The maxim, *In pari delicto potior est conditio defendentis*, expresses the general principle that a plaintiff has no standing in court to seek restitution in connection with an illegal transaction.\(^1\) Though the concept of restitution is broad enough to include this situation, its application has been restricted by a number of policies and reasons—chief among them the viewpoint that a plaintiff who has participated in such a transaction does not meet the standard of conduct required of those to whom the courts will give assistance.\(^2\)

A plaintiff who would have any hope of obtaining relief, therefore, must offer the court some means of circumventing the maxim. He must find some exception to it or other device for avoiding its application. Historically, the general principle was established after much fluctuation and the same conflicting policies which affected the establishment of the final rules are still present before the courts in the individual case. Frequently the policies urging a decision granting

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*After this article was prepared and submitted space restrictions made a reduction in length necessary. The editorial staff has therefore eliminated the very complete collection of cases, statutes and other authorities cited, leaving citations in most footnotes to one or two representative authorities.

\(^1\) A.B., 1932, LL.B., 1934, University of Mississippi; LL.M., 1935, S.J.D., 1942, Harvard Law School. Professor of Law, University of Mississippi; Visiting Professor of Law, University of Texas.

\(^2\) Other Latin maxims have often been used to express the same idea.

2. In an article entitled “Restitution of Benefits Obtained under Illegal Transactions—Reasons For and Against Recovery” (1946) 25 Tex. L. Rev. 31, I have attempted a thorough-going study of the various factors and policies which have influenced the formation of the general principle, together with an explanation and critical analysis of the reasons which have been urged both for and against granting relief. See also Wade, *The Status of Property Transferred under an Illegal Transaction* (1946) 41 Ill. L. Rev. 487.
relief are sufficiently strong to impel the court to hold for the plaintiff. This has happened so frequently that a large number of exceptions to the maxim have developed, and in most of the cases it is possible for a decision to be reached either for the plaintiff or the defendant. The certainty suggested by the expression of the maxim in many respects is illusory.

Any thorough treatment of the problem of when restitution should be granted of benefits obtained in an illegal transaction will therefore start with the general principle as incorporated in the maxim, *In pari delicto*, and will seek to trace the development and determine the nature and extent of exceptions to the maxim. This is an attempt to present such a treatment.

**Exceptions to the Maxim In Pari Delicto**

**I. Plaintiff Is Able to State His Case Without Referring to the Illegality**

The first method for avoiding application of the maxim may perhaps not properly be called an exception to the maxim; it is merely a procedural device which a complaisant court may sometimes allow. If the plaintiff can state his case without referring to the illegal nature of the transaction, then the maxim may be held not to apply and he may be entitled to relief.

Doubtless this rule has a proper application. A plaintiff's claim for relief not based upon or connected with an illegal transaction should not be barred by his participation in a separate one, as if he were an outlaw. This legitimate application of the rule, however, has occasionally been distorted in order to allow recovery when the plaintiff's claim is actually based upon an illegal transaction. Permitting the plaintiff adroitly to phrase his declaration so as to omit any illegal aspect and make it necessary for the defendant to call attention to the illegality involved means that the whole decision is based not upon the merits of the plaintiff's claim, but upon his attorney's skill in drafting a declaration.

There are several instances in which the court has allowed use of this procedural dodge. In *Taylor v. Bowers*, for example, a plaintiff who had transferred property in order to defraud his creditors was allowed to recover. In the appellate court James, L. J., said:

"Now the rule is, that a man certainly cannot recover goods in respect of which he is obliged to stage a fraud of his own as part of his title. But that is not, according to my view, the position..."
of this plaintiff. All the plaintiff has got to say is: 'These were
my goods . . . They are my goods still. I never sold them,
and I have never given them to anybody in such a way as to
deprive myself of the right to possession of them.' It is the de-
fendant who has got really to show the fraud. . . ." 4

The New Jersey court took a similar attitude when a plaintiff
who had disposed of land by a lottery brought ejectment to get it
back.5 And in Monahan v. Monahan,6 the plaintiff's ability to allege
in his complaint facts giving rise to a purchase-money resulting trust
was held to be sufficient to allow a decision for him, although his
evidence showed that he had acted solely for the purpose of evading
taxes. Among other applications,7 this device has been used fre-
quently to allow a principal to recover money from his agent,8 and to
allow a public official who had contracted to accept less than the statu-
atory salary or fee to disregard his contract and recover the full statutory
amount.9

The civil law maxim, Nemo auditur propriam turpitudinem
allegans, is somewhat better adapted to the use of this technique than
the common law maxim; so long as the plaintiff does not allege his
own turpitude in his declaration but forces the defendant to bring out
the illegality in his plea, the maxim does not literally apply to him,
but to the defendant. This argument has occasionally been used by
civil law authorities,10 and two early English cases seem to establish
this result by setting up the English maxim that "no man shall set up
his own iniquity as a defense."11 This view, however, seems to have

4. Id. at 298. Part of this statement is quoted with approval in A. L. G. [Good-
hart], Fraud and Restitution—A Postscript (1938) 54 L. Q. Rev. 216, 217, and the
suggestion made that this attitude should have been adopted by the Court of Appeals
5. DeSantis v. Sowers, 23 N. J. L. 465 (1852), aff'd 24 N. J. L. 789 (1854). Both courts succeed in giving the impression that they would like to hold
for the defendant but are compelled by the law to hold for the plaintiff, because he is
able to show an original conveyance to him and the defendant is not allowed to show
the invalid conveyance given by the plaintiff to him when he won the lottery.
6. 77 Vt. 133, 59 Atl. 169 (1905), (1905) 18 Harv. L. Rev. 547; Tyler, J., who
wrote the opinion for the majority, also dissented in a strong opinion.
7. In addition to the other cases cited; cf. Snyder v. Nelson, 101 Ill. App. 619
(1901); Zak v. Zak, 305 Mass. 194, 25 N. E. (2d) 169 (1940), (1940) 24 Minn. L.
Rev. 872; Melton v. United Retail Merchants of Spokane, 163 P. (2d) 619 (Wash.
1945).
8. Clarke, Harrison & Co. v. Brown, 77 Ga. 606, 609-10 (1886); Ingram v. Mit-
chell, 39 Ga. 547 (1886); In re Estate of Lowe, 104 Neb. 147, 175 N. W. 1015 (1920).
N. E. 198 (1922), (1923) 27 Mich. L. Rev. 604; Bodenhofer v. Hogan, 142 Iowa 321,
120 N. W. 559 (1919); cf. Bosshard v. Steele County, 173 Minn. 283, 217 N. W. 354
(1923); Fisher v. Lane, 174 Ore. 438, 140 P. (2d) 562 (1944).
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cases may be explained on other bases.
been largely ignored except for certain American cases which distinguish it. 12

The majority of courts, however, have discerned the specious nature of this method of avoiding the general rule and have declined to follow it. No court seems to have adopted it consistently. Thus, on another occasion, the English court made it clear that the test is to be applied not simply to the plaintiff’s declaration but to the whole of the case to determine what the nature of the plaintiff’s case actually is. 13 Certain American decisions have been more specific. Thus, in Plaisted v. Palmer, 14 the court tells us:

“It is true that a plaintiff can never recover where he has to trace his title through an illegal act. But it does not follow that he can recover where he technically avoids proof of the illegal act. The defendant can show that the plaintiff’s evidence is not true. If the whole evidence, properly admissible on both sides, discloses the fact that the plaintiff’s claim is founded on an illegal transaction, he cannot recover.” 15

This attitude has been generally followed. Writers agree that the use of a procedural mechanism to hold for the plaintiff is not to be sanctioned. 16 If the court is convinced that it should grant relief, there are other, more persuasive, ways of reaching that result. Significantly, most cases using this device to allow recovery could have used another, less questionable method of reaching the same result.

Adoption of this method takes control of the decision out of the hands of the court and places it in the hands of the plaintiff’s attorney, whose subtlety in constructing the declaration will determine whether his client will prevail or not. An ingenious lawyer would always find it possible to draft a declaration which would leave out the illegal aspects 17; and if the court had committed itself to this procedural

12. Smith v. Hubbs, 10 Mo. 71 (1833); Nellis v. Clark, 20 Wend. 24 (N. Y. 1838). The Smith case distinguished the doctrine on the ground that it could be applied only when the contract was completely executed; and the Nellis case distinguished it on the ground that it could apply only when the defendant was asserting his iniquity as against an innocent party.


14. 63 Me. 576, 578 (1874).


17. An example of the ingenuity with which lawyers sometimes attack the problem is found in Stewart v. Thayer, 170 Mass. 560, 49 N. E. 1020 (1898). Plaintiff’s suit for breach of contract had failed because the court found that it called for services on Sunday. On the new trial, he sought to amend, changing the dates so as to make the declaration assert that the services were to be rendered on a secular day; he admit-
test, it would have no discretion. It is essential that we maintain for
the courts a real discretion in deciding these matters. The courts have
shown good sense, therefore, in abandoning this method.

II. Plaintiff Is Ignorant of the Illegal Aspect of the Contract

The first real exception to the general rule exists in the situation
where the plaintiff does not know of the illegality of the transaction.
Chronologically, the first reference to this exception seems to have
been a dictum of Lord Kenyon in 1794.\textsuperscript{18} Within the next twelve
years, two other cases had been decided by the English courts, refusing
to allow recovery on this basis\textsuperscript{19}; and within the succeeding ten years,
two other cases had been decided upholding the exception and granting
recovery.\textsuperscript{20} All of the cases involved attempt to recover the premiums
on illegal contracts of marine insurance. To reconcile them we must
advert to the well known distinction between a mistake of law and a
mistake of fact. The cases refusing recovery involved a mistake of
law; the others involved a mistake of fact.

i. Ignorance of Fact

In \textit{Oom v. Bruce},\textsuperscript{21} the first case on this point, plaintiff obtained
insurance on goods on board a ship believed to be en route from Russia
to London. Unknown to the parties in London, Russia had commenced
hostilities against England at the time and had seized the ship. The
court allowed the plaintiff to recover the premiums paid. In \textit{Hentig
v. Staniforth},\textsuperscript{22} decided shortly thereafter, the policy of insurance was
illegal because a license required by the Navigation Act had not been
obtained until the ship had already sailed, though the parties thought
it had been granted. Recovery again was allowed the plaintiff.

These two cases have established the nature of the exception and
have been followed without any real dissent. In one respect, however,
they seem unlike any of the cases which followed, since neither party
to the contract knew the circumstance which rendered the transaction
illegal. In the later cases, the plaintiff alone was ignorant of this

\begin{itemize}
\end{itemize}
essential circumstance. The later cases might possibly have been explained on the ground of another exception—that the parties were not in pari delicto; but the Oom and Hentig cases cannot be explained on that basis, since the parties were on exactly the same footing. The independent nature of this exception was therefore established in the very beginning.

Of the several cases in which the plaintiff alone did not know the facts making the transaction illegal, the New Zealand case of Branigan v. Saba, with its excellent opinion by Sir John Salmond, seems clearly the most important. The opinion points out the relation of the quasi-contractual action for restitution to the action for breach of contract; both actions are sometimes available, but if the latter action is brought, the court must be convinced that “the relief claimed . . . does not involve the illegal performance of the contract.”

2. Ignorance of Law

When the plaintiff was ignorant of the rule of law or statute which rendered the contract illegal, the courts have not been so lenient with him. The earliest cases fall back on the apothegm that everyone is presumed to know the law; and the later cases followed their lead. There seems to have been no real questioning of this position, and no indication that the courts feel that these cases are inconsistent with the ignorance-of-fact cases. Though a few cases allow recovery where the plaintiff is mistaken as to the illegal character of the transaction, each of them is susceptible of another explanation. Either the plaintiff repudiated the contract before performance of the illegal part, or he had been deceived as to its legality by the defendant, who pretended


26. [1924] N. Z. L. R. 481, 485 (1923). The case before the court provided an illustration of the distinction. Plaintiff had contracted to sell defendant certain leasehold property; defendant turned out to be an enemy alien. The court said that plaintiff could not sue for specific performance of the contract or for the full purchase price. He could, however, sue for the damages suffered by him, or, in restitution, for the use of the premises during the time defendant had been in possession.


to have accurate knowledge on the subject. These cases are no real indication, therefore, that ignorance of the law as such is sufficient to allow recovery. They do suggest, however, that it is important to consider whether plaintiff’s mistake as to the law was induced by defendant’s misrepresentation, and whether that misrepresentation was innocent or fraudulent.  

