NSW Law Reform Commission

REPORT 53 (1987) - COMMUNITY LAW REFORM PROGRAM: ELEVENTH REPORT - RESTITUTION OF BENEFITS CONFERRED UNDER MISTAKE OF LAW

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Terms of Reference and Participants

New South Wales Law Reform Commission
To the Honourable T W Sheahan BA, LLB, MP,

Attorney General for New South Wales

COMMUNITY LAW REFORM PROGRAM

RESTITUTION OF BENEFITS CONFERRED UNDER MISTAKE OF LAW

Dear Attorney General,

We make this Report pursuant to the reference from you to this Commission dated 25 June 1985.

Helen Gamble

(Chairman)

Paul Byrne

(Commissioner)

Keith Mason QC

(Commissioner)

The Honourable Mr Justice Andrew Rogers

(Commissioner)

July 1987

Terms of Reference

On 25 June 1985, the Attorney General of New South Wales, the Honourable Sheahan BA, LLB, MP, made the following reference to the Commission:

> To inquire and report on the following matters:
>
> 1. The law relating to the recovery of money paid under a mistake of law, including the law relating to defences to claims for such recovery;
>
> 2. Any incidental matter.

Participants

Commissioners

For the purpose of this reference a Division was created by the Chairman, in accordance with s12A of the Law Reform Commission Act 1967. The Division comprised the following members of the Commission:

> Paul Byrne

Ms Helen Gamble

Keith Mason QC

Mr Justice Andrew Rogers

Research Director

Ms Fiona Tito (Acting to 19 September 1985)

Mr William J Tearle

Research and Other Assistance

Ms Heather Armstrong

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Miss Judith Grieves

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Ms Beverley Caska

Administrative Assistance

Ms Zoya Howes

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Summary of Recommendations

General Reform

1. (a) Legislation should be enacted which provides that, where relief in respect of any benefit that has been conferred under mistake is sought in any proceedings before a court by any party to the proceedings, and the relief could be granted if the mistake were wholly one of fact, the 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.

(b) In this context "benefit" means payment of money or allowance of payment in an account, the transfer of any real or personal property or of any interest in any real or personal property and the performance of any service. (5.17; Draft Bill CII 5, 7)

Change in the Law

2. Relief under the general reform should not be available where the benefit was conferred at a time when the law required or allowed the benefit to be conferred or enforced, by reason only that the law is subsequently changed. (5.29; Draft Bill Cl 8)

Change of Position

3. It would be premature to enact a statutory form of change of position defence in relation to benefits transferred by mistake of fact or law, since it appears that such a defence is already generally available in appropriate circumstances in Australia. (5.45)

Repayment by Instalments

4. There is no need for legislation relating to payment of money by mistake to confer express power on the court to allow judgment debts to be repaid by instalments. (5.47)

Restitution from Public Authorities

5. The statutory reforms which we propose should bind the Crown. (5.52; Draft Bill Cl 4)

Retrospectivity

6. The statutory reforms which we propose should apply to a mistake whenever made. (5.53; Draft Bill Cl 6)

1. Introduction

I. THE PROBLEM

1.1 A general rule precluding recovery of moneys paid under mistake of law is part of the common law in Australia. Its operation can be seen in the following example. A and B have a contract under which A is required to pay $10,000 to B upon B delivering a computer with certain specifications to C. If A makes a payment under the mistaken belief that B has delivered the computer to C, A can recover the payment by a legal action called "money had and received". But if A, misunderstanding the effect of the contract, makes a payment knowing the condition of the computer that has been delivered to C but because of A's misunderstanding of the contractual terms believing wrongly that it met the contractual specifications, the payment is irrecoverable. Although A would not have made the payment in either case had the true situation been known, recovery is allowed in the first case because the mistake is categorised as one of fact, and denied in the second because it is categorised as one of law.

1.2 The general rule that moneys paid under a mistake of law (as opposed to a mistake of fact) are irrecoverable has become firmly entrenched despite the fact that it originated in Lord Ellenborough's own mistake of law in *Bilbie v Lumley*.[1] The rule in *Bilbie v Lumley* has excited intense disagreement as to its proper formulation and has been attacked on many grounds. Starting with criticism of the misconception of the prior law that spawned the rule, the bases of this attack include the following.

> The rule is unjust because people are unable to recover moneys paid by mistake, even where such payments result in the unjust enrichment of the payee.
>
> It is artificial and arbitrary to attempt to create a dichotomy between mistakes of fact and mistakes of law.
>
> Having let the rule that one cannot recover money paid under mistake of law take hold, the courts have created a series of exceptions lacking any logical basis other than to sidestep the rule in the interests of doing justice between parties.
>
> Even outside the recognised list of exceptions to the rule at common law, courts of equity have on occasion suggested that they might disregard the rule.
>
> The result of these developments in case law is that there is much uncertainty as to whether a benefit conferred by mistake can be recovered.

1.3 One more often encounters the "luxuriant undergrowth of exceptions to the general rule"[2] than applications of the rule itself. Indeed the long list of such exceptions is regarded by most commentators as the surest sign that the rule is unsatisfactory, and certainly indicates that the operation of the rule is now greatly limited. Whilst it may be going too far to say that the numerous exceptions to the rule are of "such wide scope that as a practical matter the courts can, when they wish, evade its application"[3] it is true that the exceptions are many and extensive.

1.4 These difficulties with the rule have led to proposals for its modification or abolition. These models for reform are considered in Chapter 4.

II. THIS REFERENCE

1.5 This is the eleventh report in the Community Law Reform Program. The Program was established by the then Attorney General, the Hon F J Walker QC MP, by letter dated 24 May 1982 addressed to the Chairman of the Commission. The letter contained the following statement:

> This letter may therefore be taken as an authority to the Commission in its discretion to give preliminary consideration to proposals for law reform made to it by members of the legal profession and the community at large. The purpose of preliminary consideration will be to bring to my attention matters that warrant my making a reference to the Commission under s10 of the Law Reform Commission Act, 1967.

The background and progress of the Community Law Reform Program are described in greater detail in the Commission's Annual Reports since 1982.

1.6 The reference originated in a suggestion made on behalf of the Supreme Court Rule Committee that consideration be given to adopting ss93A and 94B of the Judicature Act 1908 (New Zealand) by letter dated 17 December 1984 from the Chief Justice of New South Wales the Honourable Sir Laurence Whistler Street KCMG to the Attorney General the Honourable T W Sheahan BA, LLB, MP. The Chief Justice indicated that the Rule Committee had taken the view that the proposal was outside its proper scope in that it involved a matter of substantive law which could have comparatively wide significance. On behalf of the Rule Committee the Chief Justice invited the Attorney General to consider whether it would be appropriate to refer the matter to the Law Reform Commission as part of its Community Law Reform Program. A useful Memorandum on the subject prepared by the Secretary of the Rule Committee was provided. The matter was brought to the Commission's attention by the Attorney General in February 1985 and, following preliminary investigation, a reference was sought by the Commission in May 1985. By letter dated 25 June 1985 the Attorney General referred to the Commission for enquiry and report:

> 1. The law relating to the recovery of money paid under a mistake of law, including the law relating to defences to claims for such recovery;
>
> 2. Any incidental matter.

1.7 Ms Heather Armstrong, a Legal Officer of the Commission, did the background research and provided a working draft of the report. A Division consisting of the former Chairman Mr Keith Mason QC, Mr Paul Byrne, Ms Helen Gamble and the Honourable Mr Justice Andrew Rogers was constituted on 7 May 1986. A draft report, prepared by the former Chairman, was examined and revised by the Division in late 1986 and early 1987.

1.8 The draft report, including the proposed form of legislation, was then submitted to a number of persons and organisations with particular interest in the topic for comment. The State Bank of New South Wales, the Local Government Association of New South Wales, the Shires Association of New South Wales and the Australian Bankers Association indicated general agreement with the draft report in the form submitted. The Commission is particularly grateful for the detailed responses it received from Ms Caroline Needham, barrister, Miss Celia Caughey, solicitor of New Zealand, the New South Wales Treasury and the New South Wales Department of Finance which in turn led to some further modification of the draft report. The Commission also acknowledges with thanks the assistance of Mr Michael Orpwood, Deputy Parliamentary Counsel, who drafted and redrafted the Bill which now forms Appendix A.

1.9 In this report we consider:

> the development of the rule denying recovery of moneys paid under mistake of law (Chapter 2);
>
> the operation of the rule (Chapter 3);
>
> criticism of the rule and options for reform (Chapter 4); and
>
> recommendations for reform (Chapter 5).

1.10 One possibly related topic is the effect of contributory negligence on restitutionary claims such as those to recover payments made under mistake. The whole question of the possible extension of the defence outside claims in tort is being considered in another reference in the Community Law Reform Program.

FOOTNOTES

1. (1802) 2 East 469 (102 ER 448). The source and nature of the error and tne way in which, by the early nineteenth century, it had become embedded in the common law are discussed in William E Knutson "Mistake of Law Payments in Canada: A Mistaken Principle?" (1979) 10 *Manitoba LJ* 23 at 23-26. For a contrary view as to the origin or-the general rule, see R J Sutton "Kelly v Solari: The Justification of the Ignorantia Juris Rule" (1966) 2 *NZUL* Rev 173.

2 . J McCamus “Restitutionary Recovery of Moneys Paid to a Public Authority Under a Mistake of Law: *Ignorantia Juris* in the Supreme Court of Canada” (1983) 17 *UBCLR* 233 at 235.

3. Law Reform Commission of British Columbia *Report on Benefits Conferred Under a Mistake of Law* (1981) at 13.

2. The Development of the Rule Denying Recovery

2.1 Although the rule is now firmly embedded, it is important to note the circumstances in which it originated. It developed from the application of the maxim *ignorantia juris non excusat* (literally, "ignorance of the law does not excuse") to claims for the recovery of money paid under mistake. *Bilbie v Lumley* which established the rule in 1802 was a surprising decision in the light of the development of the earlier law.

I. THE LAW PRIOR TO BILBIE v LUMLEY

2.2 To set *Bilbie v Lumley* in context, it is necessary to describe the prior development of claims for moneys paid by mistake or in circumstances which made it unjust for the recipient to retain the money. Since *Slade's Case* [1] in 1602 a form of action called *indebitatus assumpsit* had become the most convenient common law procedure to recover moneys paid. This form of action was based on an implied promise to pay in circumstances where no express contractual basis to a claim existed.[2] One species of indebitatus action or count became the action for "money had and received", which includes a wide range of claims to recover money previously paid by the plaintiff to the defendant which, in justice, the defendant ought to repay.

2.3 Although the *indebitatus assumpsit* action was used as early as 1657 to recover money paid by mistake, there is very little early authority on the scope of mistake.[3] The general approach taken in the early cases is illustrated in *Attorney-General v Perry* (1733) where the court said:

> Whenever a man receives money belonging to another without any reason, authority or consideration, an action lies against the receiver as for money received to the other's use; and this, as well where the money is received through mistake under colour, or upon an apprehension, though a mistaken apprehension of having good authority to receive it, as where it is received by imposition, fraud or deceit in the receiver.[4]

Prior to *Lowry v Bourdieu* (1780) (see below para 2.6), no distinction was suggested between mistake of fact or of law, when mistake was the basis of the claim for recovery. In *Farmer v Arundel* (1772), De Grey C J said:

> 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.[5]

2.4 In the latter half of the eighteenth century, the Court of King's Bench under Lord Mansfield delivered a number of decisions which relied upon a broad notion of what was described as "equity"[6] as a basis for granting recovery of moneys paid or benefits conferred, whether by a mistake, or pursuant to an illegal contract, or under duress or fraud. The court took a liberal attitude toward the criteria for recovery of money claimed in actions brought in *indebitatus assumpsit*, and would allow recovery whenever it was against conscience for the defendant to retain it. Summarising the nature of the action in *Moses v Macferlan*, Lord Mansfield noted that:

> the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.[7]

In *Sadler v Evans*, he commented that the action for money had and received was:

> a liberal action, founded upon large principles of equity, where the defendant can not conscientiously hold the money. The defence is any equity that will rebut the action.[8]

2.5 Lord Mansfield's approach to payments made by mistake was to regard them as instances of a general principle whereby unconscientious receipt of money gave rise to a claim for its repayment.[9] The cases in this period did not distinguish between mistake of fact or mistake of; law, but relied upon the primary criterion of whether, in good conscience, the defendant could retain the money. This was consistent with the attempt by Lord Mansfield to use the action of *indebitatus assumpsit* "to enforce moral duties, and many of those equitable rights which, in pursuance of his desire to effect some kind of fusion between law and equity, he was not content to leave to the court of Chancery".[10] These principles were applied throughout the latter half of the eighteenth century.

2.6 However in *Lowry v Bourdieu*[11] the seeds of change were sown in an *obiter dictum* of Buller J. The case concerned an insurance policy held to be illegal as a "gaming policy". The plaintiffs were the insured who brought an action for return of the premium paid on the ground that the contract of insurance was void, since they had no insurable interest. The court held that, since the money was paid on an illegal consideration, it could not be recovered. The reasons which led the judges who were in the majority to their conclusion are a little obscure. Lord Mansfield proceeded on the basis that the contract was illegal and in the circumstances of the particular case the general rule that the loss lies where it falls in an illegal contract would prevail. It seems that Ashhurst J was of the same view. However Buller J proceeded along a different route and said in the course of his judgment:

> There was no fraud on the part of the underwriters, nor any mistake in matter of fact. If the law was mistaken, the rule applies, that ignorantia juris non excusat. This was a mere gaming policy, without interest.[12]

It was this statement that was taken up in *Bilbie v Lumley*.

II. BILBIE v LUMLEY

2.7 In *Bilbie v Lumley*,[13] a material fact had been withheld from an insurance underwriter, but was later disclosed before the claim was paid. The underwriter failed to realise that the claim could have been repudiated because of this non-disclosure until after the claim was paid. An action was then brought in *indebitatus assumpsit* at common law to recover the moneys paid. According to the report, Lord Elienborough prevented any discussion of the effect of the underwriter's mistake by asking counsel whether he knew of any case where money paid voluntarily with full knowledge of the facts had been recovered on the ground of mistake of law, to which counsel replied that he did not. His Lordship held against the underwriter and denied recovery of the moneys paid, stating:

> 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.[14]

He cited Buller J's quotation about *ignorantia juris* non excusat in *Lowry v Bourdieu* (para 2.6), but he failed to mention that the other judges, notably Lord Mansfield, based their judgment in that case on a different ground. He thus failed to note the importance of the illegality of the contract in *Lowry v Bourdieu*.

2.8 Lord Ellenborough made it clear in *Bilbie v Lumley* that, in his view, if he allowed the recovery of money paid on the basis of a mistake of law, then the floodgates of litigation would open to admit an unacceptable number of restitutionary claims.[15] The policy underlying his Lordship's view appears to be that the occurrence of instances of unjust enrichment as a result of the operation of the rule was a lesser evil than appearing to condone ignorance of the law as a defence to claims for repayment of moneys paid by mistake.

