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RESTITUTIONARY RELIEF UNDER ILLEGAL CONTRACTS IN CALIFORNIA

Illegal Contracts Defined

Illegal contracts fall conveniently into three categories:

(1) A contract is illegal where the performance or part of the performance of either or both parties is unlawful, because it is contrary to express law, public policy, or good morals.

(2) A contract is illegal where the ultimate purpose or one of several purposes of the bargain is unlawful, because it is contrary to public policy.

(3) A contract is illegal where property set-tlement conditioned upon wife's obtaining divorce; Merrill v. Peaslee, 146 Mass. 460, 16 N.E. 271 (1888) (promissory note given in exchange for wife's promise to render conjugal consortium).

"It is primarily the prerogative of the legislature to declare what contracts and acts shall be unlawful; but courts, following the spirit and genius of the law, written and unwritten, of a state, may declare void as against public policy contracts, which, though not in terms specifically forbidden by legislation, are clearly injurious to the interests of society." Maryland Cas. Co. v. Fidelity & Cas. Co., 71 Cal. App. 492, 497, 236 P. 210, 212 (1925).

Glos v. McBride, 47 Cal. App. 688, 191 P. 67 (1920) (promise to cohabit with defendant as part of consideration for execution of lease).


Teachout v. Bogy, 175 Cal. 481, 166 P. 319 (1917) (to assign liquor license unlawfully to lessee); Shephard v. Lerner, 182 Cal. App. 2d 746, 6 Cal. Rptr. 433 (1960) (to maintain leased premises contrary to city health and safety ordinances).
to express law, public policy, or good morals.

(3) Some contracts are specifically made illegal by statute.

**General Rule of Unenforceability**

When the plaintiff sues upon an illegal contract or demands restitution of an enrichment the defendant gained through an illegal transaction, the court is faced with a dilemma. As between the parties, the plaintiff's claim may be well-founded, and his right to recover indisputable. On the other hand, the public interest demands that illegal transactions be discouraged, and it is believed that denial of relief to both parties will tend to accomplish that purpose. To solve the dilemma, the protection of the public is deemed a higher interest than doing justice between the parties. Consequently, if the court finds illegality in the bargain, the contract is held void, and no claims arising out of the transaction will be enforced, either in

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9 E.g., Takeuchi v. Schmuck, 206 Cal. 782, 276 P. 345 (1929) (buying land for person who could not lawfully buy it under Alien Land Law); Bank of Orland v. Harlan, 188 Cal. 413, 206 P. 75 (1922) (where the purpose was to mislead a bank examiner as to the assets of the bank); Chateau v. Singla, 114 Cal. 91, 45 P. 1015 (1896) (sole activity of partnership was in contravention of a criminal statute).

10 E.g., Contractor's Safety Ass'n v. California Compensation Ins. Co., 48 Cal. 2d 71, 307 P.2d 626 (1957) (dividend agreement, collateral to insurance policy, intended to reduce indirectly the premium rate); McAllister v. Drapeau, 14 Cal. 2d 102, 92 P.2d 911 (1939) (promissory note demanded by defendant bank before agreeing to refund plaintiff's debt under the Home Owner's Loan Act of 1933); People ex rel. Mosk v. Barenfeld, 203 Cal. App. 2d 166, 21 Cal. Rptr. 501 (1962) (defrauding state government). See quotation in note 5 supra.

11 Abbe v. Marr, 14 Cal. 210 (1859) (intending to win otherwise lawful wagering contract by "fixing" horse race).

An unlawful performance or purpose, however, which is remotely and collaterally connected with the contract out of which the plaintiff's claim arose will not render that contract illegal. Boloyan v. Contente, 113 Cal. App. 2d 499, 248 P.2d 96 (1952); Restatement of Contracts § 597 (1932).


15 Lewis & Queen v. N.M. Ball Sons, 48 Cal. 2d 141, 308 P.2d 713 (1957). If the parties know that they must rely solely upon each other and cannot secure the aid of a court to enforce their claims, they are less likely to make the illegal contract. Id. at 150, 308 P.2d at 719.

16 Takeuchi v. Schmuck, 206 Cal. 782, 276 P. 345 (1929). "This rule is not generally applied to secure justice between the parties who have made the illegal contract, but from regard for a higher interest—that of the public, whose welfare demands that certain transactions be discouraged." Id. at 786-87, 276 P. at 346.
law or in equity. The court leaves the parties precisely where it finds them: the contract will not be enforced by specific relief or damages, nor will either party be allowed to rescind and recover in restitution, even though the defendant may thereby remain unjustly enriched.

When an action is brought, the defendant can plead the illegality as a complete defense. The doctrines of ratification, estoppel, and laches will not bar this defense, nor does the parol evidence rule prevent proof of unlawful purposes or acts not appearing in the language of a written agreement. Furthermore, if at any time during the litigation the illegality comes to the attention of the court, the

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18 E.g., Bank of Orland v. Harlan, 188 Cal. 413, 206 P. 75 (1922), where the plaintiff bank was refused recovery on promissory notes, and the defendant maker of the notes was refused enforcement of the plaintiff's promise to return them, because the purpose of the transaction was unlawfully to mislead a bank examiner; Hooper v. Barranti, 81 Cal. App. 2d 570, 184 P.2d 688 (1947), where the court refused both partners' prayers for an accounting after termination of an illegal partnership agreement.


21 E.g., Takeuchi v. Schmuck, 206 Cal. 782, 276 P. 345 (1929) (suit to compel restitution of a deposit made under an illegal contract to sell land); Fong v. Miller, 105 Cal. App. 2d 411, 233 P.2d 606 (1951) (suit for the reasonable value of improvements made on defendant's land under an illegal lease).


"It has not seemed satisfactory to some able and just minds that courts should hold that where parties to a contract are in pari delicto they will leave the delinquents where they find them, because such a rule permits one to plead his own wrong or infamy ... and thereby obtain an unconscionable advantage over his adversary ... . Courts, however, are not called upon to settle any question of conscience between the parties, but are interested only in the higher duty of protecting society ... . While, therefore, the defense advanced may be one which ill lies in the mouth of defendant to assert, nevertheless, if public policy requires it, the plea will be permitted even if it allows one to retain an advantage without rendering the stipulated return." Maryland Cas. Co. v. Fidelity & Cas. Co., 71 Cal. App. 492, 495, 236 P. 210, 212 (1925).