Undoubtedly, the courts are correct in holding that a plaintiff is entitled to restitution when he did not know of the facts making the contract illegal; none of the reasons usually given for refusing restitution are applicable here. On the other hand, the wisdom of following here the old distinction between mistakes of law and mistakes of fact is more questionable. When the rule of law which has been violated does not express a very strong policy, courts may on occasion be ready to give relief in spite of the fact that the only mistake was one of law. The only real limitation on the scope of the exception, as it applies to mistakes of fact, is that the plaintiff must refuse to go on with the contract as soon as he finds that it is illegal. His prior innocence does not aid him if he proceeds with the transaction.

Perhaps the major legal problem to arise in connection with the exception is that of distinguishing between mistakes of law and mistakes of fact. Though the cases in this connection have not devoted much attention to this problem, cases drawing the same distinction in other fields should be of assistance. The mistake may be one of both law and fact at the same time, in which case the plaintiff comes within the scope of the exception. Difficulty may also arise in defining the term “ignorance.” Good faith, of course, is required; the plaintiff cannot blind his eyes to a fact just because he does not want to see it. What should be the holding when most intelligent men would realize the fact, but the plaintiff does not? A factual situation raising both of these problems exists when the defendant induces the plaintiff to engage in a money-making scheme which can succeed only if someone else is defrauded,—the recent dime chain letters, for example. Courts have differed whether the plaintiff should be allowed to plead that he did not know that the contract was illegal or fraudulent.

Perhaps the real decision depends not so much upon whether the court decides that the plaintiff is innocent and should be entitled to recover his money as upon whether it feels that a swindler like the defendant should be entitled to keep it. If the defendant also was a victim of the scheme and it has to choose between two dupes, the court

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is apt to refuse relief. If the decision actually turns upon the plaintiff's innocence, the problem is apparently one of fact which should be submitted to the jury. Usually, the courts have passed upon the matter themselves, but there appears to be no definite rule.

III. The Parties Are Not In Pari Delicto

The third exception to the general rule, probably the broadest and most inclusive and certainly the most flexible and adaptable, grows out of the maxim, \textit{In pari delicto potior est conditio defendentis}, itself. The maxim declares that the defendant will prevail; but this occurs when the parties are \textit{in pari delicto}—of equal guilt. Conversely, it may be argued, when the parties are not equally guilty, the maxim has no application, and the plaintiff may be allowed to recover. One can perceive the ingenuity of this exception, how it seizes upon the peculiar wording of the Latin maxim and makes that wording a means for avoiding the whole rule.\textsuperscript{33}

i. Historical Development

It was Lord Mansfield who apparently first introduced both the maxim, \textit{In pari delicto}, and its antidote into the common law, in a slightly altered form from the expression in the Roman and Civil Law.\textsuperscript{34}

The first reported case is \textit{Smith v. Bromley}, a Nisi Prius decision in 1760.\textsuperscript{35} In a composition with creditors, one of them had refused to sign the composition unless he were secretly paid an additional amount; and the debtor's sister, who had paid the additional amount, brought suit to recover it. In allowing recovery, Lord Mansfield used language giving a real indication of the scope of the exception.\textsuperscript{36} Fourteen years later, in the case of \textit{Clarke v. Shee},\textsuperscript{37} he drew the same distinction, and presented the exact technique:

"There are two sorts of prohibitions enacted by positive law, in respect of contracts. 1st. To protect weak or necessitous men from being over-reached, defrauded or oppressed. There the rule in pari delicto, potior est conditio defendentis, does not hold; and an action will lie; because where the defendant imposes upon

\textsuperscript{33} But cf. 1 GLENN, \textsc{FRAUDULENT CONVEYANCES AND PREFERENCES} (Rev. ed. 1940) 232: "as it is said, the parties, although \textit{in delicto}, do not stand \textit{in pari delicto}—which is one of those old fashioned ways of saying nothing."

\textsuperscript{34} See C. 9. 7; cf. D. 12. 5.1; D. 12. 5.3; D. 12. 5.8; D. 12. 7.5. See MACQUERON, \textsc{L'HISTOIRE DE LA CAUSE IMMORALE OU ILLECTE DANS LES OBLIGATIONS EN DROIT ROMAIN} (1924) 122-129. Prior to Lord Mansfield's introduction of the maxim, the English courts used the phrase \textit{particeps criminis}.


the plaintiff it is not par delictum. . . . The next sort of prohibition is founded upon general reasons of policy and public expediency. There both parties offending are equally guilty; par est delictum, et potior est conditioni defendantis.”

Shortly later he expressed the same technique in Browning v. Morris,38 and again in Lowry v. Bourdieu.39 After his death, the exception was taken over by Lord Ellenborough.40 In 1811 it was adopted in Chancery,41 and since that time has been an unquestioned part of the English law.

In the United States, the first reference to the exception appears to have been in 1802.42 In 1806, the Virginia Supreme Court of Appeals made use of the exception in Austin’s Adm’x. v. Winston’s Ex’x.,43 a fraudulent-conveyance case in which full consideration is given to the English cases in determining the basis of the exception. When the defendant argued that he who comes for relief must draw his justice from pure fountains, Judge Roane showed Lord Mansfield’s ingenuity in admitting the argument but declaring that in this case “the fountain from which the plaintiffs drew, was purified by the duress and peculiarity of their situation.”44 Since it was introduced, the exception has been repudiated in one or two cases on the ground that the courts cannot undertake to weigh the comparative guilt of the plaintiff and defendant;45 but these cases have not at all affected the general attitude of the courts to the exception.46

38. 2 Cowp. 790, 98 Eng. Rep. R. 1364 (K. B. 1778). In 1776, Jaques v. Golightly, 2 W. Bl. 1073, 96 Eng. Rep. R. 632 (1776), had been decided in Common Pleas, holding that the plaintiff could recover money paid for insuring lottery tickets with defendant. In the reported opinion, which is somewhat unsatisfactory, De Grey, C. J., used very general language which seemed to suggest that there could always be restitution in connection with illegal contracts. But in his opinion in the Browning case, Lord Mansfield explains this case on the same basis, and says that De Grey said: “The statute is made to protect the ignorant and deluded multitude, who in hopes of gain and prizes, and not conversant in calculations, are drawn in by the office-keepers.” 2 Cowp. 790, 793, 98 Eng. Rep. R. 1364, 1365 (K. B. 1778).

39. 2 Doug. 469, 99 Eng. Rep. R. 299 (K. B. 1789). The importance which Lord Mansfield attached to the exception may be shown by this quotation and the fact that he never lost an opportunity to call attention to it. In fact, in all of his references to it, except in the first case, the reference was not necessary to the actual decision.


42. This was in the argument of John Wood before the Vermont Supreme Court, in the case of Barnard v. Crane, 1 Tyler 457 (Vt. 1802). Wood cited Smith v. Bromley and Clarke v. Shee and presented a very forceful argument, but he lost his case.

43. 1 Hen. & M. 32 (Va. 1806).

44. Id. at 48.


46. See Note, In Pari Delicto; The Doctrine of Equal Fault in Illegal Contracts (1940) 26 VA. L. REV. 362.
2. Statute Favors the Class to Which the Plaintiff Belongs

The above quotation from Lord Mansfield is not entirely definite as to the nature of cases in which the parties were not \textit{in pari delicto}. In speaking of "prohibitions enacted by positive law . . . to protect weak or necessitous men from being over-reached, defrauded or oppressed," it does not indicate clearly whether it is referring to statutes which were enacted for the purpose of protecting a certain group of people or to general rules of law which the parties violated due to the "oppression, extortion [and] deceit" of one of them. In the development of the exception, both interpretations of the quotations have been adopted, and it is now generally recognized that there are two classes of cases in which the parties are not \textit{in pari delicto}: "[1] where the law [statute] that creates the illegality in the transaction was designed for the coercion of one party and the protection of the other, or [2] where the one party is the principal offender, and the other only criminal from a constrained acquiescence in such illegal conduct,"\footnote{47} due to "oppression, extortion [or] deceit." These two classes require separate treatment.

The first class, the more concise and less flexible of the two, is usually expressed by saying that the parties are not \textit{in pari delicto} when the statute which they have violated was enacted for the purpose of protecting the group of persons to which one party belongs from the group to which the other belongs. In determining this purpose, courts occasionally find help from the title to the act\footnote{48} or the preamble.\footnote{49} Resort is usually made to the language of the statute, sometimes in such a fashion that the decision appears almost mechanical. If the prohibition is against a "sale," for example, the seller, rather than the purchaser, may be called the wrongdoer.\footnote{50} The interpretation is perhaps a little surer when the prohibition is against a sale by a specified group of individuals,\footnote{51} or when a penalty is imposed upon one of the parties to the contract.\footnote{52} If one class of persons is generally under

\footnote{47. This quotation is taken from the classification of exceptions to the maxim, \textit{In pari delicto}, made by the reporter who reported \textit{Smith v. Bromley} in 1781 and is based upon the cases decided at that time. See 2 Doug. 696, 697, 99 Eng. Rep. R. 441, 443, n. F7 (N. P. 1768). \textit{See in this connection also}, Selden, J., in \textit{Tracy v. Talmage}, 14 N. Y. 162, 184 (1856). \textit{But cf. Ryan v. Motor Credit Co.}, 150 N. J. Eq. 531, 25 A. (2d) 607 (1941), holding that even though the statute was enacted to protect the class to which the plaintiff belongs, he must still show that he was actually subjected to fraud or oppression.}

\footnote{48. \textit{Lefebvre v. Homer M. Whittier & Co.}, 84 N. H. 105, 146 Atl. 527 (1929).}

\footnote{49. \textit{Gray v. Roberts}, 2 A. K. Marsh. 208 (Ky. 1820).}

\footnote{50. \textit{See Stansfield v. Kunz}, 62 Kan. 797, 64 Pac. 614 (1901); \textit{cf. Stegman v. Offerle Co-operative Grain & Supply Co.}, 151 Kan. 655, 100 P. (2d) 635 (1940).}

\footnote{51. This is true of the cases involving a violation of the Blue Sky Laws, cited \textit{infra} note 59.}

\footnote{52. \textit{Smart v. White}, 73 Me. 332 (1882); \textit{Edward v. Ioor}, 205 Mich. 617, 172 N. W. 620 (1919).}
economic or other oppression from another, a statute prohibiting the transaction may be enacted for the protection of the first class. If the plaintiff is morally innocent while the defendant knows he is violating the statute, the court may be aided in making its decision. But none of these tests is determinative. They have all been rejected on occasion.

There are certain statutes which are very generally considered as coming within the terms of this exception. Of these, perhaps the usury statutes are the most striking. Here clearly is a statute enacted for the protection of one class of persons against another. The case originating the exception involved a statute prohibiting a creditor signing a certificate for discharge in bankruptcy from receiving more than his proportionate amount. The next case involved statutes prohibiting lotteries and the insuring of lottery tickets. Blue Sky laws provide another typical illustration, as do all prohibitions against corporations rather than those dealing with them. Prohibitions against the sale of intoxicating liquor have frequently been construed so as to come within this exception. The federal statute prohibiting the collection of more than a specified fee in order to obtain a pension from the government, and other statutes setting maximum fees, have been so construed. The Fair Labor Standards Act has also been construed to be for the benefit of the employee so as to allow him to

54. Cf. Kneeland v. Emerton, 280 Mass. 371, 183 N. E. 155 (1932); Lyons v. Otter Tail Power Co., 70 N. D. 681, 297 N. W. 691 (1941); Burkholder v. Beetem’s Adms., 65 Pa. 496 (1870). This test, of course, is encroaching upon the exception, already discussed, which applies when the plaintiff did not know of the facts which made the transaction illegal.
55. The most frequently used test depends upon the imposition of the penalty. Yet this test has been rejected. Bank of Orland v. Harlem, 188 Cal. 413, 206 Pac. 75 (1922) (contract to stifle prosecution, statute placing penalty on the one receiving the money). Cf. 2 RESTATEMENT, CONTRACTS (1932) § 601: “If refusal to enforce or to rescind an illegal bargain would produce a harmful effect on parties for whose protection the law making the bargain illegal exists, enforcement or rescission, whichever is appropriate, is allowed.” The section is cited with approval in Fisher v. Lane, 174 Ore. 478, 149 P. (2d) 562 (1944).
56. The cases on this subject are extremely numerous. See, for example, Samuel v. Newbold, [1906] A. C. 461 (H. L.); Douglas v. Klopper, 107 Cal. App. 765, 288 Pac. 36 (1930).
59. For representative cases, see Doherty v. Bartlett, 81 F. (2d) 920 (C. C. A. 1st, 1932); Reilly v. Clune, 27 Ariz. 432, 234 Pac. 35 (1925). The annotation in (1933) 87 A. L. R. 42, 107 et seq. collects a large number of cases, not all of which speak in terms of the maxim, in pari delicto.
3. Defendant Exercises Oppression or Fraud

In the second class of cases in which the parties are held not to be *in pari delicto*, the principal offender has brought the other party into the transaction through "oppression, extortion [or] deceit"—or, as it is frequently expressed, by fraud, duress or undue influence. It is difficult to distinguish between these three groups in order to treat them separately in determining what facts need to be shown to obtain relief; they frequently fade into each other in a single case. But some classification may be helpful in organizing the cases.

