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Cornelius C. Shields, *Illegal Performance of a Legal Contract*, 41 Marq. L. Rev. 34 (1957).
Available at: <http://scholarship.law.marquette.edu/mulr/vol41/iss1/3>

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COMMENTS

ILLEGAL PERFORMANCE OF A LEGAL CONTRACT

I. INTRODUCTION

In a system of law which proceeds initially, as does the common law, from the particular facts of each individual case, absolute and universally applicable principles which do not admit of exception or qualification are not frequently established. It is surprising, therefore, to find, in the complex area of illegal contracts, the uncompromising statement that "if an agreement can by its terms be performed lawfully, it will be treated as legal, even if performed in an illegal manner,"¹ or, rephrased, "if the contract itself discloses no illegality and may be performed in a legal manner, it is not rendered unenforceable by the fact that it may also be, or is actually, performed in an illegal manner."² An array of cases may be found cited as authority for this rule,³ which shall be referred to hereafter as the "broad rule." But nonetheless a decision such as that reached in a recent New York case⁴ in which an agent performed his contract by committing the crime of bribery gives occasion to pause, because the result of applying the "broad rule" was enforcement of the contract and recovery of fees to the amount of thousands of dollars by the agent. There is a certain obvious truth in the statement of a Virginia court, "It is clear that one cannot come into court and say, 'I have done an evil thing for you, pay me for it.'"⁵ The obvious force of this statement and the discordant note of the New York decision lead one to suspect that the true legal principle is not quite so univocal. This article shall trace the development of the "broad rule" and show that, in truth, it is not without serious qualification and, when correctly applied, does not lead to decisions at variance with common notions of morality.

The rule is not expressed in exactly the same language in all the cases and secondary authorities, some stating that a legal contract is not "rendered unenforceable" by illegal performance, others that

¹ 12 AM. JUR. CONTRACTS §153.

² 17 C. J. S. CONTRACTS §190.

³ See, for example, those cited in PAGE, CONTRACTS §663 (2d ed. 1920), following the statement: "The illegality or validity of a contract is to be determined by its tendency as the parties make it and not by its actual results as the parties perform it. If it can, by its terms, be performed lawfully, it will be treated as legal, even if it is actually performed in an illegal manner . . ."

⁴ *McConnell v. Commonwealth Pictures Corporation*, 147 N.Y.S. 2d 77 (1955). The agent has been hired on contingent compensation to procure a contract for his principal with a third party. This he succeeded in doing by bribing an employee of the third party to grant the contract. The New York Court allowed the agent to enforce his bargain although the bribery was contrary to the Penal Law of New York.

⁵ *Old Dominion Transport Co. v. Hamilton*, 146 Va. 594, 131 S.E. 850, at 854 (1926).

it will still be "treated as legal" or is not "made illegal." But the fundamental concept of the "broad rule" remains the same: If the contract was legal when made, illegal performance by the plaintiff is of no consequence or effect.

II. EARLY DEVELOPMENT—NINETEENTH CENTURY

There are indications that the rule developed as early as 1834,⁶ but the case cited, *Favor v. Philbrick*,⁷ is poor authority, for the court not only failed to explicitly enunciate the "broad rule" but found no illegal performance.⁸

However, in the thoroughly considered English case of *Lord Howden v. Simpson*,⁹ Tindal, C. J., in allowing the plaintiff to enforce his contract, stated:

"The quality of the agreement, whether fraudulent or not, must depend upon the intention of the parties at the time of making it; and if there does not then exist the intention of deceiving the legislature by concealing from it, whilst the petitioners were asking for one set of favors, the purpose of afterwards asking for others, the agreement cannot be void, whatever imputation might rest on the conduct of the parties in making the subsequent concealment."¹⁰

It is doubtful whether the issue of the effect of plaintiff's illegal performance was ever raised in this case, because it appears that plaintiff's side of the contract was fully performed when he withdrew his opposition to the first bill, and his participation in any subsequent concealment of the agreement from Parliament was gratuitous and not really in performance of his promise.¹¹

⁶ 17 Am. St. Rep. 501 (1834); See: *Favor v. Philbrick*, 7 N.H. 326 (1834).

⁷ 7 N.H. 326 (1834).

⁸ The 1824 case of *Davis v. Bank of England*, 2 Bing. 393, 130 Eng. Rep. 357, involving the right of a depositor to collect dividends due on stock owned by him and held by the Bank, cited in support of the "broad rule" by counsel in *Powers v. Skinner*, 34 Vt. 274 (1861), must also be distinguished, because the court did not expressly state the "rule," and any illegal acts of the depositor were collateral to the contract and took place after performance of the contract promise.

