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Failure to Conform to the Building Code; Its Effect on the Contracting Parties

by Walter Rubenstein and John D. Murray *

THE ISSUE OF THE right of recovery by a building contractor who has failed to comply literally with the specifications of building codes and ordinances has provoked much discussion and has brought forth opinions from Courts and text writers, many of which are diametrically opposed.

The authorities are generally agreed that a contract, whether it be a building contract or not, which upon execution will, by the thing which it tends to create, breach a positive law, is void and unenforceable.[1] But, as is true of other rules of law which can not and do not have universal application, the courts will grant exceptions if justice will be better served by so doing. A court may, upon hearing the facts of a case, deviate from the general rule and grant relief to a party to an agreement calling for construction violative of a building code. Enforcement is effected not designedly to favor the building contractor but rather not to deny protection to the party who was more culpable in attempting to carry out the illegal purpose. And so where a contractor expends his labor in erecting or constructing contrary to building code specifications or any other municipal ordinance,[2] or if he fails to secure a required permit from the municipality permitting him to perform the work,[3] or fails to submit plans which are required before the work is started,[4] or for any other violation of the

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[1] Bloom v. Richards, 2 Ohio St. 387 (1853). The general proposition that a contract made in violation of a statutory prohibition, is void, is not controverted. The infliction of a penalty for the commission of an act is equivalent to an express prohibition of such acts. This principle seems to be settled and accepted by the great weight of authority.

[2] Michael v. Bacon, 49 Mo. 474 (1872).

[3] Fox v. Rogers, 171 Mass. 546, 50 N. E. 1041 (1898). A lawful contract to lay a drain, although carried out in an illegal manner because no permit was obtained and the work was not done by a registered plumber as required by law, cannot be declared illegal as a whole so as to prevent recovery under it.

[4] Ordway v. Newburyport, 230 Mass. 306, 119 N. E. 863 (1918); Palefsky v. Connor, 270 Mass. 410, 170 N. E. 410 (1930).

codified law,[5] he must present his case to the court and let the facts speak for themselves.

The courts are in disagreement as to when a liberal interpretation of the strict general rule should be applied, and in the following paragraphs there have been set forth the opinions that have been promulgated by the courts in various jurisdictions in their attempt to promote justice and grant relief to those who are deserving of it. In considering the nature of the law which has been positively and expressly codified and its effect in invalidating an agreement which, by its provisions, violates the law, the authorities have found that building ordinances as well as statutes should be given practical application and interpreted in the light of the conditions and circumstances under which they are passed and the objects sought to be attained.

Legislative Intent.

The courts have, primarily, entertained two views in regard to the purpose of the building code or ordinance. One of these views, in effect, is that legislation which lays down rules and regulations serving mainly to regulate the trade or business which is covered by it, and to impose a penalty for its violation will not make the contract relating thereto illegal or unenforceable.[6] However, the second view, and the one more generally applied, namely, *ex turpi causa non oritur actio*—that no cause of action lies for an illegal act—is usually followed in the absence of facts which would compel a different ruling.[7]

The courts will always look to the language of the statute, the intent of the legislature at the time of its enactment,[8] the sub-

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[5] Wolpa et al. v. Hambly, 20 Ohio App. 236, 153 N. E. 135 (1923); Gagnon v. Ainsworth, 283 Mass. 488, 186 N. E. 498 (1933).

[6] Adams Express Co. v. Darden (C. C. A., Tenn.), 286 F. 61, aff'd., 265 U. S. 265, 44 S. Ct. 502, 68 L. Ed. 1010 (1924). "When a statute imposes specific penalties for its violation where the act is not malum in se, and the purpose of the statute can be accomplished without declaring contracts in violation thereof illegal, the inference is that it was not the legislative intent to render such contract illegal and unenforceable." *See also* Warren People's Market Co. v. Corbett & Sons, 114 Ohio St. 126, 151 N. E. 51 (1926); Restatement of Law of Contracts, Sect. 580.

