CONTRACTS

THE DEFENSE OF ILLEGALITY AS APPLIED TO THE ROBINSON-PATMAN ACT

During the period 1936-40, Bruce's Juices, Inc., a relatively small scale canner of fruit juices, purchased most of its cans from the American Can Co. An open account debt which accumulated for the price of the cans was put into the form of promissory notes. Litigation began when Bruce's Juices defaulted and American Can sued to recover upon the notes. Bruce's Juices pleaded illegality as an affirmative defense, basing the plea upon the ground that the notes represented obligations under sales contracts which were unenforceable under the Robinson-Patman Act[1] because of discriminatory practices as to quantity discounts. The Florida courts refused to sustain the defense,[2] and on certiorari the Supreme Court affirmed. The remedies provided by Congress in the Clayton Act as amended by the Robinson-Patman Act are exclusive; hence a violation of the Act will not bar the violator from recovery in a suit to enforce rights which arose under the contract which constituted the violation.[3] *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947).[4]

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1. 49 Stat. 1526 (1936), 15 U.S.C. §§13, 13(b), 21(a) (1940).
2. Bruce's Juices, Inc. v. American Can Co., 155 Fla. 877, 22 So.2d 461 (1945). The Supreme Court of Florida first reversed the trial court in a 5-2 decision, but on rehearing affirmed, 4-3. See Note, 55 Yale L. J. 820 (1946), criticizing the Florida Court's decision.
3. The immediate consequences of the holding in the principal case will be of relatively little moment in the federal courts where the triple damage suit provided for by §4 of the Clayton Act is available as a counterclaim. 38 Stat. 731 (1914), 15 U.S.C. §15 (1940); Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944); Brown Paper Mill Co. v. Agar Mfg. Corp., 1 F.R.D. 579 (S.D.N.Y. 1941). But the triple damage remedy is available only in the federal courts. 15 U.S.C. §15 (1940); Freeman v. Bee Mach. Co., 319 U.S. 448 (1943). Therefore, under the holding of the principal case, a vendee who has been discriminated against and is sued upon the discriminatory contract in a state court must pay the discriminatory price and then seek his remedy in an action for triple damages in the federal courts.
4. A 5-4 decision in which Mr. Justice Jackson wrote the opinion of the Court, and Mr. Justice Murphy wrote a dissenting opinion in which Black, Douglas, and Rutledge, JJ, joined. On first argument the decision below had been affirmed without opinion. Bruce's Juices, Inc. v. American Can Co., 327 U.S. 758 (1946), rehearing granted, 327 U.S. 812 (1946). For discussions of the principal case, see Lockhart, "Violation of Anti-Trust Laws as a Defense in Civil Actions," 31 Minn. L. Rev. 507, 542-50 (1947); Frank, "The United States Supreme Court: 1946-47," 15 U. Chi. L. Rev. 1, 16-18 (1947); and Notes, 42 Ill. L. Rev. 550 (1947); 47 Col. L. Rev. 867 (1947); 33 Va. L. Rev. 649 (1947).

The decision justifies an examination of the case against the background of the general doctrine of illegality as a defense to a contract action,[5] and an inquiry into the policy considerations which influenced the Court in reaching its result.

The Robinson-Patman Act amends §2 of the Clayton Act[6] and prohibits sellers from discriminating in price between different purchasers of commodities of like grade and quality where the effect is substantially to lessen competition or tend to create a monopoly.[7] The alleged discrimination in the principal case consisted of quantity discounts of up to five percent granted to large scale purchasers. Bruce's Juices was a relatively small scale purchaser and, except

5. It is worthy of emphasis at this point that in its opinion the Court did not treat as decisive the fact that the suit was on the notes rather than on the original contracts of sale. It is suggested, in passing, that this consideration furnishes a possible ground for distinguishing the instant case, should a similar one arise where notes are not involved. It might be validly asserted in distinguishing the instant case that the notes here were enforceable even though the original contracts would not be, on the ground that the surrender of an invalid claim may constitute good consideration for a promise if the surrendering party had an honest and reasonable belief in the validity of the claim. Forsythe v. Rexroat, 234 Ky. 173, 27 S.W.2d 695 (1929); Blount v. Wheeler, 199 Mass. 330, 85 N.E. 477 (1908); Restatement, "Contracts" §76(b) (1932). But cf. Springstead v. Nees, 125 App. Div. 230, 109 N.Y. Supp. 148 (2d Dept. 1908). The point is not raised by the Court in the instant case. For an instance of an equally tenuous distinction of an antitrust case, see United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 214-16 (1940), distinguishing Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).

