MISTAKE OF LAW PAYMENTS IN CANADA: A MISTAKEN PRINCIPLE?

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> The mind no more assents to the payment made under a mistake of the law; than if made under a mistake of the facts; the delusion is the same in both cases; in both alike, the mind is influenced by false motives.[1]
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> That a voluntary payment made under a mistake of law cannot be recovered is, I should have thought, beyond argument at this period in our legal history . . .[2]

These two judicial statements reflecting wholly incompatible postures are responses to the deceptively simple question of whether money paid under the influence of a mistake of law should be recoverable. Although it is well settled that the Common Law embraces the latter of these views, the matter is nonetheless a legitimate topic for contemporary debate, because, as Goff and Jones lament in their treatise on restitution, "Few subjects are more confused than the recovery of money paid under a mistake of law."[3] The reason for the large number of irreconcilable decisions in this area appears to be the readiness of the courts to rebel, albeit discreetly, against this rigid mistake of law rule.

Ordinarily if a payment has been made mistakenly, the payee will be obliged to return the money if the payer's mistake was one of fact. The opposite is generally the case for payments made because of a mistake of law. This distinction has survived in the Common Law primarily because considerations other than those espoused by the Connecticut Judge above have been found most compelling. It is the objective of this paper to examine the validity of these competing policies particularly as they relate to the Canadian milieu. It will then be possible to evaluate any potential means to alter this area of the law to become more responsive to demands for justice.

To conduct such an appraisal, the extent of this rule against recovery must first be ascertained. As Canadian law in this area is almost exclusively based on English Common Law, it is necessary to look at both to determine the course Canadian law has taken. The history of the mistake of law rule is also relevant.

Origin of the Rule

The genesis of the distinction between mistake of fact and mistake of law as applied to the payment of money is usually said to be the decision of the Court of King's Bench in the 1802 case of *Bilbie* v. *Lumley*.[4] Lord Ellenborough's infamous judgment in this case therefore stands as the original evocation of the principle that money paid under the influence of a mistake of law is not recoverable.[5]

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1. *Northrop's Executors* v. *Groves*, (1849) 19 Conn. 548 (S.C.) (per Church, C.J.).
2. *Sawyer & Vincent* v. *Window Brace Ltd.*, [1943] 1 K.B. 32, at 34 (per Croom-Johnson, J.).
3. Goff and Jones, *Law of Restitution* (1st ed. 1966) 79.
4. (1802) 2 East 469; 102 E.R. 448 (K.B.) (hereinafter referred to as *Bilbie*).
5. It is arguable that Buller J. in *Lowry* v. *Bordieu* (1780), 2 Doug. 468; 99 E.R. 299 (K.B.) actually deserves this recognition, but in any event his language was less certain than was that of Lord Ellenborough. *See* P. Winfield, "Mistake of Law" (1943), 59 L.Q. Rev. 327, at 333.

The plaintiff in this seemingly innocuous matter[6] was an underwriter suing in an action for money had and received to recover £100 paid by him to the defendants under an insurance policy. It was found that at the date of the policy the defendant had failed to disclose certain material facts, thus entitling the plaintiff to repudiate any liability subsequently arising under the policy on the grounds of non-disclosure. It was further held by the trial Judge, Rooke J., that prior to the payment of the £100 on the loss of the defendant's ship, the plaintiff had in his possession papers from which the undisclosed facts could have been ascertained. The plaintiff, asserting this to be irrelevant, was successful at trial in claiming recovery of the £100 as money paid under a mistake of law.

A rule *nisi* having been granted the case then came before the Court of King's Bench where Lord Ellenborough, C.J. in promptly determining that recovery was not available said "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."[7] He then went on to indicate that his decision was based on the maxim *ignorantia juris non excusat.*

It is frequently noted that Lord Ellenborough may not have been entirely responsible for the formulation of this proposition, for Sir George Wood (later Baron Wood[8]), counsel for the plaintiff, made no response to the Chief Justice's inquiry as to whether there were any cases which had held that a claimant might recover money paid solely on account of his ignorance of the law. The otherwise redoubtable[9] Baron Wood has been much maligned for this alleged pecadillo as a number of writers[10] have suggested that there were in fact authorities he might have cited to Lord Ellenborough.

It is argued that prior to the 19th century the English courts generally did not distinguish between mistakes of law and mistakes of fact, and that several of these early cases allowed recovery where the payer had made a mistake of law. Of the decisions typically cited in support of this proposition, some of which are admittedly equivocal,[11] that of De Grey, C.J. in *Farmer* v. *Arundel* states the position most succinctly: "When money is paid by one man to another on a mistake of fact or of law, or by deceit, this action (money had and received) will certainly lie."[12] So while the argument that *Bilbie* was decided incorrectly on the basis of existing authority is

6. In the All England Law Reports, the reported version of Lord Ellenborough's decision takes only one-quarter of a page. [1775-1802]. All E.R. Reprint 425.

7. *Supra* n. 4, at 472.

8. Sir George Wood was made a Baron of the Exchequer in 1807. He served on the Bench until 1813.

9. Gibbs, J. in *Brisbane* v. *Dacres* (1813), 5 Taunton 143, at 157; 128 E.R. 641, at 647 (K.B.) referred to him as "Counsel whose learning we all know."

10. *See* R. Keener, *A Treatise in the Law of Quasi-Contracts* (1965) 57-80; F. Woodward, "Recovery of Money Paid Under Mistake of Law" (1905), 5 Colum. L. Rev. 366, at 366; Winfield, *Supra* n. 5; B. Cameron, "Payments Under Mistake" (1959), 35 N.Z.L.J. 4; S. Stoljar, *The Law of Quasi-Contracts* (1964) 44; L. McTurnan, "An Approach to Common Mistake in English Law" (1963), 41 Can. B. Rev. 1, at 32; C. Pannam, "The Recovery of Unconstitutional Taxes in Australia & The United States" (1961), 42 Tex. L. Rev. 777, at 781.

11. *Supra* n. 3, at 80.

12. (1772), 2 W. Black 824, at 825; 96 E.R. 485, at 485 (K.B.).

perhaps more persuasive than some commentators would allow,[13] Goff and Jones are surely correct in concluding that any concern with this issue may safely "be left to the legal historian."[14] Although two centuries of judicial reliance may have left *Bilbie* unassailable in this regard, it would be erroneous to assume that Lord Ellenborough's judgment has otherwise remained sacrosanct.

Most modern criticism of the case deals generally with the policy embodied in Lord Ellenborough's statements and with his allegedly incorrect use of the Latin maxim *ignorantia juris non excusat.* There is little doubt that the maxim "every man must be taken to be cognizant of the law" (as translated by Lord Ellenborough) is of application to tort and criminal law,[15] but it has been suggested that its use by Lord Ellenborough in circumstances where there was merely a mistaken payment of money was inappropriate. In spite of a formidable body of academic criticism which will be evaluated later in this paper, it remains true that judicially *Bilbie* is recognized with near unanimity as being the origin of the rule that money paid under the influence of a mistake of law is not recoverable.[16]

This widespread judicial approach appears to be largely the result of Gibbs, J.'s approbation of *Bilbie* in the 1813 case of *Brisbane* v. *Dacres.*[17] In that case the captain of a King's ship sued his admiral for the recovery of money which he had mistakenly paid in the belief that the admiral had a legal right to a share of certain public treasure brought home by the captain. The Court in holding the captain's payment to be irrecoverable because made under a mistake of law, applied the *coup de grâce* to whatever remained of the 18th century notion that no distinction was made between mistakes of fact and mistakes of law in the rules governing the recovery of money paid by mistake.[18]

An element of irony is added to this controversial area of the law because while *Bilbie* and *Brisbane* have been constantly referred to in later cases as good authorities, Lord Ellenborough appears to have recanted. In an 1811 decision, he held ineffectual in law a deed which had been mistaken-

13. Most notably Goff & Jones, *Supra* n. 3. Note that the *U.S. Restatement of the Law of Restitution* (1937) does not share the view of Goff and Jones for it states, at 180, that Lord Ellenborough's pronouncement "led to an entire change in the law."

14. *Supra* n. 3, at 80.

15. *See* C. Stadden, "Error of Law" (1907), 7 Colum. L. Rev. 476, where he traces the criminal law origin of this maxim from Roman times; *see also Iannella v. French* (1968), 41 A.L.J.R. 389, at 400-01 (per Windeyer, J.). The maxim appears to have attained some currency in England by the early 17th century as the jurist, John Selden, wrote in *Table Talk* (not published until 1689): "Ignorance of the law excuses no man; not that all men know the law, but because 'tis an excuse every man will plead, and no man can tell how to confute him."

16. Stoljar, *Supra* n. 10, at 44-45, takes a somewhat different view of the development of the no recovery principle. In claiming that the law originally made no distinction between mistakes of fact and mistakes of law he says this position was gradually overshadowed by three exceptions, with the rule in the *Bilbie* line of cases being the major one.

17. *Supra* n. 9; after hearing strenuous argument as to why *Bilbie* should be overruled, Gibbs, J. held the case to be good law, saying at 152-53; 128 E.R., at 645: "If we were to hold otherwise, I think 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. He who receives it has a right to consider it his without dispute: he spends it in confidence that it is his; and it would be most mischievous and unjust, if he who has acquiesced in the right by such voluntary payment, should be at liberty, at any time within the statute of limitations, to rip up the matter, and recover back the money."

18. Stadden, *Supra* n. 15, at 505 claims "*Bilbie* v. *Lumley* probably would have been consigned to oblivion with other repudiated cases, but unfortunately along came Sir Vicary Gibbs who rescued it, placed it upon the altar and worshipped it as exemplifying a great principle . . ."

ly cancelled, and declared the result to be the same regardless of whether the mistake was considered to be of fact or of law.[19] Despite Lord Ellenborough's recension it is now clear that *Bilbie* with the support of *Brisbane* has successfully introduced into English law[20] the general proposition that a voluntary payment made by one individual to another under a mistake of law is irrecoverable.[21]

After these decisions the spadework was done and subsequent courts have followed the rule largely without analysis. This is not to say, however, that *Bilbie* has enjoyed unlimited success for the Common Law has to some extent mitigated the impact of the original principle with the creation of exceptions. But the result of this judicial maneuvering is a regrettably tangled body of law.

Developments at Common Law

Rather than giving an exhaustive account of all the ramifications of the mistake of law rule,[22] my aim here is to provide a summary of the interpretations of the original rule by Common Law courts. It is hoped such a synopsis will supply a sufficient base from which to launch an examination of both the efficacy and the theoretical validity of the judicial decisions in this area.

As the approach of Canadian courts to this intractible subject closely follows that taken in England, this discussion will also serve as a foundation for an analysis of the reactions of Canadian courts. In seeking a propitious perspective for assessing the Canadian judicial response, references will also be made to Australia and New Zealand. Developments in the United States, where the route mistake of law has taken differs in some respects from both the English and Canadian experience will be noted.[23]

In all of these jurisdictions the desire to limit the comprehensiveness of the general rule precluding recovery of money paid under a mistake of law has been a consistent theme. Usually such attempts to obviate the harshness underlying *Bilbie* have been manifest in relatively feeble exceptions to the rule. Some courts have been bolder than others in avoiding this principle, but to a great extent similar techniques have been employed by all. In the U.S. the rule has been accepted more grudgingly than in England[24] but as

19. *Perrott* v. *Perrott* (1811), 14 East 423; 104 E.R. 665 (K.B.)

20. Note the *U.S. Restatement* at 179-81 recognizes that *Bilbie* and *Brisbane* have had this same influence on law in the U.S.: *See also* Goff and Jones, *Supra* n. 3, at 81; Woodward, *Supra* n. 10, at 366; and n. 24 below.

