SOUTH  AUSTRALIA

EIGHTY-FOURTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE IRRECOVERABILITY OF BENEFITS OBTAINED BY REASON OF MISTAKE OF LAW

1984

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The Members are:

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The Secretary of the Committee is Mrs. J. L. Leonard, c/o Supreme Court, Victoria Square, Adelaide 5000.

EIGHTY-FOURTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE REFORM OF THE LAW RELATING TO THE IRRECOVERABILITY OF BENEFITS OBTAINED BY REASON OF MISTAKE OF LAW

To:

The Honourable C. J. Sumner, M.L.C.,
Attorney-General for South Australia.

Sir,

Your predecessor referred to this Committee the question of reform of the law with respect to benefits obtained as a result of a mistake of law.

The present position as to the effect of a mistake of law is as stated in *Halsbury's Laws of England (4th Edition) Volume 32 paragraphs 8 and 9 and pages 6 and 7:*

> "As a general rule relief will not be granted on the ground of mistake if the mistake is one of law as distinguished from one of fact. The distinctions between mistakes of law and mistakes of fact have never been clearly defined by the courts, but the mistake of law must be one of general law, for example the legal interpretation of a contract or the construction of a statute.
>
> There is no mistake of general law where there is ignorance of a private right, even though the private right is the result of a matter of law, or depends upon rules of law applied to the construction of legal instruments. There is no mistake of general law where there is ignorance of a right which depends upon questions of mixed law and fact, and a statement of fact which involves a conclusion of law is still a statement of fact and not a statement of law. Mistake as to the law of a foreign country which is clearly in one sense a mistake of law is held in this country to be a mistake of fact . . .".

Goff and Jones in their text on the *Law of Restitution (2nd Edition) pages 319-320* show that the rule is not absolute, and point to specific situations where recovery of money paid under mistake of law will be allowed. They also point out at pages 90-102 the somewhat dubious legal foundations for the rule. Winfield in an article in *(1943) 59 LQ.R. 327* points out the difficulty of drawing a clear line of demarcation between what is "law" and what is "fact".

However as is said in *Chitty on Contracts 25th Edn. (1983) Volume 1 page 1084:*

> " . . . it is now accepted that where money is paid under a mistake as to the general law, or as to the legal effect of the circumstances under which it is paid, but with full knowledge of the facts, it is normally irrecoverable."

There are exceptions to that general proposition and we will deal with them later in this report. For example, for the general rule to operate, the payment made under a mistake of law must have been made "voluntarily". While English Courts have interpreted compulsion narrowly, Australian Courts have been prepared to say that payments are made

under compulsion where there was a fear that, if the money were not paid the payee would take some step, other than involving legal process, which would cause harm to the payer, and that this fear was well founded: see *Air India v. The Commonwealth [1977] 1 N.S.W.L.R. 499.*

This and other exceptions, as we have said, will be examined later in the report. At this stage consideration is given to the origins of the rule.

History:

The broad proposition that all payments made under a mistake of law are irrecoverable is frequently claimed to have been established by the judgment of Lord Ellenborough in *Bilbie v. Lumley (1802) 2 East 469; 102 E.R. 448.* In that case the defendants were the assured under a policy underwritten by the plaintiff. They had, at the time of effecting the insurance, failed to disclose to the plaintiff certain material facts. Subsequently the defendants made a claim under the policy and the plaintiff, not appreciating that he could repudiate liability on the grounds of non-disclosure, settled the claim. On discovering his mistake, the plaintiff sought to recover the payment from the defendants in an action for money had and received. The defendants pleaded that the plaintiff had paid their claim with full knowledge or means of knowledge of the circumstances. The plaintiff argued that recovery should be permitted even though the money had been paid under a mistake of law because of the concealment of the material facts, an argument which Rooke J. accepted.

The Court of King's Bench, reversing Rooke J., held that the plaintiff could not recover. The plaintiff's claim clearly surprised Lord Ellenborough, C.J., who during argument, inquired of the plaintiff's counsel whether he knew of any case where a man, who had voluntarily paid money with full knowledge of the facts, had recovered on the ground that he had paid it under a mistake of law. The plaintiff's counsel not being able to produce a case, Lord Ellenborough went on to say at page 472 (pages 449-450 of the English Reports):

> "Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case."

The statement appears to have been a departure from the law at that time. In *Landown v. Lansdown (1730) Moseley 364; 25 E.R. 441,* Lord King L.C. said at page 365—

> "The maxim of law ignorantia iuris non excusat, was, in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases."

In *Farmer v. Arundel (1772) 2 Bl. & W. 824: 96 E.R. 485* De Grey C. J. said at pages 825-6:

> "When money is paid by one man to another on a mistake either of fact, or law, or by deceit, this action will certainly lie"

see also *Framson v. Delamere (1595) Cro. Eliz. 458; 78 E.R. 711: Hewer v. Bartholomew (1597) Cro. Eliz. 614; 78 E.R. 855: Bonnel v. Foulke (1657) 2 Sid. 4; 82 E.R. 1224: Campbell v. Hall (1774) 1 Cowp. 209; 98 E.R. 145.*

However, the decision in *Bilbie v. Lumley* was made the basis of a broad rule denying restitution in all cases where the facts were known and the only mistake was one of law. This was unnecessary because the

decision could equally well have been explained as an example of irrecoverability where an honest claim is settled. It is submitted that Rooke J. isolated the real point in that case, i.e. was the claim "honest" in the eyes of the law?

The rule appears to have become firmly established when a few years later the Court of Common Pleas applied the decision in *Brisbane v. Dacres (1813) Taunt. 143; 128 E.R. 641.* There the plaintiff was a naval captain who had made a personal profit from carrying freight on his ship. From this profit the Admiral of the fleet would customarily be paid "tribute". The plaintiff paid this, believing that he was under a legal obligation to do so. The belief was subsequently shown to be unfounded. Upon discovering this, the plaintiff sued for money had and received. The Court made great play of applying *Bilbie v. Lumley*, and even issued a sharp warning against disregarding the rule about mistake of law:

> "Many inconveniences may arise; there are many doubtful questions of law: when they arise the defendant has an option, either to litigate the question, or to submit to the demand, and pay the money. I think, that by submitting to the demand, he that pays the money gives it to the person to whom he pays it, and makes it his, and closes the transaction between them" (at page 152 per Gibbs J.).

Those remarks are completely beside the point. The claimant did *not* know at the time of payment that there was a doubtful question of law involved.

It is of interest to note that even in *Brisbane v. Dacres (supra)*, there was a strong dissenting judgment. Chambre J. while agreeing that *Bilbie v. Lumley* was correctly decided on its particular facts, was of the opinion that it seemed to be a dangerous doctrine; that a man getting possession of money, in consequence of another party's ignorance of the law, could not be called upon to repay it. Nevertheless, the mistake of law rule has prevailed, even if its actual record of application has been far less consistent than one would expect. Where the doctrine was applied, there almost invariably existed a sufficient admixture of fact to justify the decision on some other ground, such as payment of an honest debt, or change of position, or payment under compulsion of law. Sometimes, where one would have expected the existence of a mistake of law, the mistake was treated as raising a different issue, or treated as one of fact.

Nevertheless as Chitty (op. cit.) points out at pages 1085-6, a mistake as to the construction of a statute is treated as a mistake of law. So is a mistaken view of regulations made under statutory authority. Likewise mistakes as to the effect of general rules of common law and equity fall into this category. Mistakes as to the general law as to the construction of written documents and wills are treated similarly. Probably the high water mark of these decisions is *Derrick v. William [1939] 2 All E.R. 559* where a litigant was not allowed to contend that he had accepted money on a mistake of law where the Court of Appeal decision on which he had relied in doing so had been later overruled by the House of Lords. That decision can only be supported if at all on the maxim interest rei publicae ut sit finis litium.

The mistake of law rule had regularly been criticized by academics, and in 1907 an American writer Stadden in an article entitled *"Error of Law"* in *7 Colum. L.R. 476* made a very determined attack on the rule. The points made by him may be summarized as follows:

> (1) The maxim ignorantia juris non excusat is quoted as the basis of the doctrine. But the meaning of this maxim is that one who has

done wrong cannot excuse himself on account of his ignorance of the law—it applies to cases in which one has committed a crime, or a tort, or a breach of contractual or other obligation. In the cases under discussion, the plaintiff has done no wrong; he is merely seeking that to which in conscience he is entitled.

(2) It is said that everyone is presumed to know the law. There is no such presumption.

(3) It is said that there is no means of trying a man's knowledge of the law. But the existence of such knowledge is a triable fact even in criminal cases where intent is an ingredient in the crime. As has been many times said, the state of a man's mind is as much of a fact as the state of his digestion.

(4) It is said that mistake of law would be urged in every case of mistaken benefit. That danger is equally great in the case of mistake of fact.

(5) It is said that allowing a recovery would put a premium on ignorance. But this argument applies equally to mistake of fact. Besides, it is no great inducement to a man to pay money because he knows that if he can successfully prove a mistake, he can get it back.

(6) Lastly, it is said that if a recovery is allowed, litigation will be multiplied. This argument applies as strongly to cases of mistake of fact. Moreover it is not the object of the law to prevent the litigation of just claims.

Stadden concluded that on the whole it would seem that if there is a mistake either of fact or law there should be recovery unless there is no legal or moral obligation to pay, as in the case of a debt barred by a statute of limitations, or unless the defendant acts in such a way in reliance on the payment that the parties can no longer be put in status quo.

An American text on *Contracts: Calamari and Perillo* also express criticism of the rule saying at page 308:

> "In 1802 Lord Ellenborough committed a mistake of law when he ruled that, because ignorance of law is no excuse, money paid under a mistake of law that a debt was owed need not be repaid."

The Americans have by no means been alone in criticising the rule. Stoljar in *The Law of Quasi-Contract* when discussing defences to claims for money paid says at page 43 that the defence of mistake of law—

> "is a defence which together with the maxim ignorantia juris non excusat pretends to old respectability. There is no mystery about the latter rule, for clearly we cannot excuse someone from legal sanction or liability merely on the plea that he never knew his conduct to be against the law. Unfortunately what is not always seen is that the mistakes of law that generally arise in quasi-contract are of an entirely different kind. For the rule that ignorance of law is no excuse by no means entails the further rule under which a person might keep or retain money simply because it is paid to him by an error of law rather than fact."

Caroline Needham in an article entitled *"Mistaken Payments: A New Look at an Old Theme" 13 Uni. B.C.L.R. 159* said of the rule at page 172:

"The rule introduces an irrational and artificial distinction between payments made under a mistake of law and those made under a mistake of fact. The only relevant question is whether the payment was made under the influence of an operative mistake. If so, the way in which the mistake is classified should be quite immaterial. The substance of the transaction is the same in both cases: the payee has received money which does not belong to him, to which he is not entitled and which, but for his mistake of law or fact, the payer did not intend him to receive. In both cases it is unjust for the recipient to retain money which was paid to him by mistake and to which he is not entitled. The essential character of the transaction is the same whether the mistake is tagged "fact" or "law". There is no real difference: it is the same transaction in substance. Yet recovery is allowed for mistake of fact but denied for error of law, even though the reason which compels recovery in the first instance applies with equal force to payments made under mistake of law. To treat essentially the same transaction in totally different ways is quite unreasonable.

