & Fiber Co., 168 Wis. 400, 170 N. W. 230 (1919); Burlington, C. R. & N. Ry. v. Northwestern Fuel Co., (C. C. Minn. 1887) 31 Fed. 652. But see Erie Ry. v. Union Locomotive & Express Co., 35 N. J. L. 240 (1871).

[10] It is interesting to note that one of the exceptions to the rule that there can be no recovery in quasi-contract for benefits conferred under an illegal contract is the case where the plaintiff is not in *pari delicto* with the defendant. (WOODWARD, QUASI-CONTRACTS, sec. 138 (1913).

[11] [1913] A. C. 724.

the same occupation within a twenty-five mile radius of London for a period of three years. When the employment ended the defendant did commence soliciting the very customers he had served while in the plaintiff's employ, and the plaintiff brought suit. The court held that the contract was an unreasonable restraint of trade because it covered more territory than reasonably necessary to protect the plaintiff's business, and that although the defendant was operating in territory where he could legally have been prevented from so doing, the illegal part of the contract made the whole bad, and the plaintiff was denied relief. Here was a contract where illegality was at least doubtful, and the public interest concerned was not considered as having been greatly injured. As a matter of fact the English courts had held,[12] and have since held,[13] that when such a contract is made as incidental to the sale of a business the plaintiff can enforce it to the extent that the restraint is reasonable. But in answer to this argument Lord Moulton said:[14]

> "It would in my opinion be pessimi exempli if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance and . . . carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master. It is sad to think that in the present case this appellant, whose employment is a comparatively humble one, should have to go through four Courts before he could free himself from such unreasonable restraints as this covenant imposes, and the hardships imposed by the exaction of unreasonable covenants by employers would be greatly increased if they could continue the practice with the expectation that, having exposed the servant to anxiety and expense of litigation, the Court would in the end enable them to obtain everything which they could have obtained by acting reasonably."

This opinion clearly shows that in circumstances of such unequal bargaining power, where the plaintiff is responsible for the illegal part, the public interest in diminishing the number of such illegal agreements is sufficiently strong to justify a refusal to enforce the legal part.[15]

[12] Price v. Green, 16 M. & W. 346, 153 Eng. Repr. 1222 (1847).

[13] Goldsoll v. Goldman, [1915] 1 Ch. 292.

[14] Mason v. Provident Clothing Co., [1913] A. C. 724 at 745.

[15] Before this decision partial enforcement of partly illegal employment contracts had been both refused, Baker v. Hedgecock, 57 L. J. Ch. (N. S.) 889 (1888), and allowed, Mallan v. May, 11 M. & W. 653, 152 Eng. Repr. 967 (1843); Davies,

A fourth important consideration is the amount which the plaintiff will forfeit if he is denied recovery upon the legal part. Failure to consider this factor would render any process of balancing the meritorious interest of the plaintiff incomplete. Its importance is made especially significant by the fact that ordinarily there can be no recovery in quasi-contract for benefits conferred under an illegal contract.[16] Although only a few cases have mentioned this factor,[17] it is interesting to note that the case in which Ireland repudiated the rule that a mortgage or negotiable instrument is entirely void if any part of the consideration for it is the illegal sale of liquor was one in which fifty-five fifty-sixths of the consideration was legal.[18] While the courts in this country in such cases hold that the instrument is entirely void,[19] they are often careful to remark that the plaintiff can recover on the legal consideration in an action on the original account for which the instrument was given, thus revealing that they, too, give consideration to what the plaintiff's forfeiture will be.[20]

2.

If, however, after considering the above factors the court feels that the plaintiff should recover upon the legal part of the contract, the next task is to separate the legal part from the illegal. If the plaintiff is attempting to enforce a promise which is itself perfectly legal but which rests upon consideration part of which is illegal, the great majority of the courts deny recovery, invoking the rule that a promise is entirely unenforceable if it rests partly upon illegal consideration.[21]

Turner & Co. v. Lowen, 64 L. T. 655 (1891). Since this decision it seems that partial recovery has always been denied regardless of the circumstances. Express Dairy Co. v. Jackson, 99 L. J. K. B. 181 (1929); Mulligan v. Corr, [1925] 1 Ir. Rep. 169. For the view of some of the States of this country, see the note to Whiting Milk Co. v. O'Connell, 277 Mass. 570, 179 N. E. 169 (1931), in 45 HARV. L. REV. 751 (1932).

[16] WOODWARD, QUASI CONTRACTS, sec. 135 (1913).