6. 38 Stat. 730 (1914). This section has been completely supplanted in U.S.C. by the Robinson-Patman Act.

7. Section 1 of theRobinson-Patman Act, 15 U.S.C. §13 (1940). This section does not prohibit all quantity discounts, but expressly permits those which "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which . . . . commodities are . . . . sold or delivered." Section 3 of the Robinson-Patman Act, 15 U.S.C. §13(a) (1940), provides criminal sanctions of fine and imprisonment for intentional discrimination "for the purpose of destroying competition, or eliminating a competitor." In addition to the triple damage action, n.3, supra, other remedies provided by the Clayton Act are: (1) The government suit in equity to enjoin further violations. Clayton Act §15, 15 U.S.C. §25 (1940); (2) Petition by the injured party to a federal court for injunctive relief. Clayton Act §16, 15 U.S.C. §26 (1940); (3) The Federal Trade Commission's cease and desist order, oxpressly authorized by §1(b) of the Robinson-Patman Act, 15 U.S.C. §13(b) (1940). None of these remedies could have been of any aid to Bruce's Juices in the principal case, since the discrimination here complained of was an accomplished fact which could not be affected by an injunction or cease and desist order.

for one year when it qualified for a one percent discount, could not qualify for the quantity discount, with the result that it ordinarily was charged five percent more for its cans than were its largest competitors. Bruce's Juices contended alternatively that the alleged discrimination was either a criminal or a civil violation of the Robinson-Patman Act. If the discrimination was criminal under §3 of the Act, it was argued that Bruce's Juices had a complete defense to any recovery on the transaction. If the discrimination was merely a violation of §1 of the Act, Bruce's Juices claimed as a partial defense that American Can could not recover on the contract but only on a *quantum valebant* for the reasonable value of the cans sold.

In refusing to allow the defense, the Court took the position that to do otherwise would be contrary to the congressional purpose. In support of this conclusion it was pointed out that the Act prescribes specific sanctions, but does not make uncollectibility of the purchase price one of them. The Court discovered no express manifestation of congressional purpose, but found significance in the fact that the Act as reported by the Senate Judiciary Committee contained no sanction more extreme than one, subsequently eliminated, of compelling remission of the excessive portion of the price charged by a violator.[8] Such congressional action adds no strength to the Court's position. If Congress abandoned one sanction in favor of more stringent ones, that fact points more strongly to an opposite conclusion. Furthermore, the purpose of the proposed Senate provision was not to provide a less stringent sanction, but was instead to provide a presumptive rule for the measurement of damages in suits by the victimized party and thus to obviate the difficulty of proving damages, which had long been one of the chief impediments to suits for recovery under the Clayton Act by victims of discrimination. This point is made abundantly clear by the committee report on the Senate Bill.[9]

In short, the Court, without adequate regard to the overall purpose of the statute, could muster no more than negative implication to support its determination that to allow the defense of illegality in the instant case would be

8. See instant case at 750, 751.
9. Sen. Rep. No. 1502, 74th Cong., 2d Sess. 8 (1936).

contrary to congressional purpose.[10] A search of the committee reports and debates on the Robinson-Patman Act confirms the Court's conclusion that Congress did not express itself directly on the question. There are, however, indications that the chief purpose of the Act was to increase the effectiveness of enforcement of the congressional policy against price discrimination.[11]

A legislature, when it enacts a statute, necessarily acts upon and in relation to the whole existing body of law including judicial decisions as well as statutes. Congress, in enacting the Robinson-Patman Act, could not have been unaware of the doctrine of illegality as a defense to contract

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10. See Heydon's Case, 3 Co. 7a, 7b, 76 Eng. Rep. 637, 638 (1584): ". . . . for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:
1st. What was the common law before the making of the Act.
2nd. What was the mischief and defect for which the common law did not provide.
3rd. What remedy the Parliament hat resolved and appointed to cure the disease of the commonwealth.
And 4th. The true reason of the remedy; and then the office of the Judges is always to make such construction as shall suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act, *pro bono publico*." In 2 Sutherland, "Statutes and Statutory Construction," §4501 (Horack's, 3d ed. 1943), Heydon's Case is commented on as follows: "This rule has been reformulated, expanded, restricted, explained, and rephrased, but the conclusions of it, the applications of the law according to the spirit of the legislative body remains the principal objective of judicial interpretation."
Representative Patman, co-author of the Robinson-Patman Act, submitted to the Supreme Court as amicus curiae in support of the petition for certiorari, a memorandum in which he said, in part: "Such a denial [of the defense] seems to me to be contrary to the intent of Congress . . . ." Brief for Wright Patman as Amicus Curiae, pp. 3-4, Bruce's Juices, Inc. v. American Can Co., 326 U.S. 711 (1945).

