Recovering Value Transferred Under an Illegal Contract

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The theory of this article is that the attitude to illegality has so dramatically changed that it is no longer possible, except in extreme cases, to say that illegality as such is a defense to restitutionary claims arising under illegal contracts. The objection to an otherwise good action in unjust enrichment is not illegality but stultification: to recognize an entitlement to restitution would make nonsense of the refusal to enforce the contract. It is true that the restitutionary action nearly always does prima facie have this stultifying tendency, for it will often operate as a safety net reducing the risks of illegal dealing or as a lever indirectly enforcing the illegal contract. However, this stultifying tendency can be neutralized by restricting the class of plaintiffs able to bring the restitutionary action and can be overridden if the effect of denying the restitutionary action would be to perpetrate a greater evil, as for instance by inflicting a wholly disproportionate penalty for the illegality. A stultification is an inexplicable contradiction. In cases such as these the seeming stultification is explained away. Restitution can then be allowed.

INTRODUCTION

This is an experimental study of one sector of the law which determines the effects of illegality in relation to contracts. It deals only with the easier part of this difficult area of the law. It begins at the point at which it is already known that the contract is illegal and that the courts will allow no action on it. It is about mopping up after that conclusion. What is to be done about benefits already transferred? A party who wants to recover such benefits

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or their value will not be able to sue in contract. He will often turn to the law of unjust enrichment and, within that, to the specific cause of action misleadingly called "failure of consideration". Sometimes the plaintiff may be able to make out another sub-form of unjust enrichment or indeed a non-contractual cause of action right outside the law of unjust enrichment.

A number of themes run throughout. One is that in the mopping up operation the plaintiff's cause of action, whatever it is, always encounters the same obstacle. Next, the obstacle can be shown to have rather little to do with illegality as such. It has much more to do with the necessity of consistency and rationality. I call the obstacle "stultification". It crops up in relation to invalidity generally, not only in relation to illegality. A third theme concerns modes of improvement. The law having been in a mess, some jurisdictions have intervened with legislation, and in England pressures are building up for just such an upheaval. Between the first draft of this article and this final version there appeared from the Law Commission of England and Wales a very fine consultation paper on the subject.[1] The Commission has taken no final position. It is consulting. But it is moving towards the introduction of a structured judicial discretion. In substance the position taken here, though it adopts a different angle of analysis, is not far from the Commission's thinking except in one crucial respect. The Commission thinks that there should be a massive legislative intervention. The present argument is that, at least in regard to the mopping up operation under illegal transactions, the necessary improvements are well within interpretive reach, do not need to be implemented by legislation, and need not be formally expressed in terms of a discretion. There are of course matters to be weighed and balanced, but the common law proceeds throughout by weighing and balancing. A discretion, even a structured discretion, suggests an undesirable degree of fluidity.

In New Zealand the Illegal Contracts Act 1970 wiped the slate clean. The Act says that an illegal contract has no effects at all, and that a court may mop up as it pleases. The Act gives very little guidance and stops short of telling the courts on what foot they ought to start. It is true that under Section 7(4) it must take into account a party's knowledge of the illegal nature of its conduct and under Section 7(3) it is to take regard of the conduct of the parties, the purpose of the rule infringed and the penalty attached to its infringement, as well as any other matter it thinks proper. But the Act does not tell the court what to do with this open-ended assortment of matters.

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1 Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality in Contracts and Trusts*, Consultation Paper No. 154 (1999).

In Israel the Contracts (General Part) Law 1973 also confers an unstructured discretion on the courts, but the Israeli position is preferable in one important respect. It does firmly tell the courts on which foot to start. Subject to the court's discretion to vary the regime, Section 31 borrows and imposes the duty of mutual restitution which is applied by Section 21 after the rescission of a contract: "... each party shall restore to the other party what he has received under the contract or, if restitution is impossible or unreasonable, pay him the value of what he has received."[2]

Discretions no doubt have their place in some special contexts, most obviously in situations which call for negotiation but where the machinery of negotiation has broken down. Where the parties cannot talk to each other, the law's role is to reintroduce the reasonableness of which they are no longer capable. But in general discretions are embarrassing. They testify to a failure of juristic intelligence, encourage speculative litigation and compel unjust settlements, in which the high cost of litigation is traded against the difficulty of predicting outcomes. *Dunbar v. Plant* should give pause for thought.[3] A happy young couple, joint tenants of their home, over-reacted to charges of dishonesty made against the woman by her employer. They made a suicide pact. Several attempts failed. Finally he died and she survived. Having criminally assisted a suicide, would she forfeit her interest in the house and under the policy on her lover's life? The Forfeiture Act 1982 conferred a discretion. She was offered a fifty:fifty settlement and declined. Not surprisingly, since there is no reason to suppose that lawyers should be any better than anyone else at answering impossible questions, the judges were not unanimous. But by a majority, she won, except that the order as to costs entirely consumed the fruits of her victory.

It will be recalled that in *Tinsley v. Milligan*,[4] which will be discussed below, the House of Lords rejected the discretionary approach to the consequences of illegality. A course of cases in the Court of Appeal had laid the groundwork. The question was to be whether the grant of relief would shock the public conscience: "The court must weigh, or balance, the adverse consequences of granting relief against the adverse consequences of refusing relief. The ultimate decision calls for a value judgment."[5] In the House of Lords both majority and minority rejected any such approach. "This is little

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2 Discussion by Nili Cohen, *Illegality: The Case for Discretion, in* William J. Swadling, The Limits of Restitutionary Claims 186 (1997); Daniel Friedmann, *Consequences of Illegality under the Israeli Contract Law*, 33 I.C.L.Q., 81 (1984).

3 [1997] 4 All E.R. 289 (C.A.).

4 [1994] 1 A.C. 340 (H.L.).

5 Tinsley v. Milligan [1992] Ch 310, 319 (Nicholls, L.J.).

different, if at all," said Lord Goff, "from stating that the court has a discretion whether to grant or refuse relief."[6] This rebuff should not surprise. A discretion in matters not fully understood, where you do not know where you are going, or why, is simply embarrassing. Until the issues have been understood, a clean slate and a shiny new discretion cannot do anything to ensure that like cases are decided alike.

Those who favor a regime for illegality based on a statutory discretion may fairly make two answers. First, recent history has shown that the common law regime in England cannot be commended as a more satisfactory alternative. It has not spoken with clarity or established a desirable degree of certainty. It can indeed be exposed as riddled with contradictions and evasions. Secondly, a statutory discretion can be structured. The matters to be considered can be identified, prioritized, and sequenced. Nobody could deny the weight of these answers. But the legislated discretion is nonetheless not the best prescription. There is no need to start the story afresh if the case law can be settled down and given a new momentum. The one great advantage of the common law is that, where it falls into trouble, it is never more than one great case way from pulling itself together.

It has fallen into trouble but there is a relatively straightforward diagnosis and cure. Reinterpreting the cases in the light of that diagnosis, they seem to point to two crisp questions. First, illegality or other invalidity aside, has the plaintiff made out a valid cause of action in respect of the value transferred under the illegal contract? Secondly, would upholding that cause of action make nonsense of the law's condemnation of the illegality and its refusal to enforce the contract? These questions can be answered analytically, not without some weighing and balancing, but without setting sail on the sea of discretion.

I. DIAGNOSIS

It is perfectly plain after *Tinsley v. Milligan*[7] and *Tribe v. Tribe*[8] that there is little guidance to be had from the proposition that participation in illegality will disqualify a party from restitution or, whether in English or Latin, that when parties are equally involved in the illegality the defendant wins (*In pari delicto potior est conditio defendentis*). These two cases both involved

6 [1994] 1 A.C. 340, 358 (H.L.).
7 [1994] 1 A.C. 340 (H.L.).
8 [1996] Ch. 107 (C.A.).

criminal dishonesty. Parties guilty of criminal dishonesty succeeded in recovering assets transferred to a collaborator who betrayed them. These cases show that in England, as in common law jurisdictions throughout the world, we have been losing faith in propositions of this kind, without quite managing to expel them from the law.

In the same volume in which Nili Cohen celebrated the virtues of the Israeli approach through a statutory discretion to vary a regime of mutual restitution, Graham Virgo lamented the failure of the House of Lords to take its opportunities to reorder the common law. He too thought the time had come to hand the problem over to the Law Commission and to statute. His principal recommendation was a statutory inversion of the present ground rule. He argued for the abolition of the rule that, in the mopping up under an illegal contract, the entitlement to restitution arises only in exceptional cases in which the party seeking restitution can advance grounds which the law accepts as excusing the illegality. In other words, Mr. Virgo wants to see reversed the rule which is usually expressed in the maxim *in pari delicto potior est conditio defendentis*: where the guilt is shared the condition of the defendant is the stronger. He thinks a plaintiff should be able to get restitution without having to free himself of the taint of illegality, without having to show that the *delictum* is not *par*.[9]

The truth is that these cases have destroyed that maxim and with it the approach to our case law which it suggested: a constant search for circumstances negativing the plaintiff's equal involvement. All that is now needed therefore is a clear interpretive statement of the resulting position. But we must first know why the reinterpretation is necessary. The fundamental reason is the same as that which has led some jurisdictions to wipe the slate clean by statutory intervention. The strictness of the earlier law in its attitude to illegality will not serve our age. The confusion in the cases derives in large measure from the failure openly to recognize and expose two interacting causes. One is that the case law derives from a period of monolithic moral confidence, while we actually live in a much more plural, tentative and tolerant society. We are less shocked by illegality than we were, more inclined to share the guilt of the guilty. This has many causes. Its complexity is not to be underestimated. But its reality necessitates a radical reinterpretation of the older cases. To disapprove mightily of illegality and turpitude, you have to have secure confidence in your own righteousness and your own version of righteousness. If we are less sure of ourselves

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9 Graham Virgo, *The Effect of Illegality in Claims for Restitution in English Law, in* Swadling, *supra* note 2, at 141, 177-85.

than we were, it ought not to be written off as mere spinelessness. In a plural society tolerance is a cardinal virtue. Less than perfect confidence in one's own righteousness is one of its essential ingredients. Alongside this transformation towards a plural and skeptical society, the second force is the great increase in legislative illegality. Thatcherism did little to dent the trend towards a more managed society. There is much more illegality, because almost every activity is regulated. This is an independent reason why a more lenient, less judgmental attitude to illegality has to be adopted.

Cases built on moral confidence and a comparatively thin statute book therefore have to be turned upside down. This does not mean that they are useless. Cases can legitimately be rearranged to highlight different themes. The surviving element of continuity is worth having. This technique is better than discretion. Discretion and pluralism sit awkwardly together. Discretion, structured or not, depends in large measure on moral intuition. It cannot thrive when no one morality commands the assent of the whole community. Transparent legal rationality is the cement of a society divided by moral pluralism. So, we should not rush to discretionary solutions but use discretion sparingly, as a last recourse.

The rest of this article attempts a radical reinterpretation of the cases in a way which strips the element of moral condemnation from illegality. This non-judgmental reinterpretation turns, not on illegality, but on a different principle. It turns on the principle against self-stultification. "To stultify" is to "to make a fool of" or "to make nonsense of". It is important that the law as stated in one area should not make nonsense of the law as stated in another. Almost all the cases in which illegality appears to defeat a restitutionary claim are cases in which to allow the non-contractual claim would stultify law and, in particular, the law's refusal to allow action on the contract itself.

II. One Anti-Plaintiff Proposition and Three Pro-Plaintiff Propositions

The cases in which illegality becomes an issue can be divided into two large classes. In the first, the plaintiff is trying to enforce a contract, as by bringing an action for damages for its breach or by demanding specific performance. In the other, the plaintiff is not seeking to enforce a contract but generally, though not always, trying to recover value transferred under a contract which by reason of illegality cannot be enforced. The vast majority of such cases conform to a single pattern: the plaintiff transferred the value in question because he relied on the defendant to make some counter-performance. However, the defendant has now let him down. Disappointed

in his expectation and unable to enforce the contract, the plaintiff therefore turns to a non-contractual claim to try to get back the value transferred. One way or another, in his view, the law must at least compel the recalcitrant defendant to surrender this value which, in the events which have happened, she was never intended to enjoy.

In the language of the law of unjust enrichment, these are cases of "failure of basis" or "transfers made on a basis which subsequently fails." In the terminology of an earlier generation, "failure of basis" was always "failure of consideration".[10] It does not matter which is used, so long as the older usage does not revive the inveterate error of confusing this "consideration" with the contractual doctrine of the same name. The language of failure of consideration, in the sense of failure of basis, satisfactorily describes all the cases currently within our purview.[11] Such a failure of consideration, or failure of basis, is a tried and tested unjust factor in the law of unjust enrichment. Our plaintiffs do not always plead their cases in unjust enrichment. Victims who suffer this kind of failure of consideration try all possible paths. On some facts, for instance, we shall see that they rely on a cause of action in tort. Nevertheless, at a certain level of generality all these plaintiffs are trying to do the same thing. Faced with their betrayal, they are turning to a non-contractual claim to prevent the defendant from holding on to benefits transferred to him. And, just as all are pursuing the same goal, so the law is the same for all of them.