Furthermore, to apply this unwarranted distinction we are obliged to undertake the notoriously difficult task of differentiating mistake of fact from mistake of law. The distinction between the two is practically impossible to define and extremely difficult to draw in any given case. The elements of fact and law are so closely intertwined that any attempt to separate them cannot but involve a certain amount of arbitrariness. The difference between a mistake of fact and a mistake of law may be nothing more than a question of degree: a mistake of fact will often involve some mistake of law and vice versa. In such cases, the distinction is meaningless and will depend largely on the opinion of the individual judge. It is impossible to predict with certainty where the line will be drawn in any given case."

Difficulties of the Fact/Law Distinction:

While the distinction between mistake of law and mistake of fact is capable of being decisive as to the outcome of a case, the exact demarcation between the two has never been determined and probably cannot be. The reason for this is the intrinsic difficulty in laying down any hard and fast line separating the two. The problems were adverted to by Jessel M. R. in *Eaglesfield v. Marquis of Londonderry (1875) 4 Ch.D. 693* where at page 703, speaking of personal status, he said:

"There is not a single fact connected with personal status that does not more or less involve a question of law."

In fact, the subsequent history of that case afforded a practical illustration of the difficulty of distinguishing a mistake of law from one of fact, for while Jessel M. R. held that in the circumstances of the case the mistake was one of fact, the Court of Appeal reversed his decision on the ground that it was a mistake of law.

In *Solle v. Butcher [1950] 1 K.B. 671* Jenkins L. J. said the mistake was one of law whereas Bucknill L. J. thought it was one of fact. Denning L. J. decided the matter on another ground not involving the fact/law distinction.

The Courts have been able to use the confusion surrounding the exact distinction, when seeking to avoid the consequences of the *Bilbie v. Lumley* rule. Thus situations which technically could have been characterized as a mistake of law have at times been characterized as a mistake

of fact. For example in *George (Porky) Jacobs Enterprises Ltd. v. City of Regina (1964) 44 D.L.R. (2d.) 174* where there had been overpayments of licence fees to a municipality, whose original by-law called for an annual fee, in the mistaken belief that subsequent amending by-laws called for a fee per day (as was the case under a superseded amending by-law), the Supreme Court of Canada held that there was no mistake of law since the interpretation of the relevant by-laws was not in question but there was a mistaken belief in the existence of by-laws calling for a daily fee. On this see also *Leedon v. Skinner [1923] V.L.R. 401* where the mistaken belief was as to the application of the then Federal Land Tax Act. That however was a stronger case in that the Commonwealth Land Tax Act 1910 section 30 prohibited the passing on of land tax from a lessor to a lessee.

Exceptions to the General Rule:

Once it has been determined that a mistake is one of law, this does not necessarily mean that recovery will be denied. Over the years exceptions to the general rule have been recognized. One exception, perhaps better described as a threshold requirement, which has frequently been utilized in Australia, is that for the rule to apply the payment must not have been made under compulsion.

Compulsion:

Where payment has been made under compulsion, the fact that the payment was made under a mistake of law will not act as a bar to recovery.

The question of compulsion is often raised where a public official has by one way or another, obtained money by way of a charge, tax, toll, duty, or other duty that was either not due at all or was excessive in amount.

In *Irving v. Wilson (1791) 4 T.R. 483; 100 E.R. 1132*, a customs officer wrongly seized the plaintiff's goods, which he refused to release save on payment of two pounds. In an action for money had and received, the court would not hold that the plaintiff's payment had been voluntary, for the revenue laws "ought not to be made the means of oppressing the subject", nor is an officer of the King "to be permitted to abuse the duties of his station, and to make it a mode of extortion" (ibid. at page 486 per Lord Kenyon).

A similar objection was raised in *Morgan v. Palmer (1824) 2 B. & C. 729, 107 E.R. 554*, where the mayor of Yarmouth had charged an illegal fee for a licence to sell ale. Again the court dismissed the objection that the plaintiff's payment was voluntary as well as a mistake of law, and further discovered an additional factor making for compulsion or constraint: Abbott C. J. saying at page 734—

> "if one party has the power of saying to the other 'that which you require shall not be done except upon conditions which I choose to impose', no person can contend that they stand upon anything like equal footing."

It is clear from the authorities that where a public official refuses to grant some right, service or privilege to which the payer is entitled (either free of charge or for a lesser sum of money than the amount claimed) unless the latter complies with his demand, then generally speaking and subject to the particular facts of the case, this will be considered sufficiently akin to coercion to raise an obligation to make restitution. The payee

has not paid voluntarily to close the transaction, he has merely paid because he needs the service, right or privilege and can get it in no other way.

It also appears that even where the official's demand is not accompanied by any element of denial by refusing to perform a duty which he is bound to perform for nothing or for a sum less than that demanded, the plaintiff can still recover. In other words, the exaction of an illegal charge colore officii is itself sufficiently coercive to raise an obligation to allow restitution. The reason given is that the individual and the official, who is clothed with the authority of the state and invested with wide enforcement powers, are not on an equal footing. The official is in a superior position as he has the whole weight of the governmental machine behind him. This positional imbalance is alone enough to render a payment made in such circumstances involuntary.

In *Steele v. Williams [1853] 8 Ex. 625; 155; E.R. 1502,* the plaintiff had to search in a parish register, and had completed his searches when the parish clerk demanded an illegal fee. There was, therefore, no question of the plaintiff being denied his rights unless he paid, for he had already exercised them. An action was brought to recover the fee which had been paid under protest.

Martin B. said in the course of argument—

> "The case of *Morgan v. Palmer* shows that if a person illegally claims a fee colore officii, the payment is not voluntary so as to preclude the party from recovering it back."

Counsel immediately pointed out that the case was distinguishable as there was no question in *Steele v. Williams* of the right being denied until the fee was repaid. Nevertheless the court decided that the plaintiff could recover the fee, and Platt B. said in his judgment—

> "The defendant took it at his peril, he was a public officer, and ought to have been careful that the sum demanded did not exceed the legal fee."

Steele v. Williams was expressly approved by Menzies J. in *Mason v. New South Wales (1959) 102 C.L.R. 108 at 133.* However, since the decision of *Whiteley v. The King 101 L.T. 741; 26 T.L.R. 19* in 1909, the English Courts have refused to take such an expansive view of what constitutes an involuntary payment.

In that case William Whiteley Ltd. had paid licence fees on demand by the Inland Revenue on the footing that certain of their employees were taxable male servants, although each time they made payment they protested in writing. The company sought to recover the money paid when a Divisional Court held in 1908 in *Whiteley v. Burns 24 T.L.R. 319; [1908]1 K.B. 705* that the employees in question were not male servants within the meaning of the Act because they were employed in trade whereas the section only taxed servants in private establishments.

The Court did not allow recovery. Walton J. said at 26 T.L.R. 20—

> "As far as any question of duress was material there was no evidence beyond the fact that the supervisor told the suppliants that they were liable and proceedings would be taken. The suppliants had all the facts before them. They knew there was a question, and they could have resisted the claim at any time, as they finally did in 1906. There was nothing amounting to compulsion, and the case did not come within the cases dealing with money extorted or obtained

colore officii. In all these there was an element of duress. These payments were voluntary, and were therefore not recoverable."

Walton J. was of the opinion that no action lay for extortion, unless some right has been withheld until payment is made.

Similar views were expressed by Romer J. in *Twyford v. Manchester Corporation [1946] Ch. 236* where he commented at page 242 "If he wished to challenge the validity of the registrar's demand his best course was to refuse to pay and to test the matter by inviting the corporation to sue him."

The English position as enunciated in *Whiteley v. The Queen (supra)* was initially followed in Australia: see *Werrin v. The Commonwealth (1938) 59 C.L.R. 150.* However nine years later in the decision of *McClintock v. The Commonwealth (1947) 75 C.L.R. 1* the High Court was equally divided on the point (Starke J. expressing no opinion on this point) as to what constituted a voluntary payment. Latham C.J. and McTiernan J. took the Whiteley approach. However, Williams J. with Rich J. concurring, took a more lenient view as to what constituted involuntariness.

Williams J. said at page 40:

"... I think that the evidence establishes that the plaintiff delivered his pineapples to the C.O.D. under the pressure of an illegal demand made under the colour of a valid law and that Mr Barwick is entitled to rely on principles analogous to those stated in *Maskell v. Horner [1915] 3 K.B. 106.* Lord Reading C.J. said at page 118 that—

'If a person with knowledge of the facts pays money which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it... If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received... The payment is made for the purpose of averting a threatened evil and is made not with the intention of giving up a right but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand.' "

A similar approach had been taken by Rich J. in *White Rose Flour Mill Co. Pty Ltd v. Australian Wheat Board (1945) 18 A.L.J. 323,* and was subsequently adopted by the majority of the High Court in 1959 in the case of *Mason v. New South Wales 102 C.L.R. 108.*

In that case the plaintiffs, who were carriers of goods by road, sued the defendant State for money had and received, being fees which they had paid for permits allowing them to carry goods for consideration. All the fees had been collected before the Privy Council decision in *Hughes and Vale Pty Ltd v. New South Wales 1955 A.C. 241,* where it was held that the relevant portions of the Act requiring permits could have no valid application to persons in interstate trade because of the operation of Section 92 of the Constitution.

In applying for a permit the plaintiffs usually protested about having to do so, and in about one quarter of the cases wrote the protest on the cheque. One of the plaintiffs was occasionally challenged by inspectors on the road side, and saw one other carrier held, and not allowed to proceed, because he could not produce a permit.

McTiernan J. alone took a strict view as to what constituted an involuntary payment. Dixon C.J. said at page 117:

"We are dealing with the assumed possession by the officers of government of what turned out to be a void authority. The moneys were paid over by the plaintiffs to avoid the apprehended consequence of a refusal to submit to the authority. It is enough if there be just and reasonable grounds for apprehending that unless payment be made an unlawful and injurious course will be taken by the defendant in violation of the plaintiff's actual rights. The plaintiffs were not bound to wait until the illegality was committed in the exercise of the void authority . . . the case is I think one in which common count in money had and received would be sustained."

Similar views were expressed by the other members of the Court: see Fullagar J. at pages 123-4, Kitto J. at page 125, Taylor J. at page 129, Menzies J. at page 133 and Windeyer J. at pge 146.

A similar approach was also recently taken by the New South Wales Supreme Court in *Air India v. The Commonwealth (1977) 1 N.S.W.L.R. 499,* where it was held that in general it must be established in order to show that a payment was made under compulsion that—

(a) there was a fear that, if the money were not paid the payee would take some step, other than involving legal process, which would cause harm to the payer, and

(b) that this fear was reasonably caused and well founded.