[7] Miller v. Ammon, 145 U. S. 421, 12 S. Ct. 884 (1892). An ordinance of the city of Chicago providing for a penalty for anyone who shall sell or offer to sell liquors in quantities of one gallon or more without first obtaining a permit is held valid and contract made in violation of it creates no right of action which a court of justice will enforce. The general rule of law is that a contract made in violation of a statute is void.

[8] Fischer-Liemann Const. Co. v. Haase et al., 64 Ohio App. 473, 29 N. E. 2d 46 (1940).

ject matter, and the wrongful act which it seeks to prevent as tests of whether a violative contract is legal or illegal.[9] In this respect there is no difference between statutes and ordinances.

The legislation must be judged as a whole, regard being had not only for its language but for the objects and purposes for which it was enacted. The imposition of a penalty by a building code does not necessarily imply a legislative intent that the act penalized is void and is of no legal effect,[10] however when a penal statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void.[11] In respect to interpretation, whatever the structure of the statute, whether prohibiting an act and imposing a penalty, or merely imposing a penalty, it is not to be taken for granted that the legislature meant to preclude a building contractor from enforcing that proscribed agreement in a court of justice.

The two leading cases in Ohio, the *Fischer-Liemann* Case[12] and the *Spurgeon* Case[13] are illustrative of the interpretation given to two types of building ordinances. In the *Fischer-Liemann* Case the ordinance in question provided regulation in respect to the installation of brick veneer on buildings. The contractor's method of installing the brick veneer was improper, but notwithstanding the violation, upon suit brought by him upon the contract, the court found in his favor. The ordinance was deemed one of a regulatory nature and not prohibitive. And since the act of installing the veneer itself was not unlawful but merely improperly executed it could not be prudently reasoned that the legislature meant to invalidate that type of agreement.

However, the courts reached a different finding in the *Spurgeon* Case. Here a builder, in contravention of a zoning ordinance, constructed a bowling alley in a tavern which was located near a residential area, and brought suit to recover on the contract. The court construed the zoning ordinance as a law that seeks to pre-

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[9] Mann v. Mann, 176 N. C. 353, 97 S. E. 175 (1917).

[10] Pangborn v. Westlake, 36 Iowa 546 (1873). ". . . in every instance courts will look to the language and subject matter of the statute, the wrong and evil which it seeks to remedy or prevent, and the purpose sought to be accomplished by the enactment, and if from all of this it is manifest that it was not intended to render the particular acts void, the courts will so hold and construe the statute accordingly."

[11] Miller v. Ammon, *supra* Note 7.

[12] Fischer-Liemann Const. Co. v. Haase et al., 64 Ohio App. 473, 29 N. E. 2nd 46 (1940).

[13] Spurgeon v. McElwain, 6 Ohio 442, 27 Am. Dec. 266 (1834).

vent the act performed and reasoned that a contract calling for such an unlawful act must be invalid and unenforceable.[14]

Parties in Pari Delicto.

Another important factor to be considered in determining the rights of parties to avoid building contracts such as those under consideration would be the role they each would play in bringing about the ultimate violation. Whether the parties are in pari delicto would depend upon their relative innocence or degree of knowledge of the unlawful character of their acts. The courts have shown a strong tendency toward applying, even in border line cases, the strict rule that parties equally guilty in perpetrating an unlawful act will be left in the same position in which they placed themselves and the court will not lend its aid in enforcing the "illegal contract."[15] But where a statute imposes a penalty upon one of them and not upon the other, the parties to the transaction are not to be regarded as in pari delicto. And so where one party is the principal offender and the other party only indirectly connected with the unlawful act there is no parity of delictum and the one protected by the law or fraudulently deceived or acting under compulsion, may resort to the law and recover money paid, or for services rendered.[16] The opportunity to solicit the aid of the court in enforcing the contract is also available to an innocent party to the contract for whose protection the statute was enacted.

