Restitutionary Recovery of Benefits Conferrred under Contracts in Conflict with Statutory Policy - The New Golden Rule

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RESTITUTIONARY RECOVERY OF BENEFITS CONFERRED UNDER CONTRACTS IN CONFLICT WITH STATUTORY POLICY – THE NEW GOLDEN RULE

BY JOHN D. McCamus

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I. INTRODUCTION

When agreements have been entered into that create a conflict with the letter or the spirit of a regulatory scheme of some kind, two problem sets emerge for resolution by the private law of obligations. The first relates to the very enforceability of the agreement itself. The second pertains to the consequences for the parties if the agreement is indeed held to be unenforceable. It is notorious that the common law has had considerable difficulty in dealing with both sets of problems sensibly. It is not abundantly obvious why this should be so as it will be argued here that the most attractive approach to the analysis of these problems is a relatively straightforward one. A good part of the explanation, however, must be that the main features of the law dealing with these questions were settled in a much less regulated environment than the one in which we now live. Speaking very broadly, the common law's approach has been to conclude rather easily that the agreement in question is unenforceable. Consequently, according to the traditional view, the parties are not only unable to enforce the agreement, but, in addition, are unable to seek the assistance of the courts in settling such consequential issues as the location of title to property transferred under such agreements or the entitlement to compensation for the value of benefits already conferred in performance of the unenforceable agreement. This "steadfast hands-offism" may have been more easily justified in an era when the commission of an offence, per se, was more likely a signal of significantly anti-social conduct than it is today. How else are we to explain the inflated rhetoric of the famous phrase, "No polluted hand shall touch the pure fountains of justice."\(^1\) The continued and remarkable growth of regulation in the modern era, notwithstanding

\(^1\)Collins v. Blantern (1767), 2 Wilson 341 at 350 per Wilmot C.J.
the occasional political popularity of attempts at "deregulation," has created an environment in which "steadfast hands-offism" simply leads to absurd results. For example, in one line of English authority, to be examined in detail in this paper, the mere fact that the parties failed to record the date of execution of their agreement in documents otherwise fully complying with the law led to the infliction of losses of thousands of pounds on apparently reputable and law-abiding citizens and, at the same time, the conferral of equivalent windfall benefits on others for which no sensible justification can be offered. It is not surprising, then, that the law in this area has attracted the attention of law reform bodies and, in one Commonwealth jurisdiction at least has been modified by statute.

Such reform is, however, unlikely to be universal and is, in any event, likely simply to instruct the courts to make a fresh start and fashion doctrine anew in the context of a statutory scheme conferring a broad discretion to do justice in the individual case. What is needed, therefore, whether in the absence of or in tandem with statutory reform, is a new analytical model for addressing these questions which will enable the courts to make reasoned and defensible departures from "steadfast hands-offism" and develop doctrine more in accord with contemporary circumstances and expectations. This article attempts to meet this need, in part, and suggests that appropriate solutions may be mined, especially in the Canadian context, from the application of traditional common law methods to the existing case law.

The first of these two problem sets — the question of enforceability — is the less complex of the two and will receive little

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2 The "Moneylenders Acts cases" discussed in Part IV of this article, at notes 100-67, infra.


5 Ibid., ss. 7(1) and (3).
attention here. In many instances, of course, the regulatory scheme in question will stipulate that the agreement at issue is unenforceable. Where this is not so, the problem obviously becomes more difficult, but it appears to be generally accepted that the proper method of analysis is that set out in the leading decision in *St. John Shipping Corp. v. Rank*. In that case, Devlin J. approached the issue by determining whether, in the light of the purposes and structure of the statutory scheme and against the background of the general policy of the common law of enforcing contractual obligations, courts should exercise their discretion to impose on the parties the common law sanction of rendering their agreement unenforceable. As the decision in *St. John* itself indicates, Devlin J. recognized that the sanction of unenforceability may be an ill-devised or unnecessary means for furthering the objects of the statute, and that in such cases the contract in question should be enforced. This influential decision has provided a policy-oriented and instrumental analytical model, offering a modern and thoughtful approach to the enforceability issue and providing a framework for reasoned departures from the "steadfast hands-offism" of the past.

Much less progress has been made in the judicial analysis of consequential issues, however, and it is to these questions — especially those of a restitutionary, rather than proprietary character — that the present article is addressed. The central problem to be confronted in the analysis of the restitutionary claims available to parties to unenforceable agreements in this context is that the common law has generally not found it possible to afford relief to the party whose conduct is in breach of or otherwise in conflict with the statutory scheme. As will be seen, a variety of devices have been developed to assist parties who are, in some sense, innocent of wrongdoing, but a party who is unable to rely on such devices is, in strict theory at least, unable to recover. It will be argued here that this is a critical deficiency in the restitutionary analysis of these problems and that it is a deficiency that has implications beyond the analysis of the restitutionary rights of the parties per se. In particular, the inability of the courts to analyze the restitutionary claims of parties in these situations satisfactorily has led to a

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similarly unsatisfactory analysis of the enforceability and passage of property issues in an effort to achieve what I suggest are "second-best" solutions to the problem at hand. For example, courts unable to grant restitution have been tempted to find the agreement itself enforceable so as to facilitate recovery of the value of benefits conferred even though such a holding is, at best, dubious. It will be suggested here that the *St. John Shipping Corp.* decision is itself an illustration of the phenomenon and is, in this respect, seriously flawed and wrongly decided.\(^7\) Similar difficulties have been exported into the analysis of proprietary issues because deciding that property has not passed is one possible means of depriving the intended recipient of some or all of the benefit thereof in a case where, otherwise, the transfer would come as a complete windfall since the transferor would be unable to assert a restitutionary right to the value of the benefit conferred.\(^8\) For this reason, resolution of this central deficiency of the restitutionary analysis of these situations appears to be a necessary precondition to clear thinking about the enforceability and passage of property issues. Accordingly, though some attention will be drawn to the proprietary question in what follows, discussion of restitutionary aspects of these problems will occupy centre stage.

The doctrinal explanation for the unwillingness of the common law to entertain restitutionary claims by parties whose conduct has rendered an agreement unenforceable in these situations is that it is assumed that the reasons that justify a refusal to enforce the agreement also, *ipso facto* justify a refusal to allow restitutionary relief. That is, if the plaintiff cannot enforce on the ground that *ex turpi causa (ex dolo malo) non oritur actio*, neither can he sue in restitution. The most frequently cited source of this proposition is the decision of Lord Mansfield in *Holman v. Johnson*.\(^9\) It is argued here that this approach ignores the essential differences between actions to enforce agreements and actions for restitutionary

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\(^7\)See, further, Part III, *infra*.

\(^8\)In other cases, however, a decision that property *has* passed may be taken in order to facilitate collateral proprietary relief for the plaintiff. See, further, Part IV, section C, *infra*.

\(^9\)(1775), 1 Cowp. 341, 98 E.R. 1120.
relief, and that it obscures the important contribution to be made to the analysis of these problems by the unjust enrichment principle. The general proposition is referred to variously here as "the general rule," "the rule in Holman v. Johnson," and, less charitably, "the Holman v. Johnson fallacy." To some extent, the Holman v. Johnson fallacy is part of a more sweeping failure on the part of English jurisprudence to recognize the independent theoretical basis of restitutionary claims.\(^{10}\) Accordingly, it will be argued here that the recognition by the Supreme Court of Canada of the independence of restitutionary law and its relationship to the unjust enrichment principle provides an additional justification, if indeed any is needed, for Canadian courts to develop a new approach to the analysis of these claims in the present context.\(^{11}\)

The discerning reader will have noted that although the issues adverted to thus far are commonly referred to in the literature and the case law as the problem of "illegality," that term has not yet been employed in this discussion nor in its title. This is intentional. The more general language of the title is meant to draw attention to the fact that these problems are not the exclusive preserve of the textbook category of "illegality" but that they arise as well, for example, in contexts normally referred to as "informality" and "ultra vires." This point is emphasized here for two reasons. First, the Holman v. Johnson fallacy has not clouded the analysis of these questions in these other areas. Courts have clearly distinguished between contractual and restitutionary liability and have usually made restitutionary remedies available to parties to agreements which are unenforceable on these other grounds. It is hoped that the law of illegality may draw some inspiration from the treatment of similar problems in these related areas. Second, and of no less importance, it is argued that no clear lines of demarcation can be drawn between "illegality" on the one hand and "informality" or "ultra vires" on the other. The legal artifacts giving rise to these problems do not fit neatly into these categories. Traditional "illegality" cases are thus merely points on a broader spectrum of

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\(^{11}\) See, further, the text at notes 201-05, infra.
contracts in conflict with statutory policy. Moreover, it is argued here that this entire spectrum of problems can best be resolved by the application of a uniform analytical model. As will be seen, however, this model is of particular assistance in illuminating the dark corners of the illegality jurisprudence.

The approach advocated here is nothing more than a recognition of the independence of the enforceability and restitutionary questions, coupled with the adoption in the restitutionary context of a policy-oriented and instrumental analysis of the kind applied to the enforceability issue by Devlin J. in *St. John Shipping Corp.* Once it has been determined that unenforceability of the agreement is an appropriate sanction to impose, a separate but parallel enquiry should be undertaken to determine whether restitutionary relief should also be withheld. It will be obvious that it is an underlying assumption of this thesis that there are cases where it is appropriate to hold the agreement unenforceable but to allow restitutionary relief to the party in conflict with the statute in question. More than this, however, it is suggested here that clearer recognition of this fact is a key that will unlock a number of the complexities currently plaguing the law relating to illegality.

The plan of the article is to first provide a brief and critical account of the rule in *Holman v. Johnson* and its exceptions, then to carefully scrutinize *St. John Shipping Corp.*, and finally to state the new golden rule approach and provide a sustained argument in favour of its adoption. Although the preoccupation throughout will be with statutory illegality, it will also be suggested that the golden rule approach is equally applicable to the restitutionary issues that arise when agreements are held unenforceable on grounds of illegality at common law.

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12 *Supra*, note 6.
II. THE HOLMAN v. JOHNSON PRINCIPLE: ITS CENTRAL FLAW AND ITS EXCEPTIONS

The general rule at common law is that money paid and other benefits conferred under agreements rendered unenforceable by reason of illegality cannot be recovered in quasi-contract or, as we would now say, in a restitutionary claim. The principle source of this general rule is a passage from the decision of Lord Mansfield in Holman v. Johnson\textsuperscript{13} that is frequently referred to and quoted at length in the case law and in secondary sources. It is best to let the famous passage speak for itself:

The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident if I may so say. The principle of public policy is this; 

\textit{ex dolo malo non oritur actio}. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise 

\textit{ex turpi causa}, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground that the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, \textit{potior est conditioni defendendi}.\textsuperscript{14}

The line of argument is clear and many have found it to be convincing. The same considerations that make the court unwilling to enforce the agreement are a sufficient basis, Lord Mansfield appears to believe, for denying all other forms of relief. This proposition is said to be "founded in general principles of policy"\textsuperscript{15} and to apply even though it may work an injustice as between the parties.

\textsuperscript{13}(1775), 1 Cowp. 341, 98 E.R. 1120.

\textsuperscript{14}Ibid. at 343 (Cowp.), 1121 (E.R.).

\textsuperscript{15}Ibid. the second sentence in the quoted passage.
The central fallacy in this line of reasoning is the apparent assumption that the policy considerations that might lead to a conclusion that the agreement should be considered unenforceable must necessarily lead to a denial of other forms of relief. It becomes apparent that this is not the case if one views the withholding of a particular kind of relief as the imposition of a sanction by the common law in order to provide a disincentive to a particular kind of conduct. The withholding of different kinds of remedies thus constitutes the imposition of different kinds of sanctions, and it is evident that the policy arguments for and against utilizing particular kinds of sanctions will vary to some extent from one type of sanction to the next. Thus, for example, the imposition of the sanction of unenforceability of the agreement has the consequence of rendering executory aspects of the agreement unenforceable by either party. It also makes it impossible for either party to recover the profits secured by the agreement or to indemnify themselves against losses occasioned by the other party's non-performance by means of an action for damages for breach of contract. A policy analysis of the desirability of imposing this kind of sanction would assess the desirability of imposing these kinds of consequences on the parties to the agreement. The withholding of restitutionary relief, on the other hand, has the single consequence of enabling a recipient of benefits under the unenforceable agreement to enjoy them without making payment for them at the contractual or any other rate. There may be cases, of course, where this is appropriate, but the point being made here is that the policy justification for imposing this outcome will be different from that which justifies the withholding of profits and the other consequences of the unenforceability of the agreement. Similarly, a different set of policy arguments must come into play if one is to determine that preventing the passage of property and withholding related proprietary remedies is an appropriate sanction to impose on either one or both of the parties.

If it is evident that the policy justifications for the imposition of these various types of sanctions will differ, it is also apparent that one might, in a particular context, conclude that the policy justifications weigh in favour of the imposition of one sanction, such as unenforceability, but do not extend to the imposition of another, such as the refusal to allow restitutionary relief. Thus, for example,
even where policy considerations suggest that unperformed aspects of the agreement should be held unenforceable and/or that it is appropriate to deprive the parties of any of the profits they may have secured from the agreement, it may still be sound policy to allow recovery of the value of benefits conferred thus far in a restitutionary claim where refusal to do so would yield unnecessarily harsh or otherwise inappropriate results in the circumstances of the particular case. Where this is so, the conferral of a windfall benefit on the defendant at the plaintiff's expense is palpably unjust and resort should be made to the general principle of the common law in favour of allowing recovery of the value of benefits conferred under ineffective transactions on the basis of the unjust enrichment principle.\textsuperscript{16} As Professor Wade demonstrates,\textsuperscript{17} there are serious arguments to be made both in favour of and against the granting of restitutionary relief in these cases, and it will not always be easy to strike an appropriate balance between a policy of providing additional sanctions against unlawful conduct on the one hand and the prevention of unjust enrichment, or as is sometimes said, the doing of justice between the parties on the other. The error of \textit{Holman v. Johnson}, however, is to assume that the balance is always to be struck in favour of the withholding of relief. It is an error that has been repeated many times in the application of this general principle and one that, it is argued here, is responsible for much of the complexity and apparent incoherence of doctrine in this area.

There is, to be sure, some irony in attributing so much of the blame for our current difficulty to Lord Mansfield's judgment in \textit{Holman v. Johnson}. In the first place, the decision itself deals solely with the question of the enforceability of the agreement at issue and, indeed, resolves that question in favour of permitting the agreement to be enforced, notwithstanding its somewhat unsavoury context. The language in the judgment, however, is much broader

\footnote{16}{The recovery of the value of benefits conferred under ineffective transactions is a large part of the law of restitution and it is therefore impractical to provide detailed references in support of the statement made in the text. A review of the treatment of this subject in the standard texts will, however, support the view that such claims are normally allowed. See, for example, Lord Goff and G. Jones, \textit{supra}, note 10, at cc. 17-25.}

\footnote{17}{J.W. Wade, "Benefits Obtained under Illegal Transactions -- Reasons for and against Allowing Restitution" (1946) 25 Tex. L. Rev. 31.}
than this, and it has certainly been interpreted by subsequent courts as an authoritative treatment of the question of the availability of restitutionary relief. Second, it is apparent from other decisions of Lord Mansfield that he did not himself take an absolutist view on this question. Rather, he was of the view that courts could and should exercise a discretion in illegality cases to determine whether to grant relief in some form.  

Thirdly, the most virulent version of the Holman v. Johnson fallacy holds that relief cannot be allowed in quasi-contract in cases where the contract is unenforceable on these grounds because the quasi-contractual claim is, at bottom, contractual in nature in the sense that it rests upon a contract implied to exist between the parties. It is thought that if the express contract is unenforceable by reason of illegality, then so, too, is the implicit one. Lord Mansfield did not himself suffer from the confusions generated by this misconceived "implied contract" theory of quasi-contractual liability. In his famous decision in Moses v. MacFerlan, he clearly indicated that so-called quasi-contract claims had an independent, non-contractual basis. In sum, it seems likely that Lord Mansfield would have been surprised by, and would have disagreed with, at least some of the judicial pronouncements that have purported to follow from the decision in Holman v. Johnson. 

It is generally accepted that there are four well-established exceptions to the Holman v. Johnson principle. First, recovery of the value of benefits conferred under the agreement is available to a plaintiff who is either ignorant of or mistaken with regard to the factual circumstances that render the contract illegal and unenforceable. The ignorance or misunderstanding, of course, must be bona fide and the plaintiff must resile from the transaction

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19 See, for example, Parker v. Mason, [1940] 4 All E.R. 199 per du Parcq L.J.

20 (1760), 2 Burr. 1005.