The Australian Courts have thus been able to circumvent some of the injustices created by the application of the general rule preventing recovery in cases of mistake of law amounting to compulsion, by taking a more expanded view of the concept of involuntary payment.

Recent cases in Canada appear to have further extended the concept of involuntary payment by dropping any requirement that the plaintiff act under an urgent or pressing necessity, instead the courts only require "practical compulsion"—see *Eadie v. Township of Bantford (1967) 63 D.L.R. (2d.) 561 (S.C.C.)* discussed by Bradley Crawford in an article in *(1967) 17 U. of T.L.J. 344* entitled *Restitution: Mistake of Law and Practical Compulsion.*

Wilful Misrepresentation of Law, Want of Bona Fides, Fraud, Undue Influence and Breach of Fiduciary Obligation by the Recipient.

In each of the above cases, recovery may be permitted notwithstanding that the mistake was one of law. On wilful misrepresentation of law see the remarks of Bowen L.J. in *The West London Commercial Bank Limited v. Kitson [1884] 13 Q.B.D. 360 at 362-3.*

On want of bona fides see *Ward & Co. v. Wallis [1900] 1 Q.B. 675 especially at page 678.*

The exception on account of fraud would appear to follow from the principles laid down in relation to par delictum in *Shelley v. Paddock [1980] Q.B. 348.*

On fiduciary obligation see the remarks of James L.J. in *Rogers v. Ingham [1876] 3 Ch.D. 351 at 356.*

Compulsion of Legal Process:

While it is true that if the essentials of compulsion are present, the fact that the payment was also made under a mistake of law will not prevent the payer from recovering the amount, this does not apply where the compulsion consists of actual, or (in some cases) threatened litigation.

The principle underlying the first exception is that "there must be an end of litigation, otherwise there would be no security for any person" per Lord Kenyon C.J. in *Marriott v. Hampton (1797) 7 T.R. 269; 101 E.R. 969.* The simplest illustration is where judgment has been given that A shall pay B a particular sum of money and A pays it. Of course if that judgment is reversed on appeal, the money paid under it must be refunded.

Even if payment is made before judgment, but under the pressure of legal proceedings, or as a result of a threat to commence an action, the payment usually cannot be recovered. Lord Halsbury L.C. said in *Moore v. Vestry of Fulham [1895] 1 Q.B. 399 (C.A.) at 401-2:*

> "the principle of law is not that money paid under a judgment, but that money paid under the pressure of legal process cannot be recovered. The principle is based upon this, that when a person has had an opportunity of defending an action if he chose, but has thought proper to pay the money claimed by the action, the law will not allow him to try in a second action what he might have set up in the defence to the original action."

A qualification of this appears in several decisions which show that where a local authority has served on a person a notice requiring him, on pain of legal proceedings, to abate a nuisance and he spends money in doing so, though in fact the authority itself is legally bound to make the abatement, he can recover the money paid: see for example *Andrew v. St Olave's Board of Works [1898] 1 Q.B. 775.* But in these cases special weight was attached to the consideration that "commonsense and the necessity of the case made it necessary for something to be done forthwith" (*Andrew's case* at page 781).

It is possible that the Australian courts are prepared to adopt a more flexible approach; for example, in *J. & S. Holdings v. N.R.M.A. Insurance (1982) 41 A.L.R. 539,* the Full Court of the Federal Court of Australia said at page 556:

> " . . . The fact that such legal proceedings are threatened or on foot does not operate to alter the character of a payment extracted by compulsion or in a case where the payee was under no obligation to pay all or part of the money paid, preclude the payee from recovering that to which the payee was not entitled. Were it otherwise, every calculating highwayman, bushranger and robber would take out the insurance of instituting an action against any potential victim. The position may well be different if the money paid was paid in actual settlement of legal proceedings."

Payments made under the compulsion of legal process other than litigation or the threat thereof, for example distress of goods, are generally recoverable. The reasons for the distinction between payment under stress of litigation and under stress of other legal process, are that with respect to process against a man's property, there are cases in which he can protect the property from seizure only by payment of the sum demanded, because the law affords him no opportunity of disputing his liability before payment; for example where goods are distrained for non-payment of a market toll see *Maskell v. Horner [1915] 3 K.B. 106 at 121-122.* Even where such an opportunity does exist, he usually has such an urgent need of the goods that it is only reasonable to expect him to pay at once rather than encounter the delays of litigation. With respect to distraint against the person, this argument is even stronger, as freedom from distraint of one's body is of far greater importance than freedom from

distraint of one's goods. This is of course of less importance in South Australia today, because of the provisions of the Debtors Act 1936.

There are exceptions to the payment following legal process rule where the money was paid under a void judgment either because the court lacked jurisdiction or the judgment was void on procedural grounds—see *Chitty (op. cit.) page 1115. Parties not in pari delicto:*

An exception to the no recovery rule was enunciated by the Judicial Committee of the Privy Council in the 1960 case of *Kiriri Cotton Co. v. Dewani [1960] A.C. 192.* There, where both parties had erred in law, the recipient of money paid in an illegal transaction was found to have had a statutory duty of observing the law placed on his shoulders. Lord Denning, in delivering the advice of the Committee, held that because of this statutory duty and also because of "oppression" (see page 205), the parties were not in pari delicto and therefore the recipient would not be entitled to rely on the mistake of law rule as a defence to the plaintiff's claim. The general principle was set out by Lord Denning at page 204 as follows:

> "If there is something more in addition to a mistake of law—if there is something in the defendant's conduct which shows that, of the two of them, he is the one primarily responsible for the mistake—then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other then they are not in pari delicto and the money can be recovered back . . . likewise, if the responsibility for the mistake lies more on the one than the other, because he has misled the other when he ought to know better—then again they are not in pari delicto and the money can be recovered back."

—see the comment on this case D.E.C. Yale in *1960 C.L.J. at pages 142-145.* As is pointed out in *Chitty on Contracts 25th Edn. (1983) Volume 1 page 1087* it may be more accurate to regard the cases referred to in Lord Denning's observations as illustrations of the limits of the rule rather than as true exceptions. For a more critical view of Lord Denning's observations in *Kiriri Cotton,* see an article by Webber in *(1960) 23 M.L.R. 322-327.*

The in pari delicto doctrine has flourished in Canada. In both *Eadie v. Township of Brantford (1967) 63 D.L.R. (2d.) 561* and *George (Porky) Jacobs Enterprises Ltd. v. City of Regina (1964) 44 D.L.R. (2d.) 174,* the Supreme Court of Canada held that money paid under a mistake of law was recoverable because one party owed a duty to the other party to know the law.

In *Eadie's case (supra),* Spence J. held at page 572—"In this case, the appellant, as a taxpayer and inhabitant of the defendant corporation, was dealing with the clerk-treasurer of the corporation and that clerk-treasurer was under a duty towards the appellant and other taxpayers of the municipality. When that clerk-treasurer demands payment of a sum of money on the basis of an illegal by-law despite the fact that he does not then know of its illegality, he is not in pari delicto with the taxpayer who is required to pay that sum."

The exception as expounded in Eadie's case and later in *Hydro-Electric Commission of Nepean v. Ontario Hydro (1979) 92 D.L.R. 3d. 481* affirmed *(1980) 127 D.L.R. 3d. 321* looks only to the fact that an unauthorized claim has been made, and to the receipt of the money by the defendant as a result of a mistaken belief concerning the scope of its authority.

Quite recently however the expansion of the in pari delicto exception has been checked. When the Ontario Hydro case went on appeal to the Supreme Court of Canada *(1982) 132 D.L.R. 3d. 193* the in pari delicto exception was held not to apply and the decision has since been applied by the Court of Appeal of British Columbia in *Langco Realty Ltd. v. Langley 37 B.C.L.R. 233* in which McFarlane J.A. delivering the Court's judgment said at pages 235-6:

> "During the interval between delivery of the trial judge's judgment on 8 February 1980 and the hearing of this appeal on 29 March 1982 there has occurred an event which in my opinion has a profound and decisive effect on the issues involved here. That event is the delivery on 2nd March 1982 of the judgment of the Supreme Court of Canada in Hydro-Electric Commission of Nepean v. Ontario Hydro (not yet reported). As a result of that judgment, counsel for the respondent here has abandoned any reliance on the "in pari delicto" principle. In my opinion, counsel is clearly right to take that position in view of those extracts taken from the judgment of Estey J. in the Nepean case. They are applicable directly to this appeal.
>
> I can find nothing in the statute to make either the respondent or the appellant primarily responsible for this mistake; nor can I find anything in the statute which makes the term "in pari delicto" appropriate in describing the action of either party . . . We are concerned with unauthorized acts and mutual mistake with respect thereto. The law of mutual mistake applies because in the circumstances such a mistake occurred. Any exception to the general rule barring recovery of moneys paid in an illegal transaction when the parties are not in pari delicto, does not apply here because neither party has committed a delict and no wrongful conduct in the sense of actions contrary to statute or public policy has taken place."

Mistake as to Private Rights:

Relief is granted for a mistake of law the mistake is deemed to be as to "private rights" as distinguished from a mistake as to general law. This exception was established in *Cooper v. Phibbs [1867] L.R. 2 H.L. 149* where the plaintiff had sought to set aside a lease of fishing rights entered into under the mistaken belief that the defendant rather than the plaintiff was, by virtue of a deed and a private Act of Parliament, the owner of the rights. In fact, on the true construction of the deed and the Act, the plaintiff was the owner. In response to the argument that equity should not relieve against a mistake of law, Lord Westbury said at page 170:—

> "It is said, 'Ignorantia juris haud excusat'; but in that maxim the word 'jus' is used in the sense of denoting general law, the ordinary law of the country. But when the word 'jus' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake."

As is said in *Chitty (op. cit.) at page 1087*—

> "The principle in Cooper v. Phibbs is difficult to reconcile with the general law because operative mistake is rarely simply a mistake as to the effect of a general rule of law but is usually a mistake as

to its application to particular fact situations, i.e., a mistake as to private legal rights."

Nevertheless, *Cooper's case* has been followed in more recent cases and the passage cited from Lord Westbury's speech was referred to with apparent approval by Lord Wright tendering the advice of the Privy Council in *Norwich Union Fire Insurance Society Limited v. Wm. H. Price Limited,* an appeal from New South Wales, reported in *[1934] A.C. 455.* The relevant passage is at pages 462-463.

Although the boundary between "general law" and "private right" is somewhat vague, mistake as to "private right" certainly includes erroneous impressions as to the legal interpretation of a particular instrument. Thus in *Earl Beauchamp v. Winn [1873] L.R. 6 H.L. 223* Lord Chelsmford said at page 234—

> "Although when a certain construction has been put by a Court of Law upon a deed, it must be taken that the legal construction was clear, yet the ignorance before the decision of what was the true construction, cannot, in my opinion, be pressed to the extent of depriving a person of relief on the ground that he was bound himself to have known beforehand how the grant must be construed."