11. The Senate Committee stated its objectives as follows: ". . . . your committee feels strongly that every reasonable facility should be afforded to the [victims of discrimination] to enable them to recover damages they have suffered, and thus to induce their active vigilance in enforcing the act, relieving the Government correspondingly of the burden of its costs . . . ." Sen. Rep. No. 1502, 74th Cong., 2d Sess. 8 (1936). Further indication of Congressional desire to strengthen enforcement of the Clayton Act is shown by debates on the floor of Congress: "Mr. Gore. I desire to ask the Senator whether the general purpose and object of the pending bill are to strengthen the provisions of section 2 of the Clayton Act, and to stop the loopholes and correct the abuses which time and experience have developed and disclosed in that legislation." "Mr. Logan. [Chairman of the Senate subcommittee to which the bill was referred] I say to the Senator that the bill has no other purpose . . . ." 80 Cong. Rec. 3115-16 (1936).

actions. Federal and state courts had applied that doctrine in relation to previous antitrust statutes which, like the Robinson-Patman Act, contained no mention of the doctrine.[12] Thus it appears that legislative silence lends less than nothing in support of the Court's position on the phantom "intent of the legislature."[13]

If no manifestation of legislative purpose was authority for dismissal of Bruce's Juices' defense,[14] then were there

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12. Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227 (1909) (Sherman Act); Penn-Allen Cement Co. v. Phillips & Sutherland, 187 N.C. 437, 109 S.E. 257 (1921) (Clayton Act).

13. For a recent article on statutory interpretation in general, see Frankfurter, "Some Reflections on the Reading of Statutes," 47 Col. L. Rev. 527 (1947), in which the author at pp. 538-39 characterizes the term "legislative intent" as a misnomer, and asserts that legislative "aim," "purpose," or "policy" is the real objective of judicial inquiry rather than the subjective "intent." For a more extreme position, see Radin, "Statutory Interpretation," 43 Harv. L. Rev. 863 (1930), with which should be compared Landis, "A Note on 'Statutory Interpretation'," 43 Harv. L. Rev. 886 (1930), and Pound, "Common Law and Legislation," 21 Harv. L. Rev. 383, 385-86 (1908).

14. The defense of illegality in a contract action is essentially a judicial rather than a legislative sanction, and no affirmative expression of legislative intent is necessary to bring it into play. Since at least as early as 1692, courts have been refusing to enforce bargains made illegal by statute. Bartlett v. Vinor, Carth. 251, 252, 90 Eng. Rep. 750 (1692). See also Cope v. Rowlands, 2 M.&W. 149, 150 Eng. Rep. 707 (1836). Difficulty, however, often arises in determining whether the legislature has actually intended to prohibit formation or performance of a bargain (to be distinguished from the inquiry as to whether the legislature intended the doctrine of illegality to be invoked). Much of the doctrine on legislative intent to prohibit can be traced to a dictum of Lord Holt, C.J., in Bartlett v. Vinor, supra, to the effect that every penalty implies a prohibition though there be no prohibitory words in the statute. The courts of this country have worked out certain exceptions to the rigor of the rule as thus stated. If a statute imposes a penalty, the court *may* inquire into the legislative intent to determine whether a contract involving the proscribed conduct is enforeable. Farmers' and Mechanics' National Bank v. Dearing, 91 U.S. 29 (1875); Harris v. Runnels, 12 How. 79 (U.S. 1851). But cf. Bank of the United States v. Owens, 2 Pet. 527 (U.S. 1829); Bisbee v. McAllen, 39 Minn. 143, 39 N.W. 299 (1888); Cheney v. Unroe, 166 Ind. 550, 77 N.E. 1041 (1906). A contract made by an unlicensed person is enforceable if the license was imposed as a revenue raising measure. Howard v. Lebby, 197 Ky. 324, 246 S.W. 828 (1923). But cf. Lund v. Bruflat, 159 Wash. 89, 292 Pac. 112 (1930). Contra: Yount v. Denning, 52 Kan. 629, 35 Pac. 207 (1894). But when the license is required as a regulatory measure, a contract made in contravention thereof is not enforceable. Vogel v. Chase Securities Corp. 19 F. Supp. 564 (D.C. Minn. 1937). But cf. Frost & Co. v. Couer d'Alene Mines Corp., 312 U.S. 38 (1940); Rosasco Creameries, Inc. v. Cohen, 276 N.Y. 274, 11 N.E. 2d 908 (1937). For further consideration of the general topic, see Notes, 50 Yale L. J. 1108 (1941); 32 Ill. L. Rev. 102 (1937). The defense has been almost uniformly upheld if the statute declares formation or