III. THE CONSOLIDATION OF THE RULE

2.9 Confined to its facts, there is nothing about *Bilbie v Lumley* that is particularly startling. The defendant's claim under an insurance policy had been paid out by the plaintiff after the defendant had submitted all relevant material to the insurer, including the letter which was later relied upon by the plaintiff as disclosing a material fact which would have entitled the plaintiff to avoid the policy. Goff and Jones have suggested that:

> the rationale of the rule in *Bilbie v Lumley* has often been misunderstood. Insofar as it lays down that a payment made in settlement of an honest claim is irrecoverable, it embodies a sound rule of policy.[16]

2.10 However *Bilbie v Lumley* soon became authority for a broader proposition. Despite a strong attack in Chambre J's dissenting judgment in *Brisbane v Dacres* (1813), where he said that it was a most dangerous doctrine, that a man getting possession of money to any extent, in consequence of another party's ignorance of the law, cannot be called upon to repay it ... [17]

> a general rule denying recovery of moneys paid under mistake of law took firm hold by the early nineteenth century.[18] At this time there was a fundamental swing away from the views of Lord Mansfield (that moral and equitable obligations overrode other legal doctrines and should determine the outcome of matters involving unjust enrichment), towards an emergent contract law based upon the notions of privity and the

> sanctity of contract. Dickson J (as he then was) of the Canadian Supreme Court in *Hydro Electric Commission of Township of Nepean v Ontario Hydro* has noted this historical coincidence as follows:

The adoption of the rule at the beginning of the nineteenth century occurred at a time when the spirit of the law was becoming opposed 'to such idealistic formulations as "aequum et bonuml" ... This change in spirit was nourished by the prevailing philosophical, political and economic ideologies of the nineteenth century, the premise being that partners to a contract are enlightened individuals exercising discrimination and free will and Courts should not disturb their contractual relations. Stability... of contractual relations then became the justification for judicial non-interference.[19]

2.11 In consequence of the establishment of the rule came the series of cases which sought to distinguish between mistakes of fact (where recovery was usually available) and mistakes of law (where it was not). The difficulty of this distinction and the anomalies which it has spawned will be discussed further below (paras 3.2-3.6).

2.12 It is possible to distinguish *Bilbie v Lumley* on its facts as an example of the irrecoverability of payments made in settlement of an honest claim.[20] However it quickly became authority for a wider proposition, being the general rule barring recovery of moneys paid under a mistake of law. Whilst a miscellany of exceptions has ameliorated its impact, the fact remains that a general rule precluding recovery of moneys paid under mistake of law is a part of the common law in Australia. It is probably not beyond dislodgement by the High Court but otherwise seems firmly fixed. Croom-Johnson *J* may have exaggerated slightly in saying, in 1943, that the proposition 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".[21] However the basic rule is attested to by authoritative dicta in the High Court,[22] Privy Council[23] and English Court of Appeal,[24] and illustrated by various cases discussed in the next chapter. It has been applied comparatively recently by the New South Wales Court of Appeal[25] and stated, in 1982, by the Full Federal Court to be "firmly entrenched".[26] The major textbooks on contract and restitution accept the general rule.[27] Recently the rule was discussed extensively by the Supreme Court of Canada which, by majority, affirmed its continued existence.[28]

FOOTNOTES

1. *Slade's Case* (1602) 4 Co Rep 92b (76 ER 1074).

2. See the discussion of the growth of the *indebitatus assumption* action and the rivalry between courts of common law and equity in Lord Goff of Chieveley and G Jones The Law of Restitution 3rd edition 1986 at 5-12. The historical development of *indebitatus assumsit* is discussed by McHugh JA in *Paul v Pavey & Matthews Pty Ltd* (198S) 3 NSWLR 114 at 121-127, Priestley JA in *Schwarstein v Watson* (1985) 3 NSWLR 134 at 143-147, and the High Court (1987) 69 ALR 577.

3. R M Jackson *The History of Quasi-Contract in English Law* 1936 at S9.

4. Attorney-General v Perry (1733) 2 Comyns Rep 481 at 491 (92 ER 1169 at 1174).

5. *Farmer v Arundel* (1772) 2 W B1 824 (96 ER 485). See also *Ministry of Health v Simpson* [1951) AC 251 at 270 and the authorities cited by the Law Reform Committee of South Australia *Report Relating to the Irrecoverability of Benefits Obtained by Reason of Mistake of Law* (SALRC 84) (1984) at 4.

6. This was equity in the lay sense not the sense of the jurisdiction administered by the Chancellor. *Indebitatus assumpsit* was a common law action: *Sinclair v Brougham* [1914] AG 398 at 431-2, 454-6; *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428 at 450; *J & S Holdings Pty Ltd v NRMA Insurance Ltd* (1981) 39 ACTR 1 at 24.

7. *Moses v Macferlan* (1760) 2 Burr 1005 at 1012 (97 ER 676 at 681).

8. *Sadler v Evans* (1766) 4 Burr 1984 at 1986 (98 ER 34 at 35).

9. W Holdsworth *A History of English Law* volume XII at 544. The many early English cases are discussed by C M Stadden “Error of Law” (1907) 7 Col L Rev 476 at 498-502.

10. Holdsworth, note 9 at 542.

11. *Lowry v Bourdieu* (1780) 2 Doug 468 (99 ER 299).

12. *Id* at 471. (ER at 300)

13. (1802) 2 East 469 (102 ER 448).

14. *Id* at 472 (ER at 449-450).

15. *Ibid*. See further para 4.5.

16. Lord Goff of Chieveley and G Jones, note 2 at 118-119.

17. *Brisbane v Dacres* (1813) 5 Taunt 143 at 159 (128 ER 641 at 647) .Indeed Lord Ellenborough himself appeared to repudiate the principle in *Bilbie v Lumley* in his later considered judgment in *Perrott v Perrott* (1811) 14 East 423 (104 ER 665).

18. See eg *Brisbane v Dacres* note 17, *Kelly v Solari* (1841) 9 M & W 54 (152 ER 24) (discussed para 3.3). The nineteenth century cases are discussed in *Smith’s Leading Cases* in the notes to *Marriott v Hampton*. The rule was approved in the United States by 1815: *Shotwell v Murray* 1 Johns Ch R NY 515 at 516. For the United States position generally see 53 ALR 949.

19. *Hydro Electric Commission of Township of Nepean v Ontario Hydro* (1982) 132 DLR (3d) 193 at 205.

20. For example *Chitty on Contracts* 25th ed para 1956, Lord Goff of Chieveley and G Jones, note 2 passage quoted in para 2.9.

21. *Sawyer and Vincent v Window Brace Ltd* [1943] 1 KB 32 at 34.

22. *Murray v Baxter* (1914) 18 CLR 622 at 630 per Isaacs and Gavan Duffy JJ; *Werrin v The Commonwealth* (1938) 59 CLR 150 at 158-160 per Latham CJ. See also, generally *Cam & Sons Pty Ltd v Ramsay* (1960) 104 CLR 247.

23. *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192 at 204 per Lord Denning.

24. *Re Diplock* [1948] Ch 465 at 480.

25. *Air India v The Commonwealth* [1977] 1 NSWLR 449.

26. *J & S Holdings Pty Ltd v NRMA Insurance Ltd* (1982) 41 ALR 539 at 550.

27. *Chitty on Contracts* (25th ed 1983) para 1956; *Halsbury’s Laws of England* 4th ed vol 32 “Mistake” para 72; J G Starke and P F P Higgins (eds) *Cheshire & Fifoot’s Law of Contract* (4th Aust ed 1981) para 2818; P Winfield *Pollock on Contracts* (13th ed) at 378; Lord Goff of Chieveley and G Jones, note 2 chapter 4; Peter Birks *An Introduction to the Law of Restitution* (1985) at 164-167. The rule is generally accepted in the United States (see 53 ALR 949 and G E Palmer *The Law of Restitution* vol III para7-l4.27) although it has been described by Learned Hand J as a “Most unfortunate doctrine”: *St Paul & Marine Ins Co v Pure Oil Co* (1933) 63 F (2d) 771 at 773.

28. *Hydro Electric Commission of Township of Nepean v Ontario Hydro* (1982) 132 DLR (3d) 193. Comprehensive discussions or the rule and its exceptions are to be found in the Law Reform Commission of British Columbia *Report on Benefits Conferred Under a Mistake of Law* (1981) and the Law Reform Committee of South Australia, note 5.

3. The Operation of the Rule

3.1 The rule operates to deny recovery of moneys paid under mistake where the court categorises the mistake as one of law as distinct from fact. The general nature of this fact/law distinction will be examined briefly, before we turn to the various situations where the rule denies recovery. Later in this chapter we shall discuss briefly the various exceptions to the general rule.

I. THE FACT/LAW DISTINCTION

3.2 As we have already indicated (paras 2.2 - 2.5) the early cases made no distinction between mistakes of fact and mistakes of law. However, *Bilbie v Lumley* and the decisions which followed it denied recovery where the relevant mistake was categorised as one of law. Henceforth there were many cases grappling with the distinction.

3.3 The leading early case was *Kelly v Solari*[1] which, like *Biblie v Lumley*, also involved a mistaken payment made under an invalid insurance policy. The court had to decide whether a payment make to Mrs Solari under her husband's life insurance policy, which had previously lapsed when a premium had not been paid, could be recovered by the insurance company. The directors who paid out under the policy had lapsed. Lord Abinger directed a new trial to clarify the issue of whether the directors had knowledge of the facts at the time they made the payment, and stated:

> The safest rule however is, that if the party makes the payment with full knowledge of the facts, although under ignorance of the law, there being no fraud on the other side, he cannot recover it back again....[T]he knowledge of the facts which disentitles the party from recovering must mean a knowledge existing in the mind at the time of payment.[2]

His view was that the plaintiff insurers in *Biblie v Lumley* would have been found to have had actual knowledge of the letter shown to them which was material to the claim, and that therefore the plaintiffs in *Biblie v Lumley* had full knowledge of the facts. The plaintiff insurer in *Kelly v Solari*, however, having forgotten the material fact, did not have full knowledge of the facts which disentitled the insured from recovering. The distinction between *Biblie v Lumley* and *Kelly v Solari* was clearly drawn by Parke B who, in course of argument, said of the former case:

> All that that case decides is, that money paid with full knowledge of all facts cannot be recovered back by reason of its having been paid in ignorance of the law.[3]

3.4 In many of the later leading cases the courts have grappled with the fact/law distinction.[4] In *Solle v Butcher*[5] one judge categorised a mistake as one of law, another as one of fact, whilst the third decided the cases on another ground not involving the fact/law distinction. Commentators are generally agreed that judicial attempts to define the distinction have been unsuccessful.[6] As the Australian editors of *Chestire and Fifoot's Law of Contract* conclude:

> The same statement would appear to be one of fact or of law according merely to the degree of detail by which it is accompanied. The judges, in truth, whether they are dealing with misrepresentation or with mistake, have failed to find a workable differentiation between law and fact.[7]

This conceptual difficulty of distinction is one of the major grounds on which the present law is attacked. It has certainly allowed wide leeway, for as Professor H W R Wade has suggested:

> Escaping from tight corners by manipulating the distinction between law and fact has always been a favourite judicial manoeuvre, and I treasure the way in which this truth was once expressed by Deane Leon Green of Northwestern University in his book *Judge and Jury:* 'No two terms of legal science have rendered better services than "law" and "fact" .... They readily accommodate themselves to any meaning that we desire to give them.... What judge has not found refuge in them? The man who could succeed in defining them would be a public enemy.' The anathema thus pronounced has not prevented numerous judges from attempting definitions, nevertheless, and their opinions have differed as radically as one would expect.[8]

3.5 Sometimes courts exercising equitable jurisdiction have been prepared to set aside or rectify transactions or contracts upon the ground of mistake, regardless of whether the mistake was one of fact or law,[9] whilst on other occasions they have asserted a distinction between mistake of fact and mistake of law.[10] However the equitable jurisdiction relating to recovery of money paid under mistake is limited. If a proceeding in equity is in substance an action for money had and received, the rule in *Bilbie v Lumley* applies to prevent recovery.[11] Where no issue of administration of estates exists and where the claim is simply between a party who paid money mistakenly to another, equity follows the common law and generally refuses recovery where the payment was made merely under a mistake of law.[12]

3.6 Courts of equity have however on some occasions taken a narrow view of what is a mistake of law. It will be seen later (para 3.10) that common law courts generally regard a mistaken construction of a contract as a mistake of law with the consequence that payment made under the belief that the payment was obliged by a contract is irrecoverable. In the equitable jurisdiction such mistakes have usually been regarded as mistakes of fact and it is only mistakes as to the general law that have precluded appropriate equitable relief.[13] Again however, this qualification appears of little interest to the issue raised in this report because, when it comes to the right to recover money paid under mistake, without more, equity follows the general rule in *Bilbie v Lumley* and denies recovery.

II. EXAMPLES OF THE GENERAL RULE'S APPLICATION

3.7 The operation of the general rule denying recovery of money paid under a mistake of law can be illustrated by the following types of cases:

mistake as to statute law or general law;

misconstruction of private agreements or documents; and

money paid in reliance on judicial decisions subsequently reversed or overruled.

A. Mistake as to Statute Law or General Law

3. 8 If a person pays money due to a mistaken construction of a statute or a misinterpretation of the common law, or through ignorance of a statute or principle of common law which would make the payment unnecessary, then, if there are no additional factors (such as duress or oppression) present, the payment is irrecoverable. The recipient may retain the money even though it would not have been paid had the payer known the true situation (ie even though there is unjust enrichment). Thus, in *Sharpe Bros and Knight v Chant*,[14] increased rent paid where both landlord and tenant were unaware of a statute[15] which prevented such increase, could not be recovered, nor deducted from future rent payments.

3.9 Some of the cases in this category involve unsuccessful attempts to recover from the Crown moneys paid under a mistaken belief as to liability under a taxing statute, where the person paying could at any time have withheld payment and tested in a court the issue of liability later asserted.[16] The rule has however worked equally against the Crown.[17]

B. Misconstruction of Private Agreements or Documents

3.10 A person who misconstrues a contract or deed and thereby pays money that is not in truth due cannot recover the mistaken payment.[18] For example, in *Re Hatch*,[19] a husband promised by deed to pay an annuity to his wife. Although the deed, on its true construction, authorised the husband to deduct tax, the husband mistook his legal right and neglected to do this. His estate was unable to recover the money overpaid or even to offset the overpayment against future instalments of the annuity. The judge concluded that "the payment having been made under a mistake of law the parties are left as they are without any resultant rights".[20]

3.11 We are not aware of any cases in which courts of equity have reached a different conclusion where application was made simply to recover moneys paid under a mistake of this kind,[21] although in other areas equity has fairly consistently categorised such mistakes as mistakes of fact.[22]

C. Money Paid in Reliance on Judicial Decisions Subsequently Reversed or Overruled

3.12 A party may make a payment to another in the belief that money is due because liability is or appears to be established by a judicial decision, not directly involving those parties, but clearly applicable to their situation. That judicial decision may be subsequently reversed on appeal or overruled by a superior court in later litigation between other parties. The money initially paid is, however, irrecoverable.[23] Thus, in *Henderson v Folkestone Waterworks Co*,[24] a houseowner failed to recover water rates he had previously paid without argument, despite the fact that a subsequent decision of the House of Lords[25] had conclusively established that the defendant company was not entitled to claim such rates.