It would appear that mistake of law is sufficient ground to trigger any relevant equitable remedy. Winfield in the article in *59 L.Q.R. 327* entitled *"Mistake of Law"* referred to above, observed at page 330:

> "As Dr H. G. Hanbury has pointed out, there are various forms of relief against mistake which may be sought in Equity, cancellation of an instrument, repayment of money, simple rectification of an instrument, rectification of a contract with specific performance of the amended contract, resistance of specific performance. We need not pursue these here, for our main problem is the nature of mistake of law rather than detailed examination of the remedies for it; but we venture to add to these remedies a tracing order, for one may infer from Sinclair v. Brougham that a tracing order is none the less available because there has been a mistake of law"

and he refers to the speech of Lord Sumner in *Sinclair v. Brougham [1914] A.C. 398 at 452.*

The status of the "private rights" exception at common law appears uncertain. However in *Anglo-Scottish Beet Sugar Corporation v. Spalding U.D.C. [1937] 2 K.B. 607 at 617 Cooper v. Phibbs* was cited as authority for the view that a mistake as to private rights will be regarded at common law as a mistake of fact and Winfield (supra) said at page 339 of the article referred to:

> "that the distinction between mistake as to general rules of law and mistake as to private rights exist at Common Law as well as in Equity, though at Common Law mistake as to private rights is reckoned as a mistake of fact; that, however, is merely a matter of nomenclature."

We note that the Law Reform Commission of British Columbia in their report on *Benefits Conferred under Mistake of Law*, raised the suggestion of enacting legislation which would put it beyond doubt that the exception in *Cooper v. Phibbs* applies both at law and in equity. The Commission however concluded that to do so would at best be only a partial solution to the problems created by the rule in *Bilbie v. Lumley*, and that it would leave intact the general rule and its elaborate overlay of exceptions.

Money received by those with a duty to be honest:

Courts are prepared to hold certain individuals to a higher degree of honesty and fair dealing than others, especially where an officer of the Court such as a trustee in bankruptcy is concerned. In *Ex parte James* it was held *(1874) L.R. 9 Ch. App. 609 at 614* per James L.J.:

> "... [The] Court, then finding that he has in his hands money which in equity belongs to someone else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people."

In fact, in ordering repayment by a trustee in bankruptcy as an officer of the court, the court imposes a higher standard of honesty than that required of other people. It is clear that when a defendant falls within a class of persons which owes such a higher "duty" the nature of the plaintiff's mistake is irrelevant. In *De Carnac, ex parte Simmonds (1885)* 16 Q.B.D. 308 Lord Esher said at page 312:

> "If money had by a mistake of law come into hands of an officer of a Court of Common Law, the court would order him to repay it so soon as the mistake was discovered. Of course, as between the litigant parties, even a Court of Equity would not prevent a litigant from doing a shabby thing. But I cannot help thinking that, if money had come into the hands of a receiver appointed by a Court of Equity through a mistake of law, the court would, when the mistake was discovered, order him to repay it."

In view of the absolute nature of the obligation to repay funds, some courts have been reluctant to create new classes of individuals subject to a duty to be honest. However in *In re Thellusson [1919] 2 K.B. 735*, the rule was extended to transactions initiated and carried through by the debtor and not the trustee.

The cases of *Ex parte James* and *In re Thellusson (supra)* were not however applied in *Re Roberts; Official Receiver v. Lincoln Investments Ltd. (1976) 12 A.L.R. 730.* There it was held, on an application before the Federal Court of Bankruptcy by the Official Receiver for directions, that Lincoln Investments Ltd. could not rely upon the rule in *Ex parte James* since—

> (1) It had not discharged the burden of satisfying the court of facts calling for the application of the principle.
>
> (2) The extension of the rule in *Re Thellusson* to transactions initiated and carried through by the debtor and not the trustee applied only in exceptional circumstances.
>
> (3) Those exceptional features were absent in the present case.

The Canadian Courts, however, have not been slow to extend the exception in *Ex parte James.* The duty has been extended to solicitors receiving money in that capacity, receiver-managers and trustees in bankruptcy. It has even been suggested that such an obligation rests on municipal officials: see *Eadie v. Township of Brantford (1967) 63 D.L.R. (2d.) 561 (S.C.C.).*

Payment by the Court:

If the court pays out money under a mistake of law, it is recoverable. In *Re Birkbeck Permanent Benefit Building Society [1915] 1 Ch. 91* a contest arose, on the liquidation of the society, between shareholders and

other claimants who had deposited money with the Society under contracts which were ultra vires the Society. The Official Receiver paid the shareholders in full before he received notice of the depositors' appeal to the House of Lords under the name *Sinclair v. Brougham [1914] A.C. 398.* This appeal was partially successful and, on the application of the liquidator, the shareholders were ordered to repay the amount by which they had been overpaid:

> "The Court has that right and ought under the circumstances to make an order that the money, which has been overpaid by an official of the court, should be refunded"
>
> *Re Birkbeck (supra) at page 93* per Neville J.

Payments by Executors, Trustees and Personal Representatives:

Wynn-Parry J. in *Re Diplock [1947] Ch. 716 at 725-726* stated the position with respect to trustees and personal representatives:

> "It is well established that a trustee or personal representative may set-off any overpayment made to a beneficiary under a mistake of law against future payments due to the beneficiary: see *Re Musgrave [1916] 2 Ch. 417.* There is, however, no authority to which a trustee can point to buttress a claim for recovery from a beneficiary overpaid under a mistake of law in the absence of any set-off. It is .... generally assumed that at law such a claim must fail because the rule that the mistake ... must be a mistake of fact is ... of completely general application. In equity there is no reported example of a successful action by a trustee or personal representative against a wrongly paid recipient."

If the lack of authority is merely a reflection of the seeming absoluteness of the general rule, in view of the wide ambit of the exceptions to the general rule such an action is a distinct possibility.

Public Moneys Disbursed without legal authority:

It is well established that any payment out of a government fund may be recovered whether or not disbursed under a mistake of law, if there was no legal authority for the payment. The principle was stated by Viscount Haldane in *Auckland Harbour Board v. The King [1924] A.C. 318 at 326-327:*

> "No money can be taken out of the Consolidated Funds into which the revenues of the State have been paid, excepting under a distinct authorisation from Parliament itself. The days are long gone by, in which the Crown, or its servants, apart from Parliament, could give such an authorisation or ratify an improper payment. Any payment out of the Consolidated Fund made without Parliamentary authority is simply illegal and ultra vires and may be recovered by the Government if it can ... be traced."

Newton J. refers in *The Commonwealth v. Burns [1971] V.R. 825 at 830* to the "well established rule that a party cannot be assumed by the doctrine of estoppel to have lawfully done that which the law says he shall not do".

This rule is in actual fact a rule of constitutional law, and far from being a method of avoiding the injustices of the mistake of law rule, appears to create injustices in itself. British Columbia has dealt with this by providing in its Financial Administration Act, 1981, Section 67—

"(1) Where public money is paid to a person by the government—

(a) in excess of the authority conferred by an enactment

(b) without the authority of an enactment, or

(c) contrary to an enactment

and a right is asserted by the government to recover the payment or part of it, or to retain other money in full or partial satisfaction of a claim arising out of the payment, the person against whom the right is asserted may, subject to subsection (2), rely on any matter of fact or law, including estoppel, which would constitute a defence in a proceeding brought to recover the payment as if it had been made under a mistake.

(2) Subsection (1) does not enable a person to rely on a defence that a payment made by the government was made under a mistake of law, and the right of the government to recover the money paid by it is not impaired by reason only that the payment was made under a mistake of law."

Under that provision, therefore, the Crown continues to have a prima facie right to recover public money disbursed in error, but the recipient of funds has the right to raise any defence which would be available on the facts of the case, if the Crown's claim had been brought to recover money paid under a mistake of fact.

Mistake of Foreign Law:

Mistakes of foreign law are regarded as mistakes of fact, and hence money paid under an error respecting a foreign law is prima facie recoverable because a question of foreign law is a question of fact: see *Lazard Bros. & Co. v. Midland Bank [1933] A.C. 289.*

Reasons for Reform:

The doctrine of mistake of law, while much restricted is far from extinct. There are a number of very good reasons why the general rule should be abrogated, not the least of which is that the rule does not result in equal justice in like cases.

In the early days of the rule it was said that mistakes of fact are often inevitable, the party seeking relief on this ground having acted as a reasonably thinking individual, but that mistake of law can never be inevitable as the law is available to all. However in view of the ever increasing mass of case law and statutes with which both lawyers and laymen must deal, such a requirement, even if correct, is much too onerous a burden today.

While the maxim ignorantia juris haud excusat is quoted as the basis for the rule, the meaning of this maxim is that one who has done a wrong cannot excuse himself on account of his ignorance of the law. This applies to cases in which one has committed a crime; for where the safety and welfare of the public is in issue, the very purpose of the criminal law would be stultified if a defendant could raise ignorance of the law as a defence to, for example, a murder charge, though different considerations may apply where for example there has been no proper publication of a law enacting a new criminal offence before a person is alleged to have offended against that law. Such a rationale has no application in any event where the question in issue involves only the adjust-

ment of private rights inter partes. In such a case the plaintiff has done no wrong; he is merely seeking that to which in conscience he is entitled.

The objection was advanced by Lord Ellenborough that mistake of law would be "urged in every case". However, the danger is equally great in the case of mistake of fact. In mistake of law cases as in mistake of fact cases, it would not be enough merely to allege mistake; the burden of proof is on the plaintiff. Also Lord Ellenborough's objection seems to amount to a "flood gates" argument, and there has been no indication that the courts have been swamped with mistake of law cases in jurisdictions where the general rule has been abrogated. Moreover, it is not the object of the law to prevent litigation of just claims, and on the whole it would seem that if there is a mistake either of fact or of law there should be a right to recovery unless there is a legal or moral obligation to pay.

In *Brisbane v. Dacres 128 E.R. 641* it was suggested that one of the reasons for the rule was that the person who received the money does so in confidence that it is his and perhaps has spent it and has no means of repayment. This is of course certainly true as a ground of resisting repayment of moneys paid under a mistake of fact: see *Chitty (op. cit.) pages 1088-1091.* However, if legislation were adopted similar to that in New Zealand, an equivalent to Section 94B of their Judicature Act in which regard may be taken of change of position of the payee, this objection to recovery would appear to be adequately dealt with. Further Section 24(2) of the Law Reform, Property, Perpetuities and Succession Act of Western Australia would provide some assistance by providing a power to order that the repayment to be made in instalments.

Although the general rule is easy to state, its exceptions are not. The application of the general rule certainly does not lead to certainty or simplicity. The elaborate overlay of exceptions to the general rule makes it difficult for counsel to predict how a court will analyse the issues in a case. The problems facing both counsel and the court are exacerbated where a number of exceptions are pleaded in the alternative. The result is unnecessary complexity, both in the law and in the manner in which a case must be presented to Court.

Where money paid under a mistake of fact is recoverable, but not money paid under a mistake of law, there is an obvious temptation to characterize the mistake as one of fact in order to do justice between the parties. Courts should not be obliged to resort to technical subterfuge in order to do justice. When both critics and courts openly acknowledge the use of technical devices and arbitrary distinctions to evade the general rule, the resulting damage is not only the unfair results which may ensue where the law is unevenly applied, but also a weakening of the inherent authority of the law.