21. Note the slightly heterodox approach taken by R. Sutton, *"Kelly v. Solari:* The Justification of the *Ignorantia Juris Rule" (1967), 2 N.Z.U.L. Rev. 173,* where he argues that the decision of the Court of Exchequer in *Kelly v. Solari* (1841), 9 M. & W. 54; 152 E.R. 24 (Ex.) marks the point at which this principle became conclusively imbedded in English law. He suggests that only with this decision was an *aequum et bonum* approach finally rejected in favour of a firm no recovery rule thus allowing greater certainty of prediction.

22. For this, see *Supra* n. 3, at 79-90.

23. The rule in *Bilbie* has been statutorily altered in some parts of these jurisdictions. For the present I shall deal only with the development by the courts.

24. *See U.S. Restatement,* at 179-80; also note the firm language of 70 *C.J.S.* 364: "The rule that money paid under a mistake of law cannot be recovered back is not without limitation or exceptions, and is confined to cases falling strictly within its scope."

Bilbie has nonetheless prevailed in all but two states[25] this problem of circumvention is still relevant to most American courts.

In England as well as in these other jurisdictions it is axiomatic that the rule against recovery will not be applied where the payee has been fraudulent[26] or where the application of the rule would result in the enforcement of an illegal contract.[27] Equally, it is clear that an innocent misrepresentation on the part of the payee will not affect the application of the rule.[28]

In contrast to the above where the applicability of the rule is delineated in a reasonably certain manner, the courts have enjoyed considerable discretion with respect to the question of what actually constitutes a mistake of law. The nature of the distinction between mistake of fact and mistake of law is a highly ambiguous matter and one which the courts have never satisfactorily resolved.[29] As a result the judiciary has developed a propensity to find mistakes of fact, thereby allowing recovery in situations where the mistake appeared to be one of law.[30] This confusion has served as a convenient means by which Common Law courts have been able to side-step the mistake of law rule.

Another important limitation on the operation of the mistake of law rule is to be found in its very formulation. As the rule only applies where there has been a voluntary payment, if it appears that a payment has been made involuntarily, or under compulsion, then it can be recovered in an ac-

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25. In Connecticut and Kentucky it has consistently been denied that any distinction exists between mistake of fact and mistake of law. In the frequently quoted Connecticut case of *Northrop's Executors* v. *Groves, Supra* n. 1, the Court allowed recovery where executors had paid a legacy to the defendant under a mistaken interpretation of the will. *See also Gilpatric* v. *City of Hartford* (1923), 98 Conn. 471, 120 A. 317 (S.C.); *Ficken* v. *Edwards, Inc.* (1962), 23 Conn. Supp. 378, 183 A. 2d 924 (Cir. Ct.). In the Kentucky case of *City of Covington* v. *Powell* (1859), 2 Met. 226 (Ky. C.A.), the Judge held "Upon the whole . . . whenever, by a clear and palpable mistake of law or fact, essentially bearing upon and affecting the contract, money has been paid, without cause or consideration, which, in law, honor, or conscience, ought not to be retained, it was, and ought to be recovered back." *See also Bruner* v. *Stanton* (1897), 43 S.W. 411 (Ky. C.A.); *Supreme Council Catholic Knights of America* v. *Fenwick* (1916), 183 S.W. 906 (Ky. C.A.).

26. *See Dixon* v. *Monkland Canal Co.* (1831), 5 Wils. & S. 445, 5 Sc. R.R. 617 (C.A.); *Henderson v. Folkestone Waterworks Co.* (1885), I.T.L.R. 329 (Q.B.) (per Lord Coleridge, C.J.); and *see Supra* n. 3, at 70 re tortious remedies. In U.S., *see Restatement* para. 55; *Haviland v. Willets* (1894), 141 N.Y. 35, 35 N.E. 958 (C.A.); *MacNamee v. Hermann* (1931), 53 Fed. 2d 549 (D.C. Cir.); *Jekshewitz v. Croswald* (1929), 265 Mass 413, 164 N.E. 609 (S. Jud. Ct.)

27. *See Lowry* v. *Bordieu* (1780), 2 Doug. 468, 99 E.R. 299 (K.B.); *Kiriri Cotton Co. v. Ranchoddas Kesharji Dewani,* (1960) A.C. 192 (P.C.) (per Lord Denning).

28. *See Harse* v. *The Pearl Life Assurance Co.,* [1904] 1 K.B. 558.

29. The *U.S. Restatement,* para. 7 offers perhaps the best available definition of mistake of law: "A mistake of law means a mistake as to the legal consequences of an assumed state of facts." This seemingly obvious distinction from mistakes of fact has provided the Common Law with a particularly obdurate and annoying problem, however, as a survey of the academic literature indicates. Winfield, *Supra* n. 5, at 327 felt it was commonplace that the distinction should be made although he readily conceded that it was a difficult one to make. Cheshire and Fifoot, *The Law of Contract* (9th ed. 1976) 641-45, after reluctantly deciding that the distinction must be maintained, conclude that the exact demarcation is unknown. Stoljar, *Supra* n. 10, less patient with the confusion states at 43, "Not only . . . is it often impracticable to distinguish between them. Even more importantly, even where we can distinguish, the distinction really states nothing of relevance." Goff & Jones, *Supra* n. 3, at 81, carry the barrage a step further by recommending that whether money was paid under a mistake of law or a mistake of fact should not even be a crucial question so they therefore find it unnecessary "to join those who have attempted the difficult, if not impossible, task of distinguishing law from fact."

30. *See Eaglesfield* v. *Londonderry* (1875), 4 Ch.D. 693, at 703 per Jessel, M.R.; *Solle* v. *Butcher,* [1950] 1 K.B. 671, where Jenkins, L.J. found the mistake to be of law, Buckmill, L.J. found it to be of fact, and Denning, M.R. made no pronouncement on the issue. *See also Daniell* v. *Sinclair* (1881), 6 App. Cas. 181; *Leedon* v. *Skinner,* [1923] V.L.R. 401 (S.C.). Similar confusion exists in the U.S. *See Champlin* v. *Laytin* (1837), 18 Wend. 407 (N.Y. Sup. Ct.) where the Court was divided as to whether the mistake was of fact or law; *Barker* v. *Clark* (1876), 12 Abb. Pr. N.S. 106 (N.Y.); *Indemnity Insurance Co. of North America* v. *Paige* (1938), 299 Mass. 523, 13 N.E. 2d 616 (S. Jud. Ct.); *E.R. Squibb & Sons* v. *Chemical Foundation* (1937), 93 F. 2d 475 (2nd Cir.). Note that at least one U.S. jurisdiction makes a distinction at common law not only between mistakes of fact and mistakes of law, but also between mistakes of law and ignorance of the law; recovery being allowed for the latter. *See American Surety Co. of New York* v. *Groover* (1941), 64 Ga. App. 865, 14 S.E. 2d 149 (C.A.).

tion for money had and received.[31] This distinction between voluntary and involuntary payments is obviously decisive, for unless a payer is able to invoke one of the specific exceptions to the mistake of law rule, it will determine in almost every case whether or not recovery is available.[32] And conversely where a payer can rely on one of these recognized exceptions he will be entitled to recovery even though he has voluntarily submitted to a claim.

The judicial creation of such exceptions provides further evidence that the Common Law courts have had doubts as to the soundness of the rule in *Bilbie.* Although the limitations imposed by U.S. courts[33] are somewhat broader than those allowed in English courts, most of these exceptions are very similar in nature.

While some of the exceptions remain controversial, most appear to be firmly established. For example, all Common Law jurisdictions have long accepted that money paid under the influence of a mistake of foreign law is recoverable.[34] The reason is that Lord Ellenborough's statement is taken to refer only to the law of one's own country, so in cases of a mistake of foreign law, the court treats the mistake as one of fact. Where money is paid under a judgment which is later reversed on appeal recovery is also allowed.[35] Similarly recovery is permitted where money is paid subject to a promise that it will be refunded if the payer was not under a legal liability to make the payment.[36]

English courts have found the *Bilbie rule* to have no application where a trustee or personal representative has overpaid a beneficiary, but a remedy is available only insofar as he will be entitled to deduct the overpayment from future installments.[37] Goff and Jones[38] note that in England such a payer would not be entitled to directly recover the money whereas in the U.S. he would.[39] In the 1951 House of Lords decision in *Re Diplock*[40] it was established that where, during the course of administration, a personal representative acting under a mistake of law, makes a wrong payment, the no recovery rule will not prevent a creditor, a legatee, or next of kin from

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31. *See Supra* n. 3, at Chaps. 8-10; Stoljar, *Supra* n. 10,at 50-80.

32. *Supra* n. 3, at 81, suggests that this should be the "crucial question" in determining whether a mistaken payment is recoverable.

33. The *U.S. Restatement,* para. 46, sets out the main exceptions to the rule against recovery:

> A person who has conferred a benefit upon another because of an erroneous belief induced by a mistake of law that he is under a duty so to do, is entitled to restitution as though the mistake were one of fact if:
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> (a) the benefit was conferred by a State or subdivision thereof, or
> (b) the benefit was received on behalf of a court which has control over its disposition, or
> (c) the mistake was as to the law of a State in which the transferor neither resided nor did business, except a mistake of law in the payment of taxes, or
> (d) the mistake was as to the validity of a judgment subsequently reversed.

34. *See Lazard Bros. & Co.* v. *Midland Bank,* [1933] A.C. 289; *Leslie* v. *Baillie* (1843), 2 Y. & C.C.C. 91, 63 E.R. 40 (Ch.). For U.S. *see Supra* n. 33.

35. *See* D. Gordon, (1843) "Effect of Reversal of Judgment on Acts Done Between Pronouncement and Reversal" (1958), 74 L.Q. Rev. 517. For U.S. *see Supra,* n. 33.

36. *See Sebel Products Ltd.* v. *Commissioners of Customs & Excise,* [1949] Ch. 409.

37. *See Dibbs* v. *Goren* (1849), 11 Beav. 483, 50 E.R. 904 (Ch.); *Re Musgrave, Machell* v. *Parry,* [1916] 2 Ch. 417.

38. *Supra* n. 3, at 87, for a general discussion of the shortcomings of English law relating to recovery of overpayments by trustees and personal representatives.

39. *See Old Colony Trust Co.* v. *Wood* (1947), 321 Mass. 519, 74 N.E. 2d 141 (S. Jud. Ct.); *Roach* v. *Underwood* (1950), 192 Tenn. 378, 241 S.W. 2d 498 (S.C.).

40. *Ministry of Health* v. *Simpson* [1951] A.C. 251; *see also Dempsey* v. *Piper,* [1921] N.Z.L.R. 753 (S.C.)

recovering from the person wrongly paid. It appears, however, that before being entitled to so recover, the rightful beneficiary must first exhaust his remedies against the personal representative.[41]

Another entrenched exception to the mistake of law rule concerns payments made to the court. Thus money mistakenly paid to an officer of the court is recoverable notwithstanding that it was made under a mistake of law.[42] Although strictly speaking no action will lie for the recovery of money so paid, the court will order it to be repaid for reasons of public conscience.[43] It also seems that where a court pays out money under a mistake of law it may be recovered,[44] although in the U.S. such payments by court officers are not recoverable.[45]

In both England[46] and in the U.S.[47] it is well settled that payments mistakenly made out of the government's consolidated fund are recoverable regardless of whether the mistake was one of fact or law. The reason for this apparently is that the money involved is usually taxpayers' money and to deny a recovery would work a hardship on the people generally. In the U.S. this doctrine has been applied to state governments and their subdivisions as well.[48] Whether payments mistakenly made by individuals to the government are recoverable is more problematical for while all jurisdictions generally refuse belief where taxes are paid under an *ultra vires* statute,[49] in the U.S. at least, some payments to government officials are recoverable.[50] In England and the other Commonwealth countries, however, the better view is that payments made to government officials are not recoverable if made under the influence of a mistake of law.[51]

An exception to the no recovery rule which has spent a rather dormant existence until recently was enunciated by the Judicial Committee of the Privy Council in the 1960 case of *Kiriri Cotton Co. v. Ranchoddas Kesharji*

41. *Ibid.*

42. This applies to trustees in bankruptcy as well. *See Ex parte James* (1874), L.R. 9 Ch. App. 609; The same rule exists in the U.S. *see Supra* n. 33; 70 *C.J.S.* 364.

