

APPLICATION OF *IN PARI DELICTO* RULE TO
EXECUTORY ILLEGAL CONTRACTS

The plaintiff brought an action for conversion on April 14, 1944. He alleged that on January 15, 1940 he had deposited with the defendant a school district bond, with a market value of \$540, to secure the payment in nine months of \$225 "which the defendant claimed to be then due him for money lost in a game of chance operated by the defendant and commonly known as 'craps.'" On his tender of payment to the defendant at the agreed date, October 15, 1940, the defendant had been unable to redeliver the bond because in the interim he had liquidated it without the plaintiff's knowledge or consent. The Ohio statutes voided all gambling agreements¹ and limited actions for the recovery of "money or other thing[s] of value" lost to another "by playing a game, or by a bet or wager" and paid or delivered in whole or in part to the winner to "six months after such loss and payment or delivery."² The statute of limitations provided a four-year period for conversion actions.³ The defendant demurred on the ground that the action had not been brought within this period. He contended that this was a suit to recover "money or other valuable thing" lost at gaming and paid or delivered to the winner and that the statute's provision for recovery of such losses made his possession of the bond wrongful from the time it began. From this he argued that the period of the statute of limitations both for the recovery of gambling losses and for conversion had begun to run at that time, and thus had expired before the action was brought. The demurrer was sustained in the trial court, and the intermediate appellate court affirmed. The Supreme Court of Ohio reversed, holding that the plaintiff had stated a cause of action for conversion. *Gehres v. Ater*.⁴

The majority distinguished the transaction from delivery to the winner of a thing lost at gaming, classifying it instead as an attempted pledge, void for want of a valid obligation and therefore a gratuitous bailment "made under a mutual mistake of law or under circumstances which transferred no title to the defendant." On this basis it was held that a cause of action for conversion had arisen, at the earliest, only when the defendant had actually liquidated the bond without the plaintiff's knowledge or consent. Since it did not appear from the pleadings that this had not occurred within the period of the statute of limitations, it was presumed that it had.

This view of the case provided a narrow entry for the principle that when an illegal contract is still "executory" and is merely *malum prohibitum*, not *malum in se*, a party has an "opportunity to repent," and may be restored to benefits conferred under it. This is a recognized exception to the general rule *in pari delicto potior est conditio defendentis*—when both parties are equally guilty the

¹ Ohio Code Ann. (Throckmorton, 1940) § 5965.

² *Ibid.*, at § 5966.

³ *Ibid.*, at § 11224.

⁴ 148 Ohio St. 89, 73 N.E. 2d 513 (1947).

defendant's position is the stronger.⁵ Since the plaintiff had not actually paid his losses but had merely secured their payment, the majority felt that he had been in a position to recover the bond from the defendant even after the limitation of actions to recover gambling losses had expired and could therefore sue for its conversion.

The dissenting opinion failed to meet the majority's distinction between delivery of a thing lost and an invalid pledge, or its argument that the agreement was still executory. Instead it merely stated the conclusion that the plaintiff's delivery of the bond to the defendant was a delivery of a thing lost at gambling and that any cause of action for its recovery arose immediately.⁶

It is submitted that the ingenious application of *locus poenitentiae* in this case produces a good result. Two principles compete for application in cases of this sort. First is the notion that a party to an illegal contract is a "bad" man, who has forfeited, so far as the contract in question is concerned, the right to the assistance of the courts. The opposing view is that no one should be unjustly enriched at the expense of another.⁷ The application of the first principle results in the indirect enforcement of the illegal contract for the defendant, while the plaintiff of course cannot get the illegal exchange contracted for.⁸ In the instant case this view would have given the defendant more than twice the amount lost by the plaintiff, the excess being the fruit of illegal conduct quite outside the gambling transaction.⁹

⁵ *Spring Co. v. Knowlton*, 103 U.S. 49 (1880); *Brashears v. Giannini*, 131 Cal. App. 706, 22 P. 2d 47 (1933), cert. den. 290 U.S. 700 (1933); *Boyer v. Garner*, 15 S.W. 2d 893 (Mo. App., 1929); *Meredith v. Fullerton*, 83 N.H. 124, 139 Atl. 359 (1927); *Greenberg v. Evening Post Ass'n*, 91 Conn. 371, 99 Atl. 1037 (1917); see 17 C.J.S. Contracts § 275 (1939). Contra: *Auditorium Kennel Club v. Atlantic City*, 16 N.J. Misc. 354, 199 Atl. 908 (1938).