23 Wells v. Comstock, 46 Cal. 2d 528, 297 P.2d 961 (1956) (no estoppel to plead illegality); Davis v. Chipman, 210 Cal. 609, 293 P. 40 (1930) (ratifying conduct could not bar defendant's plea of illegality); Colby v. Title Ins. & Trust Co., 160 Cal. 632, 117 P. 913 (1911) (estoppel and laches applied to defeat other grounds for rescission of the contract, but not to the plea of illegality).

issue will be investigated and decided on the court's own motion, even though neither party intended to raise the issue.\(^\text{25}\)

There are, however, several exceptions to the general rule of unenforceability of claims arising out of illegal transactions. For the most part, these exceptions are restitutionary in nature: they involve a restoring to the plaintiff of benefits acquired by the defendant and which are being unjustly retained by him at the plaintiff's loss.\(^\text{26}\) Even though the bargain was illegal and void, the plaintiff will be allowed restitution, if he can offer the court a sound reason for circumventing the general rule of unenforceability.\(^\text{27}\) The following discussion is intended to classify and interpret these reasons.

**Plaintiff Not In Pari Delicto\(^\text{28}\)**

Where the general rule is applied and a contract is held void and unenforceable for illegality, one of the reasons generally assigned is that courts will not lend their aid to a party *in pari delicto* (in equal fault).\(^\text{29}\) The plaintiff's unlawful purposes or moral turpitude deprive him of any right to assert his claim in court.\(^\text{30}\) It follows that the plaintiff can avoid the usual result, and thus enforce his claim, by establishing that he was not *in pari delicto* with the defendant.\(^\text{31}\)

Some courts, misled by the literal meaning of the Latin phrase "*in pari delicto,*" have concluded that the plaintiff's guilt need only be less than the defendant's to bring the case within this exception.\(^\text{32}\) In California, however, the supreme court has clearly repudiated that interpretation by holding that the plaintiff must allege and prove his fault to be *slight* compared to the defendant's.\(^\text{33}\) The plaintiff will then be allowed restitution of money, goods, reasonable value of services, or any other thing of value transferred pursuant to the agreement,\(^\text{34}\) although the defendant may be allowed to offset dam-

\(^{25}\) Pacific Wharf & Storage Co. v. Standard Am. Dredging Co., 184 Cal. 21, 24, 192 P. 847, 848-49 (1920); Greene v. Brooks, 235 Cal. App. 2d 161, 45 Cal. Rptr. 99 (1965) (raised on appeal for first time); Cain v. Burns, 131 Cal. App. 2d 439, 280 P.2d 888 (1955). *But see* RESTATEMENT OF CONTRACTS § 600 (1932), which implies that the court cannot raise the issue on its own motion when the contract is not prohibited by statute and no serious moral turpitude is involved.

\(^{26}\) *See generally* RESTATEMENT OF CONTRACTS §§ 598-609 (1932).


\(^{28}\) *See generally* CAL. CIV. CODE § 1689(b) (5); *RESTATEMENT OF CONTRACTS* § 604 (1932).


\(^{32}\) Id. at 444, 280 P.2d at 891.


ages sustained by him through the plaintiff's avoidance of the contract.\textsuperscript{35}

Grounds for alleging slight fault will vary with the facts of each case, but some circumstances bringing the plaintiff within this exception are well-recognized and frequently encountered.

**Justifiable Ignorance\textsuperscript{36}**

As stated by a California District Court of Appeal:

Where the illegality is due to facts of which one party is justifiably ignorant and the other party is not, the illegality does not bar recovery by the innocent party of compensation for performance rendered while he remains justifiably ignorant of the facts establishing illegality.\textsuperscript{37}

In this case, one partnership sued another partnership for a share of commissions earned by both in the sale of certain real estate. The plaintiffs were duly licensed real estate brokers, but the defendants were not. Thus, part of the performance of the contract to find a buyer for the property was unlawful because contrary to express law, making the companion agreement to share commissions illegal. The defendants had told the plaintiffs that they were properly licensed as a partnership. This misrepresentation would not estop the defendants to plead the illegality.\textsuperscript{38} Nevertheless, judgment for the plaintiffs was affirmed, because they did not know that the defendants were unlicensed, and their ignorance of this illegality was justified by the defendants' misrepresentation.\textsuperscript{39}

In *Tiedje v. Aluminum Taper Milling Co.*,\textsuperscript{40} a plaintiff who was justifiably ignorant of the facts establishing illegality was allowed restitution of the consideration paid, even though the contract was wholly executed on both sides. The plaintiff had sold the defendant corporation some shares of stock in the defendant and now sought their return. The price of the stock had been paid out of earned surplus in violation of a statute. The court held that, although the seller was chargeable with knowledge of the statute prohibiting the transaction, it was reversible error for the lower court to sustain the defendant's demurrer, since the seller had alleged ignorance of the money's source, as well as reliance upon the defendant to comply with the statute.\textsuperscript{41} The court indicated that, if these allegations were


\textsuperscript{36}See generally RESTATEMENT OF CONTRACTS § 599 (1932).


\textsuperscript{40}46 Cal. 2d 450, 296 P.2d 554 (1956).

\textsuperscript{41}Id. at 454-55, 296 P.2d at 556-57.
true, the plaintiff seller would not be in pari delicto and should be given relief from the illegal transaction, that is, return of the stock certificates.\(^\text{42}\)

On retrial, however, the plaintiff in the Tiedje case would undoubtedly have to return the money he received for transfer of the stock as a condition precedent to restoration of the shares.\(^\text{43}\)

In Brashears v. Giannini,\(^\text{44}\) the purpose of the contract, buying wine for sacramental uses, was lawful under the prohibition statute, but the contract was nevertheless illegal because the plaintiff buyer did not intend to obtain a required permit.\(^\text{45}\) The plaintiff did not know that a permit was required and brought suit for rescission. The court intimated that this ignorance of law, as distinguished from ignorance of fact, permitted the court to circumvent the general rule of unenforceability and to award the plaintiff restitution of the purchase price.\(^\text{46}\) However, the decision cannot be given much weight on this issue, because the case clearly falls within another exception to the general rule—namely, repudiation before unlawful performance.\(^\text{47}\) At the time the plaintiff instituted his suit for rescission, no wine had been delivered under the contract.\(^\text{48}\)

California courts generally state the rule concerning ignorance of the illegality in terms of ignorance of fact, not of law.\(^\text{49}\) Other jurisdictions hold the plaintiff to be in pari delicto, even though he lacks knowledge of the invalidating law.\(^\text{50}\) Apparently, in California, the plaintiff's ignorance of the law will not bring his case within this exception to the general rule of unenforceability of claims arising out of illegal transactions.\(^\text{51}\)

Members of the Class an Invalidating Statute Was Designed to Protect\(^\text{52}\)

When a statute or ordinance declares expressly or impliedly that a particular activity is unlawful and the contract sued upon includes the prohibited activity, the contract may or may not be illegal.\(^\text{53}\) The determinative question, in any such case, is whether the statute was designed to protect the public from an abuse.\(^\text{54}\) For example, a

\(^{42}\) Id. at 455, 296 P.2d at 557.


\(^{44}\) 131 Cal. App. 706, 22 P.2d 47 (1933).