43. As Lord Esher put it in *Ex parte Simmonds* (1885), 16 Q.B.D. 308, at 312:

> A rule has been adopted by Courts of law for the purpose of putting an end to litigation, that, if one litigant party has obtained money from the other erroneously, under a mistake of law, the party who has paid it cannot afterwards recover it. But the Court has never intimated that it is a high-minded thing to keep money obtained in this way; the Court allows the party who has obtained it to do a shabby thing in order to avoid a greater evil, in order that is, to put an end to litigation . . . [A]lthough the Court will not prevent a litigant party from acting in this way, it will not act so itself, and it will not allow its own officer to act so. It will direct its officer to do that which any high-minded man would do, viz., not to take advantage of the mistake of law.

44. *Re Birkbeck Permanent Benefit Building Society*, [1915] 1 Ch. 91.

45. 70 *C.J.S.* 365.

46. Viscount Haldane said in *Auckland Harbour Board* v. *The King*, [1924] A.C. 318, at 327: "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."

47. "The unjust and anomalous doctrine that one may not recover money paid under a mistake of law, unhappily still persists, though it is more honoured in the breach than in the observance but a well settled exception is that payments made by the legal mistakes of officers of the United States are recoverable." *United States* v. *Bentley* (1939), 107 F. 2d 382 (2nd Cir.); *See also United States* v. *Wurts* (1938), 303 U.S. 414.

48. *Supra* n. 33; *People* v. *Union Oil Co.* (1957), 310 P.2d.409 (Cal. S.C.); *State* v. *McCarty* (1955), 279 P.2d.879 (Idaho S.C.).

49. *But see Supra* n. 3, at 89, where they refer to some statutory exceptions. *See also* Pannam, *Supra* n. 10; "Mistake of Law: A Suggested Rationale" (1931), 45 Harv. L. Rev. 336, at 342; *Halliday* v. *Southland County Council* (1906), 25 N.Z.L.R. 939 (S.C.).

50. *See* "Mistake of Law," *Ibid.*

51. *But see* dicta in *Sebel Products Ltd.* v. *Commissioners of Customs & Excise*, *Supra* n. 36, at 413, which suggests that the principle applicable to mistaken payments to court officers, might be extended to government departments.

Dewani.[52] Here 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 expressing the opinion of the Committee, held that because of this statutory duty 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. This finding, if liberally construed, could represent a substantial exception to the mistake of law rule for the existence of a specific statutory duty, as opposed to a more *ad hoc* notion of duty, does not appear to be an essential prerequisite to the application of the doctrine.[53]

Any consideration of the methods by which our courts have evaded this rule would be incomplete without an examination of the role that equity has played. With the recognition of the mistake of law — mistake of fact distinction by the Common Law courts, the no recovery rule inevitably invaded the Courts of Chancery.[54] Despite this, equity has resolutely sought to maintain its policy of providing relief regardless of the nature of the mistake.[55] But typically for this area of the law, it is very difficult to ascertain to what extent equity has actually succumbed to the no recovery rule.[56] So while the law may not be in a particularly definite state, it is at least known that equitable remedies will be more readily available than will Common Law relief.[57] This is clearly the case not only in England[58] and the Commonwealth,[59] but in the U.S.[60] as well.

The biggest impact that equity has had in mitigating the rigours of the *Bilbie* rule results from its recognition of the distinction between mistakes of general law and mistakes relating only to one's personal legal rights. The establishment of this often fictional distinction is attributed to the decision of Lord Westbury in *Cooper* v. *Phibbs.*[61] On the authority of this case,

52. *Supra* n. 27.

53. Cheshire and Fifoot, *Supra* n. 29, at 641, are critical of this decision and suggest that the pre-*Bilbie* comments of Lord Mansfield which Lord Denning relies upon as authority for the *in pari delicto* principle, cannot have survived the establishment of the mistake of law rule in *Bilbie* and *Brisbane.* But the invocation of this doctrine by the Judicial Committee may not have been so bold an act as Cheshire and Fifoot might imply, for in *Harse* v. *The Pearl Life Assurance Co. case, Supra* n. 28, Romer, L.J. at 564, suggests that the only way the plaintiff could have recovered his payment (which had been made under a mistake of law) was to "make out that he is not *in pari delicto* with the defendant company."

54. Stoljar *Supra* n. 10, at 47 suggests that the courts of equity only pretended to adopt the principle. He could have added that the inflexibility of the mistake of law rule has made such judicial deception all too characteristic of this subject.

55. *See Rogers* v. *Ingham* (1876), 3 Ch.D. 351, at 357 where Mellish, L.J. said: "[I] think that, no doubt, as was said by Lord Justice Turner '[T]his Court has power (as I feel no doubt that it has) to relieve against mistakes in law as well as against mistakes in fact' . . . that is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it." *See also Daniell* v. *Sinclair, Supra* n. 30, at 190, where Sir Robert Collier said that "in Equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn."

56. Sutton, *Supra* n. 21, suggests that the courts of equity have taken no common stance as to whether recovery is available for mistakes of law and he cites cases illustrating this ambivalence. McTurnan, *Supra* n. 10, concludes more decisively that where equitable relief is sought, a court is justified in treating mistakes of law and mistakes of fact on the same basis.

57. Stoljar, *Supra* n. 10, at 46, notes that equitable actions although not actions for money had and received; are in fact based on almost identical underlying principles.

58. *Rogers* v. *Ingram, Supra* n. 55; Daniell v. *Sinclair, Supra* n. 30; *Huddersfield Banking Co.* v. *Henry Lister & Sons Ltd.*, [1895] 2 Ch.D. 273; *Solle* v. *Butcher, Supra* n. 30; *Grist* v. *Bailey,* [1966] 2 All E.R. 875 (Ch.).

59. *The King* v. *Bannatyne* (1901), 20 N.Z.L.R. 232 (C.A.); *Kelly* v. *R.* (1902), 27 V.L.R. 522 (S.C.); *Dempsey v. Piper, Supra* n. 40; *Winstone* v. *Winstone,* [1946] G.L.R. 62 (S.C.); *Waring* v. *S.J. Brentnall Ltd.*, [1975] 2 N.Z.L.R. 401 (S.C.).

60. 70 *C.J.S.* 364.

61. (1867), L.R. 2 H.L. 149.

courts have been able to allow recovery where a payer is mistaken not about some legal matter of supposed public knowledge, but where he has erred with respect only to his private legal status. In allowing relief where both parties were mistaken about the ownership of a salmon factory, Lord Westbury[62] provided the Courts of Chancery with an exception to the mistake of law rule that was to prove to be sufficiently malleable for almost any occasion.[63] In fact this somewhat arbitrary method of avoiding *Bilbie* proved so alluring to the judiciary, that the Common Law courts adopted it as well.[64]

While the judiciary is often of the mind to construe these limitations to the no recovery rule in a distinctly munificent manner, the fact remains that each of these exceptions is more or less confined to the comparatively small number of fact situations it embraces. So in spite of the judiciary's efforts, the greater number of cases of voluntary payment under the mistake of law rule remain unaffected. The generally uncritical deference to precedent and the somewhat unsympathetic approach of many judges of the late 19th and 20th centuries[65] not only saved the mistake of law rule from extinction but allowed it to endure in a largely unscathed condition.[66]

Beyond simply noting that the *Bilbie* rule will apply where no limitation is applicable, certain observations may be made regarding those instances where no recovery will be allowed. As the mistake of law rule is predicated on the payment being of a voluntary nature, this condition must obviously be satisfied for the rule to apply.[67] What constitutes voluntariness can only be determined from the facts of each case, but it is settled that a protest by the payer at the time of payment will not in itself obviate the voluntary nature of the payment.[68]

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62. *Id.*, at 170. Regarding the common mistake as to the ownership of the property, Lord Westbury observed: "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 a 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."

63. Mistakes as to private rights include erroneous impressions as to the legal interpretations of particular instruments. *Earl Beauchamp* v. *Winn* (1873), L.R. 6 H.L. 223. Mistakes as to rights under post-nuptial settlements have been included as well. *Allcard* v. *Walker*, [1896] 2 Ch.D. 369. *See* McTurnan, *Supra* n. 10, for a discussion of the expansive effect that the decision in *Solle* v. *Butcher*, *Supra* n. 30, has had on the private rights exception.

64. *See* Winfield, *Supra* n. 5, at 339. The exception exists in the U.S. as well. *See* Harv. L. Rev., *Supra* n. 49; *see also* P. Cromwell, "Recovery of Money Paid Under a Mistake of Law" (1956), 16 Md. L. Rev. 147, where the author suggests that if the facts of *Bilbie* were to now arise in the U.S., recovery would be granted on the basis of this private rights exception.

65. Note Lord Denning's remarks in *Kiriri Cotton*, *Supra* n. 27, at 204, where he is critical of decisions made early in this century because of the courts' reluctance in them to grant restitutionary remedies. Scrutton, L.J.'s famous statement in the case of *Holt* v. *Markham*, [1923] 1 K.B. 504, at 513, is perhaps representative. He referred to the history of the action for money had and received as being a history of "well-meaning sloppiness of thought."

66. This is the case in the U.S. as well for Seavey and Scott the authors of the *U.S. Restatement on Restitution* remark in the *Reporters' Notes* (1937) to the *Restatement*, at 35, "that with comparatively minor exceptions the rule (against recovery) is almost universal, both at law and in equity."

67. See *Whiteley, Ltd.* v. *The King* (1909), 26 T.L.R. 19 (K.B.). In U.S. *see* 70 *C.J.S.* 363; also note the comments of the Court in *Brumagim* v. *Tillinghhast* (1861), 18 Cal. 265 (S.C.): "It is the compulsion or coercion under which the party is supposed to act which gives him the right to relief. If he voluntarily pay an illegal demand, knowing it to be illegal, he is of course entitled to no consideration; and if he voluntarily pay such demand in ignorance or misapprehension of the law respecting its validity, he is in no better position, for it is against the highest policy to permit transactions to be opened upon grounds of this character."

68. *Twyford* v. *Manchester Corp.*, [1946] Ch. 236; *Whiteley, Ltd.* v. *The King*, *Ibid.*

Similarly the courts will deny recovery where the payment was made to effect a compromise.[69] Where the compromise payment was made to avert threatened litigation and it is subsequently discovered that the money claimed was not legally owing, the no recovery rule will still apply.[70]

Where money is paid at a time when the law is in favour of the recipient, it will not be recoverable where a subsequent judicial decision changes the law to the payer's favour.[71] This is easily defendable on policy grounds for if the law were otherwise, actions could be reopened interminably.[72]

It has been frequently held that money paid pursuant to a claim based on a statute is not recoverable where it is later discovered that the demand could have been resisted successfully. This is so whether the statute is subsequently declared *ultra vires*[73] or has merely been misconstrued.[74] Likewise where covenants are misinterpreted the mistake of law rule will ordinarily prevent the recovery of consequent payments.[75]

While Lord Ellenborough's principle has of course been held applicable in a wide variety of situations, its usual role appears to be in connection with those circumstances outlined above. As an examination of the policy underlying the mistake of law rule will indicate, some of these developments are more easily justified than others. This is the case not only in the jurisdictions dealt with so far, but in Canada as well.

Developments in Canada

The evolution of the mistake of law principle in Canada has been very much in accord with the development of the rule in England, as is to be expected given the nature of the relationship between the countries' legal systems. Naturally the Canadian body of law on this subject is somewhat sparser than that existing in England, but it is nonetheless sufficiently extensive to justify analysis. In Canada the exceptions to the rule are essentially the same as in the other Common Law jurisdictions, although recent domestic developments have perhaps resulted in a little variance around the edges. And as these limitations inevitably define the circumstances in which the rule itself can apply; it will be seen that the extent of this area too conforms largely with the English model.

