

## CONTRACTS

### EFFECT OF ILLEGALITY OF CONSIDERATION ON THE ENFORCEMENT OF BUILDING CONTRACTS

Plaintiff, a building contractor, entered into a contract to brick-veneer the defendants' residence, the bricks to be laid on their two-inch face. Defendants refused to pay and plaintiff sued for the contract price and other relief. Defendants urged that the contract was illegal under a provision of the Cincinnati building code, which provided that masonry veneer should not be less than four inches thick.<sup>1</sup> The section was introduced in evidence; others which made it unlawful to "maintain, occupy, or use" a building erected in violation of the code, and provided a penalty for violation, were merely mentioned in counsel's brief. The Court stated that defendants were entitled to rely only on the section introduced in evidence, but decided the case in the light of all the sections referred to above. It nevertheless affirmed a judgment for the plaintiff.<sup>2</sup>

The Restatement of the Law of Contracts, Section 580, declares any bargain illegal if either the formation or performance is prohibited by statute. It specifies five indicia of legislative intent to prohibit, including the imposition of a penalty. The decided cases in general support this view. Even though the statute, or ordinance (treated as equivalents) does not expressly make the bargain or performance thereunder unlawful, it is held that the imposition of a penalty implies the illegality of the contract, and renders it unenforceable. Certain Ohio cases are in accord with this view.<sup>3</sup>

The general rule finds its clearest justification where the statute or ordinance is enacted under the police power of the state to protect the health, safety, or morals of the public, or to protect the public from fraud.<sup>4</sup> The Courts have, however, recognized certain exceptions.<sup>5</sup>

<sup>1</sup> Section 1661-4. Masonry veneer . . . Masonry veneer shall . . . be not less than 4 inches thick for more than one story. . . .

<sup>2</sup> *Fischer-Liemann Construction Co. v. Haase, et al.*, 64 Ohio App. 473, 18 Ohio Op. 209, 29 N.E. (2d) 46 (1940).

<sup>3</sup> *Massillon Savings & Loan Co. v. Finance Co.*, 114 Ohio St. 523, 527, 151 N.E. 645 (1926); *Ohio Farmer's Ins. Co. v. Todino*, 111 Ohio St. 274, 125 N.E. 25 (1924), overruled by *Commercial Credit Co. v. Schreyer*, 120 Ohio St. 568, 166 N.E. 808 (1929); *Croncis v. Toledo Scale Co.*, 89 Ohio St. 168, 106 N.E. 8 (1913); *B. & O. R. R. v. Diamond Coal Co.*, 61 Ohio St. 242, 55 N.E. 616 (1899); *Penna. R. R. Co. v. Wentz*, 37 Ohio St. 333 (1881); *Hooker v. De Palos*, 28 Ohio St. 251 (1876); *Spurgeon v. McElwain*, 6 Ohio 442, 27 Am. Dec. 266 (1834); *Jackson v. Bryant*, 33 Ohio App. 468, 169 N.E. 825 (1929); *Tillinghast v. Craig*, 9 Ohio C.D. 459, 17 Ohio C.C. 531 (1893); 28 Ohio N. P. (N.S.) 319 (1930).

<sup>4</sup> *Miller v. Ammon*, 145 U.S. 421 (1892); *Levison v. Boas*, 150 Cal. 185, 88 Pac. 825 (1907); *Smith v. Robertson*, 106 Ky. 472, 50 S.W. 852, 45 L.R.A. 510 (1899); *Randall v. Tuell*, 89 Maine 443, 36 Atl. 910 (1897); *Eastern Expanded Metal Co. v. Webb Granite Co.*, 195 Mass. 356, 81 N.E. 251, 11 Ann. Cas. 631 (1907); *Cashin v.*

The exception most important for our purposes is that based on the presumed intent of the legislature that the remedies on the contract shall be unaffected, to be determined from the language of the statute, the subject matter, the expressed purpose, the wrong it seeks to remedy, and general surrounding circumstances.<sup>6</sup> This doctrine of legislative intent is the basis of many Ohio decisions.<sup>7</sup>

The Courts, in construing legislative intent, have not laid down clear guiding principles.<sup>8</sup> In cases involving title to real property, the courts have usually held the contract valid to prevent disturbance of title.<sup>9</sup> In cases involving title to personal property, there is more conflict, but a number of courts, including Ohio's, have held these contracts valid.<sup>10</sup>

In the principal case, the Court applied the doctrine of presumed legislative intent to a contract for furnishing labor and materials. Although the weight of authority is contra,<sup>11</sup> the position taken by the principal case seems just in view of the extreme forfeiture and comparatively minor turpitude involved.<sup>12</sup> The Court has here balanced

Pliter, 168 Mich. 386, 134 N.W. 482 (1912); *McManus v. Fulton*, 85 Mont. 170, 278 Pac. 126 (1929); *N. Y. Cent. & Hudson R. R. Co. v. Williams*, 199 N. Y. 108 (1910); *Burger v. Roelsch*, 28 N.Y. Supp. 460 (1894); *Beman v. Tugnot*, 7 N.Y. Super. 153 (1851). But where the sole or main purpose of the statute is to obtain revenue, the courts have been far more reluctant to permit forfeitures and have normally allowed recovery on the contract. *Sunflower Lumber Co. v. Turner Supply Co.*, 158 Ala. 191, 48 So. 510 (1909); *Hughes v. Snell*, 28 Okl. 828, 115 Pac. 1105 (1911).

