BANKER'S RIGHT TO RECOVER MONEY PAID BY MISTAKE

I

Introduction

The object of this article is to cover both English and Roman-Dutch law on the subject of the banker's right to recover money paid under a mistake of fact. Restitution in English law is based on a quasi-contractual action also known as an action for money had and received.[1] In Roman Dutch law such payment is recoverable under the action *condictio indebiti*, a species of the enrichment actions known to that legal system.[2] The origin of the *condictio indebiti* can be traced back to the classical period of Roman Law.[3]

The contrast in approach in the two legal systems was highlighted by Weeramantry J. in the Supreme Court of Ceylon in *de Costa* v. *Bank of Ceylon*.[4] His Lordship cited with approval the observations of Gratiaen A.C.J. in *Jayatilleke* v. *Siriwardene*,[5] viz:

> In England the rule against unjust enrichment had been adopted by general stages with the assistance of legal fictions such as the "quasi-contract" and in more recent times the "quasi-estoppel". But in countries which are governed by the Roman-Dutch law, this broad and fundamental doctrine is unfettered by technicalities and there is no need to insist on proof that the general rule has been previously applied in a precisely similar situation.

The Basis of the Action in English Law

Academic and judicial authority hold that English law has failed to develop a general theory of unjust enrichment in the area of restitution.[6] Hence from the very beginning there was a controversy as to the basis of

[1] The action for money had and received grew out of the action of assumpsit, an old form of action — see Goff and Jones, *The Law of Restitution* (1978) 3—4.

[2] Dr. A.M. Honare, "Condictio and Payment" (1958) *Acta Juridica* 135.

[3] *Ibid.*

[4] (1969) 72 N.L.R. 457, 541.

[5] (1954) 56 N.L.R. 73, 80.

[6] Goff and Jones *op.cit* p. 11; H.C. Gutteridge and R.J.A. David, "The Doctrine of Unjustified Enrichment" (1933-35) 5 C.L.J. 204, 223-229. *Cf.* Lord Denning who believes that the basis is unjust enrichment and that the theory of the imputed promise should be discarded — see "The Recovery of Money" (1939) 55 L.Q.R. 37 and *Kiriri Cotton Co.* v. *Dewani* [1960] A.C. 192, 204.

the action for the recovery of money paid under a mistake of fact.[7] Two lines of though can be discerned — one view based on the equitable theory of unjust enrichment[8] and the other which strongly disapproves and rejects the doctrine of unjust enrichment as the basis of the action.

Lord Mansfield in *Moses* v. *Macferlan*[9] was of the view that the juristic basis of the action for the recovery of money paid in mistake was unjust enrichment. His Lordship observed:[10]

> This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial and therefore much encouraged. It lies only for money which *ex acquo et bono*, the defendant ought to refund . . . it lies for money paid by mistake.

According to His Lordship, the gist of the 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",[11]

Six years later in *Sadler* v. *Evans*[12] Lord Mansfield expressed a similar opinion as regards the basis of the action. His Lordship stated:[13]

> It is a liberal action, founded upon large principles of equity where the defendant cannot conscientiously hold the money.

From the subsequent development of the English case law it is clear that Lord Mansfield's view that the basis of the action is the principle of unjust money had not been accepted. In *Standish* v. *Ross*[14] and *Kelly* v. *Solari*[15] the court did not seem to think that the basis was unjust enrichment. This led Hamilton L.J. in *Baylis* v. *The Bishop of London*[16] to state, "To ask what course would be *aequo et bono* to both sides never was a very precise

[7] "The authorities on the recovery of money paid under mistake are manifold and are notoriously difficult to reconcile. Even the basis for the claim of money had and received has been the subject of great debate by judges of great eminence and writers of great academic distinction." per Gillard J in *Commonwealth Trading Bank* v. *Reno Auto Sales Pty. Ltd.* [1967] V.R. 790, 794.

[8] This view was styled "The rival theory" by Weeramantry J. in *de Costa* v. *The Bank of Ceylon* (1969) 72 N.L.R. 457, 533. "Rival" here is used in the sense of being opposed to the view which rejects unjust enrichment as the basis of the action.

[9] [1760] 2 Burr. 1005 (97 E.R. 676)

[10] *Id.* 1008.

[11] *Ibid.*

[12] [1766] 4 Burr. 1984 (98 E.R. 34).

[13] *Id.* 1986.

[14] [1849] 3 Ex. 527.

[15] [1841] 9 M & W 54 (152 E.R. 24).

[16] [1913] 1 Ch. 127, 140.

guide and as a working rule it has long since been buried in *Standish* v. *Ross* and *Kelly* v. *Solari*".

Again in *Sinclair* v. *Brougham*[17] the court did not favour the view that the basis for recovery in an action for money had and received was unjust enrichment. As Lord Summer observed:[18]

> There is now no ground left for suggesting as a recognizable "equity" the right to recover money *in personam* merely because it would be right and fair thing that it should be refunded to the payer.

It would seem that the decision in *Morgan* v. *Ashcroft*[19] butresses the above criticisms and in view of the definite statements made in that case, Lord Mansfield's view that the basis of the action is the principle of unjust enrichment may no longer be valid. Sir Wilfrid Greene M.R. while conceding that the nature of the claim to recover money paid under a mistake of fact and the limits within which it can be made, have been the subject of much controversy and difficulty,[20] was positive in his assertion that the claim cannot be said to be based on some kind of *aequum et bonum* by virtue of which a man must not be allowed to enrich himself unjusty as the expense of another.[21]

The balance of authority in English law reveals the rejection by the courts of a general doctrine of an equitable nature concerning unjust enrichment as the basis of the action for the recovery of money paid by mistake. It is therefore relevant to consider the true basis of the action in English law. As pointed out earlier,[22] the action for money had and received grew out of the action in *indebitatus assumpsit* rather than of *assumpsit per se*. *Indebitatus assumpsit* was a cross between the action in debt and the action in assumpsit. The foundation of the action is said to be based on the doctrine of an implied promise to repay; an anology of quasi-contract.[23] However the development of the implied contract theory was a pure fiction because it is the law which intervenes and imputes the promise to a situation that lacks agreement between the parties. Yet it is submitted that the substance of the action is the right of the plaintiff to recover property or its proceeds from one who has wrongfully received them.

[17] [1914] A.C. 398.

[18] *Id.* 456.

[19] [1938] 1 K.B. 49.

[20] *Id.* 62

[21] *Id.*

[22] *Supra*, note 1.

[23] For the law of Malaysia the action in Quasi-Contract is provided for in SS.65 & 66 of the Contracts Act 1950.

THE APPROACH IN ROMAN-DUTCH JURISTDICTIONS

Under Roman-Dutch law, the legal basis of the recovery of money paid under a mistake of fact poses no special problem, since it recognizes a number of enrichment actions. The relevant action for the recovery of money paid by mistake would be the *condictio indebiti*.[24] This action permits the recovery of money or property that had been transferred to another without a valid cause in circumstances where the payment or transfer, although believed by the payer or transferor to be made in performance of a legal obligation, was in fact not due. The basis of recovery is the equitable[25] principle that no one ought to be enriched at the expense of another.[26]

Pothier in his text[27] sets out the three essential elements necessary for a successful action on the *condictio indebiti*. These elements are

i) The money that has been paid should not have been owing.
ii) There must not have been a reasonable cause for the payment even if it was not due.
iii) The payer must not know that the money was not due.

The above requisites for the recovery of payment under the *condictio indebiti* as set out by Pothier has been accepted by the courts administering the Roman-Dutch law as correctly setting out the *facta probanda* of the action.[28]

The problems faced by the English courts in permitting the recovery of money paid under mistake do not concern the courts administering the Roman-Dutch law. Further the action for the recovery of money paid under mistake under the *condictio indebiti* is much wider than the recovery which is permitted under English law. This is due to the English law action being tied to the theory of a notional or fictional contract with the consequence that "many a case of unjust enrichment as known to the Roman-Dutch concept of *condictio indebiti* would fall outside its scope.[29] Under Roman-Dutch law, the *condictio indebiti* operates on the basis of definitive prin-

[24] For a discussion of the general principles governing liability under the condictio indebiti, see G.L. *Peiris, Some Aspects of the Law of Unjust Enrichment* (1972).

[25] This refers to Roman equity as originally developed by the Praetor and then passed on to Roman-Dutch law.

[26] Institutes 2.1.30.

[27] Pothier ad Pandect 50.12.63 — Translated by W.D. Evans (1806). *Cf* Grotious, *Introduction to Dutch Jurisprudence Book* 111 (Translated by Prof. R.W. Lee, 1953) Chapter 30 who states, "the obligation upon which the *condictio indebiti* is founded is closely allied to natural law and gives rise to a right of reclamation of that which a person has through ignorance paid a debt when not actually due.

[28] *Recsey* v. *Reiche* 1927 A.D. 554; *Bell* v. *Ramsay* 1928 N.P.D. 266; *Le Riche* v. *Hamman* 1946 A.D. 648.