The anti-plaintiff proposition and its supporting arguments

The hostile proposition which all these plaintiffs meet is this. Recovery is always denied where to allow it would stultify the law's refusal to enforce the contract. The starting point is that to allow the non-contractual claim will so stultify the law. For, on whatever analysis the claim is actually formulated, it is undeniable that to allow the plaintiff to recover value transferred under an illegal contract must prima facie reduce the risks of illegal conduct and encourage the plaintiff and others like him to neglect the law's requirements. In some cases the non-contractual claim , if successful,

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10 The terminology is very carefully discussed in Andrew Burrows & Ewan McKendrick, Cases and Materials on the Law of Restitution 195-97 (1997). On the troublesome line between "failure of consideration" and "absence of consideration" (or "no consideration") see Peter Birks, *The Law of Restitution at the End of an Epoch*, 28 U.W.A.L.R. 13, 34-37 (1999).

11 The minority of cases where there is no failure of consideration are briefly discussed *infra* text at section VII, text from note 80.

may give the plaintiff substantially the same performance as he would have had under the illegal contract. Even if it does not, getting back money or property already transferred is likely to do one or both of two things: (a) provide a lever which this and the class of all similar plaintiffs can use for the purpose of getting the other to perform the contract, and (b) stretch out a safety-net below all those minded either to engage in similar illegality or to abstain from diligently inquiring whether their proposed course of conduct does or does not run foul of it. Thus there is in general a danger that, if the law were to allow recovery in this kind of situation, it would make nonsense of its own position in relation to the illegal contract. It would be giving with one hand what it forbids with the other. It is a view to that danger that gives rise to the prima facie bar to restitution.

The allegation that the plaintiff's non-contractual action would stultify the position which the law takes on the contract thus turns, in general terms, on the argument that it would soften the impact of illegality and encourage neglect of the law's requirements but, within that, it rests more particularly on three specific arguments, the identical yield argument, the lever argument, and the safety-net argument. Common caution then warns us to add a fourth, "other stultifications". These arguments apply in other contexts too, not solely in relation to illegality. For example, if a contract is unenforceable for want of writing or other formality, or if it is void or voidable for want of capacity, it is similarly true that restitution of value nonetheless transferred cannot be allowed in circumstances in which it would make nonsense of the law's position in relation to the invalidated contract. The same arguments apply. They indicate a prima facie self-stultification in every such case and hence a prima facie exclusion of a right to recover value transferred.

The difference between illegality and these other causes of invalidity is that in relation to illegality there is a further overriding principle which is expressed in the maxim "*Ex turpi causa non oritur actio* (From a disgraceful cause arises no action)". This means that a plaintiff's conduct may have been such as to require that his claim be struck out without further discussion. For example, one who paid a million pounds to promote a terrorist atrocity or to procure children for sexual abuse could not expect to recover it back in any circumstances. This revulsion from turpitude clearly has no application to other causes of invalidity. However, it can be ignored in almost all cases of illegality too, and we shall argue that it is probably redundant.[12]

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12 *Infra* section IX, text from note 96.

Negativing stultification: three pro-plaintiff propositions

If it is correct to say that the arguments identified above do in general indicate that recovery must be refused on the ground of self-stultification and constitute an invariable obstacle on the plaintiff's path, it is nonetheless true that it is an obstacle which can be overcome. There are three pro-plaintiff propositions. That is to say, there are three propositions which are capable of supporting a conclusion in favor of the plaintiff and his claim for recovery, namely (i) that suitable restrictions placed on the right to recover may negative the prima facie self-stultification, as for example restrictions on the class of persons entitled to recover or restrictions on the measure of recovery; (ii) that self-stultification is not stultification at all if what is done is done to avoid a greater evil; and (iii) that in some cases, even in the absence of restrictions or the need to avoid a greater evil, the court may be able to conclude that the claim in respect of the benefit transferred poses no sensible danger of self- stultification.

These three pro-plaintiff propositions explain the vast majority of cases in which a plaintiff can obtain restitution notwithstanding the objection of illegality. In other words, illegality, or more accurately self-stultification arising in connection with illegality and other causes of invalidity, is never a defense when one of these three pro-plaintiff propositions operates. For convenience, it is useful to give them one-word names. Let the first be "restriction", the second "dilemma", and the third "illusion".

III. One Principle for Personal and Proprietary Claims

Even where there is no illegality, the victim of a breach of contract is not always confined to an action on the contract. He can sometimes bring other actions based on different analyses of his facts. For example, one who pays for goods and gets none, or rightly rejects those that he does get, can bring an action in unjust enrichment for restitution of the sum paid.[13] The seller is unjustly enriched because he has received money on a basis which has failed or, in the traditional language which courts confusion with the contractual doctrine of the same name, on the ground of failure of consideration. Personal

13 Giles v. Edwards (1797) 7 T.R. 181; Rowland v. Divall [1923] 2 K.B. 500 (C.A.); Kwei Tek Chao v. British Traders and Suppliers Ltd. [1954] 2 Q.B. 459, 475. The leading case, albeit a case of frustration, not breach, is *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32 (H.L.).

claims in unjust enrichment for failure of consideration are not invariably the only non-contractual alternative. On some facts a proprietary claim in unjust enrichment may be possible, and in others the plaintiff may go right outside the law of unjust enrichment. Illegality aside, the plaintiff may be in a position to sue in tort, as for instance for fraud, or for conversion of goods, as where the plaintiff has bailed a chattel to the defendant and the bailee will not surrender it after the bailment has terminated. For example, in a hire-purchase contract for a car, if the hirer breaks the terms of the bailment to him, he may find himself liable for conversion of the car.[14]

On some facts the plaintiff may be in a position to obtain a declaration that the defendant holds some valuable thing in trust for him. In practice, claims of this last kind usually assert the existence of a resulting trust. There are some scholars who believe that the resulting trust is properly understood as a response to unjust enrichment, while others disagree and class resulting trusts with express trusts.[15] We need not be sidetracked into that argument. For these purposes we can stay at a lower level of generality and simply say that the three most common alternatives to actions for breach of contract are personal claims for failure of consideration, for conversion of chattels, and claims for declarations of resulting trust.

A claim for conversion is technically personal. It is a claim that the defendant ought to pay damages for a tort. But, since the tort is an interference with chattels, the right on which the claim ultimately rests may be said to be proprietary. The plaintiff is essentially saying: "You ought to pay me damages because you have wrongfully interfered with my chattel." By contrast, the claim that the defendant holds in trust is purely and directly proprietary, in that the plaintiff is saying, in essence, "I say that I am the equitable owner of that thing. Please, O Court, declare that that is so."[16]

Our question all along is whether, when the defendant lets the plaintiff down, and the plaintiff cannot sue in contract because of illegality or

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14 North Central Wagon and Finance Co. Ltd. v. Graham [1950] 2 K.B. 7 (C.A.); Union Transport Finance Ltd. v. British Car Auctions [1978] 2 All E.R. 385 (C.A.).

15 Robert Chambers, Resulting Trusts 32-39, 221-35 (1997) ; William J. Swadling, *A New Role for Resulting Trusts?*, 16 Legal Stud. 110 (1996). Mr. Swadling's position, favouring the interpretation of resulting trusts as genuinely referable to the intention of the parties (implied in fact rather than implied in law), was preferred by the House of Lords in *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] A.C. 669, 707-09.

16 This is as near to a Roman *vindicatio* as English law ever gets. For further discussion see Peter Birks, *Property and Unjust Enrichment: Categorical Truths*, N.Z. L. Rev. 623, 646-57 (1997).

some other cause for invalidity, the disqualification from suing for breach of contract entails disqualification from other non-contractual claims, exemplified in particular by these three. Despite the unity of the fact situation — a disappointed plaintiff seeking to recover value transferred to a defendant who has let him down — the law has been disfigured by attempts to say that the disqualification attributable to illegality operates differently according to the nature of the right on which the plaintiff relies. In particular it is said that a plaintiff who asserts a proprietary right, whether directly as in an equitable *vindicatio* or indirectly as in an action for conversion at common law, is in a different and better position than a plaintiff who asserts a personal right.

It is tolerably clear that the law for claimants who rely on rights *in personam* has been that in order to succeed, the plaintiff must show that his involvement in illegality was excusable in a manner which the law accepts as negativing the application of the maxim "*In pari delicto potior est conditio defendentis* (As between those equally involved in wrongdoing the position of the defendant is the stronger)." In short the plaintiff has had to show that there was no *par delictum*: the wrongdoing was not equal as between the two of them.[17] Broadly speaking this has meant that a plaintiff must show that he was innocent in that he was mistaken, deceived, oppressed, protected, or penitent. By contrast, it has been widely accepted that a plaintiff at common law relying on a proprietary right could do so unless he actually had to use the illegality to establish his right. Take, for example, an illegal pledge. As the owner of the thing pledged even the illegal pledgor can found a tortious claim on his prima facie right to possession. However, as against his pledgee relying on his special property in the *res*, the pledgor needs to rely on the illegality of the contract between them in order to destroy that obstacle to the immediacy of his right to possession. And that he may not do. He may assert his proprietary rights but he may not rely on the illegality as such to perfect his assertion of them.[18]

This difference has been restated and reinforced recently by the House of Lords in *Tinsley v. Milligan*, Lord Goff and Lord Keith dissenting.[19] There the plaintiff, Tinsley, sought possession of a house of which she was the legal owner. The defendant, Milligan, claimed that Tinsley was a trustee for the two of them. As lovers setting up house together the two women had practiced a

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17 Lord Goff of Chieveley and Gareth Jones, The Law of Restitution 612-22, 625-29 (5th ed. 1998).

18 Taylor v. Chester (1869) L.R. 4 Q.B. 309; Bowmakers Ltd. v. Barnet Instruments Ltd. [1945] K.B. 65 (C.A.); Tinsley v. Milligan [1994] 1 A.C. 340, 376 (H.L.).

19 [1994] 1 A.C. 340 (H.L.).

fraud on the Department of Social Security. Though both contributed to the purchase and regarded themselves as co-owners, Tinsley took the legal title in her own name, to allow Milligan to appear to have no property for the purpose of claiming state benefits. The House of Lords held, affirming the courts below, that Milligan was entitled to assert her equitable beneficial interest. If a plaintiff could make out a proprietary interest under a resulting trust, that interest could be vindicated successfully provided that the plaintiff was not driven to rely on the illegality to establish the interest. In this respect this kind of equitable interest was to be treated in the same way as immediate rights to possession at common law.[20] However, had she been asserting a personal right based on unjust enrichment, she could not have succeeded without identifying a factor excusing her from her participation in the illegality.

Where the litigation concerns the assertion of proprietary rights the courts thus seem prepared to watch the parties play an amoral game of cards, in which the party who turns over the illegality card loses, while in litigation asserting personal rights the plaintiff must come with relatively clean hands. A criminal fraudster pays money for goods but is discovered. The goods are not handed over and the money is withheld. Without relying on the illegality the criminal can make out a restitutionary claim for money paid on a basis which failed. It falls to the other to plead the illegality in order to defend himself. Yet this personal claim apparently fails.[21] A woman bent on cheating the social security system puts her house in another's name, as in *Tinsley v. Milligan* itself. She can establish a resulting trust without relying on the illegality, and it falls to the other to plead the illegality as a defense. The woman's claim is upheld.

The foundation of the reinterpretation attempted in this article is the rejection of this unexplained difference of treatment of personal and proprietary rights. Whichever approach might be right, the difference is indefensible. It is for this reason that *Tinsley v. Milligan* has to be taken as holding that the law — the law generally, and not the law for proprietary rights alone — can no longer be stated as being that parties to illegality are barred from recovering benefits transferred unless they can excuse themselves by proving facts traditionally accepted as showing that the *delictum* was not *par*. The maxim "In equal guilt the position of the

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20 *Id.* at 372-77. It was on this point that Lord Goff, with whom Lord Keith agreed, dissented. The application of the "clean hands" maxim had meant, in his view, that the assertion of equitable proprietary interests has never been exempt from the requirement that the plaintiff be innocent, *id.* at 356-57.

21 Berg v. Sadler & Moore (1937) 2 K.B. 158 (C.A.).

defendant is stronger" explains nothing at all in a system in which *Tinsley v. Milligan* represents the law.

On the other hand, the amoral nature and haphazard operation of the game of cards means that there is no question of reinterpreting the law relating to personal claims in such a way as to make disqualification depend there too on whether plaintiff or defendant is forced to rely on the illegality first. The game of cards has to be repudiated.[22] Thus *Tinsley v. Milligan*, by drawing attention to its arbitrary amorality, destroys the approach previously used in relation to proprietary claims and at the same time demolishes the principle which has been thought to operate in relation to personal claims. As we saw earlier their Lordships also, and expressly, rebuffed the discretionary approach implicit in the "public conscience" test.[23] Out of these ashes, the principle against self-stultification fortunately offers a fourth way.