It would be misleading, though, to give the impression that the uncer-

69. *See Supra* n. 3, at 80; *but see Magee* v. *Pennine Insurance*, [1969] 2 All E.R. 891 (C.A.), where an executory compromise agreement was held to be voidable in equity. In U.S. *see* "Recent Statutes" (1942), 11 Fordham L. Rev. 323, at 330.

70. *See Sawyer & Vincent* v. *Window Brace Ltd.*, *Supra* n. 2; *Halliday* v. *Southland County Council*, *Supra* n. 49.

71. *See Henderson* v. *The Folkestone Waterworks Co.*, *Supra* n. 26; *Derrick* v. *Williams*, [1939] 2 All E.R. 559 (C.A.); *Julian* v. *Mayor of Auckland* (1927), N.Z.L.R. 453 (S.C.); *Werrin* v. *The Commonwealth* (1938), 59 C.L.R. 150 (Aust. H.C.).

72. As Sir Wilfred Greene, M.R. in *Derrick* v. *Williams*, *Id.*, at 565, put it: "It would be an intolerable hardship on successful litigants if, in circumstances such as these, their opponents were entitled to harass them with further litigation because their view of the law had turned out to be wrong . . . ."

73. *See Halliday* v. *Southland County Council*, *Supra* n. 49; *see also* Pannam, *Supra* n. 10, re: money paid under *ultra vires* taxing statutes. In U.S. *see* 70 C.J.S. 366.

74. *See Whiteley, Ltd.* v. *The King*, *Supra*, n. 67; *National Pari-Mutual Assn. Ltd.* v. *The King* (1930), 47 T.L.R. 110 (C.A.).

75. *See Re Hatch*, [1919] 1 Ch. 351; *Ord* v. *Ord*, [1923] 2 K.B. 432. *But see* the private rights exception, text *Supra* n. 61-64.

tainty surrounding the mistake of law doctrine has been eliminated in Canada. To the contrary, even the debate as to the conceptual basis of restitutionary remedies in general continues in Canada after having been resolved, or at least exhausted in most other countries some years ago.[76] The failure of Canadian academics and more importantly the failure of the Canadian judiciary to conclude this debate has meant that "restitutionary" remedies such as the action for money had and received have been alternatively justified on the basis of implied contract, proprietory rights, and unjust enrichment theories as well as others.[77] Not surprisingly this confusion has failed to assist in the development of any sort of coherent judicial approach to this subject.

But due to the decidely non-restitutionary implications of Lord Ellenborough's principle, the no recovery rule has for the large part remained exempt from this controversy. The same, however, cannot be said about the limitations to the rule, for their remedial nature has qualified them for the polemic. As was the case in the preceding section, these limitations can most conveniently be dealt with at the outset of this examination of the mistake of law rule in Canada.

In *Eadie v. Township of Brantford,* Spence, J., in noting that it is "of course, a trite principle that money paid under a mutual mistake of law cannot be recovered," added that the rule "is subject to several well-established exceptions."[78] Although he did not go on to elaborate, we may assume that one of these "well-established exceptions" is the disclaimer that the mistake of law rule will not apply where the recipient has been fraudulent.[79] This stance is of course consistent with the English law, as is the Canadian view that innocent misrepresentations by the payee will not entitle the payer to recovery.[80]

In Canada, as elsewhere, money paid under a mistake of fact is considered to be *prima facie* recoverable[81] so the problem of distinguishing mistakes of law from mistakes of fact has often arisen. Given the dif-

76. *See* R. Samek, "The Synthetic Approach and Enrichment" (1977), 27 U. of T. L.J. 335; G.H.L. Fridman, "Reflections on Restitution" (1975-76), 8 Ottawa L. Rev. 156; R. Samek, "Unjust Enrichment, Quasi-Contract and Restitution" (1969), 47 Can. B. Rev. 1; C. Granger, "Equity, Law and Restitution" (1967-68), 2 Ottawa L. Rev. 195; W. Angus, "Restitution in Canada Since the Deglman Case" (1964), 42 Can. B. Rev. 529; G.H.L. Fridman, "The Quasi-Contractual Aspects of Unjust Enrichment" (1956), 34 Can. B. Rev. 393.

77. The Supreme Court of Canada decision in *Deglman* v. *Guaranty Trust Co. of Canada and Constantineau,* [1954] S.C.R. 725, [1954] 3 D.L.R. 785, is commonly regarded as representing the point at which the notion of unjust enrichment was formally accepted in Canada. It has also ensured that this apparently pedantic concern with nomenclature is to be of importance in Canadian law. In this case Mr. Justice Rand relied on the theory of unjust enrichment to award relief whereas Mr. Justice Cartwright ordered relief on the basis of "an obligation imposed by law." *See* Fridman, "Reflections on Restitution," *Id.,* at 168-69. See also Angus, *Ibid.,* for his discussion of how these competing views have caused considerable confusion in subsequent cases.

78. [1967], S.C.R. 573, at 581; 63 D.L.R. (2d) 561, at 570 (hereinafter referred to as *Eadie*).

79. *See O'Grady* v. *City of Toronto* (1916), 31 D.L.R. 632, at 634 (Ont. S.C.), where Middleton, J. indicates that a payer is entitled to recovery where "there is some fraudulent conduct on the part of the defendant, or where he has actively misled the plaintiff." *See also Gillis Supply Co.* v. *Chicago Milwaukee & Puget Sound Rwy.* (1911), 18 W.L.R. 355, 13 C.R.C. 35 (B.C.C.A.), where the Court discusses what is required to maintain an action in deceit.

80. *See Ottawa Electric Rwy.* v. *Ottawa,* [1934] O.R. 765; [1934] 4 D.L.R. 731 (Ont. S.C.). Note, however, that Canadian courts may be more sympathetic than English courts toward the claimant where the recipient's innocent misrepresentation has induced the payment. In *Hart Parr Co.* v. *Eberle* (1910), 3 Sask. L.R. 34, at 40 (S.C.), Wetmore, C.J. said in allowing recovery where E had signed notes in favour of HP on the strength of HP's agent's misrepresentation of law, "I am not concerned as to whether this statement was made fraudulently or not or whether [HP's agent] knew that it was untrue. I, however, find that it was made with the object of inducing (E) to sign the notes." Aff'd. 3 Sask. L.R. 386 (S.C., App. Div.).

81. *See Rural Municipality of Storthoaks* v. *Mobil Oil Canada Ltd.,* [1976] 2 S.C.R. 147; (1975), 55 D.L.R. (3d) 1; *Royal Bank* v. *Regem,* [1931] 1 W.W.R. 709 (Man. Q.B.).

ficulties of attempting to award recovery on the basis of mistake of law, the judiciary has almost instinctively exhibited the same type of versatility regarding this issue as was seen to be the case in the other common law jurisdictions.

This is aptly illustrated by the Supreme Court of Canada decision in *George (Porky) Jacobs Enterprises Ltd.* v. *City of Regina.*[82] Hall, J. speaking for the Court held that a mistake as to the existence of a by-law was a mistake of fact and not of law, while in the earlier *O'Grady* v. *City of Toronto*[83] case the Court had no hesitation in finding a mitake of law where the parties were unaware of a statutory amendment. Then, as Professor Crawford[84] has noted that in *Eadie*[85] the Supreme Court of Canada paid scant respect to the threadbare distinction made in the *Jacobs* case although they might easily have relied on it. The Court's use of such inconsistent approaches to accommodate desired outcomes is naturally having a far from salutary effect on the certainty of the law in this area.

This lack of conviction has been less apparent in other circumstances, although it seems always to be available if required.[86] For instance a mistaken belief as to the validity of a marriage has been held to be a mistake of fact[87] as has a mistake as to the geographical jurisdiction of a licencing commission where its boundaries were statutorily defined.[88] More sensibly Canadian courts have found a mistake of law where a provision of an agreement was misconstrued[89] and where interest was paid at a rate higher than the legal rate.[90] Also the incorrect construction of a will is a mistake of law[91] whereas a mistake as to the existence of a will is a mistake of fact[92] as is a mistake as to the existence of liens.[93]

Most of the specific exceptions to the *Bilbie* rule that were found to be available in England and the U.S. have been relied on in Canada as well. In some cases English authority will still be required to establish the availability of an exception, but the primary limitations have all been approved by Canadian courts.

For instance it has been held in Canada that mistakes of foreign law will be dealt with as mistakes of fact.[94] And although there is little law on the subject, at least one Judge has indicated that money paid under a mistake of law by a trustee or personal representative will be recoverable.[95]

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82. [1964] S.C.R. 326; 44 D.L.R. (2d) 179; 47 W.W.R. 305 (hereinafter referred to as *Jacobs*).
83. *Supra* n. 79 (hereinafter referred to as *O'Grady*).
84. B. Crawford, "Restitution: Mistake of Law and Practical Compulsion" (1967), 17 U. of T.L.J. 344, at 345.
85. *Supra* n. 78.
86. Fridman, "Reflections on Restitution," *Supra* n. 76, discusses recent cases where neither mistake of law nor mistake of fact issues have arisen in situations where they perhaps should have.
87. *See Clelland* v. *Clelland,* [1945] 3 D.L.R. 664; [1945] 2 W.W.R. 399 (B.C.C.A.).
88. *See Smith* v. *Halifax Pilot Commissioners* (1917), 35 D.L.R. 765 (N.S.S.C., App. Div.)
89. *See Ottawa Electric Rwy.* v. *Ottawa, Supra* n. 80.
90. *See McHugh* v. *Union Bank* (1913), 10 D.L.R. 562 (P.C.)
91. *See Baldwin* v. *Kingstone* (1890) 18 O.A.R. 63 (C.A.)
92. *See Keddy* v. *Power,* [1952] 4 D.L.R. 486 (N.S.S.C.).
93. *See Connick* v. *Municipality of Carmichael,* [1923] 4 D.L.R. 994; [1923] 3 W.W.R. 1244 (Sask. C.A.).
94. *See Thompson* v. *Crawford* (1932), 41 O.W.N. 231; [1932] 4 D.L.R. 206 (C.A.)

Relief of this sort would presumably be made subject to those conditions outlined in *Re Diplock.*[96]

The exception concerning money mistakenly paid by an officer of the court has also been dealt with in Canada. Courts definitely have a right to recover money so paid,[97] even if the mistake was of law, and similarly individuals will be allowed to recover money mistakenly paid into court.[98]

In conformity with English and U.S. law, Canadian law will not allow recovery where money has mistakenly been paid out of the government's consolidated fund.[99] But again where an individual has mistakenly made a payment to a government official, no recovery will be available although in the *Eadie*[100] case Spence, J. indicated that he felt some favour for the view that senior municipal officials should be subject to the same obligations as officers of the court.

One exception which has flourished in Canada is the *in pari delicto* doctrine, and curiously some of the cases in which it was applied were decided prior to *Kiriri Cotton.*[101] The *Hart Parr Co.* v. *Eberle*[102] case is in blatant contrast with the decision of the Court of King's Bench in *Harse* v. *The Pearl Life Assurance Co.*[103] In both cases agents of the recipients made misrepresentations of law which induced the payers to make payments to the recipients (in *Hart Parr* notes were signed thereby increasing the payer's liability to the recipient). In the English case no recovery was allowed whereas the Saskatchewan Court of Appeal allowed recovery saying the parties were not *in pari delicto.*[104]

More recently in *Jacobs* (1964) and in *Eadie* (1967) the Supreme Court of Canada has placed reliance on Lord Denning's remarks in *Kiriri Cotton.*[105] In the latter case Spence, J. specifically found that the claimant and an official of the defendant municipality were not *in pari delicto* where the official had demanded money on the basis of an illegal by-law.