\(^{45}\) Id. at 708-09, 22 P.2d at 48.

\(^{46}\) Id. at 713, 22 P.2d at 50.

\(^{47}\) Text accompanying notes 82-92 infra.


\(^{49}\) Cases cited note 37 supra and accompanying text.

\(^{50}\) McFall v. Arkoosh, 37 Idaho 243, 215 P. 978 (1923); Gloyd v. Hotel La Salle Co., 221 Ill. App. 104 (1921).


\(^{52}\) See generally Restatement of Contracts § 601 (1932).


licensing statute implies (if not plainly expressed) that doing the
defined acts without a license is unlawful; therefore, an agreement
to perform such acts without a license is illegal.\textsuperscript{55} However, if the
purpose of the statute is merely to collect revenue, courts are in-
clined to leave enforcement of the statute to criminal or adminis-
trative proceedings, and generally do not impose the additional pen-
alty of the forfeiture resulting from nonenforcement of illegal con-
tracts.\textsuperscript{56} On the other hand, if the licensing statute is designed to
protect the public against unqualified or irresponsible persons, the
illegality of the contract renders all claims arising out of it unenforce-
able, in law and in equity.\textsuperscript{57}

Suppose, however, the party seeking relief is a member of the
class the invalidating statute was designed to protect. Manifestly,
to deny recovery would defeat the legislative purpose by imposing a
forfeiture upon the party who was supposed to benefit by the
statute.\textsuperscript{58} The statute implies that this plaintiff is not \textit{in pari delicto},
but is the innocent victim of a wrong.\textsuperscript{59}

As indicated at the beginning of this comment,\textsuperscript{60} some contracts
are illegal not because the performance or purpose of the contract is
unlawful, but because the form or substance of the contract itself is
specifically made illegal by statute.\textsuperscript{61} Even in such cases, if the
plaintiff can prove the purpose to be his protection as a class mem-
ber, rescission and restitution will be allowed,\textsuperscript{62} although the court
may, in its discretion, require the rescinding party to make restitu-
tion to the defendant before relief will be granted.\textsuperscript{63}

A good example of most of the principles discussed under this
subheading is \textit{City Lincoln-Mercury Co. v. Lindsey}.\textsuperscript{64} In this case, a
car dealer sued to recover the deficiency on the resale of an auto-
mobile after the buyer's default on payments under a conditional
sales contract. The buyer filed a cross-complaint for restitution of
money already paid by him under the agreement. The contract, when
signed by the buyer, contained neither a time-price differential nor a
contract balance, both required by statute. The California Supreme

\textsuperscript{55} Holm v. Bramwell, 20 Cal. App. 2d 332, 67 P.2d 114 (1937); Firpo v.
Murphy, 72 Cal. App. 249, 236 P. 968 (1925).
\textsuperscript{56} Wood v. Krepps, 168 Cal. 382, 387, 143 P. 691, 692 (1914).
\textsuperscript{57} Hooper v. Barranti, 81 Cal. App. 2d 570, 184 P.2d 688 (1947); Firpo v.
Murphy, 72 Cal. App. 249, 236 P. 968 (1925); Houston v. Williams, 53 Cal.
App. 267, 200 P. 55 (1921).
\textsuperscript{58} Stenger v. Anderson, 66 A.C. 1024, 429 P.2d 164 (1967); McAllister v.
Drapeau, 14 Cal. 2d 102, 92 P.2d 911 (1939); Smith v. Turner, 238 Cal. App.
2d 141, 47 Cal. Rptr. 582 (1965); Lund v. Cooper, 159 Cal. App. 2d 349, 324
\textsuperscript{59} See Dias v. Houston, 154 Cal. App. 2d 279, 315 P.2d 885 (1957) (judg-
ment for breach of contract against unlicensed building contractor); Cain v.
Burns, 131 Cal. App. 2d 439, 280 P.2d 888 (1955) (where statutory penalty is
imposed upon only one party, other party is a member of class protected and
not \textit{in pari delicto}).
\textsuperscript{60} Text accompanying note 12 \textit{supra}.
\textsuperscript{61} Cases cited note 12 \textit{supra}.
\textsuperscript{64} 52 Cal. 2d 267, 339 P.2d 851 (1959).
Court construed the statutory requirements as mandatory, thus making the contract illegal and unenforceable. However, a judgment for the buyer on the cross-complaint was affirmed. The statute was designed for the buyer's benefit and protection. Therefore, he was not in pari delicto and could recover installments paid plus the market value of his trade-in. On the other hand, it was proper for the lower court to allow the seller a setoff against the buyer for depreciation of the car's value, in order to achieve a more just result between the parties.

Other Cases

Besides justifiable ignorance and qualifying as a member of the class the invalidating statute was designed to protect, other circumstances may persuade the court that the plaintiff is not in pari delicto. For instance, duress, menace, or undue influence practiced by the defendant to force the plaintiff into an illegal bargain will indicate that the plaintiff's fault was slight. Under such circumstances, the plaintiff will be given the aid of the court to set aside or avoid the contract and to recover consideration paid.

Divisible Contracts

The California Civil Code, section 1608, provides:

If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void.

Upon first reading this statute, one may conclude that a contract is void and unenforceable if any part of the transaction is unlawful. However, in Keene v. Harling the California Supreme Court construed the term "single consideration" to mean "indivisible consideration." The statute, therefore, states the result in cases of partial illegality only when the court determines the contract to be non-severable. If the contract is severable, the legal part will be enforced and the illegal part disregarded.

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65 Id. at 272-73, 339 P.2d at 855.
66 Id. at 277, 339 P.2d at 858.
67 Id. at 272-73, 339 P.2d at 855.
68 Id. at 274-75, 339 P.2d at 856-57.
69 Id. at 275-77, 339 P.2d at 857-58.
70 See generally Restatement of Contracts § 604 (1932).
71 Stenger v. Anderson, 66 A.C. 1024, 429 P.2d 164 (1967) (undue influence upon elderly person by relatives); McAllister v. Drapeau, 14 Cal. 2d 102, 92 P.2d 911 (1939) (economic pressure); Colby v. Title Ins. & Trust Co., 160 Cal. 632, 117 P. 913 (1911) (threat to prosecute plaintiff's daughter for embezzlement).
72 See generally Restatement of Contracts §§ 606, 607 (1932).
73 CAL. CIV. CODE § 1608.
75 Id. at 324, 392 P.2d at 277-78, 38 Cal. Rptr. at 517-18. This interpretation seems reasonable in light of CAL. CIV. CODE § 1599, which provides: "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest."
The Keene case also states the test to determine severability: "[A] contract is severable if the court can, consistent with the intent of the parties, reasonably relate the illegal consideration on one side to some specified or determinable portion of the consideration on the other side."\footnote{Keene v. Harling, 61 Cal. 2d 318, 321, 392 P.2d 273, 275, 38 Cal. Rptr. 513, 515 (1964).}