[29] W.S. Weerascoria, *Banks and Banking Law in Ceylon* (1974) 157.

ciples, so that when a factual situation arises, a court in permitting recovery has only to decide whether the general principles permit recovery in the light of the circumstance of the case.

Despite the fact that the principles underlying the *condictio indebiti* is wider than the English law action for money had and received, attempts were made in the early Ceylon cases to show that the underlying principles of the English action was *in pari materia* with the *condictio* of the Roman-Dutch law. In *Saibo* v. *The Attorney-General*[30] Bertram C.J. stated that the two actions were identical. His Lordship rationalized his assertion on the basis of Lord Mansfield's exposition of the principles of the English action in *Moses* v. *Macferlan*.[31] But as shown earlier[32] the balance of authority in the English law does not favour Lord Mansfield's view as regards the basis of the action for money had and received. In the light of this development, it is submitted that the views of Bertran C.J. are open to review. As pointed out by Evans,[33] Lord Mansfield's observation had an exact parallel in the Roman law and there is no doubt that he tried to superimpose on the rules of the English law, to use the words of Weeramantry J. "a basically Romanesque architecture."[34] It is therefore not surprising that Lord Mansfield's views did not find support among the majority of later English cases.[35]

In *Imperial Bank of India* v. *Abeysinghe*,[36] Schneider J. expressed the view that the English action for money had and received is founded on the same principle of equity as the Roman-Dutch law action of the *condictio indebiti*. Here again like Bertram C.J., His Lordship relied on Lord Mansfield's observations to support his proposition.[37] Further His Lordship went to the extent of stating that since both actions were founded on the same principle, the decisions of the English courts based upon the application of that principle should be regarded "not only as guides but even as binding authorities in appropriate circumstances".[38]

More recently in *Don Cornelis* v. *de Soyza and Co. Ltd.*,[39] Sansoni C.J. (with whom Sirimanne J. agreed) expressed the view that "there is no in-

[30](1923) 25 N.L.R. 321, 324.

[31]*Supra*, note 9.

[32]*Supra*, p. 104—105.

[33]*Supra*, note 29.

[34]*de Costa* v. *Bank of Ceylon* (1969) 72 N.L.R. 457, 531.

[35]*Standish* v. *Ross* [1849] 3 Ex. 527; *Kelly* v. *Solari* [1841] 9 M & W 54; *Baylis* v. *The Bishop of London* [1913] 1 Ch. 127; *Sinclair* v. *Brougham* [1914] A.C. 398; *Holt* v. *Marcham* [1923] K.B. 504; *Morgan* v. *Ashcroft* [1938] 1 K.B. 49.

[36][1927] 29 N.L.R. 257.

[37]*Id.* 264.

[38]*Id.* 265.

[39](1965) 68 N.L.R. 161.

consistency in applying the principles of the action for money had and received, which is founded on the same principle of equity as the Roman-Dutch action of the *condictio indebiti.*"[40]

It is respectfully submitted that the attempt made by their Lordships to assimilate the two actions from the two legal systems cannot be supported. As Weeramantry J. aptly remarks, such a view involves some measure of oversimplification if they are intended to suggest a complete identity between the action for money had and received and the *condictio indebiti.*[41] Any attempt therefore to equate the principles of the English action for money had and received with that of the *condictio indebiti* is made without foundation, since the basis of the action in English law is the theory of the notional contract[42] and not the principle of unjust enrichment. Any attempt therefore to identify the two actions as one and the same thing ought to be resisted.

II

SOME GENERAL PRINCIPLES OF THE ACTION

So far the basic doctrinal approach to undue enrichment in English law and Roman-Dutch law has been surveyed. It is now proposed to analyse specific aspects arising in both systems and relevant to the banker's action for the recovery of money paid under a mistake of fact.

Mistake as to the Paying Banker's Liability

A basic problem which has to be resolved in this area is whether the money paid under a mistake of fact and sought to be recovered, ought to have been paid by the bank in the belief that it was under a legally enforceable obligation to make payment. In other words, assuming the facts as supposed to be true, was the money "legally due" to the payee?

Commonwealth Trading Bank v. *Reno Auto Sales Pty. Ltd.*[43] was a decision of the Supreme Court of Victoria. There A, a customer of the plaintiff bank arranged to purchase a motor car from the defendant B. As a deposit for the purchase of the car A drew an open cheque for $250 and handed it over to B. On the very next day he repented of his bargain and requested his wife to inform the bank on the following day to cancel his cheque. The wife accordingly telephoned the Bank and spoke to X a member of the bank staff. At this point there was a conflict of evidence as to what actually transpired during the course of the telephone conver-

[40] *Id.* 165.

[41] *de Costa* v. *Bank of Ceylon* (1969) 72 N.L.R. 457, 531.

[42] *Supra*, p. 104—105.

[43] [1967] V.R. 790.

sation. A's wife maintained that she had said that payment was not to be paid until her husband called her that afternoon at the bank to sign the stop payment notice. However X did not inform the Bank manager or teller of the telephone conversation and when the cheque was presented for payment it was duly paid.

On the actual facts of the case before him, Gillard J. held that A the drawer of the cheque had not effectively countermanded payment.[44] However His Honour went on to consider the law on the assumption that payment had been stopped.[45] On this point Gillard J. held that since the drawee of a cheque is not liable to the holder as the bank does not accept a cheque, the bank would not have been liable to the recipient even if the cheque had not been countermanded. Therefore when the true facts emerged the Bank could not recover, since on the facts as supposed it would not have been liable to the recipient.

In arriving at the above conclusion, Gillard J. in the *Reno Case* relied on the early case of *Kelly* v. *Solari*.[46] It is therefore relevant to consider whether *Kelly* v. *Solari* laid down this requirement of the payer's supposed legal liability as a precondition before recovery could be permitted on the basis of a mistake of fact.

The discrepancies in the Law Reports which reported the decision in *Kelly* v. *Solari* pose an initial problem in this area. According to the Meeson's and Welsby's report Parke B. is reported to have stated as follows:[47]

> I think that where money is paid to another under the influence of a mistake, i.e. upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payor that the fact was untrue, an action will lie to recover it back and it as against conscience to retain it.

Here the phrase "which would entitle the other to the money" carries with it the implication that payment ought to have been made on the supposition that it is legally due.

In the *Reno Auto Case*,[48] Gillard J. was of the view that the above comments of Parke B. applied to a situation where the paying Banker sought to recover money on the basis of a mistake of fact. On the facts of *Reno Auto Case* His Honour held that B the defendant was never entitled in law as against the bank to payment of A's cheque. The bank was not bound by any duty to B the defendant to pay the cheque.

[44] *Id.*

[45] *Id.* 795.

[46] [1841] 9 M & W 54 (152 E.R. 24).

[47] *Id.* 59.

[48] [1967] V.R. 790, 796.

On the other hand the Law Journal Report[49] of *Kelly* v. *Solari* is silent on the question of the need to prove a legal liability. According to that report:[50] "If a party makes a payment on the supposition that a fact is true, which afterwards proves to be untrue, he may recover back money that has been so paid". If the Law Journal Report is the correct version of the judgment of Parke B. then it is submitted that Gillard J. was wrong in applying the requirement of the supposed legal liability to a banker seeking to recover money paid by mistake.

On the facts of *Kelly* v. *Solari* it would seem that the plaintiff would have been under a legal liability to pay if the supposed facts were true. Therefore on a narrow construction of the *ratio decidendi* of this case, it is possible to state that, Meeson's and Welby's report correctly embodies the principle of the case. The facts were than an Insurance Company had paid out to an executrix money on a life policy on a deceased person in ignorance of the fact that the policy had lapsed due to the failure to pay the premiums. The Court of Exchequer Chamber permitted recovery. It is clear from the facts that there would have been a legal liability to pay if the supposed facts had been true.

Although Gillard J. in the *Reno Auto Case* applied the requirement of the supposed legal liability of the payer to a situation where a banker sought to recover money paid under a mistake, yet it is not difficult to point out to a number of cases concerning bankers where this requirement has not been insisted upon.[51]

In the *Imperial Bank of Canada case*, the drawer's signature on the cheque was genuine, but the amount of the cheque had been fraudulently raised by the drawer himself after it was certified[52] from $5 to $500. On the facts it is clear that the bank as a mere drawee, would not have been liable to the holder if the facts had been as supposed. Nevertheless the Privy Council held that the sum of $495 which had been overpaid could be recovered.

As regards Roman-Dutch law, the absence of a legal obligation is an essential condition for recovery under the *condictio indebiti*. It is therefore settled law that payment should have been made in the belief that it was "legally due". It is essential for the availability of the *condictio indebiti* that the plaintiff when making the payment, must have believed that, in consequence of making the payment he was discharging a legally enforceable obligation. The proposition it is submitted is implicit in the South

[49] [1841] 11 L.J. Exchequer 10.

[50] *Id.* 12.

[51] [1903] A.C. 49 (P.C.) See also the recent case of *Barclays Bank Ltd.* v. *W.J. Simms, Son & Cooke* [1980] Q.B. 677.