Following that fourth path — and rejecting the search for innocence, the game of cards, and the discretion based on the perceptions of public conscience — also entails the rejection of two less radical modifications or purifications of parts of the present menu. Dr. Nelson Enonchong has argued that the game of cards can be turned into a harder and more honest exception to the search for innocence, allowing proprietary rights to be asserted without pretending that there is no reliance on illegal transactions.[24] The trouble with that is that it leaves an inexplicable distinction between the treatment of proprietary and personal rights. Assuming, for the moment, by way of example that *Chase Manhattan Bank v. Israel British Bank*[25] is correct in holding that a mistaken payment not only generates a personal restitutionary claim but also turns the payee into a trustee for the payer, it cannot be accepted that, both consequences arising out of the one unjust enrichment, the one should be capable of surviving illegality and the other not. Nor could it be acceptable that the fate of plaintiffs who confront this kind of defense should depend on the outcome of the difficult but to this

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22 It is in effect repudiated by *Tribe v. Tribe* [1996] Ch. 107 (C.A.) in which the operation of the presumption of advancement meant that the plaintiff seeking to establish a resulting trust, rather than the defendant resisting one, had to play the illegality card. The Court of Appeal went to the length of distorting other doctrine in order to evade the result indicated by the fall of the cards. Further, it is incompatible with the rule, an essential barrier against hypocrisy, that the courts take judicial notice of illegality whether it is pleaded or not, as was recently illustrated in *Taylor v. Bhail* [1996] C.L.C. 377 (C.A.).

23 *See supra* text at note 6.

24 Nelson Enonchong, *Title Claims and Illegal Transactions*, 111 L.Q. Rev. 135 (1995).

25 [1981] Ch. 105.

issue irrelevant question whether the *Chase Manhattan* proprietary response to unjust enrichment is to be encouraged or stamped out.

The second unenticing modification relates to the search for innocence itself. The High Court of Australia appears willing to contemplate ad hoc arrangements whereby a party who would be disqualified by turpitude shall be given an opportunity to purge that guilt, as by paying back money criminally obtained.[26] This seems too cumbersome, and destined in the end to operate erratically — penalizing those who for one reason or another are no longer in a position to make the required restitution or do the necessary penance. It is the great advantage of the approach through stultification that it entirely separates the mopping up exercise from evaluation of the parties' conduct and desserts.

IV. Failure of Consideration and Stultification: The Stronger End of the Spectrum

It is helpful to divide the discussion of the operation of the principle against self-stultification between those cases in which the danger of the law's making nonsense of its own positions is very great and those in which it is rather less great. It is important to show that even at the stronger end of the spectrum the defense which the principle supports is not absolute.

The stronger end of the spectrum comprises those cases in which the performance required by the non-contractual claim is identical or very similar to the performance required under the contract which *ex hypothesi* the law has decided it cannot enforce. At the weaker end of the spectrum are cases in which the non-contractual claim requires a performance which is markedly different from that of the contractual obligation so that the yield from the non-contractual action will be quite different from the yield of the barred contractual action. However, even at that weaker end of the spectrum, which will be discussed below, it remains true that the non-contractual claim does prima facie stultify the refusal to enforce the contract. The reasons lie in the stultification arguments which continue to operate even where the identical yield argument does not.[27]

The question in all these cases, at both ends of the spectrum, is whether any of the three propositions which we set out earlier can operate to

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26 Nelson v. Nelson (1995) 184 C.L.R. 538 (H.C.A.). There is a trace of this in *Tinsley v. Milligan* too.

27 *See supra* text after note 11.

negative the *prima facie* stultification and thus to allow the plaintiff to recover. At the strong end of the spectrum, where the non-contractual claim yields substantially the same as the contractual claim, the approach through stultification seems at first to point to only one result: there can be no recovery; the plaintiff's changing the label on the bottle can make no difference. But, as we shall see, even here this negative is only a starting point.

At the strong end of the spectrum, contracts of loan provide the paradigm. Against a person who will not repay a loan, the claim in contract and a personal claim in unjust enrichment on the ground of failure of consideration appear to yield substantially the same performance. In *Boissevain v. Weil*,[28] a foreign currency loan which had been made in Monaco was caught by the Defence (Finance) Regulations 1939. In the circumstances the British borrower was prohibited by the regulations from borrowing as she did. The lender could not recover in contract. Lord Radcliffe, contemplating the non-contractual alternative, said, citing *Sinclair v. Brougham*:[29]

> "Then, if this claim based on unjust enrichment were a valid one, a court would be enforcing on the respondent just the exchange and just the liability, without her promise, which the Defence Regulation has said she has not to undertake by her promise. A court that extended a remedy in such circumstances would merit rather to be blamed for stultifying the law than to be applauded for extending it."[30]

The very recent case of *Mohamed v. Alaga & Co.*[31] provides a similar example. The plaintiff introduced to the defendant solicitors many clients who were Somali asylum seekers entitled to legal aid. The plaintiff had an arrangement with the defendants that he would be paid a commission in the form of a percentage of the fees he enabled the defendants to earn. That oral agreement was prohibited by rules 3 and 7 of the Solicitors' Practice Rules 1990, forbidding fee sharing and commissions for the introduction of clients. The plaintiff could not plead ignorance of the rules, nor did it make any difference that the solicitors themselves were more blameworthy.[32] Such a contract was forbidden. At first instance the Court took the view that the

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28 [1950] A.C. 327 (H.L.).

29 [1914] A.C. 398 (H.L.).

30 [1950] A.C. 327, 341.

31 [1998] 2 All E.R. 720, *rev'd*, The Times 29 July 1999.

32 This case was decided before the House of Lords dismantled the bar to restitution for mistake of law. Kleinwort Benson Ltd. v. Lincoln CC [1998] 4 All E.R. 513 (H.L.). *See infra* text at note 89.

claim for remuneration founded on unjust enrichment was merely a stultifying circumvention of the prohibition. To allow it would be to make a fool of the law's condemnation of that kind of contract. Rather surprisingly the Court of Appeal more recently came to the opposite conclusion. We will return immediately below to the difficulty of negativing stultification on these facts. The Court of Appeal's conclusion shows how rarely the objection of illegality can now be expected to succeed, whether as illegality or as stultification.

A similar example is *Taylor v. Bhail.*[33] There a builder who had repaired a school building and had not been paid in full revealed in evidence that he had collaborated with the headmaster of the school in overstating the cost of work with a view to defrauding the insurance company. He was held to be debarred by his fraud from claiming his contractual remuneration. And a *quantum meruit* based on unjust enrichment could not fare any better, being a direct circumvention of the court's refusal to allow the action on the contract.

Escaping the bar: (i) restrictions on the right to recover may negative the prima facie self-stultification, as for example restrictions on the class of persons entitled to recover or restrictions on the measure of recovery

Until recently the best English illustration of the operation of the rule against stultification was *Sinclair v. Brougham,*[34] on which Lord Radcliffe relied in *Boissevain v. Weil.*[35] The invalidity in that case was not in the nature of illegality but want of capacity. The House of Lords held that, where a contract of loan was void because it was ultra vires, the lender could not maintain a personal claim in unjust enrichment for failure of consideration. The reason was stated in the misleading language of the old implied contract theory of restitutionary liability. Being translated into more modern terms, it was that the performance required under the loan, but barred by the doctrine of ultra vires, was virtually identical to the performance required by the first measure claim in unjust enrichment, namely repayment of the same amount of money as having been received for a consideration which subsequently failed. Although the claim in the first measure of restitution (the value received by the defendant) was thought to contradict the nullity of the contract arising from incapacity, a claim restricted to the second measure (the amount of the enrichment still traceably surviving in the defendant's hands) was allowed

33 [1996] C.L.C. 377 (C.A.).
34 [1914] A.C. 398 (H.L.).
35 [1950] A.C. 327.

to succeed. It was evidently thought that to allow the recovery of traceably surviving enrichment was compatible with, and did not contradict, the policy underlying the nullity of the contract.

Westdeutsche Landesbank Girozentrale v. Islington LBC[36] has now overruled *Sinclair v. Brougham*. There is room for discussion as to what precisely has been overruled. However, the House of Lords now appears to have held that the earlier conclusion — that the claim in the first measure must fail — was unnecessary. That conclusion was reached on the basis that it was not strictly true that the personal claim in unjust enrichment would have exactly the same yield as the outlawed claim on the ultra vires contracts of loan. The obligation arising from unjust enrichment, as now understood, was thought to have different properties, in particular in being subject to different defenses, from the obligation arising from the contract of loan. Whether this new analysis sufficiently turns the argument from stultification must be regarded as doubtful.[37] If it does, it does it under the third pro-plaintiff proposition: all things being considered, it was an illusion that the non-contractual claim stultified the exclusion of the contractual claim. But displacing the identical yield argument does not automatically get rid of the lever or the safety-net or any other stultificatory arguments.

Restrictions as to measure of recovery

The *Westdeutsche* House of Lords certainly thought that it had been wrong, as well as unnecessary, in the earlier case to uphold a proprietary claim in the second measure (traceably surviving enrichment). There could be no proprietary claim on these facts. But the House did not, and could not, deny that the claim in the second measure did not stultify the law's position in relation to the ultra vires contracts. Proprietary claims are always and by nature in the second measure, but a second-measure claim need not be proprietary. While the *Westdeutsche* court satisfied itself, however surprisingly, that, as now understood, even the claim in the first measure (the enrichment received) did not stultify the nullity of those contracts, it did not and could not deny that the claim restricted to the second measure did not do so. Whatever may be true of the first measure claim, it was not

36 [1996] 2 A.C. 669 (H.L.).

37 This is all the more so in the light of the Privy Council's rejection of the defense of change of position in *Goss v. Chilcott* [1996] A.C. 788 (P.C.), a case in which a loan became void by reason of alterations made in the documentation after signature.

unreasonable to regard the claim in the second measure as not stultifying the law.

A parallel inquiry in the case of minority would probably produce a result different, at least in part, from that which *Westdeutsche* now contemplates for an ultra vires borrowing. *R. Leslie Ltd. v. Sheill*[38] held that a borrowing minor's contractual incapacity could not be circumvented by switching to a non-contractual claim for money had and received. In antique language now not fully understood except by the legal historian, that merely says that a claim in unjust enrichment, in the first measure, could not succeed. It is virtually certain that, if the question ever came up, the overruling of *Sinclair v. Brougham* would not be taken to imply the overruling of *R. Leslie Ltd. v. Sheill*. The protection of the minor would be judged to be more absolute.

While the exclusion of the claim in the first measure against a borrowing minor might be put down to a determination that a minor ought to be protected against even non-contractual indebtedness, it could not seriously be suggested that companies have or require a general protection against non-consensual indebtedness. Hence in *Sinclair v. Brougham* the only argument for barring the restitutionary claim in the first measure was its tendency to stultify the law's position on the contract of loan.

Even after the mauling of *Sinclair v. Brougham*, a restriction to the second measure of restitution may allow the claim to succeed. It was said in *R. Leslie Ltd. v. Sheill* that no such claim lay against the minor in respect of the traceably surviving enrichment. However, it is likely, though not completely clear, that the claim in the second measure was excluded on factual rather than on legal grounds — because no traceable enrichment could be identified and not because the law did not allow any such claims. The doubt is anyhow no longer of practical importance in England, since the second measure claim is now given by the Minors' Contracts Act 1987 in such circumstance, albeit subject to the court's discretion.

It is clear that a claim in the second measure must have a better chance of escaping the objection against stultification than a claim in the first measure. The question ought always to be asked explicitly. In *Orakpo v. Manson Investments*[39], moneylenders had failed to comply with the formalities required by the Moneylenders Acts and were held to have debarred themselves from making any claim at all against their borrower, contractual or non-contractual. The borrower still held houses ineffectively mortgaged to the lenders. But the second measure question never came to the

38 [1914] 3 K.B. 607 (C.A.).

39 [1978] A.C. 95 (H.L.).

surface. It might be said to have been lost in the unsatisfactory discussion of the subrogation. It is difficult to say in such a case whether or not the court intuitively thought that even a claim for the enrichment traceably surviving in the borrower's hands would contradict the policy underlying the refusal to enforce the contract of loan and the consent-based security. The safety-net argument has to be taken into account.

Similarly, in *Boissevain v. Weil*,[40] which was discussed above, where an illegal loan was made in breach of the exchange control regulations, there was no discussion whether, if the borrower had had some of the money in a traceably surviving form, a claim in respect of that surviving value also would have been caught by the objection that "a court that extended a remedy in such circumstances would merit rather to be blamed for stultifying the law than to be applauded for extending it."

Restrictions as to the class of possible plaintiff

Restrictions as to measure of recovery — to money in a traceably surviving form — are one way to eliminate the prima facie stultification. Confining the class of plaintiffs can have the same effect, as where potential plaintiffs include only those who entered the transaction because they were mistaken, deceived, pressurized, exploited, or were in some other way unwilling participants in the illegality. In this way a large body of law which has been thought to be concerned with the search for innocence can be brought in line with the alternative search for claims which do not stultify the law's position in relation to the illegality of the contract under which the value in question has been transferred. These class-reducing factors mean in general that the qualifying member of the class has a cause of action distinct from failure of consideration. Thus, a plaintiff who has transferred value under duress or by mistake can rely directly on those matters and need not found his case on failure of consideration. These plaintiffs, founding on mistake, duress, and so on, not only rely on an independent unjust factor but also identify themselves as belonging to a restricted class. Recognising an entitlement to restitution in the members of that restricted class — not in all persons entering such illegal contracts but only in those mistaken in so doing or pressure to do so, and so on — will not stultify the condemnation of the contract.