While attaching quite a degree of prominence to the *in pari delicto* exception, Canadian courts have not employed the equitable limitations to the mistake of law rule to the same extent that English and particularly U.S. courts have. In fact, equity's attempted intrusion was originally received

95. *See Edward Mayhew, Administrator De Bonis Non of Zachariah Mayhew, Deceased* v. *Mary Jane Stone* (1895), 26 S.C.R. 58. In this case the Court determined that a payment of money be the administratrix was not part of the unadministered estate of the deceased so it was therefore not recoverable by a subsequent administrator *De Bonis Non.* But Gwynne, J. at 64, was clearly of the opinion that even if paid under a mistake of law, the money would have been recoverable by the estate if the necessary conditions had been satisfied.

96. *Supra* n. 40.

97. *See London Guarantee & Accident Co.* v. *Henderson & McWilliams* (1915), 23 D.L.R. 38 (Man. K.B.). In finding that solicitors as well were subject to this exception, Galt, J. said at 40, "where such mistakes (of law) are made by officers of the Court the general rule does not apply." *See also Robson* v. *Wride* (1867), 13 Gr. 419 (Ont. Ch.). Bankruptcy trustees are also required to refund money mistakenly paid. *See Re Sawtell* (1933), 14 C.B.R. 320 (Ont. C.A.).

98. *See Andrew* v. *The Canadian Mutual Loan & Investment Co.* (1898), 29 O.R. 365 (Q.B.). It appears that payments to police officers will come within this exception as well, *Richards* v. *Taylor* (1896), 28 N.S.R. 311 (C.A.)

99. *See R.* v. *Toronto Terminals Rwy.*, [1948] Ex. C.R. 563.

100. *Supra* n. 78.

101. *Supra* n. 27.

102. *Supra* n. 80.

103. *Supra* n. 28.

104. In *McIntyre* v. *Bank of Montreal* (1957), 22 W.W.R. 379 (Man. Q.B.), the Court considered the doctrine, but found the parties to be *in pari delicto.*

105. *Supra* n. 27.

with little welcome. In *O'Grady,*[106] Middleton, J. announced that "Equity has never yet gone so far as to afford relief by enabling an action to be brought, directly or indirectly, to recover money paid under mistake of law." Nor was he convinced in that case that Lord Westbury's comments in *Cooper* v. *Phibbs*[107] had definitely created a private rights exception.

This caution has been overcome in subsequent cases, however, and it is now settled that Canadian courts will recognize the availability of equitable remedies even where money has been paid under the influence of a mistake of law. In observing that the Court of Chancery in *Rogers* v. *Ingham*[108] had granted relief against a mistake of law, Lamont, J.A. in *Connick* v. *Municipality of Carmichael*[109] said that "even if . . . monies had been paid under a pure mistake of law, the Court has still power to grant relief, and will, in a proper case, direct a return of the monies paid."[110] The private rights exception has also now been accepted in Canada.[111]

The most thorough blow that Canadian courts have thus far delivered against the uncompromising mistake of law rule has manifest itself in two recent Supreme Court of Canada decisions. In both the *Jacobs* and *Eadie* decisions, the Court was of the view that payments made to the respective municipalities were made involuntarily and were for that reason recoverable. In the *Jacobs* case where a by-law had been misconstrued by municipal officials, Hall J. found that there had been effective compulsion because the claimant had no alternative but to pay the fee demanded. The Court in the *Eadie* case, as well as holding that the claimant was entitled to recovery on the basis of the *in pari delicto* exception,[112] found that his payment pursuant to an *ultra vires* by-law was made involuntarily because he was subject to a "practical compulsion." In finding that these claimants were entitled to recover on grounds of "practical compulsion" or because they had "no actual alternative but to pay the fee being demanded,"[113] the Supreme Court has strayed from the firmer position formerly taken by Canadian courts. The decision of the British Columbia Court of Appeal in *Vancouver Growers Ltd.* v. *G.H. Snow Ltd.*[114] reflects the traditional approach that the courts have taken to claims for the recovery of payments made under *ultra vires* or misinterpreted statutes. In that case, where the claimant had made payments to a marketing board which was subsequently found to have been constituted pursuant to an *ultra vires* statute, the court refused to allow recovery. Macdonald, J.A. set out the Court's view of this matter in the following way: "One who voluntarily pays a sum of money to another cannot demand repayment as money had and received to his use. Uress, compulsion or other forms of imposition must be shown."[115] The

106. *Supra* n. 79, at 633.

107. *Supra* n. 61.

108. *Supra* n. 55.

109. *Supra* n. 93, at 997; [1923] 3 W.W.R., at 1247.

110. *See also Rountree* v. *Sydney Land & Loan Co.* (1907), 39 S.C.R. 614; *See Ivanochko* v. *Sych* (1967), 60 D.L.R. 474, where the Sask C.A. endorsed the highly flexible equitable approach adopted in *Solle* v. *Butcher, Supra* n. 30.

111. *See Gordon* v. *Snelgrove,* [1932] O.R. 253, 2 D.L.R. 300 (Ont. S.C.); *Ferguson* v. *Zinn,* [1933] O.R. 9, 1 D.L.R. 300 (Ont. S.C.); *Thompson* v. *Crawford, Supra* n. 94.

112. *Kiriri Cotton, Supra* n. 27.

113. *Supra* n. 82, at 331; 44 D.L.R., at 184; 47 W.W.R., at 309 per Hall J.

114. [1937] 4 D.L.R. 128; [1937] 3 W.W.R. 121 (B.C.C.A.).

115. *Id.,* at 131; [1937] 3 W.W.R., at 124.

Supreme Court has no doubt remained faithful to this position, but its *Jacobs* and *Eadie* decisions seem to have weakened the authority of this second statement of Macdonald, J.A.'s: "It should be assumed that all citizens voluntarily discharge obligations involving payments of money or other duties imposed by statute."[116] Judging from the paucity of successful claimants in actions of this kind, MacDonald, J.A.'s approach must accurately represent the sense of resolution with which earlier Canadian courts approached cases where payments had been made pursuant to *ultra vires* or wrongly construed statutes.[117]

As has been suggested elsewhere,[118] this subtle change of emphasis by the Supreme Court may well have severely limited those occasions in which the mistake of law rule will be relevant. But while the Court may have devised a new method to circumvent this rule, any praise must be qualified. For in sterilizing the no recovery rule, the Supreme Court has left in its place a concept of compulsion that is not only at variance with earlier authority but is also of an unacceptably transparent nature. So although the objective may have been reached, it is submitted that the choice of vehicle was unfortunate.

Looking now to some other factors that courts will consider in determining whether a payment has been made voluntarily, it appears that Canadian courts are again slightly more willing to find in the payer's favour. In England for example, a protest at the time of payment is accorded little importance, whereas in Canada courts have been influenced by this.[119]

Other features suggesting involuntariness have also been considered in a lenient manner. In *Cushen* v. *Hamilton,*[120] the Ontario Court of Appeal was faced with a situation where butchers had paid certain fees under a by-law which was later declared invalid. The Court felt that the payments would be involuntary only if the demand to pay created "actual interference with the business" of the butchers. In that instance the test was not satisfied, but in a number of other cases a similar judicial approach has resulted in payments being declared recoverable. On at least two occasions it has been held that property tax payments are made involuntarily where the money is paid to prevent a sale of the property involved.[121] And similarly, payments are not voluntary where made under a mistake of law so as to prevent the seizure of goods.[122]

On the subject of compromise payments, the Canadian judiciary has been no less strict than have their brethren in the other Common Law jurisdictions. It is clear that a payment made to avoid litigation will not be

116. *Id.*, at 132; [1937] 3 W.W.R., at 125.

117. *See Independent Milk Producers Co-operative Assn.* v. *B.C. Lower Mainland Dairy Products Board,* [1937] 1 W.W.R. 679 (B.C.S.C.); *Hayward* v. *B.C. Lower Mainland Dairy Products Board,* [1937] 2 W.W.R. 401 (B.C.S.C.); *Fowler & Andrews* v. *Spallumcheen,* [1930] 3 W.W.R. 12 (B.C. Cty. Ct.); *Cushen* v. *The City of Hamilton* (1902), 4 O.L.R. 265 (C.A.).

118. *See* Crawford, *Supra* n. 81; R. Armstrong, "Note on *George (Porky) Jacobs Enterprises Ltd.* v. *City of Regina*" (1965), 23 U.T. Fac. L. Rev. 173.

119. *See Hancock* v. *Dartmouth* (1881), 14 N.S.R. 129 (C.A.);*See also Vancouver Growers Ltd.* v. *G.H. Snow Ltd., Supra* n. 114, where the Court acknowledges that a protest detracts from the voluntariness of a payment.

120. *Supra* n. 117.

121. *See Duffy* v. *Duffy* (1915), 26 D.L.R. 479 (N.B.S.C., App. Div.); *Canadian Mortgage Assn.* v. *City of Regina* (1917), 33 D.L.R. 43; [1917] 1 W.W.R. 1130 (Sask. S.C.).

122. *See Pople* v. *Town of Dauphin* (1921), 60 D.L.R. 30; [1921] 2 W.W.R. 276 (Man. C.A.).

recoverable where it is later discovered that the demand could have been successfully resisted.[123]

In discussing these situations where the mistake of law principle is applicable, it must be acknowledged that Canadian courts have to some extent mitigated the inflexibility of the rule. But while the doctrine may have been shaken, in most respects it clearly remains intact. It would therefore seem to be appropriate at this point to consider the legitimacy of the no recovery rule to determine whether further encroachments should be encouraged or whether the certainty provided by the existing principle should be maintained.

Criticisms of the Rule

Any assessment of the pollicy underlying the principle in *Bilbie* must begin with the observation that despite almost universal academic criticism[124] the rule has nonetheless prospered in most Common Law jurisdictions. This survival must presumably be viewed as a strong point in its favour. Another point to recognize is that while the courts have been reluctant to face the rule head-on, they have been most amenable to devious circumventions. This pattern of avoidance by the judiciary obviously tends to indicate that the rule is not felt to be applicable to all circumstances. But then what can be inferred from the refusal to challenge the precept itself? Also perplexing is the rarity of even those judicial statements which defend the rule's theoretical validity.

Unless, as Jeremy Bentham wrote in another context, "to give such proof is as impossible as it is needless";[125] one should by evaluating the arguments both pro and con be able to reach some conclusion as to whether the doctrine's continued existence is justified on policy grounds. It is clear that there is some dissatisfaction with the rule, but it is much less certain whether it should be further restricted or even eliminated altogether. It may that the law is currently at, or is approaching a state of equilibrium. Or it may also be that the very notion of distinguishing law from fact is inappropriate to the question of whether money mistakenly paid should be recoverable. Perhaps the mistake of law rule has merely served as a convenient peg on which the judiciary has hung no recovery decisions. The policy factors that determine these issues have rarely been adverted to by the courts, but several of them can be isolated.

The initial justification for the no recovery rule as expounded by Lord Ellenborough was that "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."[126] The subsequent attacks on this statement have fre-

123. *See The Queen* v. *Beaver Lamb & Shearling Co.*, [1960] S.C.R. 505, 23 D.L.R. 513; *Murray* v. *Veinotte*, [1951] 2 D.L.R. 721 (N.S.S.C., App. Div.).

124. One article that argues in favour of the rule is the student authored "Mistake of Law," *Supra* n. 49.

125. J. Bentham, *An Introduction to the Principles of Morals and Legislation* (1789) Chap. 1, para. XI. It is worth noting that in view of Bentham's positivist beliefs, whereby one seeks to separate law as it *is*, from law as it *ought* to be, he perhaps would have approved of his statement being applied to this issue. Of more relevance is the fact that legal positivism as espoused by Bentham was raging during the immediate post *Bilbie* period. In this scenario Bentham's legal contemporaries may have been particularly willing to follow Lord Ellenborough's principle without subjecting it to a thorough theoretical analysis, thus explaining its early acceptance.