[52] In the United States certification of a cheque by a bank amounts to acceptance. But his is not so in English law. In English law the effect of certification is to give the cheque additional currency by showing on its face that it was drawn in good-faith on funds sufficient to meet its payment and by adding to the credit of the drawer that of the bank on which it is drawn — *Gaden* v. *New Foundland Savings Bank* (1899) A.C. 281, 285.

African case of *Dickinson Motors (Pty) Ltd.* v. *Oberholzer,*[53] though the facts did not directly concern payment by a banker.

In *Oberholzer's* case, defendant motor company, under a hire-purchase agreement, sold a plymouth car to the plaintiff's son. On a warrant of execution being issued, the son stated that the car was in the plaintiff's farm. However, the son had meanwhile purchased another Plymouth from A motors and exchanged it for a Hudson car belonging to his father. The second Plymouth which was in the plaintiff's possession, was attached by the defendant who allowed the plaintiff to retain the car on payment of the sum which the son owed them. When judgment was subsequently obtained by A motors for possession of the second Plymouth, the plaintiff instituted action to recover the money which he had paid the defendant.

The defendant argued that the plaintiff could not recover because when he made the payment, he knew that the money was not legally due from him and that he was infact discharging the son's debt. This argument was rejected by the court.[54] Although the plaintiff was aware that the defendant had no legally enforceable rights against him, yet the object the plaintiff sought to achieve by making the payment was the acquisition of the ownership of the car in his own right and not in the name of his son. Therefore from the plaintiffs point of view payment was made in the belief that it was "legally due". Otherwise he could not claim title to the car.[55]

Mistake as to the Recipients Entitlement

It is also relevant to consider whether the legal liability which the payer believes that he is discharging also includes a situation where the payer pays money to X in the belief that by so doing he is discharging a liability which Y owes to X.

In *Aiken* v. *Short,*[56] a bank paid off an equitable charge on property over which the bank itself had an interest. It was discovered later that the grantor himself had no title to the property. An action by the paying bank to recover the money so paid did not succeed. Bramwell B. stated:[57]

> "The right to recover money paid under a mistake of fact must have reference to a belief of the existence of a fact which, if true, would have given the person receiving a right against the person paying the money."

This statement read in the light of the facts of the case would lend support to the view that the legal liability which the plaintiff believes that he

[53] (1952) 1 S.A.L.R. 443.

[54] *Id.* 448.

[55] *Cf. Commissioner for Inland Revenue* v. *Visser* (1959) 1 S.A.L.R. 452 (A.D.) where an action on the *condictio* failed since payment had not been made in the apparent discharge of a legal obligation.

[56] 25 L.J. (N.S.) Ex. 321.

[57] *Id.* 325.

is in fact discharging should be towards the recipient, thereby giving the latter a right to receive the payment.

However subsequent developments in the English law show that the rule as stated above has not been followed and paying banks have in fact been permitted to recover in such situations. The House of Lords decision in *Kerrison* v. *Glyn Mills Currie and Co.*,[58] is a leading case on this point. There the plaintiff who was resident in England had a standing arrangement with X, a firm of bankers in New York by virtue of which they undertook to honour the drafts of a Mexican Company (in which the plaintiff had an interest) upto $500; the plaintiff agreeing to put them in funds by paying that amount from time to time to the account of X at the defendant bank in London. X wrote to the plaintiff informing him that the Mexican Company had been credited with $500 and requesting him to pay that amount to the defendant bank and the plaintiff accordingly did so. In the meantime unknown to the parties in London, X had suspended payment and the drafts of the Mexican Company were not met in New York. In the present action the plaintiff sought to recover the sum of $500 paid to the defendant bank on the basis of a mistake of fact. It was held that the amount so paid could be recovered. On the facts it is clear that although no legal obligation arose on the part of the plaintiff to make payment to the defendant bank and therefore no "entitlement" on the part of the defendant bank to receive the money, yet recovery was allowed.[59]

Mistake must be Fundamental

In *Porter* v. *Latec Finance (Qld) Pty. Ltd.* [60] Barwick C.J. said,[61] "It is preferable in my opinion to test the matter by determining whether the mistake is fundamental to the transaction, properly identifying the transaction and the relationship of the mistake to it". This concept of "fundamental" mistake has been utilized by the courts in determining claims for recovery made by banks.

The test of fundamental mistake was utilized in the early case of *Norwich Union Fire Insurance Society* v. *Price*,[62] though the facts did not

[58](1911) 17 Com. Cas. 41 (H.L.)

[59]See also Scott L.J. in *Morgan* v. *Ashcroft* [1938] 1 K.B. 49 who said, "In *Kerrison* v. *Glyn Mills Currie & Co.* it was definitely decided by Hamilton J. and by the House of Lords that the plaintiff was entitled to recover a payment made to the defendants for the purpose of meeting an anticipated liability although he knew that no actual liability had yet attached to him. The decision of the House of Lords seems to me conclusive that the rule as stated in *Aiken* v. *Short* cannot be regarded as final and exhaustive in the sense that no mistake which does not induce in the mind of the payer a belief that payment will discharge or reduce his liability, can ground an action for money had and received".

[60](1964) 111 C.L.R. 177.

[61]*Id.* 187.

[62][1934] A.C. 455 (P.C.)

directly concern a banker. There lemons had been shipped from Sicily to Sydney and was covered by a policy of marine insurance. From information received it was brought to the notice of the Insurance company that the lemons had been damaged by the risk insured against. The Company then paid the insured value of the goods to the insured. In actual fact however the lemons had not been so damaged but had been sold because they were found to be ripening. The Privy Council held, that the money so paid could be recovered on the basis of a fundamental mistake. As Lord Wright said:[63]

> In the present case the only transaction with which the mind of the appellants went was payment of a claim on the basis of the truth of facts which constituted a loss by perils insured against: they never intended to pay on the basis of facts inconsistent with any such loss by perils insured against. The mistake was vital as that in *Cooper* v. *Phibbs*[64] in respect of which Lord Westbury used these words: "If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that agreement is liable to be sit aside as having proceeded upon a common mistake". At common law such a contract (or simulacrum of a contract) is more correctly described as void being in truth no intention to contract.

However in order to permit recovery of money paid under such a mistake it is essential, in the words of Lord Wright that the "mistake relied on" should be of such a nature that it can be properly described as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic"[65] Fundamental or essential error is also a ground for recovery under Roman-Dutch law.[66]

A payment of money by mistake could be recovered by the paying banker provided it falls within the definition of a fundamental mistake as defined above.

A particular aspect of fundamental mistake is mistake of identify or what has been termed error *in persona*. This would be a situation where A intending to pay B mistakenly pays the money to C. Here there is no intention on the part of A to benefit C and if we seek guidance from the analogous case of contract where mistake as to identify has been considered fundamental to the transaction so as to vitiate the contract, in banking law too such a mistake "ought to be held to negative the intention to pay the money and the money should be recoverable".[67]

[63] *Id.* 462—463.

[64] (1867) L.R. 2 H.L. 149, 170.

[65] [1934] A.C. 455, 463.

[66] G.C. Weeramantry, *Law of Contracts* Vol. (1967), 271.

[67] *Morgan* v. *Ashcroft* [1938] 1 K.B. 49, 67 per Sir Wilfrid Greene M.R.

In *Porter* v. *Latec Finance (Qld) Pty. Ltd.*,[68] A posing as his father B, induced X to lend money to him and executed a mortgage of B's land to X as security for the money borrowed. Further A requested X to pay a sum of money to a mortgagee who held a mortgage over the same land. X complied with the request and the earlier mortgage was duly discharged. A again posing as his father B executed a mortgage of the same land to the plaintiffs (who were a finance company) and also requested the plaintifs to pay the amount owing to X under the earlier mortgage. X was accordingly paid and a discharge of that mortgage was entered. The plaintiffs later discovered A's fraud and instituted action against X for the recovery of the sum paid in discharge of the mortgage. The majority[69] of the High Court of Australia held that the plaintiffs could not recover on the basis that the mistake in identity was not fundamental to the transaction.[70]

The minority[71] on the other hand held that the plaintiff's could recover. According to Kitto J.[72] the plaintiffs were entitled to recover because they would not have paid the money if they had known the true facts. The mistake was fundamental because the plaintiff's mistake in thinking that A owed X a debt for money lent and that the debt was secured by the documents which the plaintiff held "was so clearly fundamental that because it was a mistake the consideration for the payment failed completely."[73]

According to Windeyer J. when the plaintiff and X made their offers to lend money they clearly meant them for B. (i.e. A's father) and no one else. Only with him could the contract proposed, that is a loan on mortgage of his land have been made. As a man cannot bind another in contract by accepting an offer which he knows is not meant for him but for someone else and since this was the position of A in the present case, the transaction is void for mistake and the money so paid is recoverable.[74]

It is submitted that the minority judgments are consistent with the approach taken by the courts in the area of the law of contract, where it has been held that if a mistake as to the person contracted negatives the intention to enter into contractual obligations, there is no *consensus ad idem* and accordingly the contract is void.[75] On this premise since the plaintiffs

[68](1968) 111 C.L.R. 177.