⁹ (Citation follows the chronological progression of the case through the English courts): 1 Keen 583, 48 Eng. Rep. 432 (1837); 3 Myl. & Cr. 97, 40 Eng. Rep. 862 (1837); 10 Ad. & El. 793, 113 Eng. Rep. 300 (1839); 9 Cl. & Fin. 6, 8 Eng. Rep. 338 (1842). The Lord was suing to recover on a contract he had made with a railroad company whereby he would drop his opposition to a bill authorizing a line through his estate in return for which the railroad would pay compensation and after the enabling bill passed Parliament would endeavor to pass a second bill authorizing diversion of the tracks in order that they might not pass so near the Lord's mansion as they necessarily would under the first bill. The parties, not wishing delay or complications in an already delicate situation, did not tell Parliament of their intention to strive for enactment of the second modifying bill as soon as the first was passed.

¹⁰ *Ibid.*, 10 Ad. & E. 793, at 818, 113 Eng. Rep. 300, at 310.

¹¹ See also *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. Cas. 331, 10 Eng. Rep. 928 (1855), wherein Lord Campbell, during counsels argument against the

Although earlier cases may be found cited as authority,¹² the problem was not in fact considered in the United States until *Powers v. Skinner*¹³ in 1861 wherein the majority denied recovery, construing the auditor's finding as "equivalent to an express finding that the contract, as understood by the parties, contemplated the use or exercise by the plaintiff of his personal solicitations and influence with individual members of the legislature in support of the application which he was employed to favor and promote."¹⁴ However, a dissenting opinion stated that it was erroneous to hold that the auditor's finding established that the parties contemplated an illegal bargain; that the truth was that there existed no illegal intent at the time of contracting, but only illegal performance by plaintiff. In this situation the dissent was of the opinion that recovery could not be denied plaintiff, and before citing *Lord Howden v. Simpson*¹⁵ as support, said:

"The defense has, in no degree, rested on the manner of the performance by the plaintiff; nor has the decision of the court, as I understand it; but exclusively on the quality of the contract as made by the parties. This is the only tenable ground of defense."¹⁶

It ought be noted that this statement of the law, which, it may be admitted, is expressive of the "broad rule," arises in a dissenting opinion and relies for authority upon the English case of *Lord Howden v. Simpson*, analyzed above.

The issue of the effect of illegal performance under a valid bargain was avoided in *Brown v. Brown* (1861)¹⁷ where the court, after conceding that the contract was not necessarily illegal on its face, admitted evidence of illegal "acts and proceedings under the contract giving it a practical construction,"¹⁸ and thus establishing an illegal intent at time of bargaining to justify its refusal to enforce.

In *Russell v. Burton* (1867)¹⁹ the court once again avoided discussion of the effect of illegal performance, holding that none but legal

validity of a contract, made the observation: "Was the contract legal or illegal at the moment it was entered into? If it was legal, nothing happening afterwards can affect it."

¹² In *Harris v. Roof's Executors*, 10 Barb. Ch. 489 (1851), cited as authority in *Chesebrough v. Conover*, 140 N.Y. 382, 35 N.E. 633 (1893), the "rule" was not stated, and the contract was illegal on its face.

In *Sedgwick v. Stanton*, 14 N. Y. 289 (1856), also cited in *Chesebrough*, and in *Jenkins v. Hooker*, 19 Barb. Ch. 435 (1854), cited in *Russell v. Burton*, 66 Barb. Ch. 539 (1867), the "rule" was not stated, the contract was entirely legal on its face, and the performance was legal.

¹³ 34 Vt. 274 (1861).

¹⁴ *Ibid.*, at 283.

¹⁵ *Supra*, note 9.

¹⁶ *Supra*, note 3 at 284.

¹⁷ 34 Barb. Ch. 533 (1861).

¹⁸ *Ibid.*, at 537.

¹⁹ 66 Barb., Ch. 539 (1867).

services were stipulated for or contemplated by the parties. The "broad rule" was not given by the court, and its authority is at best indirect, on the reasoning that by refusing to consider the effect of illegal acts in performance except insofar as they aided in establishing the intent of the parties at the time of contracting, the court was inferentially holding that illegal performance will not effect recovery on an otherwise valid bargain.

The first univocal and clearly expressed statement of the "broad rule" occurred in the often-cited Massachusetts case of *Barry v. Capen*²⁰ in 1890, Holmes, J.:

"The Plaintiff may have rendered illegal services, and yet the defendant's promise may have been in consideration of the plaintiff's promising to perform or performing legal ones only. If the contract was legal, it would not be made illegal by misconduct on the part of the plaintiff in carrying it out."²¹

However, the court's admission that "what was done, moreover, was not necessarily improper, even in the particulars mentioned,"²² would appear to reduce its enunciation of the rule to *obiter dicta*, for the issue of the effect of illegal performance could not be raised unless illegal acts were in fact present.²³

The rule as given in *Barry v. Capen* was amended in *Fox v. Rogers* (1898)²⁴ by the qualification "not necessarily illegal." The plaintiff was allowed recovery against a defense that could allege only incidental acts of illegality, *i.e.*, the drain pipes which plaintiff had provided, the kind and type being left to his discretion by the contract, were Akron earthenware pipes and not cast iron as required by law.²⁵

²⁰ 151 Mass. 99, 23 N.E. 735 (1890). Defendant had employed plaintiff to appear before the street commissioners to advocate the laying out of a street through his land and to secure compensation for the land so condemned. Plaintiff did not draw the petition, was not present at the hearing, and "did not do some other things which it might be supposed that one who really was engaged as counsel would do;" but before public proceedings were begun for laying out the street, he went at least three times a week to see the street commissioners. "At this time he was chairman of the Democratic city committee."