21 In addition to the treatment in the standard texts, see J.W. Wade, "Restitution of Benefits Acquired Through Illegal Transactions" (1947) 95 U. Pa. L. Rev. 261.

once aware of its illegal nature. In the initial English authority on point, the plaintiff was allowed to recover premiums paid to insure goods en route from Russia. The plaintiff was unaware that hostilities had broken out between Russia and England, thus rendering the contract unenforceable.

Second, recovery in restitution is allowed where the plaintiff can establish that the statutory scheme rendering the transaction unenforceable was enacted for the benefit of, or for the protection of persons in the plaintiff's situation. In the leading authority, *Kiriri Cotton v. Dewani*, the Privy Council allowed a tenant to recover "key money." The sum was extracted from him by a landlord in contravention of a provision of a rent control ordinance enacted for the very purpose of preventing exploitation of this kind. The plaintiff in such a case was said to be not *in pari delicto* with the defendant. Obviously, it would be inconsistent with the policy underlying the rule that renders the agreement unenforceable to refuse restitution. Canadian illustrations are to be found in the context of legislation regulating the health services professions and in other product safety and consumer protection contexts.

A third exception permits plaintiffs to establish that they are not *in pari delicto* with the defendant because their agreement was induced by the defendant's fraud, oppression, or undue influence. Although this exception evidently confers a broad discretion to permit relief where the defendant is the principal offender and the plaintiff has been victimized in some sense, there are not many

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23 Cowan v. Milbourn (1867), L.R. 2 Ex. 230; Clay v. Yates (1856), 1 H. & N. 73.


29*Clarke v. Shee* (1774), Cowp. 197.
 examples of its application to be found in the reported case law. The principal illustrations concern the extraction of extra payments by creditors as a condition of entering into a composition,\textsuperscript{30} monies paid to stifle prosecutions,\textsuperscript{31} and assets transferred with a view to defrauding actual or potential creditors.\textsuperscript{32} Application of the exception requires the courts to assess the relative blameworthiness of the two parties and the extent to which the plaintiff was a willing participant in a dishonest scheme. One point of difficulty in the cases concerns the question whether, in cases of fraud, the fact that the plaintiff's motives for entering the fraudulent transaction were also unworthy should preclude relief. Although there is English authority suggesting that it should,\textsuperscript{33} the Supreme Court of Canada\textsuperscript{34} appears to have taken the opposite view, and this appears to be the position in American law as well.\textsuperscript{35}

These first three exceptions deal with situations in which the plaintiff is either innocent or less guilty of wrongdoing than the defendant. The fourth exception is available to parties who, though initially in pari delicto, have had a change of heart and now wish to resile from the transaction. In such circumstances, provided that the agreement has not been wholly, or perhaps, substantially executed, and the illicit purpose has not been achieved, the repentant party is said to have a locus poenitentiae from which a restitutionary claim can be launched.\textsuperscript{36} The precise meaning of "execution" of the agreement has proved to be controversial, as has the extent to which

\textsuperscript{30}Smith v. Cuff (1817), 6 M.& S. 160.


\textsuperscript{34}Supra, note 32.

\textsuperscript{35}J.W. Wade, supra, note 21 at 276.

the plaintiff must be able to demonstrate a genuine change of heart. We will return to these points. For the present, it is sufficient to note that the exception will not be available once the agreement has, in some sense, been performed.

In addition to these four exceptions recognized at common law, English and American courts have occasionally suggested that there is a further exception, equitable in origin, which would make relief available on grounds of "public policy" in cases where the common law would not intervene. 37 Examples from the English cases include the recovery of monies paid under marriage brokerage contracts, 38 trafficking in public offices, 39 frauds on settlements, 40 cases in which the court is exercising jurisdiction over one of its own officers 41 or is, for some other reason, in control of the benefit that passed under the transaction and must therefore do something with it, 42 and cases where refusal to grant relief would unfairly prejudice third parties. 43

In recent history, however, English and American courts have been reluctant to rely on this equitable discretion. 44 Almost without exception, the English authorities are drawn from the 18th and early 19th centuries, and Goff and Jones have questioned whether the principle would be applied to other cases besides the recovery of


40 Gay v. Wendow (1687), 2 Freeman 101.

41 Re Thomas, [1894] 1 Q.B. 747.


44 Lord Goff and G. Jones, supra, note 37; J.W. Wade, supra, note 37.
monies paid under a marriage brokerage contract. To date this is the equitable exception's only modern application.

Finally, subsequent courts have stressed that the Holman v. Johnson principle only applies, in Lord Mansfield's words, to a plaintiff "who founded his cause of action on an immoral or illegal act," and would not preclude the bringing of what are sometimes referred to as "collateral claims" which can be asserted without relying on, or as it is sometimes said, without being required to plead the illegal act. Such claims might be proprietary, tortious or, indeed, contractual in nature. Thus, in one case, a builder who performed renovations without the requisite ministry approvals was held to be entitled to enforce the defendant's collateral agreement to obtain such approvals. In Bowmakers v. Barnet Instruments, an owner of goods let out under an illegal hire-purchase agreement was held to be entitled to sue in conversion when the owner refused to either pay rent or return the goods. In the recent case of Saunders v. Edwards, the English Court of Appeal held that the purchaser of a leasehold interest in a flat could sue for damages flowing from a fraudulent misrepresentation relating to the virtues of the premises, notwithstanding the fact that the agreement was possibly tainted by the parties' inflation of the value of chattels included in the sale in order to avoid stamp duty. The enforcement of these collateral rights is no doubt better viewed as a limitation of, rather than an exception to the Holman v. Johnson principle. Nonetheless, this is obviously one device which affords some relief to a party in pari delicto and this is also a point to which we shall return. At this point, it must be emphasized that whatever meagre

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45 Lord Goff and G. Jones, supra, note 10 at 420.

46 Holman v. Johnson (1775), 1 Cowp. 342, 98 E.R. 1120 at 343 (Cowp.), 1121 (E.R.).


protection is afforded to in pari delicto parties under this rubric appears to be the only relief available to such parties under the jurisprudence spawned by the Holman v. Johnson principle.

III. REASSESSING ST. JOHN SHIPPING

The facts of St. John Shipping Corp. v. Rank\textsuperscript{50} are sufficiently well known that they need be adverted to only very briefly. A claim for freight charges was brought by a carrier against the owners of cargo conveyed by the carrier in a transatlantic voyage. The defendant resisted the claim on the ground that the plaintiff's ship was overloaded during the voyage, in breach of the provisions of the Merchant Shipping Act, and was submerged by more than eleven inches over its load line at the time of its arrival in the U.K. Although this breach of the Act exposed the shipper to a fine and, indeed, would expose the master of a British ship to imprisonment, the maximum fine that could be levied under the Act was, in the defendant's view, inadequate to act as an effective disincentive for illegal conduct of this kind. Although the Act imposed a fine that was meant to reflect the court's estimate of the extent to which the shipper profited from his or her breach of statute, the Act further stipulated that the fine could not exceed a maximum of £100 per inch or fraction of an inch by which the load line was submerged. Thus, although it was estimated in the present case that the extra freight earned by the shipper through overloading was £2,295, the maximum fine that could be imposed on the shipper was £1,200. In these circumstances, the defendant and another cargo owner resolved to inflict their own punishment on the shipper by withholding amounts totalling £2,295. The defendant withheld £2,000 and defended this action on the basis that the illegal mode of performance of the agreement rendered the contact of carriage on which the plaintiff brought his claim illegal and unenforceable at common law.

Devlin J. rejected this analysis and, in so doing, provided a model for the proper analysis of arguments of this kind. Devlin J.

\textsuperscript{50}[1956] 3 All E.R. 683 (Q.B.).
began by drawing a fundamental distinction between contracts entered into with the object of committing an illegal act as opposed to contracts which are expressly or impliedly prohibited by statute.\(^5\)

In the former category of case, such agreements will be unenforceable if it is established that either or both of the parties intended, at the time the contract was entered into, to accomplish the commission of an offence. In analyzing cases in this category, resort must be made to the statutory prohibition to determine whether or not the act or objective intended was in fact prohibited by the statute.

In the second category of cases, the issue is whether or not the particular contract is prohibited expressly or by implication. If the contract is prohibited, it is unenforceable, and it matters not what the intention of the parties might have been at the time of its creation. By "prohibit," Devlin J. appears to mean nothing more and nothing less than the familiar notion more usually referred to as a situation in which the statute "renders" the contract "illegal" or "unenforceable." There are some statutes, of course, which explicitly render particular kinds of agreements illegal or, more typically, "unenforceable," but there are many other situations in which the central question must be whether the contract conflicts with the policies of a statutory scheme to so great an extent that the courts should refuse to enforce the agreement on the ground that it is implicitly prohibited or rendered illegal by the statute.

It is evident that the facts of \textit{St. John Shipping} make it a potential candidate for this last category of illegality. The parties did not intend, at the time they entered into the contract, to commit an offence. The statute in question does not explicitly prohibit or render contracts of carriage illegal. Nonetheless, it can be and was argued that as the plaintiff engaged in an illegal mode of performance, the plaintiff is not entitled to rely upon the agreement and sue to enforce it. As Devlin J. indicated, this argument raises what is at least partially a question of statutory construction in the sense that it is necessary to articulate the objectives of the Act's scheme and consider the implications for that scheme of the courts' refusal to enforce transactions of the particular kind at issue. One

\begin{footnote}{\textit{Ibid.} at 687.}\end{footnote}
must ask, in effect, whether the additional sanction of rendering the particular agreement at issue unenforceable is so consonant with the explicit features of the statutory scheme that the courts ought to impose it or, as Devlin J. would have it, should infer that the statute prohibits this kind of transaction.

More than this, however, Devlin J. insisted that the foregoing analysis was to take place in the light of a more general concern that "the courts should be slow to imply the statutory prohibition of contracts and should do so only when the implication is quite clear."\(^5\) In adopting this attitude, Devlin J. relied on the following statement of Lord Wright from *Vita Food Products Inc. v. Unus Shipping Co. Ltd.*\(^5\)

Nor must it be forgotten that the rule by which contracts expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.

Devlin J. went on to say that "It may be questionable also whether public policy is well served by driving from the seat of judgment everyone who has been guilty of a minor transgression."\(^5\)

In applying these general principles to the facts of *St. John Shipping*, Devlin J. indicated the nature and general importance of the underlying policies in the statute, assessed the adequacy of the sanctions against this particular form of wrongdoing explicitly set forth in the statute, and considered the appropriateness of the unenforceability of contracts of carriage as an additional sanction for misbehaviour of this kind. Devlin J. noted that he did not regard an offence against a statute "as a trivial matter, particularly if it is committed deliberately, and if the safety of lives at sea is involved."\(^5\)

Further, he indicated that the statutory provision of fines did not provide an adequate disincentive for misconduct inasmuch as the

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\(^5\)Ibid. at 691.

\(^5\) [1939] A.C. 277 at 293.

\(^5\) Supra, note 50 at 691.

\(^5\)Ibid. at 685.
statutory limit of £100 per inch was no longer sufficiently high to permit the courts to recapture profits secured by the overloading of ships. Nonetheless, he felt that the imposition of the further sanction of unenforceability of contracts of carriage was inappropriate for the following reason:

It is a misfortune for the defendants that the legal weapon which they are wielding is so much more potent than it need be to achieve their purpose. Believing, rightly or wrongly, that the plaintiff had deliberately committed a serious infraction of the Act and one which has placed their property in jeopardy, they wish to do no more than to take the profit out of his dealing. But the principle which they invoke for this purpose cares not at all for the element of deliberation or for the gravity of the infraction and does not adjust the penalty to the profits unjustifiably earned. The defendants cannot succeed unless they claim the right to retain the whole freight and to keep it whether the offence was accidental or deliberate, serious or trivial. The application of this principle to a case such as this is bound to lead to startling results.

Devlin J. went on to illustrate the possible mischief of a rule of this kind by referring to a number of other statutory contexts in which contract unenforceability would be a rather draconian response to particular forms of wrongdoing. Devlin J. did not feel that the defendants' position would be improved by arguing for a pro rata reduction of their own obligations to reflect a proportionate share of the excess profits earned by the plaintiff. The explanation for this rejection of what might otherwise seem to be an attractive solution appears to be that the principle argued for by the defendants, i.e. that the agreement is unenforceable, would not provide a basis for a pro rata division of this or any other kind.

The judgment of Devlin J. in St. John Shipping has become a leading authority, principally because of its straightforward analysis of underlying policy concerns and its resistance to the widespread application of illegality doctrine in the context of the modern regulatory state. Contracts teachers often include excerpts from the opinion in their teaching materials and, presumably, offer a

56 Ibid. at 686.
57 Ibid. at 693-94.
complimentary assessment of the analytical framework set out by Devlin J. in his reasons for judgment. It may seem churlish to some, therefore, to suggest that the analysis in *St. John Shipping* is less than fully satisfactory. At best, the reasoning is incomplete and at worst, perhaps, some might think that the case was not, in fact, correctly decided. The seeds of the problem are revealed by a comparison of *St. John Shipping* with the intriguingly similar problem addressed by the Court of Appeal in *Ashmore, Benson, Pease & Co. Ltd v. A.V. Dawson Ltd.* This was also a case in which a carrier, in this instance a carrier on land, engaged in a practice of overloading in breach of the applicable regulatory statute. In this case, however, the Court of Appeal held that the contract of carriage was, although lawful in its inception and creation, illegal and unenforceable because of the illegal mode of performance. The defendant carrier had contracted to transport a large piece of engineering equipment manufactured by the plaintiff. When the equipment was loaded onto the defendant’s truck, the total weight of the load exceeded the amount permitted by statutory regulation by five tons. Half-way to its destination, the vehicle tipped over with resulting damage to the equipment. The plaintiff sued the defendant carrier, alleging that the accident resulted from the driver’s negligence and that the defendants were therefore liable either in tort or under the contract of carriage for the injury sustained by the equipment.

The underlying factual pattern of the *Ashmore* case is thus similar to that of *St. John*. There is, however, one distinguishing feature. At the time of the loading of the equipment, one of the plaintiff’s employees was present and, according to the Court of Appeal, it must have been evident to this person that the truck was overloaded. This was held by the Court to constitute a participation in the illegal mode of performance by the plaintiff. On these facts, the defendant successfully argued that the illegal mode of performance rendered the contract illegal and unenforceable and that the plaintiff’s participation in the illegality disabled it from suing not only on the contract, but in negligence as well.

In two very similar cases, then, courts came to different conclusions. In *St. John* the agreement was held to be enforceable and, in *Ashmore*, it was not. It is of interest for present purposes to note that when the claim, as in *St. John*, was for the value of a service successfully rendered, it was allowed, whereas in *Ashmore*, where the claim was not for the value of benefit conferred but for consequential loss, it was disallowed. One must ask whether the impulse underlying the analysis in *St. John Shipping* would not have been better served by the granting of relief in *quantum meruit* for the value of services rendered. It is of interest to speculate whether the agreement in *St. John* would have been found by Devlin J. to be binding in all circumstances. The *Ashmore* case strongly suggests that it would not have been. Indeed, it is difficult to believe that a court would hold the agreement in *St. John Shipping* binding at an executory stage if, for example, the owner of the cargo discovered the overloading at the point of departure and insisted that his goods be removed from the vessel. If, as seems likely, courts would hold the agreement illegal and unenforceable when executory but would still want to allow recovery for the value of services successfully rendered, the obvious analytical device for accomplishing this objective is to hold the agreement unenforceable but allow claims in restitution for the value of services rendered. It may be argued, then, that the analysis of *St. John Shipping* is misconceived or, to put the point more modestly, is incomplete inasmuch as it fails to consider the possibility of striking down the agreement while still allowing the carrier to sue for the value of services rendered in *quantum meruit*.

Two objections to this attack on *St. John* may be offered. First, it may be said that the alleged conflict between *St. John* and *Ashmore* is not as intense as suggested above because of the knowledge and participation of the plaintiff in the illegal mode of performance in the *Ashmore* case. This is not, however, a material distinction between the two cases. The point of difficulty in each case is whether a party who is *in pari delicto* can assert the claim in question. The plaintiff carrier in *St. John* and the plaintiff equipment owner in *Ashmore* both participated in an illegal mode of performance. One succeeded in enforcing its claim; the other failed. If the *Ashmore* plaintiff had not been a participant in the illegality,
it is trite that the plaintiff should be able to enforce the agreement. The point of difficulty that arises in reconciling the two cases is that the plaintiffs in each instance are *in pari delicto*.