[69]Barwick C.J., Taylor J. and Owen J.

[70](1964) 111 C.L.R. 177, 188 per Barwick C.J.

[71]Kitto J. and Windeyer J.

[72](1964) 111 C.L.R. 177, 189.

[73]*Id.* 190.

[74]*Id.* 201.

[75]G.C. Cheshire and C.H. Fifoot, *Law of Contract* 3rd Australian ed. (1976) 254; C.G. Weeramantry, *Law of Contracts*, Vol. I, *op.cit.* 279.

in *Porter*'s case had no intention to benefit A who pretended to be B, clearly the error *in persona* was a material element and on this basis the money should be recoverable. In a similar situation if a banker is mistaken as to identify in making payments and if that mistake of identify is fundamental to the transaction, then the paying banker ought to have the right of restitution.

III

SOME PARTICULAR INSTANCES OF PAYMENT BY MISTAKE

It is now proposed to examine the case law dealing directly with payment made by banks under a mistake of fact. The chief areas which will be surveyed would include situations where money is paid on a forged instrument, a stopped cheque and when the customer's account had insufficient funds.

Payment on a Forged Instrument

The situations discussed under this category would include instances of

i) The forging of the drawer's signature
ii) The forging of indorsements
iii) The material alteration of a cheque including the original amount payable and/or the alteration of the name of the payee

In all the above instances if the payee knew of the forgery, recovery would be permitted on the basis of fraud. In such a situation, the bank might sue him for damages for deceit or waive the tort and sue for money had and received. The crux of the ligitation is centred around cases where the holder of the instrument even through aware of the true facts is nevertheless innocent of fraud.

In the early case of *Price* v. *Neal*[76] the matter came before Lord Mansfield. The plaintiff was the drawee of two Bills of Exchange. The defendant an indorsee for valuable consideration of the first bill was duly paid by the plaintiff on the due date of the bill. The plaintiff also accepted the second bill, indorsed it to the defendant for valuable consideration and later paid the amount on that bill as well. Sometime later the plaintiff discovered that the two bills had been forged by a third party. The plaintiff therefore sought to recover these amounts on the basis of a mistake

[76](1962) 3 Burr. 1354 (97 E.R. 871).

of fact. Lord Mansfield emphatically held that there could be no recovery on either bill. According to His Lordship:[77]

> It can never be thought unconscientious in the defendant to retain this money, when he has once received it upon a bill of exchange indorsed to him for a full and valuable consideration, which he had bona-fide paid, without the least privity or suspicion of any forgery.

In addition to the reason given above for the denial of relief, Lord Mansfield also gave a number of other reasons. His Lordship was of the view that if there was fault or negligence, it lay on the side of the drawee and not on the side of the recipient.[78] He went on to state that it was incumbent upon the drawee to be satisfied that the bill drawn upon him was the drawer's hand before he accepted or paid it, whereas there is no duty on the recipient to inquire.[79] The delay on the part of the drawee in discovering the mistake was also attributed as a factor which precluded relief.[80]

The unsatisfactory nature of Lord Mansfield's judgment lies in the fact that due to the "multiplicity of reasons"[81] given it is difficult to extract the ratio of the decision.[82]

The subsequent case of *Cocks* v. *Masterman*[83] was a case of payment on a forged acceptance. The bankers of the drawee believing it to be the genuine acceptance paid the amount. However on the following day they discovered that the acceptance was a forgery and immediately gave notice of that fact to the party that had received payment and sought to recover the money on the basis of a mistake of fact. Bayley J. held that the plaintiff could not recover on the basis that "the holder of a bill is entitled to know, on the day when it becomes due, whether it is an honoured or dishonoured bill and that, if he receives the money and is suffered to return it during the whole of that day, the parties who paid it cannot recover it back.[84]

Again in *London and River Plate Bank* v. *Bank of Liverpool*,[85] where the plaintiff bank had paid a draft (on which the endorsements were forg-

[77] *Id.* 1357.

[78] *Ibid.*

[79] *Ibid.*

[80] *Ibid.*

[81] Weaver & Craigie, *Banker and Customer in Australia* (1976) 454.

[82] For the possible interpretations as to the basis of the decision in *Price* v. *Neal*, see Braucher & Sutherland, *Commercial Transactions — Cases and Problems* 875 — 876; Brady, *Law of Bank Checks*, (3rd ed. by H.J. Bailey) (1962) 483—484.

[83] (1829) 9 B & C 902 (109 E.R. 335).

[84] *Id.* 909.

[85] [1896] 1 Q.B. 7.

ed) drawn on its London office by its branch at Montevideo, but the forgeries were not detected until some months later, it was held that the Bank could not recover. Mathew J's reasoning in this case depended on an extension of the defence propounded by Bayley J. in *Cocks* v. *Masterman*.[86]

A similar conclusion was reached in the Canadian case of *Bank of Montreal* v. *R.*[87] There a clerk in a government department had forged departmental cheques drawn on the plaintiff bank who were the government bankers. The bank paid the amounts on the cheques through the clearing to various collecting banks for the credit of the fraudulent clerk. After a considerable period of time the forgeries came to light. The plaintiff bank then sought to recover the amounts paid to the various collecting banks. The Supreme Court of Canada held that it could not recover, relying on the broad doctrine of *Price* v. *Neal*.[88] However the reasoning of the individual judges were diverse. Giround J. based his decision on the general premise of *Price* v. *Heal*,[89] Daines J. on estoppel by representation,[90] and Idengton J. on the countervailing equities.[91]

The rule of non-recovery propounded in these cases seems to be based on business efficacy and commercial expediency. As Mathew J. said,[92] "when a bill becomes due and is presented for payment the holder ought to known at once whether the bill is going to be paid or not". His Lordship went on to state, "If the mistake is discovered at once, it may be the money can be recovered back, but if it be not and the money is paid in good faith and is received in good faith and there is an interval of time in which the position of the holder may be altered, the principle seems to apply that money once paid cannot be recovered back. That rule is obviously, as it seems to me, indepensable for the conduct of business".[93] One could therefore agree with Paget who is a review of these cases states that the basis is "the necessity for maintaining negotiability by ensuring that the holder of a negotiable instrument shall know on the day it falls due whether it will be paid or not".[94]

[86] *Supra*, note 83.

[87] (1807) 38 S.C.R. 258.

[88] *Supra*, p. 115—116.

[89] So that the same criticism made in relation to *Price* v. *Neal* would be applicable here, namely, from the variety of reasons given it is difficult to extract the ratio decidendi.

[90] (1907) 38 S.C.R. 258, 268—270.

[91] *Id.* 278-279. For a discussion on estoppel by representation, *See infra* p. 132.

[92] *Id.* 282.

[93a] *London & River Plate Bank* v. *Bank of Liverpool* [1896] 1 Q.B. 7, 11.

[93] *Ibid.*

[94] Volume 2 L.D. A.B. 53 *Cf.* F.C. Woodward, The *Law of Quasi — Contracts* (1913) 137 who states, "The ultimate basis of these decisions is the policy of maintaining confidence in the security

On the other hand in *Imperial Bank of Canada* v. *Bank of Hamilton*[95] where the drawer's signature was genuine, but the amount of the cheque had been fraudulently raised by the drawer himself after it was certified, it was held that the amount paid on the cheque could be recovered on the basis of a mistake of fact. These a customer of the Bank of Hamilton drew a cheque for $5, but when he wrote out the cheque he left spaces in the words and figures. The customer then took the cheque to his Bank and got it certified. Thereafter he raised the amount to $500. The altered cheque was then used by the customer to open an account with the Imperial Bank. When the cheque was presented by the Imperial Bank through the clearing house, the Bank of Hamilton paid it without reference to the customer's account, since this was the usual practice in relation to certified cheques. The following day the fraud was discovered and the Bank of Hamilton sued to recover the sum of $495.

The Judicial Committee of the Privy Council held that the amount could be recovered. The Board refused to follow the line of decisions beginning with *Price* v. *Neal* where recovery had been denied.[96] The gist of their Lordships opinion was that the cheque was a forgery and was not a negotiable instrument. Being a simple unindorsed cheque, there were so indorsers to whom notice of dishonour had to be given. As Lord Lindley, on behalf of the Judicial Committee stated;[97]

> The cheque as drawn and certified, i.e. for $5, was never dishonoured, and no question arises as to that. The cheque for the larger amount was a simple forgery, and . . ., the drawer and forger was not entitled to any notice of its dishonour by non-payment. There were no indorsers to whom notice of dishonour had to be given. The law as to the necessity of giving notice of dishonour has therefore no application. The rule laid down in *Cocks.* v. *Masterman*[98] and recently reasserted in even wider language by Mathew J. in *London and River Plate Bank* v. *Bank of Liverpool*[99] has reference to negotiable instrumentes, on the dishonour of which notice has to be given to someone, namely to some drawer or indorser, who would be discharged from liability unless such notice were given in proper time.