²¹ *Ibid.*, 23 N.E. at 735.

²² *Ibid.*, 23 N.E. at 736.

²³ Holmes cites as authority the English decision *Lord Howden v. Simpson*, *supra*, note 9, and the dissent in *Powers v. Skinner*, *supra*, note 13.

²⁴ 171 Mass. 546, 50 N.E. 1041 (1898). Plaintiff sought the contract compensation after laying a drain pipe for defendant. Defense was that the pipes laid differed from those permitted by statute and that certain other ordinances had been violated. In rendering decision for plaintiff, the court said:

"We shall not trouble ourselves about the construction of the statute and ordinances, because it does not follow that the plaintiff cannot recover if he broke them. There is no policy of the law against the plaintiff's recovery unless his contract was illegal and a contract is not necessarily illegal because it is carried out in an illegal way, *Harry v. Capan*, 151 Mass. 99, at 100, 23 N.E. 735."

²⁵ Other nineteenth century small cases cited as authority for the "broad rule" are of no real value because the factual situation is not such that the issue could be raised. The expressions are *obiter dicta* at best. *Chippewa Valley and Southern R.R. Co. v. Chicago, St. Paul, Milwaukee, and Ohio R.R. Co.*,

III. THE DOCTRINE IN THE TWENTIETH CENTURY

The "broad rule" as developed and applied in this century has been cited in cases falling under a number of different fact categories,²⁶ each of which must be considered in turn. The categories arise because of the nature of the problem. The "broad rule" posits the presence of three elements: first, a *contract legal on its face at inception*, because if the contract as it arose were illegal by the intent of the parties or its purpose, the matter is ended there, and there is no need to consider the effect of any subsequent performance; second, *illegal performance* of the legal contract through illegal acts that are basic and material to the contract and its performance rather than incidental and trivial; third, the "*broad rule*" given by the court as its reason for holding that the illegal performance does not effect the contract, legal when made.

1. Cases Wherein the Essential Elements Are Not All Present:

The impressively lengthy but inaccurate list of cases cited by Page in support of his statement that "the illegality or validity of a contract is to be determined by its tendency as the parties make it and not by its actual results as the parties perform it. If it can, by its terms, be performed lawfully, it will be treated as legal, even if it is actually performed in an illegal manner,"²⁷ contains three cases wherein two of the three essential elements are missing. In these cases the contract as made was legal both on its face and in fact, but the illegal acts were collateral and incidental to the contract, and the "broad rule" was not given. Thus, a paymaster was allowed to recover over \$3000 for his contractual services even though on one occasion he had paid some laborers by giving them \$67.40 worth of liquor which was illegal merchandise at the time and place.²⁸ Nor did subsequently resumed illegal cohabitation between unmarried persons prevent enforcement of a valid prior contract whereby the man promised that if the woman would not institute bastardy proceedings against him, he would pro-

75 Wis. 224, 44 N.W. 17 (1889), cited in *Chesebrough v. Conover*, *infra*, involved a contract illegal on its face, and *Chesebrough v. Conover*, 140 N.Y. 382, 35 N.E. 633 (1893) itself, cited in *McConnell v. Commonwealth Pictures Corp.*, 147 N.Y.S. 2d 77 (1955) saw no legal acts in the performance of a legal contract.

²⁶ Some cases and authors have even cited earlier cases as authority for application of the "broad rule" when the case in reference neither applied, there being, in truth, no illegal acts present, nor stated the "rule" so generously accredited to it. See: *Van Tine v. Hilands*, 131 Fed. 124 (1904), cited in *PAGE CONTRACTS* §663 (2d ed. 1920); *Ackerman v. Boyle*, 236 Mich. 664, 211 N.W. 34 (1926), cited in 12 AM. JUR. CONTRACTS §153; *Armstrong v. Toler*, 11 Wis. 258 (1826), cited in *Dunham v. Hastings Pavement*, 56 App. Div. 244, 67 N.Y.S. 632 (1900) and 57 App. Div. 426, 68 N.Y.S. 221 on rehearing (1901); and *Joseph v. Briant*, 108 Ark. 171, 157 S.W. 136 (1913), cited in *McConnell v. Commonwealth Pictures Corp.*, 147 N.Y.S. 2d 77 (1955).

²⁷ *PAGE CONTRACTS* §663 (2d ed. 1920).

²⁸ *Seid Chee v. Sanitary Fish Co.*, 103 Wash. 345, 174 Pac. 443 (1918).

vide for her and the children.²⁹ And a third-party beneficiary was allowed to enforce the contract although the contracting parties subsequently engaged in additional criminal intercourse.³⁰ These cases, each of which appears to be justly decided on its particular facts, are not connected with nor authority for the "broad rule."