judicial precedents which supported the result? Urged that holdings under the Sherman Act[15] supply an analogy for allowing the defense of illegality in the principal case, the Court accurately stated that in those cases the defense has been allowed only when the illegality was "inherent" in the contract sued upon, and had as its object and effect accomplishment of illegal ends which would have been consummated by the judgment sought.[16] Where, however, the contract sued upon was not "intrinsically illegal," the Court pointed out that the defense of illegality has been denied in the Sherman Act cases.[17]

An examination of the cases in which the defense of illegality under the Sherman Act has been denied,[18] discloses that the only illegality alleged was that the vendor was an illegal combination within the meaning of the Sherman Act. Such illegality is obviously not inherent in the contract sued upon, and the cases seem entirely sound. The fact that one of the parties to an otherwise valid sales contract is engaged in an illegal business should not, without more, preclude enforcement of the contract.[19] But in the instant case the illegality alleged has no such tenuous connection to the contract sued upon. The Robinson-Patman Act makes not monopoly but *price discrimination* illegal. Such discrimination can be accomplished only by making or contracting to make sales. Performance of a discriminatory sales contract entails the specific conduct made illegal by the Robinson-Patman

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performance of the bargain to be a crime. Cheney v. Unroe, 166 Ind. 550, 77 N.E. 1041 (1906); 6 Williston, "Contracts" §1763 and cases cited (rev. ed. 1938); Restatement, "Contracts" §580, Comment a (1932). The same is true if the statute expressly prohibits some act essential to the formation or performance of the bargain. 6 Williston, "Contracts" §1763 (rev. ed. 1938); Restatement, "Contracts" §580 Comment a (1932).

15. 26 Stat. 209 (1890), 15 U.S.C. §§1-7, 15 (1940). The Act provides, in part, that "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states . . . . is hereby declared to be illegal."

16. Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227 (1909). See Bement and Sons v. National Harrow Co., 186 U.S. 70, 88 (1902); cf. Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944); Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942).

17. See instant case at 755. Small Co. v. Lamborn, 267 U.S. 248 (1925); Wilder Mfg. Co. v. Corn Products Refining Co., 236 U.S. 165 (1915); Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902).

18. Cases cited n. 17, supra.

19. Fineman v. Faulkner, 174 N.C. 13, 93 S.E. 384 (1917).

Act. Yet, in the instant case, the illegality was held not to be inherent in the contract sued upon. In so holding, the majority of the Court found comfort in the fact that no single sale can violate the Act; that at least two transactions must take place in order to constitute discrimination.[20] If this position is sound, and the illegality is, in fact, not inherent in the contract, the case is posited on well established contract principles[21] and is hardly worthy of comment.

But illegality rarely appears on the face of a contract sued upon. Courts must constantly look beyond the documents and transactions in issue in order to determine the facts and correctly adjudicate a case. Discriminatory sales contracts are not unique in this respect, and the fact that discrimination is a relative matter depending upon the vendor's transactions with third persons provides no grounds for classifying the illegality here as not inherent. The Court has said, in effect, that illegality is not inherent in the contract because it is necessary to go outside the transaction in issue in order to prove the illegality. Such a position seems manifestly untenable and, if adopted generally, would practically eliminate the doctrine of illegality from the field of contract law.[22] This conclusion is ably supported by Mr. Justice Murphy in his dissenting opinion.[23]

If, as has been demonstrated above, the decision in the instant case was not strongly guided by either legislative purpose or judicial precedent, then what were the real considerations which led to the result reached? The Court doubted that American Can's quantity discount plan violated the Robinson-Patman Act, and may have felt that Bruce's Juices' defense was a subterfuge to avoid payment for the

20. See instant case at 755, 756.

21. Cases cited n. 17, supra; Restatement, "Contracts" §597 (1932); 5 Williston, "Contracts" §1661 (rev. ed. 1938); Lockhart, "Violation of the Anti-Trust Laws as a Defense in Civil Actions," 31 Minn. L. Rev. 507 (1947).