3.13 Indeed it makes no difference if the person who made the payment did so pursuant to a judgment of a court because, unless and until that judgment is reversed on appeal,[26] it will determine the liability between the litigants even if the principle it embodies is no longer generally accepted. The unsuccessful party's right to appeal will generally be barred by lapse of the fairly short period stipulated in rules of court for that step to be taken (see further para 5.26).

3.14 Various theories underlie this uncompromising attitude of the common law. One reason is that the party who made the initial payment had the option of challenging its enforceability, taking the matter on appeal if necessary, in order to establish the principle now relied upon to negative liability. As Latham C J put it in *Werrin v The Commonwealth:*

> if a person, instead of contesting a claim, elects to pay money in order to discharge it, he cannot thereafter, because he finds out that he might have successfully contested the claim, recover the money which he so paid merely on the ground that he made a mistake of law.[27]

This, of course, is slightly unrealistic given that all litigants do not have the means to conduct extended litigation over sums of money which may be slight compared to the cost of prosecuting it. It also overlooks the fact that resort to a higher court initially may not have produced the result later established. It is now universally recognised that judges do, on occasion, change the common law rather than simply declare what it is.

3.15 A more significant basis for declining recovery in these circumstances is the belief that any other approach would put at risk many claims "voluntarily" settled in the past.[28] This factor has led some jurisdictions to modify the statutory repeal of the rule in *Bilbie v Lumley* so as to exclude payments where the mistake of law was the result of reliance on a judicial precedent that was later reversed. We shall discuss this further below (paras 5.19-5.27).

III. SPECIFIC EXCEPTIONS TO THE GENERAL RULE: WHEN MONEY PAID UNDER MISTAKE OF LAW CAN BE RECOVERED

3.16 Brief reference has already been made (para 1.3) to the fact that the general rule has many exceptions. There is no common theme running through them and they "establish an elaborate cluster of artificial distinctions and vague standards for relief which have created an unusually chaotic body of jurisprudence".[29]

A. Mistake of Foreign Law

3.17 A mistake of foreign law is treated as a mistake of fact for the purposes of determining whether recovery of moneys will lie. The theory is that foreign law must be proved by calling expert witnesses to give evidence as to its content,[30] although it is difficult to see why this provides any rational basis for allowing recovery of moneys mistakenly paid. A judge may be able to determine and state the (local) law much more quickly than a question of fact, yet mistake as to the former will generally preclude recovery of moneys.

B. Public Moneys Mistakenly Disbursed Without Legal Authority

3.18 Where moneys are wrongly disbursed by a servant of the Crown it makes no difference whether there was a mistake of fact or a mistake of law. They are recoverable by the Crown because, as the Privy Council pointed out in *Auckland Harbour Board v The King*, it has been a constitutional principle since the seventeenth century that "no money can be taken out of the consolidated Fund into which the revenues of the State have been paid,

excepting under a distinct authorisation from Parliament itself".[31] The distinguishing elements in this exception are, firstly, that the source of the money was government revenue and, secondly, the fact that no parliamentary authority was given for the payment made, whereby it attained the character of an illegal payment.

3.19 This exception has been restricted in *Commonwealth of Australia v Crothall Hospital Services (Aust) Ltd*.[32] The Federal Court held that the Commonwealth was bound by payments made other than in accordance with a contract since the payments were not made mistakenly but as variations of the price agreed in the contract. Ellicott J (Blackburn and Deane JJ concurring) stated that:

> The principles enunciated in the *Auckland Harbour Board* case do not... operate to exclude the application to contracts by the Commonwealth of the ordinary rules of contract law.[33]

His Honour distinguished *Auckland Harbour Board v R* and *Commonwealth v Burns* as cases which involved the failure to meet a condition on which money was paid out of consolidated revenue, and as involving mistake. The payment made to Crothall Hospital was held not to be mistaken and not to be made without authority. The ultra vires or illegal nature of the payment, then, is not solely the base of recovery by the Crown; it is the illegal nature of the transaction *plus* the presence of a mistake.

C. Payments Mistakenly Made to an Officer of the Court

3.20 Payments mistakenly made to an officer of the court (even when the mistake is one of law) are recoverable. Officers of the court include trustees in bankruptcy and receivers appointed by the court. *Ex parte James*[34] was an instance of a trustee in bankruptcy being ordered to repay moneys mistakenly paid by an execution creditor who believed that the trustee in bankruptcy was entitled to it. In that case James L J took the view that the trustee in bankruptcy, as an officer of the court:

> ... ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court Of Bankruptcy ought to be as honest as other people.[35]

This ignores the fact that the degree of honesty required of other people does not compel them to repay moneys received when they are paid under a mistake of law, regardless of the honesty or morality of the situation. The exception may really illustrate judicial squeamishness with the propriety of the general rule. The limits of this exception are not precisely drawn, but it does not extend to require court officers to refund payments made to the bankrupt or insolvent company under mistake of law before the bankruptcy or insolvency. It is only the acts of the officer of the court, and not the acts of third parties, which are critical in determining whether it is a "shabby thing" to retain the money paid under mistake.[36]

D. Payments Mistakenly Made by the Court

3.21 Unlike the preceding category, there is no clearly expressed policy justification for the right of a court which pays out money under a mistake of law to recover those moneys. Nonetheless, courts are entitled to recover moneys paid out under a mistake of law. This was established in *Re Birkbeck Permanent Benefit Building Society*[37] where the official receiver paid out moneys to shareholders in a building society before receiving notice of an appeal to the House of Lords by the depositors in the society who also claimed the money. After the partially successful appeal[38] the shareholders were ordered to repay the amount by which they had been overpaid and which they had received as a result of payment by the court.

E. Payments by Personal Representatives and Trustees

3.22 Trustees and legal personal representatives may in certain circumstances recover or set off against future payments moneys wrongly distributed to beneficiaries. Underpaid beneficiaries may also bring direct claims against those to whom trust moneys have mistakenly been distributed.[39] These principles reflect the historical roots of trust law in the courts of equity, whereas the action to recover moneys paid under mistake was a creature of the common law courts. They are mentioned here nevertheless because they are another instance of a departure from the strict principles embodied in the rule in *Bilbie v Lumley* without any clear functional basis for the distinction.

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

3.23 In each of these cases recovery may be permitted notwithstanding that the person making the payment was mistaken as to the law.[40]

G. Specific Statutory Exceptions

3.24 One area where the rule in *Bilbie v Lumley* has often been applied has been to defeat claims by taxpayers for the recovery of taxes paid that were ultimately shown to be not due. There are various statutory provisions allowing recovery under limited circumstances.[41] The position of the Crown is discussed in more detail in paras 5.44-5.48.

IV. A MORE GENERAL QUALIFICATION TO THE RULE IN BILBIE v LUMLEY: "INVOLUNTARY" PAYMENTS

3.25 From time to time restitutionary claims have been refused on the ground that moneys were paid or benefits conferred "voluntarily".[42] Indeed, in *Bilbie v Lumley* itself Lord Ellenborough CJ asked the plaintiff's counsel whether he could state any case where "if a party paid money to another *voluntarily* with a full knowledge of the facts of the case, he could recover it back again on account of his ignorance of the law".[43]

3.26 The term "voluntary" in relation to a payment of money is used in the cases with many different meanings.[44] One writer has said that, in this context, flit is merely a shorthand way of saying that there is no approved ground on which restitution of benefits can be awarded".[45] It is, however, possible to discern distinct uses of the concept.

3.27 First, it may mean that the payer was not acting under duress or any form of compulsion or coercion or undue influence.[46] The presence of such factors vitiates the payment and renders it recoverable whether or not there was also some mistake of fact or law.[47] One special category of duress relates to money exacted "under colour of an office" *(colore officii)*. Where a public official refuses to grant some right, service or privilege to which the payee is entitled (either free of charge or for a lesser sum of money than the amount claimed) unless the latter complies with the official's requirements, then the payment or excessive payment will be regarded as exacted under duress and recoverable.[48] But compulsion sufficient to vitiate a payment of money can take many forms. There is a whole series of cases involving attempts to recover back taxes or other statutory exactions which were ultimately found to be not valid or due. In some cases[49] the payer paid under a simple mistake of law as to liability and was met with the rule in *Bilbie v Lumley* (see generally paras 3.8-3.9). In others the payer was not under any mistake as to liability but, believing (and sometimes asserting) that the moneys were not due, lacked the will, means or courage to contest the impost immediately.[50] Recovery is denied unless the payer can show that there was some element of coercion other than invoking legal process super-added to the fact that the impost itself had no legal basis. Refusal to grant a licence necessary to carry on a trade is an example of a factor which, if it compels the payer to submit or accompanies the payer's mistake, will allow recovery. In *Air India v The Commonwealth* the New South Wales Court of Appeal summed up the authorities as establishing that to show that a payment was made under compulsion it must be shown that: (there was a fear that, if it were not paid, the payee would take some step, other than invoking legal process, which would cause harm to the payer; and (b) that this fear was reasonably caused or well-founded.[51]

3.28 However, where payment is made solely in submission to actual or threatened litigation the payer will not be able to assert improper compulsion because "there must be an end of litigation, otherwise there would be no security for any person".[52] As Lord Halsbury LC put it in *Moore v Vestry of Fulham:*

> The principle of law is not that money paid under a judgment, but that money paid under the pressure of legal process cannot be recovered. The principle is based upon this, that when a person has had an opportunity of defending an action if he chose, but has thought proper to pay the money claimed by the action, the law will not allow him to try in a second action what he might have set up in the defence to the original action.[53]

3.29 Secondly, “voluntary” refers to the principle that money which has been paid to settle a claim by the defendant, irrespective of whether the claim is based on a true assumption, is not recoverable. The money is said to have been paid in voluntary submission to an honest claim. Whether the mistake be as to fact or law, a payer accepts the risk of mistake and intends that the payer “shall have the money at all events”.[54] Restitutionary recovery is and should be denied here because there is simply no legally relevant mistake. This category of “voluntary” and irrecoverable payments includes payments made to compromise bona fide claims and litigation.[55]

3.30 Thirdly, “voluntary” can simply refer to a payment which, though mistaken, was made as a gift.[56] The confusion about the use of the term “voluntary” is understandable when it is appreciated that the mere fact that a mistaken payment is by way of gift is no barrier to restitution.[57]

3.31 Occasionally the term “voluntary” has been used in relation to a mistaken payment of money as a synonym for a payment made under mistake of law.[58]

FOOTNOTES

1. (1841) 9 M & W 54 (152 ER 24).

2. *Id* at 57, 58 (ER at 26).

3. Id at 55 (ER at 2S). Lord Denning’s statement in *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192 at 204 (“money paid under a mistake of law, by itself and without more, cannot be recovered back”) also stresses that money may be recoverable if other factors are present. Indeed, in many of the cases where duress or other factors are found to be present (see para 3.27) there is no mistake as such at all.

4. For example *Eaglesfield v Marquis of Londonderry* (1875) 4 Ch D 693; *Solle v Butcher* [1950] 1 KB 671. see also the discussion in *Thomas v The King* (1937) 59 CLR 279 at 306-307 per Dixon J and *Iannella v French* (1968) 119 CLR 84 at 114-115 per Windeyer J. The onus of proving that the mistake was one of fact and not law is on the plaintiff: *Avon CC v Howlett* [1983] 1 AII ER 1073 at 1084-5.

5. [1950] 1 KB 671.

6. For example P H Winfield “Mistake of Law” (1943) 59 LQR 327 at 339; G H L Fridman and James G McLeod *Restitution* (1982) at 81. See also Dickson J in *Hydro Electric Commission of Nepean v Ontario Hydro* (1982) 132 DLR (3d) 193 at 201-203.

7. J G Starke and P F P Higgins (eds) *Chesire & Fifoot’s Law of Contract* (4th Aust ed 1981) para 2822.

8. H W R Wade “Administrative Tribunals and Administrative Justice” (1981) Aust LJ 374 at 381.

9. For example *Cooper v Phibbs* (1867) LR 2 HL 149.

10. For example *Midland Great Western Railway Co of Ireland v Johnson* (1858) 6 HLC 798 at 810-811 (10 ER 1509 at 1514).

11. See generally R P Meagher, W M C Gummow and J R F Lehane *Equity Doctrines and Remedies* 2nd ed para 1404.

12. *Goodman v Sayers* (1820) 2 J & W 249 at 263 (37 ER 622 at 627-8); *Rogers v Ingham* (1876) 3 Ch D 351; *Merriman v Perpetual Trustee Co Ltd* (1896) 17 LR (NSW) Eq 325; *Ministry of Health v Simpson* [1951] AC 251 at 271-2; *Air India v The Commonwealth* [1977] 1 NSWLR 449. However, provided there is the presence of a fiduciary relationship or an equity arising from the conduct of a party (eg fraud or undue influence) mistaken payments may in some cases be recovered, regardless of whether the mistake may be categorised as one of fact or law: *Minister of Health v Simpson.* See generally R P Meagher and W M C Gummow *Jacobs’ Law of Trusts in*

Australia 5th ed paras 1731-1732. Despite the general remarks in *Daniell v Sinclair* (1881) 6 App Cas 181 at 190-1 asserting that in equity the line between mistake in law and mistake in fact has not been clearly and sharply drawn, that case concerned simply an application to re-open a settled account in a redemption suit and no question was raised about challenging the general rule about non-recoverability of money paid under mistake of law (see esp at 186).

13. See *Cooper v Phibbs* note 9 at 170; *Earl Beauchamp v Winn* (1873) LR 6 HL 234; *Daniell v Sinclair* note 12; *Murray v Baxter* (1914) 18 CLR 622 at 630.

14. [1917] 1 KB 71. See also *Denby v Moore* (1817) 1 B & Aid 123 (106 ER 46).

15. The Increase of Rent and Mortgage Interest (War Restrictions) Act 1915.

16. For example *William Whiteley Ltd v The King* (1906) 26 TLR 19; *National Pari-Mutuel Association Ltd v The King* (1930) 47 TLR 110. Compare *Sebel Products Ltd v Commissioners of Customs and Excise* [1949] 1 Ch 409 at 413. Some taxing acts now provide a remedy for recovery of overpayments of tax under a mistake of law: see para 3.24.

17. Holt v Markham [1923] 1 KB 504 (overpayment of gratuity to military officer due to failure to apply true construction of regulation held irrecoverable). The Crown may, in an appropriate case, be protected by the principles discussed in paras 3.18-3.19.

18. See authorities discussed in Lord Goff of Chieveley and G Jones Law of Restitution 3rd ed (1986) at 123-124; *Fisher v Luke* [1926] VLR 190; *McColl v Bright* (1939) VLR 204.

19. [1919] 1 Ch 351.

20. *Id* at 357, per Sargant J.

21. The authorities cited in note 12 assert that equity would follow the law in this regard. *Air India v The Commonwealth* note 12, was a decision of the Chief Judge in Equity and *Re Hatch* note 19, was a decision of a judge in the Chancery Division.

22. For example *Cooper v Phibbs* note 9.

23. See Lord Goff of Chieveley and G Jones, note 18 at 122-123 and the cases there cited. See also *Re Broughton* (1897) 18 NSWLR 247; *National Pari-Mutuel Association Ltd v The King* (1930) 47 TLR 110; Derrick v Williams [1939] 2 All ER 559; *Julian v Mayor of Auckland* [1927] NZLR 453.

