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# Recovery of Money Paid Under Mistake of Law

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# RECOVERY OF MONEY PAID UNDER MISTAKE OF LAW

FEW questions which come before the courts seem more difficult to settle than those growing out of the maxim, *ignorantia juris non excusat.* The fact that the most recent decisions bearing on the subject are as much at variance and as conflicting as those rendered more than a century ago, is the excuse, if not a justification, for this article. It is proposed, however, to examine only that phase of the subject found in this inquiry: "Can one recover from another money paid under mistake of law to which the payee is not entitled, and which he can not in good conscience retain?"

No one looking at this question for the first time would hesitate to answer it in the affirmative. It is only after one has gone through the decisions and has felt the weight of precedent and *stare decisis* that he withholds his judgment. For is it not conceded that the defendant in such a case had no right to the property which by mistake he has received, and that, having thus obtained, he has no claim in conscience to keep, except perhaps that the law will prevent the true owner from interfering with his possession? But if one may judge from the number of decisions answering this question in the negative, from courts of recognized learning and ability, he must conclude that this view is sustained by the weight of authority, whether by the better reason or not. In the leading case of *Clarke* v. *Dutcher,*[1] Justice SUTHERLAND draws the distinction quite clearly between payments under mistake of law and payments under mistake of fact and gives us to understand that it matters nothing that defendant holds the money against conscience if he secured it by

[1] 9 Cow. (N. Y.) 674.

mistake of law. He contends that there is strong and sufficient reason for holding that conscience and equity will govern a case where the mistake is one of fact, but that these elements do not in any wise govern in cases of mistake of law. A brief quotation will serve to show his position in this matter. He says: "If money paid under a mistake of the law, though with a full knowledge of the facts in the case, can be recovered back in all cases where the party to whom it is paid is not in conscience and equity entitled to it, what is the practical distinction between a mistake in fact and a mistake in law? A party who has paid money under a mistake in fact cannot recover it back unless he is equitably entitled to it. The inquiry in every case therefore would be, not whether the money was paid under a misapprehension of the law, or in ignorance of the fact, but whether the party to whom it was paid can in equity and conscience retain it." The learned Justice then proceeds in an elaborate argument to show that this proposition cannot be maintained, as it would completely break down the distinction between the right to recover under mistake of law and mistake of fact.

We contend that his logic in this regard was sound, and regret that he should have permitted the very few precedents then in existence, making a distinction between the two cases, to have turned him from so just a conclusion. Proceeding, he says: "Chancellor KENT thought such a distinction existed when he said in *Lyon* v. *Richmond*, 2 Johns. Ch. 51, 'Courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of facts, though under a mistake of law.'" Concluding his opinion, SUTHERLAND, J., says: "The principle upon which courts refuse to relieve against mistakes in law is that in judgment of law there is no mistake, every man being held for the wisest reason to know the law. The act, therefore, against which the party seeks relief is his own voluntary act, and he must abide by it. This principle steers entirely clear of the conscience or equity of the transaction."

Ordinarily one may not be deprived of his property without his consent. If through fraud, accident or mistake of fact another comes into possession of it, the owner may recover it in an action at law. One may have no more intended to yield up his own title, or to pass title to another when his money was paid or his property given up under mistake of law, than if the same transaction had occurred under a mistake of fact, but upon the theory that "ignorance of the law does not excuse" or the still more radical maxim that "every one is presumed to know the law" courts hold that such pay-

ments or acts are voluntary, and therefore beyond their power or province to remedy.[2]

How absurd the maxim appears when put in this latter form! We readily agree with MAUL, J., in *Martindale* v. *Faulkner*,[3] when he says: "There is no presumption in this country that every one knows the law. It would be contrary to common sense and reason if it were so." And we concur in the expression of ABBOTT, C.J., in *Montrion* v. *Jefferies*,[4] when in charging the jury he said: "God forbid that it should be imagined that an attorney, or a counsel or even a judge, is bound to know all the law."

In *Jones* v. *Randall*,[5] Dunning, in his argument before the court, asserted that the laws of the country were clear, evident and certain. To which Lord MANSFIELD, in delivering his opinion, responded: "As to the certainty of the law mentioned by Mr. Dunning, it would be very hard upon the profession if the law was so certain that everybody knew it; the misfortune is that it is so uncertain that it costs much money to know what it is even in the last resort."

In *Stedwell* v. *Anderson*[6] the chief justice rendering the court's opinion said: "We mean distinctly to assert that where money is paid by one under a mistake of his rights and his duties, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back in action of *indebitatus assumpsit*, whether such mistake be one of fact or law, and this we insist may be done both upon the principle of Christian morals and the common law."