There seems no likelihood of the judiciary doing away with the rule altogether, despite the fact that it has created inroads into the application of the rule by the creation of many exceptions.

The Full Court of the Federal Court of Australia stated the present Australian position in *J. & S. Holdings Pty. Ltd. v. N.R.M.A. Insurance Ltd. (1982) 41 A.L.R. 539 at page 550:*

> "It must, today, be accepted as settled that there is no general principle of law that money paid by mistake of law is recoverable simply because idiosyncratic ideas of justice support a conclusion that, ex aequo et bono, it should be refunded . . .

Particular grounds, such as complete failure of consideration, or abuse of a fiduciary relationship (e.g. undue influence), or the particular situation of the payer (trustee or personal representative) or recipient (officer of the court) or mistake of fact, or involuntariness, or unequal responsibility for the mistake of law must be shown to exist before a recipient of money which was paid, under a mistake of law, to him for his own use, can be held to have received it to the use of the payer and ordered to refund it. It is true that the distinction which has been drawn between mistake of fact and mistake of law has been subjected to much learned criticism and is often difficult to apply. It is, however, at least in so far as this court is concerned, firmly entrenched."

Reform in other Jurisdictions:

California:

One of the earliest jurisdictions to legislate with respect to mistake of law was the State of California. In 1872 that state adopted the "Field Code" which was a draft code prepared for the State of New York but never adopted by that State. The relevant provision of the Field Code defines mistake to include only certain mistakes of law. Section 1578 of the Californian Civil Code provides—

"Mistake of law constitutes a mistake, within the meaning of this Article, only when it arises from:

1. A misapprehension of the Law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or

2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify."

The Field Code containing similar provisions has also been adopted in other States including Montana (1895) North Dakota (1887) South Dakota (1919) and Oklahoma (1910).

The Field Code's definition of "mistake" seems to be restricted to contractual and not restitutionary cases. Even in the context of contractual cases it has been held that the section applies only to "involuntary" payments: *Gregory v. Clayburgh's Executors 129 Cal. 455 (1900).* In fact Goff and Jones in the *Law of Restitution* submit that the decisions of these "exceptional" American jurisdictions, differ little from their more conservative neighbours.

New York:

A different approach was taken in New York in 1942 when Section 3005 of the New York Civil Code was added pursuant to the recommendation of the Law Revision Commission of that State. The Section provides:

"When relief against a mistake is sought in an action or by way of defence or counterclaim, relief shall not be denied merely because the mistake is one of law rather than one of fact."

Under Section 3005 relief is not to be denied "merely because the mistake is one of Law". The New York formulation invites the creation of separate rules governing mistakes of law, rather than creating a uniform method of dealing with mistakes. New York courts have not been bold in their interpretation of Section 3005. In the leading case of *Mercury*

Machines Importing Corporation v. City of New York (1957) 144 N.E. 2d. 400 the New York Court of Appeals held that the section . . . is not drafted in such manner as to place mistakes of law in all respects upon a parity with mistakes of fact . . . It removes technical objections in instances where recoveries can otherwise be justified by analogy with mistake of fact . . . The court in that case denied recovery of taxes paid under a statute assumed constitutional and later found to be ultra vires. This decision may usefully be contrasted with that of our High Court in *Mason v. New South Wales (1959) 102 C.L.R. 108.*

New Zealand:

In 1958 the Judicature Amendment Act was enacted in New Zealand which provided:

> *"Section 94A. Recovery of payments made under a mistake of law—*
>
> (1) Subject to the provisions of this section, where relief in respect of any payment that has been made under mistake is sought in any court, whether in an action or other proceedings or by way of defence, set-off, counter-claim or otherwise, and that relief could be granted if the mistake was wholly one of fact, that relief shall not be denied by reason only that the mistake is one of law whether or not it is any degree also one of fact.
>
> (2) Nothing in this section shall enable relief to be given in respect of any payment made at a time when the law requires or allows, or is commonly understood to require or allow, the payment to be made or enforced, by reason only that the law is subsequently changed or shown not to have been as it was commonly understood to be at the time of the payment.
>
> *Section 94B. Payments under mistake of law or fact not always recoverable—*
>
> Relief, whether under section ninety-four A of this Act or in equity or otherwise in respect of any payment made under mistake, whether of law or of fact, shall be denied wholly or in part if the person from whom relief is sought received the payment in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the Court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be."

Under Section 94A (1) the plaintiff must show that the relief could have been granted had the mistake been one wholly of fact. The result is not to equate mistakes of fact and law. Instead it invites counsel for the defendant to show why, if in similar circumstances a mistake of fact had been made, relief would have been refused. The wording of Section 94A (1) is therefore drafted to ensure the incorporation into mistake of law cases of those restitutionary principles which the common law has developed to deal with mistake generally. Section 94A (1) states that relief is not to be denied "by reason only that the mistake is one of law". This wording has the effect of reversing the general rule under which relief could be denied for precisely that reason. At the same time, this wording preserves any other defences to an action based on mistake of law which might be open on the facts of the case.

The enactment of Section 94A (2) appears to have as its motive the exclusion of cases where New Zealand courts either decline to follow a leading case, or pronounce upon an issue in doubt at the time a payment was made.

The Act's operation is restricted to "payments made" under a mistake. The use of this phrase rather than the term "money paid" should make it clear beyond argument that the section covers payments made by way of cheque or other negotiable instrument. On the other hand, the language of the section is not apt to cover cases where benefits other than money are transferred under mistake.

Section 94B enacts a change of position defence which is discussed later in this report.

Western Australia:

In 1962 Western Australia enacted the Law Reform (Property, Perpetuities and Succession) Act. The terms of Sections 23 and 24 of that Act are virtually identical to the New Zealand Act, with the exception of Section 24 (2), which provides:

> "(2) Where the court makes an order for the repayment of any money paid under a mistake, the Court may in that order direct that repayment shall be by periodic payments or by instalments, and may fix the amount or rate thereof, and may from time to time vary, suspend or discharge the order for cause shown, as the Court thinks fit."

British Columbia:

The Law Reform Commission of British Columbia in a 1981 Report on *Benefits Conferred under a Mistake of Law,* recommended a provision based on New Zealand's Section 94A along the following lines:

> "(a) Relief from the consequences of a mistake shall not be denied by reason only that the mistake is one of law or mixed fact and law.
>
> (b) When relief is claimed from the consequences of a mistake of law or of mixed fact and law, regard shall be had to the law governing the granting of relief from the consequences of a mistake of fact."

The British Columbia Commission drafted the provision in this way, so that it would apply to all forms of relief sought and the transfers of all forms of property. Paragraph (b) was included as a response to criticism that the proposal set out in the working paper along with the New Zealand legislation on which it was based, did not require Courts to treat mistakes of fact and law on an identical basis. The court was not obliged to ignore the character of the mistake, and could, if it appeared desirable, formulate different rules to govern mistakes of law.

The British Columbia Commission decided against adopting a provision along the lines of New Zealand's Section 94A(2) which prevents a court from granting relief when a payment is made under a common misunderstanding of the law. The Commission expressed the view that the subsection presented formidable problems of definition and proof; the legislation gives no hint of how "common understanding" is to be defined, much less proved.

After examination of Section 94A(2) and *Bell Bros. Pty. Ltd. v. Shire of Serpentine—Jarrahdale [1969] W.A.R. 155*— a case dealing with the identical Western Australian provision—the Commission criticized the practical consequences of such a provision whereby a defendant who had been unjustly enriched by a plaintiff operating under a common misunderstanding of the law could raise as a defence that he has also been enriched by many other persons acting under a similar error. The Commission concluded that the aim of Section 94A(2) namely closing the

floodgates of litigation, which might be opened if every over-ruling case or change in jurisprudence gave rise to restitutionary claims, could be adequately dealt with by the Canadian Courts by using existing principles of law.

The British Columbia Law Reform Commission also decided against the enactment of a provision similar to Section 94B of the New Zealand Act. The Commission's primary reason for so deciding was that in Canada the common law had already adopted a reasonably flexible approach with respect to the defence of change of position, and it was felt by the Commission that the adoption of a provision along the lines of New Zealand's Section 94B could have the undesirable affect of crystallizing the defence of change of position and fettering its development at common law.

Judicial Reform in Canada:

Of interest to note is the recent attempt in the Supreme Court of Canada to abolish judicially the distinction between mistake of law and mistake of fact. In *Hydro Electric Commission of Township of Nepean v. Ontario Hydro (1982) 132 D.L.R. 3d. 193* Dickson J. with Laskin C.J.C. concurring, held that under the doctrine of restitution or unjust enrichment the distinction between mistake of law and mistake of fact is meaningless.

Dickson J. said at pages 210-211:

> "The policy question which must be determined is whether this Court wishes to recognize, and to perpetuate, what has been rightly referred to by Judge Learned Hand as 'that most unfortunate doctrine' *(St. Paul & Marine Insurance Co. v. Pure Oil Co. (1933) 63 F. (2d.) 771 at page 773)* and by Patterson *(Improvements in the Law of Restitution 40 Cornell L.Q. 667 (1954-1955) at page 676)* as the 'monstrous mistake of law made by Lord Ellenborough' or whether we should apply to claims for relief on the ground of mistake of law the same criteria and principles that would apply to a mistake of fact. Unless the contract or payment is tainted with illegality there is no compelling reason why recovery of payments made under mistake should be denied simply by reason of the fact that the mistake is one of law rather than one of fact.
>
> I should prefer to reach this result by putting mistakes of law and mistakes of fact on the same footing rather than by increasing the number of exceptions engrafted on the rule and which have already, to a great extent, emasculated the rule."

Dickson J. further held that in all cases of money paid under mistake, the moneys shoud be returned if, on general principles of equity, it would be unjust to allow the recipient of the benefit to retain them.

As Dickson J., with whom Laskin C.J.C. concurred, were in the minority, his attempt to reform the law judicially was not successful. However his bold statements may well accelerate reform in Canada in the field of mistake.

Defence to a claim for recovery:

Traditionally, the recipient of a payment made by mistake can at common law raise only three pleas in response to a claim for recovery of the money. He can plead that the money was paid voluntarily, or that he received it as an agent and has paid it over to his principal, or he may plead an estoppel.

A plea of voluntariness denies that the payer's mistake exerted any legally relevant effect on the payment. The defence of payment over by an agent denies that the payee has received any benefit which he ought to return. A plea of estoppel, on the other hand, does not dispute that the payment was affected by mistake or that the payee is in receipt of a benefit, but denies that in the circumstances of the case it would be unjust for the payee to retain that benefit.

In order to plead estoppel successfully, the payee must satisfy three strict requirements. The first requirement is that the payer must either have been in breach of a special duty to give accurate information to the payee, or have made a representation of fact to the payee which was intended to be acted upon. Secondly, it must be shown that the payee relied upon the payer's conduct. Thirdly, the payee must prove that as a result of this reliance, he has changed his position in such a way as to make it unjust to require him to return the money.