24. (1885) 1 TLR 329.

25. *Dobbs v Grand Junction Waterworks Co* (1883) 9 App Cas 49.

26. If the judgment is reversed on appeal any payment made pursuant to it can be recovered under a common law action for restitution (see D M Gordon “Effect of Reversal of Judgment on Acts Done Between Pronouncement and Reversal” (1958) 74 LQR 517) if there is no express statutory authority (e7g-supreme Court Rules Pt 51 rl8).

27. *Werrin v The Commonwealth* (1938) 59 CLR 150 at 159. See also para 3.28.

28. See for example Lord Coleridge CJ in *Henderson v Folkestone Waterworks Co* note 24 (quoted para 5.19).

29. J McCamus “Restitutionary Recovery of Moneys Paid to a Public Body Under a Mistake of Law: *Ignorantia Juris* in the Supreme Court of Canada” (1983) 17 UBCLR 233 at 255. The exceptions are discussed extensively in Lord Goff of Chieveley and G Jones, note 18 at 128-135 and in Law Reform Commission of British Columbia *Report on Benefits Conferred Under a Mistake of Law* chapter IV.

30. *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289.

31. *Auckland Harbour Board v R* [1924] AC 318 at 326. The principle has been applied in Australia in *Commonwealth v Thomson* (1962) 1 Vic CCR 37; *Commonwealth v Burns* [1971] VR 825, *Commonwealth v Crothall Hospital Services (Aust) Ltd* (1981) 36 ALR 567 at 580. It has been held that the defences of change of position and estoppel are not available in relation to a claim for recovery of public moneys unlawfully paid: *Commonwealth v Burns*, *supra*; *Attorney-General v Gray* [1977] 1 NSWLR 406. See generally, Law Reform Commission of British Columbia *Report on the Recovery of Unauthorised Disbursements of Public Funds* (1980). Compare *Holt v Markham* [1923] 1 KB 504.

32. (1981) 36 ALR 567.

33. *Id* at S81.

34. (1874) LR 9 Ch App 609. The exception is discussed in Re Roberts (1976) 12 ALR 730. It clearly applies even if the mistake is one of law: *Re Carnac, Ex parte Simmonds* (1885) 16 QBD 308 at 312 per Lord Esher MR.

35. (1874) LR 9 Ch App 609 at 614.

36. *Re Wigzell* [1921] 2 KB 835; *Re Byfield* [1982] Ch 267.

37. [1915] 1 Ch 91.

38. See *Sinclair v Brougham* (1914) AC 398.

39. See generally note 12.

40. See *West London Commercial Bank Ltd v Kitson* (1884) 13 QBD 360 at 362-3 (wilful misrepresentation of law), *Ward & Co v Wallis* [1900] 1 QB 67S at 678 (want of bona fides, *Shelley v Paddock* [1980] 1 QB 348 (fraud); *Rogers v Ingham* (1876) 3 Ch D 351 at 356 (breach of fiduciary obligation) . See also as to fraud, the dictum of Lord Abinger quoted in para 3.3.

41. See Stamp Duties Act 1920 ss124, 140; Land Tax Management Act 1956 s16; Pay-roll Tax Act 1971 s19. Compare Income Tax Assessment Act 1936 (Cth) s170(3) which only extends to mistakes of fact: *Federal Commissioner of Taxation v Hayden* (1944) 7 ATD 440.

4 2. See generally Lord Goff of Chieveley and G Jones, note 18 at 36-38.

43. 2 East 469 at 470 (102 ER 448 at 449). See also *Brisbane v Dacres* (1813) 5 Taunt 143 at 152 (128 ER 641 at 645) per Gibbs J.

44. See generally Caroline A Needham “Mistaken Payments: A New Look at an Old Theme” (1978) 12 *UBC Law Rev* 159 at 177-8 and D Cuthbertson “The Principle of Voluntary Payment in Quasi-Contract” (1967) 5 *UQLJ* 288.

45. Dawson *Unjust Enrichment* (1951) at 128 quoted by Windeyer J in *Mason v New South Wales* (1959) 102 CLR 108 at 143.

46. This was probably the sense in which Lord Ellenborough used the term in the passage quoted in para 3.25.

47. *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192 at 204. See generally *Mason v New South Wales* note 46; Lord Goff of Chieveley and G Jones, note 18 at 124-127; I J Hardingham “Recovery of Taxes by the Taxpayer” (1971) 2 *ACL Rev* 199; P Birks “Restitution from Public Authorities” (1980) 33 CLP 191.

48. *Sargood Brothers v The Commonwealth* (1910) 11 CLR 258 at 276-7; *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* (1969) 121 CLR 137; *Air India v The Commonwealth* [1977] 1 NSWLR 449.

49. For example *Hydro Electric Commission of Nepean v Ontario Hydro* (1982) 132 DLk (3d) 193.

50. For example *Air India v The Commonwealth* [1977] 1 NSWLR.

51. *Id* at 455. For a discussion as to what is compulsion, see ,*F & S Holdings v NRMA Insurance* (1982) 41 ALR 539 at 555. Voluntariness must be detfrmi-ned as a question of fact in each case and the state of mind of the payer is relevant: *Deacon v Transport Regulation Board* [1958] VR 458 at 460; *International Packers Pty Ltd v Harvey* [1969] Qd R 159 at 177.

52. Lord Kenyon CJ in *Marriott v Hampton* (1797) 7 TR 269 (101 ER 969) (the leading case). See also *Mason v New South Wales* (1959) 102 CLR 108 at 144.

53. [18951 1 QB 399 at 401-2. As to the limits of this doctrine, see *J & S Holdings v NRMA Insurance* (1982) 41 ALR 539 at 556.

54. *Kelly v Solari* (1841) 9 M *& W* 54 at 59 (152 ER 24 at 26) per Parke B. See also *South Australian Cold Stores Ltd v Electricity Trust of South Australia* (1957) 98 CLR 65 at 74-75, *Mason v New South Wales* note 45 at 143.

55. For example *Cook v Wright* (1861) 1 B & S 559 (121 ER 822).

56. For example *Morgan v Ashcroft* [1938] 1 KB 49.

57. Lord Goff of Chieveley and G Jones, note 18 at 90-100.

58. For example *Brisbane v Dacres* (1813) Taunt 143 at 152 (128 ER 641 at 645) per Gibbs J.

4. Criticism Of The Rule and Options For Reform

I. CRITICISM

4.1 From the foregoing it will be apparent that the existing law is clearly unsatisfactory. It has been subject to constant criticism.[1] The reasons are summarised below.[2]

A. The General Rule is not in Harmony with Restitutionary Principles

4.2 The rule contradicts the rationale underlying recovery of moneys paid under mistake of fact and creates an irrational and artificial distinction between payments made under a mistake of law and those made under a mistake of fact. This means that the rule prevents equal justice in like cases. Australian law now appears to have adopted the general principle of unjust enrichment as the unifying element underpinning the law of restitution.[3] Certainly the law permitting recovery of money paid under mistake of fact is based on such a concept,[4] as are some of the exceptions to the rule in *Bilbie v Lumley* recognised in the present law. It offends widely held views of what is fair and just for a person to make a windfall out of another's mistake. Where money has been paid under mistake, the payee has received a benefit that was not due and which the payer did not intend to confer. Whatever the nature of the mistake, it is unjust for the recipient to retain the money, unless some specific ground of defence such as change of position or estoppel precludes recovery. Naturally, where the money was paid in settlement of an honest claim or where the payment is tainted with certain types of illegality, then it may be appropriate to refuse recovery of the mistaken payment, but in those circumstances different policy matters intrude. Where there is mistake alone it is quite unreasonable to differentiate between different types of mistakes.

B. The General Rule Cannot be Supported on Policy Grounds

4.3 The reasons advanced to support the rule in *Bilbie v Lumley* are untenable. Lord Ellenborough in that case stated 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 out. It would be urged in almost every case.[5]

4.4 Two separate but related reasons are advanced in this terse statement of the policies underlying the general rule. The first, namely that everyone is deemed to know the law, is however obviously spurious. It is at most a presumption of law meaning no more than that "no one is to be excused for wrongdoing on the ground that he is ignorant of the law",[6] a proposition in the criminal law which is itself no longer absolute.[7] Such a presumption is unhelpful and misleading in determining whether or not money paid under mistake of law should be recoverable. In the cases under discussion, the plaintiff has done no wrong but merely seeks to have returned that to which in conscience he or she is entitled. Furthermore, it has been suggested that:

> it does in truth, seem that if one paying must be presumed in all cases to do so with a full knowledge of his liability, it is only fair to presume also that the payee received it with a full knowledge that he had no right to accept, the consequence of which would be that, if he knew a gratuity was not intended, his acceptance would constitute legal fraud.[8]

Where the welfare and safety of the public is involved, the very purpose of the criminal law would be stultified if a defendant could raise ignorance of the law as a defence. In the area of recovery of money it is difficult to see any reason for a legal policy that should compel the law to treat the plaintiff as if he or she did actually know the law. For the reasons summarised in para 4.2 the law's policy should be to prevent unjust enrichment by one person where that is the result of another's mistake, in the absence of any defence such as change of position or estoppel which would make it inequitable to allow recovery.

4.5 Secondly, Lord Ellenborough suggested that the general rule was necessary because otherwise there would be a floodgate of litigation.[9] However, as the Law Reform Commission of British Columbia has pointed out, to say that mistake of law would be "urged in every case" is unsatisfactory in that it confuses the right to plead a cause of action with the right to succeed.[10] The paucity of cases coming before courts in New Zealand, Western Australia and those jurisdictions in the United States where the general rule has been abolished suggests that Lord Ellenborough's fears are unfounded. In many areas in the law judges or juries have to determine issues of

knowledge or intent. In view of the availability of discovery and interrogatories and the fact that the onus of proving mistake lies upon the plaintiff we believe that the courts would be quite able to distinguish true and false claims when they were advanced in this context. If , on the other hand, Lord Ellenborough was simply objecting to a principle that might increase the judicial workload, such a cause for constraint has not blocked a multitude of other judicial and statutory reforms. It is not the object of the law to prevent the litigation of just claims. It is hard to see how there may be a greater temptation to plead mistake of law than mistake of fact, yet the "floodgate" argument has not precluded relief in that area. In any event we do not accept that repeal of the rule in *Bilbie v Lumley* would increase the judicial workload. By avoiding arid disputes such as whether a mistake is as to fact or law, or whether a case falls within one of the many exceptions to the general rule, such a reform could be expected to result in a net saving of judicial time (see also para 4.8).

4.6 In *Brisbane v Dacres* Gibbs J suggested a further reason for the general rule:

> He who receives [the money] has a right to consider it as 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. He who received it is not in the same condition: he has spent it in the confidence it was his, and perhaps has no means of repayment.[11]

Of course the same could have been said in relation to the payee who seeks to benefit from a mistake of fact. But while the past inadequacy of the common law defences to actions for the recovery of money paid under mistake may explain the retention of the rule in *Bilbie v Lumley,*[12] it is anomalous that judicial reform has not to date proceeded along the lines of extending the defences and rejecting the general rule. Some of the statutory reforms that have been introduced (see Appendix C) address Gibbs J's argument by enacting a change of position defence (New Zealand and Western Australia), or allowing the court to order that repayment be made in instalments (Western Australia). For reasons which we develop later (paras 5.38-5.41) we think that the common law has now accepted an appropriate change of position defence (the details of which are being worked out in the usual common law manner) and that the further policy reason advanced by Gibbs J for the general rule is no longer generally valid, if it ever was.

C. The Law is Uncertain and Complex

4.7 The rule is uncertain in its application. The distinction between mistake of law and mistake of fact is practically impossible to define and extremely difficult to draw in any given case. The elements of fact and law are so closely intertwined that any attempt to separate them cannot but involve a certain amount of arbitrariness".[13] This complexity promotes disputes and litigation, and makes the law less accessible to litigants of modest means.

D. The Rule and its Exceptions Lack a Rational Basis

4.8 The elaborate cluster of artificial distinctions and exceptions to the general rule and the readiness to label some mistakes of law as mistakes of f act attest to the extent of judicial unease about the rule.[14] It may be true that many of the injustices of the general rule are met by passing through the gateway of one of the exceptions in appropriate cases. But such an approach makes the law costly and inaccessible. Furthermore, when both critics and courts openly acknowledge the use of technical devices and arbitrary distinctions to evade the general rule, the resulting damage is not only the unfair results which may ensue where the law is unevenly applied, but also a weakening of the inherent authority of the law.[15] The time comes when the law should discard fictions and restate itself on a rational basis.[16] An American writer commenting on the application of the general rule in Texas and its rejection in Kentucky has stated:

> But if the test of a law is in its results, it may be asked what difference does it make whether the courts, as in Kentucky, frankly admit that they correct mistakes of law, or, as in Texas, first deny that they do so in general, then cover up the rule with exceptions, so long as the plaintiff with a meritorious case gets the relief to which in justice he is entitled. The problem, however, is not so simple. In the first place, in so far as they are practicable, there is great social value in scientific rules and in consistent and smoothly working legal machinery. The Texas rule exacts for its enforcement the double price of first drawing the difficult distinction between law and fact and then, assuming the mistake is one of law, of drawing the distinction between the general rule and. its exceptions.[17]

II. OPTIONS FOR REFORM

4.9 The general rule seems firmly entrenched in Australian common law (see para 2.12). Whilst the High Court could decide to reverse it, there is no indication of any moves to raise the issue in that forum. Since the 'present law is manifestly deficient for the reasons given earlier in this chapter, legislative reform is appropriate. Reforms enacted or proposed in other jurisdictions are now considered.

A. United States Models Field Code

4.10 The first statutory reform in the United States was enacted in California in 1872 in s1578 of its Civil Code:

> Mistake of law constitutes a mistake, within the meaning of this Article, only when it arises from:
>
> 1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or
>
> 2. A misapprehension of the law by one party, of which the others are aware at the time of the contracting, but which they do not rectify.[18]

The Californian reform was modelled on a civil code completed in 1865 by Field which the New York legislature adopted, but which the New York governor vetoed, with the result that it did not become law. A number of other American states have adopted similar provisions.[19]

4.11 However the Field Code is uncertain in its scope, and gives little judicial guidance in the area with which this report is concerned. Courts in the different states which have used the Field Code as their statutory model have variously held that it merely declared the rule in *Bilbie v Lumley*; it allowed recovery only if the payment was involuntary; it only applied to rescission of a contract entered into under a mistake of law; and that it applied to recovery of payments made under a mistake of law as opposed to merely contracts.[20] Apart from this obvious confusion about the nature of the statutory reform, commentators are generally agreed that the Field Code does little more than restate the existing law so far as recovery of money or other benefits transferred under mistake of law is concerned.[21]

New York

4.12 Based on a 1942 provision[22] which was enacted following a report and recommendation of the New York Law Revision Commission,[23] s3005 of the New York Civil Practice Law & Rules provides:

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

The section deliberately knocks away a juridical basis for denying relief against a mistake, without providing any guidance as to how or in what circumstances such relief is to be granted. It may also be noted that it extends to all forms of relief against mistake and that it extends to contracts as well as the simple payment of money. The provision by its breadth of scope thus invites the creation of separate rules governing mistakes of law in particular areas, rather than creating a uniform method of dealing with mistakes in the law of restitution.