There have been cases in which the distinction has been made between violative contracts when both parties are equally culpable, and those in which, although both parties participated in the unlawful act, the guilt rests chiefly with one. In these cases the maxim, *ex dolo malo non oritur actio,* is qualified by another, that is, *in pari delicto melior est conditio defendentis.* Unless,

[14] A case which contained facts similar to those presented in both of the above cases is that of *Eastern Expanded Metal Co. v. Webb Granite and Construction Co.,* 195 Mass. 356, 81 N. E. 251 (1907). The Building Code of the City of Boston forbade the erection of a building with a roof pitch of over 20 degrees. The court interpreted this ordinance to be one that the legislature must have meant to prohibit this unlawful act and so the suit brought by the contractor failed.

[15] It is recognized that the phrase "illegal and void contract" is a contradiction in terms; however whether an agreement once regarded as a "contract" by the parties to it is void or not, is frequently a legal conclusion to be drawn only after extensive litigation. The phrase is therefore used in this article with expectation of the reader's indulgence.

[16] Thomas v. Owens, 206 Okla. 50, 241 P. 2d 1114 (1952).

therefore, the parties are in pari delicto as well as in particips criminis, the courts, although the contract will be illegal, will afford relief where equity requires it, to the more innocent party. The courts have found it necessary and essential, in such contracts, to justify the granting of relief, that the contract be merely *malum prohibitum.*[17] If *malum in se* the court will in no case interfere to relieve either party from its consequences. But where a contract neither involves moral turpitude nor violates any principle of public policy the party not in pari delicto will be awarded relief. In *Browning v. Morse,* Lord Mansfield[18] reiterated the argument of Blackstone to the effect that, ". . . it is very natural that the statute itself, by the distinction it makes, has marked the criminal, for the penalties are all on one side—upon the office keeper."

Guilty knowledge of the illegal purpose of the work to be performed by the building contractor has for the most part precluded recovery for his work,[19] but because of the diversity of fact situations, certainly some of them warranting the questioning attention of the courts, the contractor has been allowed recovery.[20]

A strict view of the rule construing a contractor to be in pari delicto in possessing guilty knowledge of the future unlawful use of the thing he would erect was expressed by Judge Lane in the "bowling alley" case.[21] He stated that, ". . . if the ordinary use of the thing produced be illegal, he must be taken to have intended the use . . ." It would seem that this view was prudently applied considering the facts surrounding the case, particularly that the bowling alley was "mala sui generis," or inherently bad, and never could be used lawfully in that residential area. Counsel for plaintiff, however, presented an intelligent and feasible argument in averring that mere knowledge of the unlawful use of the premises for a bowling alley should not preclude recovery by the contractor; because if the courts were to use this means of evaluating the effect of guilty knowledge they would indirectly inflict penalties upon the comparatively innocent vastly more severe than the statute warrants against the principal offenders. He argued further that to prevent a recovery, it is necessary that

[17] 12 L. R. A. (N. S.) 618 (1908) and cases therein cited.

[18] Browning v. Morris, 2 Cowp. 790; 12 Am. Jur. 652, Sec. 158.

[19] Spurgeon v. McElwain, note 13 *supra.*

[20] Thomas v. Owens, note 16 *supra.*

[21] Spurgeon v. McElwain, note 13 *supra.*

it should appear that plaintiff (contractor) would share the profits of the illegal operation.

A similar case, but one in which the court came to a different conclusion was that of *Bishop v. Honey*.[22] This case involved a suit brought by a building contractor for labor and materials used in erecting a building that he knew was to be used for a house of prostitution. The court found for the plaintiff and in its opinion stated, "Mere knowledge, by the vendor of goods, of the illegal purpose for which they are to be used is no defense to an action to recover the price." The court felt that if the plaintiff were in any way to gain by, or be the partner in, the illegal undertaking he could not recover, but in the case at bar the house was not paid for out of the proceeds of the vocation practised within it, but it was to be paid for as the work progressed upon it.