22. What the Court has done in this respect is, for the purpose of the instant case at least, to effect a not inconsiderable perversion of the meaning of the word "inherent." The power of courts to change the legal definitions of words cannot be denied, and adverse criticism of such judicial redefinition has been intimated to be generally a fruitless pastime. Gavit, "Legal Conclusion," 16 Minn. L. Rev. 378 (1932), reprinted in 9 Ind. L. J. 109 (1933). It does not follow that it is fruitless to point out instances in which courts have exercised their prerogative.

23. See instant case at 763, 764.

cans purchased.[24] The Court further believed that even if Bruce's Juices could prove a violation of the Robinson-Patman Act, it should be left to its remedy of a triple damage suit, since the proof in one case would be no more difficult than in the other, and since damages are no more speculative or unprovable in one suit than in the other.[25] This analysis is unrealistic, for if the defense of illegality had been allowed, Bruce's Juices need not have proved damages at all, but only the illegality of the transaction. Further, the "adequacy" of the triple damage action is made questionable by the great difficulty and expense of establishing any antitrust violation,[26] and by the fact that under the triple damage provision of the Sherman Act there has been an average of only one successful triple damage action every four years since the passage of that Act in 1890.[27] No reason appears why the triple damage remedy as applied to the Robinson-Patman Act should be substantially more effective.[28]

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24. See instant case at 745, 746. While it is impossible to tell to what extent, if any, the decision was influenced by this consideration, it should have had no bearing on the case as decided. The issue was whether a real violation of the Robinson-Patman Act constituted a defense. For a holding that a similar quantity discount plan is not per se a violation of the Act, see Morton Salt Co. v. Federal Trade Commission, 162 F.2d 949 (C.C.A. 7th 1947), cert. granted, 322 U.S. 850 (1948), a 2-1 decision in which Judge Minton wrote a dissenting opinion. The case is noted in 42 Ill. L. Rev. 556 (1947).

25. See instant case at 752, 757.

26. Hamilton and Till, "Antitrust in Action" 82-4 (TNEC Monograph 16, 1940). The difficulty of establishing an antitrust violation is further indicated by United States v. Standard Oil Co., 23 F. Supp. 937 (W.D. Wis. 1938) where the defendant gasoline companies enlisted 112 defense attorneys and expended approximately $2,500,000 to contest a suit which ultimately resulted in a fine of $65,000. See Note, 49 Yale L. J. 284, 289 (1939).

27. Note, 49 Yale L. J. 284, 298 (1939). See also Note, 41 Ill. L. Rev. 462 (1941). None of the other remedies provided by the Clayton Act as amended by the Robinson-Patman Act have any applicability to Bruce's Juices' situation in the principal case. See n.7, supra.

28. Triple damage actions under the Clayton Act have not been substantially more successful than under the Sherman Act. Hamilton and Till, "Antitrust in Action" 83 (TNEC Monograph 16, 1940). It is fair to note, however, that there have been a few instances in which substantial triple damage recoveries have been had for violations of §2 of the Clayton Act both before and after the Robinson-Patman amendment. E.g., American Can Co. v. Ladoga Canning Co., 44 F.2d 763 (C.C.A. 7th 1930), cert. denied, 282 U.S. 899 (1931); American Cooperative Serum Ass'n. v. Anchor Serum Co., 153 F.2d 907 (C.C.A. 7th 1946), cert. denied, 329 U.S. 826 (1946). By the terms of the Robinson-Patman amendment, a plaintiff, to establish his action, must show not only price discrimination but also that the effect thereof "may be substantially to lessen competition or tend to create a monopoly." It is true that it has been held that in a complaint by the FTC, once

The Court was concerned with speculating upon what effects, good and bad, a decision either way would have upon the conduct of business enterprise. To allow Bruce's Juices' defense might mean that any common "garden variety" of suit to recover the price of goods sold could result in a comprehensive inquiry into the seller's entire business operations.[29] Another reason against an opposite holding is the confusion which might result from permitting state courts to adjudicate the complicated issues arising out of the Robinson-Patman Act. The policy against permitting a buyer to get his goods for nothing also favors the Court's decision, although such a situation would not necessarily follow from an opposite holding in the principal case.[30]

In its doctrinal aspect, the principal case represents an innovation in the law as to illegality as a defense in a contract action.[31] It has been suggested that the holding of

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the Commission has proved sales at different prices, the party charged with violating the Act has the burden of proving affirmatively that the discrimination did not lessen competition. Samuel H. Moss, Inc. v. Federal Trade Commission, 148 F.2d 378 (C.C.A. 2d 1945), cert. denied, 326 U.S. 734 (1945). But no case has been found in which this ruling has been applied to a triple damage action. See CCH Robinson-Patman Act Symposium (1947 ed.) 78. Morover, the Moss case has been severely criticized, id. at 70-72, and its authority weakened by the recent case of Morton Salt Co. v. Federal Trade Commission, 162 F.2d 949 (C.C.A. 7th 1947), cert. granted, 332 U.S. 850 (1948). Any extension of the application of the Moss case would seem neither likely nor warranted by a fair interpretation of the Act.