4.13 The inappropriateness and unhelpfulness of the New York model is, in our view, shown by the 1957 decision of the New York Court of Appeals in *Mercury Machine Importing Corp v City of New York*.[24] Certain taxes levied under a New York statute were held to be illegally levied since the law was unconstitutional when applied to interstate business. Despite the words of the 1942 statute, the Court applied the pre-existing common law, holding that taxpayers who paid the taxes without protest and not under duress were not entitled to a refund of money paid; and, further, that voluntary payments of a tax made under a mistake of law could not be recovered. The Court held that the provisions of the statute empowered the court to act only in appropriate cases involving a mistake of law. The statute did not require, they said, that mistakes of law should be treated in all instances as though they were mistakes of f act. It merely removed a technical obstacle against granting relief for mistakes of law.

4.14 We agree with one commentator's criticism of the New York statute as interpreted by the Court of Appeals:

> The effect of the Mercury case, and the essential disadvantage of the New York provision, is the fact that it does not do away with the mistake of law and mistake of fact distinction.... Instead of doing away with one distinction, the reform provision has compounded the matter such that the court is now obliged to follow a two-stage procedure. First, the court must decide whether the mistake is a mistake of law or a mistake of fact, and second, if it is decided that the mistake is a mistake of law, the court then must decide whether it is one of the 'appropriate cases' within the area of mistake of law that justifies recovery. This new artificiality will either create a further 'hairsplitting' distinction to get the case to fit into that 'appropriate' area of mistake of law, or it will be ignored altogether and the old trick of arguing that the mistake of law is in fact a mistake of fact will be used to arrive at the same conclusion.[25]

4.15 We consider that, in view of the apparent fixity of the general rule in Australian common law (para 2.12), a statutory reform should give some guidance as to when recovery of money paid under mistake of law should be permitted. We think it is appropriate to give that guidance if statutory relief is confined to recovery of money (and other benefits: paras 5.10-5.16) paid or transferred under mistake of law, leaving the general law of mistake in contract to continue to be worked out at common law or by an appropriate statutory reform.[26] As we point out in para 4.17 and explain in detail in the next chapter, the New Zealand and Western Australian models to which we now refer provide this guidance. Whether the detailed rules they embody are entirely necessary or desirable will also be considered in the next chapter.

B. New Zealand and Western Australian models

4.16 In 1958 the New Zealand Judicature Act 1900 was amended by inserting ss94A and 94B to provide relief in respect of payments made under mistake of law. This reform was proposed by the New Zealand Law Revision Committee.[27] These provisions were adopted, with some changes, by Western Australia in 1962.[28] The full texts of these amendments are set out in Appendix C. Unlike the New fork provision which extends to contractual mistake generally, the sections are restricted to relief sought in respect of "any payment that has been made under mistake". They thus address squarely the rule in *Bilbie v Lumley*.

4.17 The sections also differ from the New York model in that they require a hypothetical gateway to be demonstrated as a prelude to relief. It is stated that where "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". We shall hereafter refer to this as the general reform.

4.18 The statutes then provide various exceptions or qualifications to the statutory relief made available by the general reform. Relief is not available in certain cases where the mistake is the result of a change in the law;[29] a change of position defence of general application has been enacted;[30] and, in Western Australia, the Court is expressly empowered to order repayment by instalments.[31] We shall hereafter refer to these as the statutory qualifications to the general reform.

4.19 In its *Report on Benefits Conferred under a Mistake of Law* (1981) the Law Reform Commission of British Columbia reviewed the English and Canadian law on this topic and recommended reform along the lines of the general reform embodied in the New Zealand and Western Australia provisions (para 4.17). The Commission was critical of the statutory reforms enacted in the United States and concluded that the Australasian legislation "provides a generally workable model for legislative reform".[32] It did, however, propose that reform in British Columbia should extend beyond payments of money to mistaken transfers of other forms of property, and it was not in favour of the statutory qualifications in the Australasian models. At this stage there has been no announcement on the implementation of these proposals.[33]

4.20 The Law Reform Committee of South Australia has recommended the general reform referred to in para 4.17 with a slight formal modification.[34] It has also recommended the creation of a statutory change of position defence and a power to order repayment by instalments.[35] It has also proposed the enactment of a provision that would ensure that the defences which are generally available to a person sued to recover a mistaken payment should apply where the payment is made by the government.[36]

4.21 The discussion before and after the passing of the New Zealand and Western Australia provisions and the proposals advanced in the reports of the Law Reform Commission of British Columbia and the Law Reform Committee of South Australia enables us to address, in the next chapter, the specific issues relating to the details of statutory reform.

FOOTNOTES

1. See for example C M Stadden "Error of Law" (1907) 7 *Colum L Rev* 476; S J Stoljar *The Law of Quasi-Contract* (1964) at 43; Lord Goff of Chieveley and G Jones *Law of Restitution* 3rd ed (1986) at 117-119; *Corbin on Contracts* (1960) vol 3 paras 616-617; G E Palmer *The Law of Restitution* vol III (1978) para 14.27 notes 7 and 8 (and authorities there cited).

2. We have drawn particularly on the discussion by the Law Reform Commission of British Columbia *Report on Benefits Conferred Under a Mistake of Law* (1981) at 58-67; the Law Reform Committee of South Australia *Report Relating to the Irrecoverability of Benefits Obtained by Reason of Mistake of Law* (1984) at 5-8, 18-20; G H L Fridman and J G McLeod *Restitution* (1982) at 166-174; and Dickson J in his dissenting judgment (Laskin CJC concurring) in *Hydro Electric Commission of Township of Nepean v Ontario Hydro* (1982) 132 DLR (3d) 193 at 201-211.

3. *Pavey & Matthews Pty Ltd v Paul* (1987) 69 ALR 577. Compare *Daly v The Sydney Stock Exchange Ltd* (1986) 60 ALJR 371 at 373 per Gibbs CJ.

4. See for example *R E Jones Ltd v Waring & Gillow Ltd* [1926] AC 670 at 696 per Lord Sumner; *Commercial Bank of Australia Ltd v Younis* (1979) 1 NSWLR 444 at 450 per Hope JA for Court of Appeal.

5. *Bilbie v Lumley* (1802) 4 East 467 at 472 (102 ER 448 at 449-450).

6. *Iannella v French* (1968) 119 CLR 84 at 113 per Windeyer J; *Krahe v TCN Channel Nine Pty Ltd* (1986) 4 NSWLR 536 at 546 per Hunt J.

7. See cases such as *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192 where a party to an illegal transaction may be relieved on the basis that the parties were not *in pari delicto*.

8. H F Wright "Should'Money Paid Under a Mistake of Law be Recoverable?" 9 *Virsinia L Rev* 126 at 128, quoted by Law Reform Commission of British Columbia, note 2 at 58.

9. See also *Rogers v Ingham* (1876) 3 Ch D 351 at 356-7 per James LJ.

10. Law Reform Commission of British Columbia, note 2 at 58-59.

11. 5 Taunt 143 at 152-3 (128 ER 641 at 645)

12. See Caroline A Needham "Mistaken Payments: A New Look at an Old Theme" (1978) *UBC Law Rev* 159 at p173. See further para 5.34

13. Caroline A Needham; note 12 at 172. See also paras 3.2-3.6.

14. See also paras 1.3 and 3.20.

15. Law Reform Committee of South Australia, note 2 at 19.

16. See *Commissioner for Railways (NSW) v Cardy* (1970) 104 CLR 274 at 285 per Dixon CJ; *United Australia Ltd v Barclays Bank Ltd* [1941] AC I at 29 per Lord Atkin.

17. B Smith "Correcting Mistakes of Law in Texas" (1931) 9 *Texas L Rev* 309 at 318, quoted by Law Reform Commission of British Columbia, note 2 at 58.

18. See now 8 *West's Cal. Code Ann* para 1578 (1973). The Californian law on the subject is discussed in B E Marean "Restitution for Money Paid Under Mistake of Law" (1968) 19 *Hastings LJ* 1225.

19. Montana, Oklahoma, North Dakota and South Dakota. See Donald J Lange "Statutory Reform of the Law of Mistake" 18 *Osgoode Hall LJ*, (1980) 428 at 466.

20. *Id* at 466-467.

21. *Id* at 466-467; B E Marean "Restitution for Money Paid Under Mistake of Law" (1968) 19 *Hastings LJ* 1225 at 1228; Lord Goff of Chieveley and G Jones, note 1 at 118 n9.

22. Para 112-f of the Civil Practice Act.

23. New York Law Review Commission, Legislative Document (1942) No 65 (B).

24. 3 NY 418, 144 NE 2d 400, 1655 NY Supp 2d 517.

25. Donald J Lange, note 19 at 469. We note that the Law Reform Commission of British Columbia appears to take a different view on this point: Note 2 at 69.

26. As to mistake of law in contract generally, see further para 5.18. For a detailed exposition of the distinction between restitution (with which this report is concerned) and contract, see Peter Birks *An Introduction to the Law of Restitution* (1985), esp at 44-48.

27. B J Cameron "Payments Made Under Mistake" (1959) 35 *NZLJ* 4. Papers supplied to the Commission by the New Zealand Department of Justice, Wellington show that the Law Review Committee intended to follow the lines of the solution adopted in the New York model, although for reasons given in paras 4.16 and 4.17 of this Report there were significant differences in the New Zealand legislation.

28. Sections 23 and 24 of the Law Reform (Property, Perpetuities and Succession) Act 1 96 2 , which were subsequently repealed and reenacted as ss124 and 125 of the Property Law Act 1969 (WA).

29. New Zealand, s94A(2); Western Australia, s124(2).

30. New Zealand, s94B; Western Australia, s125(1).

31. Section 125(2).

32. Law Reform Commission of British Columbia, note 2 at 73.

33. Letter from the Chairman of the Law Reform Commission of British Columbia, 18 November 1986.

34. Law Reform Committee of South Australia, note 2 at 29-30.

35. *Id* at 31-32.

36. *Id* at 32-33.

5. Recommendations

I. THE GENERAL REFORM

A. Criteria for Relief

5.1 As we stated in para 4.9 we consider that legislative repeal of the general rule is required. The general reform enacted in New Zealand and Western Australia and proposed in British Columbia and South Australia is that

> where 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.

We consider that this is the appropriate model for statutory reform.

5.2 Insofar as the rule in *Bilbie v Lumley* is an exception to a general principle (ie that payments made under mistake are usually recoverable) this statutory provision puts an end to such an exception. But the provision goes further. Unlike the New York model (para 4.12) the provision requires that it be shown that relief would have been granted had the mistake been wholly one of fact. It is therefore "carefully drafted to ensure the incorporation into mistake of law cases of those restitutionary principles which the common law has developed to deal with mistakes generally".[1] Indeed, it is so drawn as to incorporate future developments in those principles.

5.3 The provision does not, however, oblige the court to ignore the character of the mistake. For example, it is conceivable that a person who discharged a debt that was statute-barred or unenforceable for some technical reason in ignorance of the right not to repay it (that is, under a mistake of law) might be refused restitution because the payee was not unjustly enriched.[2]

5.4 The provision does, nevertheless, achieve two aims: reversing the rule in *Bilbie v Lumley*, and directing courts to the law of restitution involving a mistake of fact as a source of principles to assist in resolving problems posed by payments made under a mistake of law.[3]

5.5 Among the existing restitutionary principles which would be carried over undisturbed into the mistake of law field by the provision are:

> the rule denying the recovery of money paid in satisfaction of a doubtful claim to compromise that claim (para 3.29);
>
> the principle that denies recovery where the payer might by investigation learn the true state of affairs more accurately, but chooses to pay the money regardless;[4]
>
> any rule that would deny recovery if there were an added element of illegality involved in the payment sought to be recovered (where no common law exception to the rule requiring illegal losses to lie where they fall is appropriate);[5] and
>
> the principles which determine what is a mistake and the relationship which a mistake must have to the payment sought to be recovered.[6]

5.6 The model provision expressly applies to mistakes of mixed fact and law. This overcomes the need for the plaintiff to prove the precise nature of the mistake[7] and precludes claims failing, as they may under the existing law,[8] because the plaintiff cannot affirmatively establish that the mistake was one of fact and not law.

5.7 The model provision does not touch the equitable rules relating to rectification,[9] defences to specific performance,[10] and tracing[11] which may apply where there is a mistake of law which would preclude recovery of money at common law under the general rule in *Bilbie v Lumley*.[12]

B. Defences, Cross Claims, Allowances in Accounts

5.8 The model provision (see Appendix C) makes plain that relief is to be available in all forms of claims, defences and cross-claims.[13] This is clearly appropriate.

5.9 The legislation should also be drafted expressly to permit the recovery of money allowed in account under a mistake of law. This is necessary because of earlier decisions that sums allowed in account under a mistaken view as to the plaintiff's rights cannot be recovered,[14] at least at common law.[15]

C. Benefits Other than Money

5.10 The New Zealand and Western Australian models deal expressly with "relief in respect of any payment that has been made under mistake". Whilst the phrase "payment ... made" indicates clearly that the section covers payment by way of cheque or other negotiable instrument,[16] these statutory models are confined to restitution of monetary payments made under mistake of law. The Law Reform Commission of British Columbia[17] and the Law Reform Committee of South Australia[18] have disagreed with this narrower approach and have recommended generally that relief from the consequences of a mistake should not be denied by reason only that the mistake is one of law or mixed fact and law. Those bodies propose thereby to extend the reforming legislation to all claims for relief regardless of the nature of the benefit conferred or the manner in which it was transferred.[19]

5.11 While a person to whom land or goods are transferred by mistake or who is the mistaken recipient of unsolicited services may be unjustly enriched, the development and application of correct restitutionary principles is not as simple in those areas as with mistaken payments of money.[20]

5.12 Where the benefit transferred is land, restitutionary principles become intermeshed with the practical realities of conveyancing law and practice. The general rule in Australia is that unless the vendor has no title at all to the property sold, neither law nor equity will undo a sale of land after conveyance unless there has been fraud or there is such a discrepancy between what has been sold and what has been conveyed that there is a total failure of consideration, or what amounts practically to a total failure of consideration.[21]

5.13 Even the delivery of chattels may create special problems. As the Law Reform Commission of British Columbia put it:

> Unlike money, which is both the measure of value and the medium of exchange, the value of a chattel (or services rendered) is not fixed. A delivery of heating oil, for example, is of little value to the homeowner whose household has been converted to natural gas. The recipient of a chattel may therefore subjectively devalue a benefit by showing that in his particular circumstances the benefit has a lower value than its apparent objective worth. He may even be able to show in, the circumstances that the benefit is worthless to him. A defendant may subjectively devalue a benefit by proving that the object is unwanted (and therefore worthless to him) , that he could have got it at a lesser price elsewhere, or that forcing him to pay for the benefit deprived him of some advantage which might accrue had he been able to exercise his freedom to contract with someone else.[22]

5.14 Where services are supplied the general rule at common law is that, unless the defendant has requested the benefit or freely accepted it with knowledge that it was to be paid for, there is no obligation to compensate the person who provides it, even where the recipient is enriched.[23] The valuation of the benefit to the defendant is problematical. Services cannot simply be restored, and their value to the recipient is highly subjective. In the homely words of Pollock CB: "One cleans another's shoes; what can the other do but put them on?".[24]

5.15 Whilst we are not aware of any reported cases where appropriate restitution has been refused on the ground that a benefit other than money was transferred under mistake of law, we believe that *Bilbie v Lumley* should be expelled from this field as well. We therefore agree with the Law Reform Commission of British Columbia and the Law Reform Committee of South Australia that statutory reform should extend to restitutionary claims relating to all forms of benefit that are transferred or conferred. As with payments made under mistake of fact, appropriately drafted legislation will leave undisturbed any other legal or policy rule relating to restitution in these cases.