A second objection that might be taken is that the attack assumes that, as a general matter, a contract should be determined to be either enforceable or not, and that this is in some sense too wooden an approach. Why not say that the contract is enforceable when the carrier sues to recover his fees, but say that it is not enforceable when a claim for consequential loss arises? The answer to this objection, of course, is simply that the concept of intermittent enforceability is perhaps a conceivable notion, but not one that is conducive to clear thinking about these questions or predictable judicial decision-making. We could say that whenever the claim is essentially one of unjust enrichment, the contract will be enforced. Yet, even with respect to such claims, would we always want to enforce the precise terms of the agreement? If the carrier in *St. John Shipping* had secured very advantageous payment terms as a result of which the delay in payment had substantially escalated the payment obligation, would we wish to give the carrier the advantage of such terms? I think not. A more attractive analysis of the relationship, then, would be that the agreement in *St. John* is unenforceable but the carrier is nonetheless allowed, for the reasons advanced by Devlin J., to sue in *quantum meruit*. It might be added that, notwithstanding Devlin J.'s views to the contrary, many might find it attractive to reduce the *quantum meruit* claim on a *pro rata* basis in such a way as to eliminate the plaintiff's ill-gotten gains. At the very least, then, this is an option that should have received some consideration in the *St. John* case.

The explanation for Devlin J.'s failure to consider *quantum meruit* as an alternative is interesting. In the following discussion in which Devlin, J. offers a justification for the general principle that unlawfully performed contracts are as unenforceable as prohibited contracts it becomes apparent that Devlin J. is an adherent of the extreme version of the *Holman v. Johnson* fallacy:60

60See the text at notes 13-20, *supra*.
the contract is unenforceable by either party]. It must likewise fall within it if the contract is implied. If, for example, an unlicensed broker sues for work and labour, it does not matter that no express contract is alleged and that the claim is based solely on the performance of the contract, that is to say, the work and labour done; it is as much unenforceable as an express contract made to fit the work done. The same reasoning must be applied to a contract which, though legal in form, is performed unlawfully.\textsuperscript{61}

In the midst of this well-reasoned and, indeed, illuminating judgment, we thus have a remarkably mechanistic piece of analysis. Devlin J. argues that just as one cannot sue for \textit{quantum meruit} for work performed under a prohibited contract, one cannot sue for the value of an unlawful performance of an otherwise lawful contract. Both steps in the analysis are faulty. The major point of this article is to demonstrate that there is no necessary connection between the unenforceability of the contract and the inability to recover in \textit{quantum meruit}. Indeed, there will be many cases in which sound policy will dictate that \textit{quantum meruit} relief will be available notwithstanding the unenforceability of the contract. Further, there appears to be no logical connection between the Holman v. Johnson fallacy and the general principle that unlawfully-performed agreements are also generally unenforceable.

Given Devlin J.'s apparent assumption that there can be no relief in \textit{quantum meruit} where the contract is found to be illegal, it is not at all surprising that in \textit{St. John}, he concludes in due course that the contract is enforceable. For Devlin J., this appears to be the only device available for avoiding the unattractive conclusion that the commission of even a trifling offence would result in the shipowner's inability to collect any of the freight charges for the voyage in question. Had Devlin J. assumed that \textit{quantum meruit} relief might be available, one suspects that he might well have found the contract to be enforceable.

\textsuperscript{61}Supra, note 50 at 687-88.
IV. THE CASE FOR THE NEW GOLDEN RULE

A. Introduction

The new golden rule approach to the analysis of restitutionary claims under illegal agreements requires simply that the plaintiff's entitlement to the value of what would otherwise be a windfall for the defendant at his expense be assessed in the light of the purposes and structure of the statutory scheme or rule rendering the underlying transaction unenforceable.\(^6\) The court must consider whether the imposition of the additional sanction of rendering restitutionary relief unavailable is either necessary or so highly desirable for the proper implementation of the statutory policy that the common law's general policy of restoring the value of benefits conferred under ineffective transactions ought to be suppressed. As in *St. John Shipping*,\(^6\)\(^3\) it would no doubt be appropriate for a court to consider whether the sanctions imposed in the statutory scheme itself constitute so sufficient a disincentive to unlawful conduct that further sanctions of this kind are not necessary. A court would also consider whether this particular sanction is suited to the crime or misconduct in question. As well, the court would wish to look at such considerations as the relative fault or immorality manifest in the conduct of the parties, the gravity of the offence or conflict with the statutory scheme in question, the extent of the injury to the public interest caused by the particular transaction, and the degree to which the conferral of a substantial windfall on the defendant appears to be unacceptable for these or other reasons.

This section of the article argues for a more explicit recognition of the golden rule approach and more particularly, for recognition of the fact that its application may lead, from time to

\(^{62}\) Hence the appellation, "golden rule" approach. For a classic exposition of the "golden rule" approach to statutory interpretation, see J. Willis, "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1.

\(^{63}\) *Supra*, note 50.
time, to the granting of restitution to parties who are *in pari delicto*. In what follows, an attempt will be made to catalogue a number of difficulties that appear to be the product of a failure to recognize the force of this point. As well, it is argued that the golden rule approach is nonetheless manifest in many aspects of the traditional doctrine in this area, and has, in recent years, been manifest in a greater willingness of the courts to ignore the traditional doctrine and grant restitutionary remedies to plaintiffs who are *in pari delicto*.

B. *Relieving the Pressure on the Unenforceability Rule and the Exceptions to Holman v. Johnson*

It was argued above\(^6\) that the case law tends to conclude that the agreement at issue is enforceable in circumstances where such a holding is dubious, for the apparent reason that this offers the only basis for permitting the party *in pari delicto* to recover the value of benefits conferred through performance of the agreement. Indeed, it was suggested that *St. John Shipping* itself is an illustration of this phenomenon. These points will not be repeated here but it is appropriate to emphasize that this distortion of the boundary between enforceable and unenforceable agreements is a persuasive reason for straightforwardly recognizing the restitutionary rights of parties in such circumstances. The unenforceability sanction can then be left to the work it is suited for, the rendering of executory portions of the agreement unenforceable and the withholding of the benefits that would otherwise flow from an action for damages for breach of contract.

A similar argument can be made with respect to pressures exerted on the exceptions to *Holman v. Johnson*\(^6\) by the traditional assumption that a party to an unenforceable agreement can have no relief unless one of the well-recognized exceptions is applicable. Thus, where a court is sympathetic to the restitutionary claim of a party *in pari delicto*, the temptation exists to expand the exceptions in such a way as to embrace the particular plaintiff without doing

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\(^6\) Part III, *supra*.

\(^6\) *Supra*, note 13. And see, Part II, *supra*. 

violence to the general principles underlying the exception at issue. Two illustrations of this phenomenon are briefly considered here — the *locus poenitentiae* exception and the enforcement of collateral rights — with a view to making two points. First, it is suggested that this approach leads to complexity and uncertainty concerning the nature and scope of these exceptions. Second, it is argued that expansion of the exceptions is not a device that is likely to successfully resolve the central problem addressed here, the unavailability of restitutionary relief to the *in pari delicto* plaintiff.

1. The *locus poenitentiae* exception

The ambiguities and complexities with which this exception has become encrusted have been recently and thoroughly canvassed elsewhere, and it is unnecessary to repeat that analysis here.\(^6\) The important point for present purposes is that to some extent, at least, these complexities reflect a tension between a tendency to expand the exception to accommodate more attractive plaintiffs and a tendency to contract the exception where the plaintiffs are less attractive. The case law on the question of when "execution" of the agreement has occurred is illustrative. Consider the following three leading cases. In *Taylor v. Bowers*,\(^7\) a financially embarrassed plaintiff had entered into an agreement to transfer his stock in trade to another in order to defeat his creditors. The stock was delivered and, indeed, subsequently retransferred to another party, the defendant, by the first transferee. Prior to the eventual sale by auction of the debtor's assets, he repudiated the transaction in question and sought recovery of the stock in trade. In *Kearley v. Thomson*,\(^8\) the defendants were solicitors who had acted for a petitioning creditor in bankruptcy proceedings. A friend of the bankrupt offered to pay for these services, knowing that they would probably otherwise go unrewarded, in return for an undertaking that

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\(^7\) (1876), 1 Q.B.D. 291.

\(^8\) (1890), 24 Q.B.D. 742.
the solicitors would not attend at the public examination of the bankrupt and would not oppose his discharge. In the event, the solicitors did not appear at the public examination but before discharge the friend sought return of the monies paid in effect as a bribe to them. In *Hermann v. Charlesworth*, the plaintiff sought recovery of moneys paid to the defendant marriage broker. A number of introductions had by then been arranged, but no marriage had taken place.

If one asked whether in each of these three cases, the agreement had been "executed" or its purpose had been substantially accomplished, it is not obvious what the answer should be. In each case, the plaintiff has done all that was required to be done under the agreement; the defendant has completed a substantial portion of the illicit performance and, in each case, the ultimate objective of the agreement has not yet been achieved. One might expect, then, that a rule based on a coherent definition of "completion" of the agreement or its objective would yield the same result in each case. On the other hand, the golden rule approach would suggest that some claims are more attractive than others. If the plaintiff is not allowed to recover in *Taylor v. Bowers*, it is the other creditors, rather than the plaintiff, who will pay the price of failure, and a strong case for recovery is thus made out on policy grounds. In *Kearley v. Thomson*, although the correct analysis is not perfectly obvious, it seems unlikely on policy grounds that we would favour the recovery of monies paid as a bribe. In *Hermann v. Charlesworth*, on the other hand, one can easily articulate the policy grounds in favour of recovery by the client who now regrets an arrangement that may be viewed as an exploitative one. Perhaps it is not surprising, then, that the courts found that there was sufficient execution to preclude recovery in *Kearley v. Thomson* but not in either *Taylor v. Bowers* or *Hermann v. Charlesworth*. While the results of these cases are therefore probably satisfactory to many, the resultant notion of "execution" is an incoherent one which does not easily yield to confident application to new fact situations. The adoption of a new golden rule approach to the analysis of these cases would substitute for the expansion and contraction of the

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69[1905] 2 K.B. 123.
concept of "execution" a more direct analysis of the merits of the dispute.

While it would be possible to argue for an expansion of the notion of "execution" as a "second best" solution to the problem addressed in this article, it should be noted that this path for reform in the area is a precarious one. Notwithstanding a history of some leniency in the reported case law, there is likely to be a countervailing tendency in the courts to reassert the underlying premise of the exception which is one of protecting parties who are, in some sense, significantly less morally culpable than the defendant. This point can be demonstrated by reference to the question whether a plaintiff can invoke the exception in a case where the "repentance" has come only after it has become clear that the object of the agreement has been frustrated by the defendant or by external events. In the controversial decision in Bigos v. Boustead, it was held that the exception would not lie in such circumstances. The claimant Englishman had entered into an agreement with an Italian to avoid English currency controls. The Italian was to provide financial support for the claimant's spouse and child during a sojourn in Italy in return for repayment of an equivalent amount in English currency. The claimant had pledged securities to secure the promise of repayment. When, ultimately, the Italian money was not made available, the claimant sought return of the security pledged. The court refused recovery on the ground that the agreement had become frustrated and that the plaintiff's conduct did not manifest any genuine repentance of the illicit scheme. It is obvious that a requirement of this kind will limit the scope of the exception to a very narrow range of cases, and for this and other reasons, the decision in Bigos v. Boustead has been criticized. Nonetheless, whatever be the ultimate fate of this particular holding,

70 See, for example, J.K. Grodecki, "In Pari Delicto Est Conditio Defendentis" (1953) 71 L.Q.R. 254. A sustained critique of the various limits on the notion of execution is to be found in Merkin, supra, note 66 who concludes at 444 that "the execution exception has done little to achieve equity" and calls for a general rule favouring the availability of relief as a preferable device for achieving this objective.

71 [1951] 1 All E.R. 92.

72 See, for example, Grodecki supra, note 70; Merkin, supra, note 66.
the tendency to restrict the focus of the exception in such a way as to avoid assisting in pari delicto parties is likely to be an enduring one as long as the exception is required to peacefully co-exist with the Holman v. Johnson principle.

2. The enforcement of collateral rights

The illustrations provided above of the enforcement of collateral rights in contract and property strongly suggest the courts' willingness to manipulate doctrine in such a way as to secure indirectly the relief that Holman v. Johnson appears to deny. Thus, the collateral agreements found to exist in the contracts cases\footnote{Strongman (1945) Ltd v. Sincock, [1955] 2 Q.B. 525; Archbold's (Freightage) Ltd v. Spanglett Ltd, [1961] 1 Q.B. 374 (C.A); Munro v. French (1979), 103 D.L.R. (3d) 91 (Sask. Q.B.). And see the text at note 47, supra. See also, the tort cases referred to in note 49, supra, in which the courts openly take into account the relative fault of the parties, the gravity of the wrongdoing and so on in determining to grant or withhold collateral tortious relief.} are a transparent, though admirable device for avoiding the harsh consequences of Holman v. Johnson. They are not, however, the product of a straightforward attempt to give effect to the contractual intentions of the parties. The availability of relief which is dependent upon artfulness of this kind is rather unpredictable.

Similarly the decision in Bowmakers v. Barnet Instruments\footnote{[1945] KB. 65 (C.A.). And see the text at note 48, supra. See also Belvoir Finance v. Stapleton, [1970] 3 W.L.R. 530 (C.A.).} appears to be a somewhat agile application of existing doctrine with the object of preventing the defendant's enrichment by granting proprietary relief to the plaintiff. The plaintiff purchased machine tools and delivered them to the defendant under three separate hire-purchase agreements. The initial purchase and the agreements with the defendant were all unenforceable. The defendant stopped making payments, resold the tools covered by the first and third agreements to third parties and refused to restore those covered by the second agreement to the plaintiff. In order to grant relief to the plaintiff in conversion, it was necessary for the court to assume that property in the tools had passed to the plaintiff under the initial agreement and, further, to ignore a particular problem pertaining to those tools covered by the second agreement. The
only possible basis for recovery of those tools that were retained by the defendant would appear to be non-performance of the illicit agreement, thus making it difficult to sustain the argument that the plaintiff is not, in some sense, relying on the illicit agreement in establishing the proprietary cause of action. Although the decision has been subjected to criticism on these two grounds, it has also been stoutly defended,\textsuperscript{75} no doubt for the reason that it provides an avenue for relief in a case where Holman v. Johnson appears to stand in the way of a straightforward restitutionary claim.

Even if one accepts the Bowmakers line of authority to be correctly decided, however, it does not offer a satisfactory device for expanding the scope of relief available to \textit{in pari delicto} parties. The availability of relief is dependent on the happenstance of the manner in which the proprietary aspects of the impugned transaction have been structured. Thus, if there had been an outright sale to the defendant in Bowmakers, no relief would be available. Similarly, the owner of pledged goods would not be able to recover their value.\textsuperscript{76} The pattern of relief is thus incoherent. Moreover, the effect of granting proprietary relief is, of course, to give a priority over unsecured creditors in the event of an insolvency. This may often be rather more protection for the \textit{in pari delicto} plaintiff than the circumstances warrant. Finally, and this point will be developed in the next section of the article, the use of proprietary doctrine to solve what are essentially restitutionary problems will complicate the already subtle questions relating to the passage of property interests under illegal agreements.

In summary, then, the evident difficulties that the courts have experienced in delivering relief in some form to the \textit{in pari delicto} plaintiff appear to have distorted both the analysis of the threshold question of enforceability and the contours of the

\textsuperscript{75}B. Coote, "Another Look at Bowmakers v. Barnett Instruments" (1972) 35 M.L.R. 38. See also, C.J. Hamson, "Illegal Contracts and Limited Interests" (1949) 10 Camb. LJ. 249.

\textsuperscript{76}Taylor v. Chester (1869), L.R. 4 Q.B. 309, which was distinguished in Bowmakers on the basis that in Taylor v. Chester, the plaintiff, who had pledged a half-note to the defendant to secure a debt incurred in return for an immoral consideration, could only defeat the defendant's reliance on the apparent validity of the pledge by pleading the immoral consideration. In Bowmakers, it is alleged, it is the defendant who must first raise the illegality as part of the defence.
exceptions to the *Holman v. Johnson* principle. Straightforward recognition of the possibility of restitutionary claims would thus prepare the way for a more coherent analysis of these inter-related questions.

C. Divorcing Restitutionary Concerns from the Analysis of the Property Passage Issue

A full assessment of the question of whether property interests, be they entire or special, can pass under an illegal agreement is beyond the scope of this article. Nonetheless, brief treatment must be accorded this issue as it is closely related to the subject at hand and, moreover, the desirability of divorcing restitutionary considerations from the analysis of the proprietary question constitutes yet another reason for plainly admitting of the possibility of restitutionary claims for parties *in pari delicto*.