Thus, the court held that, where the contract recited a total price for the transfer of a going business and several coin-operated machines, and the sale of some of the machines was a criminal offense, the plaintiff seller was entitled to judgment for the purchase price minus the value of the illegal machines.\footnote{Id. at 322-24, 392 P.2d at 276-78, 38 Cal. Rptr. at 516-18.} The court could determine what portion of the contract price reasonably related to the illegal machines, because their market value was published in a trade magazine.\footnote{Id. at 322-23, 392 P.2d at 277, 38 Cal. Rptr. at 517. The Keene case expressly overruled, at 323 n.2, 392 P.2d at 277 n.2, 38 Cal. Rptr. at 517 n.2, the test of divisibility used in a prior appellate court case. The overruled decision had held a contract indivisible because a single sum had been promised for a variety of items. Ryan v. Mike-Ron Corp., 226 Cal. App. 2d 71, 37 Cal. Rptr. 794 (1964). Keene also impliedly overruled prior interpretations of section 1608 of the Civil Code. Keene v. Harling, 61 Cal. 2d 318, 324, 392 P.2d 273, 277-78, 38 Cal. Rptr. 513, 517-18 (1964). For example, a 1951 district court of appeal case had held a contract entirely void because part of the consideration moving to the plaintiff was unlawful, and the court had responded to the plaintiff's claim of severability by merely quoting section 1608. Fong v. Miller, 105 Cal. App. 2d 411, 414, 233 P.2d 606, 607 (1951). Dodging the issue of severability in this manner is clearly contrary to the Keene decision.}

In a 1920 California Supreme Court case\footnote{Pacific Wharf & Storage Co. v. Standard Am. Dredging Co., 184 Cal. 21, 192 P. 847 (1920).} a payee obtained judgment on several promissory notes, even though evidence at the trial disclosed that part of the consideration for the notes was in restraint of trade, therefore unlawful. The court held the contract divisible, because the money consideration was apportioned among the several performances to be rendered, thus permitting enforcement of the legal part of the bargain.\footnote{Id.}

Repudiation Before Unlawful Performance\footnote{See generally Cal. Civ. Code §§ 1689, 1691, 1692; Restatement of Contracts § 605 (1932).}

"[W]here money has been paid in consideration of an executory contract which is illegal, the party who has paid it may repudiate the agreement at any time before it is executed and reclaim the money."\footnote{Smith v. Bach, 183 Cal. 259, 263, 191 P. 14, 15 (1920); accord, Green v. Frahm, 176 Cal. 259, 168 P. 114 (1917); Brashears v. Giannini, 131 Cal. App. 706, 22 P.2d 47 (1933). Yet, the buyer was allowed to repudiate the contract before unlawful performance.}

Accordingly, where a vendor agreed to sell land by reference to an unrecorded map, a procedure made unlawful by statute, the contract was illegal and unenforceable.\footnote{Smith v. Bach, 183 Cal. 259, 261-62, 191 P. 14, 14-15 (1920).}
repudiate the contract, before title passed, and to obtain restitution of that portion of the purchase price already paid. 85

It is not necessary that the contract remain entirely executory. 86 As long as the illegal portion has not been executed or has been abandoned, the plaintiff can repudiate the agreement and enforce any claims he may have in restitution. Thus, a lessee, who had been in possession for several months, was awarded restitution of a $3,000 deposit made to secure rent payments, even though the purpose of the lease was to conduct a house of prostitution. 87 The court held that the unlawful purpose did not render the lessee's cause of action void. 88 The decision rested upon the court's finding of an abandonment of the original plan, since the premises were never in fact used for prostitution. 89

Contrary to the general statement of this exception, 90 one California case indicated that a plaintiff may repudiate an illegal agreement, and recover the consideration paid, even after the unlawful performance has begun. The plaintiff had leased a house to the defendant on the latter's promise to cohabit with her as husband and wife, though neither contemplated marriage. The lessor brought suit to quiet title, and although the complaint itself disclosed the unlawful consideration, she was allowed to repudiate the agreement and cancel the illegal lease. 91 The lessee contended on appeal that this exception to the general rule should not be applied if, as he alleged, the unlawful cohabitation actually commenced. But the appellate court held the lessee's allegation to be immaterial upon the ground that the unlawfulness in this case was a continuing relationship between the parties, thus permitting rescission and restitution at any time. 92

Terminated Transactions

The fact that an illegal transaction is terminated is becoming an important element in persuading California courts not to apply the general rule of unenforceability of claims arising out of illegal bargains. 93 This is not an absolute exception to the general rule, as were the exceptions discussed above, but is a persuasive factor which the court will balance against other facts in the case. 94 The following discussion will analyze the reasons supporting this exception and the circumstances which prevent its application.

85 Id. at 263-64, 191 P. at 15.
86 Green v. Frahm, 176 Cal. 259, 168 P. 114 (1917).
87 Id.
88 Id. at 264, 168 P. at 116.
89 Id.
90 See Restatement of Contracts § 605 (1932).
92 Id. at 690-91, 191 P. at 67-68.
The leading case on the subject is *Norwood v. Judd*, a suit for the dissolution of a partnership and an accounting. A statute required that each partner should be licensed individually and that the partnership business should be separately licensed. The defendant had an individual license, but neither the plaintiff nor the partnership was licensed. The plaintiff had served as bookkeeper for the firm, and could have qualified for a license had he applied, while the defendant acted as general manager. The partnership agreement was illegal, because performance under it was contrary to the licensing statute. Nevertheless, the court ordered an accounting between the parties for the following reason:

Where, by applying the rule [of unenforceability of claims arising out of illegal transactions], the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied.

The distinctive feature of this quotation is its emphasis upon completed execution of the illegal contract. The court believed that, where the unlawful activity is completed, the public can no longer be protected by a refusal to enforce claims arising out of the bargain, and if the reason for a rule fails, the rule should not be applied. The court understood the basic reason for general unenforceability to be the protection of the public from the harmful effects of the transaction in question. Although this view was not without precedent, an examination of the cases holding claims unenforceable for illegality (rather than applying an exception) will reveal that the true purpose is to discourage future transactions of like nature. It is submitted that this proposition would destroy the major premise of the court's argument; for if the parties know that any claims they may have against each other are likely to be enforced once the illegal agreement has been executed, they are actually encouraged to proceed with their unlawful plan.