[17] Wesley v. Chandler, 152 Okla. 22, 3 Pac. (2d) 720 (1931), noted in 45 HARV. L. REV. 750 (1932); McCall Co. v. Hughes, 102 Miss. 375, 59 So. 794 (1912).

[18] Sheehy v. Sheehy, [1901] 1 Ir. Rep. 239. This case expressly refused to follow Scott v. Gillmore, 3 Taunt. 226, 128 Eng. Repr. 90 (1810).

[19] Hanauer v. Doane, 12 Wall. (79 U. S.) 342, 20 L. ed. 439 (1871); Widoe v. Webb, 20 Ohio St. 431 (1870); Braitch v. Guelick, 37 Iowa 212 (1873).

[20] Wadsworth v. Dunnam, 117 Ala. 661, 23 So. 699 (1897); Bick v. Seal, 45 Mo. App. 475 (1891). Such recovery on the account is allowed. Carleton v. Woods, 28 N. H. 290 (1854); Boyd v. Eaton, 44 Me. 51 (1857).

[21] The rule seems to have originated in the case of Featherston v. Hutchinson, Cro. Eliz. 199, 78 Eng. Repr. 455 (1580), where the plaintiff, a bailiff, released a prisoner and paid two shillings in exchange for the defendant's promise to pay the debt for which the prisoner had been condemned. The release being illegal, the court

A few courts have allowed full recovery upon the promise.[22] It is difficult to justify the latter decisions in view of the established reluctance of a court to enforce the exchange for an illegal consideration. The proper solution for such a case would perhaps be to allow quasi-contractual recovery for benefits conferred in the execution of the legal portion of the consideration.[23]

The plaintiff may be suing to enforce a promise which is partly illegal but is based entirely upon legal consideration. Here the court can be sure it is only enforcing the legal part by allowing recovery upon only the legal part of the promise.[24] If part of both the promise and the consideration for it are illegal and the illegal parts cannot be apportioned to each other, the court should treat this situation the same as it does that where the promise sued upon is entirely legal,[25] although the fact that there is illegality upon both sides might influence the court in deciding whether or not it should hold the entire contract unenforceable regardless of separation of the legal from the illegal. If the illegal parts are apportioned to each other there is no problem, for the court can hold the legal parts enforceable without any danger of enforcing the illegal part.[26]

held that the promise was unenforceable upon the ground that the *entire consideration was void*. Here, where the legal consideration seemed purely nominal, the court seemed to think that the entire contract should be illegal, rather than that the difficulty of apportionment prevented their enforcing that part of the promise resting on the legal consideration. If this distinction were kept in mind it would perhaps result in the allowance of quasi-contractual recovery for benefits conferred in the execution of the legal consideration in many cases where the consideration test prevents recovery upon the promise, i. e., those cases in which the test is invoked merely because the promise cannot be apportioned and public policy does not require that the entire contract be condemned.

[22] Fishell v. Gray, 60 N. J. L. 5, 37 Atl. 606 (1897); Nicholson v. Ellis, 110 Md. 322, 73 Atl. 17 (1909); Pierce v. Pierce, 17 Ind. App. 107, 46 N. E. 480 (1896).

[23] Recently the Supreme Court of Oklahoma, in a well considered case, allowed recovery upon the promise, but deducted from such recovery the amount estimated to be the exchange for the illegal consideration. Wesley v. Chandler, 152 Okla. 22, 3 Pac. (2d) 720 (1931), noted in 45 HARV. L. REV. 750 (1932). Is this so different from quasi-contractual recovery?

[24] Oregon Steam Nav. Co. v. Winsor, 20 Wall. (87 U. S.) 64, 22 L. ed. 315 (1874); Miller v. Atchison T. & S. F. Ry., 97 Kan. 782, 156 Pac. 780 (1916); Walker v. W. T. Rawleigh Co., 133 Okla. 75, 271 Pac. 166 (1928); Hood v. Legg et al., 160 Ga. 620, 128 S. E. 891 (1925).

[25] McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839 (1898); Estate of Ramsay v. Whitbeck, 183 Ill. 550, 56 N. E. 322 (1900); Bryant Lumber Co. v. Fourche River Lumber Co., 124 Ark. 313, 187 S. W. 455 (1916); In re Shannon's Estate, 289 Pa. 280, 137 Atl. 251 (1927).