126. *Supra* n. 7.

quently been unreserved.[127]

Most commentators accept that Lord Ellenborough's proposition embodies what Scott, L.J. has gloriously referred to as "the working hypothesis on which the rule of law rests in British democracy,"[128] but they go on to argue that the maxim is applicable only to criminal and tort law, and not to this area.[129] Although a conclusive presumption of knowledge of the law is unquestionably necessary in criminal and tort law, the critics surely are correct in maintaining that it is not properly applicable where one who has done no wrong, seeks not to inflict a loss upon another, but rather to save himself from a loss. So clearly the *ignorantia juris non excusat* maxim should have no application where the claimant is interested not in excusing himself, but merely in putting right his mistake.

Another criticism often marshalled against Lord Ellenborough's principle is that it is unsound not only in law but in common sense as well for it absurdly ascribes a knowledge of the law to everyone. Quite obviously rules of law can no more be presumed to be matters of common knowledge than can be equally technical deductions from other fields of special learning. Lord Mansfield makes this point in a way that is pleasantly ineluctable to the practioner's ear: "as to the certainity of the law it would be very hard upon the profession if the law was so certain that everybody knew it."[130] More recently Lord Denning in *Kiriri Cotton* seems to have terminated the debate concerning the veracity of Lord Ellenborough's remarks by noting "It is not correct to say that everyone is presumed to know the law. The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter."[131]

This general condemnation of Lord Ellenborough's reasoning is capable of being taken a step further as well. For it is feasible that in conceding that everyone does not actually know the law, defenders of the rule may instead choose to interpret the principle as declaring that claimants cannot recover because they should have found out what the law was. This is reasonable enough, but it does not appear to be sustainable, for logically a claimant should then not recover where his error was about a fact which he could have discovered. It is very well established though, that such is not the case.[132]

Although having discountenanced Lord Ellenborough's statement, it is submitted that critics of the mistake of law rule are not yet entitled to rest their case. While perhaps not persuasive in this instance, it is certainly legitimate to argue, as does Professor Hart,[133] that outside of the criminal law, motives for obedience such as "nullity," must be substituted for the

127. This is particularly so of U.S. writers. Seavey and Scott, *Supra* n. 66, refer to the "obvious absurdity" of Lord Ellenborough's reasoning and the *U.S. Restatement of Restitution,* 180, calls his statement "demonstrably untrue."

128. *Blackpool Corp.* v. *Locker,* [1948] 1 K.B. 349, at 361 (C.A.).

129. S. Williston, *The Law of Contracts* (3rd ed. 1970) para 1581. In discussing the misapplication of the maxim, this author has suggested that the explanation may be found in the fact that Lord Ellenborough received his early training in criminal trials.

130. *Jones* v. *Randall* (1774), 1 Cowp. 37; 98 E.R. 954 (K.B.).

131. *Supra* n. 27, at 204.

132. *See Kelly* v. *Solari, Supra* n. 21.

133. H.L.A. Hart, *The Concept of Law* (1961) Ch. 3.

more traditional sanctions that operate within the criminal sphere. The U.S. *Corpus Juris Secundum* seems to accept this argument in the mistake of law context:

> The principle denying recovery of money voluntarily paid under mistake of law is a corollary of the maxim, born of necessity, that all men are conclusively presumed to know the law without which legal accountability could not be enforced and judicial administration would be embarrassed at every step.[134]

Apart from the controversy pertaining to the validity or invalidity of Lord Ellenborough's original proposition, much has been said about the general rectitude of not allowing recovery for mistake of law payments. Ultimately it is the acceptability of this unadorned principle that must determine whether the present rule is supportable or not. While the dubious genesis of the rule is of some relevance, after a period of 175 years one would expect current policy considerations to govern.

Since my position is that the mistake of law rule is not supportable, or at least that major aspects of it are not, I propose to examine first those justifications for the principle most easily countered. By progressing to the more compelling arguments acclaiming the rule, it should be possible to ascertain in which instances public policy would justify no recovery of money paid under the influence of a mistake of law.

Advocates of the rule, commencing with Gibbs, J. in *Brisbane* v. *Dacres,* have maintained that there would be too much uncertainty of rights if the rule were otherwise. The practical need for certainty is self-evident and the hope was that even if the law could not be perfect, at least it would be known. After all it may be better for a litigant to know that he has no claim than for him to be told that some vague notion of "palm tree" justice is to govern his action. And furthermore it is believed that to deny recovery in all cases as a rule of thumb, would in the long run, work less injustice than would some abstractly just, but less workable, rule granting relief.

The flaw in this argument is of course that it is premised on the assumption that the no recovery rule actually does make the law more certain. As has been seen, this reliability which was claimed to be the rule's great merit, has not been forthcoming. Also, as the rule governing mistake of fact is otherwise and uncertainty has not been rampant there, there seems to be no good reason for distinguishing between mistakes of law and mistakes of fact on this basis.

But as the type of proof required to show a mistake of law is said to differ from that required for a mistake of fact, some suggest that this is sufficient to justify a maintenance of the distinction. This defence of the rule, which also had an early beginning,[135] is based on the general difficulty of inquiry into a man's state of mind. It is held that the proof of a mistake of law is not objectively ascertainable because it must be found in the mind of the party making the payment. Because of this subjective nature of the evidence required, the possibilities of fraud would be too great.[136]

134. 70 *C.J.S.* 363.

135. Sutton, *Supra* n. 21. The author notes that this justification appeared in the argument of counsel in *Milnes* v. *Duncan* (1827), 6 B. & C. 671; 108 E.R. 598 (K.B.).

136. "Mistake of Law," *Supra* n. 49, at 338. The author of this article, who favours the no recovery rule, bases his conclusion on this problem of evidence. He stresses the possibility of fraudulent behaviour by the claimant as proof of the mistake will usually rest on his word alone. The danger is compounded because even the most honest litigant in an action to recover his money will over-estimate his assumed legal obligation as the primary motive for payment.

This argument must be accepted in some circumstances, but as a general justification it is too emphatic. It fails to acknowledge that in many cases, proof of a mistake of law, like proof of a mistake of fact, may rest on objective evidence of the surrounding facts. And secondly this caveat may hold true in an inquiry concerning criminal guilt, but it would seem to be less applicable in a civil matter of this sort, particularly as the claimant will always bear the burdon of proving his mistake.

Another major pretext of the principle is expediency.[137] Obviously this argument does not take the shape of a rigid formulation which can be verified on the one hand or shown to be empty or spurious on the other. Instead it is simply a concession that the no recovery rule must be based on grounds of expediency, rather than of principle. In many, if not most cases in which the rule has been applied, there were other grounds available on which the decision could have been based,[138] although apparently the courts have found it more convenient to refuse recovery on the basis of the mistake of law rule. But surely at some point the theoretical inconsistencies must outweigh a merely expeditious maintenance of the status quo. For instance, there seems to be no good reason why, when two parties are mistaken about the law, the payer of a demand must *ipso facto* assume responsibility for the mistake. Nor is it logical that the recipient should be able to retain the money just because it was paid to him under a mistake of law and not of fact.

Perhaps the most telling criticism of the rule is that these matters of principle are considered to be paramount where money has mistakenly been paid into court, because the court must act as "a man of principle." So why is it unreasonable for everyone to be expected to act in this way? The fact that not everyone will act so honourably should be irrelevant for no other rule of law demands universal compliance in order to be valid. Adding to the inconsistency is the fact that governments are not required to act as men of principle either.

For the omnipotence of modern governments not even to be limited by an inability to demand and collect money illegally must surely represent the ultimate injustice. The policy reason for this is apparently to prevent the disruption of government finance. It is felt that if the invalidation of a taxing statute was to involve the exodus from the public treasury of all moneys collected under it, then great confusion would result. Ordinarily the money will have been spent or otherwise allocated on the basis that the government was entitled to keep it. This argument may have its merits but one of them is certainly not the compassion it shows for the citizen who has made the payment. Its major downfall though, is that it leads inevitably to the sophistic suggestion that the greater the amount of money illegally collected, the stronger the reason for not returning it.

These theoretical deficiencies have been caused in large part by the failure of the courts to distinguish, in terms of the rule to be applied, between the various circumstances in which a payment under a mistake of law

137. 70 *C.J.S.* 363. The following is given as a reason for the mistake of law rule: "Rule is founded on public policy and political necessity resulting from fact that to admit ignorance of law to be recognized as sufficient to pervert the will of the parties doing the act would render the administration of the law impracticable."

138. *See* McTurnan, *Supra* n. 10, at 33.

might be made. Typically the same approach has been taken regardless of the relationship between the parties or the nature of the payment. Presumably in an effort to counteract this situation the courts created the private rights exception. But this measure has not been entirely helpful for the nature of the distinction between private and general law is so inherently vague that either category is capable of indefinite expansion. So as a matter of principle we now allow relief where an individual has erred with respect to the law which we assume he should know. Yet if his mistake was one of general law, no recovery would be allowed even though the reasons for compelling a person to ascertain this law at his own peril would seem to be less apparent.

Judging from the number of instances in which the principles underlying the mistake of law rule are unsatisfactory, the argument that the rule should be maintained on grounds of expedience alone cannot be accepted. In fact the most desirable course may be for the courts to refrain altogether from using mistake of law as a reason for refusing recovery. This would not, however, make relief automatic in every mistake of law situation because other more tenable grounds for not allowing recovery would be available to the courts. But at least then the judiciary would be able to grant relief in situations where it was warranted by policy considerations.

Many writers agree that the mistake of law rule should be severely limited so as to apply only where the parties are conscious of some doubt about the legal issue involved. Here the risk of a mistake of law is part of the bargain and as the parties know they may be surrendering legal rights in effecting their compromise there is no good reason for the courts to disturb the result. The mistake of law principle does accommodate this policy but in doing so it is forced by its comprehensive nature to accommodate many less attractive policies as well. What then can be done to trim this area of unnecessary applicability from the rule?

Having decided that the mistake of law rule is in many ways anachronistic, although it is perhaps overgenerous to accept that it actually ever was justified, it befits the critic to assume the role of reformer. The problem is to effect a somewhat radical change on the law of Canada within the confines of the *stare decisis* doctrine. An obvious solution, and one which has been employed elsewhere is that of legislative action. By statutory intervention the deficiencies might be swiftly corrected, but as will be seen this route is not without its difficulties. Although precedent stands in the way, it may as well be open for the judiciary to exercise its not inconsiderable ingenuity. Through the application of subtle distinctions or even by more overt methods the courts have frequently been able to effect an acceptable compromise between a hallowed line of precedent and changing social and economic needs. But which of these two alternatives is to be preferred can only be determined by an evaluation of their benefits.

Legislative Reform

A satisfactory legislative solution is a particularly viable option as it offers the prospect of certain advantages that a strict juris-prudential development would be unlikely to render. Presumably a change in the law could be

effected more quickly in this way, but more importantly the abolition or amendment of the mistake of law rule by statute may be able to avoid some of the added uncertainty that would inevitably result from judicial reform. This at least was the belief in those jurisdictions in the U.S., New Zealand, and Australia where legislative attempts have been made to eliminate the distinction between mistakes of law and mistakes of fact.

By the early 1900's, six states in the U.S. had modified the mistake of law rule by enactment. The statutes in Montana, California, Oklahoma, North Dakota, and South Dakota are practically identical, with Georgia's being the exception. In that state, where at Common Law money paid under a mistake of law as distinguished from ignorance of the law was recoverable, the statute has maintained this distinction by providing that "mere ignorance of the law"[139] will not authorize recovery.