The plaintiff in *Mohamed v. Alaga & Co.*,[41] discussed above, must now

40 [1950] A.C. 327. *See supra* text at notes 28-30.

41 *See supra* text at note 31.

be seen as exemplifying this kind of evasion of the charge of stultification. The plaintiff was innocent and by common consent less responsible for the illegality than the solicitors. Traditionally, innocence arising from mistake of law has not been regarded as relevant. The Court of Appeal does not distinctly say that it was on the ground of his mistake of law that he was allowed in the end to recover. However, it does appear that his relative innocence (arising from mistake of law) was crucial. In terms of stultification it is true that a cause of action confined to those who prove themselves to have been unaware of the illegality can be said not to stultify the condemnation of that class of illegal transaction. It is enough that such people are prevented from deriving enforceable rights from it. It is not nonsense to say that on the ground of their innocence they may nonetheless obtain restitution of value transferred under it. This is tied up with wider changes in relation to mistake of law which we cannot pursue here. The matter recurs briefly below.[42]

Escaping the bar: (ii) the dilemma: there is no stultification if the non-contractual action is allowed in order to evade a greater evil

Our second pro-plaintiff proposition was that the non-contractual claim may escape disqualification where the law faces a dilemma and has to choose between self-contradiction and a greater evil. A New York case concerning an alien working without a work permit provides an illustration. In *Nizamuddowlah v. Bengal Cabaret Inc.*[43] an alien illegally working in the defendant restaurant had received no remuneration and was allowed his claim in unjust enrichment, so that he recovered from the exploitative employer a sum calculated by reference to the statutory minimum wage. By applying the minimum wage the Court created some clear water between the measure of recovery allowed and even the reasonable remuneration which might have been allowed if there were no problem arising from illegality. But it is also clear that the Court found itself on the horns of a dilemma. To rule out the claim by the unpaid illegal immigrant would be to increase the possibility of grievous exploitation, approaching slavery. In this dilemma, the law had to take the view that the policy underlying the immigration laws was sufficiently protected by the sanctions of the criminal law.

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42 *See infra* text at notes 89-92.

43 399 N.Y.S. 2d 854 (1977).

Fraudulent resulting trusts

The troublesome modern cases on fraudulent resulting trusts can be explained in the same way. In these cases,[44] one party transfers property to another in order to deceive a third party. The victims are sometimes creditors, sometimes spouses, sometimes the state. However the transfer is construed, there is always an agreement between the parties that the transferee will keep quiet and will not double-cross the transferor. And the litigation almost always arises because the transferee does double-cross the transferor. The transferee determines not to acknowledge the transferor's superior right. Such transactions can sometimes be construed as transfers of possession only, sometimes as transfers of the legal title. In the latter case it is clear that, but for the illegality, there would generally be a resulting trust, either by presumption unrebutted or by rebutting the presumption of advancement. It is equally clear, as we have seen above, that despite the dishonesty of both parties the resulting trust will be upheld.

This is prima facie inexplicable. It is inexplicable because the trust gives the plaintiff the very performance which was the primary objective of the agreement between the parties. In entering into such an arrangement the one party takes a risk, for he empowers the other to betray him. The deal is, invariably, that the recipient will keep the secret and, as between the two conspirators, never deny the superior right of the transferor. The transferee decides to betray the transferor by not going through with the crucial second stage of the arrangement. Yet the court is prepared to give, through a declaration of trust, exactly what the treacherous defendant had determined to deny.

Quite apart from the relatively high degree of moral turpitude which they involve, these cases therefore seem to infringe the principle against self-stultification. No court would ever allow an action for the breach of a contract not to betray the transferor or not deny the latter's superior right when the latter saw fit to reassert control of the thing. There could hardly be clearer cases of prima facie stultification. The declaration of trust gives the plaintiff just what the contract would not give, and it spreads a safety-net under all who are tempted to engage in this kind of conduct. Is there then any way to explain why they seem to escape the principle against allowing one cause of action to contradict the denial of another?

The answer can be given in one of two ways, one of which is merely a more

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44 Rowan v. Dann (1992) 64 P. & C. R. 202 (C.A.); Tinsley v. Milligan [1994] A.C. 340; Tribe v. Tribe [1996] Ch. 107; Nelson v. Nelson [1995] 184 C.L.R. 538.

generalized version of the other. Both exemplify the necessity of getting off the horns of a dilemma by identifying the lesser of two evils. In the narrower version the greater evil is the unwanted and incidental expropriation of a proprietary interest which was never intended to be transferred. In the wider version, the greater evil is the arbitrary disproportion of the punishment which would otherwise be inflicted on the plaintiff.

Whenever I transfer my asset to you so as to hide it, as for instance so that I can appear poor in the eyes of the authorities administering the social security system, in substance I do not intend more than a partial and temporary transfer. Your interest is intended to be limited and temporary, just as it would be if, with the same end in view, I merely bailed my gold to you. If we stick within a world in which substance prevails over form, we can say that in all these cases there is a reversion which I never intended to part with or to subject to any illegality. It is this "reversion" which I stand to forfeit if you betray me. The law's dilemma thus consists in the fact that, to uphold the principle against stultification, it would be necessary to deprive a claimant of an interest which was in substance never subjected to or brought within the illegal transaction; and, vice versa, in order to avoid a civil forfeiture of proprietary interests never brought within the illegal transaction, it would be necessary to tolerate giving with one hand what it would refuse with the other. A choice therefore has to be made, whether to expropriate and, at the cost of expropriation, avoid a seeming contradiction, or, at the cost of a seeming contradiction, to refuse to expropriate.

The greater evil is taken to be the expropriation or, putting the matter more widely, the prospect of a disproportionate civil punishment. Claims which, in substance, vindicate untainted[45] reversionary interests are therefore not considered to run the risk of self-stultification. In the end this is not a case of self-stultification which is tolerated but an example of an apparent or prima facie self-stultification which turns out on inspection not to be one. Self-stultification is making a fool of yourself. The law makes a fool of itself if it contradicts itself without sufficient reason. The necessity of avoiding the greater evil is the sufficient reason. Formally, the law still has the turpitude card to play, though in fact in none of the recent cases did it find it necessary to play it.

This exemption is not confined to equity. In fact, as Lord Goff showed

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45 The word "untainted" is constantly used in this connection by Virgo, *supra* note 9, at 158-62. I am not sure that in borrowing it I am using it exactly in his sense. I mean that these reversionary interests are untainted in the sense that, in substance, they were never within the illegal deal, no more than the fee simple is within the sale and conveyance of a five-year lease.

in *Tinsley v. Milligan*, and Lord Browne-Wilkinson could not deny, equity was formerly willing to break this dilemma the other way.[46] It is necessary to spend a little time on the common law manifestation of this same phenomenon. The common law also ensures that a reversionary interest never intended to be brought within the illegal transaction is not forfeited. Whatever temporary interest is intended to be transferred is transferred even under an illegal contract.[47] Once the temporary interest is out of the way, thus reviving the transferor's right to possession, the reversionary interest will be protected.

The common law and the protection of reversionary interests

Suppose that, for an illegal purpose, I deposit a suitcase of gold with you for one week. Knowing the illegality, you determine to double-cross me. The week passes and you refuse to surrender it. You will be liable for conversion. That claim does prima facie stultify the law's refusal to enforce the contract, but the alternative of forfeiture of the "reversion" would be the greater evil.[48]

Such temporary interests expire, most obviously, by the effluxion of time, but such interests are not defined solely by simple time limits. A bailment for a fixed time will expire with that fixed time but it also can be brought to an end, within the time, by the act of the bailee himself, as by his selling the *res*. His conversion terminates his right to possession: "Any act or disposition which is wholly repugnant to or as it were an absolute disclaimer of the holding as bailee revests the bailor's right to possession."[49] Or, illegality aside, such a bailment can be terminated by the bailor in response to a repudiatory breach of the contractual terms of the bailment, as where the bailee is bound to pay a weekly hire charge and refuses to pay. Thus in *Bowmakers Ltd. v. Barnet Instruments Ltd.*,[50] an illegal hire purchase agreement was ended as to some of the tools in question by the defendant bailees selling them off and as to other tools in response to the

46 [1994] 1 A.C. 340, 356-58 (Lord Goff), 373-74 (Lord Browne-Wilkinson).

47 Scarfe v. Morgan (1838) 4 M & W 270, 281 (Parke B); Alexander v. Rayson [1936] 1 K.B. 169; Singh v. Ali [1960] A.C. 167 (P.C.).

48 Freak facts can nonetheless bring it about: if the action in conversion is time-barred, there is no returning to the contract, even if that action would not be. Thomas Brown and Sons Ltd. v. Fazal Deen (1962) 108 C.L.R. 391.

49 Frederick Pollock & Robert Samuel Wright An Essay on Possession in the Common Law 132 (facsimile reprint, Rothman 1985)(1888).

50 [1945] K.B. 65 (C.A.).

defendant bailees refusing to pay the installments of the hire. The plaintiffs, who had hired the tools out, successfully sued in tort for conversion, in respect of both categories.

Assuming that no court would have allowed a contractual action to recover the money due to the plaintiffs under the illegal agreements or to enforce an obligation to return the goods,[51] the plaintiff's action in tort looks like a simple circumvention of the denial of the action on the contract. It is an aggravating factor that, in the case of one of the categories, the plaintiffs appear to have had no right to immediate possession other than by their own termination of the bailment for breach of an essential term. That looks like recourse to a contractual right, the right to terminate, in order to reach through to the claim in tort.

Sir Guenter Treitel therefore draws a distinction which in effect is designed to preserve the principle against self-stultification.[52] He distinguishes between automatic termination and termination by the illegal bailor. If and so far as the bailments ended automatically, the result of the case can be defended. There might have been a provision for automatic termination even in relation to the mere non-payment of installments. However, the line which he draws appears to assume that the principle against self-stultification is answered only and automatically by showing that the law is not doing with one hand exactly what it refuses to do with the other. But the principle is more complex. In the *Bowmakers* case the proposition that the non-contractual action would stultify the law is supported by all three arguments — the identical yield argument, the lever argument, and the safety-net argument. Even supposing the first to be successfully negatived by the assumption as to automatic termination, which is doubtful, the other two remain untouched. However, the principle against self-stultification can here be satisfied by the necessity of resolving the dilemma described above. Such element of stultification as there may be has to give way in order to avoid the evil of an expropriation of the reversion. Claims which protect the reversion succeed despite the prima facie element of stultification because the alternative would be to tolerate forfeiture of interests never brought within the illegal transaction between the plaintiff and the defendant.

There is in fact no trace in the Bowmakers case of Treitel's compromise. It merely accepts that after the extinction of the temporary interest, whether

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51 *Cf.* Thomas Brown & Sons Ltd. v. Fazal Deen (1962) 108 C.L.R. 391.

52 Sir Guenter Treitel, The Law of Contract 453 (9th ed. 1995).

by effluxion of time or not and whether automatically or not, the plaintiff may take the usual measures to assert and protect his reversion. Hence it supports the view that, so far as self-stultification is concerned, there is a general exemption for actions which protect the plaintiff's reversionary interest, itself never subjected to the illegal transaction.

Let us suppose a case of fraudulent concealment in which a court regards what has happened as a bailment. The time comes when *A* thinks it safe to have back the *res*. *B* refuses to give it back. Can *A* sue *B* for conversion? The answer must be that he can. He would have an immediate right to possession but for the illegality. It was a bailment at will and has been brought to an end. Hence *A* is merely trying to protect in tort an interest which he always had and which he never subjected to the illegal transaction. It is true that to allow him his action in tort would be to give him a weapon to enable him to complete the illegal purpose. It is a case in which the focus of the action of the conversion and the very evidence of the conversion is the failure to complete the illegal plot. However, if one accepts that the necessity of escaping a dilemma satisfies the principle against stultification in the cases of protecting a reversion upon a temporary transfer, then, subject to anything that might be said simply on the ground of turpitude, there is no obstacle to the action. Nor is there any longer any case for making a distinction between aborting the concealment and completing it.[53]

We have noticed that these cases of fraudulent concealment and betrayal can be construed in different ways. They can be construed as transfers in trust and they can be construed as bailments. Theoretically, there is a third construction which would, prima facie, defeat the present explanation. Suppose that the *Taylor v. Bowers* scenario is construed as an out and out transfer merely subject to a promise on the part of the nephew to retransfer later, when the uncle says. Without the resulting trust or bailment, restitution to the uncle would be difficult to explain within the present scheme, because according to this construction he retained no reversionary interest. However, the best answer might be to insist on substance over form and to treat this case as identical to the others.[54]

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53 *Taylor v. Bowers* (1876) 1 Q.B.D. 291 seems to say that a plaintiff may abort the plot and sue in tort the collaborator who is betraying him. It does not say that he may complete or perfect the plot by suing after the danger has passed from which the assets were to be hidden. But *Tribe v. Tribe* [1996] Ch. 107 (C.A.) now certainly goes that far, for there the betrayal supervened after the financial storm clouds had blown away.