This conclusion was also found applicable in *Michael v. Bacon*[23] where the contractor performed work on a house that he knew was to be used as a gambling establishment. The court ruled that the contractor's knowledge of the purpose did not affect the contract.

Contracts, Executed or Executory.

May the parties to an illegal agreement change their minds and be protected by the courts, or must they remain in the position they find themselves? The answers lie in well established principles of law applicable to illegality in general.

It has been generally held that where the contract's illegal purpose has not been effected and the builder becomes aware of the illegal nature of the work to be done and makes a timely repudiation of the contract, he may reclaim the value of the labor performed and the value of the materials furnished, and the owner can neither recover damages in the event he chooses to bring a cross petition, nor defeat the contractor's claim by alleging that the builder has breached his contract. It has been held in many cases that where the matters called for in a contract are illegal in a sense that they are mala prohibita and while the contract still remains executory, either party may disaffirm it on the grounds of illegality and recover back money and property

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[22] 34 Tex. 245 (1870).
[23] 49 Mo. 474 (1872).

that has been advanced under it and so long as it remains entirely unexecuted in that part which violates the law, there is "locus penitentiae." The disaffirming party has the same right to have compensation for the benefit conferred upon the real estate that he would have to recover for money or property received by the other party before the disaffirmance of such an agreement.

But, where the illegal purpose has been accomplished and the contract partially executed by both parties,—as where one has paid out money on the contract and the other has rendered services, or otherwise suffered damages by part performance on his part,—then the condition of the parties is the same as if the contract has been fully executed, and the courts shy away from aiding either of the parties in its further execution, or in undoing what has been done under it. And so if a builder were to enter into a contract to erect a structure not in conformity with expressed building laws, and performing some of it which the law has deemed unlawful, he could not be restored to status quo, because to support his cause he would have to depend on an unlawful act to enforce his claim.

Almost unanimously the courts have applied the strict rule as to illegal contracts when the contracts have been fully executed and that is that parties to an unlawful contract can never deserve, nor be granted relief, if the contract is wholly executed. In refusing to award relief to a party to an illegal contract, the court does not look beyond the point at which the unlawful act was consummated.[24]

And so where a builder has not yet performed the illegal work he may make a timely rescission and recover quantum meruit; if the agreement is executed the court will not rescind it, nor grant relief either to the builder for his services nor to the owner to enforce the contract.

Permit Requirements of a Model Building Code.

At this point it is timely to show some of the ramifications of a model building code and the requirements prescribed in that code. This is the code that the courts must construe when deciding whether the prohibitions are of such a nature as to hold all contracts embodying them unenforceable.

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[24] 13 C. J. 496, n. 21, and cases therein cited.

When will a building permit be required? The various municipalities in attempting to promote the safety and welfare of their citizens, have promulgated rules and regulations pertaining to the requirements for obtaining building permits within their jurisdiction. An exemplification of these provisions contained in the "City of Cleveland Building Code" provide that, ". . . no person, firm, or corporation shall erect, construct, enlarge, alter, repair, move, or demolish a building or other structure, or install any equipment or other appurtenances the installation of which is regulated by this Code, or cause the same to be done, without first making application to the Commissioner of Building and Housing and obtaining a permit therefor unless this Code specifically provides that such work may be done without a permit."[25]

The exceptions to the above requirements of building code provide that, "Ordinary minor repairs may be made without filing an application or obtaining a permit, provided that permits for such repairs are not specifically required by this Code, and provided further that such repairs are made without violating any provisions of this Code." [26]

If the work that is to be done meets the situation set down in the Building Code then "An application for a permit will be required and signed by the owner or his authorized agent, shall be filed with the Commissioner of Building and Housing on a form furnished by him and shall provide such information as may reasonably be required by the Commissioner for an intelligent understanding of the proposed work." [27]

Failure to Obtain a Permit and Its Contractual Effect.