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of negotiable paper by making the time and place of acceptance or payment, the time and place for the final settlement as between drawee and holder, of the question of the genuineness of the drawer's signature". See also the American case of *Dedham National Bank* v. *Everett National Bank* (1901) 177 Mass 392, 395 where Holmes C.J. stated: "Probably the rule was adopted from an impression of convenience rather than for any mere academic reason". For a summary of the reasons given by the courts to deny recovery in these situations, see Kerr J. in *National Westminister Bank Ltd.* v. *Barclays Bank International Ltd.* [1975] Q.B. 654.

[95] [1903] A.C. 49.

[96] *Supra*, p. 115—117.

[97] [1903] A.C. 49, 57—58.

[98] *Supra*, note 83.

[99] *Supra*, note 85.

From the above analysis it is clear that English law draws a distinction in this category of cases. Two lines of reasoning may be discerned — one line of cases indicate that where the drawers signature has been either forged or unauthorized, the paying bank is precluded from claiming recovery.[1] The rule of non-recovery in these instances is based on the assumption that a bank, by paying the cheque, affirms the regularity on the customer's signature. The commercial injury of having had the money in the recepient's hands for an appreciable period and having to restore it precludes recovery. On the otherhand where a cheque has been fraudulently altered as by raising the amount or by altering any other detail the drawee could recover on the basis of a mistake of fact.[2]

However it appears that this distinction had not been accepted by Kerr. J. in the recent case of *National Westminister Bank Ltd.* v. *Barclays Bank International Ltd.*[3] There the basic issue involved was whether a bank which had honoured an apparently genuine cheque on which the signature of its customer was in fact skilfully forged could recover the money from the payee of the cheque after he had acted to his detriment in direct reliance on the cheque having been honoured.[4]

In the *Westminister Bank* case, the plaintiffs were the paying bank on whom the cheque was purported to have been drawn by one of its customers, resident in Nigeria. The cheque in question had been stolen from a spare chequebook issued to the customer. The removal of the cheque had been skilfully carried out in the sense that the cheque leaf together with its stubb had been removed from the middle of the chequebook. The customer therefore failed to notice that one leaf had been stolen.

In this particular instance an intermediary brought the stolen cheque to the second defendant. It had been written out for $8,000, uncrossed and unendorsed. The customer's signature had been forged but this was undetectable for the two [meaning the specimen and forged signature] were so similar that to anyone other than a graphologist it would appear to be an excellent forgery. The second defendant agreed with the intermediary to send the cheque to his bank in London for collection and if it was honoured agreed to pay the intermediary a greater sum in local currency. The cheque was duly honoured and the second defendant paid the intermediary the sum of money as promised. Two weeks later when the customer received his bank statement he found that his account had been debited with a cheque for $8,000 about which he knew nothing. The customer then discovered the theft of his cheque and immediately notified the bank of the forgery.

[1] This line of cases of which *Price* v. *Neal* "is the *fons et origo*", all relate to documents which posses some negotiability by reason of the presence thereon of two or more genuine signature.

[2] *Imperial Bank of Canada* v. *Bank of Hamilton*, *op. cit.*

[3] [1975] Q.B. 654.

[4] *Id.* 656 per Kerr J. The issue came before an English court for the first time though there were two cases from the Commonwealth on the same point, namely, *Bank of Montreal* v. *R.* (1907) 38 S.C.R. 258 and *Imperial Bank of India* v. *Abeysinghe* (1927) 29 N.L.R. 258.

The paying bank's action to recover the money on the basis of a mistake of fact was resisted by the second defendant, the payee of the cheque on several grounds.[5] It was contended that the doctrine of estoppel by representation applied, i.e. by honouring the cheque the payer had represented that the cheque was genuine. It was further sought to prove that the payee had acted to his detriment in reliance on the payment. Negligence was sought to be imputed to the paying bank on the basis that it owes a duty of care to payees in connection with the honouring of cheques and that the payer was in breach of that duty. The doctrine of estoppel by reason of their alleged negligence, it was argued also applied.

Kerr J. embarked upon an exhaustive review of previous authorities on this issue. In doing so, he did attempt to reconcile the previous case law but departed from the well established rule of non-recovery, laid down by the early case of *Price* v. *Neal*.[6] His Lordship states:[7]

> Taking the judgments all together, it seems to me, with respect, that they illustrate not only the variety of grounds on which it is possible to justify an obviously correct result as between a paying bank and a collecting bank which has paid the money over to its customer after collecting the proceeds, but also the difficulty of extracting any clear principle from the prior authorities. None of the various *rationes decidendi* can however, in my view be taken even as persuasive authority for the broad proposition that merely by honouring a forged cheque without negligence, the paying bank impliedly represents to the payee that the signature is genuine so as to bar any right of recovery from him.

His Lordship therefore held that the mere fact that the bank had honoured a cheque on which the customer's signature had been undetectably forged did not carry with it an implied representation by the banker to the payee that the cheque was genuine.[8] "The common aphorism that a banker is under a duty to know his customer's signature is in fact incorrect, even as between the banker and his customer. The principle is simply that a banker cannot debit his customer's account on the basis of a forged signature, since he has in the event no mandate from the customer for doing so".[9]

According to Kerr J. a forged cheque was in law not a cheque or a negotiable instrument but a mere sham piece of paper[10] and accordingly

[5] [1975] Q.B. 654, 657—658.

[6] *op. cit.*

[7] [1975] Q.B. 654, 672.

[8] *Id.* 674.

[9] *Id.* 666.

[10] *Id.* 656—657. *Cf.* Fisher C.J. in *Imperial Bank of India* v. *Abeysinghe* (1927) 29 N.L.R. 257, 260 to the same effect.

the present case was distinguishable from the line of cases relating to negotiable instruments (where recovery has not been allowed) which are not mere forgeries in toto but contain at least one genuine signature and which have been negotiated to at least one innocent holder.

The implications flowing from the *National Westminister Bank* case are indeed far reaching. A bona fide payee of a cheque for value would not know with certainty when payment by cheque would be complete. If the signature had been skilfully forged, he may be called upon to repay the money paid to him since the judicial opinion in relation to a forged cheque is that it is in law not a cheque but a mere sham piece of paper. This right of recovery is of course subject to the traditional defences[11] available to the payee in an action for money had and received. Nevertheless the *Westminister* decision greatly undermines the importance of payment by cheque in commercial transactions where certainty and security of payment are important considerations.[11a] It was unfortunate that the case was not reviewed by the Court of Appeal. It is to be hoped that in the near future the House of Lords would be called upon to decide that very question.

In the Malaysian case of *Ho Chooi Soon* v. *Indian Overseas Bank Ltd.*[11b] the plaintiff paid an uncrossed cheque to the credit of his account with the defendant bank. The cheque was drawn by an Insurance Company in favour of one Yeo Wee Yang, whose purported indorsement was guaranteed by the Secretary of the company. The defendant bank crossed it specially to itself after it had received if for collection and credited the proceeds to the plaintiff's account. Two years later the Insurance company discovered that the indorsement of the payeed had been forged. On discovery, the Insurance Company demanded repayment of the proceeds of the cheque claiming that they were the true owners of the cheque. The defendant bank in turn debited the plaintiffs account to the extent of $3,243.87 (which was the sum originally credited under the forged cheque).

The main issue which Rigby J. was called upon to decide was whether the defendant bank was entitled to debit the plaintiff's account with the value of the cheque in circumstances where payment had been made under a mistake of fact.

The defendant bank's claim to debit the plaintiff's account was resisted on a number of grounds:

1. It was argued that a condition precedent to such recovery was that the mistake should be discovered at once and repayment claimed at once.

[11] *Infra*, p. 132.

[11a] No doubt the transaction in the *Westminister* case involved an element of illegality in that it was made in violation of Nigerian foreign exchange regulations but as the court did not base its decision on that aspect, the *ratio decidendi* would apply to all cases where forged cheques have been involved.

[11b] [1960] MLJ 286.

2. It was contended that the plaintiff was a holder in due course of the cheque; that the defendant bank debited his account two years after the proceeds had been collected by them and paid into his account and that they did this simply on the strength of the correspondence from the drawer of the cheque who claimed to be the true owners of the cheque and therefore entitled to its proceeds.

Commenting on the above arguments, Rigby J. said:[12]

> I must confess that I find the case to be one of considerable difficulty and complexity. At first sight it certainly seems a startling proposition that a Bank, two years after it has collected the proceeds of a cheque paid by a customer into his account and credited the customer with that amount, should claim the right to debit the customer with that amount simply on the representative of the makers of the cheque that it was a forgery.