What, then, is the basis of those decisions forming what seems to be the weight of authority, both in this country and in England, holding that money paid under mistake of law cannot be recovered back? Have these courts mistaken the meaning, or misapplied the maxim, *ignorantia juris non excusat?* Or is this maxim one which should no longer be quoted as a correct brief statement of a legal principle? For it is certain that with many courts and law writers agreeing with the above statement quoted from the opinion in

[2] Brisbane *v.* Dacres, 5 Taunt. 144; Stevens *v.* Lynch, 12 East 37; Bilbie *v.* Lumley, 2 East 469; Ege *v.* Koonts, 3 Pa. St. 109; Beard *v.* Beard, 25 W. Va. 456; Bank of U. S. *v.* Daniels, 12 Pet. 32; People *v.* Foster, 133 Ill. 496; Clark *v.* Dutcher, 9 Cow. 674; Wapples *v.* U. S., 110 U. S. 630; Philips *v.* McConica, 59 O. St. 1; Railway Co. *v.* Iron Co., 46 O. St. 44; Yates *v.* Royal Ins. Co., 200 Ill. 202; Coburn *v.* Neal, 94 Mo. 541; Hunt *v.* Rousmainiere, 2 Mason 342, 8 Wheat. 174; Bank of U. S. *v.* Daniels, 12 Pet. 32; Alton *v.* First Nat'l Bank, 157 Mass. 341; Painter *v.* Polk County, 81 Iowa 242; Vanderbeek *v.* Rochester, 122 N. Y. 159; Scott *v.* Ford, 78 Pac. 742, collecting cases.

[3] 2 C. B. 719.

[4] 2 C. & P. 113.

[5] Cowp. 38.

[6] 21 Conn. 139.

*Stedwell* v. *Anderson*, which is in direct conflict with so many learned opinions found elsewhere on the same statement of facts, some error lies at the bottom of these divergent views.

Since the decisions in the United States rest back upon the earlier English cases, it is important to examine a few of these and to note the origin in England of the rule prohibiting the recovery of benefits conferred under a mistake of law. For when the question first arose there the court made no distinction between one's rights whether they were claimed under a mistake of fact or of law. As early as 1598, in *Hewer* v. *Bartholomew*,[7] the court permitted plaintiff to recover money which he had paid defendant under mistake of law. And in 1657 the same question arose in *Bonnell* v. *Fouke*,[8] where the plaintiff had, upon request by the Lord Mayor of London, paid to him his rent as Colemeeter, whereas under the law it should have been paid to the Chamberlain, who thereafter collected it from the plaintiff. Having thus paid his rent twice by reason of his mistake of law, plaintiff now sued to recover back the amount he had paid to the Lord Mayor and was given judgment.

In 1786 the oft quoted case of *Bize* v. *Dickason* was decided, reported in 1 T. R. 285. Bize by mistake of law paid to the defendant an entire debt of £1,356, when he had a valid set-off of £661, which he did not know the law would have permitted him to retain. Upon learning later of his legal rights in this respect, he brought an action to recover this amount of £661 from defendant, and was permitted to recover it.

No decision can be found in England holding a contrary view till in 1802 the case of *Bilbie* v. *Lumley* arose, wherein plaintiff sought to recover money which he claimed had been paid to defendant under mistake of law. Lord ELLENBOROUGH, C.J., asked plaintiff's counsel whether he could state any case where, if a party paid money to another voluntarily with a full knowledge of all the facts of the case, he could recover it back again on account of his ignorance of the law? The counsel was unable to direct Lord ELLENBOROUGH'S attention to the foregoing cases and he thereupon gave judgment for defendant, on the ground that *ignorantia juris non excusat*. He said: "Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried."

Here, then, was this maxim for the first time applied in English law to prevent plaintiff recovering what is conceded to be his prop-

[7] Croke, Eliz., 614.
[8] 2 Siderhn 4.

erty, held by the defendant without any consideration whatever and against conscience. To sustain this proposition his Lordship cited *Lowry* v. *Bordieu*.[9] In that case plaintiff sought to recover back the premium paid on an insurance policy, on the ground that the policy was void and the money paid without consideration. The court refused recovery on the sole ground that the insurance was a gambling transaction; that the parties were *in pari delicto*, and neither could for this reason receive the court's aid. After stating the facts Lord MANSFIELD says: "This, then, is a gaming policy and against an act of parliament; and therefore it is clear that the court will not interfere to assist either party, according to the well known rule *in pari delicto*," etc. An incidental remark of BULLER, J., in an opinion according with that of Lord MANSFIELD, is the only thing in the case which in any way supports the decision of Lord ELLENBOROUGH, *supra*. BULLER agreed that "This was a mere gaming policy without interest," but he adds, "if the law was mistaken the rule applies that *ignorantia juris non excusat*."

Anyone who examines this case of *Lowry* v. *Bordieu* must agree that it gives practically no foundation to a rule which has developed into so great importance, and has become in so many instances an instrument of injustice.