Will a contract be enforced which either directly or indirectly violates a provision of the Building Code? The precise violation to be presently considered is the failure to obtain a building permit as required by the Code. The influence of this failure can only be shown by wide search in many jurisdictions.

From an affirmative point of view one court found that "An examination of the sections of the ordinance before us shows: (1) The making of repairs and improvements is not unlawful

[25] Building Code, City of Cleveland, Chap. 979, Div. C, Sec. 979-7, Subsec. (a).

[26] Id., Subsec. (d).

[27] Building Code, City of Cleveland, Chap. 979, Div. C, Sec. 979-8, Subsec. (a), Clause 1.

per se. It is only when they are done without a permit that the ordinance is violated. (2) Contracts made for the making of repairs and improvements without securing a permit are not declared to be void or unenforceable. (3) If a permit is not obtained for the making of repairs and improvements then the offending person, or persons, shall be deemed guilty of a misdemeanor and punished by fine." [28] The final view expressed by the same court was "Although the necessary permit to make repairs and improvements on building had not been obtained from the city by the owner when contract for repair and improvement of building was executed, and no such permit had been obtained by owner at time he repudiated the contract, the contract was enforceable and owner was liable in damages for breach thereof." [29]

In a Pennsylvania case relating to mechanic's liens the court enforced the contract and held that, "Granting appellant did violate the city ordinance by proceeding with alterations or repair work for which the mechanic's lien was filed, without a permit, that did not invalidate the mechanic's lien . . . Violation of the ordinance may have subjected the appellant to specific penalties set forth therein, but these penalties for non-compliance are limited to those expressly provided in the ordinance. No other remedy is enforceable." [30]

Another building contract was enforced when the court decided that "to lay a drain was not illegal even if a required permit had not been obtained, the parties not intending to contract for anything illegal." [31]

The foregoing conclusions regarding the lack of a building permit in connection with a building contract and its effect on the enforceability of the contract do not conclusively show that in other fact situations the building contract may be held to be unenforceable nonetheless. For example, building contracts performed which violated the Building Code have been held unenforceable due to the violation of the Code itself. It is said in one case that, "Where an ordinance requires that a permit for building must be obtained, an agreement between the builder and

[28] Comeaux v. Mann, 244 S. W. 2d (Tex.) 274 (1951).

[29] Id., 2nd par. of syllabus.

[30] Kessler v. Mandel, 156 Pa. Super. 505, 40 A. 2d 926 (1945); Beckershoff et ux v. Bomba, 112 Pa. Super. 294, 170 A. 449 (1934).

[31] Fox v. Rogers, 171 Mass. 546, 50 N. E. 1041 (1898).

owner to construct without obtaining such permit is unlawful and cannot form the basis of a civil action."[32]

Also, the absence of a permit may be used as the basis for illegality if it is first decided that the permit is part of the consideration. In order for the contract to be illegal the object must be illegal. "To invalidate the contract, the illegality must be inherent and not merely collateral. The contract is to be judged by its character and not by what the parties may do or attempt to do, with the fruits of it, and the courts will look to the substance and not the mere form of the transaction. 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."[33]

Is the Work in Itself Illegal?

The most important question to be kept in mind in a building contract is the legal or illegal classification of the work itself. Observing the problem with this question in mind, requires a recognition of the distinction between the terms malum in se and malum prohibitum. These terms have great effect upon the enforcement of questionable contracts, depending on the contract's object.

"Acts mala in se are felonies or breaches of public duties, injuries to person or property, outrages upon public decency or good morals, and breaches of official duty, when done willfully or corruptly. Acts mala prohibita are acts forbidden by statute, but not otherwise wrong."[34] "A misdemeanor of the second class, penal by statute, is mala prohibita."[35]

The model Building Code clearly states that "within the scope of this code as herein defined, the purpose of this code is to provide minimum standards to safeguard life or limb, health, property and public welfare."[36] It goes on to state that "all buildings or structures which are structurally unsafe, unsanitary, or not provided with adequate safe egress, or which constitute a fire hazard, or are otherwise dangerous to human life, or which in

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[32] Smith v. Lunning Co., 111 Cal. 308, 43 P. 967 (1896).