⁶ The conclusion of the dissent that recovery was barred under both statutes seems to be rested in large part on the statute's provision for recovery of "things delivered" to the winner as well as "money paid" and on another section's description of the proper allegations which follows the same twofold pattern: "the plaintiff need only allege that the defendant is indebted to the plaintiff, or received to the plaintiff's use, the money so lost and paid, or converted the goods won of the plaintiff to the defendant's use, whereby the plaintiff's action accrued to him, without setting forth the special matter." Ohio Code Ann. (Throckmorton, 1940) § 5968. Italics added by author of dissenting opinion, *Gehres v. Ater*, 148 Ohio St. 89, 98, 73 N.E. 2d 513, 518 (1947). It seems unlikely that "delivered" was meant to have any different significance from "paid" except as distinguishing a transaction where a "thing" was lost from one where money was lost, and that the distinction between a payment and a pledge should hold valid for delivery of a thing in payment as well.

A distinction which perhaps influenced the dissent is expressed in the rule that a loser in an illegal gambling transaction may recover whatever he has wagered from a stakeholder even after the event wagered on has occurred, so long as the stake has not been paid over to the winner. The importance given by the dissenting judges to the delivery of the bond into the hands of the winner may have stemmed in part from this rule.

⁷ Wade, *Benefits Obtained Under Illegal Transactions—Reasons for and Against Allowing Restitution*, 25 Tex. L. Rev. 31, 60 (1946).

⁸ In a gambling contract, of course, there is no agreed exchange. Rest., Contracts § 520 (1932)

⁹ This suggests the possibility that the plaintiff might have brought his case within the very flexible exception to the *in pari delicto* rule that recovery of benefits conferred under illegal

It has been asserted that the flexibility given the *in pari delicto* rule by its many exceptions makes it easy for courts to reach a just result in any particular case.¹⁰ The instant case would be a good citation for this proposition. Nevertheless, the rule's generality and ease of application seem to promote a judicial inertia in these cases, so that courts frequently countenance harsh results produced by failure to take advantage of the opportunities the exceptions offer.¹¹ For example, in a California case a United States citizen of Japanese extraction sued to recover money paid on account of an agreement to purchase land and taxes paid pursuant to the agreement. The court held the agreement illegal because the money had been furnished and the land was to be enjoyed by the plaintiff's father, an ineligible alien, and refused to order repayment of the money although the plaintiff had abandoned her illegal intent because of the refusal of a bank to handle the transaction.¹² Similarly, a New Jersey court held that a kennel club could not recover \$25,000 paid to Atlantic City on a lease of its convention hall for pari-mutuel greyhound racing, though the contract was disaffirmed and the action brought before the hall had actually been put to the use contemplated by the lease.¹³ The New Jersey legislature previously had enacted statutes permitting these races, and their constitutionality was in litigation at the time when the lease was executed. They were subsequently held unconstitutional by the Court of Errors and Appeals,¹⁴ and an Atlantic City citizen sued to have the lease set aside. At this point the kennel club disaffirmed the lease and sued to recover the advance payment, to be met with the holding that the doctrine of *locus poenitentiae* was not followed in New Jersey. Such results are difficult to justify. Courts reaching them seem to require that the plaintiff have gone through some genuine "repentance" before the doctrine of *locus poenitentiae* is applied. The fact that circumstances outside the plaintiff's control have frustrated his intent is frequently regarded as insufficient. The New Jersey court that decided the greyhound-racing case was not content to rest its decision on the fact that the doctrine did not exist in the law of that state, but more broadly announced the ironical results which might follow its completely nonliteral application: "There is no moral efficacy in a policy that permits an adventurer to proceed with his unlawful undertaking until he discovers the utter futility of his efforts and when hopeless of all gain, repents and

contracts will be permitted when the parties are not "equally" guilty. But this would have been useful only if the plaintiff could have taken the position that delivery of the bond was delivery of a thing lost. This the statute of limitations prevented him from doing.