Cases in which the court finds that the contract was illegal from the moment it was made, before any performance was begun, and nevertheless quotes the "broad rule" must be regarded as furnishing only *obiter dicta* and of little weight.³¹ Equally useless as solid authority are those cases giving the "broad rule" when the contract was legal when made and there existed no illegal acts in performance.³² Some courts have also quoted the "broad rule" with approval when the contract was legal when made and the question of any possible illegal acts was not actually considered because the case was before the appellate court only on demurrer.³³ These cases are at best indirect authority on the reasoning that in expounding the "broad rule" the court is effectively instructing the trial court on how to handle the problem if it should arise in the future on retrial.

2. Cases Wherein the Essential Elements Are All Apparently Present:

There do exist a number of cases which, after only a brief inspection, appear to offer firm support for the rule: A contract legal when made, illegal performance, and the "broad rule" offered by the court as its reason for holding the contract unaffected. However, closer examination reveals that in all of them the acts constituting the illegal performance are not basic and essential to the contract, but of an incidental and collateral nature. The result is that the rule goes beyond these cases and gives a univocal and exceptionless answer without ever having been presented with the question of the effect of illegal performance upon a legal contract when the illegal acts are basic, funda-

²⁹ *Burton v. Belvin*, 142 N.C. 151, 55 S.E. 71 (1906).

³⁰ *Doty's Admin. v. Doty's Guardian*, 118 Ky. 204, 80 S.W. 803, 2 L.R.A. (N.S.) 713 (1904).

³¹ See: *Drake v. Lauer*, 93 App. Div. (N.Y.) 86, affirmed 182 N.Y. 533, 75 N.E. 1129 (1904); and *Arlington Hotel Co. v. Ewing*, 124 Tenn. 536, 138 S.W. 954, 34 L.R.A. (N.S.) 842 (1911), cited in 17 C.J.S., CONTRACTS §190.

³² See: *Stansell v. Roach*, 147 Tenn. 183, 246 S.W. 520 (1923); *Kelly v. Williams*, 162 Ill. App. 571 (1911); *Cochran v. Burdick*, 63 App. D.C. 150, 70 F. 2d 754 (1934), cert. den. 293 U.S. 561, 55 Sup. Ct. 73, 79 L. Ed. 661, cited in 17 C.J.S., CONTRACTS §190; *Lewis v. Davis*, 145 Tenn. 468, 199 S.W. 2d 146 (1947), cited in 12 AM. JUR., CONTRACTS §153; *Freeman v. Jergens*, (Dist. Ct. of Appeals, Calif.), 125 C.A. 2 578, 271 P.2d 210 (1954), cited in 17 C.J.S., CONTRACTS §190; *Yazoo and Mississippi Valley R. Co. v. Searles*, 85 Miss. 520, 37 So. 939, 68 L.R.A. 715 (1905), cited in 12 AM. JUR., CONTRACTS §153; *Traver v. Naylor*, 126 Or. 193, 268 Pac. 75 (1928).

³³ *Bush v. Russell*, 180 Ala. 590, 61 So. 373 (1913); *Kerr v. American Pneumatic Service Co.*, 188 Mass. 27, 73 N.E. 857 (1905); *Hollister v. Ulvi*, 199 Minn. 269, 271 N.W. 493 (1937).

mental, and inhere in the very substance of the contract and its performance.³⁴

Included is the appearance of an Indiana attorney before the state legislature to urge passage of a certain bill, an appearance which under the circumstances might have been illegal although the court is not sure, and which was neither expressly nor by implication required in his agreement with defendant. It was, essentially a waste of time rather than performance, and the court could see no reason why it should prevent recovery for the services when the attorney eventually completed his side of the bargain.³⁵

A New York decision of 1900³⁶ furnishes a good example of the typical case under this group, in which the court virtually admits that the allegedly illegal acts are so minor or collateral as to be beneath consideration, but then, rather than rendering a decision limited to the facts before it quotes the "broad rule." The court stated that plaintiff had "the right" to present the merits of a manufacturer's paving materials to the mayor and said of his dealings with the aldermen that there was "little basis for condemnation."³⁷

An agreement between a undisclosed agent and his principal whereby the agent was to return certain property, bailed to him, after completion of business dealings was not rendered illegal by subsequent illegal manipulation of Federal taxes relating to the property when the agreement did not contemplate such action, and it was not essential to performance.³⁸ Nor was the legality of the contract affected when the illegal acts occurred in a "distinct transaction" which "can be separated from the valid acts of the parties."³⁹ And an employee's right to recover under Workman's Compensation was not affected by the fact that he was performing under the requisite contract of hire on Sunday, which under statute made the performance illegal.⁴⁰

A number of cases in this group deal with the right of plaintiff to recover on a contract legal when made but performed in a manner violative of some statute. These decisions are dependent upon the wording of the particular statute, its nature and purposes, and on the

³⁴ As was the case in the New York decision of *McConnell v. Commonwealth Pictures Corp.*, *supra*, note 4, where plaintiff's task was to obtain a contract for his employer with another corporation. He performed by bribing the agent of the other corporation to issue the contract and then sued for his services, alleging that he had performed by obtaining the desired contract.