The first requirement, that there be a special duty or representation, has been so strictly interpreted that estoppel as a defence can be pleaded by an innocent recipient of money paid under a mistake only in rare and exceptional cases.

The defendant cannot rely on estoppel if he was himself in any way at fault. Estoppel will arise only where there has been misconduct on the part of the plaintiff, constituted by a represention or breach of a special duty and none on the part of the defendant.

A payee should be able to resist a claim to recover a mistaken payment whenever he has incurred a sufficient detriment as a result of the payment, even though the payer may not have committed any technical misconduct within the meaning of the first requirement for estoppel. A new and more adequate defence is needed, consisting of the "reliance" and "detriment" element only. In a number of jurisdictions such a defence does exist, and is usually called the change of circumstances or change of position defence. The defence reflects the view that, since a claim to recover a mistaken payment is founded on consideration of justice and fairness, provision must be made to ensure that recovery is not granted where this would be inequitable—see *Chitty (op. cit.) page 1090* where England seems to allow a defence of change of position but not one of change of circumstances.

England:

The early nineteenth century English cases on mistake seemed to provide a favourable basis for the defence of change of circumstances. They reflected a concern for the unfairness of making someone pay money back after he had spent it, e.g. *Brisbane v. Dacres (1813) Taunt. 143; 128 E.R. 641 at 645.* However the change of circumstances defence came to be associated with the impractical test of "equity and good conscience" and fell into disfavour with English judges. There is a line of English cases decided between 1849 and 1926 which are generally thought to provide conclusive authority against the defence of change of circumstances.

In *Standish v. Ross (1849) 3 Ex. 527; 154 E.R. 954* Parke B. had commented obiter at page 957—

> "it could not be any bar to the recovery of [money paid under a mistake of fact], that the defendant had applied the money in the meantime to some purchase which otherwise he would not have made."

The high-water mark came with a statement of Hamilton L. J. (later Lord Sumner) when he was dealing with a proffered defence of change of circumstance in 1912 in *Baylis v. Bishop of London [1913] 1 Ch. 127* at 140 when he said:

> "In effect, therefore, both the equitable and the legal considerations applicable to the recovery of money paid under a mistake of fact have been crystallised in the reported common law cases. The question is whether it is conscientious for the defendant to keep the money, not whether it is fair for the plaintiff to ask to have it back. To ask what course would be ex aequo et bono to both sides never was a very precise guide, and as a working rule it has long been buried in *Standish v. Ross (1849) 3 Ex. 527, 154 E.R. 954* and *Kelly v. Solari 152 E.R. 24.* Whatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled justice as between man and man."

United States:

In the United States, the initial impetus for the development of a comprehensive "change of circumstance" defence came, not from the courts but from legal theorists. Professor Keener in his book *"A Treatise on the Law of Quasi-Contract" (1893)* said:

> "The principle that forbids the defendant enriching himself at the expense of the plaintiff should clearly forbid the plaintiff indemnifying himself against loss at the expense of an innocent and blameless defendant."

The defence of change of circumstance was given the final seal of theoretical approval in The American *Restatement of Restitution 142 (1) at page 567:*

> "(1) the right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution."

At the time that Keener wrote his *Treatise on Quasi-Contract,* the American Courts held the view that still prevails in England and Australia—that change of position was not relevant except in the limited fields of estoppel and payments by agents. In a number of American jurisdications, the defence of change of circumstances gradually became available in any case where the payer has been negligent, the concept of "negligence" being widened over a period of time to the point where failure by the payer to take adequate steps to look after his own interests is regarded as negligence. Finally, negligence was discarded altogether as a basis for the defence, and the courts acknowledged that the defence is available in any case where an order for restitution would impose a net loss on the payee.

It has been held insufficient in support of the defence, to show that the money has been used to pay a debt. Nor, it seems, is it enough to prove that the money has been passed onto a third person (other than a disclosed principal) if the money can still be recouped from that person's assets. On the other hand, there are some situations where the defence will inevitably succeed. By far the most common is the case where the receipt of the money leads the recepient to change his position in his dealings with some third person in an irrevocable way. Less clear is the case where the recipient converts the money into property which is

subsequently destroyed or diminished in value. Another type of change of circumstances which has caused difficulty occurs when the recipient uses the money for his own personal purposes and then, when the money is recalled, avers that he would not have lived so extravagantly had he known that the money was not his. The authors of the Restatement adopt what seems to be a compromise solution, holding that recovery should be allowed notwithstanding the extravagance, unless the 'amount of such payment was of such size that considering the financial condition of the payee, it would be inequitable to require repayment'. A similar solution is put forward where the money is paid to a municipality, and has been spent for a public purpose in circumstances in which it cannot be recouped without hardship to the taxpayers who would have to provide the funds.

Canada:

The defence of change of circumstances was recognized by the Supreme Court of Canada in *Rural Municipality of Shorthoaks v. Mobil Oil Canada Ltd (1975) 55 D.L.R. (3d.) 1* (S.C.C.), where Martland J. said at page 13:

> "In my opinion it should be open to the Municipality to seek to avoid the obligation to repay the moneys it received if it can be established that it had materially changed its circumstances as a result of the receipt of the money . . . There is no evidence of any special projects being undertaken or special financial commitments made because of the receipt of these payments, nor that the municipality altered its position in any way because these moneys were received. The mere fact that these moneys were spent does not by itself furnish an answer to the claim for repayment . . .".

Martland J.'s statement was utilized by Craig J. in *Hydro-Electric Commission of the Township of Nepean v. Ontario Hydro (1980) 27 Ont. R. (2d.) 321* to encompass a variation of spending pattern which was not reflected in specific projects or expenditures. Craig J.'s decision was affirmed by the Ontario Court of Appeal. However when the matter came before the Supreme Court of Canada *(1982) 134 D.L.R. (3d.) 193* Dickson J. with Laskin C. J. C. concurring, disagreed that the authorities allowed any such extension to the law, saying at page 214:

> "The mere spending of the money is not, of itself, sufficient to establish a defence *(Rural Municipality of Shorthoaks v. Mobil Oil Canada Ltd. (1975) 55 D.L.R. (3d.) 1).* The authorities are clear that for a defendant to succeed he must show a detrimental change of position as a result of the payment, something which Ontario Hydro is unable to show."

In *Wilson v. Surrey (1981) 3 W.W.R. 266* Hinds J. of the British Columbia Supreme Court, in following the *Nepean case (supra)* at the Ontario Court level, had held that it was open to him to assess the equities between the parties, and held that it was therefore necessary to consider the surrounding circumstances in order to determine whether the defendant was obliged by the ties of natural justice and equity to refund the money.

It was because "Canadian courts have abandoned the relatively narrow confines of change of position for the open range of natural justice and equity" (page 78 of Law Reform Commission of British Columbia's Report: Benefits Conferred Under a Mistake of Law), that the British Columbia Commission concluded that it would not recommend the enactment of a provision similar to Section 94B of the New Zealand Judicature Act, the adoption of which could have the undesirable effect

of crystallizing the defence of change of position and fettering its development at common law.

Unfortunately at the time the British Columbia report was written, the *Ontario Hydro case (supra)* was still on appeal to the Supreme Court of Canada and the Commission did not make it clear whether it would have held a different view if the Supreme Court of Canada took (as it did) a more narrow view of when the defence of change of position would be available.

New Zealand:

Section 94B of the New Zealand Judicature Act provides:—

> 'Relief, whether under Section 94A of this Act or in equity or otherwise, in respect of any payment made under mistake, whether of law or fact, shall be denied wholly or in part if the person from whom relief is sought received the payment in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the Court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be."

This section is designed to incorporate in to New Zealand law a defence of "change of position". This defence would apply where on the strength of receiving a payment to which he bona fide believed himself to be entitled, the recipient spends the funds in such a way that it would be inequitable to compel him to repay them.

The leading case in New Zealand on Section 94B is *Thomas v. Houston Corbett and Co Ltd (1969) N.Z.L.R. 151 (C.A.).* In that case, the appellant and respondents were victims of a man named Cook, an employee of the respondent solicitors. The appellant invested four hundred pounds with Cook, who converted the money to his own use. When the appellant requested the return of his money, Cook fraudulently induced the respondents to pay £1,381 into the appellant's bank account. The appellant, relying on Cook's representation that some £840 was due to the other investors, drew a cheque in Cook's favour for that amount. When the respondents discovered the fraud, an action was brought to recover the £1,381 as money paid to the appellant under a mistake of fact. The main issue before the Court of Appeal was whether the appellant could rely on Section 94B.

The Court of Appeal took the view that section 94B gave a court the power to apportion loss between the parties. Rather than being of the essence of the defence, the fact that the appellant had changed his position in reliance upon the receipt of the funds was regarded only as a ground for apportioning the loss without regard to the change of position.

Western Australia:

Section 24 (1) of the Law Reform (Property, Perpetuities and Succession) Act differs in some respect to the New Zealand provision. The Western Australian Act says "having regard to all possible implications in respect of the parties *(other than the plaintiff or claimant)*". This wording is not included in Section 94B of the New Zealand Judicature Act, the effect of the words being that the court may not take into consideration the position of the person who paid the money by mistake or those who acquire rights or interests through him.

Illegal Contracts:

The distinction between mistake of law and mistake of fact have resulted in differing results in the sphere of illegal contracts.

In cases where a party to the contract was unaware of the illegal nature of the arrangement because he executed the agreement under an error of fact, Courts have permitted a plaintiff to proceed with his action. In *Oom v. Bruce (1810) 12 East 225, 104 E.R. 87,* the plaintiff successfully brought an action to recover insurance premiums paid to insure goods being transported by ship from Russia to England, neither party being aware at the time the contract was made that Russia and Great Britain were at war. In *Dalgety & New Zealand Loan Ltd. v. Imeson Pty. Ltd. [1963] 63 S.R. (N.S.W.) 998* the parties agreed to sell and purchase diseased cattle and the sale of diseased animals was an offence, but the plaintiff was permitted to recover on the ground that the fact of one of the animals being diseased was unknown to both parties.

However mistake of law does not in general give a party the right to enforce a contract which is affected by illegality. Thus in *Nash v. Stevenson Transport Ltd [1936] 2 K.B. 128* the plaintiff agreed to allow the defendants to use goods vehicle licences taken out by him in his own name. This arrangement was made in good faith but by statute involved both parties in criminal liability. It was held that the plaintiff could not sue for the money due to him under the contract.

In *Waugh v. Morris [1873] L.R. 8 Q.B. 202* Blackburn J. said at page 208:—

> "Where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not."

