

has been actually paid over; but not if the stakeholder has paid it over according to the event before his authority is revoked: *Howson v. Hancock* (1800), 8 T.R. 575.

The party seeking to recover money paid upon an illegal contract or purpose must give notice that he repudiates the transaction before it is executed, and reclaim the money, in order to entitle him to maintain an action; and merely bringing the action is not sufficient notice: *Busk v. Walsh* (1812), 4 Taunt. 290; *Palyart v. Leckie* (1817), 6 M. & S. 290.

After the execution of the illegal contract or purpose, money paid under it, whether as the consideration or in performance of the promise, cannot be recovered back; for the parties are then equally delinquent, and the rule applies that "*in pari delicto melior est conditio possidentis*": *Taylor v. Chester* (1869), 33 L.J.Q.B. 227, L.R. 4 Q.B. 313. The rule applies where the illegal purpose has been executed in a material part, though it remains unexecuted in another material part: *Kearley v. Thomson* (1890), 59 L.J.Q.B. 288, 24 Q.B.D. 742; and where it has been executed as far as possible, and further execution has become impossible: *Re Great Berlin Steamboat Co.* (1884), 54 L.J.C. 68, 26 Ch.D. 616.

The true test for determining whether or not the plaintiff and the defendant were *in pari delicto* is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party: *Simpson v. Bloss* (1816), 7 Taunt. 246; *Taylor v. Bowers* (1876), 46 L.J.Q.B. 39, 1 Q.B.D. 201; *Hyams v. Stuart King* (1908), 77 L.J.K.B. 796, [1908] 2 K.B. 696. But in the case of purely equitable remedies, the Court may refuse its assistance to a *particeps criminis*, who does not rely upon any part of the illegal transaction, as a person invoking the jurisdiction of the Court of Chancery must come into Court with clean hands: *Ayerst v. Jenkins* (1873), 42 L.J.C. 690, L.R. 16 Eq. 27. Accordingly money lost fairly at illegal gaming or wagering, and paid, cannot be recovered back: *Howson v. Hancock* (1800), 8 T.R. 575; *Thistlewood v. Cracroft* (1813), 1 M. & S. 500; *Dufour v. Ackland* (1830), 9 L.J.O.S. K.B. 3. So with money paid or accounted for as the price of goods sold and delivered under an illegal contract of sale: *Owens v. Denton* (1835), 4 L.J. Ex. 68, 1 Cr. M. & R. 711. And money paid to induce a person to become bail for another cannot be recovered back, after the purpose is completed by acceptance of the bail, whether the principal makes default or not: *Herman v. Jeuchner* (1885), 54 L.J.Q.B. 340, 15 Q.B.D. 561. See *Consolidated Exploration Co. v. Musgrave* (1899), 69 L.J.C. 11, [1900] 1 Ch. 37, which is perhaps to be supported upon the ground that the transfer of shares was *ultra vires*, and the transferee a trustee for the company.

Where money was deposited with a company's banker for the purpose of giving the company a fictitious credit, it was held that after an order was made for winding up the company the money could not be recovered back: *Re Great Berlin Steamboat Co.* (1884), 54 L.J.C. 68, 26 Ch.D. 616. Upon this principle a premium paid upon an illegal insurance, after the