It is submitted that the courts have enlarged the meaning of this maxim, and in using it to sustain a rule which works an injustice to innocent persons have forced it from the position and purpose originally attributed to it. For with proper limitations it does stand for a legal principle upon which all persons agree, namely, that ignorance of law will not excuse one in the commission of a wrong. It may be conceded also that one should not be justified in the violation of a positive statute which stands for the policy of the State on some particular subject, because of his ignorance of the statute. But in cases where these elements do not appear and where, without casting a burden upon anyone else, plaintiff seeks only to recover that which in equity belongs to him, the courts should not permit the defendant to invoke this rule of law to protect him in retaining benefits to which he otherwise has no claim in morals or in law. To permit a plaintiff to recover in a case where the money was paid in a transaction which was not connected with a crime or a tort and was not in violation of a positive statute would not interfere with the rule which the courts enforce of leaving parties who have paid money in criminal transactions where they have left themselves. If one, by a mistake of either

[9] Douglas 468.

law or fact, has done a thing which at his expense unjustly enriches another, what plausible reason is there why courts should not correct the error, just as honor, justice and fair dealing between man and man would dictate should be done out of court? If one gentleman by mistake pays another more money than was due him, he has only to call attention to this fact, when every gentlemanly instinct man possesses requires the other to promptly correct the error. To hesitate, and draw fine distinctions, questioning whether the mistake under which the money was paid was one of fact or of law, where there is no consideration to justify its retention, would seem unmanly, if not dishonest, and would probably terminate the friendly relations existing between the parties. If he who received the overpayment discovers that it was made by a mistake of fact he must act the part of a gentleman and promptly return it, but if paid under mistake of the payer's legal rights, he may basely, but not honorably, retain it. A rule of law which may be invoked to justify such conduct should have back of it strong overpowering reasons, such as have not yet been disclosed to sustain the one here in question.

The reasons generally given in support of the rule are (1) that it is difficult to adduce proof to contradict a plaintiff who declares his payment was made under mistake of law, and (2) that to permit the recovery of money so paid is against public policy, because it tends to encourage litigation in repeatedly opening up matters which the parties have considered settled. Other objections to such recovery are sometimes stated, but none seem more plausible than these, unless it be that which is most frequently relied upon, namely, that this is the settled law and we are bound by precedent. BRICKELL, J., in *Hardigree* v. *Mitchum,* [10] says: "If ignorance of law could be admitted, in judicial proceedings, as a ground of complaint or defense, courts would be involved and perplexed with questions incapable of any just solution and embarrassed by inquiries almost interminable, until the administration of justice would become in effect impracticable. There would be but few cases in which one party or the other would not allege it as a ground of exemption, and the extent of the legal knowledge of each individual suitor, not his acts or words, would be the material fact on which judgments would be founded."

In *Brisbane* v. *Dacres,*[11] MANSFIELD, C.J., gave as the reason why plaintiff should not recover, that it would probably be incon-

[10] 51 Ala. 151.
[11] (1813) 5 Taunt. 144.

venient for defendant to pay, a reason which, if generally adopted by the courts, would find great support and frequent illustration among those of us forming the debtor class. The learned Chief Justice said: "So far from its being contrary to *aequum et bonum* I think it would be most contrary to *aequum et bonum* if he were obliged to pay it back. For see how it is! If the sum be large it probably alters the habits of his life; he increases his expenses, he has spent it over and over again; perhaps he cannot pay it at all, or not without great distress." The eminent jurist overlooked the fact that it would not only be right, but highly convenient, for the plaintiff to be permitted to use his own money in his own way, if only he could compel defendant to repay it to him.

CHAMBRE, J., wrote a dissenting opinion in the case, which presents cogent reasons why plaintiff should recover. Among other things he says: "The plaintiff had a right to it [the money paid], and the defendant in conscience ought not to retain it. The rule is that where he cannot in conscience retain it he must refund it, if there is nothing illegal in the transaction." * * * "It seems to me 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."

In answer to the first reason for the rule above stated, it may be conceded that there would be great difficulty in many cases to determine whether the plaintiff was really mistaken in the law when he paid the money, but in the great majority of cases this would not be so. The plaintiff's testimony could generally be supported by the circumstances surrounding the case, showing that except for the mistake the money would not have been paid. In probably ninety per cent of the adjudicated cases where courts have held that plaintiff could not recover because his action was based upon payment under mistake of law, the trial courts have been fully convinced that the payment would not have been made except for such mistake. Certainly the cases are rare where the courts would have had difficulty in determining this point. If, however, the difficulty were many-fold greater than it is in fact, it could not justify the establishment of a rule of law which prevents one recovering that which in all fairness and good conscience belongs to him. The difficulty usually confronted in establishing facts sufficient to sustain a recovery should not prevent a recovery in any case where the difficulty has been overcome or does not exist.

The second reason above suggested in support of the rule which

prevents recovery in such cases applies as well to mistakes of fact as to mistakes of law; for when parties have settled their accounts on the basis of a mutual mistake of fact, they each regard the matters ended as fully as if the mistake were one of law. In permitting the mistake to be corrected the settlement is disturbed, and litigation encouraged in the one case precisely as in the other. The methods and difficulties of proof on either side of the controversy are quite similar in both cases. The inducement to commit perjury in the one case is as great as in the other. The hardship caused by the inadvertent loss of one's property is in no way mitigated by the statement that it was by reason of his mistake of law rather than of fact.