54 The consequences would be quite difficult: either a species of recission *ab initio* or an action in unjust enrichment on the ground of failure of consideration, analogous in the case of non-money transfers to the claims brought under a legal contract

A word needs to be said about illegal pledges. A pledge confers a special property on the pledgee. If we view it as a contract, the essence of the agreement between the parties is that the pledgee may keep the *res* until repaid and must then return it. So long as he continues to owe, the pledgor has no right to possession, but here too the pledgor has a reversion which is not subjected to the illegality. In *Taylor v. Chester*,[55] the plaintiff deposited with the defendant one half of a £50 note, as a pledge to secure the payment due from the plaintiff to the defendant. The money had been advanced by the defendant to be spent in her brothel. The court would not have allowed her to recover the loan, and, in the action by the plaintiff to recover the half-note, the plaintiff's action in tort for interference with his goods failed. Avoiding the explanation in terms of the game of cards,[56] the modern way of putting it would be to say that the defendant had acquired a good pledge, so that the plaintiff's reversionary right to possession was still obstructed by that unextinguished temporary interest. The reason is that an illegal contract passes that property which it would have passed had it not been illegal.[57]

The notion that there is an exemption for reversionary interests is not weakened by the failure of this plaintiff. Had he paid the money due, he would have extinguished the temporary property in the defendant. So far as concerns the principle against self-stultification, the dilemma exemption would then have allowed him to sue in tort for conversion. For, though he would be aiming to obtain in tort what he could not get in contract, the second pro-plaintiff proposition would operate, to avoid the evil of the forfeiture of the reversionary interest never brought within the illegal transaction. There seems no escape, however, from one element of self-stultification hidden in this. The illegal pledge here is allowed to work as an effective lever to secure repayment of the void loan.

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terminated for breach. Prickett v. Badger (1856) 1 C.B.N.S. 296, Planché v. Colburn (1831) 3 Bing 14; Lodder v. Slowey [1904] A.C. 442. Under a contract unenforceable because illegal the claim would normally fall to the objection of self-stultification, because the obligation to repay the value of the thing prima facie makes nonsense of refusing the action on the contract to reconvey. However, given the need to treat like substance with like, irrespective of form, the action is entitled to the same compelled exemption from this principle as are all actions which protect a reversionary interest never subjected to the illegal transaction.

55 (1869) L.R. 4 Q.B. 309.

56 *See supra* text from note 17.

57 Singh v. Ali [1960] A.C. 167(PC); Belvoir Finance Corp. Ltd. v. Stapleton [1971] 1 Q.B. 210 (C.A.).

Bigos v. Bousted[58] is different. Mr. Bousted gave Mrs. Bigos share certificates as security for her providing Italian money in Italy. She failed to provide the money. Not only would she not return the share certificates but she even began legal action to recover the debt supposedly secured by them. Her counsel had to tell the court that he was unable to argue her case. In other words, it was a pack of lies. But could Mr. Bousted counterclaim for the certificates? Mr. Justice Pritchard came with great reluctance to the conclusion that she had a good though wholly unmeritorious defense to that claim. If there was any doctrine allowing parties to illegal contracts to withdraw and recover, it did not in his view apply where the illegal purpose had been frustrated by the other side's refusal to go through with it. Hence, though Mrs. Bigos had no interest at all in the certificate — for she was not a pledgee, no money being owing — Mr. Bousted could not assert his reversionary ownership.

This must be wrong. It permits the evil which the courts seek to avoid, namely civil forfeiture of an interest never subjected to the illegality. Although there was a prima facie self-stultification in that this was an illegal contract and an illegal pledge, the facts put Mr. Bousted squarely within the exemption for the protection of reversionary interests. He sought to protect his reversionary interest after the extinction of the temporary property which he had intended to transfer. The judge's discussion of the difference between penitence and frustration was irrelevant.

Protection of proprietary rights illegally obtained

We have been talking about the protection of reversionary interests, never subjected to the illegal transaction in question. The protection of such interests is explained by the second of the pro-plaintiff propositions, to the effect that a seeming stultification of the law ceases to be one if the law is caught on the horns of a dilemma and chooses prima facie stultification in preference to a greater evil. A different case of a dilemma which justifies the making of proprietary claims is this. Plaintiffs are allowed to assert proprietary interests acquired under illegal transactions which the law would never have enforced. That is, once the interest has been transferred, the transferee is not barred from asserting it by the illegality

58 [1951] 1 All E.R. 92.

of its acquisition. In *Singh v. Ali*,[59] the plaintiff had acquired a lorry from the defendant. The transaction was illegal because it involved a fraud on the registration authorities. The defendant repossessed the lorry. The plaintiff successfully sued. It can be argued that to recognize the buyer as having a defensible interest in the asset stultifies the law's refusal to enforce the illegal contract under which it was acquired. But against the prima facie stultification stands the prospect of licensed looting of illegal acquisitions. A rational choice is made against allowing that to come about.

Escaping the bar: (iii) in some cases, even in the absence of restrictions or the need to avoid a greater danger, the court may be able to conclude that the claim in respect of the benefit transferred poses no sensible danger of self-stultification

The immediately preceding pages have illustrated the first two pro-plaintiff propositions, where the *prima facie* bar is overcome either by a restriction put on the non-contractual claim or by the need to choose the lesser of two evils. The third proposition supposes that the non-contractual claim may sometimes survive without either of those props. We now have to accept, as a matter of authority, that *Sinclair v. Brougham*[60] should have been such a case. That is to say, according to the modern understanding of the nature of the personal claim which the plaintiffs in that case made, it was not necessary to hold that allowing it would make nonsense of disallowing the action on the contract of loan itself. Nowadays an action in *indebitatus assumpsit* for money had and received is understood as a personal claim in unjust enrichment, and a claim of that kind, with its own distinctive defenses, is no longer thought to be an identical twin of the claim which a lender has after making a loan of money. However, we have already noticed that this new view of *Sinclair v. Brougham* is not wholly convincing.[61]

Similarly, in *Pavey & Matthews v. Paul*[62] the High Court of Australia would have disallowed the plaintiff builders' claim had it thought that the policy of the New South Wales Builders Licencing Act 1971 would have

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59 [1960] A.C. 167 (P.C.). The plaintiffs in *Bowmakers Ltd. v. Barnet Instruments Ltd.* [1945] K.B. 65 also had to take advantage of this, since they were a finance house and the sale by which they acquired the tools was itself illegal. *Cf.* Belvoir Finance Co. Ltd. v. Stapleton [1971] 1 Q.B. 210 (C.A.); Gordon v. Chief Commissioner for Metropolitan Police [1910] 2 K.B. 1080.

60 [1914] A.C. 398 (H.L.), *discussed supra* text at notes 29, 34.

61 *See supra* text from note 36.

62 (1987) 162 C.L.R. 221 (H.C.A.).

been contradicted. The Act rendered building contracts unenforceable unless in writing. The builders claimed in unjust enrichment for work which had been completed under an oral contract. The court first upheld the argument that the claim did indeed arise from an event distinct from contract, namely an unjust enrichment, and then asked itself whether allowing that analytically distinct claim would make nonsense of the statutory unenforceability of the contract. It decided that it would not, and the non-contractual claim therefore survived.

The strongest cases in this category are those in which the policy of the rule rendering the contract void is found to favor restitution. Under an ultra vires interest swap the party which has paid more recovers the excess. There is no stultification defense because, though the reasons have never been explained in detail, the policy behind the ultra vires rule evidently is thought to require disgorgement, even when the plaintiff is not the incapax.[63] Again *Kiriri Cotton Company v. Dewani*[64] illustrates a class of case in which the policy of a protective illegality would be frustrated by refusing restitution and is fulfilled when restitution is ordered. A tenant had been made to pay an illegal premium. Protection from such demands required restitution to him.

Few of these examples involve illegality, as opposed to invalidity short of illegality. It may only be in specialized cases of protective illegality that a contract which is illegal will leave room for this kind of conclusion to be reached. However, if the plaintiff does not fall foul of the objection of great turpitude — and we now know that even dishonesty need not attract that bar — there seems to be no reason to distinguish between illegality and other kinds of invalidity.

V. Failure of Consideration and Stultification: The Weaker End of the Spectrum

We have been looking at cases in which the non-contractual alternative will yield very much the same as the contractual action. It is obviously in those cases that the principle against self-stultification is most active. Sometimes the alternative claim is obviously different from that which arises under the contract. The non-contractual alternative might then be thought to have more hope of surviving. Nevertheless, as we saw at the beginning, the

63 *See infra* text at notes 87, 88.

64 [1960] A.C. 192 (PC). *See infra* text at note 82.

non-contractual claim still has to meet the objection that it provides a lever and a safety-net. And there may be other stultificatory arguments with which to cope. The presumption is still that there will be no recovery. One of the three pro-plaintiff propositions has to be satisfied. It can safely be assumed, *a fortiori*, that where either the first or the second of these propositions operates, it will operate as effectively at the weak end of the spectrum as at the strong end. If there were any difference between the two ends of the spectrum, we might expect to find it in relation to the third pro-plaintiff proposition, namely that it might sometimes be possible to conclude that there is no real danger that allowing the non-contractual action will make nonsense of the law's position in relation to the contract.

The basic position is set by *Parkinson v. College of Ambulance*.[65] There the plaintiff was a donor to charity who had given on the basis that he would thereby earn a knighthood. He had been deceived as to the influence of the charity in this matter, but the court did not doubt that he knew he was entering a corrupt contract. No knighthood being forthcoming, he wanted his money back. His claim was denied. This might be put down directly to great turpitude, but that is dangerous in the light of the relaxed attitude which we have noticed even in relation to dishonesty. Furthermore the fact that he was the victim of deceit palliates his turpitude. However, the decision can be shown to be right without any direct reliance on turpitude. The contract was void as tending to corrupt public life. The power to demand repayment would clearly be an effective inducement towards greater efforts to achieve the corrupt objective. And people minded to embark on this species of corruption would have the benefit of a safety net.

An American case illustrates the fact that even in relation to contracts to corrupt public life, the first pro-plaintiff proposition can find room to operate. Parkinson, as we have just seen, was deceived, but not so as to disguise the corrupt nature of the bargain. He could not claim to come within a restricted class of plaintiff whose right to sue would not conflict with the law's hostility to corrupt bargains. However, in *Liebman v. Rosenthal*,[66] the New York courts refused to deny the plaintiff's right to restitution. In that case the plaintiff and his family were French Jews trying to escape the Nazis. They had fled from Paris to the southwest. In Bayonne they met the defendant who claimed that he could induce the Portuguese consul to grant them visas. To that end he took diamond jewelry from them worth about $30,000. But, having received the

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65 [1925] 2 K.B. 1.

66 185 Misc. 837, 57 N.Y.S. 875 (1945), *aff'd.* 269 App. Div. 1062, 59 N.Y.S. 2d 148 (1945).

bribe money, the defendant absconded. The plaintiff and his family did get out none the less. Years later, the plaintiff met the defendant in New York. In the resulting action he was successful. One of the appellate judges, Judge Adel , firmly dissented from the majority's decision to allow recovery. But the result is right. It is justified by the extraordinary pressure under which the plaintiff found himself, under the threat of persecution, imprisonment and death. A system which allows relief to persons under such pressure could not be said to make general nonsense of its refusal to enforce corrupt contracts.

There are some cases which, in an atmosphere of greater sensitivity to the question of stultification, and less anxiety about turpitude, might now be decided differently. In *Berg v. Sadler & Moore*,[67] the plaintiff was a tobacco retailer who had been blacklisted by his trade association, with the effect of depriving him of supplies from wholesalers. The defendant was a wholesaler. The plaintiff was endeavoring to obtain supplies by criminal false pretences when the defendant wholesaler saw through his stratagem. The defendant retained the plaintiff's money but supplied no goods. The plaintiff claimed his money back as paid on consideration which had failed. His claim was defeated. Nowadays it is doubtful whether such a case could be explained on the basis of great turpitude. The stultification argument is also weak. Berg's claim did not demand the same performance as was due under the contract and realistically could not be said to provide a lever to compel performance, since people who detect criminal deception will never be induced to complete the fraudster's project. Hence the danger of stultification depends entirely on the safety-net. A right of recovery reduces the risks of the illegality. But, differently from the case of public corruption, one might easily conclude that the existence of such a safety-net would have no practical effect on this kind of criminality. The decision can only be defended by coming to a contrary evaluation. That is, those who think that the cases turn on stultification and not on turpitude as such would have to conclude that the Court thought that recovery of this money would place a safety net below this kind of criminality and that the existence of that safety net would stultify the law's condemnation of the conduct. For the two other stultifying arguments was inapplicable. Berg was not seeking a performance identical to the contractual performance. And there was no question of this kind of restitutionary action operating as a lever to compel performance in other similar cases.

In *Shaw v. Shaw*[68] Lord Denning said that, had it been properly pleaded, he might have been in favor of allowing a claim for failure of consideration.

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67 [1937] 2 K.B. 158.