[26] Edleson v. Edleson, 179 Ky. 300, 200 S. W. 625 (1918); Huber v. Culp, 46 Okla. 570, 149 Pac. 216 (1915). Where the plaintiff is quite innocent, it seems the

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In reaching a decision upon the various fact situations above suggested, the court must also take into consideration the rights of the parties. If the plaintiff is seeking to enforce a legal promise part of the consideration for which is illegal, and the consideration has been executed the defendant cannot complain. He has received all he bargained for.[27] If only the illegal part of the consideration has been executed, still the defendant cannot complain because he can still enforce the remainder of what he bargained for. If, however, the illegal part is unexecuted the defendant can justly object.[28] He cannot enforce performance of the illegal consideration, nor can he get damages for its nonperformance. Thus from the standpoint of the interest of the parties as well as that of the public the proper solution for such a case would be to allow quasi-contractual recovery for benefits conferred in the execution of the legal consideration.

If the plaintiff's consideration, which is legal, is executed, and he is seeking to enforce the legal part of the defendant's promise, he should recover, since the defendant has received more than the exchange for this part of his promise.[29] If the plaintiff's consideration has not been executed he should not succeed, since the illegality upon the defendant's part makes the plaintiff's promise unenforceable and thus a failure of consideration might result.[30] When the consideration on both sides is partially illegal the case can be decided by the application of the principles of the above examples,[31] but when the illegal portions are the complete exchange for each other the interest and intent of the parties becomes especially prominent. In such a case the question is simply, do the illegal parts go to the root of the contract — would the parties have made the contract without these illegal parts? An opportunity for the development of the case law upon this particular problem as well as upon other questions concerning partial illegality has been

courts will go far to apportion the illegal parts to each other. In re Craig's Estate, 298 Pa. 235, 148 Atl. 83 (1929).

[27] King v. King, 63 Ohio St. 363, 59 N. E. 111 (1900).

[28] Edwards County v. Jennings, 89 Tex. 618, 35 S. W. 1053 (1896); Hagler v. City of Salem, (Mo. 1933) 62 S. W. (2d) 751.

[29] Farmers Bank v. Bass, 218 Ky. 813, 292 S. W. 489 (1927); Nye v. Chase Nat. Bank, (C. C. A. 8th, 1929) 34 F. (2d) 435; Pelc v. Kulentis, 257 Ill. App. 213 (1930); Schibi v. Miller, (St. Louis Ct. of App. 1925) 268 S. W. 434.

[30] Lehigh Valley R. R. v. United Lead Co., 102 N. J. L. 545, 133 Atl. 290 (1926); Lindsay v. Smith, 78 N. C. 328 (1878). This distinction is not always recognized. Poultry Producers, Inc. v. Barlow, 189 Cal. 278, 208 Pac. 93 (1922). In a leading case part of the plaintiff's consideration was a bond which he executed to the defendant. Price v. Green, 16 M. & W. 346, 153 Eng. Repr. 1222 (1847).

[31] Edwards v. Mullen, (Cal. App. 1933) 24 Pac. (2d) 936 (recovery denied where both sides were executory).

conveniently furnished by the recent litigation concerning the standard form of contract recently put in use in the motion picture industry.

Motion picture distributors controlling ninety-eight per cent of that business adopted a standard form of contract to be used in all dealings between themselves and exhibitors. One clause provided for compulsory arbitration of all disputes concerning rights under the contract, and a breach of this clause was made ground for repudiation. Such a breach also made it practically impossible for exhibitors to get any films, since the distributors collectively agreed to refuse to deal with exhibitors who had refused to arbitrate or comply with the arbitrators' decision. At the suit of the United States the distributors were enjoined from engaging further in this conspiracy in restraint of trade.[32] As a result, many exhibitors who had signed such contracts attempted to repudiate them upon the ground that the contracts were illegal and consequently unenforceable. In the ensuing litigation the courts have not agreed as to just what the injunction suit actually decided. Some have taken the position that it held the entire contract illegal,[33] while others have decided that only the arbitration clause was so held.[34] It is this uncertainty about the meaning of the original suit [35] that makes these cases unique in the application of principles of partial illegality to them.

If a court with an opportunity to interpret that decision either way decides that merely the arbitration clause was held illegal, it certainly comes very close to saying that no public interest requires that the entire contract be unenforceable, since the original suit was at the instance of the United States, representing the public interest, and its main pur-

[32] United States v. Paramount Lasky Corp., (D. C. S. D. N. Y. 1929) 34 F. (2d) 984, aff'd, Paramount Lasky Corp. v. United States, 282 U. S. 30, 51 Sup. Ct. 42 (1930).