KEENER, in his treatise on Quasi-contracts, at page 91, says: "The only possible danger arising from allowing recovery of money paid under mistake is that one who has paid money, knowing that the defendant had no claim upon him, might, if he were allowed to plead ignorance of law, repent of his generosity, and seek to recover it by falsely swearing to the existence of a mistake of law. But this argument proves too much, for it is as easy for a claimant to simulate ignorance of fact as of law. In either case the inquiry is as to the plaintiff's state of mind at the time that he made the payment. It is therefore difficult to understand why the same rule should not be applied in each case, since, in any case, the plaintiff is required to show not only that he paid the money under mistake, but that the defendant has no claim in law, equity, or conscience to the money so paid."

It would be interesting to note the manner in which this question has been treated by the courts in the various states, but such an examination would extend this paper into a treatise. Time can be taken only to notice a limited number of cases. In Ohio the doctrine seems to have been adopted for the first time in *Mays* v. *Cincinnati*,[12] where plaintiff had paid to the city certain license money under an ordinance which had later been declared void, and which he thereupon sought to recover back. But the court, basing its decision on both English and American authority, found for the defendant. From this time on the theory has been adhered to in this State even to the extent in some cases of producing decisions unsupported anywhere else.

In the case of *Philips* v. *McConica, Guardian*,[13] plaintiff, an executor, in distributing testator's estate, paid to the defendant, who

[12] 1 O. St. 268.
[13] 59 O. St. 1.

was guardian of Mary McConica, an infant who had been adopted by one Wilbert McConica, a certain portion of the estate, under a misconstruction of the law relating to adopted children. To the amount so paid neither the guardian nor the infant for whose benefit it was paid had any claim, right or color of title. The plaintiff on discovering his mistake and while the money was still in the guardian's possession began suit to recover it back. But the court held that the money, having been paid with a knowledge of the facts, under a mistake of the law, could not be recovered. The guardian was permitted to keep that to which she had no possible claim, and the executor, because he did not know the law, was required to pay it over again, out of his personal funds. Even this hardship would not seem remarkable under the rule except for the fact that the defendant was an officer in possession of funds in charge of and under the control of the court. It has been repeatedly held in other jurisdictions, even where the rule exists preventing recovery of money paid under mistake of law, that the court will require its own officers or trustees to return money so received.

In *Ex parte Simmonds*,[14] Lord ESHER, discussing this subject, said: "A rule has been adopted by courts of law, for the purpose of putting an end to litigation, that if one litigant party has obtained money from the other erroneously, under a mistake of law, the party who has paid it cannot afterwards recover it. But the court has never intimated that it is a high-minded thing to keep money obtained in this way; the court allows the party who has obtained it to do a shabby thing in order to avoid a greater evil, in order, that is, to put an end to litigation. * * * Although the court will not prevent a litigant party from acting in this way, it will not act so itself, and will not allow its own officer to act so. It will direct its officer to do that which any high-minded man would do, namely, not to take advantage of a mistake of law."

So in *Ex parte James*[15] the rule was laid down that when a trustee or officer of the court has in his hands a sum of money which has been paid to him erroneously under a mistake of law the ordinary rule as between adverse litigants does not apply, but he will be ordered to repay it. This doctrine is approved in *Gillig* v. *Grant*.[16] The court said that "the general rule is subject to the limitation that money paid under a mistake of law to an officer of the court (in that case a receiver) can be recovered back."[17]

[14] (1885) L. R. 16 Q. B. D. 308.
[15] (1874) L. R. 9 Ch. 609.
[16] (1897) 23 App. Div. (N. Y.) 596.
[17] See Moulton *v.* Bennett, 18 Wend. 586; Dixon *v.* Brown, L. R. 32, Ch. D. 597; In re Opera (1891) L. R., 2 Ch. 154.

In *Railway Co.* v. *Iron Co.*[18] this doctrine is again pressed to an extreme, unsupported in any other jurisdiction in the country. In this case the Iron Company had contracted to purchase $2,000 worth of the Railway Company's stock, agreeing to pay therefor in iron goods. It furnished $295 worth of these goods, when, learning that its contract to purchase stock in another corporation was void, under the Ohio laws, it brought suit for the value of the iron furnished defendant. The court held that the goods were furnished defendant under a mistake of law, reversed the judgment which plaintiff had secured, and held that the answer setting out these facts was good against plaintiff's claim. Plaintiff had received no consideration for its goods, and the contract under which they were delivered was not illegal, as being either *malum in se* or *malum prohibitum*. It was merely *ultra vires* and void only because one corporation had not been given the right to purchase stock in another corporation. Mr. Chief Justice COOLEY, in deciding the exact question here presented, said:[19] "The defendant has had the goods, and there is no want of equity in requiring it to make payment. They were delivered under a contract which bound neither party, and though the plaintiff is the party who now refuses to go on with it, the defendant was at liberty to do the same. * * It is to be observed that the contract, though void in law, involved no element of criminality and nothing of an immoral nature. The case is not therefore one in which the law will leave the parties without redress for the consequences of criminal or immoral action. The plaintiff had a right to sell her manufacture and to be paid for it; the defendant has received something of value from her, and there is manifest equity in its being required to make payment notwithstanding it exceeds its powers in the purchase."