**A. Duress and Undue Influence**

The concept of duress is slightly different here from that in an action to rescind a transaction untainted with illegality. In one sense, more is required in order to obtain relief when illegality is present. A threat of criminal prosecution is held by many courts not to be sufficient in case of a contract to stifle prosecution. Others have said that if the defendant's threat of prosecution was made for the ulterior purpose of obtaining money, there may be recovery.


65. Thus it has been held that the prohibition implied in the Home Owner's Loan Act against the payment of additional money or giving of a secret mortgage after the first had been settled by a refunding effected by the Home Owner's Loan Act is deemed to be for the benefit of the borrower so that he may obtain relief. See McAllister v. Drapeau, 14 Cal. (2d) 102, 92 P. (2d) 911 (1939); (1939) 52 Harv. L. Rev. 842.

66. Lefebvre v. Homer M. Whittier & Co., 34 N. H. 205, 46 Atl. 677 (1929) (Blue Sky law: "The design of the Legislature was to safeguard the public from the dealers, not to shield dealers from each other."). The same attitude was taken in Ryan v. Motor Credit Co., 130 N. J. Eq. 531, 23 A. (2d) 607 (1941), involving a Small Loan Act.

67. Examples of this may be seen in Klein v. Pederson, 65 Neb. 452, 91 N. W. 281 (1902); Norris v. York, 105 Kan. 448, 185 Pac. 43 (1919); and Smith v. Blachley, 188 Pa. 559, 41 Atl. 619 (1898). In all of them, fraud, duress and undue influence were mixed.

68. This is generally recognized and is implicit in the cases involving contracts to suppress prosecution cited herein. See, e. g., Union Exchange Bank of N. Y. v. Joseph, 231 N. Y. 250, 131 N. E. 905 (1921); 34 Harv. L. Rev. 791, 30 Yale L. J. 760.

69. Richardson v. Duncan, 5 N. H. 508 (1826); Gorringe v. Reed, 23 Utah 120, 123, 16 Pac. 902, 906 (1900); Heckman v. Swartz, 64 Wis. 48, 24 N. W. 473 (1885).
another sense, however, less is required. Frequently, the courts talk in terms of duress, but often they are satisfied to find present something which they characterize as oppression, imposition, involuntary action, hardship, inequality of condition, menace, surprise or lack of competent advice. A survey of the cases creates the impression that many courts are more ready to grant relief here than they would on the ground either of duress or of undue influence in an ordinary transaction. Occasionally, indeed, a court does not try to characterize the defendant's conduct but contents itself with stating the facts and declaring that the parties are not in pari delicto. Other courts have gone to the opposite extreme and have declared that even though real duress is present, there can be no relief granted to a party who has participated in an illegal transaction.

Actually, while cases on duress and undue influence in other fields may be of some assistance, when the court is considering an illegal contract they may frequently prove misleading. The problem is not so much one of finding duress or undue influence as of determining whether the general rule as to illegal contracts should apply. The contract is already void or voidable because of its illegal character; the question is whether the plaintiff is entitled to request the court to grant him relief. True, the explanation is that the parties are not in pari delicto because there is fraud, duress or undue influence present, but that is merely the mechanical technique for avoiding the application of the maxim.

Though the exception has been applied in numerous factual situations because of the duress or undue influence involved, there are three situations in which its application has been most usual: (1) com-
positions by a debtor with his creditors, in which one of the creditors is secretly paid more than his just proportion, (2) contracts to buy off or stifle a prosecution, and (3) fraudulent conveyances and similar transfers of property with the intent of defrauding or deceiving some third person. In the first of these situations, the courts ordinarily grant relief on the basis of this exception; in the last two, the usual rule is that relief will be refused, but there is a very large number of cases in which it has been held that the circumstances were such that the parties were not in pari delicto.

Sometimes the court reaches the decision that relief should be granted because it is impressed by the necessitous situation of the plaintiff and has a desire to aid him. At other times, it grants relief not so much from a desire to aid the plaintiff as from a desire to prevent the defendant from keeping the money or property to which he is so obviously not entitled. Whichever motive impels the court, the easy way to reach the decision is by means of this exception. There is no concise or exact test for determining when the parties are not in pari delicto under this exception. Because of the nature of the exception, this is not possible or even desirable. But there are a number of factors or circumstances which may have varying degrees of importance in an individual case.

The condition of the plaintiff is an important factor. Courts have laid emphasis upon the fact that the plaintiff was sick, infirm, an invalid, a cripple, or of nervous temperament. An immature or aged plaintiff is far more likely to succeed in his suit. As for mental condition, it need not be shown that the plaintiff is insane or feebleminded; any failure to measure up to the normal individual in intelligence and firmness of mind may possibly be sufficient. Ignorance


75. For representative cases involving fraudulent conveyances, see Drake v. Thompson, 14 F. (2d) 933 (C. C. A. 8th, 1926); MacRae v. MacRae, 37 Ariz. 307, 294 Pac. 280 (1930). Representative cases involving contracts to stifle prosecution: Shattuck v. Watson, 53 Ark. 147, 13 S. W. 516 (1890); Haynes v. Rudd, 102 N. Y. 372, 7 N. E. 287 (1886).

76. E. g., May v. Draper, 220 Ala. 214, 124 So. 59 (1929); Birney v. Birney, 217 Cal. 353, 18 P. (2d) 672 (1933).


and lack of education, lack of business experience or ability, drunkenness at the time of the transaction, the fact that the plaintiff was a foreigner—all have played an important role on occasion.

Another factor of importance is the question whether the defendant received money (or property) to which he was actually entitled. This question, of course, is applicable more to contracts to stifle a prosecution than to other contracts. It includes the sub-questions (1) whether the crime for which the prosecution was threatened was one involving the taking of money or property and whether it was the defendant's money which was taken; (2) whether the consideration for the dropping of the prosecution was actually more than defendant's loss; and (3) whether the plaintiff was actually guilty of the crime. If the defendant received what he was entitled to, the court will be inclined to follow the general rule and leave the parties as they stand, even though the defendant used an illegal means of obtaining the money. On the other hand, if the defendant had suffered no loss and has obtained a windfall through his conduct, the court is apt to speak of duress or extortion and to apply the exception.

Defendant's motive in threatening or bringing a criminal prosecution may influence the court. If he brought or threatened the action with the sole purpose of forcing the plaintiff to pay back embezzled funds, his case is much weaker than if he in good faith started a prosecution to have an embezzler punished and dropped the action on the solicitation of the plaintiff and the payment of the amount taken.

In this connection, too, it is well to consider who paid the money to the defendant, the accused person (in case of a contract to stifle prosecution) or the debtor (in case of a secret preference in a composition with creditors), or a friend or relative. The fact that the money was paid by a friend or relative who now seeks to get it back may work both ways. On the one hand, it may be argued that the defendant was not entitled to any money from this plaintiff and so should be required to return it. On the other hand, it may be argued

81. Duncan v. Dazey, 318 Ill. 500, 149 N. E. 495 (1925), (1925) 39 Harv. L. Rev. 650 ("illiterate and of limited business capacity").
83. Cf. Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433 (1903); Batman v. Cook, 120 Ill. App. 203 (1905) (allegation of plaintiff's drunkenness in connection with conspiracy to win at cards against plaintiff).
85. Lack of guilt on the part of the plaintiff was held not to help him in Union Exchange Bank of N. Y. v. Joseph, 231 N. Y. 250, 131 N. E. 905 (1921).
that since the friend or relative was not personally threatened, his payment was voluntary and not under duress, so that he has no ground for coming within the exception. In practice if the plaintiff is a close relative, he is more likely to succeed than the debtor or accused person; if he is not a close relative or merely a friend, he is less likely to succeed.

Other factors are the presence of a confidential or close relationship between the parties, the degree of moral turpitude involved in the transaction, and the question of who suggested the scheme.

B. Fraud

If through the defendant's fraud, the plaintiff is misled into believing there is no illegality, he should be entitled to recovery. This is more on the basis of ignorance of the illegality than upon a holding that the parties are not in pari delicto. In one sense at least, the plaintiff is not in delicto at all; and these cases will come more accurately under the preceding exception than this one.

Usually, however, the defendant's deceit misleads the plaintiff in his anticipation of the benefits to be obtained from the transaction. Here, the plaintiff is deliberately and knowingly participating in the illegality. If the rule is that a party so engaging in an illegal contract cannot recover, then the plaintiff has no standing. True, the defendant is worse than the plaintiff in having added fraud to his illegal conduct. Is he not in pari delicto for that reason? A majority of courts have so held, thus indicating that the equality of guilt may be upset by adding more to the defendant's side of the balance as well as by taking away from the plaintiff's side. Probably the principal motive for

89. In the Union Exchange case, ibid., the parties were brothers-in-law. On payment by a wife, see Note (1909) 11 Am. Cas. 385.
93. This statement would perhaps include cases in which the defendant entered into the illegal contract intending at the time not to carry it out. See Keeton, Fraud—Statements of Intention (1937) 15 Tex. L. Rev. 185, 216.
granting relief in these cases is the desire to prevent the defendant from keeping the property rather than in allowing the plaintiff to obtain it.\textsuperscript{96}

In another group of cases the defendant does not use deceit to induce the plaintiff to enter the contract but defrauds him after the transaction has been undertaken. Here, it may be said that the fraud is superimposed upon the illegality. A majority of the courts have allowed recovery, and usually make no attempt to distinguish this group of cases from the preceding group.\textsuperscript{98}

There is a special subdivision of this last group in which the plaintiff has agreed not only to engage in the illegal transaction but also to try to defraud someone else, and instead is double-crossed by the defendant, who out-cheats him. The usual situation involves a wager over an event which the plaintiff thinks is "fixed" in his favor but actually is fixed against him.\textsuperscript{97} Here, the plaintiff, too, is guilty of illegality plus fraud, and the only way of declaring that the parties are not \textit{in pari delicto} is to say that the defendant is guilty of two measures of fraud or an especially reprehensible brand of it. This is carrying the computation to an extreme and making it appear that the determination of the issue whether the parties are \textit{in pari delicto} is a mere matter of calculating the degree of guilt on each side.\textsuperscript{98} On the other hand, there are stronger reasons here for depriving the defendant of the property so acquired, especially if he has made a practice of seducing others to his nefarious activities. The cases are about evenly divided.

In connection with the duress cases, there were listed a number of factors or circumstances which might prove influential in individual cases in determining whether the parties are \textit{in pari delicto} or not. In a very large measure, they are all applicable to the fraud cases, too.\textsuperscript{99} But the preceding paragraph suggests an additional factor of importance. The plaintiff is greatly aided if he can show that the defendant is engaged in transactions of this sort as a kind of business— is a professional, so to speak. Courts are loath to see a professional profiting from his iniquitous business; and most of them are ready to


\textsuperscript{96} The distinction may not be of extreme importance, and it is sometimes hard to apply. The card cheating cases, for example, could be classed in the preceding group on the ground that when the parties started to play, the defendant impliedly represented that he intended to play fairly.