Another reason in support of the conclusion reached in *Norwood* was advanced in *Matchett v. Gould*. After reviewing *Norwood* and several other unlicensed-partnership cases where accounting had been ordered between the parties after termination, the court stated a more general principle. The fact of partnership merely afforded a "basis for application of the equitable concept that one person in possession of property belonging to himself and another cannot deny the claim of that other to his share because the property was acquired in a transaction which was unlawful only because had without the sanction of a licensing statute." To state the same principle in

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96 Id. at 283, 209 P.2d at 28.
97 Id. at 289, 209 P.2d at 31.
98 Id. at 286-88, 209 P.2d at 30-31.
100 Notes 15 & 16 supra.
another way, if the defendant will be unjustly enriched unless the plaintiff is awarded restitution of what rightfully belongs to him, the illegality of the bargain will not prevent recovery, as long as the unlawfulness is not a serious matter. This interpretation is manifestly contrary to settled law.\textsuperscript{103} If carried to its logical conclusion, this principle would permit any party to an illegal bargain to enforce claims arising out of it merely by suing in restitution and claiming that he is not seeking to enforce the contract, but is praying for restoration of the status quo as it existed before the contract was formed. It should also be noted that Matchett was disapproved by the California Supreme Court.\textsuperscript{104}

Although some courts have held the terminated-transactions exception, as expressed in Norwood, to be applicable only to partnership-dissolution cases,\textsuperscript{105} and although its most frequent application occurs in settling accounts between partners, the recent trend has been to apply this exception to any case where an illegal transaction has been terminated.\textsuperscript{106} In view of the significance of the Norwood case, the principle there stated will be divided into its component parts and analyzed in the light of both prior and subsequent decisions.

As stated by Norwood, the general rule of unenforceability will be circumvented when four conditions are present: (1) the illegal transaction must be fully terminated, that is, the unlawful performance or purpose must have ceased or been abandoned; (2) the plaintiff's moral fault must be less than the defendant's; (3) the denial of relief would unjustly enrich the defendant at the plaintiff's expense; (4) the illegality must not involve serious moral turpitude.\textsuperscript{107}

Termination

What constitutes termination? Norwood used the word "completed," which tends to denote not only the cessation of activity, but also full realization of purpose or plan.\textsuperscript{108} Subsequent cases indicate that this word was not so interpreted but was given the more neutral meaning of "ended" or "ceased," regardless of fulfillment.\textsuperscript{109} If the reason supporting this exception, namely, that the public can no longer be protected, is at least partially valid, that reason applies whenever activity under the bargain terminates, whether or not the intended purpose or plan was completed. It is submitted, ac-

\textsuperscript{103} Cases cited notes 20 & 21 supra.
\textsuperscript{104} Lewis & Queen v. N.M. Ball Sons, 48 Cal. 2d 141, 154, 308 P.2d 713, 721 (1957).
\textsuperscript{108} WEBSTER'S NEW INTERNATIONAL DICTIONARY 546 (2d ed. 1956).
cordingly, that the word "terminated" more accurately expresses the stage which the bargain must have reached.110

Termination of transactions, within the meaning of this exception, occurs whenever the parties are no longer performing their promises, no matter what the reason.111 Thus, if the suit is for dissolution of a partnership, the forcible ejectment of one party from the business premises will terminate the partnership agreement,112 as will a wholly voluntary understanding between the parties that they no longer desire to do business together.113 If the suit is for the reasonable value of services rendered under an oral contract, the transaction is terminated when the plaintiff has performed and the defendant refuses to pay as agreed.114 On the other hand, if one partner in an unlicensed partnership, which is continuing to do business, refuses to share a particular commission, a copartner cannot enforce his claim,115 because the parties are still performing under the illegal agreement which gave rise to the duty to share commissions.116

Given a terminated transaction, what circumstances balanced against this factor will tend to persuade the court to deny relief despite the termination?

Relative Fault

The plaintiff's moral fault must be less than the defendant's. If not, the court may deny relief, despite the fact of termination.117 For example, in Hooper v. Barranti,118 which was approved by Norwood,119 the plaintiff and the defendant were partners in an on-sale liquor business. Neither the defendant nor the partnership was properly licensed. The plaintiff forcibly ejected the defendant and then brought suit for dissolution and an accounting. Neither party was allowed recovery upon the legal partnership agreement.120 Three of the facts which distinguish this case from Norwood are as follows: (1) the defendant was an alien and therefore unqualified for a license; (2) the defendant actually sold liquor at the bar, precisely what the statute attempted to prevent (in Norwood,121

110 Webster's New International Dictionary 2605 (2d ed. 1956).
the plaintiff merely acted as bookkeeper); and (3) operating without a proper license was one of the terms of the agreement, not merely the result of negligence or oversight. In short, the plaintiff had no excuse for his failure to procure a partnership license; he knew he could not obtain one and purposely violated the statute as part of the planned bargain. The parties were equally blameworthy in this respect, and neither was awarded an accounting.

As a word of caution, however, the requirement that the plaintiff be in less fault than the defendant must be distinguished from the previously discussed exception in cases where the plaintiff is not in pari delicto. It was there emphasized that the plaintiff must be no more than slightly at fault; if he is, he can recover as coming within an absolute exception to the general rule of unenforceability of claims arising out of illegal transfers. Here, however, the plaintiff's fault need only be less than the defendant's.

An excellent example of this aspect of the problem is Tri-Q, Inc. v. Sta-Hi Corp. This case involved a complicated fact situation with several parties, but one portion of the case is directly in point. The plaintiff corporation had agreed to buy some stock from the defendant. The contract was illegal because its purpose was to give both parties improper tax advantages in fraud of both federal and state governments. The seller had delivered the stock, and the buyer had paid part of the purchase price but refused to pay any more. The buyer prayed for rescission, while the seller, in his cross-complaint, demanded payment of the purchase price. Although the seller was seeking direct enforcement of the terms of an illegal contract, the court held in his favor. The parties had both intended to defraud the government, which would normally make them in pari delicto, and the fault of neither could be considered slight. But in applying the terminated transactions exception, the court distinguished between primary and secondary purposes and concluded that the seller's primary purpose was to sell the stock. The fraudulent aspect of the transaction was forced upon the seller by the buyer, who was primarily interested in the improper tax advantages. Therefore, the seller's fault was less than the buyer's, permitting his recovery under this exception to the general rule.

123 Text accompanying note 32 supra.
125 Id. at 218-21, 404 P.2d at 496-99, 45 Cal. Rptr. at 888-91.
126 Id. at 215-20, 404 P.2d at 497-99, 45 Cal. Rptr. at 889-91.
127 Beard v. Beard, 65 Cal. 354, 4 P. 229 (1884), where the court generalized as follows: "[A] right of action cannot arise out of fraud, which applies not only where the contract is expressly illegal, but whenever it is opposed to public policy, or founded on an immoral consideration." Id. at 355-56, 4 P. at 230.
129 Id. at 220, 404 P.2d at 498-99, 45 Cal. Rptr. at 890-91.
It should be noted, however, that some cases, in applying the terminated-transactions exception, seem not to require that the plaintiff be in less fault than the defendant.\textsuperscript{131} Other cases indicate that the defendant's breach of contract may put him in greater moral fault than the plaintiff, when the illegality is of a very minor nature.\textsuperscript{132}

Unjust Enrichment

Relief will be denied in cases of illegal contracts, despite the fact of termination, if the denial will not leave the defendant unjustly enriched.\textsuperscript{133} It is submitted that this proposition logically follows from the basic dilemma faced by the courts in all illegal contracts cases, that is, the impossibility of doing justice between the parties and protecting the public from illegal transactions at the same time. If no unjust enrichment would result from a refusal to enforce the plaintiff's claim, there remains little reason to forego the public's protection, and the plaintiff should not be allowed to recover.