The *California Civil Code* which is representative of the legislation in these other states provides that restitution or rescission is available for a mistake of law 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 the contracting, but which they do not rectify.[140]

The mistake defined in Section 2 contains an element of fraud which affords an abvious ground of relief. The mistake discussed in Section 1 allows relief where the mistake of law was common to all parties. But no purpose seems to be served by confining recovery to situations where the mistake was mutual, for this one factor should not independently determine when relief will be available. Although the statute does not expressly apply to cases of mistaken payments of money, its role in this regard has been recognized.[141] Largely because of the mutual mistake requirement though, the statutes in these jurisdictions being the subject of narrow judicial interpretations only, have not proved very satisfactory.

A more substantial legislative attack on the *Bilbie rule* occurred in 1942 when the following provision was inserted into the New York *Civil Practice Act:* "When relief against mistake is sought in an action or proceeding or by way of defense or counterclaim, relief shall not be denied merely because the mistake is one of law rather than one of fact."[142] In interpreting this provision, New York courts have placed reliance on the intentions of the Law Revision Commission of the State of New York which in recommending the Section, submitted that

> Its purpose is to change the existing rule which denies relief merely because the mistake is one of law. Its purpose is not to grant relief in every case of mistake of law or to make the same rules applicable as in the case of mistake of fact. It does afford to the court, however, the power to act in appropriate cases involving a mistake of law.[143]

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139. *Ga. Code Ann* s.4575. The rationale for this approach was elucidated by the Court in *Culbreath* v. *Culbreath* (1849), 7 Ga. 64, at 70 (S.C.) *"Ignorance* implies passivity; *Mistake* implies action."

140. *Cal. Civil Code* s.1578.

141. *See Gregory* v. *Clabrough's Executors* (1900) 129 Cal. 475, 62 P. 72 (S.C.).

142. *New York Civil Practice Act,* s.3005 (1963), formerly s.112 (f).

143. Leg. Doc. (1942) No. 65 (B), at 3.

In cases subsequent to this enactment, the courts have faithfully held that a parallel cannot be drawn between mistakes of law and fact so as to automatically permit relief for a mistake of law just because it is shown that recovery would have been available if it were a mistake of fact.[144] So despite the wide discretion available to them, the courts have determined that the statute did not abolish all distinctions between mistakes of law and fact. Instead it merely ended the distinction formerly made that actions for recovery based on mistake of fact would be decided on their merits, while those involving mistake of law were beyond the court's jurisdiction.

Again in spite of the considerable discretion made available to the court by Section 3005, the history of the Section consists primarily of examples of its non-application. Most prominent among these instances of non-application are the cases dealing with the attempted recovery of taxes paid under unconstitutional statutes. The New York courts have clung to their former position whereby no recovery was allowed for such tax payments unless they were made under protest or under the influence of duress.[145] On the whole it seems that the courts have not only refused to apply mistake of fact rules to mistake of law situations, but they have also declined the invitation of the Law Revision Commission to formulate a new set of rules applicable to mistakes of law. Instead they have been content to interpret the statute as having a very limited purpose even if this occasionally means restricting the effect of the legislation in a way that cannot find support in the wording of the Section.

In 1958, New Zealand, following the New York example, adopted legislation intended to remove the distinction between mistake of law and mistake of fact:

> 94A (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 in 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.[146]

This Section allows the courts at least as much discretion as is ordinarily conferred by statute, but it is still less than that allowed in New York. Rather than giving the court a free hand to construct the rules applicable to mistake of law, Section 94A (1) ensures that relief will run along the same lines as the existing law on mistake of fact. But the Legislature has other-

144. The Court of Appeals in *Mercury Machine Importing Corp* v. *City of New York* (1957), 3 N.Y. 418, 144 N.E. 2d 400, said that s.3005 "is not drafted in such manner as to place mistakes of law in all respect upon a parity with mistakes of fact . . . It removes technical objections in instances where recoveries can otherwise be justified by analogy with mistakes of fact." *See also Riverdale Country School Inc.* v. *City of New York* (1960), 11 N.Y. 2d 741, 181 N.E. 2d 457 (C.A.).

145. *Mercury Machine, Id.* This case has effectively determined that tax payments are excluded from the operation of s.3005, although there is nothing in the statute to indicate that such should be the case. *See also Bellefont Dyeing Corp.* v. *Joseph* (1956), 148 N.Y.S. 2d 895 (S.C.).

146. *Judicature (Amendment) Act*, 1958. s.94A.

wise not provided the courts with much assistance. So although literally narrower than the New York statute, this provision, if construed expansively, could have application in a reasonably wide variety of circumstances.

It is not certain whether Section 94A will provide remedies outside of the strict action for money had and received formula as it is of application only "where relief in respect of any payment that has been made under mistake is sought." In this way it is more restrictive than the New York legislation which refers simply to "relief against mistake," but in a comprehensive article on the New Zealand enactment, Professor Sutton [147] suggests that it could apply to any cause of action in which a payment under a mistake is an ingredient. His expectations would seem to be somewhat unwarranted, however, for in light of the U.S. experience it is unlikely that the courts will be willing to stretch the applicability of Section 94A to the extent that he suggests.[148]

The limit of the court's jurisdiction is undecided in other ways as well. One major issue with which the courts will now have to grapple is that concerning the nature and importance of the mistake that will be required to invoke this Section. Formerly this question was exclusively within the domain of mistake of fact payments, but now obviously it will be relevant to mistake of law as well. And to further complicate matters, it may not be sufficient to merely apply the currently favoured mistake of fact test (whether it be the requirement that the mistake be "fundamental," or some other test) to mistake of law payments, because much of the precedent that established the test has been made expressly inapplicable to mistake of law by Section 94A.

Nor has it been determined whether this legislation will apply to payments of property other than money. The section refers to "any payment" and not just "money" so presumably this will at least encompass negotiable instruments, but whether it will be held to be applicable to payments of real or personal property is a matter of conjecture.

Subsection (2), in creating an exception to subsection (1), performs a role that is essential to the finality of litigation. It may be though, that this subsection is unnecessary, for when the law is altered by a higher court or the Legislature it cannot realistically be said that there was any mistake of law at the time the payment was made. In any event it is now clear that the court will be unable to entertain any arguments based on the declarative theory of law, whereby the law has always been what the most recent authority says it is.[149]

Section 94A has not yet been considered in detail by a New Zealand court,[150] but in Western Australia where in 1962 the Legislature adopted a

147. R. Sutton, "Mistake of Law: Lifting the Lid of Pandora's Box," in *The A.G. Davis Essays in Law* (1965) 218.

148. Even under the wider terms of the New York Statute, rescission is not available, *see Jacob Goodman & Co.* v. *Pratt* (1954), 138 N.Y.S. 2d 89 (C.A.). *See* Sutton, *Ibid.*, for his speculations as to the availability under s.94.

149. Sutton, *Supra* n. 147, refers to some tentative arguments which might enable a claimant to avoid subsection (2). Note also that the effect of this subsection will be to prevent recovery of money paid under taxing statutes that undergo subsequent changes in interpretation.

150. In *Southland Savings Bank* v. *Anderson*, [1974] 1 N.Z.L.R. 118 (S.C.), the Court referred to s.94A, but sent the matter back to a magistrate for determination.

virtually identical section,[151] the equivalent to subsection 94A (2) has been examined judicially. In the case of *Bell Bros.* v. *Shire of Serpentine-Jarrahdale,*[152] the claimant paid a licence fee to the defendant municipality in compliance with a by-law. At the time both parties thought the fee was lawfully demanded, but at a later date the by-law was declared invalid and the plaintiff sought to recover his payments. The municipality argued that when the plaintiff made the payments the law was "commonly understood" to require them, so Section 23 (2) of the *Law Reform (Property, Perpetuities, and Succession) Act* should therefore operate to prohibit recovery. Hale, J. of the Supreme Court of Western Australia held that this Section did in fact prevent recovery because it was "commonly understood" at the time of payment that the by-law was valid. He added that a by-law could be "commonly understood" within the meaning of the *Act* even if only a few people had any understanding at all about the subject. What is important is that the class of persons, however small, who had actually adverted to the Section were in general agreement as to the law's meaning. The High Court of Australia in a decision reminiscent of the recent *Jacobs* and *Eadie* cases in Canada, later reversed the finding of Hale, J. on the ground that the plaintiff's payments were not voluntary. Even though this case seemed to be clearly covered by the *Act,* the High Court did not feel obliged to discuss the lower court's interpretation of Section 23 (2), so Hale, J's remarks may still be of some assistance to future courts. Apart from this decision, Section 23 appears never to have been invoked by Western Australian courts so the above speculation as to the New Zealand statute is applicable here as well.

In each of these countries a change of position defence[153] was adopted at the same time as were the mistake of law provisions. This change of position defence, whereby recovery is refused if the recipient has "so altered his position in reliance on the validity of the payment" so as to make it "inequitable to grant relief," was instituted in these countries largely because it was felt necessary to effect a complete assimilation of payments made under mistakes of law with those made under mistakes of fact. In both jurisdictions the change of position provisions also permit reapportionments[154] which should encourage more equitable outcomes in actions for recovery of payments. Now the courts need no longer adopt the traditional all or

151. *The Law Reform (Property, Perpetuities, and Succession) Act* (1962), s.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."

152. [1969] W.A.R. 104 (S.C.); aff'd. [1969] W.A.R. 155 (C.A.); rev'd on different grounds (1969) 121 C.L.R. 137 (Aust. H.C.).

153. In Western Australia s.24(1) of the *Law Reform (Property, Perpetuities, and Succession) Act* (1962) reads: "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." As with the mistake of law sections, s.94B of New Zealand's *Judicature Act* is virtually the same as the Western Australia provision.

nothing approach, but may instead apportion the loss between the parties in a manner appropriate to the circumstances of the case.

Overall, the legislative schemes enacted in these three jurisdictions have favoured giving the courts a relatively wide discretion. But instead of exercising this power in an excessively liberal fashion as many had felt they would, the judiciary have by and large indicated that in the absence of specific legislative guidance they tend to refrain from altering the mistake of law rule too drastically. It must be assumed that this will hold true as well in New Zealand and Australia for the judicial approach to the mistake of law problem has typically been more conservative in those countries than in the U.S., and also because the New York statute is the most radical of the three.

While statutory intervention to make recovery available may be effective in isolated instances,[155] ordinarily the question of recovery cannot be settled *a priori* by some dogmatic formula. So in terms of general legislative cures, these discretionary statutes seem to be the only option. And while such reforms are clearly of benefit in that they increase the availability of recovery for mistake of law payments, it is not certain that they have provided a solution felt to be entirely appropriate by the courts. It remains necessary then to examine any further approaches that may assist in this regard.

Judicial Reform

The remedial statutes seem to have been construed in so narrow a manner because of the unrelenting grip that *stare decisis* holds on the courts. The result of course is that the judiciary has largely thwarted the legislative purpose of these enactments. But at the same time the exceptions to the rule and the many dubious decisions in which mistakes of fact rather than mistakes of law are found, serve as continuing evidence of the rule's unsoundness. So having seen that legislative reform has proved to be something short of an unmitigated panacea, the balance of the solution must lie with the judiciary.

One obvious answer to the problem is to simply allow the exceptions to continue eating away at the no recovery rule. This approach, however, is too phlegmatic for it makes no prctical sense to continue applying a rule, even within an ever diminishing region of applicability, when it has been found to be unacceptable. And secondly it would be unfortunate if the courts were to place further reliance on the frequently artificial distinctions that must be made in order to circumvent the rule. Also, as a conceptual matter, where a rule of law exists and yet even judicial compliance is not forthcoming a number of unnecessary theoretical problems are raised.[156]

Another answer which is not without its problems is that provided by the Supreme Court of Canada in the *Jacobs* and *Eadie* cases. Although not

154. *Law Reform (Property, Perpetuities, and Succession) Act* (1962) s.24(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 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." Again the New Zealand provision contained in s.94B of the *Judicature Act* is very similar to this Western Australia provision.