5.16 Neither of the reports of those last mentioned bodies contains draft legislation. For that reason alone it would be unproductive to be unduly critical of the form of their recommendations. It does however appear that legislation which simply enacted that "relief from the consequences of a mistake shall not be denied by reason only that the. mistake is one of law or mixed fact and law"[25] might be construed as affecting the general law of mistake in contract. This is something which neither the Law Reform Commission of British Columbia nor the Law Reform Committee of South Australia intended to do and which we also think is best left to consideration in a different context (see para 5.18). We therefore favour following the formulation used in the New Zealand and Western Australian models, but modified to make clear that it applies in respect of any form of benefit conferred.

5.17 Summarising our recommendations thus far we propose that:

> **(a) legislation should be enacted which provides that, where relief in respect of any benefit that has been conferred under mistake is sought in any proceedings before a court by any party to the proceedings, and the relief could be granted if the mistake were wholly one of fact, the 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.**
>
> **(b) in this context "benefit" means payment of money or allowance of payment in an account, the transfer of any real or personal property or of any interest in any real or personal property and the performance of any service.**

D. Mistake in Contract

5.18 Should statutory reform go beyond restitutionary claims? It appears to be accepted that a contract will not, in general, be voidable for a mistake of law, although the courts have devised various "exceptions" which permit adjustment in many cases.[26] In the area of compromises an agreement entered into under a fundamental common mistake of law may be avoided, at least in equity, in particular circumstances.[27] In New Zealand there has been a comprehensive restatement of the common law and equitable rules regarding the granting of relief for mistake in any contract in the Contractual Mistakes Act 1977.[28] This legislation has considerable merit but the issues which it raises go far beyond the legal and policy matters we have discussed in this Report. Like the Law Reform Commission of British Columbia[29] and the Law Reform Committee of South Australia,[30] we consider that the wider issues of the effect of mistakes on contracts generally should be dealt with on another occasion. The relatively specific reform we have proposed (para 5.17) is the suitable vehicle for adjusting the problems identified earlier in this report.

II. DEFENCES

5.19 Our terms of reference require us to consider the law relating to defences to claims for the recovery of money paid under a mistake of law. The New Zealand and Western Australian models (Appendix C) upon which we have drawn contain defences relating to payments sought to be recovered following a change in the law[31] and change of position.[32] In the latter case the statutory defences extend to all forms of relief and thus include claims for the recovery of money paid under mistake of fact.

A. Change in the Law

5.20 A person who pays money to another in the belief that money is due because liability is or appears to be established by a judicial decision, not directly involving those parties, will be unable to recover that money if the decision is later overruled or reversed (see paras 3.12-3.16). The main argument advanced against recovery in these cases is the fear of opening the floodgates to many claims. As Lord Coleridge CJ put it in *Henderson v Folkestone Waterworks Co:*

> Just see what consequences would follow - that wherever there has been a reversal of judgment all the money that has been paid under the previous notion of the law can be recovered back! Has that ever been held? Can it be that every reversal of a decision may give rise to hundreds of actions to recover back money previously paid?[33]

5.21 In response to this, the New Zealand and Western Australian models expressly preclude relief under the statutory reform where the "mistake" is associated with a change in the law. Each statute[34] provides that:

> 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.

5.22 The only judicial illumination of this provision to date is to be found in the decision of the Full Court of the Supreme Court of Western Australia in *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale*.[35] Until a decision of the High Court in 1966[36] declared invalid a by-law under which the defendant Shire Council had charged licence fees, the plaintiff company had paid the fees demanded for the issue of a licence to quarry gravel and stone. The fee was calculated according to the amount of material actually quarried. After the 1966 decision of the High Court, the plaintiff demanded repayment of the fees previously paid, claiming that they had been unlawfully demanded "under colour of an office" *(colore officii)* and paid by the plaintiff involuntarily (cf para 3.27). Alternatively, the plaintiff claimed that the money had been paid by mistake. At f irst instance the plaintiff Is claim was dismissed. On appeal to the Full Court of the Supreme Court of Western Australia it was held that, although the demand for the licence fees was unlawful, there was no evidence of compulsion in the sense necessary to render the payments involuntary. The Full Court held that the fees were irrecoverable at common law, in accordance with the rule in *Bilbie v Lumley*.[37] It also held that, although the plaintiff established a ground of recovery under s23(1) of the Law Reform (Property, Perpetuities and Succession) Act 1962 (WA),[38] the defendant had made out a defence under s23(2) of that Act the terms of which are quoted in para 5.21. The Court made the following points.

> The burden of proving that the case fell within s23(2) is on the defendant, although the defendant may rely on presumptions.
>
> The defendant needed to prove that at tile time when each payment was made it was "commonly understood" that the fee was lawfully exigible.
>
> "Understood" is apt to cover everything from a positive and reasoned belief to a tacit assumption, but it must involve a state of mind, and its existence or otherwise must always raise a pure question of fact.
>
> It is not enough that the parties were each mistaken: the section predicates some generality of understanding beyond that of the parties to the action.
>
> There can be no understanding about a subject unless the mind has been in some degree directed to that subject, and the class in which the understanding must be looked for is of necessity limited to persons who for some reason or another have at least to some extent adverted to the subject. The class will be wide or narrow according to the subject in question.
>
> Once a defendant shows an apparently adequate class and a common understanding in that class, then if the plaintiff contends that the class is in truth more extensive, or that there was not within the defendant's limited class the common understanding, which would otherwise be presumed, it is necessary for the plaintiff to adduce some evidence on the subject.

5.23 A statutory defence along these lines would have particular relevance if taxpayers sought generally (under our proposed general reform: para 5.17) to be permitted to recover moneys paid to the Revenue upon later discovering that the "law had changed". But it would not be confined to those cases. it is easy to envisage situations where payments are made by one private individual to another under a mistaken belief that the law required it where a later decision revealed the error of that belief.[39]

5.24 Although the decision in *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* (para 5.22) shows that the statutory defence has scope, it is a fairly narrow scope because, even without it, many "mistakes of law" turn out on closer examination not to be so:

> Too often what is said to be a mistake of law is really a misjudgment as to the expediency of risking the outcome of a lawsuit. Payment made with this chance element in mind is in the nature of a compromise or voluntary payment, and established considerations of policy prevent relief.[40]

Lord Sumner had the same idea in mind in *Sinclair v Brougham* when he referred to "that mistake of conduct to which all of us are prone, of doing as others do and chancing the law".[41] The statutory defence was designed to make it clear that relief cannot be claimed on the ground that, as a result of the decision of a higher court over-ruling an earlier decision, the law as it was commonly understood to be is no longer the law.[42] Although it has been suggested that the section is probably unnecessary since in the cases to which it applies "it can hardly be said that there was any mistake in the law at the time the payment was made", the provision "should, however, serve to avoid doubts, and in particular will prevent any argument based on the fiction that the law has always been what the latest and most authoritative decision has decided that it is it.[43]

5.25 We believe that a statutory "change in the law" defence is appropriate. It is no longer thought that judges simply discover and declare the law and it is readily accepted that courts, particularly those of ultimate appeal, alter it from time to time.[44] Whilst the existing principles will generally deny recovery of money paid by someone who consciously chances his or her arm about the true state of the relevant facts or law, the *Bell Bros* case (para 5.22) shows that a statutory defence has work to do. Since the American doctrine of prospective overruling of precedents (which allows a change in the law to be declared by the court to operate prospectively only)[45] is not part of Australian law[46] there is a significant potential for havoc to be caused if a judicial change in the law were able to disturb completed transactions.[47] True, a change of position defence (below) mitigates against hardship suffered by those who can point to something in addition to merely having spent the money mistakenly paid. But a statutory defence precluding argument that persons who pay money in the belief that the existing state of the law is in truth the law, is really a way of underlining the reality that judges do alter the law from time to time.

5.26 There is a wider social interest in reinforcing this attitude to the process of development in the common law. It is illustrated by the doctrine that in civil and criminal appeals an extension of time to appeal will not be granted solely on the ground that a subsequent decision (to that now sought to be appealed from) has disclosed that the law as it was understood when the trial was conducted is no longer the law.[48] The reason for this ostensibly harsh doctrine was given by Street CJ in *R v Unger:*

> Although in pure theory the overruling or modification by judicial decision of previous conceptions of legal principle does no more than correct a departure from the timeless perfection of the law, the plain fact is that legal principle is constantly evolving and being moulded in the light of the changing and developing social context. Recognizing this, there has always been an unwillingness to permit the re-opening of past decisions. Indeed the process of appeal, either civil or criminal, is a comparatively recent and statutory concept - it finds no basis in the common law itself. This finality of decision in each individual case leaves the courts free to permit a judicious flexibility in the development of principle in later cases, free from inhibition lest such development may set at large disputes that have previously been resolved.[49]

5.27 Both the Law Reform Commission of British Columbia[50] and the Law Reform Committee of South Australia[51] have however recommended against the enactment of the "change in the law" defence which appears in the New Zealand and Western Australia models.[52] The Law Reform Commission of British Columbia said:

> The New Zealand legislation gives no hint of how "common understanding" is to be defined, much less proved. The use of the word "common" implies that a certain interpretation of the relevant legal rule is prevalent among a certain class of individuals whose affairs are touched by that rule. How is that class of individuals to be defined in each case? In a dispute over the imposition of a tax, whose "common understanding" is important - the taxpayer's or the taxing authority's. If the former, how is it to be ascertained and proved? If the views of both taxpayer and authority are relevant, what if they differ?[53]

As the Law Reform Committee of South Australia put it:

> For a subsection which was probably unnecessary, it is capable of raising a lot of problems.[54]

5.28 We believe that there is real force in these criticisms, but that they address the form of the "change in the law" statutory defence rather than the substantial policy which it embodies. A requirement that it be shown that the law be "shown not to have been as it was commonly understood" casts the inquiry into a sea of subjective fact, an investigation about what unknown persons other than the parties believed to be the legal position. This is illustrated by the propositions formulated by the Full Court of the Supreme Court of Western Australia in *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale*.[55] We propose that references to common understanding should be omitted from the statutory defence. By leaving the judicial inquiry as one about whether the law actually changed subsequently to the payment the courts can resort to such objective sources as the statute book, law reports and legal textbooks without the need to investigate or presume the beliefs of an undefined class of persons about the law. Sometimes, of course, the change can be when a judicial decision holds that a consensus of opinion on a point in standard text books is erroneous.

5.29 Accordingly we recommend that **relief under the general reform should not be available where the benefit was conferred at a time when the law required or allowed the benefit to be conferred or enforced, by reason only that the law is subsequently changed.**

B. Change of Position[56]

5.30 There is considerable debate in the academic literature as to whether the common law has yet recognised the defence of change of position as generally available to restitutionary claims such as claims in relation to money paid by mistake.[57] Professor Birks describes the defence in the following terms:

This defence is like estoppel with the requirement of a representation struck out. In other words the enriched defendant succeeds if he can show that he acted to his detriment on the faith of the receipt.[58]

5.31 We have already noted (para 4.18) that the New Zealand and Western Australian models of statutory reform enact a change of position defence. These provisions (which are not identical) are set out in Appendix C. The defence is of general application and extends to relief whether under the general statutory reform, in equity or otherwise. The court is empowered to refuse repayment in full or in part.

5.32 The New Zealand provision (s94B of the Judicature Act 1908) provides that relief should be denied wholly or in part if the person from whom relief is sought received the payment in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the Court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be.

5.33 Professor R J Sutton has criticised s94B on the basis that its vagueness creates a confusion "so great that the court is left merely making *ex gratia* payments with other people's money".[59] He points out that the requirement for the court to look at the equities on both sides is an entirely new doctrine of mistake, based not on strictly legal considerations arising out of the payment itself, but upon the surrounding circumstances and subsequent events. The power, which he described as "arbitrary", is questioned as going beyond what is desirable in commercial matters.[60]

5.34 Section 94B of the New Zealand Judicature Act was considered by the New Zealand Court of Appeal in *Thomas v Houston Corbett & Co*.[61] The fact that all three members of the Court differed in their initial assessments attests to the uncertain operation of the statutory defence. In that case the plaintiffs (respondents) and the defendant (appellant) were victims of a rogue named Cook, an employee of the plaintiffs who were a firm of solicitors. The defendant gave 400 pounds to Cook to invest, but he converted the money to his own use.

> When the defendant requested the return of his money Cook fraudulently induced the plaintiffs to pay 1381 pounds from the plaintiffs' trust account into the defendant's bank account. The defendant, relying on Cook's representation that some 840 pounds was due to the other investors, drew a cheque in Cook's favour for that amount. When the plaintiffs discovered the fraud an action was brought to recover the 1381 pounds as money paid to the defendant under a mistake of fact. The main issue before the Court of Appeal was whether the defendant could rely on s94B (set out in para 5.32). The court took the view that s94B gave it the power to consider which party had more opportunity to avoid the loss, and jurisdiction to apportion the loss between the parties. The three judges expressed differing views as to where the balance of

> responsibility lay, before concurring in an order that the defendant should repay only one-third of the 840 pounds (that being the amount of the defendant's detrimental reliance).

5.35 Rather than being the essence of the defence, the fact that the defendant had changed his position in reliance upon the receipt of the funds was regarded only as a ground for apportioning the loss without regard to the change of position. "The court ... rejected the alternative approach that the appellant should have to repay only whatever unjust enrichment remained in his hands, treating the change of position more as a prerequisite for equitable relief than a factor which should determine its extent."[62] By preferring a moral assessment of who should bear the loss, the court made the application of the statutory defence an arbitrary and subjective exercise. We agree with the Law Reform Commission of British Columbia that s94B, so interpreted, clearly goes far beyond what is required to give effect to a change of position defence. While the idea of apportioning losses inflicted on innocent parties by a rogue is not itself inappropriate, such a solution goes outside the context of the issues involved in recovery of money paid under mistake.[63]

5.36 The Western Australian legislation (s125(1)) of the Property Law Act 1969) requires recovery to 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 and interests through them], it is inequitable to grant relief, or to grant relief in full.

The words in square brackets distinguish the Western Australia model from the New Zealand provision (para 5.32) and require the court to disregard the position of the person who paid the money by mistake or those who acquire rights or interests through that person. One commentator has suggested that it is difficult to see how the Court is to achieve equity if it is obliged to disregard the plaintiff's position entirely,[64] although the presence of the words in square brackets invites the balancing process evidenced in *Thomas' Case* (para 5.34).