It is now no longer possible, if indeed it ever was, to confidently describe the position taken by Anglo-Canadian law on the property passage issue.\(^7\) The traditional view combined "steadfast hands-offism" with a belief that inasmuch as illegal contracts were a nullity, no property rights could be created by them. Neither party, including the true owner, could invoke the assistance of the courts in enforcing proprietary rights.\(^8\) Thus, the traditional view assumes that in the case of an illegal lease, for example, though no enforceable interest will pass to the lessee, the landlord will not be able to bring an action to eject a tenant in

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possession. On the other hand, there is a modern line of authority, which draws some support from earlier authority, to the effect that property interests do pass under illegal contracts either by delivery of possession or, as was held in Belvoir Finance v. Stapleton, through execution of the agreement itself. In the leading case, Singh v. Ali, the Privy Council held that property would pass under an agreement for the sale of a lorry notwithstanding the fact that the parties intended to deceive the transport authorities by retaining registration of the vehicle in the seller's name. The seller had subsequently retaken possession of the vehicle and the purchaser was allowed a claim in trespass. Even a cursory examination of the underlying policy considerations reveals much to be said in favour of the passage of property interests. It avoids the creation of unenforceable interests in property which will nonetheless have the effect of making further transfer of the property difficult if not impossible. It would avoid the prejudice that would otherwise result to third parties who innocently purchase such property. It would eliminate any incentive to self-help remedies and the possibilities for violent encounters thereby entailed.

And yet, a rule that property invariably passes is also unattractive. It may be appropriate that items of property such as burglary tools be rendered derelict under the traditional approach. One would not, in any event, expect the courts to utilize their

79 Feret v. Hill (1854), 15 C.B. 207; Alexander v. Rayson, [1936] 1 K.B. 169 (C.A.). And see, Furmston, ibid. at 363-64, and, for a discussion of Feret v. Hill, at 372-73. It is assumed, however that the landlord can recover the land after expiration of the term of the lease. Some have characterized this situation as one in which the tenant obtains, in effect, a possessory interest or perhaps, a leasehold interest for the term. See, for example, Treitel, ibid. at 377; Waddams, ibid. at 429.


81 See, for example, Scarfe v. Morgan (1838), 4 M. & W. 270; Taylor v. Chester (1869), L.R. 4 Q.B. 309. And see, Higgins, supra, note 77.


resources in adjudicating disputes concerning such items. Further, the nature of the illegality or immorality may be such as to render it inappropriate for the courts to facilitate the transfer in any way. Perhaps many would agree that the sale of a house of ill-fame to a purchaser who eagerly anticipates building on the reputation of his predecessor in title comes within this category. As well, it is possible that, in a particular case, a holding that property has passed will frustrate the underlying objective of the rule that has rendered the transaction unenforceable. Thus, where the very purpose of the statutory scheme in question is to prevent the transfer from taking place, it would be perverse for a court to hold that although the transaction is itself unenforceable, property nonetheless passes to the purchaser. The decision of the Privy Council in *Kalubya v. Singh* provides an illustration. There, the transfer of certain protected "Mailo" lands without the requisite statutory consent was held ineffective. It may well be wondered whether similar concerns should not have been weighed more carefully in *Singh v. Ali* and in the *Bowmakers v. Barnett Instruments* line of authority. Finally, there may be cases where the withholding of property passage will be thought to act as an appropriate disincentive to wrongful conduct.

In short, a rule holding either that property does or that it does not pass as a matter of general principle is plainly

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84 But see *Clark v. Hagar* (1893), 22 S.C.R. 510 (purchase price included component for "goodwill" – mortgage held enforceable). An attractive solution in such cases would be to withhold relief from the immediate parties who acquire interests from the transferee to enforce them. Gwynne J. appeared to consider this to be a possible result. See *ibid.* at 527-28.


86 In both cases, the regulatory scheme had, as one of its objectives, the prevention of a transfer of title without the requisite approval. There is at least a respectable argument, therefore, that a withholding of property passage would be more consistent with the statutory scheme in each case. On the other hand, it would be reasonable to conclude, consistent with the result in these cases, that this concern is not so grave as to outweigh the policies against encouraging self-help remedies and against creating effectively inalienable property which favour a holding that property has passed. But see further, the discussion in note 89, *infra.*

87 Transfers under agreements infected by some fraudulent scheme of the purchaser's, for example, may warrant such treatment.
unsatisfactory. It is therefore not surprising that although each of these conflicting general principles is embraced to some extent in the case law, neither has attracted universal support. Further, although an elaborate defence of this position will not be attempted here, it seems apparent that a new golden rule approach to the analysis of proprietary issues that brings into explicit consideration the policy issues adverted to above would be considerably more fruitful than the approaches taken to this problem in the jurisprudence to date. The point to be made for present purposes is, however, a more limited one. It is evident that in the absence of any possibility of direct restitutionary rights for \textit{in pari delicto} parties, courts will be tempted to manipulate property passage rules in such a way as to facilitate some form of relief. Such considerations have the unsatisfactory effect of complicating the analysis of proprietary questions, distracting attention from the proper purpose of proprietary analysis, the determination of the proprietary rights of the parties \textit{inter se}, and the effect, in proprietary terms, of their conduct on third parties. There are doubtless cases, and Singh v. Ali\footnote{Professor Wade offered a similar analytical model ostensibly as a means for accounting for the results in the decided cases. See J.W. Wade, \textit{supra}, note 77.} may be one of them, in which it is appropriate to grant restitution but deny the effectiveness of the transfer. Straightforward recognition of the potential restitutionary claim of an \textit{in pari delicto} party would remove the temptation to hold that a transfer has occurred in order to create a device for depriving the user enjoyed. If the court in Singh had felt itself able to withhold property passage but, at the same time, allow the purchaser to bring a restitutionary claim for the price paid (subject to a counterclaim for the value of user enjoyed), this might have been considered to be a result which more satisfactorily implemented a desire to prevent the seller's unjust enrichment without, in so doing, undermining an important objective of the statutory scheme. A similar analysis could be offered of Bowmakers v. Barnett Instruments, [1945] K.B. 65 (C.A.). No doubt however, if such an approach were considered in Singh, the court would very likely have concluded that Holman v. Johnson precluded restitutionary relief for the purchaser (or the seller). It may well be, therefore, that the decision to allow property to pass was motivated by a desire to employ what appeared to be the only available means to prevent the unjust enrichment of the seller. The point being made here, however, is not that these cases were necessarily incorrectly decided, but rather that the restitutionary and proprietary issues ought to be rendered independent of each other by recognizing more clearly that restitutionary relief may be available in cases such as these.
transferor of a windfall gain. Similarly, it would remove the temptation to hold that property has *not* passed where that seems to be the only available device for affording relief of some kind to the transferor.

D. Deciding Like Cases in Like Fashion

The *Holman v. Johnson* principle and its corollaries and exceptions have a remarkable capacity for generating anomalous results. Indeed, this area of the law is unique in the sense that it is riddled with anomalous holdings, and quite content to tolerate what appear to be indefensible differences in the treatment of similar fact situations. This may be thought by some to be the very point of *Holman v. Johnson* and its underlying assumption that the courts should, by refusing intervention on behalf of plaintiffs as a class, allow the existing distribution of gains and losses to lie undisturbed regardless of the potential injustice to the parties. The result of this approach, however, is the toleration of outcomes that have little similarity from one case to the next and the infliction of losses randomly on persons whose degree of wrongdoing ranges from trivial and accidental misconduct at one end of the scale, to serious crime at the other end. In determining whether a loss is to be inflicted in a particular case, the critical factor may simply be the manner in which performance of the agreement has been scheduled,\textsuperscript{90} or the nature of the arrangements made for the giving or taking of security,\textsuperscript{91} or, indeed, the mode of payment chosen by the parties.\textsuperscript{92} In many cases, such differences will appear accidental and irrelevant to the merits of the dispute with the result that the pattern of outcomes generated has an illogical and incoherent appearance.

\textsuperscript{90}This follows from the general principle that once conferred, benefits are generally irrecoverable. Distinctions drawn on this basis are also inherent in the operation of the *locus poenitentiae* exception, discussed above in the text at notes 36 and 66-72, supra.

\textsuperscript{91}See the discussion of *Bownakers v. Barnett Instruments* in the text at note 76, supra.

\textsuperscript{92}See, further, the text at notes 93-97, infra.
A fine illustration of this capacity for inconsistency can be found in the decision of the Ontario Court of Appeal in Steinberg v. Cohen. In that case, the plaintiff had paid money and given a chattel mortgage to secure a further payment in return for an undertaking by the defendant to stifle the prosecution of a third party. The plaintiff had reason to fear that he might ultimately be implicated himself and prosecuted separately. The plaintiff sought recovery of the monies paid and cancellation of the mortgage. After a lengthy and careful review of the applicable authorities, the Court of Appeal ordered that the security be set aside, but refused recovery of the money paid. The Court was not "unmindful that at first sight it may seem inconsistent that two different results should accrue from the one corrupt agreement" but felt that any inconsistency was "more apparent than real" and that, in any event, "if there is any real inconsistency, anomalous results are not unknown in our law." Notwithstanding this protest, a holding that the plaintiff is sufficiently in pari delicto so as to be precluded from recovering the payment, but sufficiently not in pari delicto to permit cancellation of the mortgage, does not appear to have a firm basis in public policy or, indeed, in common sense. Little comfort can be drawn from Orde J.A.'s further suggestion that if, instead of a chattel mortgage, a negotiable security such as a bond or debenture had been delivered, "such a security might well stand in the same category as money paid."

Similar differences in the treatment of different modes of payment surfaced in Menard v. Genereux, a recent Ontario decision in which Krever J., as he then was, concluded that monies paid under an illicit scheme were irrecoverable, but that a negotiable instrument executed by the payer would be unenforceable. As a result, the payer would effectively be relieved from this obligation. It is of interest in the present context that Krever J. went on to

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94Ibid. at 928-29 per Masten J.A.

95Ibid. at 929 per Orde J.A.

96(1982), 39 O.R. (2d) 55 (H.C.)
express the view that the circumstances of this case were such that any enrichment of the defendant at the plaintiff's expense would be unjust, and he lamented the fact that no direct claim in restitution appeared to be available to the plaintiff. Krever J. was relieved to note, however, that a result consistent with his views and with the effective release of the plaintiff's obligations on the instrument could be achieved by virtue of the fact that the monies paid were still in the hands of the solicitors for the parties. As neither party could assert a claim to the monies under the impugned agreement, the solicitors would appear to be obliged, on resulting trust principles, to restore the monies to the plaintiff. Had the monies been paid over to the defendant already, they would be beyond reach. If justice did in the end triumph in Krever J.'s view however, it is surely nonetheless an embarrassment to our doctrine in this area that a sensible result was achieved only by such accidental means.

These and other illustrations that might be offered provide support for the view that some evolution of doctrine in this area is overdue. It is evidently the case that an open recognition of the possibility of direct restitutionary claims for in pari delicto plaintiffs will eliminate some of the difficulty. An even more fundamental problem is revealed by a careful reading of the cases. A principal source of our difficulty in analyzing these problems is a tendency to over-generalize in these matters. It would be surprising if a general rule of broad application could consistently resolve the main difficulties generated by agreements in conflict with public policy. Cases dealing with such varied phenomena as major crime, work done by unlicensed plumbers, Sunday contracts, and lending agreements in which the date of the loan has been carelessly omitted, do, after all, have some material differences. It is obviously necessary to develop a more contextually specific approach to the analysis of these problems. It is precisely this type of analysis that is suggested in St. John Shipping with respect to the enforceability issue, and here with respect to the restitutionary and proprietary issues. If like cases are to be decided in like fashion — and there

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97 Ibid. at 73.
98 [1956] 3 All E.R. 683 (Q.B.), discussed in the text at notes 50-61, supra.
appears to be no compelling reason not to aspire to this lofty objective here, as elsewhere — an analytical method that renders these contextual differences material must be adopted.99

E. The Moneylenders Act Cases

Readers who are familiar with the series of English decisions under the Moneylenders Acts of 1900100 and 1927101 may find the prospect of a reconsideration of these authorities a somewhat chilling one. Nonetheless, there are a number of reasons why it may be useful to rake these old chestnuts (and their offspring) over the coals one more time in the present context.

First, the Moneylenders Act cases appear to be the only line of English authority that explicitly attempts to afford some protection to the guilty party, and it is important to note how limited and unsatisfactory a solution has been developed in these cases. Second, a close look at the Moneylenders Act cases cannot fail to assist the case for reform. The Moneylenders Act cases are the reductio ad absurdum of the illegality case law. The results achieved in the modern cases are simply outlandish. For example, in one case, a commercial borrower was allowed to resist repayment of monies advanced on the ground that the parties had failed to record in a written agreement the date on which the money was advanced.102 The agreement fully complied with the legislation in all other respects. Nonetheless, the English courts have resisted any modification of the traditional rules that would avoid such harsh and indefensible consequences.

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99 In Steinberg v. Cohen, supra, note 93, Masten J.A. commented to similar effect as follows, at 928: "It is possible that each case should depend on its own facts, and upon a balancing by the court of the public interest on the one hand and of the private injustice on the other."

100 Moneylenders Act, 1900, (U.K.), 63 & 64 Vict. c. 51.

101 Moneylenders Act, 1927, (U.K.), 17 & 18 Geo. 5 c. 21.

Third, although it would be appropriate to confine the influence of these decisions to the very specific and narrow context of the English moneylending legislation, these decisions appear to have had a broader influence than this, and, more importantly for present purposes, they appear to have enjoyed some support in the Canadian jurisprudence. Accordingly, the present treatment is offered, in part, as an exercise in exorcism.

1. The old cases

The English legislation is uncomplicated and transparent in purpose. The Act of 1900 has three principal features. Section 1 confers a power on the courts to re-open and reform moneylending transactions found to be harsh and unconscionable. Section 2 establishes a registration scheme for moneylenders. A moneylender who fails to register under the Act or who carries on business other than in his registered name is exposed, under sub-section 2, to criminal sanctions including a fine and, for repeat offenders, imprisonment. Section 4 creates an offence of fraudulent inducement of moneylending transactions.

The Moneylenders Act, 1927 introduced two features of interest in the present context. First, the section 2 registration scheme of the 1900 Act was replaced by a more elaborate licensing scheme in section 1 of the 1927 Act. Section 1(3) of that Act establishes a regime of criminal sanctions for the carrying on of a moneylending business without a license that is similar in all respects to the penalties imposed in section 2(2) of the 1900 Act for non-registration.

Secondly, section 6 of the 1927 Act introduces formal requirements for moneylending contracts. Section 6(1) stipulates that:

no contract for the repayment by the borrower money lent to him ... and no security given by the borrower ... in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract....

Section 6(2) further stipulates that the note or memorandum must contain "all the terms of the contract" and, more particularly, must
contain the date of the loan, the amount advanced, and the rate of interest as a percentage per annum of the principal.

The restitutionary issues that have become troublesome in the case law are first, whether an unlicensed moneylender can recover the amount of principal advanced, even though the lending of money without a licence constitutes an offence, and secondly, whether monies advanced under a transaction that has not adopted the requisite form can be recovered, notwithstanding the unenforceability of the agreement itself. The Act is silent on both of these points.

Although none of the case law decided under the Acts has suggested that a direct right of recovery should be available in either circumstance, the first of the leading cases, Lodge v. National Union Investment Co. Ltd,\(^{103}\) offers support for the view that borrowers seeking relief from their obligations in reliance on the provisions of the Acts might be required, as a condition of their relief, to repay the amount of principal advanced. Notwithstanding the considerable attention this problem set has attracted in the case law since Lodge, the central question of the extent to which this "passive" protection of the moneylender is available remains, to some extent, unresolved.

The dispute in Lodge itself arose from the fact that the defendant moneylender, from whom the plaintiff borrowed money, had not registered its name under the 1900 Act. This conduct constituted an offence under the Act, and the transaction was stated by Parker J. to be "void for illegality."\(^{104}\) The loan was secured by a mortgage of the borrower's reversion interest in certain investments and also by the assignment to the defendant of a life insurance policy taken out on the life of the borrower. The documentation of the mortgage was unusual. The borrower had executed an absolute assignment of his reversion interest. A separate letter was signed by the defendant clearly indicating that the transaction was intended as a mortgage. In addition, the borrower's obligation to repay was documented in two bills of exchange in favour of the moneylender drawn upon and accepted by


\(^{104}\) Ibid. at 335.
the borrower. When these instruments fell due in February 1906, the borrower, upon payment of £150 to the defendant, was granted an extension of the time for repayment. Two new bills of exchange were given and the old ones were cancelled. Upon learning that the defendant had not registered itself under the Act, the borrower brought this action seeking a declaration that the transaction was illegal and void, delivery up from the defendant of the two bills of exchange and the two assignments, and recovery of the £150 as money had and received.

Parker J. said that the normal rule in the case of transactions void for illegality was that "neither party can take any proceedings against the other party for the restoration of any property or for the repayment of any money which has been transferred or paid in the course of illegal transactions," but noted that there was an exception in favour of "persons for whose protection the illegality of the contract has been created." Accordingly, the borrower was able to seek the assistance of the court in this action. It was also his view, however, that the granting of the relief requested should be conditional upon the borrower's willingness to repay the money borrowed. For Parker J. it seemed "reasonably clear that, at any rate, in equity, if not also at law, a person taking advantage of the exception arising from the fact that he belongs in the class for whose protection the statutes were passed could not assert any right unless he himself was prepared to do what the court considered fair to the defendant," fairness here requiring that the price of being relieved from the obligation to pay interest and being granted delivery up of the documents should be the repayment of the monies advanced by the defendant. Although the moneylender would have no standing to bring an active claim for the recovery of these monies, the proposition put forward by Parker J. affords "passive" entitlement to the recovery of monies lent in the event that it becomes necessary for the borrower to bring an action against the moneylender.