In a 1966 district court of appeal case,\textsuperscript{134} the plaintiff, a licensed plumbing contractor, and the defendant, a licensed air-conditioning contractor, had agreed to submit a joint bid for their respective work on the construction of a building. Their bid was accepted by the general contractor, and each separately contracted with him. The defendant failed to install the air-conditioning equipment as promised, resulting in $700 damages to the general contractor. To cover this loss, the general contractor deducted $700 from the plaintiff's compensation for the plumbing work, and the plaintiff sued to be reimbursed upon the theory that the defendant had breached the joint venture agreement. The licensing statute made the contract illegal, because neither party to the joint venture was licensed to do the other's work.\textsuperscript{135} In refusing to apply the terminated-transactions exception, the court stated: "[T]he Norwood case turned on the issue of unjust enrichment; here, however, there was no retention of money or benefits by the defendant."\textsuperscript{136}

Absence of Serious Moral Turpitude\textsuperscript{137}

In Chateau v. Singla,\textsuperscript{138} the court refused to decree an accounting after termination of a partnership business, the purpose of which was the renting of apartments to prostitutes in contravention of a penal statute. The partnership agreement was illegal because its purpose

\textsuperscript{135} Id. at 521, 55 Cal. Rptr. at 765-66.
\textsuperscript{136} Id. at 522, 55 Cal. Rptr. at 767.
\textsuperscript{138} 114 Cal. 91, 45 P. 1015 (1896).
was unlawful; therefore, the court refused to enforce any claims arising out of the transaction, even though the partnership was entirely terminated. 139

Serious moral turpitude will usually be present when the agreement is to perform acts *mala in se* (wrong in themselves, even in the absence of penal law). 140 However, serious moral turpitude may be present even though no activity under the agreement is *malum in se*. A contract may be illegal and unenforceable merely because its performance or purpose is forbidden by statute or case law and not otherwise wrong, that is, *malum prohibitum*. 141 But the particular manner in which such a law is violated can be so flagrant as to involve serious moral turpitude. 142 In other words, serious moral turpitude is not synonymous with *malum in se*. The latter is a technical classification in the criminal law which divides crimes into two categories based upon the court's interpretation of the general moral conscience of the community. 143 A finding of serious moral turpitude, on the other hand, while judged in light of the same standard, does not objectively classify defined conduct. To say that a bargain involves serious moral turpitude is to say that the manner of its performance, as well as the defined performance itself, taken together are shocking to the moral conscience. 144 Thus, failure to comply with a licensing statute, although always *malum prohibitum*, may or may not involve serious moral turpitude.

*Hooper v. Barranti* 145 has already been discussed in connection with determining whether the plaintiff's fault is less than the defendant's. 146 That case is also illustrative of serious moral turpitude. Although the only illegality of the partnership agreement was failure to procure a proper license, the manner of that failure was flagrant. It was not a case of mere neglect; the parties had agreed, at the outset, to conduct their liquor business in violation of law. In addition, the party who could not qualify under the statute actively managed the business and directly sold liquor to customers—precisely what the statute was intended to prevent. 147

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139 Id. at 95-95, 45 P. at 1015-16.
140 "Acts *mala in se* include, in addition to all felonies, all breaches of public order, injuries to person or property, outrages upon public decency or good morals, and breaches of official duty, when done wilfully or corruptly. Acts *mala prohibitita* include any matter forbidden or commanded by statute, but not otherwise wrong." Commonwealth v. Adams, 114 Mass. 323, 324 (1873).
143 R. Perkins, Criminal Law 692-710 (1957). The difference between acts *mala in se* and *mala prohibita* is not the difference between crimes at common law and statutory crimes. The true distinction lies in whether the act is morally wrong of itself, without reference to the criminal law. Thus, an act is *malum prohibitum* if it is wrong only because prohibited by law, either common law or statutory (for example, criminal nuisance). And an act may be *malum in se*, even though it is only statutorily criminal (for example, embezzlement), or even though the law provides no punishment for the act at all (for example, suicide). Id. at 698-99, 703.
144 See Abbe v. Marr, 14 Cal. 210 (1859).
146 Text accompanying notes 117-32 supra.
147 Id. at 572-73, 184 P.2d at 690 (1947).
Lewis & Queen v. N. M. Ball Sons is another leading case on this subject. An unlicensed subcontractor sued the general contractor for compensation for the use of equipment the plaintiff had rented to the defendant during a construction project for a third party. The contract was held illegal, and the defendant was awarded judgment, even though the plaintiff thereby suffered a serious forfeiture.149 The dissenting opinion of Justice Carter indicated the factual similarity between this case and Norwood: "Two parties agreed to perform work for a third party and one of the two withheld the other's share of the proceeds."150 But the majority, without disapproving Norwood, held the law of that case inapplicable upon the ground that the defendant general contractor was a member of the class the licensing statute was designed to protect.151 The dissenting opinion interpreted the statute differently, believing that general contractors are so familiar with the quality of work and character of their subcontractors that a licensing statute is not needed for their protection.152 However, it would seem that both opinions are consistent with the following generalization: Where an invalidating statute is designed to protect the defendant, the plaintiff's moral fault is so serious that recovery will be denied, even though the illegal transaction is terminated, leaving the defendant unjustly enriched.153

Summary of the Terminated-Transactions Exception

The fact of termination of the bargain weighs heavily in favor of awarding the plaintiff restitution to avoid unjust enrichment of the defendant, but the following factors will also be considered:

(1) the relative moral fault of the parties;154
(2) whether the defendant will be unjustly enriched if the plaintiff's claim is not enforced;155
(3) whether there was slight or flagrant violation of the law;156
(4) whether the unlawfulness was in the nature of the enterprise itself, rather than, for example, failure to procure a business license;157
(5) whether the unlawful activity or purpose was included in the terms of the contract or contemplated by the parties from the

149 Id. at 150-51, 308 P.2d at 719.
150 Id. at 157, 308 P.2d at 723.
151 Id. at 151-54, 308 P.2d at 719-21.
152 Id. at 158, 308 P.2d at 724.
153 See id. at 153, 158, 308 P.2d at 720-21, 724.
outset;\textsuperscript{158}