68 [1965] 1 W.L.R. 537.

In that case the plaintiff sought to recover £4000 paid for a flat in Majorca. The defendant succeeded in getting the claim struck out on the ground of illegality, because no consent had been obtained from the Treasury, as was then required under the Exchange Control Act 1947. The contract was illegal, and the money paid under it was irrecoverable. However, Lord Denning evidently contemplated the case as a simple attempt on the plaintiff's part to reverse an illegal transaction after performance on both sides, for he said that if a cause of action could have been made out in failure of consideration it would have succeeded:

> If the plaintiff is to overcome this bar, he must put forward some reason why he should not be defeated by his own illegality. To take a simple illustration: supposing the flat in Majorca had not been conveyed to him and that it had not been handed over to him in return for his £4000, then I can well see that he could make out a claim. He could say that the money had been paid over on a consideration which had wholly failed, but he does not attempt to do that.

This is unlikely to be an instance of Homer nodding. It is more likely that Lord Denning intended to plant a seed for the future. This was a case at the weaker end of our spectrum. Moreover, the lever argument was barely applicable, and the safety-net argument not particularly strong. It may well be that Lord Denning intended to let it be known that in such a case there was not much in the defense arising from illegality.

There is much to be said for that point of view. It is supported by the decision of Mr. Justice Bristow in *Shelley v. Paddock*,[69] though the cause of action in that case was not in unjust enrichment but in tort, for fraudulent misrepresentation. The plaintiff had been induced to pay in sterling for a house in Spain, in breach of the exchange control regulations. The sellers were in possession but knew they had no title and no authority to sell on behalf of the owner. The plaintiff recovered as damages the money she had paid. The same result could have been reached in an action in unjust enrichment for failure of consideration. In the terms of the present analysis, the decision implies that there was no danger of self-stultification and no disabling turpitude.

Similarly, though in a different context, *Saunders v. Edwards*[70] allowed a non-contractual claim in tort in circumstances in which an earlier court probably would have concluded that to do so made nonsense of the nullity of the contract. The parties had dressed up the documentation of the plaintiffs'

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69 [1979] Q.B. 120.

70 [1987] 1 W.L.R. 1116 (C.A.).

purchase of a London flat in such a way as to overvalue the fixtures and fittings and thus save *ad valorem* stamp duty on the flat itself. The Court of Appeal said that the illegality would have rendered the contract unenforceable. It nevertheless allowed an action by the purchaser plaintiffs in respect of a fraudulent misrepresentation inducing them to enter it. The vendor had knowingly led them to believe that the flat carried with it the right to use a roof garden accessed from French windows.

There are also analogous cases outside the field of illegality, especially cases of incapacity. In *Phoenix Life Insurance Company* it was held that against a company issuing ultra vires insurance policies it was possible to maintain an action for failure of consideration, to recover the premiums.[71] This decision formerly stood in contrast with *Sinclair v. Brougham.*[72] The obligation to repay the premiums was quite different from the obligation to carry the insured risk and pay out if the peril eventuated. The nullity of the contractual obligation was not thought to be subverted by permitting the recovery of the premiums in, as we would now say, unjust enrichment.

By contrast, the opposite conclusion was reached in *Cowern v. Nield* against a minor who failed to deliver hay and clover which had been paid for. The adult party was held not to be able to recover the price paid.[73] Heavily criticized by Goff & Jones,[74] that result is nevertheless justifiable. It is true that, as in all cases at the weaker end of the spectrum, the identical yield argument does not apply: recovery of money received by the minor in return for goods never supplied would not be the same as contractual performance or damages for non-performance. But that is not conclusive, because recovery of a payment in advance can be a lever to compel performance. In the case of ultra vires insurance, it would be unrealistic to suppose that an action to recover premiums would serve to compel an insurer to pay a loss. But a threat against a minor of an action to recover a price paid indeed might be seen as a lever to compel performance. *Cowern v. Nield* is perfectly explicable as a refusal to stultify the policy of protecting minors from contractual liability. But the case could equally be explained, not as an instance of avoiding stultification, but on the basis that a minor's protection should not be confined to contractual liability but should extend to all kinds of indebtedness, even to debts arising non-consensually. In other words, the bar could be explained independently , even if it could not be explained

71 (1862) 2 J. & H. 441.
72 [1914] A.C. 348 (H.L.).
73 [1912] 2 K.B. 419.
74 Goff & Jones, *supra* note 17, at 644-45.

parasitically. At all events the combined effect of this decision and the Minors' Contracts Act 1987 is not unsatisfactory, for the restitutionary liability of the minor is now confined to the second measure: restitution stops were repayment begins.

This discussion provides a model for the application of the principle against stultification in cases of illegality where the plaintiff is seeking to recover a prepayment. The inquiry has to focus on the question of whether recovery would make nonsense of the refusal to enforce the contract. Is the lever argument applicable? Is the safety-net argument realistic? At the weaker end of the spectrum, where the yield of the non-contractual action is markedly different from that which would have been obtained from the contractual action, there may be some room to find that the non-contractual action, frequently a claim in unjust enrichment brought on the ground of failure of basis, can after all go ahead, even without either (i) a restriction as to permissible plaintiffs or measure of recovery, or (ii) the identification of a greater evil which has to be avoided.

In some marginal cases their very marginality may entitle the plaintiff to invoke the second of the pro-plaintiff propositions. *Berg v. Sadler & Moore*,[75] for instance, might, as we have seen, be judged to justify a conclusion in favor of the plaintiff simply because allowing recovery does not stultify the law's refusal to enforce the contract. That is, it might be judged to be a clear case and not a marginal one. If, on the other hand, it were thought to be marginal in that light, the conclusion for the plaintiff instead might be justified as necessitated by the need to avoid a greater evil, the greater evil being the imposition in such a marginal case of the arbitrary additional penalty of forfeiture of his money to the defendants. In other words, the reinforcement of the criminal law might be regarded in such a marginal case as unwarranted and, as such, as an evil to be avoided.

VI. THE *LOCUS POENITENTIAE*

It is said that it is open to a person who has entered an illegal contract to withdraw from it at any time before any of the illegal purpose has been fulfilled. Up to that time he can simply change his mind and call the whole thing off. He has that "*locus poenitentiae* (space for repentance)".[76] That is

75 [1937] 2 K.B. 158.

76 Goff & Jones, *supra* note 17, at 616-20; Taylor v. Bowers (1876) 1 Q.B.D. 291, 297 (Mellish, L.J.); Kearley v. Thomson (1890) 24 Q.B.D. 742.

clearly true in one sense. The other party cannot sue him, for the contract is *ex hypothesi* illegal and therefore void. However, the point of asserting that he may withdraw is not that he cannot be sued for aborting the project but that, if he has already transferred value, he may recover it.

Supposing this to be true, which of our pro-plaintiff propositions might explain it? The second one is not in play. There is no obvious dilemma. The third proposition seems the obvious candidate: on reflection, any prima facie threat of self-stultification proves illusory. It is entirely consonant with the policy of the law that people should be encouraged to withdraw from their illegal projects. There is no threat of stultification. Quite the contrary. So long as the withdrawal is a genuine withdrawal, neither the lever argument nor the safety-net argument applies. At the weaker end of the spectrum, if those two arguments do not apply there is no threat of stultification. However, the picture changes if the withdrawal is forced by betrayal on the part of the other. Those two arguments then jump back into action. The lever is an instrument against the reluctant performer, and the safety-net is a comfort against the danger of a betrayal which the lever fails to prevent. It is only while the project appears to be going ahead smoothly that there is an interest in encouraging withdrawal. In short, under this third pro-plaintiff proposition, the doctrine really is about penitence, meaning an unforced change of mind. It is about the voluntary abortion of illegal projects. Cases in which the plaintiff has been thwarted are not within it. That is not to say that thwarted plaintiffs are always barred from recovering, only that they cannot recover under this doctrine. They have to recover, if at all, within the terms of the previous discussion.

One would not expect to find very many examples in the case law. Voluntary changes of heart are rare. Unsurprisingly therefore the doctrine rests on dicta. Some cases then misapply the dicta. The *locus poenitentiae* cannot explain *Tribe v. Tribe*,[77] the result of which is, however, dictated by the second pro-plaintiff proposition which says that stultification is not stultification when it is done to avoid a greater evil and then holds that the forfeiture of an untainted "reversionary" interest is an evil worth avoiding. Right in its result, *Tribe v. Tribe* was not a case of the voluntary abortion of an illegal plot before the illegal purpose was achieved. The father transferred shares to his son, to hide them from creditors in stormy financial weather. The illegal purpose was achieved. It is true that no creditor actually was defrauded, because the storm receded. But the fraudulent concealment was carried through until the financial clouds cleared and creditors no longer

77 [1996] Ch. 107 (C.A.).

threatened. It was then that the plaintiff was betrayed by his son, who refused to acknowledge his father's superior right. Nevertheless, the recovery in that case gave the father exactly what the illegal agreement intended him to have and what the recalcitrant son was trying to withhold. Far from aborting the illegal plan, it completed it, a result which can be explained only as a forced exception from the principle against self-stultification.

In misapplying the doctrine but reaching the right result, *Tribe v. Tribe* is the mirror image of *Bigos v. Bousted*,[78] which applies this doctrine correctly but reaches the wrong conclusion. In that case a father needed to send his consumptive daughter to the Alps. He entered into a transaction with an Italian woman in breach of the exchange control regulations. He deposited a share certificate with her as security for the loan. She never advanced any money. Mr. Justice Prichard held, quite rightly, that this was not a case of penitence and held that the plaintiff had no action in respect of the share certificate. He had no claim under this particular head, whether as a member of the restricted class of penitent plaintiffs permitted to claim under the first pro-plaintiff proposition or, better, as a person advancing a claim under the third proposition which allows claims that, exceptionally, create not even a prima facie threat of stultification. But, even assuming that the illness of the daughter was insufficiently exceptional to bring the plaintiff within a restricted class of plaintiffs under unusual pressures for the purpose of the first pro-plaintiff proposition, he should have been allowed his action under the second proposition. That is, the decision against him ought to have preferred the danger of stultification to the greater evil of acquiescing in the forfeiture of a "reversionary" proprietary interest which was never intended to be subjected to the legal transaction. The Italian woman was intended only to have a limited interest, a bailment by way of pledge for a loan which was never made.

These conclusions are reached on the basis that the *locus poenitentiae* doctrine works through the third pro-plaintiff proposition. We ruled out the second, though we pulled it back to explain the result of *Tribe v. Tribe*. We ought to notice, for completeness' sake, that the doctrine also could operate under the first proposition, namely that a claim available to the penitent is so restricted as to pose no threat of stultification. However, this would not alter its scope. It would not serve to extend it to *Tribe v. Tribe*. The category of people who are thwarted is not a suitable category of plaintiffs. To offer a claim to the thwarted would be to ignore the lever argument altogether. It is against those who thwart, and those who threaten to thwart, that the lever is effective.

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78 [1951] 1 All E.R. 92; *cf. supra* text at note 58.

One ought never to jump to the pro-plaintiff propositions until one has established a prima facie cause of action. The plaintiff must have a cause of action, and he must then save it from the bar. This plaintiff has saved himself from the bar, but we have not so far identified his cause of action. This is difficult because it needs more space than it can have. What follows is incomplete.

It is easy to jump to the conclusion that here the cause of action is the illegality itself. That is to say, this is a special policy-motivated cause of action which arises from the need to encourage a return to the path of virtue. I have myself taken that position. I am not sure that it is correct. There is indeed a difference between this case and the others discussed above. In them, the plaintiff would have been able to make out a failure of consideration even had the contract been valid. On that assumption, there would in every case have been either and automatic termination or a termination in response to a repudiatory breach. However, having entered a valid contract one cannot bring about a failure of consideration simply by changing one's mind.[79] In this case, one can do just that. One can change one's mind and recover what one has transferred. Hence the temptation to say that the illegality is here an essential element in the cause of action. However, it may be better to say that this is just the background to what is after all just a cause of action in failure of consideration.

When the cause of action is failure of consideration, the plaintiff must always be ready to show that his relation with the defendant is not regulated by a valid contract. While that is commonly established in terms of termination for frustration or in response to a repudiatory breach, here it follows from the initial invalidity of the contract. That is the only way in which the illegality is an element in the cause of action. And it is not the illegality as such but the invalidity that allows what might be called the unilateral failure of consideration. It is the same in all the cases of interrupted void interest swaps. It does not matter which party initiated the cessation of performance. Probably the best answer is that one who aborts the project when it still might proceed has a cause of action for failure of consideration, it being a failure of consideration to which *Thomas v. Brown* does not apply.

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79 Thomas v. Brown (1876) 1 Q.B.D. 714, 723 (Quain, J.), *analyzed* in A.S. Burrows, The Law of Restitution 257-58 (1993).