Support for this view on the equity side was drawn by Parker J. from the maxim that he who seeks equity must do equity and from cases decided under the old usury laws holding that borrowers

105 Ibid. at 335.
seeking delivery up of usurious securities would be required to repay
the monies borrowed as a condition of obtaining such relief. The
position at Common Law was, Parker J. conceded, less certain.
Nonetheless, he was able to draw support from a decision of Lord
Mansfield in Fitzroy v. Gwillim, in which a pawner who brought
an action in trover against a pawn broker to recover the pledged
goods was obliged, as a condition of obtaining relief, to repay the
monies borrowed from the latter. It was true, Parker J. acknowledged,
that subsequent cases had doubted Fitzroy v. Gwillim, but, nevertheless, it was Parker J.'s view that such
conditions could still be imposed at common law in an action for
trover or detinue in any case where the plaintiff borrower found it
necessary, in the particular circumstances of the case, to rely on the
illegality of the transaction to establish entitlement to such relief.
This would be the case in Lodge itself, for example, where the
absolute nature of the assignments made it necessary for the
borrower to advert to the illegal nature of the transaction.

Having expressed a preference for this view, however, Parker
J. went on to observe that it was unnecessary for him to decide this
point inasmuch as the relief sought in the present case, apart from
the common law claim in money had and received for the £150, was
equitable in nature. As far as the claim in money had and received
was concerned Parker J. relied on Lord Mansfield's often quoted
statement in Moses v. Macferlan to the effect that this claim,
though common law in origin, is equitable in nature and "lies only
for money which, ex aequo et bono, the defendant ought to
refund." Parker J. did not think that it was "either aequum or
bonum that the plaintiff who has had the benefit of the [monies


107 Supra, note 103 at 336.

108 Parker, J. doubted that trover or detinue would lie in Lodge, however, as he did not
"see how there was ever in the plaintiff any property or right to possession of these
documents." Ibid. at 337.

109 (1760), 2 Burr. 1005 at 1012.

110 Supra, note 103 at 337.
advanced] ..., is relying on the illegality of the contract, wants his money, and cannot get it except under the exception, should recover it without being put on terms which both parties may be restored to the positions they occupied before the transaction."^{111}

This passive protection of the restitutionary interest of the moneylenders affected by *Lodge* is not, of course, a perfect or ideal solution to their restitutionary problem. Relief is contingent on the happenstance of the borrower needing to come forward to the courts for relief of some kind. Presumably, there would be many borrowers who do not need to retrieve a security and who would be content to let sleeping dogs lie and refuse to repay their loans, secure in the knowledge that the moneylender cannot sue to enforce the obligation to repay. The rule in *Lodge*'s case is therefore vulnerable to the critique that it leads to an anomalous pattern of remedies. Its appeal, on the other hand, must be that it does at least afford some measure of relief to the lender and, in so doing, employs an analytical device that avoids direct conflict with *Holman v. Johnson*.

*Lodge*'s case was, however, narrowly distinguished rather than applied in subsequent cases. In the case of *Chapman v. Michaelson*,^{112} which arose a year later, the defendant moneylender was carrying on the business of moneylending otherwise than in his registered name and thus in contravention, as in *Lodge*'s case, of section 2 of the *1900 Act*. The borrower sought a declaration that the mortgage given to the defendant was illegal and void. The moneylender sought to rely on *Lodge*'s case and condition relief on the repayment of the monies advanced without interest. The Court of Appeal, upholding a decision of the trial judge to the same effect, granted the declaration requested but refused to impose terms of this kind on the borrower. The "simple answer" to the attempt to rely on *Lodge*'s case, according to Cozens-Hardy M.R., was that "this is not equitable relief."^{113} Although the claim had in fact been brought in the Chancery Division, this was said to been a

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^{111} *Ibid.* at 338.

^{112}[1909] 1 Ch. 238 (C.A.).

mere accident inasmuch as the declaration sought by the borrower was one that could have been granted by a Court of Common Law. A distinction was thus set up between relief available only at Equity, with respect to which terms can be imposed, and Common Law relief with respect to which they cannot. The arguments advanced by Parker J. in Lodge’s case in support of the view that terms could be imposed at Common Law as well were neither mentioned nor discussed in Chapman v. Michaelson.

It may be of more than passing interest to note that it was conceded on behalf of the moneylender that the transaction was "grossly usurious." Presumably, it was this fact that Fletcher Moulton L.J. had in mind when he said, "I am not going to express any general opinion as to the propriety of imposing terms in such cases, but I think that in the circumstances of this case no terms ought to have been imposed." His Lordship went on to observe that the considerations that might apply in a case of "true equitable relief do not necessarily apply to an action for a mere declaration of rights." It would thus be possible to read Chapman as authority for the proposition that it is appropriate to take into account the exploitative nature of the transaction in deciding whether to impose terms on the borrower, at least in a case where the remedy is one which could have been obtained at Common Law. Such an approach would involve an attractive balance of the statute’s consumer protection objectives with a general policy of normally requiring that the monies borrowed be returned to the moneylender. This approach surely could have been extended to cases involving truly equitable relief. That has not been the fate of Chapman, however. The case has been interpreted as support for the view that terms can be imposed only in cases where relief was available exclusively in Equity. This view carries with it, of course, the unfortunate consequence that much will turn on the proper characterization of the origin of the remedy in question.

\[114\] Ibid. at 241.

\[115\] Ibid. at 242.
An equally unsatisfactory distinction from *Lodge* was developed in the later decision in *Cohen v. Lester.* In this case, the plaintiff borrower sought delivery up of jewellery deposited with a moneylender as security for the loan and of promissory notes evidencing the repayment obligation. The defendant moneylender conceded that the lending documents did not fully disclose all of the terms of the arrangement and that the loans were therefore unenforceable by virtue of section 6 of the 1927 Act. Nonetheless, the defendant sought to invoke *Lodge's* case and argued that the granting of relief to the plaintiff should be conditioned on an obligation to repay the monies advanced. The plaintiff successfully argued, however, that *Lodge's* case should not apply to a case in which the transaction is determined by the Act to be "unenforceable" rather than "illegal and void" (presumably, in the sense that the impugned transaction involves the commission of an offence under the Act). Section 6(1) of the Act provides that "No contract for the repayment by a borrower of money lent to him ... and no security given by the borrower ... shall be enforceable...." By way of contrast, it was apparently said (though this is not quite true) that section 2 of the 1900 Act "expressly stated" that agreements entered into in breach of its provisions are "illegal." It is only where the transaction is "illegal," the Court held, that the moneylender is entitled to the benefit of the condition that the loan be repaid as the price of the plaintiff's relief.

The rationale for this holding cannot be obvious. As others have observed, this approach leads to the absurdity that "from the moneylender's point of view it was better to commit an offense and make an illegal loan than to commit no offense and make a loan that was merely unenforceable." The explanation offered by Tucker J. was that the moneylender, in attempting to insist on

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117 *Ibid.* at 191 (All E.R.). This passage is not reproduced in the K.B. report. Section 2 of the 1900 Act creates an offence of carrying on business, including the entering of lending agreements, "otherwise than in his registered name," but does not speak directly on the status of such agreements.

repayment of the monies advanced as a condition of releasing the security was "doing the very thing which section 6 says cannot be done — that is, he is seeking to enforce a contract which the statute has said shall be unenforceable." The patent absurdity, in policy terms, of this method of distinguishing Lodge's case appears to have escaped Tucker J.'s attention.

At this point, then, the position appeared to be that moneylenders would gain the passive entitlement afforded by Lodge's case only if (i) the relief sought by the borrower were truly equitable in nature and, (ii) the applicable provision of the Acts rendered the transaction "illegal" rather than "unenforceable." This was the unsatisfactory state of the law when the Privy Council addressed a very similar question in Kasumu v. Baba-Egbe.120

This case arose under a Nigerian moneylenders ordinance which contained provisions similar but not identical to section 6 of the 1927 Act. Section 19 of the Ordinance required that certain written records be maintained concerning loans and then stipulated in subsection 4 as follows:

(iv) any moneylender who fails to comply with any of the requirements of this section shall not be entitled to enforce any claim in respect of any transaction in relation to which the default shall have been made. He shall also be guilty of an offence under this ordinance.... (emphasis added).

Two material differences from section 6 may be noted. First, the phrase "any claim" may be thought to be considerably broader than the stipulation in section 6 that the contract for repayment and the security given are "unenforceable." Second, section 19 confounds the possibility of applying the illegality/unenforceability distinction, as it also renders the failure to keep appropriate written records an offence.

The facts of Kasumu are similar to those of the cases previously discussed with the added complication that the moneylender who had taken a mortgage on the borrower's premises, had, upon the borrower's default, gone into possession of the premises and received rents and profits from that occupation. The

119 Supra, note 116 at 193 (All E.R.) and, to similar effect, at 507 (K.B.).

borrower brought an action seeking delivery up of the mortgage documents, repossesssion of the premises, and recovery of the rents and profits. The West African Court of Appeal had granted such relief and, unlike the trial judge, had refused to apply Lodge and require repayment of the principal amount of the mortgage. In the Privy Council, the moneylender’s attempt to invoke Lodge also failed. Lord Radcliffe was unstinting in his criticism of Lodge and the distinctions developed in Chapman and Cohen. With respect to Lodge, he suggested that reliance on the cases decided under the Usury Acts was misconceived inasmuch as the underlying moral concern with respect to usury tainted both borrower and lender, whereas it was clearly only the moneylenders’ conduct that was the subject of concern and regulation in the Moneylenders Acts. Moreover, he was of the view that a general rule requiring repayment of monies as a condition of "any order for relief" would mean the adoption of a policy "in direct conflict with the policy of the Acts." The distinction advanced in Cohen v. Lester between illegal and unenforceable contracts was criticized on the basis that it affords more favourable treatment to a moneylender who has committed an offence than to one who has merely entered an unenforceable agreement. The distinction advanced in Chapman v. Michaelson between purely equitable relief and common law remedies did not, in his Lordship’s view "seem a very satisfactory basis for a material difference in the resulting positions of lender and borrower." Notwithstanding this withering attack on the earlier cases, Lord Radcliffe refrained from actually stating that Lodge’s case was wrongly decided or ought not be followed. Indeed he said that "Lodge’s case was a decision of a great equity lawyer and it has stood as a decision since the year 1906," and contented himself with the observation that it "cannot be treated as having established any wide general principle that governs the action of courts in granting relief in moneylending cases." This, together with the fact

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121 Ibid. at 522.

122 Ibid. at 550.

123 Ibid. at 549.
that Lord Radcliffe, rooting his opinion in a close reading of the language of section 19, held that the imposition of a requirement of repayment would constitute "a claim in respect of the transaction," leaves open the possibility that Lodge's case may properly be considered to have survived this searching critique. Surprisingly, perhaps, this indeed appears to be the prevailing view of the matter. The explanation for this may well be that the courts are reluctant to reach the conclusion that there should be no prospect whatsoever of the borrower being required to repay. Moreover, for all its critical force, the decision in Kasumu does not offer persuasive reasons for Lord Radcliffe's assumption that the unenforceability of the moneylending contract carries with it the necessary inference that the borrower must be allowed to retain the monies advanced.

2. The old cases received in Canada

Canadian courts appear to have taken a less critical approach to the English case law than did Lord Radcliffe in Kasumu. In a number of Canadian cases, Lodge's case and its successors have been referred to on the assumption that they represent a statement of valid principle. The most extensive discussion of the English decisions is found in the decision of the Ontario Court of Appeal in Sidmay v. Wettham Investments Ltd which in turn, appears to have had a substantial influence in subsequent Canadian cases. This case involved a rather substantial mortgage loan advanced by a

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124 Ibid. at 551.

125 See, for example, Gyurcsek v. Eng (1977), 2 B.C.L.R. 12; Chambers v. Pennysfarthing (1983), 43 B.C.L.R. 262; Cano Projects Ltd v. Corrales (1985), 64 B.C.L.R. 218 (C.A.); Haug & Nellermore v. Murdoch (1916), 26 D.L.R. 200 (Sask.).


private company carrying on the business of a mortgage broker. The borrower alleged that the lending of money on the security of real estate constituted the carrying on of the business of a loan and trust corporation and accordingly, that the lender, having neglected to register himself in accordance with section 133(1) of the Loan and Trust Corporations Act, had committed an offence. The result of this, it was argued, was that the mortgage in question was illegal and void. The lender argued that its lending business had not brought it within the reach of the Loan and Trust Corporations Act and, in the alternative, argued that even if it had, the commission of a section 133 offence did not carry with it the implication that any lending transactions entered into were themselves illegal. In the further alternative, it argued that if the transactions were illegal, at the very least, Lodge's case could be invoked so as to ensure that the borrower would be required to restore the principal monies advanced by the lender as a condition of obtaining an order declaring the transaction null and void. The Court of Appeal decided, and was affirmed on this point by the Supreme Court of Canada, that the statute did not reach privately controlled corporations such as the defendant who, although it did indeed engage in the business of lending money on the security of mortgages, did not otherwise carry on the business of a loan or trust corporation. Although a literal construction of the Act would appear to capture individuals engaged in such a lending business, the intent of the statute was to regulate the activities of corporations that raise monies from a wide clientele of depositors, debenture holders, and other creditors for the purpose of lending money to the public. The object of the legislation is to afford some measure of protection to those who entrust their monies to a loan or trust corporation.

The carefully reasoned judgment of the court on this point is reminiscent of the decision in St. John Shipping in two respects.

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128 R.S.O. 1960, c. 222, s. 133(1), now s. 174(3) of R.S.O. 1980, c. 249.
129 Supra, note 103.
First, it constitutes a thoughtful elaboration of legislative purpose in aid of a careful delineation of the scope of the statute and it avoids the traditional hazard of assuming that the coverage of the statute is broader than is required by the objectives of the statutory scheme. Secondly, however, one cannot resist wondering whether the court in Sidmay, like the St. John Shipping court, was not pushed in the direction of finding the agreement to be lawful by a concern that this would be the only device whereby the court could avoid the unattractive result that the borrower could, if the agreement were held to be illegal, simply retain the monies advanced by the lender. Certainly, a majority of the Court of Appeal appeared to be of the view that if the contract were illegal, the lender would not be able to recover any of the monies advanced by relying on Lodge's case. Again, as was suggested above in the discussion of St. John Shipping, one wonders whether the Court would so easily have concluded that the agreement was legal if all or some portion of the defendant's obligations remained executory. If the borrower sought to resile from the transaction before receiving any benefit thereunder, one suspects that the temptation to hold the contract unenforceable by reason of the lack of registration might well have been irresistible. If that is so, the preferable analysis on the facts of Sidmay itself is arguably that the contract is unenforceable but the lender is entitled to recover the monies advanced to the borrower in a restitutionary claim.

In any event, the holding of the Court of Appeal that the mortgage was enforceable was unanimous and carefully reasoned. Both the majority opinion of Kelly J.A. and the concurring opinion of Laskin J.A. went on to consider, however, the extent of the moneylender's right to recapture the monies advanced where the transaction itself is found to be unenforceable. For Kelly J.A. that issue was to be resolved by a straightforward application of Lodge's case. Kelly J.A. accepted that the rule in Lodge's case would be available to protect the moneylender only if, as was held in Cohen v. Lester, the contract was illegal rather than unenforceable. Here, the moneylender had engaged in a prohibited act and had brought itself within the former category.131 There was, however, an

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131 (1967), 61 D.L.R. (2d) 358 at 378-79, per Kelly J.A.
apparently insurmountable problem confronting the moneylender. It was Kelly J.A.'s view that the relief made available to the moneylender in *Lodge's* case was contingent upon the borrower being a member of the class protected by the statute in question. That is to say, the borrower must come before the court as plaintiff as a member of the class protected by the statute.\(^1\) The moneylender is then entitled to insist that a condition of the plaintiff's relief is repayment of the monies advanced. The class protected by the *Loan and Trust Corporations Act* comprises those persons who have invested in such companies whether as depositors or shareholders or in some other manner. The plaintiff borrower in *Sidmay* was not a member of this class; accordingly, *Lodge's* case could not in his view apply.

In summary, then, Kelly J.A. espoused the view that the moneylender should be entitled to a return of the monies advanced only if the following two conditions are met:

1. the plaintiff borrower must be within the class protected by the statute in question, and
2. the moneylender must have committed an offence and thus rendered the transaction "illegal" rather than merely "unenforceable."