His Lordship went on to state that,[12a]

> A banker cannot dishonour his customer's cheque upon a mere claim by a third person to the moneys standing to the credit of the account; otherwise the banker would often be set the task of conducting a judicial inquiry into the rights of parties. The person claiming the moneys should obtain an injunction restraining the bank from honouring the customer's drafts. (See Grant's Law of Banking, 7th Edition, page 97). By analogy, it would seem to me that when a Bank, as a collecting agent for a customer who has presented a cheque for collection has received the money due and credited it to its customer's account, it could not subsequently, on the representation of a third party — albeit, the drawer of the cheque — that the cheque was a forgery, debit the customer's account with the proceeds already collected and paid in. To act in such a manner appears to me to be an attempt by the Bank to absolve itself of its own want of precaution in failing to ensure that the cheque was crossed generally or specially by the customer to himself before it was presented by him to the Bank for collection.

However following the case of *Bavins Junr. & Sims* v. *London and South Western Bank Ltd.*[13] Rigby J held that the defendant bank was entitled to debit the plaintiff's account with the value of the cheque. His Lordship went on to hold further that the plaintiff in this case was not a holder in due course of the cheque because before the cheque came into the hands of the plaintiff, its previous negotiation was effected with fraud.

Having surveyed the English law, it is now relevant to consider the aspect of recovery of payment on a forged instrument under Roman-Dutch law.

[12] Id 288.

[12(a)] *Ibid.*

[13] [1960] 1 QB 270.

Roman-Dutch law has not accepted the distinction made in English Law between an instance where the drawer's signature has been forged and where a cheque had been materially altered as by raising the amount. The attitude of the Roman-Dutch law is that recovery is permitted in both situations. This proposition it is submitted, is implicit in the decision of the Ceylon Supreme Court in *Imperial Bank of India* v. *Abeysinghe*.[13a]

In *Abeysinghe*'s case the court by a majority decision permitted a bank to recover money paid on a cheque which bore the forged signature of one of its customers. In doing so the court refused to be bound by *Price* v. *Neal*. In this case the defendant a proctor and notary public had received a cheque for a sum of Rs. 2,000/= as part payment of the consideration on a transfer of land. The deed relatng to the transaction had been attested by him. The alleged transferor and transferee were strangers to the defendant. The cheque had been drawn in the defendant's favour by the alleged transferee. The defendant presented the cheque personally at the bank and on receiving payment handed the money to the transferor. It later turned out that the cheque had been forged on a leaf issued by the bank and the number on the leaf had been altered to correspond to one of the numbers in the series of cheques leaves issued to A. whose signature had been forged. The entire land transaction was in fact of fictitious one. Throughout the transaction the defendant had acted bona-fide.

The majority of the court[14] held that the paying bank could recover even though the defendant had paid out the proceeds of the cheque to the vendor. Fisher C.J. considered the cheque a nullity and therefore did not treat it as a cheque at all. Therefore the line of cases beginning with *Price* v. *Neal* had no application.[15] Dealing with counsel's argument that a bank is bound to know its customer's signature, His Lordship said, "while that proposition is good as between a bank and its customer I do not think that any duty or obligation towards a third party in the situation of the defendant can be founded upon it."[16] Counsel for the defendant also contended that in honouring the cheque the bank must be taken to have made a representation to the payee that the signature was genuine. On this aspect, His Lordship said, "I am not prepared to say that merely cashing the document is in itself conduct which amounts to a representation that the document is genuine."[17]

[13a](1927) 29 NLR 258 (A decision of a Divisional Bench) see also *Natal bank* v. *Rooda* 1903 T.H. 298.

[14]Per Fisher C.J. and Schneider J; Garvin J. dissenting.

[15](1927) 29 N.L.R. 257, 260.

[16]*Ibid*.

[17]*Ibid*. See also Schneider J. at p. 264 who agreed with the Chief Justice and followed the same line of reasoning.

Relevance of Negligence in Actions for Recovery on a Forged Instrument

In *Price* v. *Neal*[18] Lord Mansfield as a ground for denying relief stated, "if there was any fault or negligence in anyone, it certainly was in the plaintiff and not the defendant?[19] This statement carries with it the implication that negligence on the part of the paying banker, would be a bar to recovery of money paid by mistake on a forged instrument. It is submitted that this view is incorrect. While proof of negligence would give rise to a possible defence of estoppel by negligence,[20] negligence *per se* is not a factor to be taken into account when denying relief in an action for money had and received.

It has also been asserted that in actions of this nature, the failure to recognize the signature of the customer of the bank implies fault on the part of the payer.[21] This again it is submitted is incorrect. As Mathew J. said, "Lord Mansfield is reported to have said that the acceptor was bound to know the drawer's handwritting. From that it was argued that the foundation of the liability of the plaintiff in such a case was negligence and that if there was no negligence the acceptor was entitled to recover the money back. But that is not the decision".[22]

In the earlier case of *Keely* v. *Solari* Parke B. said,[23] "If money is paid under the impression of the truth of a fact which is untrue, it may generally speaking be recovered back, *however careless* the party paying may have been in omitting to use *due deligence* to inquire into the fact.[24] (Emphasis mine)

This view that negligence *per se* is generally irrelevant in a banker's action to recover money paid on a forged document was confirmed by the Privy Council in *Imperial Bank of Canada* v. *Bank of Hamilton*.[25] Lord Lindley delivering the opinion of the Board said,[26] "It cannot be denied that when the Bank of Hamilton paid the cheque. . . it had means of ascertaining from its own books that the cheque had been altered. But means of knowledge and actual knowledge are not the same, and it was long ago decided in *Kelly* v. *Solari* that money honestly paid by a mistake of fact

[18](1762) 2 Burr. 1354 (97 E.R. 871)

[19]*Id*. 1357.

[20]For a discussion of the defence of estoppel by negligence see *infra*.

[21]Per Lord Mansfield in *Price* v. *Neal* (1762) 3 Burr. 1354, 1357.

[22]*London & River Plate Bank* v. *Bank of Liverpool* [1896] 1 Q.B. 7, 10.

[23](1841) 9 M & W 54, 58.

[24]See *R.W. Jones Ltd. v. Waring & Gillow Ltd.* [1926] A.C. 670, 688 where Lord Shaw of Dunfermline cited with approval the above passage in the judgment of Parke B. in *Kelly* v. *Solari*.

[25][1903] A.C. 49 (P.C.)

[26]*Id*. 56.

could be recovered back, although the person paying it did not avail himself of means of knowledge which he possessed".

These rulings of the English courts on the irrelevance of negligence in a banker's action to recover money paid by mistake, is also consistent with the basic principle of the *condictio indebiti* of the Roman-Dutch law that the negligence of the payer is not a bar to relief. As Voet[27] states, "an ordinary careful person is not required to make too scrupulous an investigation with reference to a fact not immediately apparent and will in the case of a mistake be entitled to relief".

A case in Roman-Dutch law illustrative of this point is *Sarnelis Appuhamy* v. *Ram Iswara*[28]. There at the conclusion of a public auction of immovable property the purchaser was presented a bill by the auctioneer setting out the amount due from him. The plaintiff without scanning the bill, paid the full amount. On the following day he discovered that an exhorbitant amount had been charged as notarial fees and he sought to recover this amount as having paid under a mistake of fact. Nagalingam A.C.J. held that he could recover, even though the mistake could have been avoided if he had checked the bill before payment. This decision it is submitted would apply equally to a bank making payment under a mistake of fact, even though the mistake could have been avoided by the exercise of due care.

Where Payment had been Stopped

The courts have been called upon to decide whether a bank which pays a cheque, the payment of which had been countermanded, could recover the amount from the payee as money paid under a mistake of fact. The balance of authority points to the fact that provided there had been an effective countermand it is possible to recover. From this it follows that constructive countermand is insufficient.[29]

Bank of New South Wales v. *Deri*[30] was a decision given by the District Court of New South Wales. There in connection with the negotiation for the purchase of a house, the potential buyer gave a cheque for a certain sum of money to the owner. The negotiations fell through, whereupon the cheque was stopped. The vendor did not know that the cheque had been stopped. It was nevertheless presented over the counter of the drawee bank and, due to an oversight, was paid. Clegg D.C.J. following *Kelly* v.

[27] 12.6.7.

[28] (1954) 56 N.L.R. 221.

[29] "Countermand is really a matter of fact. It means much more than a change of purpose on the part of a customer. It means, in addition, a notification of that change of purpose to the bank. There is no such thing as constructive countermand in commercial transactions of this kind" per Cozens Hardy M.R. in *Curtice* v. *London City and Midland Bank* [1908] 1 K.B. 293, 299.

[30] (1963) 80 W.N. (N.S.W.) 1499.

Solari[31] held that the bank could recover on the basis that "the cheque had ceased to be a valid and subsisting one, the bank had no authority to pay it and the defendant no right to receive its proceeds".[32]

Commonwealth Trading Bank v. *Reno Auto Sales Pty Ltd.*[33] was subsequent to *Deri*'s case. This case appears to be the first reported decision of a Superior Court in the Common Law world (outside the United States) which considered the right of a banker to recover payment from a payee who did not know that the cheque had been stopped.[34]

As seen earlier, Gillard J. in the *Reno Auto* case proceeded on the assumption that payment had been stopped.[35] Nevertheless before proceeding on this premise His Honour did hold that the cheque had not been effectively countermanded. It is therefore relevant to consider the basis on which His Honour came to that conclusion.