(6) whether the unlawful activity or purpose was wrong in itself \textit{(malum in se)} or merely wrong because prohibited by statute or common law \textit{(malum prohibitum);}\textsuperscript{159}

(7) whether the parties could have performed the contract lawfully had they desired to do so;\textsuperscript{160}

(8) whether the conduct of the parties was precisely what the invalidating statute was intended to prevent, for example, management of a partnership by one who cannot qualify under a licensing statute;\textsuperscript{161}

(9) whether the defendant is a member of the class the invalidating statute was designed to protect;\textsuperscript{162}

(10) whether, under peculiar circumstances, the granting of the relief sought will actually tend to discourage such transactions.\textsuperscript{163}

With such a long list of "other circumstances" to be considered with the fact of termination, it may seem doubtful that terminated transactions truly constitute an exception to the general rule of unenforceability of claims arising out of illegal transactions. However, there are many cases applying the reasoning of \textit{Norwood}\textsuperscript{164} and awarding restitution despite the illegality of the bargain.\textsuperscript{165}

Probably the best single-sentence expression of the law of this line of cases is found in \textit{Lewis & Queen v. N. M. Ball Sons};\textsuperscript{166} "In each such case, how the aims of policy can best be achieved depends on the kind of illegality and the particular facts involved."\textsuperscript{167} To state the same conclusion another way, each case is unique in some respects, and the basic objectives of doing justice between the parties on the one side, and protecting the public from illegal transactions on the other, must always be kept in mind.\textsuperscript{168}

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\textsuperscript{165} Cases cited notes 154-56 \textit{supra}.

\textsuperscript{166} 48 Cal. 2d 141, 308 P.2d 713 (1957).

\textsuperscript{167} \textit{Id.} at 151, 308 P.2d at 719. \textit{See also Nichols v. Boswell-Alliance Constr. Corp.}, 181 Cal. App. 2d 584, 5 Cal. Rptr. 546 (1960).

\textsuperscript{168} \textit{Norwood v. Judd}, 93 Cal. App. 2d 276, 209 P.2d 24 (1949), where the following admonition appears: "The rule that courts will not lend their aid to the enforcement of an illegal agreement or one against public policy is fundamentally sound. The rule was conceived for the purposes of protecting the public and the courts from imposition. It is a rule predicated upon sound public policy. But the courts should not be so enamored with the Latin phrase \textit{in pari delicto} that they blindly extend the rule to every case where illegality
Where the Forfeiture Would Be Disproportionately Large in Light of the Unlawfulness Involved

Where application of the general rule of unenforceability of claims arising out of illegal transactions would impose a serious forfeiture upon the plaintiff, as balanced against the nature of the illegality involved, California courts may allow recovery of damages for breach of the contract or restitution of consideration paid.\(^{169}\) In determining whether the plaintiff can recover under this exception, however, there are two other variables to be considered—namely, whether the defendant pleads the illegality, and whether the particular language of an invalidating statute declares the contract to be void and unenforceable.\(^{170}\)

Section 600 of the *Restatement of Contracts* expresses the rule as follows:

If neither the consideration for a promise nor the performance of the promise in an illegal bargain involves serious moral turpitude, and the bargain is not prohibited by statute, it is enforceable unless the plaintiff's case requires proof of facts showing the illegality, or they are pleaded by the defendant, and even in that event recovery may be allowed of anything that has been transferred under the bargain, or its fair value, if necessary to prevent a harsh forfeiture.\(^{171}\)

Most of the decided cases on this issue have involved licensing statutes, that is, the plaintiff was not licensed to perform the work promised, thus rendering the contract illegal.\(^{172}\) A short analysis of the language used in various statutes must be considered to avoid confusion in comparing cases.

Some statutes merely prohibit the defined activity, unless a proper license is procured, and impose administrative penalties, but do not declare contracts made by unlicensed persons to be unenforceable.\(^{173}\) In cases involving such statutes, if an unlicensed plaintiff obtains judgment upon a contract in which he agreed to perform the defined activity, an appellate court will not reverse the judgment if neither party raised the issue of illegality at the trial.\(^{174}\) This is contrary to the general rule that courts have the power and duty to raise an issue of illegality on their own motions whenever the evidence of either party discloses the possibility that an unlawful performance or purpose was involved.\(^{175}\)


\(^{171}\) *Restatement of Contracts* § 600 (1932).

\(^{172}\) Text accompanying notes 53-57 supra.


Furthermore, even if the defendant does plead the illegality as a defense, the court may award restitution to avoid a harsh forfeiture. The fact that only administrative penalties were imposed by the legislature gives the court an excuse for circumventing the general rule of unenforceability, when serious forfeiture would otherwise result.

Another class of licensing statutes imposes further sanctions by providing that no person engaged in the defined activity can maintain an action for services rendered without first alleging and proving that he was duly licensed at the time the cause of action arose. Under such a statute, a real estate broker may recover his commission for selling real estate, although he was not licensed when the contract was made, if he obtained a license before the listing agreement was finally executed, or before the commission became due. The legislature has fixed the time when the unenforceability of the illegal contract shall attach, and courts will follow its direction, even though statutory prohibition of an activity normally renders a contract involving such activity void and unenforceable from its inception.

Finally, section 7031 of the California Business and Professions Code imposes even further sanctions upon unlicensed building contractors:

No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract.

The California Supreme Court has construed this section to represent "a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business outweighs any harshness between the parties, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of the state." Nevertheless, a doctrine of "substantial compliance" has developed in an effort to apply the exception under discussion to contracts violative of even this explicitly harsh licensing statute. For example, an unlicensed partnership can recover compensation for services rendered, if the partners are individually licensed, or if the partner or partners

177 See Wood v. Krepps, 168 Cal. 382, 143 P. 691 (1914).
178 E.g., CAL. BUS. & PROF. CODE § 10136 (real estate brokers and salesmen).
180 Brenneman v. Lane, 87 Cal. App. 414, 262 P. 400 (1927).
183 CAL. BUS. & PROF. CODE § 7031.
184 Lewis & Queen v. N.M. Ball Sons, 48 Cal. 2d 141, 151, 306 P.2d 713, 719 (1957).
directly managing the work are licensed, even though others are not. The theory of recovery is that the purposes of the statute have been substantially fulfilled. Therefore, the slight public interest to be protected is outweighed by the forfeiture the plaintiffs would suffer if the contract were not enforced.

In a recent California Supreme Court case, a corporation was allowed to recover for excavation work although its contractor's license had expired during the project and was not renewed for almost a year. The court emphasized that the amount due was over $400,000, substantially all the corporation's assets. Recovery was allowed for three reasons:

1. The fact that plaintiff held a valid license at the time of contracting,
2. That plaintiff readily secured a renewal of that license and
3. That the responsibility and competence of plaintiff's managing officer was confirmed throughout the period of performance of the contract.