The cases holding that money paid or benefits conferred under an *ultra vires* contract may be made the basis of an action in assumpsit are too numerous for citation, though a few may properly be given.[20]

It has been supposed that the United States Supreme Court construed more strictly than any of the courts in this country the law pertaining to *ultra vires* contracts of corporations. Yet that court has never denied the right of plaintiff to recover from defendant

[18] 46 O. St. 44.

[19] Day *v.* Spiral Springs Buggy Co., 57 Mich. 146, s. c. 58 Am. Rep. 352.

[20] Northwestern Union Packet Co. *v.* Shaw, 37 Wis., 655; Greenville Compress Co. *v.* Planters' Compress Co., 70 Miss. 669; Davis *v.* Old Colony R. R., 131 Mass. 258; Brunswick Gas Light Co. *v.* United Gas Co., 85 Me. 532; Manchester R. R. Co. *v.* Concord R. R. Co., 66 N. H. 100; Day *v.* Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352; Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138.

the value of benefits received under such contracts. It was said by Mr. Justice GRAY, in *Central Transportation Co.* v. *Pullman's Car Co.*,[21] "A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action on the unlawful contract, have always striven to do justice between the parties so far as could be done consistently with adherence to law by permitting property or money parted with on the faith of the unlawful contract to be recovered back, or compensation to be made for it. In such case the action * * * is maintained on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain."

Other decisions in Ohio sustain the doctrine of *Bilbie* v. *Lumley* and firmly establish the rule there laid down in this State.[22]

In New York the early case of *Clarke* v. *Dutcher,* supra, seems to have so well established the rule that it has been repeatedly followed there without a further investigation as full and complete as that given by Mr. Justice SUTHERLAND.

In *Mowatt* v. *Wright,* [23] the court says, "A mistake which entitles a party to maintain this action [action for money had and received] must be a mistake of fact. Where there is no fraud nor mistake in matter of fact, if the law was mistaken, the rule applies that *ignorantia juris non excusat.*"

This doctrine is repeated in *Champlin* v. *Laytin,*[24] and *Vanderbeck* v. *Rochester.*[25]

In Kentucky the rule has been consistently repudiated.[26]

It is said in *Bruner* v. *Town of Stanton* that "The general rule is well settled and is alike applicable to transactions between an individual and a municipality as between individuals alone that where money has been paid through a clear and palpable mistake of law or fact essentially affecting the rights of parties, which in law, honor or conscience was not due and payable, and which

[21] 139 U. S. 34.

[22] Cincinnati *v.* Gas Light & Coke Co., 53 O. St. 278; City of Marietta *v.* Slocomb, 6 O. St. 471; Buchanan Bridge Co. *v.* Campbell, 60 O. St. 406; The Vindicator Printing Co. *v.* State, 68 O. St. 362.

[23] 1 Wend. 355.

[24] 18 Wend. 407.

[25] 122 N. Y. 285.

[26] Ray *v.* Bank of Kentucky, 3 B. Mon. 510; Louisville *v.* Henning, 1 Bush 381; Bruner *v.* Town of Stanton, 102 Ky. 459; Capitol Gas Co. *v.* Gianes, 20 Ky. L. R. 1464; Fitzgerald *v.* Peck, 4 Litt. (Ky.) 125; Bruner *v.* Clay City, 100 Ky. 567; McMurtry *v.* Kentucky Ry. Co., 84 Ky. 462; Louisville & Nashville Ry. Co. *v.* Commonwealth, 89 Ky. 531.

ought not to be retained by the party to whom it is paid, it may be recovered back."

That rule at once meets the approval of every man's conscience, and the courts of Kentucky are to be highly commended for the tenacity with which they have held to it, while those in so many other jurisdictions have, through technicalities and the desire to follow authority and precedent, strayed from it into interminable difficulties.

The courts of Connecticut have also refused to follow the early English cases, and in recent decisions quote with approval the rule laid down in *Northrop* v. *Graves*,[27] that it is not material whether the money was paid under mistake of fact or law. If held against conscience in either case, it may be recovered back.

South Carolina and Georgia courts seem also to hold in line with the rule established in Kentucky and Connecticut.[28]

EXCEPTIONS—MONEY PAID TO AN OFFICER OF THE COURT

Many of the courts which feel bound to follow the rule have nevertheless surrounded it with conditions and exceptions which have materially modified it. Some of these exceptions only serve to emphasize the injustice of the rule. The quotation above from the opinion of Lord ESHER, in *Ex parte Simmonds*, very well illustrates this where he says, "The court has never intimated that it is a high-minded thing to keep money obtained in this way. The court allows the party who obtained it to do a shabby thing in order * * * to put an end to litigation."

This case and those cited in connection with it, *supra*, should establish the rule that where *money is paid to an officer of the court, under mistake of law, the court will, on application, require the officer to return it.*

MIXED FACT AND LAW

So where the payment is made under a mistake of mixed fact and law the courts permit a recovery. This position would seem unassailable. Since plaintiff is entitled to recover by showing a mistake of fact, he should not be deprived of this right by proof that he was also mistaken in the law under which he made the payment.