VII. Other Species of Unjust Enrichment Besides Failure of Consideration

This article has focused on the commonest kind of case, where there is a failure of consideration. There the reason for the plaintiff's suit is that he has been let down. He has transferred value on a particular basis and that basis has failed. Or, in a rarer version, he has precipitated the failure of basis himself, by aborting the project. Can he, despite the illegality, get it back? Can he get it back in unjust enrichment, or perhaps deprive the defendant of it in some other way? There is no doubt in these cases that, but for the illegality, the plaintiff would have a good cause of action. This is true, on reflection, even under the doctrine of the *locus poenitentiae*, where, without the illegality, the plaintiff would be in a position identical to that of the plaintiff seeking to recover value transferred under void interrupted interest swaps. The argument all along has been that the recipient does have a defense, but that it is a defense based on the principle against stultification, not on illegality, and that the defense is limited by three pro-plaintiff propositions. There are two reasons for adding a short section about cases in which there is no failure of consideration. One is to give some indication of the matter which, although related, has not been properly considered. The other is to give some assurance that the excluded matter does not destroy the picture.

The cases which have been left out are those in which the plaintiff got what he bargained for but nevertheless wants back the value which he transferred. The answer to such plaintiffs is, or was until recently, extremely simple. It was that in the absence of special facts they have no cause of action, and no hope of recovery. The earlier orthodoxy is illustrated by *Green v. Portsmouth Stadium Ltd.*[80] A statute regulated the conditions on which bookmakers were admitted to greyhound staid. The defendant stadium unlawfully overcharged the plaintiff bookmaker. The bookmaker paid and was admitted. He was treated as having no cause of action at all. If he had one, it certainly was not failure of consideration. He had got what he paid for. He tried to argue, by way of special facts, that he was a member of a protected class and that would in itself give him a cause of action. That argument was rejected. The statute in question was not "a bookmakers' charter". This is not the place to chase the question whether that plaintiff might have run some other arguments. It is enough that the case illustrates the fact that a plaintiff who

80 [1953] 2 Q.B. 190 (C.A.).

cannot rely on failure of consideration must find some other cause of action. If he fails in that attempt, he loses, not to a special defense, but because he has no claim. The question then is whether the plaintiff can find some cause of action other than failure of consideration.

As we shall see, the recent litigation concerning void interest swaps has made the search for a cause of action easier from the point of view of the plaintiff and more problematic from that of the jurist. For the moment, however, let us draw a line at about 1990 and stay on the other side of it. The crucial features of the law then were: (1) that it was assumed that there was no recovery for mistake of law, and (2) that the debate had not yet been opened whether the nullity of a contract or other transaction was in itself a ground for restitution. In the search for a cause of action other than failure of consideration there was therefore rather little room for maneuver.

It is necessary to notice a complication which affects the handling of this material. We have just crossed a factual boundary between situations in which the plaintiff has suffered a failure of consideration and cases in which he has not and therefore must find another cause of action. However, the causes of action which we are about to consider for the case in which there has been no failure of consideration may apply even where there has been, so that the plaintiff will then have a choice whether to rely on one or the other or both.

Other causes of action before 1990

In retrospect the cases in which plaintiffs succeeded in finding unjust enrichment claims which would work even where the consideration had not failed appear to have been of two kinds. There were cases of duress and cases of protection from transactional inequality. "Transactional inequality" is shorthand for situations in which the law accepts that in relation to a particular kind of transaction people generally (not just people under a particular disadvantage) are unable to defend their own best interests in the normal way, by bargaining. These successful plaintiffs succeeded because they overcame three obstacles. First, they were able to point to a cause of action other than failure of consideration. Second, they could show that despite the presence of illegality, allowing their claims would not stultify the law's position in relation to that illegality. Third, they could show that although in principle, having received what they bargained for, they fell within the general requirement of counter-restitution, there was a reason why they should not be subject to that requirement.

Examples of claims based on duress are those in which one creditor, in fraud of the others, demands a secret payment from or on behalf of an

insolvent as a condition of agreeing to an arrangement.[81] Such a payment is obtained by illegitimate pressure, but it is also an illegal payment, being a payment in fraud of the other creditors. There is a prima facie cause of action on the ground of duress. As for stultification, the lever argument is out of the way, the other having done his part already. However, a version of the safety-net argument still applies, since it might be said that a right to recover would encourage insolvents to make such deals of this kind and then claw back their payments afterwards. But the first pro-plaintiff proposition covers the case. If restricted to payers who have been subjected to duress, such a right of recovery will not make nonsense of the law's condemnation of fraud on creditors. Moreover, a right to recover for duress will not encourage debtors generally to undermine the principle of equal treatment of creditors. And no counter-restitution has to be made in respect of a benefit which ought never to have been offered in return for the payment sought to be recovered.

The best example of a claim based on transactional inequality is *Kiriri Cotton Company Ltd. v. Dewani*.[82] Landlords were prohibited by the Uganda Rent Restriction Ordinance 1949 from demanding, and tenants from paying, key money for tenancies. A tenant who had paid such a premium and who was within the protective purpose of the statutory rent control regime was allowed to recover despite the violation. In these cases of protection no issue arises in relation to self-stultification, because the protected person's claim reinforces and does not in any way contradict the policy underlying the illegality. The protected nature of the class need not be understood simply as a factor excusing turpitude. Its primary function is to establish a cause of action where there is no failure of consideration. That cause of action was the recognized transactional inequality which elicited the law's protection. Next, there is no stultification, for in a case in which the law protects a party from making a particular transfer, recovery of that which is transferred reinforces and does not stultify the law's position in relation to the illegality. Pro-plaintiff proposition three applies: on reflection this non-contractual claim does not stultify the law. Finally, the plaintiff is exempt from counter-restitution, because (a) the exemption itself reinforces the protection and, anyhow, (b) a defendant cannot insist on counter-restitution when a plaintiff is seeking restitution of a price which ought never to have been demanded for the benefit which he himself received.

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81 Smith v. Bromley (1760) 2 Dougl K.B. 696; Smith v. Cuff (1817) 6 M.&S. 160.

82 [1960] A.C. 192 (P.C.); *cf.* Singh v. Kalubya [1964] A.C. 142 (P.C.); Re Cavalier Insurance [1989] 2 Lloyds Rep. 430.

Other causes of action after the void swaps litigation

The picture now looks very different. It is also very unstable. The latest swaps cases may support one or more of the following propositions, all of prima facie nature: (1) a party to a void contract is always entitled to restitution of the other's enrichment at his expense; (2) a party to a void contract is entitled to restitution of the other's enrichment at his expense if the principle which nullifies the contract also requires that restitution be ordered; (3) a party is entitled to restitution in respect for mistake of law on the same basis as for mistake of fact and hence, where he has entered a void contract under a mistake of law, he will be entitled to restitution on that ground. The first and second of these are different interpretations of *Guinness Mahon & Co. Ltd. v. Kensington and Chelsea Royal LBC*,[83] itself interpreting *Westdeutsche Landesbank Girozentrale v. Islington* as decided by Mr. Justice Hobhouse and subsequently affirmed.[84] The third derives from *Kleinwort Benson Ltd. v. Lincoln CC*.[85]

If the first of these propositions is correct, all our plaintiffs would have a prima facie cause of action. Would that cause of action be defeated? This would involve the same discussion as we have had in relation to the cause of action in failure of consideration. If, as might happen, "no consideration" or "absence of consideration" were relied upon in a case in which there had been a true "failure of consideration", the plaintiff having been let down, the stultification arguments would apply in exactly the same way despite the cause of action's different label. But it is a curious, though obvious, fact that those arguments change after full performance. The identical yield argument cannot apply. The lever argument also does not apply when the other has already performed. Indeed the lever argument now runs the other way: the availability of recovery after full performance is a disincentive to performance. In the same way, the safety-net argument has no weight, for a plaintiff who already has received the counter-performance stands in no need of any safety-net and derives no advantage from it. However, there is another kind of nonsense to be taken into consideration. These plaintiffs under-executed illegal contracts, and, were they to be able to recover, would derive a privilege from the nullity which the illegality imports. They could have their cake and eat it. If they were happy with the outcome, they could

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83 [1998] 2 All E.R. 272 (C.A.), *discussed in* Peter Birks, *The Law of Restitution at the End of an Epoch*, 28 U. West Austl. L. Rev. 13, 30-37 (1999).

84 [1994] 4 All E.R. 890 (Hobhouse, J. and C.A.), *modified in* [1996] A.C. 669 (H.L.).

85 [1998] 4 All E.R. 513 (H.L.).

leave their performance in place, if unhappy they could recover its value. That privilege is a form of stultification. If this doctrine were to be invoked in relation to executed illegal contracts in cases not covered by the second proposition, which is about to be considered, the claims would have to be dismissed on the ground that the law could not stultify itself by turning the invalidity into a privilege.

However, this is an unnecessary speculation. In English law nullity or "absence of legal ground" is not in itself a reason for restitution.[86] Only the second proposition, which provides a narrower interpretation of the swaps cases, can be defended, namely that a party who has received what he bargained for under a void contract can only recover what he transferred if the policy underlying the invalidity requires that reinforcement. Before performance he has his cause of action in failure of consideration; after performance he has his cause of action which rests directly on the policy underlying the illegality. The real engine behind the right to restitution fully-executed void interest swaps was the protective policy underlying the ultra vires doctrine, not the nullity in itself.[87] In such cases there is no stultification. Quite to the contrary, as in *Kiriri Cotton Company Ltd. v. Dewani*, which was discussed above,[88] the underlying policy requires restitution.

The third proposition is secure. Mistake of law is now a good unjust factor, although its wings may be clipped a bit in later cases. It seems to follow from *Kleinwort Benson Ltd. v. Lincoln CC*[89] that even under fully-executed contracts all innocent parties will always be able to show that they do have a prima facie cause of action in unjust enrichment, on the basis of mistake. They generally would not be innocent if they were not

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86 This will remain contentious for some time. *See* Birks, *supra* note 83, at 32-38. *See also* Peter Birks, *No Consideration: Restitution under Void Contracts*, 23 U. West Austl. L. Rev. 195 (1993). In *Singh v. Ali* [1960] A.C. 167 (P.C.), discussed in *supra* text at note 59, the defendant unilaterally took back the lorry he had sold to the plaintiff. The case is the primary authority for the proposition that an illegal transaction transfers whatever property would have been transferred had the transaction been legal. On that basis the court allowed the plaintiff his action in tort for interference with what had become his lorry. On the broad, but incorrect, interpretation of the swaps cases, the seller's error was only his recourse to self-help, for he was entitled to reverse the transaction. Again, there is no restitution under an executed contract void under section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Tootal Clothing Ltd. v. Guinea Properties Ltd. (1991) 64 P. & C.R. 452 (C.A.) (to which Dr. Thomas Krebs drew my attention).

87 [1998] 2 All E.R. 272, 284 (Moritt, L.J.) 287 (Waller, L.J.).

88 *See supra* text at note 64.

89 [1998] 4 All E.R. 513 (H.L.).

mistaken either as to facts which concealed the illegality from them[90] or as to law. To the party innocent by reason of mistake of law we used to give short shrift: *ignorantia iuris nocet*, ignorance of the law is like mumps, you just have to put up with the trouble it brings. But the *Kleinwort Benson* case has changed all that. Mistake of law suffices. It provides the cause of action. The arguments about stultification proceed exactly as before. Once again the executed contract is the difficult case, because of the way in which those particular arguments weaken from the moment of full execution. However, it may be that an action which is only open to the innocent might anyhow be expected to survive under the first pro-plaintiff proposition above. The claim is restricted to a particular class of plaintiffs whose claims do not imperil the rationality of the law. This is new territory which will have to be explored carefully. *Green v. Portsmouth Stadium Ltd.*[91] will certainly be decided differently, although it may not carry all cases with it. Again, the restriction to those mistaken as to law might, as we have seen, be regarded as explaining the Court of Appeal's decision in *Mohamed v. Alaga & Co.*[92]

VIII. Overpayments

Suppose that two robbers have agreed together to divide their spoils equally but in making the division one makes a mistake. Let us say that, having worked out that he should give £22,000, he counts out one bundle of two hundred notes as though it were tens, when in fact it is fifties, with the result that he actually gives his mate £30,000. This is different from all the cases considered so far. In all of them, if one discounts entirely the element of illegality, the plaintiff intended to transfer the value in question. It was invariably the contractual performance or, at least, the transfer intended to elicit the counter-performance. Here, if the illegality is discounted, we are still looking at a mistaken payment. The payer transferred £10,000 where he intended to transfer £2,000.

On the argument advanced here it is very difficult to see why this payer, though a robber, should not recover. Of course, this could show that this approach is doomed. It is no answer to try to solve the problem in terms of turpitude. We might indeed decide that the line of gross turpitude

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90 As in *Oom v. Bruce* (1810) 12 East 225, where the plaintiff was trading with the enemy not knowing that war had been declared.

91 [1953] 2 Q.B. 190 (C.A.). This case is within range of *David Securities Pty. Ltd. v. Commonwealth Bank* (1992) 175 C.L.R. 353 (H.C.A.).

92 [1998] 2 All E.R. 720, *supra* text at note 31.

runs between robbery, which connotes violence, and the kind of acquisitive dishonesty seen in *Tinsley v. Milligan*.[93] The robber plaintiff could be repelled as altogether too smelly to be allowed into a court. But then the hypothetical problem would have to be re-run at a slightly lower level of turpitude.