In the *Reno Auto* Case the purported countermand was effected through the medium of the telephone. The drawer's wife had spoken over the telephone to a member of the bank staff. However there was a conflict of evidence as to what actually transpired during the course of the telephone conversation. The drawer's wife maintained that she had said payment was not to be made until her husband called that afternoon at the bank to sign the stop payment notice. Neither the manager nor the teller was informed of this telephone conversation.

The decision turned on the question whether the telephone conversation between the drawer's wife and the bank employer constituted a countermand of payment. On this aspect Gillard J. observed:[36]

> I am not satisfied that the message received by Miss Sturdy [i.e., the banks employee] from Mrs. Gossler [drawer's wife] constituted a countermand of the payment of the cheque. The conversation deposed to by both the ladies was, in my view, extremely ambiguous. On the face of the most favourable view to the plaintiff's, the plaintiffs quoad Gossler, would not have been safe in acting upon the telephone message to refuse payment. If the manager or teller had known of the telephone message neither of them could have safely acted upon the view that payment was stopped. Miss Sturdy says she did not regard the payment as being stopped and I am of the same opinion.

According to His Honour when a bank is called upon to pay its customer's cheque, it is acting as an agent of its customer for the specific

[31] *Supra*, p. 109 n. 46.

[32] (1963) 80 W.N. (N.S.W.), 1499, 1503.

[33] [1967] V.R. 790.

[34] For the facts of the case, see *supra* p. 108-109.

[35] *Supra*, p. 125 n. 30.

[36] [1967] V.R. 790, 793.

purpose of using his funds to pay his cheque.[37] The bank therefore being an agent for a specific purpose is required to act on a customer's instructions, but in the interests of all parties such instruction should be clear and unambiguous so as not to mislead the bank or its servants as to the customer's instructions. If a customer desires to stop payment it should be communicated unequivocally to the relevant person in the bank who may be expected to make payment or supervise such payment. On this premise His Honour distinguished[38] the previous case of *Bank of New South Wales* v. *Deri*[39] since in that case there was no ambiguity in the instructions and the bank had received the appropriate notice of countermand.

The facts of *Commonwealth of Australia* v. *Kerr*[40] is analogous to the case of a bank paying on a cheque that had been stopped. There a soldier before being stationed overseas, signed an allotment directing the Commonwealth to pay a part of his salary to the defendant who was his finance. While serving overseas he married another woman and cancelled the allotment in favour of the defendant. The Commonwealth having overlooked the cancellation, continued to pay the defendant. On discovery of the mistake it was sought to recover the payment made to the defendant. The Full Court of the Supreme Court of South Australia upheld the Commonwealth's claim.

A New Zealand case on the question of countermand of payment is *Southland Savings Bank* v. *Anderson*.[41] The facts were practically identical with those in the *Reno Auto* case.[42] The material difference was that the customer who had drawn the cheque had got it "marked" by the bank. It was argued that once a cheque had been "marked" it could not be countermanded. On this aspect the Supreme Court of New Zealand stated that the practice of "marking" was no more than a device to notify the teller that there are sufficient funds in the drawer's account to meet the cheque when it is presented for payment and that a marked cheque did not preclude the drawer from countermanding payment.[43] The case was however remitted back to the trial court in order to determine whether there had been a change of position that would affect the right of recovery in terms of Sections 94A or 94B of the Judicature Act of New Zealand.

[37] *Ibid.*

[38] *Id.* 794.

[39] *Supra*, p. 26, note 30.

[40] [1919] S.A.S.R. 201 (F.C.).

[41] [1974] 1 N.Z.L.R. 118.

[42] *Supra.*

[43] [1974] 1 N.Z.L.R. 118, 121.

In the recent case of *Barclays Bank Ltd.* v. *W.J. Simms Son & Cooke (Southern Ltd) and another*[44] the question of recovery of money paid on a stopped cheque arose for the first time in English law. Briefly the facts were that a housing association drew a cheque for $24,000 on its account with the plaintiff bank, in favour of a building company. On the following day a receiver was appointed to call in the building company's assets. On hearing this, the association instructed the plaintiff bank through the telephone not to pay the cheque. The stop order made through the medium of the telephone was subsequently confirmed by written instructions. The bank's paying official overlooking the stop order, paid the cheque. The plaintiff therefore sought to recover the money so paid on the basis of a mistake of fact. Goff J. sitting in the Queen's Bench Division held that the bank was entitled to recover the amount paid. In doing so His Lordship rejected the doctrine based on *Kelly* v. *Solari*[45] that money paid by mistake could be recovered only if the plaintiff would have been under a legal liability to pay if the supposed facts were true.[46]

It has been stated that as the question of countermand relates to the nature of the mistake, such a mistake of fact can form the basis for an action in restitution only if the error relates to the relationship of payor and payee. Thus in the *Reno Auto* case, Gillard J. said, "since the alleged mistake of fact did not affect the legal character of the relationship between the plaintiff and defendant, there being in law no privity between them, such mistake would not found the action for money had and received".[47] In Halsbury it is stated:[48]

> The mistake must be a mistake between the party paying and the party receiving the money. If the fact about which the mistake exists has nothing to do with the payee, the rule does not apply.

[44][1980] Q.B. 677.

[45](1841) 9 M & W 54, 58-59 per Parke B.

[46][1980] Q.B. 677, 688. Professor R.M. Goode has argued that the plaintiff bank in *Barclays Bank* v. *Simms* should have been denied recovery on two grounds namely change of position and the bankers apparent authority to make payment. See "The Bank is Right to Recover Money Paid on a Stopped Cheque" [1981] L.Q.R. 254, 255-256. It is however submitted that the facts of *Barclays Bank* v. *Simms* would not have supported the defence of change of position. This defence has been restrictively interpreted by the English courts. The onus is a very heavy one since the defendant must show a change of position as a result of the particular payment. Thus where the payee had done nothing more than to expend the money on his own purposes, that has been held to afford no defence — see *R.E. Jones Ltd.* v. *Waring & Gillow Ltd.* [1926] A.C. 671. The argument based on the banker's apparent authority to make payment ignores the fact that countermand of payment terminates the banker's mandate to pay the cheque and consequently the banker has no right to debit the drawer's account. On this latter point, see *Barclays Bank* v. *Simms* [1980] Q.B. 677, 699.

[47][1967] V.R. 790, 798.

[48]Laws of England, Vol. 26 (3rd ed.) 923.

In *Barclays Bank* v. *Simms,*[49] Goff J. rejected the above proposition as being a misapplication of the dictum of Erle C.J. in *Chambers* v. *Miller*[50] and as being in consistent with subsequent authority.[51] Alternatively Goff J. held that the mistake by the bank as to its mandate to pay was clearly shared by the defendants. This view is also supported by the decisions in *Bank of New South Wales* v. *Deri* and *Southland Saving Bank* v. *Anderson.* Thus in *Deri's* case, Clegg C.J. adopted the view that as the cheque had been paid on the assumption that it was a valid and subsisting order to pay, whereas it had ceased to be so because of the countermand, this was a common mistake as to the belief in the validity of the cheque was shared by both parties.[52] In the New Zealand case of *Anderson* to which reference had already been made, the court held that the cheque was paid under a mutual mistake in that "both the appellant and the respondent were mistaken in thinking that the cheque had not been countermanded."[53]

It would seem therefore that the balance of judicial decisions favour the recovery of money paid by mistake after a cheque had been countermanded. The basis of the right of recovery in this regard seems to be that 'a cheque is only a revocable mandate'[54] which may be stopped at anytime by the drawer and the drawing of a cheque does not amount to an assignment by the customer of his funds at the bank.[55]

Insufficient Funds

If a bank honours a cheque or any other form of negotiable instrument and subsequently discovers that the customer had insufficient funds, the available authorities point to the fact that it cannot recover. *Chambers* v.

[49][1980] Q.B. 677.

[50]In *Chambers* v. *Miller* 13 C.B. (N.S.) 125 E.R. 50) the plaintiff presented on behalf of his employer, a cheque at the defendant's bank. The teller cashed the cheque and handed the money over to plaintiff. While the plaintiff was in the act of counting the money, the cashier discovered that the drawer's account was overdrawn and he therefore demanded the money back. Upon the plaintiff's refusal to do so, the cashier seized it by force. The court held that once cash had been paid over the counter, the property in the money passed to the bearer of the cheque. It was in the context of considering that question that Erle C.J. referred to the mistake as being "not as between [the cashier] and the bearer of the cheque, but as between him and the customer" — 13 C.B. (N.S.) 125, 133. In *Barclays Bank* v. *Simms* supra, at p. 688-689 Goff J. stated that this dictum has been taken out of its context and used as authority for the proposition that no action will lie to recover money paid under a mistake of fact, unless the mistake was "as between" the payer and payee, in the sense that both parties were suffering under the same mistake.