The distinction between mistake of law and mistake of fact in the field of illegal contracts has been criticized by J. W. Wade in an article in *95 U. of Pa. L.Rev. 261 at 263,* cited by the Law Reform Commission of British Columbia in a 1982 working paper relating to illegal contracts. Wade says:—

> "Undoubtedly the courts are correct in holding that a plaintiff is entitled to restitution when he did not know of the facts making the contract illegal; none of the reasons usually given for refusing restitution are applicable here. On the other hand, the wisdom of following here the old distinction between mistakes of law and mistakes of fact is questionable. When the rule of law which has been violated does not express a very strong policy, courts may on occasion be ready to give relief in spite of the fact that the only mistake was one of law. The only real limitation on the scope of the exception, as it applies to mistakes of fact, is that the plaintiff must refuse to go on with the contract as soon as he finds that it is illegal. His proper innocence does not aid him if he proceeds with the transaction."

If the recommendations of this Report, relating to the mistake of law and mistake of fact distinction, are implemented, a party seeking relief from the consequences of entering into an illegal contract will have a prima facie right to relief if he was mistaken concerning the legality of the agreement. Whether that error is one of fact or law would be irrelevant. However whether the courts will or will not entertain any action based on illegality is a different point outside the ambit of this report.

Recommendations of Reform:

The Committee has reached the conclusion that legislation based on Sections 94A (1) and 94B (in the latter case subject to the comments at page 55) of the New Zealand Judicature Act, section 24 of the Western Australian Law Reform (Property, Perpetuities and Succession) Act 1962, and the recommendations of the British Columbia Law Reform Commission should be adopted to deal with the problems created by the present differences between consequences of a mistake of law and a mistake of fact. For the contents of these sections and recommendations see appendices A, B and C to this Report.

Benefits other than Money:

The language of Section 94A of the New Zealand Act is not apt to cover cases where benefits other than money are transferred under mistake (for example, services, chattels and land). The Committee holds the view that the reforming legislation should extend to all claims for relief regardless of the nature of the benefit conferred or the manner in which it was transferred, and thus recommends a provision along the lines of British Columbia's recommendation 1 *(a)*, namely:—

> "Relief from the consequence of a mistake shall not be denied by reason only that the mistake is one of law of mixed fact and law."

Relationship between mistakes of law and mistakes of fact:

The New Zealand legislation does not clarify the relationship between mistakes of law and mistakes of fact. The legislation does not require the courts to treat mistakes of fact and law on an identical basis and the courts could, if it appeared desirable, formulate different rules to govern mistakes of law.

In order to make it clearer that the courts are obliged to have regard to the jurisprudence concerning mistake of fact the British Columbia Law Reform Commission recommended the following provision:—

> "1 *(b)*. When relief is claimed from the consequences of a mistake of law or of mixed fact and law, regard shall be had to the law governing the granting of relief from the consequences of a mistake of fact."

Donald Lange in an article entitled *"Statutory Reform of the Law of Mistake" (1980) 18 Osgoode Hall Law Journal 429* suggests that the distinction should be abolished altogether and this could be done by omitting the word "only" from Section 94A (1) saying at page 474:

> "The distinctions between mistake of law and mistake of fact have not been abandoned. Instead, a new second stage distinction has arisen between mistakes of law that are worthy of relief and mistakes of law that are not worthy of relief."

Lange pointed out that Section 94B abandons the distinction between a mistake of law and a mistake of fact, while Section 94A (1) apparently does not, and that to omit the work "only" from Section 94A (1) would create harmony between the two provisions.

The Committee is inclined to the view that the mistake of fact/mistake of law distinction should be completely abolished; as indeed it has in civil law countries. For example, Article 1047 of the Quebec Civil Code provides:—

"He who receives what is not due to him, through error of law or of fact, is bound to restore it; or if it cannot be restored in kind, to give the value of it."

The Committee suggests that the recommendation made by Lange, that "only" be omitted from Section 94A (1) be adopted and that this should likewise apply to British Columbia's recommendation 1 *(a)*. If there are special reasons for denying recovery these should be stated by the Court. It is undesirable that the reason that the mistake was one of law should be included among reasons for denying recovery; and this is so despite the fact that some of the reasons for denying recovery may apply almost exclusively to mistakes hitherto characterized as mistakes of law.

No relief where the mistake is the result of a change in the law:

Section 94A (2) of the New Zealand legislation makes it clear that relief cannot be claimed on the ground that perhaps as the result of the decision of a higher court over-ruling an earlier decision, the law as it was commonly understood to be is no longer the law. B. J. Cameron in an article entitled *"Payments made Under Mistake" (1959) 35 N.Z.L.J. 4* said of this provision at page 5:—

"Probably, the subsection is unnecessary, as in such cases it can hardly be said that there was any mistake in the law at the time the payment was made. It should, however, serve to avoid doubts, and in particular will prevent any argument based on the fiction that the law has always been what the latest and most authoritative decision has decided that it is."

For a subsection which was probably unnecessary, it is capable of raising a lot of problems, as the British Columbia Law Reform Commission pointed out at page 70 of its report:

"The New Zealand legislation gives no hint of how 'common understanding' is to be defined, much less proved. The use of the word 'common' implies that a certain interpretation of the relevant legal rule is prevalent among a certain class of individuals whose affairs are touched by that rule. How is that class of individuals to be defined in each case? In a dispute over the imposition of a tax, whose 'common understanding' is important—the taxpayer's or the taxing authority's. If the former, how is it to be ascertained and proved? If the views of both taxpayer and authority are relevant, what if they differ?"

Although Section 94A (2) has yet to be considered in a New Zealand Court, the identical provision in the Western Australian Law Reform (Property, Perpetuities and Succession) Act was considered in *Bell Bros Pty. Ltd. v. Shire of Serpentine—Jarrahdale 1969 W.A.R. 155.* In that case, the plaintiff claimed the return of money paid to acquire a licence to quarry gravel and stone. The by-law authorising that charge was held to be ultra vires and the plaintiff immediately brought his action claiming duress and mistake. Negus J. at first instance, held that the claim as it was based on a mutual mistake of law failed as the "common understanding of the law" was that the by-law was valid. He expressed the view that "commonly understood" meant "that which would appear to the ordinary individual" adding that most ordinary individuals who found it necessary to read and understand the by-laws as the years went by would have presumed that they were validly made, particularly if they considered who made and approved them.

On appeal the Full Court of Western Australia proposed a different test. Hale J. stated at page 159:—

> "In the context of this section I think that 'understood' is apt to cover everything from a positive and reasoned belief to a tacit assumption, but it must involve a state of mind, and its existence or otherwise must always raise a pure question of fact. The action was tried on an agreed statement of facts, and the only reference therein to anybody's state of mind is that until the judgment in Marsh's case the plaintiff and the defendant believed that cl.7 of the by-law was valid: i.e. they laboured under a common mistake. But the 'common' understanding mentioned in the section is clearly of wider import than the same word in the phrase 'common mistake'. If Parliament had meant that there should be no liability if (no matter what anybody else thought) the payor and payee were mistaken as to the law, Parliament would certainly have said so in simple language. The section predicates some generality of understanding beyond that of the parties to the action. Now there can be no understanding about a subject unless the mind has been in some degree directed to that subject, and the class in which the understanding must be looked for is of necessity limited to persons who for some reason or another have at least to some extent adverted to that subject. The class will be wide or narrow according to the subject in question: by way of example the validity of a receipt duty which affects every wage-earner in the State involves a much wider class than would a local by-law which affects only a few people in a small district. Without attempting an exhaustive definition I think that in the present case the class may reasonably be said to comprise (i) those concerned with the making of this by-law or other by-laws in similar terms (ii) those who have been asked or expect to be asked, to pay under this or a similar by-law, and (iii) persons such as lawyers who have been asked to advise on the validity of such a by-law. Initially that class must be very small, although with the passage of time it could swell to include scores or hundreds of persons."

In the end result, because no evidence had been led to show the "understanding" of the class, the court presumed from the fact that the by-law was passed that the common understanding of the relevant class was that the by-law was valid. In the High Court, the plaintiff's claim succeeded on the ground that the shire council had obtained the money colore officii. It was not therefore necessary for the High Court to consider the interpretation of "common understanding" advanced by either Court.

Under these circumstances we do not recommend the enactment of a provision in terms of New Zealand's Section 94A (2).

Defence of Change of Position:

The British Columbia Law Reform Commission when considering Section 94B of the New Zealand legislation, decided against adopting a similar change of circumstance provision; due primarily to the fact that in Canada a general restitutionary defence of change of position is recognised and still developing. No such reason exists in this State; and while change of position is a factor in estoppel, the fact that estoppel will only arise where there has been some misconduct on the part of the plaintiff (constituted by a representation or breach of a special duty) means that it is of such limited application, that its existence can hardly be considered a reason for not enacting a change of position provision.

Section 94B could possibly prove to be unjust where the defendant has changed his position when normally he would not have been expected to. In such circumstances the court may be able to use the wide words of Section 94B and only deny a "part" of the relief sought, or take into account the "possible" implications to the plaintiff. However, this is making liberal use of the wording of the section and it may be wise to incorporate into such a section the requirement that the alteration in position should reasonably flow from the mistake.

Payment by Instalments:

Section 24 (2) of the Law Reform (Property, Perpetuities and Succession) Act (Western Australia) provides that the Court may order that repayment be made by period payments or instalments. Such a provision is desirable in this State.

It is therefore recommended that a provision similar to Western Australia's Section 24 (2) be included in legislation relating to benefits conferred under mistake.

Recovery of Unauthorised Disbursements of Public Funds:

As was mentioned earlier in this Report, British Columbia has legislated to abrogate the common law rule conferring an absolute right in the Crown to recover expenditures of public money (see Appendix D).

While similar amendments would not necessarily be placed in the same statute as those enacting the recommendations relating to mistake, we hold the view that reform is desirable and concur with the comments of the Law Reform Commission of British Columbia in their 1980 Report relating to *The Recovery of Unauthorised Disbursements of Public Funds* when they say at page 14—

> "The recognition of the legislature's right to control the public purse need not have as a consequence a rule framed so broadly as to create the potential for unjust results. The balance between private and public right is best adjusted by permitting the recipient of improper disbursements to raise any defence available to him on the facts of the case."

Section 67 (2) of the British Columbia Financial Administration Act 1981, is intended to do away with the defence of mistake of law in the context of actions for recovery of public money. If the foregoing recommendations relating to mistake are adopted, such a provision may not be necessary in this State, but the matter should be put beyond doubt.

Summary of Recommendations:

The Committee recommends that statutory provisions should be enacted along the following lines—

(1) Relief from the consequences of a mistake shall not be denied by reason that the mistake is one of law or mixed fact and law.

(2) Relief in respect of any benefits transferred under a mistake, whether of law or fact, shall be denied wholly or in part if the person from whom relief is sought received the benefit in good faith and has so altered his position in reliance on the validity of the transfer of the benefit that in the opinion of the Court, having regard to all possible implications in respect

to other persons, it is inequitable to grant relief or to grant relief in full as the case may be.

(3) Where the Court makes an order for repayment of any benefit paid under a mistake, the Court may in that order direct that repayment shall be by periodic payments or by instalments, and may fix the amount or rate thereof, and may from time to time vary, suspend or discharge the order for cause shown, as the Court thinks fit.