[33] C. J. S. Contracts, Sec. 190.

[34] Commonwealth v. Adams, 114 Mass. 323, 19 Am. Rep. 362 (1873).

[35] People v. Mahon, 1 Idaho, 330 (1870).

[36] Building Code, City of Cleveland, Chap. 979, Div. B, Sec. 979-1.

relation to existing use constitute a hazard to safety or health by reason of inadequate maintenance, obsolescence, or abandonment are, severally for the purpose of this Title, declared to be illegal and shall be abated by repair and rehabilitation or by demolition. . . ."[37]

Although the purpose of the Building Code has undoubtedly been inspired from a moral point of view as can readily be seen from the preceding paragraph it does not necessarily mean that all violations of the Code will be looked upon as malum in se.

Regardless of whether the act is malum in se or malum prohibitum, a general rule of law holds "any bargain is illegal if either the formation or the performance thereof is prohibited by constitution or statute."[38] For instance "A, the owner of land enters into a contract with B, a builder, to construct a building that materially violates the building laws. The bargain is illegal."[39]

It is said further that, "All contracts which are in violation of law are illegal, and no action or suit will lie to enforce them. And it is immaterial whether the contract is directly prohibited, or arises collaterally out of transactions prohibited by statute. Nor is it material whether there is in fact any corrupt intentions on the part of either of the contracting parties to violate the law. . . . There can be no civil right where there can be no legal remedy for that which is in itself illegal. And this is true as well of contracts malum in se as of contracts malum prohibitum. . . ."[40]

Further, it is said that "A contract in violation of the prohibition of a statute is unlawful and void, and will not be enforced. It has been said that the legislature can and does define the public policy of the state. . . . The law is supreme and no contract between individuals can make it lawful to do that which the statute positively commands shall not be done. A party, who enters into a contract despite a statute prohibiting it, cannot thereafter claim the fruits of its performance in a court of justice."[41]

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[37] Building Code, City of Cleveland, Chap. 979, Div. E, Sec. 979-29, Subsec. (a).

[38] Restatement, Contracts, Sec. 580, Subsec. 1 (1932).

[39] Id., Subsec. 2a, Illus. 2 (1932).

[40] Price v. Marcus, 199 Okl. 356, 185 P. 2d 953 (1947).

[41] 9 Ohio Jur. 341, Contracts, Sec. 124, and cases cited.

Acts Classified as Malum in se.

The issuance of a building permit is mainly to protect the welfare of the public as stated in the purpose clauses of the Building Code, and therefore any violation of the Code, as construed by some courts, is an act which is malum in se. This fact was readily brought out in an Ohio case[42] "when the building commissioner refused to grant the permit applied for, upon the ground that the provisions of the ordinance of the city comprising its building code prohibits the conversion of the fifth story of relator's building into residence apartments and forbids the use of that portion of the building for tenement purposes." The court went on to state that "The authority of a municipality in the exercise of its police power to enact and enforce ordinances of this nature, which provide for and secure the safety and welfare of the people, is no longer open to question. Such regulations are in no wise an invasion of property rights, for no one has a right to use his property in a manner that unreasonably and unnecessarily endangers the lives of others; hence in the interest of the public welfare a property owner must submit to a reasonable regulation and limitation of the use of his property."

In instances where contracts will not be enforced due to illegality the maxims *ex turpi causa non oritur actio* and *ex dolo malo non oritur actio* (causes of action based on an illegal or immoral act), gave rise to the opinion stated by Lord Mansfield that, "no court will lend its aid to a man who founds his action upon an immoral or an illegal act. It is upon that ground that the court goes, not for the sake of the defendant but because they will not lend their aid to such a plaintiff." [44]

For example, in an action by a plaintiff to foreclose a mechanic's lien on a contract to perform a service which did not comply with the price regulations set up by the O. P. A. it was held "both under Federal and State authorities, that where parties who are charged with the knowledge of the law . . . undertake to enter a contract in violation thereof they will be left in the position which they put themselves." [45] An Illinois case held that, ". . . under the city building code making it unlawful to alter

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[42] State ex rel. The Euclid-Doan Building Co. v. Cunningham, 97 Ohio St. 130, 119 N. E. 361 (1918).