STONE, J., in *Hemphill* v. *Moody*,[29] says: "If there was inter-

[27] 19 Conn. 458; Mansfield *v.* Lynch, 59 Conn. 320; Stedwell *v.* Anderson, 21 Conn. 39; Kane *v.* Morehouse, 46 Conn. 300.

[28] Lawrence *v.* Benhien, 2 Bailey (S. C.) 623; Hopkins *v.* Mazyack, 1 Hill's Ch. 242; Culbreath *v.* Culbreath, 7 Ga. 64.

[29] 64 Ala. 468.

mixed with the mistake of law any mistake of fact, courts have willingly seized upon it and made it the ground of relief."[30]

It has been suggested that there is a distinction between those cases where payments are made under mistake of law, and those made in ignorance of law.[31] NISBET, J., in *Culbreath* v. *Culbreath,* indulges in a subtle and refined argument to maintain this distinction. It, however, does not seem sound, and has not generally been accepted by the courts.[32]

### MONEY PAID IN ACCORDANCE WITH THE LAW, WHICH IS LATER CHANGED

Again the question under discussion sometimes occurs where money is required to be paid in accordance with a decision of the highest judicial tribunal in the construction of a statute or ordinance. If later this decision is overruled, thus establishing a converse rule of law, according to which such payment could not have been enforced, can there be a recovery of payments made while the former decision stood unreversed? In such cases the courts hold that the unreversed decision was the law so long as it stood, and that transactions in the nature of contracts made at such times, or payments then made on contractual obligations, are binding, and that all persons were entitled to regard it as a correct exposition of the law and to govern their transactions in accordance with it.[33]

In *Douglas* v. *County of Pike*[34] the court states the rule in this language: "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is, making it prospective, but not retroactive. After a statute has been settled by judicial construction, the

[30] See also Haviland *v.* Willets, 141 N. Y. 35; Freeman *v.* Curtis, 51 Me. 140; Estate of Woodburn, 138 Pa. St. 606; Lane *v.* Holmes, 55 Minn. 379; Thornton *v.* Bank of Ky. 3 B. Mon. 510.

[31] Culbreath *v.* Culbreath, 7 Ga. 64; Lawrence *v.* Benbien, 2 Bailey (S. C.) 623; Hutton *v.* Edgerton, 6 S. C. 485. See Cunningham *v.* Cunningham, 20 S. C. 317; Haven *v.* Foster, 9 Pick. 112.

[32] Jacobs *v.* Morange, 47 N. Y. 57; Champlin *v.* Layton, 18 Wend. 407; Schlesenger *v.* U. S., 1 Ct. of Cl. 16; Gwynn & Wife *v.* Hamilton's Adm'r, 29 Ala. 233; Heacock et al. *v.* Fly, 14 Pa. St. 540.

[33] I Kent's Com. 476, Troy, Adm., *v.* Bland, 58 Ala. 197; Harris *v.* Jex et al., 55 N. Y. 421; Lewis, Aud., *v.* Taylor, 10 Cir. Ct. Dec. 205; Lewis, Aud., *v.* Taylor, 18 C. C. (Ohio) 443; Lewis, Aud., *v.* Symms et al., 61 O. St. 471; Hardigree *v.* Mitchum, 51 Ala. 151; Kelly *v.* Turner, 74 Ala. 513; Pittsburg Iron Co. *v.* Lake Superior Iron Co., 118 Mich. 109; Douglas *v.* County of Pike, 101 U. S. 677; Anderson *v.* Santa Anna, 116 U. S. 356; Menges *v.* Dentler, 33 Pa. St. 495; Wisconsin Ry. *v.* U. S., 164 U. S. 190; U. S. *v.* Dempsey, 104 Fed. 197.

[34] 101 U. S. 677.

construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment." It is, however, held that where parties enter into a contract in ignorance of the fact that the law has been changed by reason of the decision being overruled, and are thus mistaken in the law applying to their contract at the time it is made, that no relief will be given on account of such mistake.[35]

But it should be observed that this rule applies only to contractual and vested rights, and that where the transaction does not partake of the nature of one of these, a contrary rule applies, and the decision is in its effect not only prospective, but retroactive also. In such cases money paid under the rule of the first decision should, on its reversal, be recoverable, if there is nothing else to prevent. A good illustration of this will be found in *Center School Township* v. *State ex rel. Board of School Commissioners.*[36] In that case plaintiff, Board of School Commissioners, sought to recover of defendant certain public funds which, under the decision of *School City of South Bend* v. *Jaquith,*[37] the defendant was entitled to hold for its own use. This decision had, however, been overruled in the later decision of *Taggert* v. *The State,*[38] according to which plaintiff was entitled to the funds in controversy in the litigation in this case. Defendant insisted that the decision of the Taggart case could apply only to funds which had come into its possession after the decision was rendered, and that it could have no retroactive effect. The court held that the rule thus contended for by defendant did not apply to cases of this character, and that such decisions, overruling former ones, were retroactive except where contractual or vested rights were involved. To the same effect are the Ohio cases cited above.