¹⁰ Wade, *op. cit.* supra note 7, at 62.

¹¹ See 2 Page, *Contracts* § 1061 (2d ed., 1919), for an attack on the efficacy of the *in pari delicto* rule as a discouragement to the formation of illegal contracts. Professor Williston seems to disagree. 5 Williston, *Contracts* § 1630, at 4562 (rev. ed., 1937).

¹² *Takeuchi v. Schmuck*, 206 Cal. 782, 276 Pac. 345 (1929). The court castigated the defendants verbally but said it was bound by the general rule.

¹³ *Auditorium Kennel Club v. Atlantic City*, 16 N.J. Misc. 354, 199 Atl. 908 (1938).

¹⁴ *Hyman v. Long Branch Kennel Club, Inc.*, 115 N.J.L. 123, 179 Atl. 105 (1935).

with the aid of the courts is reestablished *statu quo ante contractum*. No court in any jurisdiction follows such a policy. There is naturally a type of *locus poenitentiae* when the police arrive on the scene."¹⁵

Other courts have taken wise advantage of the generality of the main rule and its exceptions and have made careful and discriminating dispositions of cases raising this problem, permitting recovery in cases where a more superficial analysis would probably have resulted in a blundering application of the *in pari delicto* rule and denial of relief. In *Greenberg v. Evening Post Ass'n*¹⁶ the plaintiff was permitted to repudiate a fraudulent agreement on advice of counsel and to recover payments made to the defendant's agent to insure plaintiff's winning an automobile offered by the defendant as a prize in a public contest, even though the court assumed that he was aware of the contract's illegality at the time he paid the money.

The Illinois courts have afforded plaintiffs a "place of repentance" where a wager has been placed in the hands of a stakeholder and, prior to its payment into the hands of the winner, the other party has repudiated the wager and demanded the return of the stake deposited.¹⁷ A plaintiff who had paid money to a probate judge for services in settling a circuit-court contest of a will in which the plaintiff was interested was permitted to recover the payment, though the transaction was held illegal because the will in question was before the defendant's court for probate.¹⁸ Here, however, the services had been performed, precluding the application of *locus poenitentiae*, and it was necessary for the court to grant relief on the ground that the parties were not *in pari delicto*. Recently an Illinois court recognized a right of action to recover a payment fraudulently represented by the defendant to be necessary to enable him to procure the plaintiff's appointment to the state police.¹⁹ The doctrine is stated in dicta in other cases.²⁰ Thus it appears that, while no Illinois cases have presented the

¹⁵ Auditorium Kennel Club v. Atlantic City, 16 N.J. Misc. 354, 360-61, 199 Atl. 908, 911 (1938).

¹⁶ 91 Conn. 371, 99 Atl. 1037 (1917).

¹⁷ Stevens v. Sharp, 26 Ill. 404 (1861); Parmalee v. Rogers, 26 Ill. 56 (1861); Doxey v. Miller, 2 Ill. App. 30 (1878). The stakeholder situation is one of the most well recognized occasions for the application of the doctrine, so that the courts in these cases apparently did not feel called upon to set it out in any detail, nor was it mentioned by its usual name.

¹⁸ Evans v. Funk, 151 Ill. 650, 38 N.E. 230 (1894).

¹⁹ Johnson v. Harman, 328 Ill. App. 585, 66 N.E. 2d 498 (1946). This was an appeal from an order sustaining the defendant's motion to strike the statement of claim on the ground that the contract pleaded was in violation of public policy and void. The appellate court reversed and remanded, but published only an abstract, so that the theory of the reversal is not available.

²⁰ "If a contract is illegal affirmative relief against it will not be granted unless the contract remains executory. . . ." Vock v. Vock, 365 Ill. 432, 435, 6 N.E. 2d 843, 845 (1937).