³⁵ *Hogston v. Bell*, 185 Ind. 536, 112 N.E. 883 (1916).

³⁶ *Dunham v. Hastings Pavement Co.*, 56 App. Div. 244, 67 N.Y.S. 632 (1900), rehearing 57 App. Div. 426, 68 N.Y.S. 221 (1901).

³⁷ *Ibid.*, 67 N.Y.S. 632, at 638.

³⁸ *Erminger v. Damel*, Tex. Civ. App., 185 S.W. 2d 148 (1945).

³⁹ *Phend v. Midwest Engineering and Equipment Co.*, 93 Ind. App. 165, 177 N.E. 879 (1931).

⁴⁰ *Texas Employers' Insurance Association v. Tabor*, 283 S.W. 779 (1926), *Texas Com. App.* For similar case see, *Southern Underwriters v. Knight*, Tex. Civ. App., 107 S.W. 2d 1097 (1937).

individual court's determination of the most just manner in which to effect the declared public policy. Especially are the courts hesitant to declare a contract unenforceable when the resulting hardship on plaintiff would be gravely disproportionate to the penalty imposed by the statute and the actual harm caused the public by its violation.⁴¹ This attitude appears logical, for in almost all cases the violation entails the performance of an act which is not naturally unlawful or destructive of the public welfare and which at common law would not be an illegal act. The courts tend to treat the regulatory statute as imposing its own penalty and not requiring in addition that the whole contract be declared unenforceable, and in this sense the statutory violation may be termed incidental or collateral to the performance of the contract. Thus, in performing a valid sales contract, plaintiff violated a State-of-Washington Statute by failing to mark the product "renovated butter," but the contract was not invalidated.⁴² Similarly, the demolition and removal of a building,⁴³ the installation of an oil burner,⁴⁴ and the repair of a building,⁴⁵ all without required permits, have not prevented plaintiff from enforcing the contract.⁴⁶

IV. THE OTHER SIDE

The inherent fallacy of the "broad rule" in asserting its applicability in all cases of illegal performance of a legal contract without any variance or distinction depending upon the kind and substantiality of the illegal acts has not gone unrecognized through the years, although the flaw was not placed in bold relief until the *McConnell* decision in 1955.⁴⁷ Williston has stated his position:⁴⁸

"It has been said that 'there is no policy of the law against the plaintiff's recovery unless his contract was illegal, and a con-

⁴¹ See: WILLISTON, CONTRACTS §1767:

"Where the illegality of work done or of materials furnished under a contract is slight, or where judgment for the defendant will impose a severe forfeiture upon the plaintiff, courts are astute to discover ground for allowing the plaintiff to recover . . . In general, unless a bargain necessary contemplates an illegal act, it is not unenforceable. and if it is later performed in a way that involves some slight violation of law, not seriously injurious to the public order, the person performing may recover on his bargain."

⁴² *Armour v. Jesmer*, 76 Wash. 475, 136 Pac. 689 (1913).

⁴³ *Gardiner v. Burket*, 3 Cal. App. 2d 666, 40 P.2d 279 (1935).

⁴⁴ *Keith Furnace Co. v. Mac Vicar*, 225 Ia. 246, 280 N.W. 496 (1938).

⁴⁵ *Comeaux v. Mann*, Tex. Civ. App., 244 S.W. 2d 274 (1951).

⁴⁶ For an example of the complex situation that can arise from concluding prenuptial contracts within the restricting period following the prior divorce of one of the parties, see *Knollenberg v. Meyer*, 151 Kan. 768, 100 P.2d 746 (1940); and *Mitchell v. Clem*, 295 Ill. 150, 128 N. E. 815 (1920). The Court's enforcement of the prenuptial contracts would seem explainable on the more narrow grounds that interpretation of the effect of a particular state statute was involved and that any illegality was cured by reason of emergence of a valid common law marriage after the restraining period had run.

⁴⁷ *McConnell v. Commonwealth Pictures Corp.*, 147 N.Y.S.2d 77 (1955).

⁴⁸ WILLISTON, CONTRACTS §1761.

tract is not necessarily illegal because it is carried out in an illegal way.' It is submitted that, if this statement is made as a general principle, it is unsound. The illegality of the plaintiff's conduct is the vital test, not only as shown by the character of the contract itself, but by his acts in performing it. It is true that not every illegal act in performing a contract will vitiate recovery; thus, if a carpenter in building a legal fence commits a trespass, this will not preclude recovery for the fence. But if the performance actually rendered by the plaintiff is something in itself forbidden by law, the fact that the bargain was in such general terms as to cover either the illegal performance or a lawful performance, and that both parties originally had no intention to have the performance unlawful, will surely not justify recovery on the bargain if the illegality is serious or more than an incidental part of the performance. An agent can recover no commissions for negotiating a bargain or sale by illegal means, though his contract with his principle did not specify the means to be employed, and his case would not be helped by proving that the principle or both the principle and he himself originally expected legal means only would be employed."