\textsuperscript{99} Some of the cases cited in connection with the duress cases involved fraud, and sometimes that fact has been indicated. Of course, the factors there discussed have varying importance when fraud is involved.
allow recovery in order to prevent this from happening, even though it means that they will be granting aid to a party almost as bad.\footnote{100}

Another factor of importance is the nature of the position which the defendant occupies. In connection with the duress cases, reference was made to the effect of a confidential relationship between the two parties. Here, the emphasis is placed more upon the fiduciary position which the defendant occupies in an abstract sense than upon the relationship between the parties. If the defendant is an attorney, for example, courts often refuse to let him rely upon the maxim. They feel that the honor of an attorney must be kept unburnished even though it is done forceably and though it means that the general rule as to illegal contracts cannot apply.\footnote{101} In cases of this sort they have not been greatly troubled to find fraud actually present, but have often declared that the parties are not \textit{in pari delicto}, with some incidental reference to the idea of fraud. Indeed, these cases might well be classified as a separate division of this general exception rather than under the topic of fraud. Not all courts have agreed, of course. Some of them have declared that the fact that the defendant is an attorney can make no difference, because otherwise anyone wishing to make sure that his illegal contract will be carried out needs only to contract with an attorney.\footnote{102} But the suggested difficulty is one which could easily be handled by the courts if it actually arose,\footnote{103} and there is no indication that states in which the exception has been applied have been bothered by it. This rule concerning attorneys has been applied to other fiduciary positions.\footnote{104}

A third factor to be considered is whether anyone else was actually injured by plaintiff's conduct. Several courts wishing to apply the

\footnotetext{100}{The cases of Wright v. Stewart, 130 Fed. 905 (C. C. S. W. D. Mo. 1904), \textit{aff'd} 147 Fed. 321 (C. C. A. 8th, 1906); Lockman v. Cobb, 77 Ark. 279, 91 S. W. 546 (1905); Hobbs v. Boatright, 195 Mo. 603, 93 S. W. 934 (1906); and Falkenberg v. Allen, 18 Okla. 216, 90 Pac. 415 (1907), all involved a single group of individuals, known as the "Buckfoot gang", which operated out of southern Missouri covering the whole Southwest, enticing victims in to be defrauded by means of fake footraces. As the court in one of the cases said, they seemed to have a vague idea of the maxim, \textit{in pari delicto}, and conducted their operations in an attempt to bring their victims within it. The decisions in all of the cases seem influenced by the breadth of the defendant's conduct; the opinions in the \textit{Wright} and \textit{Hobbs} cases are exceptionally strong.}

\footnotetext{101}{Berman v. Coakley, 243 Mass. 348, 137 N. E. 667 (1923), (1923) 32 \textit{Yale L. J.} 745 (fraudulent conveyance).}

\footnotetext{102}{Roman v. Mail, 42 Md. 573 (1875); \textit{cf.} Jones v. Henderson, 189 Ky. 412, 225 S. W. 34 (1920) (deposit of money to be used to buy off prosecution, action for excess).}

\footnotetext{103}{\textit{Cf.} Schermerhorn v. DeChambrun, 64 Fed. 195 (C. C. A. 2d, 1894), holding that though there might be recovery where the scheme was suggested by the attorney and carried out by his advice, the rule will not stand when plaintiff planned it and "was the dominant mind."}

\footnotetext{104}{See Marshall v. Lovell, 11 F. (2d) 633 (D. Minn. 1926), (1926) 36 \textit{Yale L. J.} 280, \textit{aff'd} 19 F. (2d) 751 (C. C. A. 8th, 1927). The fact that the defendant occupies a public office has sometimes influenced the court, too; \textit{cf.} Richardson v. Crandall, 48 N. Y. 348 (1872).}
exception have attached considerable significance to the fact that no one was injured but the plaintiff himself. That being true, they contend, the plaintiff cannot be in pari delicto with the defendant. The argument appears to be somewhat makeshift in character and cannot have had much influence. The maxim, In pari delicto, is not concerned with the question of who was injured; its very statement indicates that the courts will leave the parties alone and allow the loss to lie where it falls.

Of the factors mentioned in connection with the duress cases, one which perhaps needs emphasis here is the one concerning the degree of moral turpitude involved in the plaintiff's conduct. It becomes more important in connection with the fraud cases, and there is some indication that a rigid limitation upon the exception is involved here.

In these cases perhaps more than in any other single group, stress has been placed upon considering which decision will be more likely to prevent such transactions in the future. This aspect of the case frequently outweighs the fact that the plaintiff has been guilty of moral turpitude. But it involves considerations which can best be taken up in connection with another exception to be treated later.

C. Explanation of Exception

Mr. Justice Holmes has suggested that the proper explanation of all of the fraud cases is that a party engaging in an illegal transaction is still entitled to protection against fraud and deceit; and when he shows that the other party has defrauded him, he is entitled to relief. From this viewpoint the illegal character of the transaction becomes unimportant. Proof of the same thing must be shown to get the same kind of relief whether the contract be legal or illegal. The explanation, it appears, would also apply to the duress cases. Its application to the fraud cases in which the defendant out-cheated the plaintiff in his attempt to defraud some third party, is not clear. Perhaps the plaintiff's right not to be double-crossed is also "anterior . . . to the contract." It might, however, fit certain cases in which

105. This argument is set out at some length in Wright v. Stewart, 130 Fed. 905 (C. C. S. W. D. Mo. 1904), involving a bet on a foot race which plaintiff mistakenly thought was faked for him.
106. See infra, notes 117, 118.
107. See, for example, the language in the cases involving professionals as defendants, supra note 100. This, of course, may work both ways, and it is frequently urged that relief must be denied in order to prevent such transactions in the future. See Wade, Benefits Obtained Under Illegal Transactions—Reasons For and Against Allowing Restitution (1946) 25 Tex. L. Rev. 31, 48-50, 55-57.
too much money or property was given by mistake and relief was granted as to the excessive amount, although because of illegality none was granted as to the rest.\textsuperscript{109} This suggestion does not seem to explain the cases. There is no such simple rule to follow. The problem is like that in the other illegality cases—essentially one of making a choice between giving aid to a “bad” man and preventing an unjust enrichment.\textsuperscript{110} The more excusable the plaintiff’s conduct due to defendant’s fraud or duress, the more likely the court to grant restitution.\textsuperscript{111} The more reprehensible the defendant’s conduct due to his oppression or double-dealing the more likely the court to prevent an unjust enrichment on his part.\textsuperscript{112} In either case, if the desire is strong enough, the conveniently vague doctrine that there may be relief when the parties are not \textit{in pari delicto} provides an acceptable technique for reaching the desired result. Some authorities have criticized the doctrine, particularly in its application to the situation where the fraud underlies the illegality, on the ground that the plaintiff is actually \textit{in delicto} and is not absolved from blame by defendant’s fraud.\textsuperscript{113} These authorities, it seems, misconceive the real nature of the doctrine. The expression that the parties are not \textit{in pari delicto} does not provide an exact test for determining when the exception will apply. It furnishes, instead, a linguistic method for avoiding unduly harsh application of the maxim without presenting any appearance of inconsistency. Lord Mansfield knew what he was doing when he introduced into the common law the maxim, \textit{In pari delicto potior est conditio defendentis}, and immediately provided the antidote for it in any case in which the court should find it necessary. Most courts have perceived how these two

\textsuperscript{109} In Clemens v. Clemens, 28 Wis. 637 (1871), the plaintiff by mistake made a conveyance of all of a certain tract of land instead of half, as he intended. He was held entitled to a reformation of the deed, though he could not have it cancelled. The case contains a very good discussion of the problems involved.

\textsuperscript{110} For a detailed treatment of these and other policies affecting the decision whether restitution should be granted as a general rule, see Wade, Benefits Obtained Under Illegal Transactions—Reasons For and Against Allowing Restitution (1946) 25 Tex. L. Rev. 31.

\textsuperscript{111} Most of the cases cited in connection with the general exception might be cited here.

\textsuperscript{112} Many cases might be cited here, too. One quotation will suffice. “Was there ever a better opportunity for a court to punish the flagrantly guilty and set a wholesome example before the community than is afforded in this case? It may be difficult to apply the criminal law to such men, but sometimes requiring them by a civil suit to make good the losses that they have caused, or helped others to cause is a better punishment than the prison affords.” Hobbs v. Boatright, 195 Mo. 693, 723, 93 S. W. 934, 937 (1906).

\textsuperscript{113} Woodward, \textit{Quasi-Contracts} (1913) § 142; cf. 6 Williston, \textit{Contracts} (2d ed. 1938) § 1791; Note (1940) 26 Va. L. Rev. 362.
rules “travel in pairs” and have known how to use them. The second rule—the exception or curative rule—is remarkably flexible. It may be applied whenever the courts find the defendant using fraud, duress or undue influence; and since they may give and have given these terms such meaning as they want in this connection, not being bound by their meaning when used in situations not involving illegality, it provides a very wide discretion for the court. This discretion has made this the broadest exception to the general rule, a sort of catch-all or final resort when other exceptions fail, or an additional reason to be tacked on for good measure. Courts have not usually referred the question of fraud and duress to a jury but have treated it as a matter of law.

This explanation also answers the criticisms of those who declare that the exception can have no real basis because courts cannot be expected to weight the exact degree of guilt of the parties and determine by a mathematical process which party is less guilty. Actually they are not required to make any decision with mathematical precision; and whenever any court is not convinced that a plaintiff should recover on this basis, it needs only to fall back on the general rule.

D. Limitations on Exception

Two limitations have been urged upon the exception. The first is that it cannot apply when the illegality involved is particularly offensive to the court. Some courts rely on the old distinction between mala in se and mala prohibita, saying that only in the latter case can the exception apply. Others declare that the plaintiff cannot be allowed to recover when his conduct shows moral turpitude on his...
The degree of moral turpitude involved in the plaintiff’s conduct is an important factor. It seems a mistake, however, to make this a rigid limitation upon the scope of the exception. It hampers too seriously the court’s discretion and frequently prevents it from allowing recovery when it is primarily motivated by a desire to prevent the defendant from keeping property which he has unjustly acquired.

The second restriction is that the doctrine can apply only when the contract is executory. This restriction belongs accurately to the exception next to be considered (locus poenitentiae) and not here. Perhaps there is some idea that unless the contract is executory there can be no unjust enrichment, but this exception applies in cases of fraud and duress, where restitution is always an appropriate remedy. In some cases public policy makes it unnecessary to find an unjust enrichment. The question of which party is in default is not important here; plaintiff is entitled to relief whether he seeks it because he repented, or because the transaction turned out unfortunately for any reason, including defendant’s refusal to carry out his part of the bargain.

IV. Locus Poenitentiae

The next general exception to the maxim, In pari delicto, usually known by the term locus poenitentiae, has been used to grant relief to a plaintiff if he seeks to rescind while the contract is still executory.

1. Historical Development

Disregarding certain chancery cases which had little influence on the development of the doctrine, Mr. Justice Buller is usually given the credit for its authorship. In Lowry v. Bourdieu he expressed the distinction between executed and executory contracts, indicating by way of dictum that in the latter class an action to recover money


120. The two doctrines are separated in Tracy v. Talmage, 14 N. Y. 162, 181 (1856), and it is explained that the contract does not have to be executory for the in pari delicto exception to apply.

121. See Woodward, Quasi-Contracts (1913) 216, n. 4, criticizing Mr. Keener for treating the exception in his text under the title, “Obligation of a Defendant in Default.”

122. For example, Whaley v. Norton, 1 Vern. 483, 23 Eng. Rep. R. 608 (Ch. 1687) (distinction drawn between executed and executory contracts, and bond given for past illicit cohabitation considered as executed).

paid would lie. Two years after Lowry v. Bourdieu, Buller's doctrine was made the basis of decision by Lord Mansfield in Wharton v. De la Rive. The first regularly reported case in which the doctrine was adopted was Tappenden v. Randall, a Common Pleas decision in 1801, in which reference was made to the dictum in Lowry v. Bourdieu, and Heath, J., first used the term locus poenitentiae.

Like Lowry v. Bourdieu, these last cases involved attempts by one party to an illegal wager (usually in the form of insurance) to recover his payment; since the attempt was made before the event had taken place, recovery was allowed. In the meantime there had been developing another series of cases slightly different in nature. Cotton v. Thurland, in 1793, involved a wager, and plaintiff, contending that he had won, had not sued to recover the sum he had put up until after the event had taken place. But in this case the defendant was a stakeholder, who still held the money. Expressly overruling an earlier unreported Nisi Prius decision by Wilson, J., the court held for the plaintiff. In 1828, when this decision was approved by the King's Bench, in Hastelow v. Jackson, Littledale, J., explained the distinction between these cases and those holding that there could be no recovery after the event in the absence of a stakeholder, on the ground that in the first group, "although the event has happened, yet the contract is not completely executed until the money has been paid over, and therefore the party may retract at any time before that has been done."

The doctrine seems to have had a slow development in the United States. The first reference to it was in 1802 by an attorney for the plaintiff, who did not mention the phrase, locus poenitentiae, but urged that the plaintiff should be able to rescind because the contract was executory, relying upon the previous English decisions. The court decided against him.