29. CCH Robinson-Patman Act Symposium (1947 ed.) 78. This objection has merit, but goes as much to the policy of the Robinson-Patman Act itself as to allowing the defense in the principal case. For the Act is highly "inconvenient" to anyone charged with its violation, whether that charge be made in an original suit for triple damages, a counterclaim of the same description (in the federal courts), a suit in equity for an injunction, a complaint by the Federal Trade Commission, or, as here, in an affirmative defense to a contract action in a state court.

30. Bruce's Juices' most earnest contention was that the alleged discrimination violated §1 of the Act, which carries no criminal sanction. If Bruce's Juices had prevailed on this theory, American Can would still have been free to recover the reasonable value of the goods on a *quantum valebant* basis. Restatement, "Contracts" §600 (1932). If, however, Bruce's Juices had established violation of the criminal provisions of the Act, it is true that American Can could have made no recovery. Restatement, "Contracts" §598 (1932); 6 Williston, "Contracts" §1768A (rev. ed. 1938). The Court accepted this rule as settled. See instant case at 748, n.1.

31. The case goes even further in the respect than has the New York Court of Appeals in recent years. Rosasco Creameries, Inc. v. Cohen, 276 N.Y. 274, 11 N.E.2d 908 (1937); Sajor v. Ampol, Inc., 275 N.Y. 125, 9 N.E.2d 803 (1937); Fosdick v. Investors Syndicate, 266 N.Y. 130, 194 N.E. 58 (1934).

the case should be limited to its facts, and that any expansion of its principle to the contract field generally would be unwarranted.[32] But the familiar tendency of a principle to expand itself to the limit of its logic cannot be ignored. The possibility of such an expansion makes *Bruce's Juices, Inc. v. American Can Co.* a case of considerable significance to both lawyers[33] and legislators.[34]

EVIDENCE

PHYSICIAN-PATIENT PRIVILEGE— WAIVER IN DEED AND WILL CONTESTS

The heirs of a deceased grantor sued the grantees to set aside a deed on the grounds of fraud, undue influence, and unsoundness of mind. The heirs called two physicians to testify to the physical and mental condition of the grantor. The grantees objected to this testimony on the grounds that a physician is incompetent to testify as to any information acquired in his professional capacity while attending or treating a patient. The trial court admitted the testimony of the physicians over this objection. On appeal, the Indiana Appellate Court reversed, holding that the deceased grantor's privilege of objecting to the admission of testimony of physicians who attended him cannot be waived over the objections of the grantees who seek to sustain the deed. *Stayner v. Nye*, 76 N.E.2d 855 (Ind. App. 1948).

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32. Lockhart, "Violation of Anti-Trust Laws as a Defense in Civil Actions," 31 Minn. L. Rev. 507, 548 n.215 (1947).

33. At time of writing there has been at least one reported attempt (unsuccessful) to use the doctrine of the instant case to overcome a defense of illegality in a contract action. A seller who charged more than the OPA ceiling price brought suit to recover damages for buyer's failure to pay for goods sold. Defendant pleaded illegality ,and plaintiff urged the Bruce's Juices case on the Court. In refusing recovery, the Court said: " . . . the fact, if it be a fact, that the Supreme Court of the United States has held that a seller's violation of another statute—the Robinson-Patman Price Discrimination Act—does not render unenforceable notes given for the purchase price of goods . . . does not give a N.Y. court leave to ignore or disregard the specific decision of [the New York] Court of Appeals with reference to the effect of violation of the identical statute here involved." Government of French Republic v. Cabot, 16 U.S.L.Week 2240 (N.Y. Sup. Ct. Nov. 25, 1947).

34. The refusal of courts to enforce contracts involving violation of a statute is often one of the most effective of the available sanctions. If those who draft statutes wish to avail themselves of this sanction, it appears, as a result of the principal case, even more clearly than before, that they must expressly provide for it. Not even addition of criminal sanction will assure the result.