In *Old Dominion Transport Co. v. Hamilton*⁴⁹ the above quotation from Williston was approved, and the court stated that:

"On principle we are of opinion that there should be no recovery in cases where fraudulent devices were adopted or where public policy is plainly violated. The reasons which lead to this conclusion are more compelling when the action is for services rendered and not on a contract performed . . . It is clear that one cannot come into court and say, 'I have done an evil thing for you; pay me for it.'"⁵⁰

"It is equally clear . . . that incidental acts of illegality do not render a lawful contract unlawful. There must be some attendant sinister suggestion that goes to the heart of the case."⁵¹

The Virginia Court then held that in the case before it the acts alleged against plaintiff by defendant were not necessarily illegal, but granted that by plaintiff's own testimony there appeared admissions which, if unexplained, would be extremely damaging and, accordingly, remanded the case for new trial because the jury had not decided "whether personal and political influences beyond such as were necessary and lawful were brought to bear when the matter [an attempt to obtain by legislative action a pier lease then held by a competitor of plaintiff's employer] was up for decision."⁵²

In previous discussion, examples of performance in violation of statute have been examined and the point was made that the language of the particular statute, the court's evaluation of the public policy

⁴⁹ 146 Va. 594, 131 S.E. 850 (1926).

⁵⁰ *Ibid.*, 131 S.E. 850, at 854.

⁵¹ *Ibid.*, at 855.

⁵² *Ibid.*, at 857.

issue involved, and the nature of the prohibited act itself could lead to the conclusion that *vis a vis* the promised performance the illegality was incidental and, therefore, that the facts of the case did not warrant so sweeping a generalization as the "broad rule." Without retreating from the position that in all cases involving statutory violations care must be exercised in evaluating the meaning and worth as precedent of each decision, it may be observed that if the broad rule were the correct one in its area (and if it were, it could be the only rule, because its terms leave no room for others) in no case, regardless of the public policy question or seriousness of the breach,⁵³ could violation of a statute result in rendering a previously legal contract unenforceable. But cases of exactly that type do exist. *Anderson v. Daniel*,⁵⁴ an English decision, arose because of plaintiff's failure to state on the invoice, by percentages, the chemical composition of the fertilizer sold. In denying plaintiff the right to maintain suit for the price, the court said, Banks, L.J.:

"But Mr. Macaskie has contended that a contract cannot be avoided for illegality except where it was void ab initio . . . It has been said that in such a case the contract was perfectly legal when made, and cannot be avoided by a subsequent omission to do some act which the statute requires to be done. I do not think it is necessary to show that the contract was illegal ab initio in order to avoid it; it is enough to show that the vendors failed to perform it in the only way in which the statute allows it to be performed."⁵⁵

Recovery has also been refused in cases involving violation of a municipal ordinance in erecting an unapproved water tank,⁵⁶ and of an order of the Civilian Production Administration in erecting a house without obtaining the necessary priorities for the materials used.⁵⁷

⁵³ Granted that the statute did not expressly make illegal all contracts performed in violation of it.

⁵⁴ 1K.B. 138 (1924).

⁵⁵ *Ibid.*, at 144.

⁵⁶ *American T. and I. Co. v. Rudolph Wurlitzer Co.*, 254 Ill. App. 514 (1929).

⁵⁷ *Tocci v. Tembo*, 325 Mass. 707, 92 N.E.2d 254 (1950). It is interesting to note that this is the same Massachusetts Court that was the first to state the "broad rule" in its presently quoted form—see: *Barry v. Capen*, *supra*, note 17 and *Fox v. Rogers*, *supra*, note 18. For a case similar to and which cites *Tocci v. Tembo* see *Hawes Electric Co. v. Angell*, 332 Mass. 190, 124 N.E.2d 257 (1955).

Apart from the question of statutory violations, the dicta in two California cases suggests that the "broad rule" is but another way of stating that illegal performance by one party does not render the contract illegal and unenforceable for all purposes; that the innocent party can still enforce it if he so elects, but not the guilty party. Thus, in *Teachout v. Bogy*, 175 Cal. 48, 166 Pac. 319, at 322 (1917).

"Respondent further suggests, very briefly, the application of the principle that where a contract can be performed in a legal manner as well as in an illegal manner, it will not be declared void because it was in fact performed in an illegal manner . . . But the principle just stated is applied where the contract manifests no intent or purpose that it is to

V. CONCLUSION

Reflection on the cases reveals how slight and unreliable is the authority for the "broad rule." Mr. Holmes' pronouncement in *Barry v Capen*⁵⁸ has probably had the most decided influence upon many later, often rather superficially reasoned, cases, but in his case Holmes himself removed one of the essential requisites for application of the "broad rule," *i.e.*, illegal performance, by admitting that the acts were not "necessarily improper" and further weakened the decision by citing as authority an English case in which the illegal acts were not done in performance of the contract,⁵⁹ and a dissenting opinion of a Vermont judge.⁶⁰ The development of the rule in the Twentieth Century inspires no more confidence. Many of the decisions that quote it do not even involve the issue of illegal performance of a legal contract,⁶¹ and the others deal with illegal acts which are incidental and collateral to the promised performance rather than serious, substantial, and immediately concerned with the performance.⁶²

The components of the problem are simple: A legal contract and illegal performance. The defendant contends that as a result of the illegal nature of the performance the court should not lend its aid to the plaintiff by assisting him in enforcing the bargain. By quoting the "broad rule," the court replies that the illegality was in the performance rather than in the contracting, and in such a situation the illegality is of no consequence, does not affect the contract, and does not prejudice the rights of the plaintiff.