Although Kelly J.A. evinces little enthusiasm in his judgment for *Chapman v. Michaelson*, it might be safe to assume that he would agree that a third condition must be met:

3. the relief sought by the plaintiff borrower must be of a kind exclusively available in Equity rather than Common Law.

This is, of course, a perfectly defensible reading of the English case law. It must be emphasized, however, that the resulting rule is a most peculiar one. The unsatisfactory nature of requirements two and three have already been noted above.\(^2\) Requirement two

\(^1\) *Ibid.* at 382.

\(^2\) In the discussion of the English cases in the text at notes 103-24, *supra.*
represents the precise opposite of common sense. Requirement three introduces arcane and artificial distinctions. Item one adds further perversity. Surely the fact that the plaintiff is a member of the protected class should work in his favour and reduce the ability of the moneylender to seek a return of the funds. If, on the other hand, the borrower was not a member of a protected class, this would make the moneylender's claim for reimbursement all the more compelling in terms of the underlying policy considerations.

Laskin J.A. offered a different and somewhat idiosyncratic analysis of the moneylender's position if the agreement is found to be illegal. His opinion introduced a novel distinction between cases in which the agreement is "void so far as both parties are concerned" and cases in which "the statutory prohibition is not one which touches the plaintiff borrower." The case had been argued, in Laskin J.A.'s view, on the assumption that its facts brought it within the former category. The preferable view, he suggested, is that the case fits in the second category, as the statutory prohibition was one which touched the mortgagee alone. The unlawfulness was in the lending, not the borrowing. Parenthetically, it should be noted that it is not abundantly clear what kind of dividing line is drawn here, unless it be something akin to the distinction between illegality affecting the formation of an agreement as opposed to illegality affecting the performance of an otherwise lawful agreement. Certainly, however, the distinction is not one that has been drawn by the English courts in, for example, the Moneylenders Act cases themselves. Laskin J.A. did, however, proceed to an analysis of the restitutionary rights of the moneylender in each category of case. If, as the parties allegedly assumed, Sidmay falls within the first category, it was Laskin J.A.'s view that the moneylender was not entitled to impose repayment of the monies advanced as a condition of allowing the borrower relief. Laskin J.A. was less welcoming of the English authorities than Kelly J.A., and in

134 A point made with rather more restraint by R.E. Megarry, supra, note 118 and by Lord Radcliffe in Kasumu v. Baba-Egbe, supra, note 120. And see the discussion in the text at notes 121-22, supra.

135 A distinction discussed by Devlin J. in St. John Shipping Corp. v. Rank, [1956] 3 All E.R. 683 (Q.B.) at 687. And see, generally Furmston, supra, note 78, at 337.
general terms advanced the views of Lord Radcliffe in *Kasumu*, briefly described above. It was Laskin J.A.'s opinion that Lodge's case had been "completely discredited" by *Kasumu* and, although Laskin J.A. did not plainly state that he would refuse to apply the decision, his analysis rather clearly suggests that he would. It was also his view that the Moneylenders Acts cases were not, in any event, useful to the lender on the facts of *Sidmay* inasmuch as the plaintiff borrower was not a member of the class protected by the statute. He, like Kelly J.A., accepted that this was a pre-condition to the applicability of the Moneylenders Act cases.

Turning then to the second category of cases identified by Laskin J.A., situations in which the plaintiff was not touched by the illegality, the position of the moneylenders and, indeed, of defendants more generally was considerably strengthened in Laskin J.A.'s view. In what appears to be a quite unorthodox, if rather sensible analysis, Laskin J.A. suggested that in these cases, the party untouched by the illegality, such as the borrower in *Sidmay*, should be permitted to go forward to undo the transaction only if the plaintiff restores to the defendant the value of benefits received. Thus, the borrower plaintiff in *Sidmay* would, indeed, be required to restore the monies advanced by the defendant as a condition of being permitted to unwind the transaction. The plaintiff's position in these cases, it appears, is in effect one of seeking rescission and being required to make a *restitutio in integrum* as a condition of obtaining that relief.

Although Laskin J.A. did suggest that the imposition of a requirement to make restitution was all the more compelling where the plaintiff is not a member of a class protected by the statute, he appeared to assume that members of a protected class could indeed be subject to a requirement of this kind. The very case cited by him in support of this rule, *Lumley v. Broadway Coffee Co. Ltd* is in fact a case in which the plaintiff purchaser of securities from an unregistered securities dealer, was a member of the class protected by the statutory scheme in question. The plaintiff was not

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allowed to resile from the transaction because of his inability to make *restitutio in integrum*.

The opinion of Laskin J.A., though rather difficult to support on the authorities, is in its own way a rather remarkable *tour de force*. Although the opinion appears to heap scorn on the rule in *Lodge's* case, it in fact imposes a very similar doctrine on a much broader range of cases and, indeed, imposes the requirement of restitution on the plaintiff in *Sidmay* itself. If the reasoning of the Laskin opinion were to be applied to the facts of the old *Moneylenders Act* cases, it would appear that similar obligations could have been imposed in all of the earlier cases inasmuch as it seems to be true that in each case the illegality in question did not touch the plaintiff borrower.\(^{138}\) Though this, if true, may be thought to reveal an internal inconsistency in the opinion, nonetheless it is obviously the case that Laskin J.A. was, broadly speaking, supportive of the notion that restitution ought to be available in the form of passive protection to *in pari delicto* defendants in a substantial range of cases.

Though some may believe that Laskin J.A.'s unusual minority opinion is the more attractive position in policy terms, it is nonetheless true that the position advanced by Kelly J.A., which narrowly circumscribes the availability of restitutiorary protection available to the defendant in these cases, more accurately reflects the prevailing view. In very different ways, however, both opinions offer abundant evidence of the remarkably unsatisfactory state of current English and Canadian doctrine on these questions.

3. The modern cases — including the rise and fall of subrogation

In recent years there have been two assaults mounted on the application of the *ex turpi causa* rule to moneylenders — one direct and the other indirect. The direct assault involved an attempt to persuade a court to narrowly confine *Kasumu*\(^ {139}\) to its particular statutory context and to give the moneylender a direct right of

\(^{138}\) To be sure, cases dealing with "unenforceability" rather than "illegality" may not fit as neatly within Laskin J.A.'s category two.

\(^{139}\) [1956] A.C. 539 (P.C.).
recovery for monies advanced. The second line of attack utilized subrogation doctrine and would have enabled the moneylender to recover any portion of the monies advanced used to discharge the security interests of third parties. Neither of these approaches enjoyed success. A brief account of these developments offers further evidence of the dogged refusal of the English courts to develop a general theory of relief available to moneylenders under these statutes.

In Barclay v. Prospect Mortgages Ltd,140 moneymoon transactions were rendered unenforceable under section 6(1) of the 1927 Act by virtue of the parties' failure to record in their documents the date on which the loan was made. The date was left blank because the parties were uncertain when they signed the memorandum of agreement that the transaction could be completed on the same day.

The usual fact pattern in these cases was varied in Barclay in one important respect. The security given to ensure repayment of the loan was given, not by the borrower, but by a third party. It was the third party who brought the present action for a declaration that the arrangements concerning the security were unenforceable and for delivery up of other relevant documents. For obvious reasons, the moneylender could not argue that relief should be conditional on repayment of the monies advanced; the third party had not received any of these monies. The moneylender did argue, however, that the relief requested ought to be denied in the circumstances, thus setting the stage for a reconsideration of Kasumu.

Two arguments were made on behalf of the moneylender that are of interest in the present context. First, it was suggested that the decision in Kasumu could be explained on the basis of differences between the English and Nigerian legislation. Whereas the 1927 Act provides that the contract and security are "unenforceable," the Nigerian Ordinance stipulated that the moneylender would not be entitled to enforce "any claim in respect of any transaction." Moreover, the Nigerian Ordinance made the failure to keep proper records an offence. Goulding J. rejected this

140[1974] 3 All E.R. 672 (Ch. D.).
argument on the basis that the Judicial Committee did not seem to have attached any significance to these differences in the statutory context. We may note that another conclusion on this point might have been possible. Lord Radcliffe had, after all, stressed that the language of the Ordinance on this point was "very widely drawn," and he made a point of noting that the protection requested by the moneylender amounted to "a claim" for the purposes of the Ordinance. Nonetheless, Goulding J. is probably correct to assume that Lord Radcliffe would have preferred the view that there was no material distinction in the English context, even though he did refrain from saying in Kasumu that Lodge's case ought not to be followed in the future.

Secondly, it was argued on the moneylender's behalf that the court should seek guidance from the manner in which analogous problems involving agreements unenforceable for want of formality are treated under such legislation as the Statute of Frauds, 1677 and various other more recent enactments derived from it. Although the agreements themselves are unenforceable under these statutes, they still have effect for many legal purposes and should be given the effect here of immunizing the moneylender from this action. (It was not emphasized, apparently, though it might well have been, that restitutionary claims for the value of benefits conferred are normally allowed in these other contexts). The decision in Kasumu, it was argued, is inconsistent with these decisions and ought not be followed. Goulding J. also found this argument unattractive. In his view, the language, purpose, and character of the Moneylenders Acts distinguished them from these other statutory schemes. Whereas the moneylenders legislation was expressly designed to ensure the protection of one class of persons, borrowers, against another, lenders, the formality requirements of the Statute of Frauds operate indifferently between parties, affording protection to whichever of the parties was the potential defendant. The word "enforceable" in the moneylenders legislation ought to be read against the background of this statutory purpose, said Goulding


142(U.K.), 29 Car. II c. 3.
J., and given the broad sweep attributed to the "any claim" language of the Nigerian Ordinance by Lord Radcliffe.\(^{143}\) Again, though a different conclusion would also have been possible on this point, Goulding J.'s arguments are not without force and, moreover, they come as close as one comes in this series of cases to an attempt to articulate the policy objectives of the statute and relate them to the remedial issue at hand. We shall return, at a later point in this article, to a consideration of this proposed clear distinction between cases of informality under the Statute of Frauds and illegality under the moneylenders legislation.\(^{144}\) In Barclay, then, the attempt made on behalf of the moneylender to persuade the court to confine or ignore Kasumu failed utterly.

For a brief period of time, a more fruitful device for affording some relief to moneylenders was fashioned by the Court of Appeal through extended application of one of the doctrines of the law of subrogation. It is perhaps not as well understood as it should be that two different patterns of subrogation are revealed in the subrogation case law. We may refer to them as Type (A) and Type (B).\(^{145}\)

Type (A) subrogation arises in situations where a payer is entitled to assert rights held by the payee against a third party in an attempt to recoup the value of the payment made to the payee. The most familiar application of this type is found in the context of liability insurance. The insurer, who has indemnified the insured, is entitled to assert all of the remedies of the insured, (typically in the law of tort), against the individual who has caused the insured's loss.\(^{146}\)

As figure 1 below indicates, however, there are a number

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\(^{143}\)[1974] 3 All E.R. 672 at 681-82.

\(^{144}\)See the discussion in the text at notes 173-75, infra.


\(^{146}\)Although the insurer's right to subrogate may now be conferred by agreement or by statute, it was initially recognized by the courts as arising not from the agreement itself, but from elementary considerations of fairness and the nature of indemnity agreements. See, for example, Burnard v. Rodocanachi (1882), 7 App. Cas. 333; Castellain v. Preston (1883), 11
of other cases fitting this pattern. Some of these well established instances include the right of a surety, once it has paid off the principal debtor's obligation to the creditor, to enforce the creditor's remedies against the principal debtor and have the benefit of any securities deposited by the principal debtor with the creditor in order to secure the debt.\textsuperscript{147} Similarly, creditors who have assisted a trustee or personal representative of an estate in carrying on the business of the trust or estate are entitled to be subrogated to the right of indemnity or lien enjoyed by the trustee or representative against the assets of the trust or estate.\textsuperscript{148} One could cite other illustrations. It is more important to note simply that the category of applications is understood to be open-ended.\textsuperscript{149}

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\caption{Fig. 1}
\end{figure}


\textsuperscript{149} See, for example, \textit{Orakpo v. Manson Investments Ltd}, [1978] A.C. 95 at 112 per Lord Edmund-Davies.
Type (B) subrogation involves the subrogation of the payer to the rights of the third party in order to assert that party's rights against the payee. It will be obvious that the payer must suffer an inability, for some reason, to bring an action directly against the payee. The typical examples involve the lending of money to individuals who have no capacity to borrow. The lender may then be able to subrogate to the position of a third party against the borrower. As figure 2 indicates, typical examples include the case of a lender who advances monies to a minor or mental incompetent where these monies are in turn spent on the purchase of necessaries.

![Diagram]

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That lender has the right to be subrogated to the position of the supplier of those necessaries.150 Similar rights were conferred on lenders who advanced money to married women in order to facilitate the purchase of necessaries. Such lenders were entitled to assert the rights of the suppliers of the necessaries against the husband.151 As well, it is well established that ultra vires borrowings are recoverable to the extent that the monies advanced have been spent by the ultra vires borrower on the discharge of intra vires debts.152 The lender cannot enforce the lending agreements which the borrower had no capacity to enter, but is entitled to be subrogated to the rights of the intra vires creditors whose debts have been discharged by means of the borrowed money.

Before turning to the cases dealing with illegal loans, a preliminary point should be noted. It is well established in the case law that the right of subrogation, whether it be Type (A) or Type (B), does not arise from the parties’ intentions. Although rights of subrogation may be the subject of agreement, as they typically are in the context of liability insurance, the right to subrogation arises notwithstanding the absence of such agreements in order to prevent, as we might now say, the unjust enrichment of the defendant by the plaintiff.153 Indeed, in the Type (B) cases, the notion of subrogation is quite fanciful. The plaintiff is being subrogated to the rights of persons whose debts have been discharged and thus now have no rights at all. The plaintiff is allowed to bring a claim against the payee on the pretext that its rights are being subrogated to the third

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151 See, for example, Harris v. Lee (1718), 1 P. Wms 482; Jenner v. Morris (1861), 3 DeG. F. & J 45. This doctrine was rendered irrelevant, of course, by the recognition of the contractual capacity of married women.

152 See Re Cork and Youghal Ry (1869), L.R. 4 Ch. App. 748; Blackburn Benefit Building Society v. Cunliffe Brooks & Co. (1822), 22 Ch. D. 61. A similar rule applies to unauthorised borrowings by agents utilized to discharge legitimate debts of the principal. See, for example, Bannatyne v. D & C. Maciver, [1906] 1 K.B. 103.

153 The "unjust enrichment" rationale of subrogation was expressly articulated by Coyne J.A. in Morrison et al. v. Canadian Surety Co. et al., [1954] 4 D.L.R. 736 at 757 (Man. C.A.).
party's rights, because it is determined that it is, for public policy reasons, appropriate to allow the plaintiff some measure of relief against the defendant. The remedies are made available notwithstanding the absence of any intention either on the part of the payee or of the third party to confer such a right. Indeed, in many instances, it would be very unlikely that the parties would address their minds to a question of such subtlety.

In *Congresbury Motors Ltd v. Anglo-Belge Finance Co. Ltd*, the English Court of Appeal extended the availability of Type (B) subrogation to the context of lending transactions rendered unenforceable by the Moneylenders Acts. In that case, once again, a commercial moneylending transaction was rendered unenforceable due to the failure of the parties to insert the actual date of the loan in the relevant documents. The money was lent to the plaintiff corporation in order to enable it to purchase a filling station and garage. Pursuant to their arrangement, the monies were advanced by the lender directly to the vendor in return for the execution of a deed of transfer to the plaintiff of the premises. This deed then became subject to a mortgage in favour of the defendant. The plaintiff sought a declaration that the transaction was unenforceable and an order for the cancellation and delivery up of the mortgage and other documents. The Court of Appeal noted that the plaintiff's position was completely "devoid of ethical merit." The date had not been filled in at the time the mortgage was signed because the date for completion had not yet been set. Later insertion of the date did not meet the statutory requirements. Understandably, the plaintiff relied on *Kasumu* and argued its right to relief without having to repay the monies advanced.

The Court of Appeal held, however, that the moneylender was entitled to the benefit of the vendor’s lien and accordingly, could recover the purchase price of the property from the plaintiff. In reaching this conclusion, the court relied heavily on the analogy


\[156\] [1969] 3 All E.R. 545 at 552 *per* Plowman J.
of Thurstan's case,\textsuperscript{157} an earlier decision of the Court of Appeal, which concerned a moneylender who had entered into a lending agreement with an infant. The moneylender was allowed a similar right of subrogation into a vendor's lien once the infant had, as she was entitled to do, ratified the transaction and taken title to the property. Russell L.J., for the Court, could see no relevant distinction between Thurstan's case and the facts in Congresbury. In Thurstan's case, the Court felt that the policy rendering infants' moneylending contracts unenforceable was not violated by the granting of the right of subrogation. So too, it was suggested, the granting of subrogation in Congresbury would not conflict with the underlying policy of the Moneylenders Acts.