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124. Walker v. Chapman, Lofft 342, 98 Eng. Rep. R. 684 (K. B. 1773), cited by Buller as authority for the statement, is so poorly reported that it is impossible to determine with any degree of certainty either the holding or the basis for it. The action was to recover money paid as a bribe to obtain a position, which plaintiff had failed to obtain. A jury verdict for plaintiff was reversed on evidential grounds, though it seems to be indicated that plaintiff should recover. Buller had expressed the same idea in his treatise, Nisi Prius (anon. ed. 1768) 185.


126. 2 B. & P. 467, 126 Eng. Rep. R. 1388 (C. P. 1801). Suit to recover premium paid for a bond paying a certain annuity until the hop duties collected by the government should reach a certain amount. Recovery allowed because suit brought before the event. The doctrine is treated in some detail by William David Evans in Evans, Essays (1802) 47-48, 49, 55; see also 2 Evans, Further on Obligations (1806) 7.


129. Barnard v. Crane, 1 Tyler 457 (Vt. 1802). The case involved a purchase of counterfeit money. Attorney John Cook's argument also contains the first American reference to the exception applying when the parties are not in pari delicto.
The first authoritative judicial recognition of the doctrine was given by the Massachusetts court in the case of *White v. Franklin Bank*,\(^\text{130}\) where the court expressly approved the exception by way of dictum. The first case actually to be decided upon the basis of the exception was *Skinner v. Henderson*,\(^\text{131}\) a Missouri decision in 1846. In *Tracy v. Talmadge* \(^\text{132}\) (1856), Selden, J., for the New York court expressed the exception very clearly and distinguished it sharply from the exception applying when the parties are not *in pari delicto*. The case turned on the second exception.

There followed several cases in which it was held that a man who has handed money to an agent to be used for an illegal purpose can recover it before it has been so used.\(^\text{133}\) But in *Knowlton v. Congress & Empire Spring Company* the New York court repudiated the doctrine and said that there were no cases applying it except those involving wager contracts, and those which might be explained on the ground that the parties were not *in pari delicto*.\(^\text{134}\) This case might have proved a serious obstacle in the development of the doctrine if a suit between the same parties and arising from the same factual situation as that in the New York case had not come before the United States Supreme Court six years later. In this case of *Spring Co. v. Knowlton*,\(^\text{135}\) Woods, J., reviewed many of the previous authorities, both English and American, and declared that the doctrine of *locus poenitentiae* had become well established, and that relief should be granted in this case upon it as a basis. This decision immediately became the leading case on the subject, and the doctrine has not since been seriously questioned.\(^\text{136}\)

### 2. Basis of the Doctrine

To what extent can the contract be performed and a plaintiff still be entitled to relief because the contract is still executory? Very largely, the test for determining application of the exception depends upon the basis behind the doctrine. Analysis of the doctrine of *locus poenitentiae* should therefore begin with a consideration of the idea behind it.

\(^{130}\) 22 Pick. 181, 189 (Mass. 1839) (bank deposit illegal because calling for payment on a future day certain).

\(^{131}\) 10 Mo. 205 (1846) (illegal sale of a right of preemption to public lands).

\(^{132}\) 14 N. Y. 162, 181-82 (1856). Reference to the doctrine had been made in the previous New York case of Perkins v. Savage, 15 Wend. 472 (N. Y. 1836).


\(^{134}\) 57 N. Y. 518 (1874). Lott, Ch. C., rendering the opinion, admitted that there were dicta and statements in texts broader than this, but he considered them erroneous and not binding.

\(^{135}\) 103 U. S. 49 (1886).

\(^{136}\) But see Auditorium Kennel Club v. Atlantic City, 16 N. J. Misc. 354, 109 Atl. 908 (1938), in which it is stated that the doctrine of *locus poenitentiae* does not apply in New Jersey.
Mr. Justice Buller felt that it was based upon principles of fairness and justice—such as those upon which the courts generally prevent unjust enrichment. This is certainly the idea expressed in his treatise on *Nisi Prius*,¹³⁷ and apparently also the basis of his dictum in *Lowry v. Bourdieu*.¹³⁸ That case had involved an attempt after the ship had arrived safely to recover premiums paid on a policy of marine insurance. Defendants, the underwriters, had argued that while in case of a loss they would not have been compelled by the law to pay, they still would have been impelled by their honor to do so. If the ship had been lost, plaintiffs would have received the proceeds of the policy; after they waited for it to come in safely they could not claim the return of the premiums. This argument seems to have influenced Buller, since he used similar language.¹³⁹ This idea of fairness of conduct and justice seems to have been behind the argument of Sir James Mansfield and others that a party to a wager ought not to be allowed to rescind when the outcome has become practically certain, even though the event has not actually happened.¹⁴⁰

The second basis which has been suggested for the doctrine is that it prevents the illegal contract from being carried out. Of course, it frequently does more than that, "disaffirming and destroying"¹⁴¹ what has already been done; but it is the effect upon the future which is most important. This basis has frequently been urged by courts and other authorities.¹⁴² Sometimes it is phrased differently by saying that application of the doctrine prevents the illegal purpose contemplated by the parties from being carried into effect.¹⁴³ This difference in phraseology may appear unimportant, but it may make a very real difference in some cases in determining whether relief can be granted or not.

¹³⁷. Buller, Nisi Prius (anon. ed. 1768) 132.

¹³⁹. If the plaintiffs had acted fairly and "had brought their action before the risk was over, and the voyage finished, they might have had a ground for their demand; but they waited till the risk (such as it was, not indeed founded in law, but resting on the honour of the defendant), had been completely run." *Id.* 2 Doug. at 471, 99 Eng. Rep. R. at 300.


¹⁴³. Block v. Darling, 140 U. S. 234 (1890) (relief "would tend to defeat the alleged purpose of defrauding his creditors").
It has been contended that the doctrine has exactly the opposite effect, making it more likely that the contract will be completed. The argument runs like this: If the party to the contract who has already received the consideration for performing an unlawful act should decide not to do the act, the other party then would be able to force him to do it by the threat to sue to get back the money paid. Since the unlawful act had not been performed, he could assert that he was still entitled to his *locus poenitentiae* and could recover the money. Superficially, the argument seems very persuasive. Actually, it can have little effect in real experience. It presumes that the parties know all of the intricacies of doctrine concerning the maxim, *In pari delicto*, especially that part dealing with the doctrine of *locus poenitentiae*. In most cases, a threat to take back the consideration either by force or legal suit would have the same effect whether the courts adopt or disregard the doctrine of *locus poenitentiae*. Moreover, a court may easily refuse recovery if it feels that the action is brought for the indirect purpose of forcing the defendant to perform an illegal act.

A third basis suggested for the doctrine of *locus poenitentiae* is that it provides an opportunity to the wrongdoer to repent, mend his ways, and withdraw in safety from the position in which he has placed himself. This opportunity to repent—this *locus poenitentiae*—is lost after the contract has become completely executed and no one can be benefited by the plaintiff's reformation except himself. But while the contract remains executory (or while the illegal purpose remains unperformed), a giving effect to the plaintiff's repentance will not only aid him but will advance public policy by interrupting the illicit transaction. The clemency of the law can thus serve a double purpose.

Another suggested basis for the doctrine is that the plaintiff is entitled to appear before the court to seek redress so long as a "moral stain" has not yet attached to him. Other courts merely draw the

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145. The objection has been expressed not so much in terms of the plaintiff's threat to take back the consideration paid as in terms of the defendant's being encouraged to commit the crime in order to "insure the retention of the money." But the idea that the plaintiff will take back his money is the same in either case. Mr. Anson draws a distinction between the case where the money is paid directly to the defendant and the case where it is placed in the hands of a stakeholder to be given him when he has performed his part of the contract, saying that in the latter case recovery by the plaintiff discourages performance of the illegal act. Mr. Harriman draws a distinction between the case where money is paid as consideration for the doing of an illegal act and the case where the plaintiff gives the defendant the means of committing the act.

146. Hooker v. DePalos, 28 Ohio St. 251, 262 (1876) ("policy which aims to prevent wrongdoing by encouraging such repentance and abandonment"); Carter, *The Doctrine of Locus Poenitentiae* (1901) 9 Am. Lawy. 386.

147. Adams Express Co. v. Reno, 48 Mo. 264, 268 (1871). The idea has also been expressed that the plaintiff's delictum is not complete until the illegal act has been per-
distinction between executed and executory contracts as if it constituted a complete explanation of the whole matter.\textsuperscript{148}

While selection of one of these bases as the true foundation of the doctrine would make much simpler the task of determining exactly at what point the plaintiff’s right of action is lost, careful analysis indicates that no single basis is determinative and that there is some element of all of these suggestions present in the doctrine.

3. Tests for Applying the Doctrine

The first series of tests revolves around the question of how far the contract is executed. Occasionally the courts say that there can be no recovery unless the contract is “wholly executory.”\textsuperscript{149} Treated literally, this is almost a contradiction in terms. If the contract is wholly executory, then nothing has been done and neither party is in need of any assistance from the courts. Obviously, the phrase is merely a striking way of saying that a very little amount of performance will prevent relief. A somewhat different test is that which requires that the contract remain entirely executory on one side.\textsuperscript{150} This test would suggest that though the extent of the plaintiff’s performance makes no difference, as soon as both parties have started performance, whether a substantial performance or not, the right to restitution is gone. If the plaintiff’s performance is the payment of money as consideration for the defendant’s proposed act, the courts are in essential agreement that the \textit{locus poenitentiae} has not been lost.\textsuperscript{151} When the plaintiff’s part of the contract consists of something besides the payment of money, there is less chance that he will be allowed to recover, especially when he has made a conveyance of land.\textsuperscript{152} The deed is apt to be considered as a transaction complete

\textsuperscript{148} Formed, Knowlton v. Congress & Empire Spring Co., 14 Blatch. 364, Fed. Cas. No. 7993 (1877).

\textsuperscript{149} New Castle Northern Ry. v. Simpson, 21 Fed. 533 (C. C. W. D. Pa. 1884) (stock issued not for money); Green v. Frahm, 176 Cal. 239, 168 Pac. 114 (1917) (recovery of deposit made on illegal lease).

\textsuperscript{150} Miller v. Larson, 10 Wis. 463, 467 (1865) (“it is only when the contract is wholly unexecuted, and by way of anticipating and preventing the wrong, that the party may rescind.”). Unlike the marine insurance cases, this seems to be the effect in life insurance, if the contract is considered illegal, where premiums cannot be recovered back even before the event. E. g., Bruer v. Kansas Mutual Life Ins. Co., 100 Mo. App. 540, 75 S. W. 380 (1900) (problem discussed); Harse v. Pearl Life Assurance Co., 1904 I K. B. 558 (C. A.).

\textsuperscript{151} Hooker v. DePalos, 28 Ohio St. 251, 262 (1876).

\textsuperscript{152} Sometimes the payment of money alone is considered illegal so that there can be no recovery. Thus a statute making the receipt of stakes by a stakeholder illegal has been held to prevent a rescission. Sutphin v. Crozer, 32 N. J. L. 462 (1865).

\textsuperscript{152} Cases mentioning the doctrine of \textit{locus poenitentiae} include Brown v. Peterson, 27 Ariz. 418, 233 Pac. 895 (1925) (fraudulent conveyance); and Adams v. Barrett, 5 Ga. 404 (1848) (conveyance of land as part of contract to suppress prosecution).
in itself and not as a part of a more inclusive contract. Some courts have declared that there can be rescission so long as the contract has not been completely executed.\textsuperscript{153} It is possible, too, to divide the contract and to say that the court will not assist either party as to the executed part but will relieve against the executory part.\textsuperscript{154} This has been done, for example, in connection with illegal leases.

A second series of tests is concerned not with the extent to which the contract generally has been performed, but with the question of whether the illegal part of the contract has been performed.\textsuperscript{155} This method of phrasing the test has been favored by most of the recent authorities which have given more than a cursory examination to the problem. When it is possible to point to a single part of a contract as the element which makes it illegal, this test is very simple and easy to apply. In other cases, however, the application is not so simple; it is not feasible to pick out one step in the contract as the thing which makes it illegal.\textsuperscript{156} In such cases, courts abandon this test and usually speak in terms of the execution or non-execution of the contract as a whole.