Defendant's contention is based on the fact that an illegal contract

be performed in an illegal manner and where also the party complaining does not participate in, or cooperate with, the illegal performance. In other words, the illegal intent or act of the party in default, not essential to a proper performance, will not vitiate the contract, so as to affect the rights of the other party, who was guiltless of any participation or cooperation therein."

And in *Vagim v. Brown*, 63 Cal. App. 2d 504, 146 P.2d 923, at 927 (1944):

"... where a contract can be performed in a legal manner, as well as in an illegal manner, it will not be declared void because it was in fact performed in an illegal manner... This last principle stated is applied where the contract manifests no intent or purpose that it is to be performed in an illegal manner and where also the party complaining does not participate in, or cooperate with the illegal performance."

Similarly in 6 R.C.L. §100:

"Similarly if a contract is of a lawful character it is not rendered unlawful by the attempt of one of the parties to put it to an unlawful use, or by his misconduct in carrying it out, though such misconduct would no doubt affect his right to enforce the contract."

⁵⁸ 151 Mass. 99, 23 N.E. 735. See *supra*, note 20. The statement was: "If the contract was legal, it would not be made illegal by misconduct on the part of the plaintiff in carrying it out."

⁵⁹ See *Lord Howden v. Simpson*, *supra*, note 9. See also *supra*, note 23.

⁶⁰ See *Powers v. Skinner*, *supra*, note 13. See also *supra*, note 23.

⁶¹ See cases discussed under, 1. Cases Wherein the Essential Elements Are Not All Present.

⁶² See cases discussed under, 2. Cases Wherein the Essential Elements Are All Apparently Present.

is not enforceable; that if this illegality had been present in the contracting rather than in the performance, the plaintiff could not prevail in his suit. The "broad rule" in effect admits that if the illegality were in the contracting, plaintiff could not maintain suit, but says that the same result does not follow when the illegality is in the performance. This position is not only unsupported by authority and contrary to the facts and decisions of the cases which have arisen in the area, but falsely reasoned.

In the case of illegal contracts generally, the line of thought is that the plaintiff cannot enforce the contract because his conduct has rendered him a petitioner whom the courts will not aid.⁶³ If the courts so regard him when he is responsible for the introduction of illegality at the time when the promises are exchanged, why should their attitude be suddenly changed when he causes the illegality to be introduced during performance, which may occur only a moment after the exchange of promises?

The basic reasoning of the correct approach to illegal contracts, which states that the plaintiff cannot enforce his illegal bargain, places its emphasis on the effect of the illegality on the plaintiff as a person rather than on the contract itself considered as an entity apart from its makers. Modern cases and authors often quote verbatim from a decision of Lord Mansfield in 1775:⁶⁴

"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is that; *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 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

⁶³ RESTATEMENT, CONTRACTS §598 (1932).

"A party to an illegal bargain can neither recover damages for breach thereof nor, by rescinding the bargain, recover the performance that he has rendered thereunder of its value . . .

"COMMENT:

a. The statement that all illegal bargains are void is not wholly accurate . . . When relief is denied it is because the plaintiff is a wrongdoer, and to such a person the law denies relief. Courts do not wish to aid a man who founds his cause of action upon his own immoral or illegal act."

⁶⁴ *Holman v. Johnson*, 1 Cowp. 341, 98 Eng. Rep. 1120 (1775). See also: 17 C. J. S., CONTRACTS §272; 12 AM. JUR. CONTRACTS §209; RESTATEMENT, CONTRACTS §598 (1932); WILLISTON, CONTRACTS §1630; *Oklahoma Portland Cement Co. v. Pollock*, 181 Okla. 266, 73 P. 2d 427 (1937); *Gibbs & Sterrett Mfg. Co. v. Brucker*, 111 U.S. 597, 4 S.Ct. 572, 28 L. Ed. 534 (1884); *Parish v. Schwartz*, 344 Ill. 563, 176 N.E. 757 (1931); *Smith v. Smith*, 255 Wis. 96, 38 N.W.2d 12 (1949).

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. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff the latter would then have the advantage of it; for where both are equally in fault, potior est conditio defendantis."⁶⁵

The Mansfield analysis finds its principal antagonist in the erroneous and oft-discredited void contract theory,⁶⁶ which, in stating that the illegality renders the contract itself void, attempts to place the effect of illegality in the contract rather than in the person. The "broad rule" in dealing with illegality falls into precisely the same error as the void contract theory. It makes an absolute distinction between the contract and its performance and holds that because the illegality was not found in the contract, it is of no effect, completely unmindful of the fact that illegality acts primarily upon the person and not the contract and that the same person both contracted and performed.