Before considering the ultimate fate of Congresbury, it is important to note the vulnerability of Russell L.J.'s position on this point. In each of the Type (B) situations adverted to in figure 2 above, it is possible to identify a clear basis for the conclusion that there is no material conflict between the policy underlying the rule rendering the transaction unenforceable and the granting of the subrogation right. In each case the general rule rendering transactions of the kind in question unenforceable is not offended by the granting of the particular form of relief. In the case of infants' contracts for example, although there are obvious policy reasons for rendering transactions with minors in general, and moneylending transactions in particular, unenforceable, it is also true that there is a strong policy justification for allowing suppliers of necessaries to recover their value. The same policy justification can be extended to moneylenders who facilitate the acquisition of necessaries upon credit, thus providing a sound basis for an exception to the general rule of unenforceability that is palatable in policy terms. Similarly, the spending of ultra vires borrowings on intra vires debts merely has the effect of changing the identity of creditors and does not, in effect, increase the ultra vires debt load of the borrower. Again, a policy justification for an exception to the general rule is made out. As well, in Thurstan's case, contract law ultimately permits minors to ratify and render binding agreements of

\textsuperscript{157}Thurstan v. Nottingham Permanent Benefit Building Society, [1902] 1 Ch. 1. An appeal taken on a different point was unsuccessful; see [1903] A.C. 6.
the kind at issue as an exception to the general rule of unenforceability. An exception for money lent to facilitate such transactions is therefore similarly defensible. No similar justification can be developed, however, for the availability of subrogation in the Congresbury context. It is irrelevant to the policy objectives of the Moneylenders Acts that the money borrowed happens to be spent by the borrower on the acquisition of an interest in realty. The defective lending transaction is not rendered any less offensive to the legislation by reason of the use made of the borrowed money. Thus, if it is correct that the lender has no direct claim in money had and received for the monies advanced, there appears to be no policy justification for reaching a different conclusion with respect to the subrogation claim. Curiously, however, this point of difficulty with the holding in Congresbury was not considered when the issue later came before the House of Lords.

In Orakpo v. Manson Investments Ltd,158 an opportunity was afforded the House of Lords to review the Congresbury line of authority.159 The familiar fact pattern was present. Substantial sums of money had been advanced by a moneylender under a series of seven transactions, all of which were designed to enable the borrower to acquire interests in realty which would be utilized, in turn, to secure the loans. The borrower was sophisticated and fully aware of the terms of the borrowings. The transactions were evidently carefully planned and heavily documented, but none of them fully complied with section 6 of the 1927 Act. Six failed to record a particular term in the written document. The seventh misstated the date on which the monies were advanced. The borrower defaulted and resisted repayment on the ground of the moneylender's failure to comply with section 6. Basing its arguments on Congresbury, the moneylender claimed to be entitled to be subrogated to the interests of the vendors and other lien holders whose interests had been discharged with the borrowed money. In reply, the borrower argued that Congresbury ought to be overruled and that, in any event, any such claim was now caught by the

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limitations period set out in section 13 of the Act. The Court of Appeal indicated that it felt bound by its own previous decision in Congresbury\textsuperscript{160} and held that the subrogation claims would have succeeded had they not been rendered stale by section 13. On further appeal, the House of Lords agreed that the claims could be disposed of on the limitations point but went on to hold that Congresbury should be overruled. The central basis of this holding was that subrogation could be available in a case of this kind only if the parties had explicitly agreed that the borrowed monies should be used to discharge the interests in question.\textsuperscript{161} Such an agreement would, in turn, be covered by section 6, with the result that it will have to be recorded in the written agreement and that, even so, it will not give rise to enforceable rights of subrogation if some other defect renders the transaction unenforceable under section 6.\textsuperscript{162} Such defects were present both here and in Congresbury.

Another view of this matter could, of course, have been taken. Viscount Dilhorne, dissenting on this point, would have held that subrogated rights, once validly created by the parties' agreement, would not be cut down by section 6.\textsuperscript{163} More generally, however, as their Lordships were well aware, subrogation has often been made available in other contexts in the absence of a binding agreement of this kind. There appears to be no technical reason, therefore, why subrogation could not have been imposed here in order to prevent the unjust enrichment of the borrower. Accordingly, it is not surprising that the decision has attracted criticism,\textsuperscript{164} no doubt for the reason that Congresbury afforded at

\textsuperscript{160}[1977] 1 All E.R. 666 at 684 (C.A).

\textsuperscript{161}[1978] A.C. 95 at 104-05 per Lord Diplock.

\textsuperscript{162}That is to say, that the right of subrogation is a "security given by the borrower" for the purposes of section 6 and therefore cannot be enforced if the requirements of that section are, for any reason, unmet. See \textit{ibid.} at 105 per Lord Diplock.

\textsuperscript{163}\textit{Ibid.} at 109.

\textsuperscript{164}See, for example, Goff and Jones, \textit{supra}, note 145 at 49-51 and 528; J. Beatson, "Unjust Enrichment and the Moneylenders Act" (1978) 41 Mod. L. Rev. 330.
least some measure of relief in obviously compelling circumstances where none other is available. The least persuasive aspect of their Lordships' reasoning distinguished Thurstan's\textsuperscript{165} case on the basis that the applicable legislation in that case, the \textit{Infants Relief Act 1874}\textsuperscript{166} rendered the initial agreement "void," whereas section 6 of the \textit{Moneylenders Act, 1927} merely rendered the agreement in question "unenforceable." Perversely, then, their Lordships appear to have concluded that the more determined Parliament is to nullify the agreement, the more likely it is that the plaintiff will be able to recover the value of benefits conferred under the agreement\textsuperscript{167}. If it is not obvious that a Canadian court should or would follow \textit{Orakpo}, then, it must still be acknowledged that this form of relief for the moneylender is a very poor substitute for a direct claim in money had and received for the monies advanced. There being no reason for treating monies utilized for the acquisition of interests in realty in a special manner, the relief afforded by this device is random and incoherent in policy terms. The important point for present purposes, however, is simply that in \textit{Orakpo}, the House of Lords appears to have blocked the only escape route available in English law from the iniquitous consequences of the traditional judicial treatment of Moneylenders Act cases.

In summary, then, we see in the Moneylenders Act cases, a body of doctrine in a rather advanced state of deterioration and a judiciary that is apparently unwilling to evolve that doctrine in more fruitful directions. This is surely an embarrassing chapter of English private law jurisprudence, and is one that ought not be emulated elsewhere. Nonetheless, it is submitted that the problems present in these cases are merely colourful illustrations of more systemic problems in the illegality jurisprudence. They offer persuasive evidence of the need for a shift in our general approach to issues of this kind.

\textsuperscript{165} \textit{Supra}, note 157.

\textsuperscript{166} \textit{The Infants Relief Act, 1874}, (U.K.), 37 & 38 Vict. c. 62

\textsuperscript{167} The decision is criticized on this basis by Goff and Jones, \textit{supra}, note 145 at 49-51 and 528.
F. Illegality in the Context of the General Problem of Contracts in Conflict with Statutory Policy

The traditional case law on "illegality" is not the only body of common law dealing with benefits conferred under contracts in conflict with statutory schemes of one kind or another. Thus, the case law concerning agreements which fail on grounds of "informality" or because the agreement in question is ultra vires the contractual capacity of one of the parties must similarly effect a reconciliation between a statutory policy precluding enforcement of the agreements in question and the common law's general policy of permitting recovery of the value of benefits conferred under ineffective transactions. It is useful to compare the illegality rules with doctrine in these other areas for two reasons. First, in these related areas the courts have developed quite different solutions to what appear to be rather similar problems. Secondly, careful scrutiny reveals that illegality, informality, and ultra vires are not the watertight compartments they are assumed to be under current law. This constitutes a further inadequacy in the traditional approach to the analysis of contracts in conflict with statutory policy.

The Statute of Frauds, 1677\(^{168}\) and the various statutes derived from it throughout the common law world stipulate that contracts of certain kinds cannot be enforced unless they are recorded in a written document signed by the party against whom enforcement is sought. In sharp contrast to the illegality context, however, it is well established that the value of benefits conferred under such agreements can be recovered in a restitutionary claim.\(^{169}\) Indeed, it was precisely such a claim that was allowed in the important decision of the Supreme Court of Canada in DeGlman v. Guaranty Trust,\(^{170}\) in which the Court stated that such claims are based on the unjust enrichment principle rather than on a theory of obligation resting on an implied promise by the defendant to pay

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\(^{168}\) Car. II, c. 3.

\(^{169}\) See, generally, Goff and Jones, supra, note 145, c. 20.

for benefits received if the agreement should prove to be unenforceable. Restitutionary relief is allowed, we may safely assume, because the courts are of the view that the policy underlying the Statute of Frauds does not require the impoverishment of plaintiffs as a class and the random conferral of windfall benefits on defendants.

It is of interest, of course, that the form of section 6 of the Moneylenders Act, 1927\(^{171}\) is very similar to these provisions and, accordingly, it is not surprising that the plaintiff moneylender in Barclay v. Prospect Mortgages\(^{172}\) attempted to press the analogy of the Statute of Frauds case law. As has been noted, the attempt to do so failed, though it is not at all clear that it should have. Goulding J. distinguished the informality cases on the ground that the Statute of Frauds was indifferent between plaintiffs as a class and defendants on policy grounds, whereas the Moneylenders Acts were aimed at the protection of the class of defendant borrowers from claims brought by plaintiff money-lenders. Attractive as this reasoning may at first appear, however, no such neat division can be erected between "illegality" on the one hand and "informality" on the other. Goulding J.'s view of the policy neutrality of the Statute of Frauds, vis-à-vis plaintiffs and defendants, has some historical basis in the initial objectives and the surrounding circumstances of the statute at the time of its enactment in the late seventeenth century.\(^{173}\) However, it is no longer true (if, indeed, it ever was) that the statute is devoid of class protection elements. Thus, law reform bodies have defended retention of the writing requirement for guarantees on the basis that it serves to protect inexperienced parties.\(^{174}\) Other provisions of the statute would no doubt be

\(^{171}\) & 18 Geo. 5, c. 21

\(^{172}\)[1974] 3 All E.R. 672 (Ch. D.).


defended on similar grounds. Further, it is not, of course, the case that "illegality" as such is confined to class-protecting statutes. Many statutes that give rise to "illegality" analysis advance policy objectives that, in the sense intended by Goulding J., are indifferent as between plaintiffs and defendants. In short, the distinction proposed by Goulding J. simply does not effectively distinguish cases of true illegality from mere informality.

More importantly, however, the endless variety of existing and future statutory contexts will doubtless frustrate any attempt to draw a clear dividing line between illegality and mere informality. The Ontario Consumer Protection Act offers a useful illustration. That statute provides that agreements for the supply of goods and services, including credit, to consumers must be recorded in writing in a particular manner. Failure to do so results in "executory" portions of the agreement in question being "not binding" on the buyer. Further, the supplier who fails to comply is subject to prosecution under the offence provisions of the Act and is liable to penalties including both fine and imprisonment. It is further provided, however, that a defence to such a charge will be made out "where the person against whom the contravention is alleged proves that the error or omission is a bona fide accidental or clerical error or omission or beyond his control." Under a scheme of this kind, it is not obvious whether suppliers who have failed to comply with the Act's writing requirements should be permitted to bring

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175 This is most obviously true of the provision relating to minors' contracts, but would also be part of any modern defence relating to the provisions relating to promises concerning the transfer of interests in land, promises to pay liquidated damages and, perhaps, agreements not to be performed within a year.

176 R.S.O. 1980, c. 87.

177 Ibid. ss 1(i), 18, 19 and 24.

178 Ibid. s. 19(2).

179 Ibid. s. 39.

180 Ibid. s. 39(4).
restitutionary claims for the value of benefits conferred.\textsuperscript{181} Though the traditional analysis would suggest that the answer to this question turns on whether the writing requirements raise issues of illegality or informality, it is not apparent that they fall neatly into either category. Under the golden rule approach, careful consideration would be given to whether the additional civil sanction of the unavailability of restitutionary relief should be added by the courts to the sanctioning scheme set out in the Act. It would be noted that the sanctions provided for in the Act are not insubstantial, that the Act allows the supplier to retain payments made under executed agreements, and that the Act attaches no penal consequences to breaches that are in some sense accidental or incorrect. Such considerations might be thought by many to lead to the conclusion that the sanctions set out in the statute are sufficient and that the further sanction of making restitutionary relief unavailable would inappropriately penalize conduct that the Act itself determines to be innocent. In addition, they would impose an artificial distinction between situations in which the supplier has been paid and where he has not. Other views are, of course, possible. One might argue that, at least in the case where an offence has been committed, it is desirable for the common law to provide an additional disincentive to this form of wrongdoing. Such a disincentive would discourage unscrupulous parties from risking the quasi-criminal sanctions and attempting to run up their profits through misleading conduct, secure in the knowledge that they should, at the very least, be able to recover the value of benefits conferred on others. Those who are attracted by this consideration might wish to hold, however, that restitutionary relief should be allowed where no offence has been committed. And so on. The important point for present purposes is not that one is driven inescapably to any particular conclusion with respect to this issue, but rather that our understanding of the problem is enhanced by this contextual approach and, by way of contrast, is not advanced

\textsuperscript{181}Interestingly, one Ontario court held the agreement in such a case binding on the basis of a most dubious interpretation of the concept of "executory contract". See J. Schofield Manuel Ltd v. Rose (1975), 9 O.R. (2d) 404 (Co. Ct.). This appears to be a further illustration of the phenomenon discussed in Part III of this article, of a court holding the agreement enforceable on dubious grounds in order to prevent an unjust enrichment.
one iota by focusing attention narrowly on the (perhaps unanswerable) question of whether these particular statutory writing requirements raise issues of illegality or informality.

Similar points can be made with respect to the common law's treatment of ultra vires agreements. As in cases of informality, it is well established that parties who have entered into agreements that are ultra vires their contractual capacity can recover the value of benefits conferred on the other party.\textsuperscript{182} It is not difficult to see why this is and should be so. Any other outcome would be inconsistent with the underlying policy of preserving the assets of the ultra vires actor and attempting to ensure that its resources are directed to its legitimate objectives. Thus, even though he or she has failed to adhere to a governing regulatory scheme, the ultra vires party can recover in a restitutionary claim. Holman v. Johnson is not considered to be a relevant authority. Again, however, it is not every case that can easily be classified as ultra vires rather than illegal. For example, provincial legislation regulating the affairs of credit unions typically provides that these unions can make loans only to members of the credit union.\textsuperscript{183} Thus, it might be said that a loan to a non-member is ultra vires the credit union. In addition, however, these statutes may also provide that the entering into of transactions with a non-member constitutes an offence.\textsuperscript{184} Does this not render the transaction illegal and subject to the rigours of Holman v. Johnson? And yet, since such an outcome is so contrary to the underlying statutory policy, it is tempting to classify the problem as one of ultra vires and take the view that Holman v. Johnson is irrelevant. Again, however, the relevant consideration is


\textsuperscript{183} See, for example, The Credit Unions and Caisses Populaires Act R.S.O. 1980, c. 102 s. 81.

\textsuperscript{184} Prior to 1976, this was the case in Ontario, for example, where the making of an unauthorized loan would have been captured by the legislation's general offence provision. See, The Credit Unions Act R.S.O. 1960, c.79,ss 4, 23, 29, and 59. Reforms enacted in 1976, however, replaced the general offence provision with a series of narrowly defined offence provisions which would not render the making of an unauthorized loan, per se, an offence. See, 1976 S.O., c.76, ss 141-44, and, now, R.S.O., 1980 c.102,ss 141-44.
obviously a matter of determining whether the granting of restitutionary relief is consistent with the underlying regulatory policy, rather than a matter of attempting to classify the case as truly *ultra vires* rather than illegal. Fortunately, the Canadian court that has considered this question simply ignored the potential applicability of *Holman v. Johnson* and allowed relief in order to prevent, as it was said, a borrower from being "unjustly enriched."\(^{185}\)

It is evident, then, that there are no obvious and clear dividing lines severing true "illegality" from these related phenomena. Indeed, the traditional "illegality" cases are merely points on a continuum of cases dealing with transactions in conflict with statutory policy. As is recognized by the courts in cases of informality and *ultra vires*, what is generally required in these cases is an analysis of the underlying objectives of the statutory policy that renders the transaction unenforceable, and an analysis of the implications of those objectives for the parties' restitutionary liabilities. To attempt to resolve these problems by labelling some cases as "illegality" cases and others as something else simply obscures the more general nature of this problem set and the need for a contextual and policy-oriented analytical framework within which to assess the validity of claims for restitutionary relief.