(4) Where public money is paid to a person by the government

(a) in excess of the authority conferred by the government

(b) without the authority of an enactment

(c) contrary to an enactment

and a right is asserted by the government to recover the payment or part of it, or to retain other money in full or partial satisfaction of a claim arising out of the payment, the person against whom the right is asserted may rely on any matter of fact or law, including estoppel, which would constitute a defence in a proceeding brought by an individual to recover the payment if it had been made under a mistake.

We turn now to a topic on the periphery of our remit,. but one to which we feel we ought to draw your attention as being in our opinion a necessary reform.

Reform of the effect of mistakes on contracts generally:

Apart from being one of the earliest common law countries to grapple with the problems involved in the mistake of fact—mistake of law distinction, New Zealand was also one of the first countries to deal with the effect of mistakes on contracts. R. J. Sutton in an article entitled *Reform of the Law of Mistake in Contract 7 N.Z.U.L.R. 40* pointed to problems of definition of operative mistake, and the remedies available for operative mistake, as reasons for legislative reform in the law of mistake of contract.

In 1976 the New Zealand Contracts and Commercial Law Reform Committee utilised Sutton's work as a basis of a report on the Effect of Mistakes on Contracts. The Committee saw the objectives of reform as a redefinition of mistake, and emphasis being placed upon remedies rather than upon the technical definitions of mistake. The draft bill attached to the Report reflected the need to establish certain principles to determine whether or not the court has jurisdiction to entertain a case of mistake, to establish a much wider range of remedies than those previously available, and to amalgamate the existing fragmented doctrine into a single body of law dealing with mistake.

The resulting statutory reform is embodied in the Contractual Mistakes Act 1977. This Act provides a code to replace the common law and equitable rules regarding the granting of relief for mistake in any contract entered into after the commencement of the Act. Although it is a code Section 5 (2) expressly preserves certain other doctrines normally treated as part of the law of mistake—*non est factum,* rectification, undue influence, fraud, breach of fiduciary duty or misrepresentation, and the operations of Section 94A and B of the Judicature Act, the provisions of the Illegal Contracts Act 1970 and the Frustrated Contracts Act 1944.

Section 2 (1) of the Act simply defines "mistake" as a "mistake whether of law or fact". Section 6 sets out the grounds for relief under the Act. All three subsections of Section 6 must be satisfied before relief may be granted. Section 6 (1) provides—

"A Court may in the course of any proceedings or an application made for the purpose grant relief under Section 7 of this Act to any party to a contract—

(a) If in entering into that contract—

(i) That party was influenced in his decision to enter into the contract by a mistake that was material to him, and the existence of the mistake was known to the other party or one or more of the other parties to the contract (not being a party or parties having substantially the same interest under the contract as the party seeking relief); or

(ii) All the parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake; or

(iii) That party and at least one other party (not being a party having substantially the same interest under the contract as the party seeking relief) were each influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or of law, and

(b) The mistake or mistakes, as the case may be, resulted at the time of the contract—

(i) In a substantially unequal exchange of values; or

(ii) In the conferment of a benefit, or in the imposition or inclusion of an obligation, which was in all the circumstances a benefit or obligation substantially disproportionate to the consideration therefor; and

(c) Where the contract expressly or by implication makes provision for the risk of mistakes, the party seeking relief or the party through or under whom relief is sought, as the case may require, is not obliged by a term of the contract to assume the risk that his belief about the matter in question might be mistaken."

The Act provides three bars to relief. The first is with regard to contracts that provide for the risk of a mistake to be borne by one party (Section 6 (1) *(c)* above). The second bar to relief is set down in Section 6 (2) *(a)* which provides that "a mistake in relation to [a] contract, does not include a mistake in its interpretation". The third absolute bar is set down in Section 6 (2) *(b)*; it provides that there has been no mistake if the party discovers the mistake and still elects to enter into the contract.

By Section 7 (3), the court is vested with a discretion to make various kinds of orders. The language used in the section makes it clear that the court has a complete discretion as to what kind and in what way orders are to be made. Section 7 (3) provides:—

"The Court shall have the discretion to make such order as it thinks just and in particular, but not in limitation, it may do one or more of the following things:

(a) Declare the contract to be valid and subsisting in whole or in part for any particular purpose.

(b) Cancel the contract.

(c) Grant relief by way of variation of the contract.

(d) Grant relief by way of restitution or compensation."

Section 7 (5) gives the Court the power to vest the property forming the subject-matter of the contract, or the consideration for the contract, in any party to the proceedings. The Court may also direct such a party to transfer or assign such property to any other party to the proceedings. Section 7 (6) again reflects the discretionary and remedial nature of the Act; the court may make any orders "subject to such terms and conditions as the court thinks fit."

Section 8 of the Act protects the rights of third parties by providing that no order made under the Act shall invalidate any disposition of property made by a party to a mistaken contract for valuable consideration or by a person who has acquired the property from such a person; provided the recipient was not a party to the mistaken contract, had not at the time of the disposition notice of the mistaken contract, and otherwise acted in good faith.

After a very brief look at the New Zealand Contractual Mistakes Act 1977, the Committee is of the view that it has considerable merits. As a consequence the Committee suggests that following the reform of the mistake of law and fact distinction, consideration should be given to reforming the law relating to the effect of mistakes on contracts, possibly along the lines of the New Zealand legislation, and we recommend a remit of the topic to us for a report to you.

We have the honour to be

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20 June 1984.

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APPENDIX A

Judicature Amendment Act, 1958 (New Zealand)

1958, No. 40

An Act to Amend the Judicature Act, 1908

[25 September 1958]

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title—This Act may be cited as the Judicature Amendment Act, 1958, and shall be read together with and deemed part of the Judicature Act, 1908 (hereinafter referred to as the principal Act).

2. New sections inserted—The principal Act is hereby amended by inserting in Part III, after section ninety-four, the following sections:

94A. *Recovery of payments made under mistake of law*—

(1) Subject to the provisions of this section, where relief in respect of any payment that has been made under mistake is sought in any court, whether in an action or other proceeding or by way of defence, set off, counterclaim, or otherwise, and that relief could be granted if the mistake was wholly one of fact, that relief shall not be denied by reason only that the mistake is one of law whether or not it is any degree also one of fact.

(2) Nothing in this section shall enable relief to be given in respect of any payment made at a time when the law requires or allows, or is commonly understood to require or allow, the payment to be made or enforced, by reason only that the law is subsequently changed or shown not to have been as it was commonly understood to be at the time of the payment.

94B. *Payments made under mistake of law or fact not always recoverable*—Relief, whether under section ninety-four A of this Act or in equity or otherwise, in respect of any payment made under mistake, whether of law or of fact, shall be denied wholly or in part if the person from whom relief is sought received the payment in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the Court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be.

APPENDIX B

Law Reform (Property, Perpetuities and Succession Act, 1962, Sections 23 & 24 (Western Australia)

1962.] [No. 83.

Law Reform (Property, Perpetuities and Succession)

23. (1) Subject to the provisions of this section, where relief in respect of any payment that has been made under mistake is sought in any court, whether in an action or other proceeding or by way of defence, set off, counterclaim or otherwise, and that relief could be granted if the mistake were wholly one of fact, that relief shall not be denied by reason only that the mistake is one of law whether or not it is in any degree also one of fact.

(2) Nothing in this section enables relief to be given in respect of any payment made at a time when the law requires or allows, or is commonly understood to require or allow, the payment to be made or enforced, by reason only that the law is subsequently changed or shown not to have been as it was commonly understood to be at the time of the payment.

24. (1) Relief, whether under section twenty-three of this Act or in equity or otherwise, in respect of any payment made under mistake, whether of law or fact, shall be denied wholly or in part if the person from whom relief is sought received the payment in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the Court, having regard to all possible implications in respect of the parties (other than the plaintiff or claimant) to the payment and of other persons acquiring rights or interests through them, it is inequitable to grant relief, or to grant relief in full.

(2) Where the Court makes an order for the repayment of any money paid under a mistake, the Court may in that order direct that the repayment shall be by periodic payments or instalments, and may fix the amount or rate thereof, and may from time to time vary, suspend or discharge the order for cause shown, as the Court thinks fit.

APPENDIX C

1981

Law Reform Commission of British Columbia
Report on Benefits Conferred under a Mistake of Law

Summary of Recommendations:

The recommendations made in this Report are as follows:

1. The law and Equity Act be amended by the addition of a provision comparable to the following:

Mistake of Law

(a) Relief from the consequences of a mistake shall not be denied by reason only that the mistake is one of law or mixed fact and law.

(b) when relief is claimed from the consequences of a mistake of law or mixed fact and law, regard shall be had to the law governing the granting of relief from the consequences of a mistake of fact.

2. That the Municipal Act and the Vancouver Charter be amended to provide that:

(a) a person who has paid money, transferred property, or conferred a benefit to or upon a municipality [city] pursuant to an ultra vires bylaw, order, resolution or regulation of the municipality [city] is entitled, subject to 2 *(b)* and 2 *(c)*, to the return of the money, property, or benefit so paid, transferred, or conferred;

(b) in a claim brought pursuant to Recommendation 2 *(a)*, the municipality [city] may rely on any defence which would apply had the payment been made, the property transferred or the benefit conferred under a mistake of fact;

(c) any claim against a municipality [city] in respect of money paid, property transferred, or a benefit conferred pursuant to an ultra vires bylaw, order, resolution or regulation of that municipality [city] is extinguished after the expiration of two years after the date on which the payment, transfer or benefit was made or conferred."

3. That the Municipal Act be amended to provide that:

(a) a claim may be brought pursuant to Recommendation 2 notwithstanding that the by-law, order, resolution or regulation:

(i) has not been set aside pursuant to section 313 or otherwise, and

(ii) notice has not been given to the municipality concerning the action.

(b) a claim pursuant to Recommendation 2 shall be brought against the municipality alone, and not against the person acting under the bylaw, order, resolution or regulation.

4. *(a)* Nothing in Recommendation 1 should permit a claim for relief from the consequences of a mistake of law to be brought in respect of a

mistake occurring before the legislation implementing that recommendation comes into force, save to the extent that relief was available prior to that date.

(b) Nothing in Recommendations 2 and 3 should permit a claim to be brought in respect of money paid, property transferred or a benefit conferred pursuant to an ultra vires bylaw before the legislation implementing those recommendations comes into force, save to the extent that relief was available prior to that date.

APPENDIX D

Financial Administration Act 1981
(British Columbia)

Defences to action for recovery of public money

67. (1) Where public money is paid to a person by the government

(a) in excess of the authority conferred by an enactment,

(b) without the authority of an enactment, or

(c) contrary to an enactment,

and a right is asserted by the government to recover the payment or part of it, or to retain other money in full or partial satisfaction of a claim arising out of the payment, the person against whom the right is asserted may, subject to subsection (2), rely on any matter of fact or law, including estoppel, which would constitute a defence in a proceeding brought to recover the payment as if it has been made under a mistake.

(2) Subsection (1) does not enable a person to rely on a defence that a payment made by the government was made under a mistake of law, and the right of the government to recover the money paid by it is not impaired by reason only that the payment was made under a mistake of law.

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