<sup>6</sup>The Courts will enforce a contract, although the act is prohibited by penal statute, if the person seeking relief is one of a class for whose benefit or protection the statute was enacted. *Bowditch v. New England Mutual Life Ins. Co.*, 141 Mass. 292, 4 N.E. 798 (1886); *Musser's Ex'r v. Chase*, 29 Ohio St. 577 (1876); *Union Mut. Life Ins. Co. v. McMillan*, 24 Ohio St. 67, (1873); *Oklahoma Portland Cement Co. v. Pollack*, 181 Okl. 266, 73 Pac. (2d) 427 (1937). Under this theory creditors, investors, and borrowers have been allowed recovery even though Fictitious Name Statutes, Blue Sky Laws, and Usury Statutes, respectively, have been violated. 45 A.L.R. 279-80.

<sup>6</sup>*Harris v. Runnels*, 12 Howard 79 (U.S. 1851); *Panghorn v. Westlake*, 36 Iowa (1873); *Niemeyer v. Wright*, 75 Va. 239 (1881); *Middleton v. Arnolds*, 13 Gratt. 489 (Va. 1856).

<sup>7</sup>*Commercial Credit Co. v. Schreyer*, *supra*, note 3; *Warren People's Market Co. v. Corbett & Sons*, 114 Ohio St. 126, 151 N.E. 51 (1926); *Tod v. Wick Bros. & Co.*, 36 Ohio St. 370 (1881); *Vining v. Bricker*, 14 Ohio St. 331 (1863); *Rossmann v. McFarland*, 9 Ohio St. 367 (1859); *State v. Buttles*, 3 Ohio St. 309 (1854); *Strong v. Darling & Walcott*, 9 Ohio 201 (1839).

<sup>8</sup>The imposition of a recurring penalty is generally deemed to evidence an intent that the contract should be unenforceable. 30 A.L.R. 835. On the other hand, a statute may, by proviso or otherwise, clearly show that it was not intended to affect civil liability. *Tod v. Wick Bros. & Co.*, *Vining v. Bricker*, *supra*, note 7; *Niemeyer v. Wright*, *supra*, note 6.

<sup>9</sup>*Panghorn v. Westlake*, *Middleton v. Arnolds*, both *supra*, note 7; *Strong v. Darling & Walcott*, *supra*, note 7.

<sup>10</sup>*Harris v. Runnels*, *Niemeyer v. Wright*, both *supra*, note 6; *Commercial Credit Co. v. Schreyer*, *supra*, note 3; *Warren People's Market Co. v. Corbett*, *Vining v. Bricker*, both *supra*, note 7.

<sup>11</sup>*Randall v. Tuell*, *Burger v. Roelsch*, *Beman v. Tugnot*, all *supra*, note 4; *Spurgeon v. McElwain*, *supra*, note 3.

<sup>12</sup>RESTATEMENT, CONTRACTS (1932), Section 600.

the social policy of not enforcing illegal contracts in order to prevent their formation, against the equities of the parties in the particular case, and found the latter more persuasive. Since the parties are in *pari delicto*, this position is not untenable,<sup>13</sup> but not many courts will permit recovery, even in quasi-contracts.<sup>14</sup>

J. B. S.

## CONVEYANCES

### COVENANT AGAINST INCUMBRANCES

The plaintiff purchased a lot from the defendant by warranty deed with covenant against incumbrances. A natural watercourse on the premises had been covered with concrete and sod in such a manner that it was not visible, and neither party knew of its existence. This covering collapsed causing damage to the building on the property. In a suit against the grantor, the court held that the concealed watercourse, which had existed less than twenty-one years, was not such an incumbrance as to constitute a breach of the covenant against incumbrances.<sup>1</sup>

When a purchaser is injured by defective title in the realty purchased, he usually must seek his recourse through an action for breach of an express covenant. In real property there are few implied warranties, in the absence of statutes creating them, and, except in the case of leases, none are implied from the mere conveyance of land.<sup>2</sup> Where the defect in title is not inconsistent with the passing of the estate, as in the principal case, the covenant against incumbrances seems the plausible one on which to seek recovery. It is sometimes said that the covenant against incumbrances warrants against any right or interest of another to the diminution of the value or use of the land, but not inconsistent with the passing of the estate.<sup>3</sup> This covenant extends to easements,<sup>4</sup>

<sup>13</sup> The Courts dislike having one wrongdoer subjected to a severe forfeiture and the other unjustly enriched. When the infraction of law is minor, they try to prevent this. Note (1913) 26 HARV. L.R. 739.

<sup>14</sup> *Cashin v. Pliter, Randall v. Tuell*, both *supra*, note 4; *Peck v. Sands*, 198 N.Y. Supp. 313, 119 Misc. 804 (1922); *Peacock, Woodside & Co. v. Grannan*, 2 Ohio Dec. Rep. 465, 3 W.L.M.155(1861).

<sup>1</sup> *Zoyteck v. Peoples Savings Bank Co.*, 65 Ohio App. 118 (1940).

<sup>2</sup> *Peoples Savings Bank Co. v. Parsiette et al.*, 68 Ohio St. 450, 67 N.E. 896 (1913); *Nelson v. Hamilton County*, 102 Iowa 229, 71 N.W. 206 (1897); *Thorp v. Keokuk Coal Co.*, 48 N.Y. 253 (1872); *Van Doren v. Fenton*, 125 Wis. 147, 103 N.W. 228 (1905); *Wheeler v. Wayne Co.*, 132 Ill. 599, 24 N.E. 625 (1890).

<sup>3</sup> *Stanbaugh v. Smith*, 23 Ohio St. 584 (1873); *Peoples Savings Bank Co. v. Parsiette et al.*, 68 Ohio St. 450, 67 N.E. 896 (1903); 61 A.L.R. 72; RAWLE, COVENANTS, Sec. 85.

<sup>4</sup> *Fassnacht v. Bessinger*, 35 Ohio App. 509, 172 N.E. 636, (1930); *Kunkle v. Beck* 1 Ohio App. 70 (1913).