The rule in cases of this kind should be that money paid while the first decision stood unreversed is recoverable after the reversal of the case. Whether this would be permitted, however, would depend upon the view taken by the court in reference to the recovery of money paid under mistake of law.

### MONEY PAID UNDER INVALID LAW

Closely related to the last class of cases are those arising from the payment of money under a law or an ordinance which is later

[35] Kenyon *v.* Welty, 20 Cal. 637.
[36] 150 Ind. 168.
[37] 90 Ind. 495.
[38] 142 Ind. 668.

declared to be invalid. They are divided into two classes. Those where the payment was involuntarily made, by reason of some duress or unavoidable necessity; and those cases where no urgency for the payment is shown, but only because there was apparently a legal requirement for such payment to be made. The courts quite uniformly hold that money paid under duress can later be recovered back, if the law under which payment was enforced has been held to be invalid.[39] But concerning the second class of cases, where the voluntary payment was made solely on a mistake of law, the courts are divided, the weight of authority holding that no recovery can be had. It is stated as a general rule in cases of this kind that money paid under an unconstitutional statute or void ordinance not under compulsion or duress cannot be recovered back.[40]

But other courts repudiate this doctrine and permit a recovery where the statute is held unconstitutional, on the ground that he who paid the money "is not presumed to know more than those who constitute the legislative and executive department of the governments under which he lives."[41]

### WHERE JUDGMENT IS REVERSED AFTER PAYMENT

Where money is paid in satisfaction of a judgment, which is later reversed, the rule is that it may be recovered back, unless there are circumstances indicating that the payment was voluntary and made without an intention of further questioning plaintiff's right to the payment.[42]

### MONEY PAID BY AN OFFICER

It is generally held that the government is not bound by an unauthorized payment made by its officer, under a misconstruction or mistake of law. The question here most frequently arises in cases where counties or municipalities make payments of illegal claims, or make overpayments of salaries to officers. The general

[39] Mayor, etc. of Baltimore *v.* Lefferman, 4 Gill 425; Boston & Sandwich Glass Co. *v.* City of Boston, 4 Met. 181; Stephen *v.* Daniels, 27 O. St. 527; Galveston Gas Co. *v.* Galveston, 54 Tex. 287; Greenbaum *v.* King, 4 Kan. 332; Kansas, etc. R. R. Co. *v.* Wyandotte Co., 16 Kan. 587; Pemberton *v.* Williams, 87 Ill. 15; The De La Cuesta Ins. Co., 136 Pa. St 62, 658; Motz *v.* Mitchell, 91 Pa. St. 114; Carter *v.* Riggs, 112 Ia. 245; Cunningham *v.* Monroe, 81 Mass. 468.

[40] Town Council of Cahaba *v.* Burnett, 34 Ala. 400; Cook *v.* Boston, 9 Allen (Mass.) 393; Mays *v.* Cincinnati, 1 O. St. 268; Coburn *v.* Neal, 94 Me. 541; Yates *v.* Royal Ins. Co., 200 Ill. 202; Mayor & Council of Wilmington *v.* Wicks, 2 Marvel (Del.) 297.

[41] City of Louisville *v.* Anderson, 79 Ky. 344; Standford *v.* Hite, 2 Ky. Law Rep. 386; Bruner *v.* Town of Stanton, 102 Ky. 459.

[42] East River Bank *v.* Butterworth, 8 Alb. L. J. (N. Y.) 57; Clark & Clark *v.* Pinney, 6 Cow. (N. Y.) 297; Scholy Ex. *v.* Mumford et al. 72 N. Y. 578; Maghee *v.* Kellogg, 24 Wend. 32; Mann and another *v.* Aetna Ins. Co., 38 Wis. 114.

rule is that such payments may be set aside and the money recovered back.[43]

In the case of *Frederick* v. *Douglas Co.*[44] the court said that public officers do not stand upon the same basis as individuals in making payments. "They are not dealing with their own. They are trustees for the taxpayers, and in dealing with public funds are dealing with trust funds. All who deal with them know also that the trust officials are acting in this capacity. To hold that when public officers have paid out money in pursuance of an illegal and unwarranted contract such money cannot be recovered in a proper action brought on behalf of the public merely because the payment has been voluntarily made for services actually rendered would be to introduce a vicious principle into municipal law, which would necessarily sweep away many of the safeguards now surrounding the administration of public affairs."

This rule, however, is not universally sustained. Some of the courts adhere so closely to the rule that no relief can be given for money paid under mistake of law that they will not aid a municipality which has so paid out its funds.[45]

In the case of *The People* v. *Foster et al.*,[46] the money was paid by the county board out of the county funds upon the demand of a person who was not entitled to receive the same. The court held that the money was paid under a mistake of law solely, and that the rule that where money is voluntarily paid under a mistake as to the law, and under a claim of right it could not be recovered back, applied to a municipality or county the same as to a natural person.