**G. Doctrinal Support for the New Golden Rule**

The preceding sections of this article have offered a series of principled arguments in favour of a more explicit adoption of a golden rule approach to the analysis of restitutionary claims for the value of benefits conferred under agreements that are in conflict with statutory policy. For some readers, however persuasive such arguments might appear to be, a further question will be of interest. To what extent can the golden rule approach be said to derive support from the existing case law? To put the matter differently, to what extent are judges who take the doctrine of *stare decisis* seriously free to supplant the traditional reliance on *Holman v.*

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Johnson with the adoption of the golden rule approach? There are a number of points to be made in response.

First, the golden rule approach is manifest, though rarely explicitly espoused, in the existing case law in a variety of ways. Thus, the exceptions to Holman v. Johnson itself\(^{186}\) must rest ultimately on an analysis that is consistent with the golden rule approach. The application of the "not in pari delicto" exception in Kiriri Cotton v. Dewani,\(^{187}\) for example, rests on a determination by the court that the underlying policy objectives of the statute in question would be hindered rather than furthered by a refusal to allow restitutionary relief. In the same vein, though this may seem less persuasive, judicial reliance on the golden rule approach is to some extent evident in the difficult jurisprudence that has developed at the borders of the traditional exceptions. As has been argued above,\(^{188}\) judges who have concluded that considerations of public policy favour the granting of restitutionary relief are inclined to stretch the exceptions to accommodate that result. Further, as St. John Shipping indicates, the golden rule approach has been explicitly adopted in the analysis of the threshold question of enforceability.\(^{189}\)

One can argue that, \textit{a fortiori}, it must be available to analyze the second level question of the availability of restitutionary relief. If one looks beyond the boundaries of traditional "illegality," it is plainly the case that the golden rule approach is manifest in the treatment of parallel questions in cases dealing with informal and \textit{ultra vires} agreements.\(^{190}\) The plaintiffs in these cases are, in some sense, \textit{in pari delicto} and, indeed in the \textit{ultra vires} cases may have committed an offence. Nonetheless, restitutionary relief is allowed because it is felt that the granting of such relief is consistent with the policy objectives of the statutory scheme in question. In these

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\(^{186}\) Briefly described in the text at notes 21-49, \textit{supra}.

\(^{187}\) \textit{Supra}, note 25.

\(^{188}\) See the discussion in the text at notes 65-76, \textit{supra}.

\(^{189}\) See the text at notes 50-58, \textit{supra}.

\(^{190}\) See the text at notes 168-85, \textit{supra}. 

various ways, then, the existing case law may be said to offer indirect support for the golden rule approach.

More than this, however, there exists within the traditional illegality case law a strain of authority openly allowing restitutionary relief in favour of plaintiffs who cannot bring themselves within one of the traditional exceptions to the rule in *Holman v. Johnson*. Typically, judgments in these cases simply do not refer to the *Holman v. Johnson* problem. Occasionally, however, judges have indicated that if forced to choose between doing justice and slavish adherence to earlier precedents, they would choose the former path.¹⁹¹ Three devices for protecting the restitutionary interests of *in pari delicto* parties are to be found in the cases. First, there are cases in which plaintiffs have been straightforwardly allowed to bring claims for the value of benefits conferred on the other party. Thus, for example, (and notwithstanding the existence of authority to the contrary),¹⁹² plaintiffs have been permitted to recover benefits conferred under agreements rendered invalid by Sunday observance legislation.¹⁹³ Secondly, courts have occasionally allowed a not *in pari delicto* party merely to rescind the agreement with the consequence that a *restitutio in integrum* would have to be made to the *in pari delicto* party. Thus, a purchaser of securities from an unregistered trader has been allowed to rescind the purchase agreement on the condition that the value of benefits received be


restored to the seller. 194 This view of the applicable law received the support of Laskin J.A. in his concurring opinion in Sidmay v. Wehttam Investments. 195 It should not go unnoticed, of course, that this is a view which is quite inconsistent, at the level of general principle, with the approach taken in the English Moneylenders Act cases. 196 Thirdly, there are cases in which courts have refused to allow not in pari delicto parties to recover monies paid to the defendant in return for services rendered under an illegal agreement. 197 Again, the consequence is to allow in pari delicto parties a form of protection of their restitutionary interest.

In more recent years, Ontario trial judges have begun to acknowledge explicitly the strength of the kinds of criticisms of Holman v. Johnson that have been made here and have suggested that the appropriate solution is to allow straightforward restitutionary claims for the value of benefits conferred. In Berne Developments Ltd v. Haviland, 198 Saunders J. observed that "[i]n recent years, there has been a recognition of the desirability [of] balancing the need to preserve public policy by not enforcing illegal agreements and the need to avoid unjust enrichment." He went on to observe that "[t]he striking of the balance may depend in each case on the extent of the illegality and the unjust enrichment." On the facts of that case, the parties to an agreement for the purchase and sale of land had deceived the first mortgagee by not disclosing the existence of a second mortgage taken back, in effect, by the vendor. Although it was Saunders J.'s view that this conduct rendered the transaction unenforceable and that the plaintiff second


195(1967), 61 D.L.R. (2d) 358 at 388.

196For discussion of which see the text at notes 100-67, supra.


198(1983), 40 O.R. (2d) 238 at 250, drawing support, inter alia from the statement of Masten J.A. in Steinberg v. Cohen quoted above in note 99, supra. See further, the discussion in note 212, infra.
mortgagee, therefore, ought to be unable to enforce the mortgage and recover interest owing, it was nonetheless appropriate in his view that the purchaser be required to complete repayment of the value received by restoring the principal amount of the mortgage to the plaintiff. The conduct of the parties, though reprehensible, was not such as to justify the defendant's enrichment at the plaintiff's expense. Similarly, another Ontario trial judge\(^{199}\) has suggested that claims in \textit{quantum meruit} might be allowed to unlicensed tradesmen whose contracts of employment, as a result of the decision to this effect of the Ontario Court of Appeal in \textit{Kocotis v. D'Angelo},\(^{200}\) are normally held to be unenforceable. Again, the apparent assumption is that although the plaintiff is indeed \textit{in pari delicto}, the nature of the offence is not such that the additional civil sanction of denying restitutionary relief is appropriate.

Further, in an important Australian decision, the High Court has adopted a golden rule approach to the analysis of a claim brought by a builder to recover the value of work performed under an oral building contract rendered "unenforceable" by section 45 of the New South Wales \textit{Builders Licensing Act}. In \textit{Pavey & Matthews Pty. Ltd v. Paul},\(^{201}\) the builder was allowed to recover in \textit{quantum meruit} as the court was of the view that granting such relief would not, in the circumstances of the case, undermine the objectives of the statute. Wisely, the Court refrained from expressly classifying the problem as one of "illegality" or "informality." Though the Court appeared to be impressed by the analogical force of the \textit{Statute of Frauds} cases, it did not plainly so state. On the other hand, no reference was made to \textit{Holman v. Johnson} and no

\[^{199}\text{Monticchlo v. Torcena Construction Ltd et al. (1979), 102 D.L.R. (3d) 462 per R.E. Holland J., (Ont. H.C.).}\]


suggestion was made that the agreement was "illegal" though obviously such a holding would have been possible.

In short, then, there are a number of features of existing doctrine in this area that are consistent with the golden rule approach. As well, there are recent developments offering more direct support for it. The analysis offered in this article can be defended in part, then, on the basis that it merely renders explicit the underlying structure of some features of current law and provides an analytical basis for initiatives already being undertaken in the reported cases. To be sure, however, more open acknowledgment of the availability of restitutionary relief to in pari delicto plaintiffs and a more explicit adoption of the golden rule analysis in the restitutionary context would represent a shift in judicial thinking. Indeed, there would be little point in writing at such length on this subject, were this not the case. Doctrinal support for such a development can be drawn, however, from the adoption by the Supreme Court of Canada of the American unjust enrichment analysis of restitutionary claims. This development has been described many times elsewhere, and it is sufficient for present purposes simply to note that in a series of decisions over the past thirty years or so, the Supreme Court has moved away from the traditional English view of quasi-contract and constructive trust and has adopted the American view that these two bodies of law are better understood and analyzed if they are brought together to form a modern law of restitution having as its central organizing principle the proposition that "a person who has been unjustly enriched at the expense of another is required to make restitution to the other." Although recognition of the utility of the unjust enrichment analysis is, in the main, a matter of reorganizing and

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202 See, for example, G. Klippert, *Unjust Enrichment* (Toronto: Butterworths, 1983) c. 2.


rendering more accessible and more coherent the existing rules of quasi-contract and constructive trust, it is also the case that this development has carried with it an increasing recognition of the appropriateness of allowing claims of this kind. Thus, in *Pettkus v. Becker*, the Supreme Court of Canada, relying heavily on the unjust enrichment analysis, gave recognition to what is, in effect, a new cause of action relating to the division of matrimonial or quasi-matrimonial property upon dissolution of the parties' relationship. It is not argued here that a similarly dramatic break with the past is required in the illegality context. On the contrary, it has been argued that what is required is an explicit recognition of the underlying structure of much of our existing law and further development of initiatives already under way. Nonetheless, to the extent that adoption of the analysis offered here requires the courts to place greater emphasis on the availability of restitutionary claims in this context, this would be a development that is very much consistent with the modern treatment of restitutionary claims in Canadian restitutionary law.

The unjust enrichment analysis has not, however, been as enthusiastically embraced in England. Accordingly, it may be that in the English context, the most attractive device for weaving a development of this kind into the fabric of existing law would be a revitalization and expansion of the equitable exception to *Holman v. Johnson* briefly referred to above. Although this device has lain dormant for several decades, it has the attraction of being an open-ended category of cases in which relief is made available simply because it is warranted on public policy grounds. It thus appears

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206 See, generally, Goff and Jones, *supra*, note 204. Thus, for example, it may well be that Lord Diplock's apparent lack of enthusiasm for the "unjust enrichment principle" contributed to the decision to overrule the *Congresbury* line of authority in *Orakpo v. Manson Investments*. See, [1978] A.C. 95 at 104. And see further, the discussion in the text at notes 145-67, *supra*.

207 In the text at notes 37-45, *supra*. 
well suited to further development and it would not, of course, be
the first such equitable doctrine to enjoy renewed vigour in the
present century.

Finally, it may be observed that even in the absence of a
development of this kind, however desirable it may be, considerable
progress can be achieved through the deployment of the traditional
techniques of confining the reach of unattractive earlier authority.
It has been argued above that this field suffers from an excess of
generalization and, indeed, the main thrust of the golden rule
approach is one of focusing attention on the specific statutory
context at issue and assessing the private law implications of its
structure and underlying objectives. The effect of doing so, of
course, is to limit the influence by analogy of past error. Thus, to
choose but one example, if it is indeed the case that the English
courts have painted themselves into a corner from which they will
not emerge in the Moneylenders Act cases,\footnote{208} there is no compelling
reason or need to repeat this experience in other statutory contexts
and, indeed, in other jurisdictions in which English authority is not
binding. Perhaps a concern of this kind with our tendency to over-
generalize in this area underlies Laskin J.A.'s observation in Sidmay
v. Wettham Investments that "I doubt whether a single rationalizing
principle can be applied to the English money-lender cases or,
indeed, to cases on illegality in general".\footnote{209} A similarly cautious
approach to past authority more generally would no doubt be a
constructive development. It must be added, however, that
incremental adjustment of this kind will not meet the need for a
more basic and pervasive change in the analytical framework within
which these problems are addressed.

In summary, then, there is considerably more support for the
golden rule approach in the existing doctrine than might at first be
appreciated. To the extent that some evolution and adjustment of
document in this area is needed, however, the necessary doctrinal
tools for accomplishing such change are readily available.

\footnote{208}{Discussed in the text at notes 100-07, supra.}

\footnote{209}{(1967), 61 D.L.R. (2d) 358 at 384.}
V. CONCLUSION

In *St. John Shipping v. Rank*, Devlin J. offered an analysis of the question of whether a particular agreement is unenforceable on grounds of statutory illegality. This analysis placed the issue in the context of the objectives and structure of the statutory scheme in question and in the context of the general policy of the common law favouring the enforceability of agreements. The question may to some extent be one of attempting to divine legislative intent. But here, as in many other contexts, the legislators often appear to have assumed a reasonable division of labour between the legislature and the courts and have simply left the issue at large. The attempt in these circumstances, then, must be to articulate a rule of common law that is complementary to and consistent with the statutory scheme, and that is as consistent as possible with general common law principles.

What has been suggested here is the adoption of a similar analysis for the secondary question of restitutionary liability that arises once it has been determined that the contract is unenforceable. Too often in the past it has been simply assumed that the contractual and restitutionary issues can be collapsed and that if there is a policy basis for refusing to enforce the agreement, so, too, is there a policy justification for refusing restitutionary relief. That this is plainly not so becomes evident when one considers the questions of enforceability and restitutionary relief for what they are — as determinations by the judiciary to impose or withhold additional civil sanctions beyond those sanctions, if any, that have been imposed by the statutory scheme itself. As has been argued, the sanction of unenforceability of the contract is different in important ways from the sanction of not allowing relief in restitution.*

The policy analysis that would support the imposition of the former would not necessarily support the latter. Indeed, it has been argued that there will be many circumstances, in addition to these now

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210 [1967] 3 All E.R. 683 (Q.B.), for discussion of which see Part III of this article.

211 See the text at notes 15-17, supra.
clearly recognized in our law,\textsuperscript{212} in which it will be appropriate to hold the agreement unenforceable but still allow a restitutionary claim. The enquiry in each case, then, must be one of determining whether the policies underlying the statutory scheme\textsuperscript{213} that renders the agreement unenforceable would also be well-served by the denial of restitutionary relief and then of assessing the desirability of doing so in the light of the general policy of the common law to allow restitutionary recovery of benefits conferred under ineffective transactions.\textsuperscript{214} This approach to the analysis of restitutionary claims — here referred to as the new golden rule — has been argued to be manifest in a number of features of our current law on the consequences of illegality and in recent developments in this area. It becomes all the more apparent that this approach is in fact utilized by the judiciary and that, indeed, its use is indispensable if attention is drawn beyond the boundaries of traditional "illegality" to the more general problem of agreements in conflict with statutory authority, of which illegality forms only a part. As has been seen,\textsuperscript{215} the case law on \textit{ultra vires} and "informality" reaches different conclusions than the illegality cases, no doubt because a contextual analysis of the golden rule variety suggests that these kinds of statutory schemes, which, at their margins cannot be clearly distinguished from "illegality," do not, as a matter of policy, require the withholding of restitutionary relief.

More explicit recognition of the value of the golden rule approach in the context of the traditional "illegality" cases would, however, facilitate more thoughtful analysis of these issues and a reconsideration of the value of earlier authority. Moreover, explicit

\textsuperscript{212}That is, the recognized exceptions to the rule in \textit{Holman v. Johnson}, briefly described in the text at notes 21-49, \textit{supra}.

\textsuperscript{213}Although the focus of discussion here has been statutory illegality, the golden rule approach applies equally well to cases of common law illegality. One must simply ask whether the policies underlying the rule of \textit{common law} that renders the agreement unenforceable also require rejection of restitutionary relief. Indeed, \textit{Berne Developments Ltd v. Haviland}, discussed \textit{supra}, note 198, was a case of common law illegality.

\textsuperscript{214}See the discussion in note 16, \textit{supra}.

\textsuperscript{215}See the text at notes 168-85, \textit{supra}.
adoption of this approach would, it has been argued, relieve the pressure otherwise bearing on the enforceability concept to render agreements enforceable in order to accommodate what are in effect restitutionary objectives. Such a development would also relieve the pressure on the established exceptions to the Holman v. Johnson principle to expand in order to accommodate what are, in reality, meritorious restitutionary claims of in pari delicto parties. As well, it has been argued (albeit somewhat more tentatively) that a similar treatment of proprietary questions arising in this context would similarly be fruitful.

The main elements of the golden rule approach have been set forth in some detail in earlier sections of this paper. It has been argued that a more open use of this type of analysis would lead to a greater recognition of the availability of restitutionary relief to parties who are, in the traditional sense, in pari delicto. Nonetheless, it should be emphasized that it is not part of the thesis here advanced that such relief should invariably, or perhaps even normally, be available to such parties. The appropriateness of granting such relief is a matter to be determined on a case by case basis. What is being suggested is that the golden rule approach will generate consideration of the factors that are material to the determination of whether such a claim should lie. To the extent that this approach is likely to lead, however, to a greater availability of restitutionary claims in this context, this development should be seen as consistent with more general developments occurring in Canadian restitutionary law.

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216. This phenomenon has been described and criticized in Part III of this article. Further illustrations may be found in the text at note 130, supra and in notes 181, 193, and 200, supra.

217. See text at notes 77-89, supra.

218. See the text at notes 62-64 supra, and for a brief illustration of its application, the discussion of the Ontario Consumer Protection Act at notes 176-82, supra.

219. See the text at notes 202-06, supra.