5.37 We are firmly of the view that it would be unjust to compel the return of moneys paid under mistake to a payee who, on the strength of receiving a payment to which he or she bona fide believes himself or herself to be entitled, spends the funds in such a way that it would be inequitable to compel repayment. While this was one of the reasons given in *Brisbane v Dacres* for the general rule denying recovery of moneys paid under mistake of law (see para 4.6), the injustice is equal whatever the type of mistake. The innocent payee is in either case ignorant of the very existence of the mistake and thus quite unconcerned about its nature.

5.38 After an extensive review of the authorities,[65] the Law Reform Committee of South Australia recommended in 1984 the adoption of a statutorily defined change of position defence. It proposed that the defence should be modelled on s94B of the New Zealand Judicature Act but incorporating a requirement that the alteration in position should reasonably flow from the mistake.[66] That Committee considered that (unlike the United States situation) the English and Australian common law did not recognise a change of position defence except in the limited fields of estoppel and payments by agents.[67]

5.39 On the other hand, the Law Reform Commission of British Columbia recommended against the enactment of a provision similar to s94B of the New Zealand Act, firstly on the basis that its adoption could have the undesirable effect of crystallising the defence of change of position and fettering its development at common law,[68] and secondly because the New Zealand provision as interpreted in *Thomas' Case* (para 5.34) apparently goes beyond what is required to redress any problems arising out of an innocent party changing his or her position.

5.40 The interpretation of the statutory provisions is not, however, the real question to be decided. The real issue is whether a "change of position" defence in any form should be enacted. If it were, it would put the issue beyond doubt, but perhaps at the expense of the correct principles being worked out on a case by case basis.

5.41 There have been decisions in England, Canada and Australia since the second edition of Goff and Jones *Law of Restitution* (on which the Law Reform Committee of South Australia appears to have relied) which suggest that the common law in those countries has now accepted that it is a defence to a claim for the return of money paid under mistake of fact that the payee has changed position in good faith on the strength of the

payment.[69] Recent dicta in the Court of Appeal in New South Wales[70] indicate that the court would be receptive to a change of position defence not based on estoppel, although Clarke J has more recently stated (obiter), in *National Mutual Life Association of Australia Ltd v Walsh*,[71] that "nowithstanding my view that the defence should be available I consider that I should follow the Court of Appeal decision which has stood for 70 years[72] and leave it to appellate courts to decide whether it was erroneous". The fact that the availability of the defence in a proper case has been accepted by the Supreme Court of Canada, by Goff J (as he then was) in the Court of Queen's Bench in England and by the Full Court of the Supreme Court of Victoria[73] makes us sufficiently confident that the defence will in due course be accepted as part of the common law in this state to refrain from seeking to encase it in what could be a statutory straitjacket. Like the Law Reform Commission of British Columbia (para 5.39) we fear that a statutory embodiment of such a defence could have the undesirable effect of fettering appropriate development of a change of position principle.

5.42 The case law in the United States[74] and Canada[75] shows how the defence has been firmly accepted in those jurisdictions and how various issues of principle are capable of being worked out in the traditional case-by-case way. Change of circumstances may be a defence or a partial defence.[76] At least in the United States, the courts will weigh equities and deny repayment flon patent equitable considerations"[77] if the defendant has changed position. The plaintiff's negligence may be relevant when the defendant has changed position.[78] Conversely, where the defendant has been at fault, for example by misrepresenting the position to the plaintiff or failing to use reasonable diligence to ascertain facts, or if the defendant discovered the mistake before changing position, the defence will be denied.[79]

5.43 Courts in those two jurisdictions have also grappled with the circumstances and nature of the defendant's expenditure. Mere expenditure will not constitute a change of position.[80] Similarly expenditure for the defendant's own benefit, including the purchase of an automobile,[81] or of stock,[82] or the payment of existing debts[83] have been held insufficient to found a defence. At least in Canada, the mere fact that a defendant is without means to pay the judgment is not sufficient to constitute the defence.[84] However, money spent solely in reliance on the payment, from which the defendant no longer retains a benefit, will constitute a good defence, for example payment of a deceased's hospital bill in reliance on mistakenly overpaid death benefits.[85] If the defendant has lent the money to a third party that in itself is not sufficient because "until all reasonable efforts have been made by the defendant to get money back and have proved unavailing, how can it be said that it would be inequitable to permit a recovery?".[86]

5.44 We have referred to this selection of the substantial body of North American case law to illustrate the variety of situations likely to attract a change of position defence and to show that Australian courts will be able to draw on a rich jurisprudence for guidance as they work out the detailed principles relating to the defence.

5.45 We therefore recommend that **it would be premature to enact a statutory form of change of position defence in relation to benefits transferred by mistake of fact or law,**

since it appears that such a defence is already generally available in appropriate circumstances in Australia.

5.46 We have already referred (paras 3.18-3.19) to the rule which allows the Crown to recover moneys mistakenly disbursed by a servant of the Crown regardless of the nature of the mistake. It has, indeed, been held in Victoria that the constitutional principle against unauthorised disbursement of public funds is so strong that defences of estoppel or change of position are not available in this specific field.[87] The Law Reform Commission of British Columbia recommended repeal of this rule, arguing persuasively that:

> The recognition of the legislature's right to control the public purse need not have as a consequence a rule framed so broadly as to create the potential for unjust results. The balance between private and public right is best adjusted by permitting the recipient of improper disbursements to raise any defence available to him on the facts of the case.[88]

This recommendation has been substantially implemented in British Columbia in s67 of that Province's Financial Administration Act 1961 and the Law Reform Committee of South Australia has supported its adoption in that state.[89] We incline to the view that there is no reason why the Crown should, in this regard, be in any preferred

position. However we conclude that it would be premature for us to propose statutory intervention into an area that could be affected by the clarification of the common law about the defence of change of position generally.

III. SOME MATTERS OF DETAIL

A. Repayment by Instalments

5.47 As we have already noted, the Western Australian statute (Property Law Act 1969 s125(2)) provides that:

> 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.

The Supreme Court,[90] the District Court[91] and Local Courts[92] of New South Wales have jurisdiction to order that a judgment debt, however obtained and for whatever type of debt, may be paid by instalments. Such orders may be varied or discharged as circumstances dictate. In our view there seems to be no reason why judgment debts resulting from a restitutionary order to repay money paid by mistake should be singled out for special attention or treatment in any statutory reform. It is clear that the money should be repaid. If the debtor's means make immediate repayment inequitable then the court can exercise its general jurisdiction to stay execution on terms. We therefore recommend that **there is no need for legislation relating to payment of money by mistake to confer express power on the court to allow judgment debts to be repaid by instalments.**

B. Restitution from Public Authorities

5.48 We have mentioned already (para 3.27) the body of case law determining when moneys not due to public authorities can be recovered by those who through mistake or lack of courage to press their rights do not resist payment when demanded. Short of a statutory provision allowing recovery (see para 3.24) or an agreement between payer and payee that moneys will be repaid should it later turn out that they were not due,[93] restitution will be refused unless the payer can show that there was some element of coercion other than invoking the legal process added to the illegality of the impost itself.[94]

5.49 This state of the law has been criticised by Professor Birks as being out of step with a public law approach to the problem, which would relate restitution directly to the administrative law doctrine of *ultra vires*.[95] It has been argued that the current law's requirement of duress inadequately protects the high constitutional principle that there shall be no taxation without the consent of Parliament, for it means that in the ordinary case money levied without parliamentary consent can be kept.[96] Nevertheless the need for proof of duress in the general case is well enshrined in recent binding authority and it reflects, perhaps, a concession that payments to public authorities differ from those between private individuals in some respects. The payer in the former category may be more reasonably expected to know his or her own legal or factual position before making the payment than an otherwise disinterested bureaucracy which is largely dependent on the honesty of the taxpayer for information relevant to liability.[97] Underlying these rules is the belief that "public bodies have their own interest in the security of their receipts, and society has a wider interest in the stability of their finances".[98] A principle allowing recovery on mere proof of the invalidity of the public authority's demand for payment would throw the finances of the country into utter confusion. After several years questions might be raised which, on some suddenly discovered interpretation of a taxing Act, whether internal revenue or Customs, would unexpectedly require the return of enormous sums of money. and quite disorganize the public treasury.[99]

5.50 In New South Wales there are statutory provisions allowing recovery of stamp duties, land tax and pay-roll tax paid and then found to be not due.[100] These rights are in some cases subject to stringent time limitations,[101] or to a favourable exercise of an administrative discretion vested in the relevant Commissioner.[102] In the case of death duties, it is expressly provided that no refund shall be made in respect of any property wrongly included in the dutiable estate by reason of any mistake in the construction of the Act.[103] Whether these limited statutory rights are in lieu of any common law right of recovery where the taxpayer can establish the requisite element of coercion added to the impost that was not in fact due is a question of statutory interpretation.[104]

5.51 For many taxes or imposts, however, there is no statutory provision relating to repayment and the taxpayer's rights of recovery are governed by the general law. Added to the comparative difficulty of threading a way past the general rule in *Bilbie v Lumley* there is, in New South Wales, a stringent time limitation to be found in s2 of the Limitation of Actions (Recovery of Imposts) Act 1963 which provides that "no action or proceeding shall be brought to recover from the Crown or the Government or the State of New South Wales or any Minister of the Crown, or from any corporation, officer or person or out of any fund to whom or which it was paid, the amount or any part of the amount of any tax, fee, charge or other impost paid, under the authority or purported authority of any Act... after the expiration of twelve months after the date of payment". The bar does not apply to any action or proceeding brought pursuant to any specific provision of any Act providing for the mode of challenging the validity or for the recovery of the whole or any part of any tax, fee, charge or other impost actually paid.[105]

5.52 If, as we propose, the general rule in *Bilbie v Lumley* should be repealed by statute, the question arises whether the Crown should be bound by the statute. In our view there is no reason why the position of the Revenue should, in this respect, be any different from that of private persons. A regime which allows recovery of money paid under mistake of law arguably would act as an incentive to taxpayers to pay moneys claimed due by or on behalf of a public authority.[106] In any event the Revenue would, in our view, be amply protected by the enactment of the "change in the law" defence which we propose (para 5.29). Taxpayers who chance their arm by making a payment with the intent of seeking recovery should others establish the invalidity of the relevant tax will also be defeated by the existing common law rules governing payments made under mistake (see para 5.24). Added to this are the very stringent general time limitations to which we have drawn attention (para 5.51) and, as a last resort, the New South Wales Revenue's capacity to protect itself by Act of Parliament should it deem it appropriate that an invalid impost should be validated retrospectively.[107] Accordingly we recommend that **the statutory reforms which we propose should bind the Crown.**

C. Retrospectivity

5.53 Since the reforms we have proposed will correct an unjust and technical anomaly the Commission recommends that **the statutory reforms which we propose should apply to a mistake whenever made.** Naturally, the Limitation of Actions (Recovery of Imposts) Act 1963 and the Limitation Act 1969[108] will continue to apply to bar State claims.

FOOTNOTES

1. Law Reform Commission of British Columbia *Report on Benefits Conferred Under a Mistake of Law* (1981) at 68.

2. Compare S J Stoljar *Quasi-Contracts* at 24-26; B Smith "Correcting Mistakes of Law in Texas" (1931) 9 *Texas L Rev* 309 at 330. See also *National Mutual Life Association of Australasia Ltd v Walsh* Supreme Court of New South Wales, Clarke J, unreported 13 March 1987).

3. Law Reform Commission of British Columbia, note 1 at 82.

4. See *South Australian Cold Stores Ltd v Electricity Trust of South Australia* (1957) 98 CLR 65 at 74-75.

5. See, for example, Kiriri Cotton Co Ltd v Dewani [1960] AC 192; *Hydro Electric Commission of Township of Nepean v Ontario Hydro* (1982) 132 DLR (3d) 193.

6. See generally *Porter v Latec Finance Co (Qld) Pty Ltd* (1964) III CLR 177; *Commercial Bank of Australia Ltd v Younis* [1979] 1 NSWLR 444. We agree with the Law Reform Commission of British Columbia that these matters are best left to continue to be worked out on a case by case basis, and that the legislation should not seek to define them: Law Reform Commission of British Columbia, note 1 at 69-70.

7. Sir Owen Dixon has said that a mistake as to the existence of a compound event consisting of law and fact is in general one of fact: *Thomas v The King* (1937) 59 CLR 279 at 306.

8. *Holt v Markham* [1923] 1 KB 504; *Avon CC v Howlett* [1983] 1 All ER 1073-at 1084-5.

9. As to rectification where there is a mistake of law see R P Meagher, W M C Gummow and J R F Lehane *Equity Doctrines and Remedies* 2nd ed (1984) para 2611.

10. Mistake will in some circumstances constitute a defence to a claim for specific performance: *Id* paras 2017-2018.

11. See *Sinclair v Brougham* [1914] AC 398.

12. See also Chapter 3 note 12.

13. For a decision at common law, denying recovery by way of set off or conterclaim of money paid under a mistake of law, see *Fisher v Luke* [1926] VLR 190. As to cross-claims in New South Wales, see Supreme Court Act 1970 s78, Supreme Court Rules Part 6, District Court Rules Part 20 and *Stehar Knitting Mills Pty Ltd v Southern Textile Converters Pty Ltd* [1980] 2 NSWLR 514.

14. *Skyring v Greenwood* (1825) 4 B & C 281 (107 ER 1064); *Halsbury's Laws ofEngland* 4th ed vol 32: "Mistake" para 72.

15. See *Daniell v Sinclair* (1881) 6 App Cas 181 at 190.

16. B J Cameron "Payments Made Under Mistake" (1959) 35 *New Zealand LJ* 4 at 5.

17. Law Reform Commission of British Columbia, note 1 at 67, 82.

18. Law Reform Committee of South Australia *Report Relating to the Irrecoverability of Benefits Obtained by Reason of Mistake of Law* (SALRC 84) (1984) at 29, 32.

19. Law Reform Commission of British Columbia, note 1, at 82; Law Reform Committee of South Australia, note 18 at 29. This deficiency of the New Zealand provision is also criticised by R J Sutton "Mistake of Law - Lifting the Lid of Pandora's Box" in J F Northey ed, *The A G Davis Essays in Law* 218 at 223-5.

20. For general discussion, see Lord Goff of Chieveley and G Jones *The Law of Restitution* 3rd ed (1986), chaps S and 6; Law Reform Commission of British Columbia, note 1, chap 3.

21. *Svanosio v McNamara* (1956) 96 CLR 186. *Compare Lukacs v Wood* (1978) 19 SASR 520.

22. Law Reform Commission of British Columbia, note 1 at 36-37.

23. See, for example, *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234 at 238 (Bowen LJJ; *Pettit v Pettit* [1970] AC 777 at 818 (Lord Upjohn).

24. *Taylor v Laird* (1856) 25 LJ Ex 329 at 332.

25. See note 19.

26. See *Svanosio v McNamara*, note 21 at 196 (Dixon CJ and Fullager J)*; K* E Lindgren, J W Carter and D J Harland *Contract Law in Australia* (1986) paras 1212-1213.

27. See the discussion of the various categories of compromise cases in Law Reform Commission of British Columbia, note 1 at 29-32. See also Re Roberts [1905] 1 Ch 704.