In the case of *Village of Morgan Park* v. *Knopf*[47] the court again reaffirms the rule. It says: "There was no fraud or mistake of fact, and if there was any mistake it was one of law, and the money having been voluntarily paid under such circumstances no action would lie to recover it back. This rule, which is well settled as between individuals, has been extended to municipal corporations under similar circumstances."

[43] Wayne Co. *v.* Reynolds, 126 Mich. 231; County of Allegheny *v.* Grier, 179 Pa. St. 639; Commonwealth *v.* Field, 84 Va. 26; Ward *v.* Barnum, 10 Colo. App. 496; Village of Ft. Edward *v.* Fish, 156 N. Y. 363; Frederick *v.* Douglas Co., 96 Wis. 411; Wisconsin Central R. R. Co. *v.* U. S., 164 U. S. 190.

[44] 96 Wis. 411.

[45] People *v.* Foster et al., 133 Ill. 496; Village of Morgan Park *v.* Knopf, 199 Ill. 444; State ex rel Hunt *v.* Fronizer et al., 77 O. St.; Cox *v.* Mayor, etc., of New York, 103 N. Y. 509; Supervisors of Onondaga *v.* Briggs, 2 Denio (N. Y.) 26; Snelson *v.* State, 16 Ind. 29; Hedrick *v.* U. S., 16 Ct. Cl. 88.

[46] 133 Ill. 496.

[47] 199 Ill. 444.

In *Snelson* v. *State*[48] the court said: "We are of the opinion that the acts of the Board of Commissioners were not void, but within the general scope of their authority, and that the money having been allowed and paid, upon a mere mistake of law as to the liability of the county, it cannot be recovered back."

In *Hedrick* v. *United States*[49] the eighth syllabus reads as follows: "Where a settlement is made at the Treasury between the government and a private party in good faith, though under a mistaken construction of the statute, for services actually rendered at an honest valuation, the settlement cannot be reopened by one party without the consent of the other, and the government cannot recover back the money so paid."[50]

### MISTAKE OF FOREIGN LAW

Since the courts do not take judicial notice of foreign laws they must be proven as facts, when it is material to have them passed upon in the matter in litigation.

Courts treat mistakes of foreign law as mistakes of fact. Consequently, where money is paid under mistake of a law of a foreign jurisdiction, it may be recovered back under the same rules and conditions as if paid under a mistake of fact.[51]

The court in *Bank of Chillicothe* v. *Dodge* said: "Ignorance of the law of a foreign government is ignorance of a fact,—and in this respect the statute laws of the other States of this Union are foreign laws."[52]

But this rule seems not to apply when the parties to the contract intend that it shall be performed in the foreign State. In such case a mistake thus made is regarded as a mistake of law and not of fact.[53]

The rule which governs in mistakes of foreign law applies with like effect to private or special statutes[54] and to rules of court.[55]

### MONEY PAID ON IMPOSSIBLE CONTRACT

On the theory that an impossible contract is void, and that it is impossible for one to purchase that which is already his own, courts

[48] 16 Ind. 29.

[49] 16 Ct. Cl. 588.

[50] The same principle is adopted in State *v.* Fronizer, 77 O. St. 7.

[51] Haven *v.* Foster, 9 Pick. 112; Raynham *v.* Canton, 3 Pick. 293; Chillicothe Bank *v.* Dodge, 8 Barb. (N. Y.) 233; Patterson *v.* Bloomer, 35 Conn. 57.

[52] Rosenbaum *v.* U. S. Credit System Co., 64 N. J. L. 34.

[53] Bentley *v.* Whitmore, 18 N. J. Eq., 366; Cambioso *v.* Maffett, 2 Wash. (U. S.) 98.

[54] State *v.* Paup, 13 Ark. 129; Cooper *v.* Phibbs, L. R., 2 H. L., 149; Benchamp *v.* Winn, L. R., 6 H. L. 223.

[55] Allen *v.* Galloway, 30 Fed. 466; Gaul *v.* Miller, 3 Paige (N. Y.) 192.

will permit one to recover money which he has paid under the mistaken purchase of his own property, whether the mistake was one of fact or law.[56]

REIMBURSEMENT BY TRUSTEE

So if under a mistaken construction of the law a trustee pays funds to one not entitled thereto, he may reimburse himself out of funds thereafter coming into his hands, which belong to the person who had thus secured an unauthorized prior payment.[57]

To the foregoing exceptions to the rule under discussion may be added all cases where defendant knowingly misled plaintiff in reference to his rights under the law, or where he stood in such relation to plaintiff that it was his duty to guard plaintiff's interests.

Other exceptions doubtless exist, and still others will be added to the list, till the rule will be largely absorbed by the exceptions to it.

Any method is acceptable which brings us back to the original proposition of Lord MANSFIELD in *Bize* v. *Dickason,* in 1786, that "where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back."

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[56] Bingham *v.* Bingham, 1 Ves. 127.

[57] Livesy *v.* Livesy, 3 Russ. 287; Hilliard *v.* Fulford, L. R., 4 Ch. D. 839; Hemphill *v.* Moody, 64 Ala. 468