"Permitting recovery in [a stakeholder] case is not a recognition, or sanction of, the illegal contract. It is simply a recognition by the courts of the party's right to repudiate and to refrain from further recognition of the illegal contract. . . . In . . . cases [where] the parties rely on the illegal contract for recovery, and in such cases, only, are they said to be in *pari delicto*." Kearney v. Webb, 278 Ill. 17, 22, 115 N.E. 844, 846 (1917).

problem sharply, there is some recognition of the principle in this jurisdiction. It is a question, however, whether the old stakeholder precedents, which seem to be the only ones where it has been squarely applied, would be of great weight in a close case.

The *locus poenitentiae* doctrine is recognized by the *Restatement of Contracts*, but with an unwieldy qualification. "Where money has been paid or goods have been delivered under a bargain containing illegal provisions the money or the value of the goods can be recovered so long as the illegal part of the bargain is wholly unexecuted, *unless entering into the bargain involves serious moral turpitude on the part of the plaintiff.*"²¹ This is probably another way of stating the old distinction between *malum prohibitum* and *malum in se*. The content of the concept of moral turpitude, or *malum in se*, is shifting and uncertain, and it does not offer a helpful test. At least one court has refused to recognize this limitation.²²

Professor Wigmore strongly criticized granting the *in pari delicto* rule any application whatsoever in these cases,²³ and made a practical suggestion for dealing with them. His solution was to leave the plaintiff's rights against the defendant intact, regardless of the illegality of the transaction, to the extent of ordering the amount due paid into court. This would take from the defendant any unjust enrichment. Then such an amount would be deducted from it as the court ruled the plaintiff should lose because of his participation in the illegal transaction, and the remainder would be paid over to him.²⁴ Professor Wade has drafted a statute following this principle which would do much to remove unpredictability from this branch of the law.²⁵

²¹ Rest., Contracts § 605 (1932) (italics added); see generally Rest., Contracts §§ 598-609 (1932) on the effect of illegality; 5 Williston, Contracts § 1630 and 6 *ibid.*, § 1762 (rev. ed., 1937).

²² *Meredith v. Fullerton*, 83 N.H. 124, 139 Atl. 359 (1927). This was a suit by a town to cancel a lease of its town hall to a motion picture exhibitor. The lease contained a covenant by the selectmen not to license any other such exhibitors during its term. This bartering away of "their judicial functions" was held to constitute moral turpitude, but the moral turpitude limitation was disapproved and cancellation permitted on grounds of public policy.

²³ "[T]he whole notion is radically wrong in principle and produces extreme injustice. If A owes B \$5,000 why should he not pay it whether B has violated a statute or not? Where the issue is as to the rights of two litigants, it is unscientific to impose a penalty incidentally by depriving one of the litigants of his admitted right. It is unjust, also, for two reasons: first, one guilty party suffers, while another of equal guilt is rewarded; secondly, the penalty is usually utterly disproportionate to the offense. If there is one part of criminal jurisprudence which needs even more careful attention than it now receives it is the apportionment of penalty to offense. Yet the doctrine now under consideration requires, with monstrous injustice and blind haphazard, that the plaintiff shall be mulcted in the amount of his right whatever that may be. . . . In this way, . . . a fine of thousands of dollars may be imposed for petty violations of law. One cannot imagine why we have so long allowed such an unworthy principle to remain." Wigmore, *A Summary of Quasi-Contracts*, 25 Am. L. Rev. 695, at 712 n. (k.) (1891).

²⁴ *Ibid.*

²⁵ "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

Pending such an abandonment of the old rules, however, decisions such as that of the Ohio court in the instant case are to be commended. The fact that the plaintiff was a "bad" man, in that he apparently intended to go through with the illegal transaction until he discovered that the defendant had liquidated the bond, should not be allowed to disqualify him for relief from the defendant's unjust enrichment at his expense. Holding the alleged conduct of the defendant actionable conflicts neither with the statute's provisions that gambling losses are not recoverable by the loser after six months nor with the rule that the courts will not aid a plaintiff to recover benefits conferred pursuant to illegal contracts which are executed.

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." Wade, *Restitution of Benefits Acquired through Illegal Transactions*, 95 U. of Pa. L. Rev. 261, 305 (1947).