28. The Act followed the report of the New Zealand Contracts and Commercial Law Reform Committee *Report on the Effect of Mistakes on Contracts* (1976).

29. Law Reform Commission of British Columbia, note 1 at 72-3.

30. Law Reform Committee of South Australia, note 18 at 33-35.

31. Judicature Act 1908 (NZ) s94A(2); Property Law Act 1969 (WA) s124(2).

32. Judicature Act 1908 (NZ) s94B; Property Law Act 1969 (WA) s125(1).

33. (1885) 1 TLR 329 *(arguendo)*.

34. Judicature Act 1908 (NZ) s94A(2); Property Law Act 1969 (WA) s124(2).

35. [1969] WAR 155. The decision was reversed on appeal, (1969) 121 CLR 137, but on different grounds.

36. *Marsh v Shire of Serpentine-Jarrahdale* (1966) 120 CLR 572.

37. On this point the decision was reversed by the High Court on appeal, that Court holding that the money had been exacted *colore officii*.

38. Now s124(1) of the Property Law Act 1969 (WA). That section is set out in Appendix C. Although the Court said that "it is common ground that at all material times both parties believed that cl 7 of the by-law was valid: this was a mistake of law common to both parties, and the case falls within the terms of" s124(1) ([1969] WAR 155 at 158), we do not read this as holding that common mistake is essential to make out a case for recovery under the statutory reform.

39. Compare *Brisbane v Dacres* 5 Taunt 143 (128 ER 641); *Derrick v Williams* [1939] 2 All ER 559. In the United States the issue arose in a critical way in a group of cases arising under the Legal Tender Acts passed during the Civil War, which made United States notes (greenbacks) legal tender for most public and private debts. In 1870 the United States Supreme Court held the legislation invalid as applied to pre-existing debts, but the following year the decision was overruled. Debtors who paid during this interval in gold or its equivalent, on the basis of the earlier decision, sought restitution of the "overpayment". In all cases relief was denied: see Palmer *The Law of Restitution* vol III para 14.27 at 353-354.

40. Note 45 *Harv L Rev* at 340.

41. [1914] AC 398 at 452. See also note 4.

42. Cameron, note 16 at S. (Mr Cameron was a member of the New Zealand Law Revision Committee which proposed the New Zealand model upon which we have drawn.)

43. *Ibid*.

44. Compare *R v National Insurance Commissioner; Ex parte Hudson* [1972] FAC 944 at 1026 per Lord Simon.

45. The constitutional validity of the technique of making a change in decision operate prospectively only was established by the Supreme Court in *Great Northern Railway v Sunburst Oil and Refining Co* 287 US 358 (1932).

46. The possibility of introducing such a doctrine is discussed in *R v National Insurance Commissioner; Ex parte Hudson* [1972] AC 944 at 1015, 1026 and by Mason J (as he then was) in *Babaniaris v Lutony Fashions Pty Ltd* (High Court, unreported 5 June 1982).

47. See Note "The Effect of Overruled and Overruling Decisions on Intervening Transactions" (1934) 47 *Harv L Rev* 1403. See also note 39. Compare cl 14 of Australian Bill of Rights Bill 1985 (Cth).

48. Re Berkeley [1945] Ch 1; *Piening v Wanless* (1968) 117 CLR 498; *R v Ramsden* (1972) Cr L Rev 547; *R v Unger* [1977] 2 NSWLR 990. Compare also *Eggins v Brooms Head Bowling and Recreational Club Ltd* (1986) 5 NSWLR 521.

49. *R v Unger*, note 48 at 995-6.

50. Law Reform Commission of British Columbia, note 1 at 70-72.

51. Law Reform Committee of South Australia, note 18 at 30-31.

52. See para 5.21.

53. Law Reform Commission of British Columbia, note 1 at 70.

54. Law Reform Committee of South Australia, note 18 at 30.

55. See para 5.22.

56. Particular indebtedness is expressed to Ms Celia Caughey of Auckland who made available her unpublished BCL (Oxford) thesis “A Change of Position Defence to Recovery of Mistaken Payments in English Law” containing an extensive review of the English, Canadian, New Zealand, American and Australian law on this topic.

57. See generally Lord Goff of Chieveley and G Jones Law of Restitution 3rd ed (1986) chap 39; Peter Birks *An Introduction to the Law of Restitution* (1985) at 410-415. For an argument that the Englis cases provide no conclusive authority against the defence of change of position, on the ground that in no case where the defence would have been applicable was it fully argued and rejected, see Caroline A Needham “Mistaken Payments: A New Look at an Old Theme” (1978) 12 *UBCLR* 159 at 192-198.

The lastmentioned author also points out (at 199-200) that all of the early English authorities were decided at a time when the now outmoded view of the action for money had and received as a contractual. action was in vogue.

58. Peter Birks *An Introduction to the Law of Restitution* (1985) at 410.

59. R J Sutton, note 19 at 243.

60. *Id* at 238.

61. [1969] NZLR 151.

62. Celia Caughey, note 56 at 54.

63. Law Reform Commission of British Columbia, note 1 at 79.

64. E K Braybrooke (1963-1964) *Univ of WA Law Rev* at 233 note 21.

65. Law Reform Committee of South Australia, note 18 at 24-27.

66. *Id* at 31-33.

67. *Id* at 25. The leading early authorities supporting this stricter view are *Bayliss v Bishop of London* [1913] 1 Ch 127 and *R E Jones Ltd v Waring & Gillow Ltd* [1926] AC 670. see generally, Lord Goff of Chieveley and G Jones Law of Restitution 3rd ed (1986) Chapter 42. For a more recent decision containing dicta to similar effect, see *National Westminster Bank Ltd v Barclays Bank International* [1975] QB 654.

68. Law Reform Commission of British Columbia, note 1 at 78.

69. Rural Municipality of *Storthoaks v Mobil Oil Canada Ltd* (1975) 55 DLR (3d) 1; Barclays Bank Ltd v W J Simms Sons & Cooke (Southern) Ltd [1980] 1 QB 677 at 695-6 per Goff J; *Bank of New South Wales v Murphett* (1983) VR 489. Cf also *Kleinwort, Sons & Co v Dunlop Rubber Co* (1907) 97 LJ 263 at 264 per Lord Loreburn; and *Kerrison v Glynn Mills Currie & Co* (1912) 81 LJKB 465 at 472 per Lord Mersey for other indications of receptiveness in English law to a defence based on detrimental change of position without reference to other elements of estoppel. A recent survey of the arguments for and against the adoption of a change of position

defence in English law concludes that the present uncertainty about the defence will be resolved in favour of admitting it: Peter Birks *An Introduction to the Law of Restitution* at 414-415.

70. In *Commercial Bank of Australia Ltd v Younis* [1979] 1 NSWLR 444 the Court of Appeal permitted recovery of a payment made in ignorance of the fact that a cheque had been countermanded. Hope JA said (at 450): "If the Bank cannot recover from Younis, it cannot recover from anyone the money which it mistakenly paid, and Younis will have been unjustly enriched at the Bank's expense .... There has been no prejudice to Younis, as a result of the payment or of the negligence, which would make it unjust to require the repayment of tne money." In Westpac Banking Corporation v Australia and New Zealand Banking Group (court of Appeal, unreported 20 June 1986) the case turned on the application of the specific rule that an agent to whom money is paid by mistake has a defence to an action for its recovery if the agent has paid over that money to the principal. McHugh JA however noted that "the rule that an agent is not obliged to repay moneys which he has paid away at the direction of his principal is a particular application of the more general principle that the recipient of a mistaken payment is not obliged to repay moneys when he would suffer detriment to an extent that would make it unjust for him to have to repay the *Holt v Markham* [1923] 1 KB 504: *Grundt v Great Boulder Gold Mines Pty Ltd* (1937) 59 CLR 641 at 674-675".

71. Supreme Court of New South Wales, unreported 13 March 1987 at 30 of transcript of judgment.

72. *Bayliss v Bishop of London* [1913] 1 Ch 127.

73. See first three authorities cited in note 69.

74. See generally American Law Institute *Restatement of the Law of Restitution* (1936) Art 142; 40 ALR 2d 997.

75. See generally G H L Fridman and J G McLeod *Restitution* (1982) at 605-613.

76. *Sawyer v Mid-Continent Petroleum Corporation* (1956) 236 F 2d 518. Compare K G Richolson "Recovery of Money Paid Under a Mistake of Fact" (1986) 60 ALJ 459 at 465-467.

77. *Bank of New York v Simmons & Co* (1921) 190 NYS 602.

78. *Messner v County of Union* (1961) 167 A 2d 897; *Maricopa County v Cities and Towns of Avondale* (1970) 467 P 2d 949.

79. *E R Squibb & Sons v Chemical Foundations* (1937) 93 F 2d 475.

80. *Old Colony Trust Co v Wood* (1947) 74 NE 2d 141; *Rural Municipality of Storthoaks v Mobil Oil Canada Ltd* (1975) 55 DLR (3d) 1; *Hydro Electric Commission of Nepean v Ontario Hydro* (1982) 132 DLR (3d) -1793 at 214. See also *K J Davies (1976) Ltd v Bank of New South Wales* (1981) NZLR 262 at 264-265 and K G Nicholson, note 72 at 464-465.

81. *Picotte v Mills* (1918) 203 SW 825.

82. *Smith v Rubel* (1932) 13 P 2d 1078.

83. *Donner v Sackett* (1916) 97 A 89. See also Re Diplock [1948] Ch 465 at 548-549.

84. *Hydro Electric Commission of Nepean v Ontario Hydro* note 69 at 216. Compare *Moritz v Horsman* (1943) 9 NW 2d 868.

85. *Amalgamated Association v Danielson* (1964) 128 NW 2d 9.

86. *Phetteplace v Bucklin* (1893) 18 RI 297. See also *Bank of New York v Simmons & Co* (1921) 190 NYS 602.

87. Commonwealth v Burns [1971] VR 825; *Attorney-General v Gray* [1977] 1 NSWLR 406.

88. Law Reform Commission of British Columbia *Report on the Recovery of Unauthorised Disbursements of Public Funds* (1980) at 14.

89. Law Reform Committee of South Australia, note 18 at 32-33.

90. Supreme Court Rules, Part 44 rule 5.

91. District Court Rules, Part 31A.

92. Local Courts (Civil Claims) Act 1970 s40.

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

94. See authorities cited in para 3.28.

95. See P Birks “Restitution from Public Authorities” (1980) 33 CLP 191.

96. Id at 203-204. See also his *Introduction to the Law of Restitution* (1985) at 294-299.

97. Although a contrary view is that if taxing authorities expect taxpayers to make full disclosure they ought to maintain the highest standards of probity and fair dealing: see *Sebel Products Ltd v Commissioners of Customs and Excise* note 93 at 413-414 per Vaisey J.

98. Birks, note 95 at 204. It is very difficult to envisage circumstances where the public body would be able to rely on any change of position defence.

99. *Sargood Bros v The Commonwealth* (1910) 11 CLR 258 at 303 per Isaacs J. See also *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83 at 100.

100. See chapter 3 note 41.

101. For example Land Tax Management Act 1956 s16(2).

102. For example Land Tax Management Act 1956 s16(1); Pay-roll Tax Act 1971 s19. See also Stamp Duties Act 1920 s124 where the administrative discretion is subject to the court’s power to extend time.

103. Stamp Duties Act 1920 s140(1). Death duties are no longer exigible in relation to the estates of persons dying on or after 31 December 1981.

104. See *Ochberg v Commissioner of Stamp Duties* (1943) 43 SR (NSW) 189; *Kelly v The King* (1902) 27 VLR 522.

105. Limitation of Actions (Recovery of Imposts) Act 1963 s2(2).

106. See *Sebel Products Ltd v Commissioners of Customs and Excise* [1949] 1 Ch 409 at 413-414.

107. Compare War Charges (Validity) Act 1925 (UK) which was passed to deal with the problem exposed by *Attorney General v Wilts United Dairies* (1922) 37 TLR 884.

108. Note s56 of the Limitation Act 1969 which provides in effect that time does not run in relation to a course of action for relief from the consequences of a mistake until the person with the cause of action discovers, or may with reasonable diligence discover, the mistake.

Appendix A - Restitution (Mistake of Law) Bill 1987

NEW SOUTH WALES

TABLE OF PROVISIONS

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3. Report to be an aid to interpretation

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RESTITUTION (MISTAKE OF LAW) BILL 1987

NEW SOUTH WALES

A BILL FOR

An Act to enable the restitution of benefits conferred under a mistake of law.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:

Short title

1. This Act may be cited as the "Restitution (Mistake of Law) Act 1987".

Commencement

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor and notified by proclamation published in the Gazette.

Report to be an aid to interpretation

3. (1) It is the intention of Parliament that this Act is to give effect to recommendations made in a report of the Law Reform Commission laid before each House of Parliament, being the report on Restitution of Benefits Conferred under Mistake of Law, and accordingly, in the interpretation of this Act, regard may be had to that report, including the draft legislation set out in that report.

(2) Subsection (1) does not prevent regard being had, in the interpretation of this Act, to any matter to which regard might have been had if that subsection had not been enacted.

Act binds Crown

4. This Act binds the Crown, not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

Interpretation

5. In this Act-

"benefit" includes the payment of money, the crediting of an account, the transfer of any real or personal property or of any interest in any real or personal property and the performance of any service.

Application of Act

6. (1) This Act applies to a benefit conferred under a mistake, whether the benefit was conferred before or after the commencement of this Act.

(2) This Act does not apply to a benefit in respect of which an order of a court has, before the commencement of this Act, been made.

(3) Nothing in this section affects the application of the Limitation of Actions (Recovery of Impost) Act 1963 or the Limitation Act 1969.

Recovery of benefits conferred under mistake

7. If relief in respect of any benefit conferred under mistake is sought in any proceedings before a court by any party to the proceedings and the relief could be granted if the mistake were wholly one of fact, the relief shall not be denied only because the mistake is one of law, whether or not it is in any degree also one of fact.

Effect of changes in the law

8. For the purposes of section 7, a person is not mistaken as to the law only because, after a benefit is conferred, the law is changed.

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Appendix C - Statutory Reform in Other Jurisdictions

1. New Zealand

Judicature Amendment Act 1958 s2 (inserting ss94A and 94B in the Judicature Act 1908)

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 civil proceedings 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.

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

(By the Judicature Amendment (No 2) Act 1985 the words "civil proceedings" were substituted for “an action or other proceeding” in s94A(1).)

2. Western Australia

Property Law Act 1969 ss124 and 125 (originally Law Reform (Property, Perpetuities, and Succession) Act, 1962 ss23 and 24)

124. (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.

125. (1) Relief, whether under section 124 of this Act or in equity or otherwise, in respect of any payment made under mistake, whether of law or fact, shall be denied wholly or in part if the person from whom relief is sought received the payment in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the Court, having regard to all possible implications in respect of the parties (other than the plaintiff or claimant) to the payment and of other persons acquiring rights or interests through them, it is inequitable to grant relief, or to grant relief in full.

(2) Where the Court makes an order for the repayment of any money paid under a mistake, the Court may in that order direct that the repayment shall be by periodic payments or 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.

Appendix D - Table of Statutes

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