155. *E.g.*, Pannam, *Supra* n. 10, advocates legislation to permit recovery of taxes paid pursuant to *ultra vires* statutes.

156. J. Finch, *Introduction to Legal Theory* (1970) 101-03.

offering a specific reproach to the mistake of law principle, by granting recovery on the ground of compulsion in these cases, the Court has beneficially restricted the rule's influence in Canada. In the areas where the mistake of law rule and compulsion overlap it is sensible, and indeed salutary, for the courts to rely on the latter ground so as to make relief available more frequently. But here the judiciary has gone further, for in these two cases where the payments were found to have been compelled, the Court has extended the area in which compulsion will apply at the expense of the no recovery rule. Simply because this now means that recovery will be more readily available, the result is laudable, but as mentioned earlier in this paper, the fidelity of the courts' approach is subject to suspicion.

It is difficult to quarrel with the findings in these cases that the claimants had no real choice but to pay the money demanded pursuant to the by-laws in question. In fact the Supreme Court would probably have been fully justified in saying that realistically no payments to government officials are made in what could be called a truly voluntary sense. For surely it is implicit in this day and age that if one fails to pay demands by the government, or by any creditor for that matter, civil or criminal sanctions will result. But rather than bravely stating that they were dispensing with the traditional voluntariness-compulsion test, which is hopelessly naive in this context anyway, the Court simply held that the ground of compulsion had been established. In doing so they appeared to be undeterred by the fact that this required them to arrive at conclusions only marginally supported by the facts. The result of this inventiveness by the Supreme Court will admittedly be the greater availability of relief where payments have been made pursuant to *ultra vires* or misconstrued statutes, but it is nonetheless unfortunate that the law of compulsion will have to be dragged into the *mêlée* and further perverted in the process.

In these same two cases, particularly in the *Eadie* decision, the Supreme Court has demonstrated another potential answer to the mistake of law problem. The use of the *in pari delicto* doctrine by the Court in these cases showed itself to be an apposite means by which equitable results might be achieved. The advantage of this approach over the above mentioned is that it allows the court to recognize the inequalities inherent in certain of the modern world's commonly recurring payer-payee relationships. As with the payments in the *Jacobs* and *Eadie* cases, there are certain transactions in which one party will inevitably have the upper hand. It would seem that an extended use of this doctrine would enable courts to acknowledge this state of affairs in a less surreptitious manner than has formerly been required.

In the *Eadie* decision, Spence, J., while relying on Lord Denning's remarks in *Kiriri Cotton,*[157] has taken the *in pari delicto* doctrine very much further than did the Privy Council. By finding that an official of the municipality was not *in pari delicto* with the claimant taxpayer solely on account of their ordinary taxpayer — municipal official relationship, Spence, J. has applied the doctrine in circumstances that should facilitate its further development. This must be seen as beneficial for now it will be legitimate

157. *Supra* n. 52.

for Canadian courts to discuss openly the degree of responsibility which should be attributed to a party by virtue of his role in a transaction.

Surely much of the injustice embodied in the mistake of law rule could be alleviated if the judiciary were to consider the relative bargaining power of the parties to be of greater significance. If the courts were to adopt this view it would represent a change of emphasis whereby the central question would relate to the nature of the relationship rather than to whether the particular mistake was one of law or of fact. Instead of merely creating another crack in the mistake of law structure, this altered perspective would allow substantial areas of the no recovery rule to wither away into desuetude.

It would seem to be elementary that by examining the relationship of the parties and not just the details of the mistake, one can gain a much more complete insight as to what a "just" outcome might be in a particular case. But generally the relative responsibility of the parties in a mistaken payment case has not been a concern of the courts in determining whether recovery is available. Usually mistake of law payments will not be recoverable regardless of which party is more blameworthy,[158] and similarly mistake of fact payments will ordinarily be recoverable no matter who was at fault. To suggest that courts should base their decisions in this context entirely on "fault" would be heretical indeed, for the conceptual rationale of restitutionary remedies in general is thoroughly inimical to considerations of fault. This should not preclude, however, the adoption of a less severe position wherein causation would be regarded as a relevant factor.

The decision of the Court of Exchequer in *Kelly* v. *Solari*[159] is of significance here because that case is largely responsible for the judiciary's reluctance to consider the relative responsibility of the parties where mistaken payments are involved. Baron Parke's judgment is frequently referred to as having established that carelessness or negligence on the part of the payer is not a bar to recovery. It follows that if negligence is not relevant, then there is nothing to be gained by showing that the payer was not responsible for the mistake. But this is of course only applicable to mistake of fact payments, for in a mistake of law situation the payer is not entitled to recovery regardless of whether he was negligent. What is relevant for present purposes, however, is the contemporary view that the *Kelly* v. *Solari* rule should be discarded in favour of an approach which would allow the courts to regard the payer's negligence as a factor worthy of consideration.

This is still of no direct significance to the mistake of law rule, but the implications of the movement are important. Essentially, those writers arguing in favour of this reform are advocating that the court take an increased interest in the respective duties of the parties to one another. Professor Birks, for instance, suggests that in certain circumstances payers may be estopped from recovering payments carelessly made.[160] Professor Sutton argues too that a reasonable standard of prudence should be expected of

158. For instance it is very difficult to conceive of the payer as being more at fault than the recipient where money is paid to the government pursuant to a statute that is subsequently declared invalid. And yet there is no doubt that ordinarily the payer will not be entitled to recovery in this situation.

159. *Supra* n. 132.

160. P. Birks, "Recovery of Carelessly Mistaken Payments," 1972 Current Legal Prob. 179.

claimants.[161] And others have advocated the adoption of an approach whereby the payer would be held subject to some flexible *Hedley Byrne* style of duty *vis à vis* the recipient. While none of these approaches can as yet be said to have found judicial favour, it is clear that in related areas the law is moving in this direction.[162]

What this means to mistake of law payments is that the courts may be increasingly willing to make determinations as to who really is responsible for the payment. It cannot then represent too radical a progression for the courts to begin looking to the payee for signs of responsibility once they have recognized the payer's carelessness to be relevant. If this attitude were adopted in combination with an expansive interpretation of the *in pari delicto* doctrine, it would enable the courts to dispense with the unrealistic notion that the loss must always lie with the payer where there has been a payment made under the influence of a mistake of law.

An enlightened approach of this kind would negate the effect of the no recovery rule only in those circumstances where there were no compelling policy reasons to prevent recovery. The rule's effect therefore, need not be undermined where policy considerations dictate that it be retained. Furthermore the *in pari delicto* doctrine together with this more inquisitive judicial outlook would allow recovery primarily where the recipient could be said to be more responsible for the mistake of the payer. So while the mistake of law rule itself would surely not be eliminated, perhaps some of its attendant injustice might be.

Another way in which judicial determinations in this area could be made more equitable is through the adoption of reapportionment methods. It follows that if the relative responsibility of the parties is to be assessed, then surely there is no need that one of them must get all of the mistaken payment and the other none of it. If reapportionment became the practice of the courts where warranted by competing equities, the rigidity of the *Bilbie* rule could be further eroded. Again where necessitated by policy, recovery could still be withheld, but at least the courts would have the option of apportioning the payment in a manner consistent with the equities of the case.

In submitting these proposals it is recognized that the law in Canada is currently in a state that falls short of satisfying them. But assuming the absence of remedial legislation, it is felt that these suggestions would allow the law on the subject to develop in a more acceptable and cohesive manner. In the likelihood that legislation of the sort previously examined was forthcoming, then these schemes could as easily operate in a supportive capacity. Some commentators maintain that only via more comprehensive reforms may the law in this area be altered sufficiently, but such proposals *a fortiori* are further from fruition than the above. That the Canadian judiciary has thus far failed to adopt these measures need not necessarily discourage those concerned with reform, however, for there are indications

161. *Supra* n. 21.

162. The House of Lords has recently indicated in *Saunders* v. *Anglia Building Society*, [1970] 3 W.L. R. 1078; [1970] 3 All E.R. 961, that carelessness is to be of more relevance in *non est factum* pleas than was formerly believed to be the case. *See* J. Cote, "Error as to Identity of Parties" (1972), 10 Alta. L. Rev. 374. *See also* R. Sutton, "Reform of the Law in Mistake of Contract" (1976), 7 N.Z.U.L. Rev. 44, where he discusses the increasing importance of carelessness in contract law.

that in the future the court may be amenable to at least some of these suggestions.

Conclusions

It has been the aim of this paper to establish that the rule prohibiting recovery of payments made under the influence of a mistake of law has become increasingly difficult to support on either theoretical or practical grounds. No less significantly, this inadequacy is now widely recognized. While seldom reacting violently against the principle, the Common Law courts have quietly but determinedly attempted to nullify its authority with the creation of well placed chinks in the rule's armour. And to complete the metaphor, the armour has now reached a state of disrepair that would seem to warrant its replacement with a lighter and more flexible material.

It appears, however, that this process of alteration is going to require greater effort than the Canadian and English courts have heretofore found the will to muster. As has been said, remedial legislation is at least a partial solution, but because the mistake of law problem may be regarded as being less vital than some others, statutory aid must be considered unlikely. So the question remains: will the Canadian courts be sufficiently resourceful to effect the much needed changes in this area of the law, especially if legislative assistance is to be unavailable?

This problem emphasizes once again the manner in which *stare decisis* seems intent on robbing the law of creative vitality. But, on the other hand, there are those who would argue that by relaxing the technical rules we are inevitabily left with vague standards of fairness and justice which do nothing other than encourage anarchy. Surely though, Canadian courts are capable of finding a balance between a system which injects unnecessary rigidity into the law and one in which previous decisions are inconsequential.

A recent article by Professor Curtis would suggest that the Canadian judiciary is up to such a task. He explains:

> the process of re-evaluation of *stare decisis* at common law in Canada, which had its beginnings in the intermediate appellate courts of the provinces, has been rounded out by the Supreme Court, largely in the present decade. The flexible doctrine of precedent which has resulted affords the courts opportunities to restate the law in keeping with changed wants and expectations in those areas where the law has lagged behind the time.[163]

Concerning restitution specifically, Canadian courts have recently made considerable use of their creative powers. As well as in the *Jacobs* and *Eadie* cases, the Supreme Court of Canada has exhibited this propensity in the 1975 case of *Rural Municipality of Storthoaks* v. *Mobile Oil Canada Ltd.*[164] In adopting a change of position defence the Court in this case chose

163. G. Curtis, "*Stare Decisis* at Common Law in Canada" (1978), 12 U.B.C.L. Rev. 1, at 14.

164. *Supra* n. 81. As the plaintiff was allowed recovery in this case, Martland, J.'s remarks concerning the change of position defence are of course only *dicta*, but in speaking for the Court he did discuss the issue at some length. The Supreme Court of Canada's readiness to adopt this defence must be seen as weakening the case for legislative action relating to the mistake of law problem. In New Zealand and Australia the mistake of law enactments were accompanied by provisions adopting the change of position defence, the view obviously being that both subjects were in need of reform. So, in Canada, half the need for such legislation has now has been removed, making it less likely that statutory solutions will appear. This further indicates that if reforms are to be made in this area of the law, they should be made by the judiciary.

the U.S. rather than the English route to follow. Apart from introducing a new concept to the Canadian law of restitution, this judgment is of significance in that it indicates a willingness on the part of the Supreme Court to follow the generally more liberal tendencies of the U.S. jurisprudence on this subject in preference to the more cautious approach favoured by English courts.[165]

So it seems that Canadian courts may indeed have available the means by which beneficial reforms might be introduced to this troubled area of the law. And given the current trend of liberalization there is even reason to hope that this process of amelioration may be imminent.

165. *Chimo Structures* v. *Canadian Pacific* (1977) 78 D.L.R. (3d) 210 (B.C.S.C.). This is another recent mistaken payment case in which a Canadian Court has felt U.S. law to be relevant.