Frequently, the illegal part of the contract consists not of a single act but of a continuous performance. In such case, how may the test be applied? There has been no clear decision on this point. The view that the doctrine of \textit{locus poenitentiae} is based upon the idea that the plaintiff can recover until a moral stain has attached to him, would indicate that the right to restitution is lost as soon as any bit of the illegal portion of the contract is performed.\textsuperscript{157} On the other hand, explanation of the doctrine on the theory that it helps to prevent the carrying out of illegal purposes, would indicate that as long as any material part of the illegal purpose remains unperformed the plaintiff may rescind and prevent the performance of the rest.\textsuperscript{158} On occasion,
a compromise position is taken, and restitution is granted while the illegal purpose has not been "substantially" performed.\textsuperscript{159}

The distinction between execution of the contract generally and execution of the illegal purpose has not always been sharply drawn by the courts. Quite frequently, they speak of one and then immediately of the other, as if they were completely synonymous.\textsuperscript{160}

Other tests have been suggested. It has been said, for example, that the rescission must take place in time to prevent loss to the other party.\textsuperscript{161} Similarly, the plaintiff cannot "receive the fruits of the contract" and then attempt to rescind.\textsuperscript{162} And again, the doctrine "does not apply where the parties cannot be returned to their original position, but only in cases where the circumstances are such that \textit{restitutio in integrum} is possible."\textsuperscript{163} It has also been suggested that after third parties have been injured there no longer remains a right to restitution.\textsuperscript{164} Some of the cases also apparently indicate that a suit is more apt to succeed when its purpose is to prevent the acquiring of a further unjust enrichment rather than to rectify one which had already taken place.\textsuperscript{165} Recovery has occasionally been allowed without regard to the extent to which the contract has been executed if the plaintiff has repented and has taken action to "purge" the agreement "of its obnoxious character." The cases involved are those in which a man who made a conveyance to defraud his creditors subsequently paid all his debts voluntarily and then sued to get his property back.\textsuperscript{166}

Initially, it would appear that this exception to the maxim, \textit{in pari delicto}, could be reduced to the terms of a specific rule, but it should now be apparent that the courts are agreed on no such rule. There is, and probably can be, no single test for determining when a case comes within the exception.

\textsuperscript{159} Cf. Kearley v. Thompson, 24 Q. B. D. 742, 747 (C. A. 1890).

\textsuperscript{160} This is true of many cases. An example of an opinion in which the confusion is made though the general problem is well considered is Ullman v. St. Louis Fair Ass'n, 167 Mo. 273, 66 S. W. 949 (1902).

\textsuperscript{161} Hooker v. DePalos, 28 Ohio St. 251 (1876) (The "repentance, to be meritorious, should come in time to prevent loss to the other party, and, if honest, should be at his own proper expense.").

\textsuperscript{162} Knowlton v. Congress & Empire Spring Co., 14 Blatch. 364, Fed. Cas. No. 7903 (1877).


\textsuperscript{164} Cf. Lunsford v. First Nat. Bank of Birmingham, 224 Ala. 679, 141 So. 673 (1932) (Sunday contract).


\textsuperscript{166} Taylor v. McMullan, 123 N. C. 390, 31 S. E. 730 (1898). A majority of the courts would probably not agree, on the ground that even though the plaintiff paid off his debts he had "hindered and delayed" his creditors for a time and thus actually defrauded them.
4. Limitations on the Doctrine

Two limitations have sometimes been held to apply to the doctrine. The first is that there can be no locus poenitentiae when the contract involves serious moral turpitude. In the early cases, the limitation was frequently referred to, the distinction usually being made between mala prohibita and mala in se. Though the references to it were usually dicta, it was so generally acknowledged that it was considered an integral part of the doctrine. During more recent years, however, the limitation has been openly questioned by a number of authorities, and several well-considered cases have expressly repudiated it. The argument followed is that since the basis of the doctrine is prevention of the carrying into effect of the illegal purpose, that reason becomes all the more forceful as the illegal object increases in infamy. On the other hand, taking the view that the plaintiff should be allowed to recover up until the time when a moral stain attaches to him and he is disqualified from appearing in court, it is possible to justify the limitation; if the illegal object does not involve serious moral turpitude, the plaintiff does not become morally stained until that object has been accomplished, but if the object involves serious moral turpitude the mere entering into the contract is enough to degrade the plaintiff and to close the doors of the court to him. Inability to adopt either of these two reasons as the sole basis for the doctrine of locus poenitentiae makes it impossible to argue categorically for or against the limitation. While the question of the degree of infamy of the illegal object is more important here than in connection with the exception where the parties are not in pari delicto, it still does not constitute an iron-bound limitation upon the doctrine. The present trend, apparently, is to eliminate the limitation.

The second limitation which has been urged upon the doctrine is that it can apply only when the plaintiff brings his suit in a spirit of repentance. The early cases imposed no such requirement and granted restitution though the plaintiff obviously was bringing suit because the contract would not be fully performed. But the name, locus


169. Greenberg v. Evening Post Ass'n, 91 Conn. 371, 99 Atl. 1037 (1917), (1917) 4 VA. L. REV. 673 (newspaper prize contest with bought votes; both the opinion and the comment on it are well-considered); Town of Meredith v. Fullerton, 83 N. H. 124, 139 Atl. 359 (1927) (illegal lease by municipal corporation; strong opinion).

170. This is the argument used by Lord Innes, J., in Clegg v. Wilson, 32 N. S. W. St. Rep. 109, 121 (New South Wales 1932).

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poenitentiae, indicates that a repentance is required, and many cases so state.172 Were it not for the numerous cases in which the requirement is ignored,173 it might be listed as a definite limitation on the doctrine. 

Factually, there are very few cases in which the plaintiff repents his evil-doing and brings suit solely to give effect to that repentance. Almost always, plaintiff’s realization that he not only is uncertain of acquiring the proposed gain but also is very apt to lose what he has put into the transaction, is the real reason for his bringing suit. To say that when he discovers this himself he has met the requirement of repentance and may maintain his suit, but that when it is brought home to him by defendant’s refusal to perform his part of the contract he cannot then sue in a proper penitent mood, is to be slightly unrealistic. After all, the opportunity to the parties to repent is only one of many reasons given for the doctrine of locus poenitentiae. And although the motive which impelled the plaintiff to bring suit is an important factor to be considered by the court, it ordinarily is no more than a single factor which must be considered with several others and may be outweighed by them. The requirement of a repentance supplies a useful limitation upon the doctrine of locus poenitentiae which the court may use when it feels that the plaintiff should not recover.

5. Related Problems

Three problems closely related to some aspects of the doctrine of locus poenitentiae may now be considered.

(i) Is it permissible for a plaintiff to sue in the alternative for breach of contract or for restitution of the benefit bestowed? If repentance is necessary such a suit is out of the question; if not, it may be permitted. There is very little authority directly in point and that which exists is not in agreement.174 In view of the uncertainty, plaintiff should not bring a suit in this form unless he strongly believes that the court will hold the contract legal, in which event the addition of the second count for a rescission will not injure the first count and may provide some faint hope if the first count falls through. Perhaps there may also be occasion to bring suit in the alternative when the plaintiff thinks that he can bring his case within some other exception

174. Such a course was apparently permitted in Wharton v. De la Rive, (N. P. 1782) (Wager—Lord Mansfield), noted in 2 PARK, MARINE INSURANCE (8th ed. 1842) 780.
than that of *locus poenitentiae*, particularly where he was ignorant of the facts which made the contract illegal.

(2) In a wager, while the money is still in the hands of the stakeholder, if the plaintiff demands all of it as winner, can he later contend successfully that this demand will now allow him to sue for a return of his own stake? If a real repentance is required, he cannot prevail. But approximately half of the cases allow recovery on the ground that the original demand amounted to a revocation of the stakeholder's authority to pay to the other party.\(^{175}\)

(3) May a plaintiff maintain a suit for restitution when the illegal purpose has failed for some reason outside his control? Until the plaintiff has actually accomplished his illegal object, he may urge that he is not morally stained, therefore not *in delicto*, and that the maxim does not apply.\(^{176}\) On the other hand, it has sometimes been held that the illegal intent, especially when the plaintiff has done all in his power to carry it into effect and has failed through no mitigating circumstances, is sufficient to place the plaintiff *in delicto* and cause the maxim to apply.\(^{177}\) If repentance is an absolute requirement of the plaintiff's suit, he, of course, cannot prevail.\(^{178}\)

The problem has arisen most frequently, perhaps, in connection with fraudulent conveyances. Some of these cases might be distinguished from the others in that there was nobody to defraud or the property in question was not subject to the claims of creditors. Here, it could be said that there was actually no wrong or illegality at all but merely a belief on the part of the plaintiff that he was doing wrong. Plaintiff is probably not as morally reprehensible then as when the contract is actually illegal but the illegal object is prevented by circumstances developing after the contract was agreed upon. But the courts have not paid much attention to the distinction. In both types of cases, there has been a division of opinion, with a fairly even number of authorities on each side.\(^{179}\) If the illegal purpose fails because of the defendant's action the courts do not allow a recovery.\(^{180}\)

\(^{175}\) Recovery allowed in Hale v. Sherwood, 40 Conn. 332 (1873); recovery denied in Maher v. Van Horn, 15 Colo. App. 14, 60 Pac. 949 (1900).


\(^{178}\) Woodward, Quasi-Contracts (1913) § 147.

\(^{179}\) See Woodward, Quasi-Contracts (1913) § 147; 3 Scott, Trusts (1939) § 422.2.

\(^{180}\) See, for example, Liness v. Hesing, 44 Ill. 113 (1867) (bribe money paid to defendant who did not carry out his contract).
V. Partnership and Agency Cases

The next exception covers the situation in which a third person has delivered to the defendant money which should be turned over to the plaintiff—the partnership and agency cases. No single doctrine has served as the basis for an exception here. But in both types of cases, recovery has often been allowed, and because of the factual similarity it seems convenient to treat together both of them and the various reasons which have been suggested for allowing recovery.

1. Historical Development

From a historical standpoint, the partnership problem arose first in the famous Highwayman's Case, decided around 1723. It was a bill for an accounting between two highwaymen, which the court dismissed for scandal and impertinence. Following this case, there gradually began to develop a more lenient attitude in the partnership cases until it appeared that recovery was the rule. But the pendulum swung in the other direction, and the attitude became markedly more strict. This experience of the English courts was duplicated in the United States. Earlier cases allowing recovery have been restricted by later cases, and today it is an exceptional case which grants relief in a partnership case. The earliest cases involving agency allowed recovery; and though in conjunction with the trend in the partnership cases the courts became slightly more strict, the majority rule still allows recovery.

2. Bases for Recovery

In these cases the defendant has agreed with the plaintiff or a third person that he will pay money which he has to the plaintiff. The action might, therefore, be maintained upon the contract except for the fact that it is illegal. The suit, however, is upon the obligation.

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181. See generally Note, Defense Against Recovery of Money Collected on Ground That It Was Collected on Unlawful Contract or for Illegal Purpose (1888) 99 Am. Dec. 61.
182. Everet v. Williams (The Highwayman's Case), set out in (1893) 9 L. Q. Rev. 197. For further statements about the case, see Lindley, Partnership (8th ed. 1912) 113, n. (4).
184. Sharp v. Taylor, ibid., was severely criticized by Jessell, M. R., in Sykes v. Beadon, 11 Ch. D. 170 (1879), when recovery was refused.
185. The leading case allowing recovery in Brooks v. Martin, 2 Wall. 70 (U. S. 1864).
186. For a good collection of cases and careful analysis, see Restatement, Agency, Explanatory Notes (Tentative Draft No. 7, 1932) 264-69.
187. Cases involving an action by principal or agent (or partner) to recover advances made to the other are not included. It is generally held that there can be no recovery in such cases. See, e. g., Stirtan v. Blethen, 79 Wash. 10, 139 Pac. 618 (1914).
which the law imposes independent of the contract on the ground of
the defendant’s unjust enrichment. Some courts have seized upon this,
and, carried away by the fact that the suit is not on the contract, have
allowed recovery without requiring any other reason.\textsuperscript{188} In doing
this, they forget that all other suits for restitution are not on the con-
tract but that the maxim, \textit{In pari delicto}, is usually held to apply just
the same. Other courts go to the opposite extreme and say that there
Can be no recovery \textit{because} that would amount to an indirect enforce-
ment of the contract.\textsuperscript{189}

The first reason urged for creating an exception in these cases is
that the transaction has been completed, so that no harm is done in
dividing the spoils and no additional infraction of the law is induced;
a division of the money between partners will not make the evil
worse.\textsuperscript{190} The argument is precisely the converse of that urged in
behalf of the doctrine of \textit{locus poenitentiae}. If the two were put
together, they would apparently take care of all restitution cases in-
volving illegal transactions.