These factors amounted to "substantial compliance" with the licensing statute, and the plaintiff could recover on the contract, since otherwise the defendant would be unjustly enriched.

One may conclude that these cases are actually applying the statute literally and are merely finding the contracts not to be illegal. However, in another recent case, an unlicensed corporation doing business as a contractor, was denied recovery, even though its sole shareholder and responsible managing officer was individually licensed. The action was for anticipatory breach of a contract to construct a building. The court held the doctrine of "substantial compliance" to be inapplicable, since the defendant was not unjustly enriched. In other words, mere technical failure to comply with the licensing statute rendered the contract void, and a court can allow recovery under the doctrine of "substantial compliance" only to prevent serious forfeiture.

Statutes which would make a contract illegal and unenforceable are strictly construed to avoid that result when the moral delinquency of the parties is not serious. In construing this type of statute, the fundamental legislative purpose must be kept in mind. In one case, a real estate agent sued a developer for reasonable compensation for selling a tract of houses. The exclusive employment agree-

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188 Id. at 281, 411 P.2d at 567, 49 Cal. Rptr. at 679: "If the facts clearly indicate that the contractor has 'substantially' complied with the statute and that such compliance has afforded to the obligor the protection contemplated by the statute, we have rejected the obligor's attempt to escape liability."
189 Id. (4-3 decision).
190 Id. at 280, 411 P.2d at 567, 49 Cal. Rptr. at 679.
191 Id. at 281-82, 411 P.2d at 567, 49 Cal. Rptr. at 679.
192 Id.
195 Id. at 445, 49 Cal. Rptr. at 669.
ment between the parties did not provide a specific date of final and complete termination, as required by statute. An administrative agency was given power to impose a penalty for a real estate broker's violation of the statute. Yet, the illegality did not bar the broker's recovery.\textsuperscript{198} The statute prohibited the "practice" of making such agreements. There was no evidence that the broker habitually made the forbidden agreements, so the appellate court reversed the judgment for the defendant.\textsuperscript{199} The court concluded that, "If the law making body had in mind that all contracts made in violation [of the statute] should be void or voidable, it could have expressly so provided . . . .\textsuperscript{200}

Finally, another application of this exception to the general rule of unenforceability is found in cases where the invalidating statute affects only a small part of the total transaction. Even where the contract is not divisible (which would bring it under another exception to the general rule),\textsuperscript{201} the plaintiff will be awarded restitution of the consideration transferred, because the unjust enrichment of the defendant at the plaintiff's expense is a penalty too harsh in light of the slight unlawfulness involved.\textsuperscript{202}

**Stating the Cause of Action Without Revealing the Illegality of the Bargain**

Some courts have held that a plaintiff can recover upon a cause of action arising out of an illegal transaction if he can establish his claim without necessary reference to the illegality.\textsuperscript{203} If this is the law, it is another exception to the general rule of unenforceability of illegal contracts. It would permit plaintiff to recover whenever his attorney has sufficient writing skill to plead a cause of action without disclosing its illegal origin.\textsuperscript{204}

It is submitted, however, that this is not the law in California, but a misapplication of another principle, which was stated as follows in *Hooper v. Barranti*:\textsuperscript{205}

\textsuperscript{198}\textsuperscript{ Id.}
\textsuperscript{199} Id. at 478-80, 267 P.2d at 64-65.
\textsuperscript{200} Id. at 479, 267 P.2d at 65. This is an application of an exception to the general rule of unenforceability of illegal contracts, and not a finding that the contract was not illegal. *Accord*, Nichols v. Boswell-Alliance Constr. Corp., 181 Cal. App. 2d 584, 5 Cal. Rptr. 546 (1960), where a vendor repudiated a contract violative of the same statute before performance was completed. The plaintiff real estate broker recovered compensation for the executed portion of the contract, but could not enforce his claim for damages for the anticipatory breach.
\textsuperscript{201} Text accompanying notes 72-81 supra.
\textsuperscript{205} 81 Cal. App. 2d 570, 184 P.2d 688 (1947).
The test whether a demand connected with an illegal transaction is capable of being enforced is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot establish his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant.206

The second sentence of the above quotation is an accurate statement of the law,207 but its converse is not.208 In other words, the test of whether the plaintiff can establish his claim without disclosing his own unlawful purposes or activities is applied to render his cause of action unenforceable209 and his complaint void on its face.210 This does not mean that the defendant's plea of illegality will be disregarded merely because the plaintiff was able to allege sufficient grounds for recovery without disclosing the illegal aspects of the transaction.211

There are several cases, however, in which the court offers as an alternative reason for its decision the fact that the plaintiff's claim can be established without reliance upon the illegal contract.212 This element of the case makes the illegality appear more remote and thus helps to persuade the court that the general rule of unenforceability should not be applied.213 Consequently, a plaintiff should not fail to direct the court's attention to this circumstance, if it is present, even though a recognized exception to the general rule clearly applies.

**Conclusion**

The purpose of this comment has been to label, define, and explain exceptions to the general rule of unenforceability of claims arising out of illegal transactions. The reader should not conclude that the general rule is being consumed by the exceptions in California,

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206 Id. at 576, 184 P.2d at 692.
212 It should also be noted that, when neither party intends to raise the issue of illegality, the court has not only the power, but the duty, to raise and decide the issue on its own motion if the evidence of either side discloses the possibility of illegality in the bargain. Pacific Wharf & Storage Co. v. Standard Am. Dredging Co., 184 Cal. 21, 24, 192 P. 847, 848-49 (1920); Greene v. Brooks, 235 Cal. App. 2d 161, 168, 45 Cal. Rptr. 99, 103 (1965). To hold that a plaintiff can recover whenever he can plead his cause of action without disclosing the illegal nature of the transaction would directly conflict with this power and duty of the court. The two propositions are mutually exclusive.
because: (1) there are numerous recent cases in which the validity of
the plaintiff’s claim as between the parties is indisputable, but it is
held unenforceable for illegality, although the defendant is thereby
unjustly enriched;\textsuperscript{214} and (2) when the court does apply an exception
to the general rule, the argument always begins with the major
premise of unenforceability.

The California decisions have taken a liberal course and refuse
to follow blindly what would otherwise be a simple equation: illeg-
ality=unenforceability. Each case is carefully scrutinized to find the
proper balance between public policy and individual justice. Which
interest will prevail in any given case “... depends on the kind
of illegality and the particular facts involved.”\textsuperscript{215}

\textit{William S. Hunter*}

\textsuperscript{214} See, \textit{e.g.}, cases cited notes 14-21 \textit{supra}.
\textsuperscript{215} Lewis & Queen \textit{v. N.M. Ball Sons}, 48 Cal. 2d 141, 151, 308 P.2d 713,
719 (1957).

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