However, the fundamental error of the "broad rule" is its failure to recognize that as a result of the illegal performance there is actually an illegal contract, and therefore the usual rules applicable to illegal contracts should apply, and there is no need for anything new and different such as the "broad rule." Its conclusion depends upon its distinction between the contract and its performance, but any such distinction is in logic rather than in reality. A bilateral contract consists of an offer, acceptance, and consideration, which consideration is not ultimately the promise itself, but the performance promised. As performance is rendered, the contract becomes continuously more perfected until it is executed, on first one side and finally on both. As the contract progresses from inception to execution, it is in a state in which it is called executory, during which additional performance is necessary to reach an executed condition, but it is the contract itself as a whole that is in this state, and at any moment there exists in fact but one contract, in various stages of development, although it is

⁶⁵ *Holman v. Johnson*, 1 Cowp. 341, 98 Eng. Rep. 1120, at 1121.

⁶⁶ See cases and authorities cited in note 64, *supra*. Evidence of the fact that illegality does not render the contract void is found in the existence of cases wherein the innocent party to a contract to marry, made when the defendant is already married, is able to maintain an action for breach of promise (A), and in the unavailability to the party responsible for illegality of an action for money had and received, which action would necessarily be present if the contract were void.

Note: (A) *Hilbert v. Kundicoff*, 204 Cal. 485, 266 Pac. 905 (1928); *Wallin v. Sutherland*, 252 Wis. 149, 31 N.W.2d 178 (1948); RESTATEMENT, CONTRACTS §599 (1932); 11 C.J.S. Breach of Marriage Promise §2 f, WILLISTON, CONTRACTS §1631.

Of course, express provision of statute may alter the situation and make the contract itself void ab initio because of the illegality, but in the absence of such express declaration, the effect of illegality is as outlined above.

possible to separate in logic the bargain that arose when promises were exchanged from the performance of those promises. The court which enunciates the "broad rule" refuses, like Zeno,⁶⁷ to recognize the dynamic development that has taken place and now appears before the court as the contract in issue. "The" contract of which such a court speaks in the "broad rule" is no longer in existence; only the contract before the court actually exists in fact, and it is composed inseparably of offer, acceptance, the promises exchanged and the performance of those promises insofar as such performance has been rendered. There is only one contract, an illegal contract, and the plaintiff cannot enforce it.⁶⁸

All that is of worth and merit in the "broad rule" may be incorporated as a narrow part of the observation that an illegal contract cannot, as a general rule, be enforced by a plaintiff responsible for the illegality, and the situation is not altered by the fact that the illegality appears in the performing rather than the contracting, provided only that the illegal acts be serious and substantial and not incidental and collateral.

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⁶⁷ Considering Zeno's attitude of mind as evidenced in his paradox that a man cannot go from point A to point B because he must first travel half the distance, and then half the remaining distance, and then again half the remaining distance, ad infinitum.

⁶⁸ The correctness of this reasoning is even more immediately apparent in the case of unilateral contracts, in which no contract at all exists until the requested performance is completed. Indeed, it appears that in the following cases, variously cited as authority for the "broad rule," the contract might well have been unilateral: *Harris v. Roof's Executors*, 10 Barb. Ch. 489 (1851); *Jenkins v. Hooker*, 19 Barb. Ch. 435 (1854); *Sedgwick v. Stanton*, 14 N.Y. 289 (1856); *Powers v. Skinner*, 34 Vt. 274 (1861); *Russell v. Burton*, 66 Barb. Ch. 539 (1867); *Barry v. Capen*, 151 Mass. 99, 23 N.E. 735 (1890); *Fox v. Rogers*, 171 Mass. 546, 50 N.E. 1041 (1898); *Chesebrough v. Conover*, 140 N.Y. 382, 35 N.E. 633 (1893); *Joseph v. Briant*, 108 Ark. 171, 157 S.W. 136 (1913); *Drake v. Lauer*, 93 App. Div. (N.Y.) 86, affirmed 182 N.Y. 533, 75 N.E. 1179 (1904); *Arlington Hotel v. Ewing*, 124 Tenn. 536, 138 S.W. 954 (1911); *Stansell v. Roach*, 147 Tenn. 183, 246 S.W. 520 (1923); *Freeman v. Jergens*, 125 Cal. App. 2d 578, 271 P.2d. 210; *Bush v. Russell*, 180 Ala. 590, 61 So. 373 (1913); *Hollister v. Ulvi*, 199 Minn. 269, 271 N.W. 493 (1937); *Hogston v. Bell*, 185 Ind. 536, 112 N.E. 883 (1916); *Dunham v. Hastings Pavement Co.*, 56 App. Div. 244, 67 N.Y.S. 632 (1900); and 57 App. Div. 426, 68 N.Y.S. 221 (Rehearing—1901).