The defects in the whole argument are readily apparent. It makes
no answer whatsoever to the position that the plaintiff is unworthy of
being granted relief because of his iniquitous conduct. The sole reason
for the maxim, \textit{In pari delicto}, which it purports to refute is the one
which justifies the maxim on the ground that it discourages the enter-
ing into illegal transactions. And even here, the refutation is very
incomplete. Though the dividing of the spoils does not accomplish
a greater evil or induce the parties to do further wrongs, still the
knowledge that they would be entitled to have the spoils divided may
have induced them to enter into the transaction in the beginning.\textsuperscript{191}

A second basis frequently offered for allowing recovery is that
the facts giving rise to the defendant’s obligation to pay plaintiff are
not so closely connected with the illegality as to prevent the enforce-
ment of that obligation.\textsuperscript{192} So long as the participation in an illegal
transaction does not make one a complete outlaw he should be able to
enforce other obligations. How close the relationship between the two
contracts may be is a question of policy. The court in \textit{Farmer v.}

\textsuperscript{188} Cf. Cook v. Sherman, 20 Fed. 167 (C. C. D. Ia. 1882) (partnership—illegal
agreement as to location of railroad).


\textsuperscript{190} Brooks v. Martin, 2 Wall. 70, 80 (U. S. 1864) (partnership for purchase of
soldiers’ land warrants).

\textsuperscript{191} The doctrine is criticized at some length by Jessell, M. R., in Sykes v. Beadon,
11 Ch. D. 170 (1879); and by Peckham, J., in McMullen v. Hoffman, 174 U. S. 639
(1899).

\textsuperscript{192} Cf., \textit{e. g.}, Mayor and Common Council of City of Auburn v. Draper, 23 Barb.
425 (N. Y. 1856).
Russell would make it depend on whether the agent knowingly participated in the illegal aspects of the contract between his principal and a third person. The argument allowing recovery here is essentially a converse of the argument for allowing recovery when the parties are not in pari delicto because the plaintiff is not as deeply stained as the defendant. Here the parties are not in pari delicto and the maxim does not apply because the defendant is not in delicto. But as Rooke, J., demonstrates, in Farmer v. Russell, the practical administration of the distinction reaches a very anomalous result. The defendant, since he wants to keep the money, will be trying to show that he did intentionally engage in the illegal aspects of the contract. If he can succeed in tarring himself black enough he will win.

Despite the anomaly, however, there is reason to be urged for the distinction. The case where the agent does no more than agree to transmit money or other property from one party to another is like those in which the plaintiff has obtained such property in an unlawful manner and subsequently asks the defendant to keep it or in which the defendant takes it away from the plaintiff. In these cases the decision is given for the plaintiff, usually without regard to the question whether the defendant knew that the plaintiff had obtained the property through an illegal transaction. The distinction, therefore, is not confined to the agency problem. The problem is merely one of determining how closely the illegal aspects of the transaction are connected with the obligation which the plaintiff is attempting to enforce; and the anomalous position in which the defendant may find himself after the trial begins is an incident unavoidably arising from that necessity, which does not affect the general rule and is probably of very little practical importance.

Though recovery has been allowed on the basis of the distinction in a number of cases, the courts have not attempted to be very precise in expressing it. Apparently, the idea toward which they are striving is that the defendant must account for the proceeds he has

193. 1 Bos. & P. 296, 126 Eng. Rep. R. 913 (C. P. 1798). Plaintiff gave defendant goods to deliver to another and receive payment, from which he was to get a commission. After paying plaintiff part of the money received, defendant refused to pay more and defends his action on the ground that the goods delivered were counterfeit money. It was not shown that defendant knew at the time that the goods were counterfeit money, and the court held for the plaintiff.


196. Matta v. Katsoulas, 192 Wis. 212, 212 N. W. 261 (1927). Perhaps the most striking decisions in this regard are those which hold that when police seize money used in gambling or for other illegal purposes, they cannot keep it but must return it. Gordon v. Chief Com’r of Metropolitan Police, [1910] 2 K. B. 1030, 1036-97 (C. A.).

197. The two leading cases are Lemon v. Grosskopf, 22 Wis. 447 (1888); and Nave v. Wilson, 12 Ind. App. 38, 38 N. E. 876 (1894).
received unless he has knowingly participated in accomplishing part of the illegal aspect of the contract. This raises the problem, previously discussed, of what constitutes the illegal aspect of a particular contract, and suggests that even though the agent is participating in such aspect he must still account if he did not know of the facts making the contract illegal.

Still a third basis has been urged for allowing recovery in these cases. The legal policy of requiring an agent to comply with his fiduciary duty of accounting to his principal may be regarded as sufficiently strong to outweigh the policy of refusing to give relief to parties who have engaged in an illegal transaction. In several cases courts have indicated that this is the real basis for allowing recovery. In other cases the court suggests that a principal may always recover from an agent. This and the fact that the first two reasons given for the exception have not been given their logical extension to other fields all indicate that the policy of maintaining a high standard of conduct on the part of agents has been an extremely important factor in the determination of these cases. Strangely, the argument does not appear to have had much effect in the partnership cases, though there is a fiduciary relationship requiring just as high a standard of conduct.

Just as no single doctrine will explain the exception, there is no basis on which the cases can be reconciled. In the partnership situation a substantial majority of the cases refuse recovery, but there are numerous authorities providing precedents for granting relief. In the agency cases, there is more confusion. Some courts appear ready to allow recovery in all agency cases; others are likely to go to the opposite extreme. The majority take a position in between, making the chances for recovery depend largely upon how closely connected the agent’s conduct is with the illegal aspect of the contract. Though no reference is usually made to them, such factors as the seriousness of the legal infraction involved may influence the decision in the individual case.


200. See Note (1928) 41 HARV. L. REV. 650.

201. Recovery was refused because the defendant had taken part in the illegality: Lanahan v. Pattison, 1 Hilp. 416, Fed. Cas. No. 8,036 (C. C. W. D. Tenn. 1874) (sale of lottery tickets); Goodrich v. Tenney, 144 Ill. 425, 33 N. E. 44 (1893) (contract tending to subornation of perjury).

202. In the cases of Nave v. Wilson, 12 Ind. App. 38, 38 N. E. 876 (1894); Anderson v. Moncrieff, 3 Desaus. 134 (S. C. 1810); and Sharp v. Taylor, 2 Ph. 801, 41 Eng. Rep. R. 1153 (Ch. 1849), for example, reference is made to the seriousness of the offenses involved.
VI. Public Policy Favors Restitution

The next exception uses language more frank than the others have used. It permits restitution whenever public policy requires it, and the courts exercise their discretion in determining when this is so.

Discussions of public policy are usually begun by quoting the famous remark of Burrough, J., in *Richardson v. Mellish*,203 to the effect that "public policy . . . is a very unruly horse, and when once you get astride it you never know where it will carry you." But the restraining influence of this warning need not be as strong here as it is on other fields. For the maxim, *In pari delicto*, itself is based upon considerations of public policy rather than upon logical deductions from established rules.204 A court is therefore reaching its decision in terms of public policy, whether it decides to apply the maxim or to resort to this exception. To continue Justice Burrough's metaphor, the court is already astride the unruly horse; it is now concerned merely with trying to determine the direction in which that unpredictable steed will bear it.

This circumstance, recognized by several courts,205 might have made it easy to adopt as a general policy the practice of investigating the peculiar facts of each individual case so as to determine which decision was best for the parties and for the public as a whole, without establishing any clear rule one way or the other. There is some indication that the English equity court in its early decisions adopted something of this attitude.206 But generally speaking, the courts have been slow to resort to this exception as the sole basis for allowing recovery.

The first cases applying the exception were those in which a fraud of some sort was attempted on a third person.207 If relief has the effect of preventing the consummation of the fraud, it is clearly available.208 The effect of the action one way or the other on strangers


204. Perhaps the best authority to cite for this is Lord Mansfield's classic statement concerning illegal contracts in Holman v. Johnson, 1 Cowp. 341, 343, 98 Eng. Rep. R. 1120 (K. B. 1775).

205. See, e.g., Wright v. Stewart, 130 Fed. 905, 921 (C. S. W. D. Mo. 1904) (bet on fake foot race).


to the illegal contract is always considered by the courts; sometimes they speak of whether their ruling will "benefit the public." Public policy is held to favor recovery when the granting of relief might be considered as having the effect of tending to prevent such transactions in the future. Opinions differ widely, of course, as to the cases in which this effect is to be expected. Perhaps a variation of this reason is the argument that recovery should be allowed in order to punish the defendant when his conduct is worse than the plaintiff’s, and thus to provide an example for the public generally. Courts frequently speak in terms of public policy in holding that the parties are not in pari delicto because of additional wrongdoing on the part of the defendant. Again, public policy is said to demand recovery on occasion in the interests of "good morals." This suggests that the relationship between the parties as individuals may have some effect. Public policy may require honesty and fairness in dealing. Finally, public policy favors the granting of relief when such action has the effect of undoing the illegality or ending the illegal condition.

The exception has been resorted to as a means of granting relief in the following kinds of illegal contracts: secret preferences in compositions with creditors, office brokage contracts, contracts to defraud third persons, contracts to suppress prosecution, wagering contracts, voting trusts, purchase of its own stock by a corporation, marriage brokage contracts, unlawful insurance rebates, dealing with Confederate money, newspaper contests for

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211. Hobbs v. Boatright, 190 Mo. 693, 723, 93 S. W. 934 (1906).
212. Gorringe v. Reed, 23 Utah 120, 43 Pac. 902 (1900) (contract to stifle prosecution—duress).
213. Hobbs v. Boatright, 190 Mo. 692, 93 S. W. 934 (1906) (bet on fake foot race).
226. Hale v. Sharp, 4 Cold. 275 (Tenn. 1867).
prizes, this does not mean, of course, that the cases suggest that recovery should always be allowed in the types of illegal contracts listed, but only that the exception has been held to apply on occasion to a contract of this type.

This exception is potentially the easiest to apply and the one with the widest scope of coverage. In practice, it has not been extensively used, being adopted usually in cases in which application of other exceptions is difficult. It affords an efficient safety valve, offering the court a permissible way of holding for the plaintiff when it has a real desire to do so and providing an additional reason to be tacked on to the opinion when the court is not entirely sure of its ground in applying another exception.

VII. Minor Exceptions

These constitute the major exceptions to the maxim. There are certain minor ones occasionally used which may be considered briefly.

(I) Though the relief may not be given to the immediate parties to an illegal contract, the court may still grant relief to an innocent party if it can find one. Thus, in case of an illegal or fraudulent trust, if the beneficiaries are innocent, the court may hold in their favor.

A recent case has granted relief to a party to an illegal contract, but declared that he holds the money as constructive trustee for another person who was not party to the suit but who was really entitled to it.

Perhaps this principle will explain the cases in which a principal is allowed to recover money which he entrusted to an agent who wrongfully lost it to another party by gambling. The principal is innocent, and is therefore not barred by the maxim. In a few similar situations a plaintiff has been allowed to recover when the illegality was brought about by acts of his agent or someone else. The principle might also have been applied to allow a recovery by a person claiming through a party to an illegal contract but who was himself innocent of wrongdoing, on the ground that the disability is a personal one. Some of

232. In Crocker v. United States, 240 U. S. 74 (1915), plaintiff's agent to sell mail satchels to the Post Office Department made a secret agreement with a member of the Department for giving him half the commission. The contract was therefore illegal and unenforceable; but it was held that if the plaintiff were innocent he could recover on a quantum valebat.
the early cases seemed to suggest that this might be done, but the rule is now definitely otherwise.

(2) Davies v. London & Provincial Marine Ins. Co., suggests another exception. Plaintiff deposited the money in a bank to the joint account of himself and defendant to induce the latter to drop a prosecution against a third person. His subsequent action to rescind the agreement and obtain the money was sustained. To defendant's argument that *melior est positio defendentis*, the court said, "there is great difficulty in applying that principle to a case where money has been placed *in medio*, and when the Court must do something or else leave it up forever." The argument might well be suggested as the reason for the rule allowing a party to a bet to rescind while the stakes remain in the hands of the stakeholder, even though the event on which the bet hinges has been determined. So long as the money has not been paid over to the other party, it remains *in medio* and the court can take action.