[33] United Artists Corp. v. Piller, 62 N. D. 289, 244 N. W. 20 (1932). See note, 42 YALE L. J. 431 (1933); Fox Film Corp. v. Tri-State Theatres, 51 Idaho 439, 6 Pac. (2d) 135 (1931). See Fox Film Corp. v. C. & M. Amusement Co., (D. C. S. D. Ohio 1932) 58 F. (2d) 337.

[34] United Artists Corp. v. Odeon Bldg., Inc., (Wis. 1933) 248 N. W. 784; Paramount Famous Lasky Corp. v. National Theatres Corp., (C. C. A. 4th, 1931) 49 F. (2d) 64; Metro-Goldwyn-Mayer Dist. Corp. v. Bijou Theatre Co., (D. C. Mass. 1931) 50 F. (2d) 908; Universal Film Ex. Corp. v. West, 163 Miss. 272, 141 So. 293 (1932); Fox Film Corp. v. Buchanan, 17 La. App. 285, 136 So. 197 (1931); Fox Film Corp. v. Ogden Theatre Co., (Utah 1932) 17 Pac. (2d) 294.

[35] Some cases have asserted that these contracts were entirely collateral to the illegal combination and thus unaffected by it. Columbia Pictures Corp. v. Bi-Metallic Inv. Co., (D. C. Colo. 1930) 42 F. (2d) 873; Metro-Goldwyn-Mayer Dist. Corp. v. Cocke, (Tex. Civ. App. 1933) 56 S. W. (2d) 489. This introduces a nice question. Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431 (1902); Continental Wall Paper Co. v. Voight & Sons Co., 212 U. S. 227, 29 Sup. Ct. 280 (1909); Wilder Mfg. Co. v. Corn Products Co., 236 U. S. 165, 35 Sup. Ct. 398 (1914).

pose was to condemn the parts of this combination which were inimical to public welfare. Thus, although from a consideration of the widespread economic detriment caused by this combination, and the distributors' active part in causing the arbitration clause to be included in the contract,[36] it might correctly be held that no part of the contract should be enforced, still, when a court interprets the original suit as condemning only the arbitration clause, and itself holds that the entire contract is not illegal in a strict sense, it would seem to have decided that, as far as the public interest is concerned, that part of the contract relating to the sale and purchase of films, severable from the arbitration clause, should be enforced. If so, then the only thing to prevent such enforcement is the interest of the parties.

The cases which have dealt with this problem on the theory that only the arbitration clause is illegal have not made it clear that it is the interest of the parties which they are considering, but, nevertheless, a majority of them have perhaps reached a correct result, i. e., that the rest of the contract can be enforced.[37] It seems clear that the main purpose of the contract is the purchase and sale of films, and the arbitration clause is only incidental to, and not part of the substance of, the contract, as such clauses have so often been held to be.[38] The courts which have taken the minority view have stressed the fact that the parties provided that breach of the arbitration clause should be ground for repudiation of the entire contract.[39] While this consideration shows that these courts are thinking somewhat of the interest of the parties, it perhaps should not be controlling, since it is quite probable that this stipulation was merely a club used by the distributors to enable them to carry through more effectively their illegal combination rather than an indication that the arbitration clause was such a substantial part of the contract that the parties would not have made it without such clause included.

I would seem from the many different conclusions reached in this group of cases that the general rules applied to cases of partial illegality are not always adequate. Perhaps these cases would have been more

[36] See note, "Status of the Standard Form Contract in the Motion Picture Industry," 42 YALE L. J. 431 (1933).

[37] Fox Film Corp. v. Ogden Theatre Co., (Utah 1932) 17 Pac. (2d) 294; Paramount Famous Lasky Corp. v. National Theatres Corp., (C. C. A. 4th, 1931) 49 F. (2d) 64; Fox Film Corp. v. Buchanan, 17 La. App. 285, 136 So. 197 (1931).

[38] Blodgett Co. v. Bebee Co., 190 Cal. 665, 214 Pac. 38 (1923); United States Asphalt Ref. Co. v. Trinidad Lake Pet. Co., (D. C. S. D. N. Y. 1915) 222 Fed. 1006.

[39] United Artists Corp. v. Odeon Bldg., Inc., (Wis. 1933) 248 N. W. 784; Universal Film Ex. Corp. v. West, 163 Miss. 272, 141 So. 293 (1932). This point was also stressed in a case where the legal and illegal parts were perhaps not apportionable. Van Horn v. Kittitas County, (C. C. Wash. 1901) 112 Fed. 1.

uniformly and correctly decided if the problem had been attacked as involving the two distinct questions as to public policy and the interest of the parties, as suggested above. Such a treatment would at least have given the next court faced with such a case a more definite policy proposition to either accept or reject.

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