Suppose, therefore, that the court does not invoke any principle against gross turpitude. This plaintiff then has a prima face personal claim in unjust enrichment, the unjust factor being mistake. He is or may be also the beneficiary under a trust arising by operation of law from mistaken payment, a trust which certainly "results", though some people would say that it is not a resulting trust, at least not with a capital "R". For instance, Lord Browne-Wilkinson has said that this kind of trust is constructive and does not arise at once but is postponed to the moment at which the conscience of the recipient is affected by knowledge of the mistake.[94] This is not the place to enter on that. Let it be given that the recipient instantly realized what had happened and thus satisfied that additional requirement, if it be one. According to the thesis of this article the plaintiff encounters the defense based on stultification if (1) the claim would give the plaintiff more or less exactly what he would have received under the contract, or (2) the claim to recover could be used as a lever to compel performance, or (3) the claim would operate as a safety-net in the event of the other's not performing, or (4) for some other reason the claim if allowed would make nonsense of the law's position in relation to the illegality. And, whichever of these stultifications is in question, the danger must be real and sensible, not fanciful. The question is whether the claim in relation to the mistaken overpayment , if upheld, would create a real and sensible danger of stultifying the law's position in relation to the illegality at issue.

The Court of Appeal's decision in *Morgan v. Ashcroft*[95] says that this kind of plaintiff cannot recover. Some of the reasoning of that case has since been discredited. The defendant was in the habit of placing bets with the defendant bookmaker. He lost some and won some. The bookmaker claimed to have made a clerical error which led to an overpayment to the defendant. The decision to deny him recovery was partly based on an extreme version of the old requirement that a mistake, if it is to ground recovery, must be such as to give the payer an impression of facts on which he would be legally liable to pay. Since gambling debts are void, a mistaken belief that

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93 [1994] 1 A.C. 340 (H.L.), *supra* text from note 21.

94 Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] A.C. 669 (H.L.) 714-715, *commenting on* Chase Manhattan Bank NA v. Israel-British Bank Ltd. [1981] Ch. 105. *Cf. supra* note 25.

95 [1938] 1 K.B. 49.

you owe is not a liability mistake. It fails the test. The notion that there has to be a liability mistake has meantime been exploded. It would have wholly excluded restitution of mistaken gifts. The modern test, special facts aside, is whether the mistake caused the payment.[96]

There was another ground for the decision. If we put aside thoughts of turpitude as such, that other ground appears to have been that to allow this kind of recovery would in effect amount to sorting out and enforcing debts which the court must not enforce. That can undoubtedly be true with a running account of void debts. The demand for restitution of a mistaken overpayment will hardly be distinguishable from a claim to enforce a unilaterally repudiated liability, and the latter easily might be dressed up as the former. The same can be true of a single payment of the kind in the example under consideration. In no time the court might be drawn into the question of who owes what to whom.

This is a kind of stultification. That is to say, the courts are entitled to say that inquiring into restitution of overpayments in such a situation would make nonsense of their refusal to pass judgment on sums intended to be due. All things being considered, the *Morgan v. Ashcroft* result must hold good. To adjust overpayments would make nonsense of the refusal to enforce. Even where neither the lever argument nor the safety-net argument is in play, adjusting is hardly different from enforcing, and, under the fourth head of other stultifications, to adjust would be to invite plaintiffs to dress up enforcement as adjustment. Good as they are at sniffing it out, courts must not invite deceit. On the other hand it might be that a system which prefers to proceed on the basis of stultification rather than turpitude, and which does not refuse to enforce property rights acquired illegally[97] or rescue fraudsters from their tangled webs,[98] would not reject such a case out of hand but only if and when the evidence began to draw the judge into the feared embarrassment.

IX. THE ROLE OF TURPITUDE

The argument of this article is that it is better to settle the non-judgmental question of stultification before addressing the question of turpitude. When the plaintiff's claim has cleared that first obstacle, the question finally arises

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96 Barclays Bank Ltd. v. W.J. Simms Son & Cooke (Southern) Ltd. [1989] Q.B. 677.

97 Armory v. Delamirie (1722) 1 Str. 505; Bowmakers Ltd. v. Barnet Instruments Ltd. [1945] K.B. 65; Singh v. Ali [1960] A.C. 167 (PC).

98 *See supra* text at notes 7, 8.

whether he must be defeated directly upon the ground of turpitude. If the matter had no history, we might expect an uncontroversial answer at this second stage: the plaintiff, having survived the first inquiry, will only be disqualified in case of real necessity. Such an answer follows more or less automatically from the fact that, *ex hypothesi*, at this stage of the inquiry it is given that the non-contractual claim to recover the value transferred will not make nonsense of the law's stand on any other matter. If, notwithstanding, the plaintiff's non-contractual rights are to be forfeited, it can only be by reason of some powerful independent rationale. "Real necessity", operating as such an independent rationale, might then be taken to embrace both very serious turpitude and an inescapable prohibition against the bringing of the action in question, as for instance an unequivocal provision of a statute to that effect.

That simple answer is at first sight impeded by the past. The traditional assumption was that every illegality was turpitudinous and that what a plaintiff in our situation had to do was to show that in his case it was not. The two relevant maxims are "*Ex turpi causa non oritur actio* (From a disgraceful cause arises no action)" and "*In pari delicto potior est conditio defendentis* (As between those equally involved in wrongdoing the position of the defendant is the stronger)." Yoked together, as they usually are, they appear to assume that every illegality is a disqualifying illegality, and, further, that unless and until a plaintiff can excuse himself he can recover nothing from the defendant.

As we have seen, the cases, or the majority of them, appeared to match that starting point. A plaintiff could excuse himself in a number of standard ways. He could do it by showing (1) that he repented and called off the illegal transaction before any of the illegal purpose had been achieved; (2) that he was mistaken as to a fact which concealed the illegality from him; (3) that he was deceived by the other into believing the transaction lawful; (4) that he was oppressed by the other and thus compelled to enter into the illegal transaction; or (5) that the illegality had been created to protect a vulnerable class of persons of which he was a member. Penitent, mistaken, deceived, oppressed, or protected, he could wriggle out from under the burden of *par delictum*. There was another category, category (6), in which the plaintiff was allowed to assert a proprietary right. This category could barely be integrated with the other five. On some views success depended on the fall of the cards. On others it could be aligned, somewhat artificially, with the others by saying that it was the right itself which escaped the charge of *par delictum*, because it had never been subjected to the illegal transaction between the plaintiff and the defendant. In that way every one of the categories could be represented as forms of escape from turpitude.

However, in the post-*Tinsley* world none of this will stand up. It is evident that people do not on the whole lose actions on the ground of common or garden turpitude. Even criminal dishonesty does not disqualify them. Very serious turpitude may yet do so, but it has to be something worse than acquisitive dishonesty. In this world it is senseless to begin from the assumption that illegality connotes turpitude and turpitude bars. It manifestly does not.

This article has argued that the law relating to the recovery of value transferred under an illegal contract can be explained in a quite different way. Claims of that kind are primarily barred only because they stultify the law. That is, they are barred because they make nonsense of the position which the law takes in relation to the illegality. And they are not barred if they do not, unless in case of "real necessity".

Against that picture, what happens to the old categories of relative innocence? They cannot just be thrown into the nearest dustbin. The answer is, and it is implicit throughout the previous discussion, that they fit well in the new and different picture. They are not, after all, cases in which a plaintiff sheds the charge of turpitude. There is no relevant turpitude. They are merely cases in which the plaintiff can show that recovery by a person in his position will not make nonsense of the law's position in relation to the illegality and hence to the contract. It is never the relative innocence of these plaintiffs which is decisive. Their relative innocence is merely a factor which assists in bringing into play one of the pro-plaintiff propositions capable of removing the bar, as where, for example, the relative innocence defines a restricted class of potential claimants and excludes those who need to be, or can be, effectively deterred. Category 6 no longer needs to be pressed into line with the others and represented as a different way of excusing the plaintiff. Excusing the plaintiff is neither here nor there. There are simply different ways of showing that the law will not stultify itself if it allows the plaintiff's claim. In category 6 the prima facie stultification is negatived by the need to avoid a greater evil, which, in this case, is an arbitrary civil forfeiture of an interest never intended to be brought within the illegal transaction.

As for the principle against turpitude, in the post-*Tinsley* world if turpitude has any role only very serious turpitude can independently destroy a plaintiff's non-contractual rights. It does no harm to keep a potential disqualifier of this kind in reserve. However, rigorous reasoning might reveal it to be redundant. The pro-plaintiff propositions just will not work in favor of a plaintiff guilty of really heinous illegality. Those who are guilty of commercial child abuse or incitement to mass murder will never fit the description of a restricted class of plaintiff entitled to sue, and no

forfeitures inflicted on them will seem out of place or disproportionate. It may be easier to say that come what may such a plaintiff will be turned away on the ground of gross turpitude. But the more accurate conclusion is that, when their non-contractual claims confront the routine prima facie objection, namely that to allow them would stultify the law's position in relation to the illegality and contracts invalidated by it, such plaintiffs will never satisfy any one of the propositions capable of dissolving the prima facie bar.

CONCLUSION

In the law of unjust enrichment, illegality as such plays hardly any part. The first question is whether the plaintiff can establish a cause of action. Where a contract is void, whether for illegality or for another reason, a disappointed plaintiff can usually establish the cause of action in unjust enrichment which is traditionally called failure of consideration, though nowadays more safely named failure of basis. Even a plaintiff who unilaterally aborts the project can establish the same cause of action. The reason is that, if there is no contract to be gotten rid of, aborting the performance is sufficient in itself. By contrast, where there is a valid contract, orthodox doctrine says that there can be no recourse to the law of restitution so long as the contract still regulates the relations of the parties. Even here there is nothing special about illegality. It is just one among many invalidating factors.

A cause of action once established, the only role of illegality in the law of unjust enrichment is as a defense against causes of action, whether for failure of consideration, mistake, duress, or any other. Yet, even there, except perhaps in cases of very gross turpitude, it is not the illegality as such which constitutes the defense. Nor is it the invalidity of the contract under which or in relation to which the value has been transferred. The defense rests on the danger that the law may stultify itself. The question is always whether allowing the claim in unjust enrichment would make nonsense of the law's condemnation of the illegal conduct in question and of its refusal to enforce the illegal contract. Since the danger is real, and not confined to cases in which the claim in unjust enrichment will produce a yield identical to the barred contractual action, the presumption in such cases is that the non-contractual action is barred. In other words, there is a widespread defense of stultification.

However, the defense will not succeed if the element of stultification can be overcome. The plaintiff may be able to show that, when restrictions are put upon the claim, as to the measure of recovery or the conditions which

define possible plaintiffs, the claim does not make nonsense of the law's refusal to enforce the supposed contract; or the plaintiff may show that the prima facie stultification is outweighed by the rationality of avoiding some other evil; or he may be able to show, even in the absence of restrictive conditions or the horns of a dilemma, that, all things being considered, the suggestion that to allow the claim in unjust enrichment would be to stultify the law is unreal, exaggerated or fanciful. In short there are pro-plaintiff propositions which can trump the routine argument that to allow the claim in unjust enrichment would make nonsense of condemning the illegality and refusing to enforce the illegal contract.

When the plaintiff is trying to recover value transferred, whether because the defendant has let him down, or despite the fact that the defendant has not let him down, or more rarely because it was anyhow not the value which he was supposed to transfer, he will in general find his cause of action in unjust enrichment, often on the ground of failure of consideration, sometimes on the ground of mistake, duress, or some other unjust factor. However, in some circumstances he may be able to make out a different cause of action, as for instance in tort. In this context reliance on another cause of action should never alter the terms of the discussion. The structure remains stable. The plaintiff makes out his cause of action, whatever its nature. The question is always the same. Would allowing that cause of action to be maintained make nonsense of the refusal to enforce the contract? There are different forms of stultification. It might be that the non-contractual action would give the plaintiff closer to what the nullification of the contract says he cannot have. It might be that allowing him to recover value transferred would provide a lever in other similar cases for compelling performance. Or it might be that it would much reduce the risks of recourse to illegality by stretching out a safety-net against the day when the other let him down. Or it might be that the stultification might take some other form. Whatever the cause of action, it will fail unless the plaintiff can bring it within one of the three pro-plaintiff propositions outlined above.

This account of the case law is non-judgmental. It does not require us to feel absolutely sure that our own righteousness is also the righteousness of others. The inquiry is constantly an inquiry into consistency and rationality, not into turpitude. Turpitude may have no role at all. Or it may be that gross turpitude can have a role in a rare case, as a long-stop. It might possibly be that a bad plaintiff could make a convincing argument to the effect that his claim was covered by one of the three pro-plaintiff propositions. It is unlikely that a really wicked plaintiff could ever do so. If such a one slipped through, he would be caught by the long-stop. However, it is clear that only very serious turpitude counts. When it comes to mopping up under an illegal

contract the most important change that has overtaken the law of unjust enrichment and the law of other claims which in this context serve similar ends is the recognition, now nearly complete, that even moderately serious turpitude, such as acquisitive dishonesty, does not in itself destroy valuable civil rights.