Two other cases are relevant. In *Phillips v. Probyn*, a man who had married his deceased wife's sister set up a trust for himself for life and then for his second "wife." After his death, the trustees applied to the court to determine whether the woman was beneficially entitled to the money. The court declared that if the heirs of the decedent had sought to set the trust aside, no assistance would have been given them, but since the trustees needed instructions it would advise that the trust was illegal and invalid and that the money should be paid to the heirs. In *Herren v. Beck*, one of the heirs of Herren made a deed to another on Sunday. The court held that the grantor could not have the deed cancelled, but when another heir sought to have the property sold for partition, the court could treat the deed as


234. If the party to the contract cannot recover, neither can his personal representative (Southworth v. Huffaker, 79 Colo. 364, 245 Pac. 260 (1926); heir or legatee (Dent v. Ferguson, 132 U. S. 50 (1888)); assignee (Beverage Co. v. Villa Marie Co., 13 N. W. (2d) 670 (S. D. 1944)); or creditors or anyone representing them (Horton v. Buffington, 105 Mass. 399 (1870)); and see (1941) 29 Calif. L. Rev. 418, and (1941) 39 Mich. L. Rev. 1245.

235. 8 Ch. D. 469 (1878).

236. Id. at 477; see KEH, FRAUD AND MISTAKE (6th ed. 1929) 547; Whitmore v. Farley, 43 L. T. Rep. 102, 107 (Ch. 1880). And compare the language of Augustus N. Hand, J., in Judson v. Buckley, 130 F. (2d) 174, 180 (C. C. A. 2d, 1942), to the effect that relief should be granted "where the res sought to be recovered is held in escrow under what is in effect an order of interpleader so that a refusal to act in favor of the complainant will amount to affirmative action in favor of the other party." See (1941) 39 Mich. L. Rev. 1245.


238. There are other explanations. One is based upon the doctrine of *locus poenitentiae* and the other upon the principal-and-agent relationship. Both have been considered previously.

239. 1895] I Ch. 811.

240. 231 Ala. 328, 164 So. 904 (1935).
void and divide the property as if it had never been made. Thus, the attitude indicated in both cases is that if the court must act in some manner and is not called into action solely for the benefit of one of the parties to the illegal contract, its course of action will not be affected by the fact that its decision may confer a benefit on one of the parties.

(3) The Restatement of Contracts suggests still another exception which may have more importance in the future. Section 600 provides that if the contract does not involve serious moral turpitude and is not prohibited by statute, "recovery may be allowed of anything that has been transferred under the bargain, or its fair value, if necessary to prevent a harsh forfeiture." This exception, while it uses a more realistic method of reaching the result than courts are accustomed to use, is somewhat restricted in its scope. The Washington court has already given restitutionary relief on the basis of this section, 241 and it seems likely that other courts may follow the precedent. The section will probably have more effect as an additional exception than as a limitation upon existing exceptions.

(4) Another exception allows the granting of relief when a statute prohibits some act not serious in its nature and sets a penalty for its infraction, which the court decides is the only one the legislature meant to apply. 242 This exception seems to have been applied with caution.

(5) A final exception is suggested by a series of cases holding that when the only illegal aspect of a contract is not in the services rendered but in the method of paying for them, the plaintiff may disregard the contract and sue in quantum meruit for the value of his services. The cases all involve champertous contingent-fee contracts. Many courts hold that while the attorney cannot recover the agreed percentage, he may recover in quasi-contract. 243

How Should the Problem Be Solved?

The problem of whether restitution should be granted in connection with illegal transactions admits of either an affirmative or a negative response. Both of these two obvious answers have been tried by


243. Overstreet v. Barr, 255 Ky. 82, 72 S. W. (2d) 1014 (1934). Others disagree [Sapp v. Davids, 176 Ga. 295, 168 S. E. 62 (1933)] and it is probably significant that the illegality involved is of a particularly mild sort. While the exception is usually phrased in general terms, there do not seem to be any cases applying it to any except the contingent-fee situation.
the common law. But neither has proved satisfactory as a single rule to apply to all situations. We have seen that the solution which the courts finally developed was to adopt the negative answer but to create so many exceptions to it that considerable leeway was left in reaching a decision in the individual case. In any case except that rare one which is completely average, a decision either way would be entirely possible, with a satisfactory legal explanation.

By this solution the courts are able to give effect to the various conflicting policies which are brought into play in connection with the problem. As one or the other of those outstanding competitors—the policy against allowing an unjust enrichment and the policy against extricating a "bad" man from the toils in which his evil conduct has placed him—proves the stronger in the case before the court, so the decision is likely to go. The relative strength of these policies is apt to fluctuate depending upon the seriousness of the illegal aspect of the contract and the amount of unjust enrichment which will be sanctioned by a refusal to act. But though these policies may have a large degree of free play in the decision of the case before the court, the discretion is available only to the extent that one policy may outweigh the other and thus prevail at its expense. In each particular decision no compromise or adjustment of the conflicting policies is available.

The suggestion has been made that it is possible to give some effect to both policies by granting restitution and making certain that the parties to the transaction are punished by operation of the criminal law. This solution has much to be said for it from a theoretical standpoint. Its difficulty lies in its practical administration. In the first place, participation in many types of illegal transactions has not been made a crime, so that no criminal prosecution is possible. In the second place, even if the conduct is criminal in nature, there is no way of obtaining assurance that the parties will be prosecuted successfully. So long as that assurance is lacking, it would be hard to convince many courts that relief should always be allowed.

If we have only the two solutions of relief or no relief available in the individual case, I think that the present result is perhaps the most satisfactory. Some think that relief should be somewhat more freely granted; some take the view that it should not be given so freely. One may agree or disagree with the specific holding reached in the particular case. But as long as the matter is within the general discretion of the courts, flexibility, with adjustment either way, is possible. It would seem decidedly unfeasible to attempt to reduce the law in this field to a series of inflexible rules which would seek to cover every possible situation.
RESTITUTION OF BENEFITS

The legislatures have offered still a third solution. Usually they have passed statutes merely changing from one result to another.\(^{244}\) Examples are the numerous states providing that the loser in a gambling transaction may recover the amount lost,\(^{245}\) and somewhat similar statutes in connection with sales of intoxicating liquor,\(^{246}\) Sunday contracts,\(^{247}\) and usury.\(^{248}\) But sometimes they have offered the independent solution of taking the enrichment away from one party but doing something with it besides giving it to the other party. The action then, of course, must be brought by someone else.

These statutes are almost all connected with gambling contracts of one kind or another, though occasionally a statute is passed for some other kind of illegal transaction. Some of them allow the family of the loser to recover.\(^{249}\) Sometimes the money is simply forfeited to a government sub-division or subjected to confiscation by the state, or sometimes taken for charitable purposes.\(^{250}\) Some statutes allow any person to recover, a part of the amount recovered to go to the county or to charity.\(^{251}\) Others allow any person to sue for himself alone.\(^{252}\) Recovery may be for two, three or even five times the amount involved. In most of the cases, this action is made available after a short period of time in which the loser is allowed to bring an action for himself.

These statutes take care of the unjust enrichment, but they do not provide restitution to the party who has lost the enrichment. If it is felt that he should get nothing but the other party should not keep the enrichment, then the statutes may possibly be considered the best way of solving the matter. But even then, the practical working out may not prove entirely satisfactory. Third parties are not often looking for suits of this sort to bring, and public officers are very unlikely to display much initiative in this connection.\(^{253}\) If the money is to go


\(^{247}\) In Conn. Gen. Stat. (1930) § 5665; and Me. Rev. Stat. (1944) c. 100, § 154, it is provided that there can be no defense to an action on a Sunday contract unless the consideration is returned.


\(^{252}\) Ala. Code Ann. (Michie, 1928) § 6806 (money received for not bidding at public sale—double).

\(^{253}\) Cf. Commonwealth v. Avery, 14 Bush 625 (Ky. 1879) (civil action by attorney-general to collect winnings for state; indictment for fine authorized as separate action). For further discussion as to the practical operation of such statutes, see (1938) 28 J. Crim. L. & Crim. 912, 914-15.
to charity, hardly anyone is apt to display sufficient interest to bring a suit. And *qui tam* actions, or actions by a third person for his own benefit, though rather commonly provided for at one time, have now very largely died out.\(^{254}\)

Once we enter the domain of legislation in seeking a solution of the problem, however, another possibility offers itself. This is to allow the plaintiff to recover the full amount of the enrichment but to deduct from that amount a sum to be set by the court and hold this sum for some other purpose. The solution was suggested in 1891 by Dean Wigmore,\(^ {255}\) and something of the sort has been broached by a few statutes, particularly in Mexico.\(^ {256}\) This suggestion seems to me to incorporate most of the advantages of all of the other solutions, without their serious disadvantages. Thus, if the amount of the deduction is not made certain but is made to depend upon the discretion of the court, the conflict of policies will be brought out into the open and it will be possible to adjust between them without forcing one to give way completely to the other. The old common law idea of all or nothing will no longer have to apply.

Most of the objections, either to granting relief or to refusing to grant it,\(^ {257}\) appear to be taken care of by this solution. There is no unjust enrichment, and restitution is given to the other party only to the extent that the court thinks proper. The court is giving aid to a "bad" man, but no more than it thinks proper; and it is treating him in such a manner as to prevent him from profiting from the transaction and to keep from encouraging him to engage in such transactions. The deduction made from the amount which the plaintiff is to recover also goes far to eliminate the effectiveness of the argument that the nature of the action itself is bad. And as for the argument that the court will still be consuming time and money in entertaining the suit, it may be predicted that there will be no more suits than under the present set of rules and probably fewer to come before the appellate courts. Since a party to the transaction is the one to bring the suit for his own benefit, there is far more chance that this statute would

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256. The Mexican Civil Code provides that half of the sum may be recovered by the person paying it and that the other half shall go to Public Charity. Article 1,895 provides: "Lo que se hubiere entregado para la realización de un fin que sea ilícito o contrario a las buenas costumbres, no quedará en poder del que lo recibió. El cincuenta por ciento se destinara a la Beneficencia Publica y el otro cincuenta por ciento tiene derecho de recuperarlo el que lo entregó." Articles 2,765 and 2,766 make the same provision for wagers.

serve a useful purpose than the statutes giving any person the right to sue.

This solution has been called Utopian, but in my considered opinion it may prove a very practical adjustment of the various difficulties involved in attempting to meet the problem. With this in mind, I have drafted a statute in an effort to put this solution into a concrete form.

SECTION ONE. (a) Any person shall have the right to restitution of money paid or the value of property transferred or services rendered in any transaction which is illegal because of common law, statute or public policy, regardless of the degree of turpitude involved in the transaction and despite any moral stain attaching to the parties to the transaction, provided the other party to the transaction would have been considered unjustly enriched at his expense if the agreement between them had been merely unenforceable and not illegal.

(b) The term "unjust enrichment" as used in this section shall include all winnings obtained through any wager or other gambling transaction.

SECTION Two. In any action brought under the preceding section the plaintiff shall be entitled to the full amount of the unjust enrichment, less any sum which the court may see fit to deduct, taking into consideration the degree of moral turpitude involved, the relative guilt of the parties and the plaintiff's motive in bringing the suit. In no case shall more than one-half of the amount of the enrichment be thus deducted. Judgment against the defendant shall be for the full amount of the enrichment and execution in favor of the plaintiff shall issue as with other judgments, but before any amount is paid to the plaintiff the sum thus deducted shall be paid into court for the use of the county in which the action is brought. After judgment has been rendered, the plaintiff shall have no authority to enter into any compromise agreement with the defendant which shall affect the sum due to the county and may not accept any voluntary payment until such sum has been paid into court.

SECTION THREE. In any case in which the plaintiff shall seek specific restoration of property instead of the value thereof, his bill of complaint shall contain an offer to pay into court such proportion of the value of the property, not to exceed one-half, as the court shall assess in accordance with the provisions of section two.

SECTION FOUR. Either party to an illegal transaction may obtain rescission of the illegal agreement although neither party is unjustly enriched at the expense of the other, if the court considers that it is in the interests of public policy to allow the action.

SECTION FIVE. Action may be maintained for cancellation or declaration of invalidity of any written instrument unenforceable because of illegality; and the provisions of sections two and three shall not apply unless additional relief is sought.


259. Discussion of the specific provisions of this act is not here possible. While it seems unlikely that the constitutionality of the act may be questioned, reference may be made in this connection to Ervin v. State ex rel. Walley, 150 Ind. 332, 48 N. E. 249 (1897); and Larned v. Tierman, 110 Ill. 173 (1884). Statutes allowing the loser at gambling to recover his losses are generally regarded as remedial and construed liberally. Mann v. Gordon, 15 N. M. 652, 110 Pac. 1043 (1910); Foley v. Whelan, 219 Minn. 209, 17 N. W. (2d) 367 (1945).