[44] Holman v. Johnson, Cocop. 341.

[45] Perma-Stone Corporation v. Merkel et ux, 255 Wis. 565, 39 N. W. 2d 730 (1949).

building without permit and providing a penalty for each offense, failure to obtain permit made building contract unenforceable, and the fine provided was an additional penalty for failure to comply." [46]

When the thing to be performed is in itself of an illegal nature and against the morals of the community justice will not lend its aid to the enforcement of the contract. "A summary of an old Ohio case has held that a contract, whose object is tainted with illegality, will not be enforced. A nine-pin alley in conjunction with the operation of a tavern, and any contract in violation thereof must of necessity be illegal and void as being against public morals and in derogation of the statute. If the ordinary use of the thing produced be illegal, he must be taken as intending the use, and as a privy to the illegality, and therefore entitled to no benefit for his labor." [47]

Acts Classified as Malum Prohibitum.

"If the contract as made could have been performed in a legal manner, the courts will not declare it void and unenforceable because it may have been performed in an unlawful manner." [48]

Summarizing an Ohio case where the installation of brick veneer on a building was to be done in a manner violative of a building code, the improper method of installation was no defense to a suit on the contract and the contract was held not to be illegal or void. The court held that when a person enters into a contract to have brick veneer placed upon his residence in an improper manner, so that the completed work is not satisfactory and violates the building code provisions, he cannot set up such improper method of applying the brick veneer as a defense to an action for labor, work and materials furnished in accordance with the contract. The court stated that a contract to brick veneer a building contrary to the provisions of a city building code is not illegal, void and unenforceable when the contract has been substantially performed by one party and there is no ordinance making such a contract itself unlawful.[49]

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[46] Litwin v. Pioneer Trust & Savings Bank et al., 347 Ill. App. 75, 105 N. E. 2d 807 (1952).

[47] Spurgeon v. McElwain, 6 Ohio Reports 442 (1834).

[48] Comeaux v. Mann, 244 S. W. 2d (Tex.) 274 (1951).

[49] Fischer-Liemann Construction Co., v. Haase et al., 64 Ohio App. Rep. 473, 29 N. E. 2d 46 (1940).

When Will an Illegal Contract be Held Valid.

"Contracts made in violation of statutes, if not malum in se, are sometimes held valid, and generally so notwithstanding the infraction of law, whenever it becomes necessary to save from injury persons for whose protection the violated statutes were enacted, or whenever the public interests require that such contracts be enforced." [50]

"When a statute imposes specific penalties for its violation, where the act is not malum in se, and the purpose of the statute can be accomplished without declaring contracts in violation thereof illegal, the inference is that it was not the legislative intent to render such contracts illegal and unenforceable, and the court must examine the entire statute to discover whether the Legislature intended to prevent courts from enforcing contracts based on the act prohibited, and unless it does so appear, only the penalties imposed by the statute can be enforced." [51]

Conclusion.

"A distinction is made between acts which are mala in se, which are generally regarded as absolutely void, in the sense that no right or claim can be derived from them; and acts which are mala prohibita, which are void or voidable, according to the nature and effect of the act prohibited." [52]

In conclusion it can safely be stated that contracts in violation of the Building Code which are malum in se will not be enforced in most instances and contracts in violation of the Building Code, which are malum prohibitum, will ordinarily be enforced.

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[50] 12 L. R. A. (N. S.) 618 (1908).

[51] In re T. H. Bunche Co., 180 Fed. 519 (1910).

[52] Ewell v. Daggs, 108 U. S. 143, 150 (1883).

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