[51]*Kleinwort, Sons & Co.* v. *Dunlop Rubber Co.* (1907) 97 L.J. 263; *Kerrison* v. *Glyn, Mills, Currie & Co.* (1911) 81 L.J.K.B. 465; *R.E. Jones Ltd.* v. *Warring & Gillow Ltd.* [1926] A.C. 670.

[52][1963] Sow. N. (N.S.W.) 1499.

[53][1974] 1 NZLR 118, 121.

[54]*Re Beaumont* [1902] 1 Chancery 889, 894 per Buckley J.

[55]Thus if the bank refuses payment to a third party, the latter has no legal redress against the bank because a bank owes a duty to its customer and not to the payee.

Miller[56] is the leading authority on the point. There the plaintiff presented on behalf of his employer, a cheque at the defendant bank. The teller cashed the cheque and handed the money over to the plaintiff. While the plaintiff was in the act of counting the money, the cashier discovered that the drawer's account was overdrawn and he therefore demanded the money back. Upon the plaintiff's refusal to do so, the cashier seized it by force. The plaintiff's action was based on assault and false imprisonment. In deciding that issue the court had to determine whether in the circumstances of the case the bank had a righ of recovery.

The court held that once cash had been paid over the counter, the property in the money passed to the bearer of the cheque and a mistake on the part of the paying bank as regards the state of its customer's funds did not entitle it to claim repayment. The pragmatic reason for the decision is clearly stated in judgment of Byles J. who said, "It would create a great sensation in the city of London, if it were to be held . . . that, after a cheque had been regularly handed over the banker's counter and the money received for it and in the act of being counted, the banker might treat the cheque as unpaid, because be has subsequently to his taking the cheque and handing over the amount ascertained that the state of the customer's account was unfavourable".[57] The decision no doubt rests clearly on commercial practice and expediency.

In the subsequent case of *Pollard* v. *Bank of England*,[58] the court followed *Chambers* v. *Miller*. There a bill payable at the acceptor's banker was presented by the defendants, along with other negotiable instruments payable by the banker. The banker issued a cheque to the defendants for an amount which included the value of the bill. The defendants then credited the account of the plaintiff, from whom they had received the bill. On the same day, the acceptor's bank discovered that the acceptor had insufficient funds. It also came to light for the first time that the acceptor had stopped payment. It was held that the plaintiff was entitled to retain the credit given to him.

The above decisions have led some writers and judges to assert that a mere unilateral mistake on the part of a banker cannot be the basis of an action for money had and received. In this regard reference may be made to the case of *Barclays Bank Ltd.* v. *Malcolm & Co.*[59] There a bank in Warsaw instructed the plaintiff bank by telegram to pay a sum of $2000 to the defendants. The plaintiff bank accordingly did so. After a period of time the plaintiff received a letter from the Warsaw bank confirming the telegram. The plaintiffs however construed this as a new instruction and paid a further sum of $2000 to the defendants. Subsequently, the plain-

[56] 13 C.B. (N.S.) 125 (142 E.R. 50).

[57] *Id.* 136.

[58] (1871) L.R. 6 Q.B. 623.

[59] (1925) 133 L.T. 512.

tiffs received further instructions to pay a sum of $1000 but this amount was not paid. After discovery of the mistake, the plaintiffs agreed to credit the defendants with $1000, seeking to recover $1000 of the $2000 paid by mistake. Roche J. held that the mistake was not such as to entitle the plaintiff to recover. According to His Lordship the mistake was in no way due to the defendants, that the mistake concerned only *Barclays* and that it was not a mistake with regard to the liability of one person to pay or the right of another to receive.[60] These remarks imply that unless the mistake was one between the payer and payee, a unilateral mistake on the part of the payer precludes recovery. However the value of this decision as a precedent is diminished because it is a decision of a judge of first instance and also the learned judge saw it as not within his function as a trial judge that he should examine all the cases dealing with money paid on a mistake of fact or should reformulate the principles applicable to such cases.[61]

According to *Cheshire* and *Fifoot*[62] a unilateral mistake is where "one only of the parties is mistaken. The other knows or must be taken to know, of his mistake". If we keep in mind this definition it would seem that the facts of *Chambers* v. *Miller* do not justify the view that the mistake was unilateral. Indeed,the true analysis of that case would be that there was no mistake at all. This point was emphasized by Clegg D.C.J. in *Deri*'s case. His Honour referring to *Chambers* v. *Miller* said, "The case appears to me to have proceeded upon the basis that the cheque was a valid and subsisting order for payment and that about that fact there was no mistake on either side".[62]

On balance, it is submitted that a unilateral mistake as defined by Cheshire and Fifoot should form the basis of an action for money paid under a mistake of fact. *Westminister Bank Ltd.* v. *Arlington Overseas Trading Co.*[63] supports this proposition. There the plaintiff bank had paid to the defendants the proceeds of a drawing under a documentary letter of credit. This was a mistake on the bank's part because it had received from the defendants a letter authorizing payment under the documentary letter of credit to X who had supplied and shipped the goods covered by the credit. The defendants either knew or must be taken to have known of the bank's mistake. It was held by the Queens Bench Division that the bank could recover the amount of the payment which had been made in mistake of fact.

In the Singapore case of *Naderlandsche Handel-Maatschappij N.V.* v. *Koh Kim Guan*[63a] the defendant presented for payment a cash cheque for $3,000 drawn by a third party. The amount payable i.e. $3,000 appeared

[60] *Id.* 513.

[61] *Id.* 519.

[62] *Law of Contracts, op. cit.* 227.

[63] [1952] 1 Lloyds Report 211.

[63a] [1959] MLJ 174

only in figures and was not stated in words in the body of the cheque. According to the plaintiffs by an act of inadvertence on the part of their cashier a sum of $30,000 was paid instead of $3,000 as was written on the cheque. It was the plaintiffs contention that the defendant retained the sum of $30,000 very well knowing that he had been overpaid and therefore he was guilty of a fraudulent act.

On the above facts, it is clear that the over-payment had been made as a result of a unilateral mistake made by the bank officials. Accordingly the court was of the view that in such a situation the excess payment could be recovered as money paid under a mistake of fact. However, on the actual facts of this case, Rose C.J. held that the plaintiffs claim failed. This conclusion was reached because it was the plaintiffs contention that the defendant's conduct was fraudulent. The court therefore following English authorities held that a high standard of proof was required in cases where fraud is alleged in civil proceedings.[64] On the evidence presented in the case, it was held that the plaintiffs had not discharged this burden.

DEFENCES

Estoppel

This operates only as a shield and not as a sword. Estoppel therefore cannot be made the subject matter of a cause of action. But a defendant can always plead it as a defence in order to defeat the plaintiff's claim. In an action by a banker to recover money paid by mistake, estoppel could be pleaded in two situations:

i) A misrepresentation of fact by a banker which induces a third party to act to his detriment, would estop the former from denying the truth of the misrepresentation.

ii) In case of a breach of a duty by a bank towards its customer, estoppel will bar the right of recovery.

Misrepresentation of Fact

In *Lloyds Bank Ltd.* v. *Brooks*[65] Lynskey J. said, "If as a result of a mistatement by a bank, a person is induced to spend more money than he has got to spend, than it seems to me in the ordinary case . . . they are acting to their detriment". In a similar vein Viscount Cave L.C. said in *R.E. Jones Ltd.* v. *Warring and Gillow Ltd.*[66] "There is a great body

[64]Id 175. On this point see *Samanathan* v. *Papa* [1981] 1 MLJ 121 P.C.

[64a][1952] 1 Lloyd's Report 211.

[65]Vol. 6 L.D.A.B. 161, 169. This case is not reported in any of the regular law reports.

[66][1926] A.C. 671, 683.

of authority in favour of the view that where a person to whom money has been paid by mistake has been misled by the payer's conduct, and on the faith of that conduct has acted to his detriment, the payer cannot in law . . . insist on repayment".

A case which illustrates the doctrine of estoppel by misrepresentation is *Deutsche Bank (London Agency)* v. *Deriro and Co.*[67] There X indorsed and forwarded a bill of exchange drawn on a firm in Antwerp to the defendant who were commission agents in London. The defendant indorsed and handed over the bill to the plaintiffs, who in turn gave it to their agents in Antwerp for collection.

Sometime later the plaintiff without making any inquiry of their agents, informed the defendant that it had been paid and sent a cheque to them for the amount. The defendant thereupon credited X with that amount and X paid the money away to others which could not be recovered. The plaintiffs sought to recover the money paid on the bill from the defendant as money paid under a mistake of fact. The Court of Appeal affirming the decision of Mathew J. held that the money could not be recovered. The plaintiffs, it was held, were estopped by the representation which they made to the defendant and upon which the defendant acted to his detriment.[68]

It has been held that the mere fact that a banker had honoured a cheque on which the drawer's signature had been skilfully forged did not carry with it the implied representation by the banker that the cheque was genuine. In such a situation the doctrine of estoppel by representation will not apply.[69]

Breach of a Duty of Care

Estoppel in consequence of a breach of a duty of care on the part of a banker is narrow in scope than estoppel by representation. The former can be pleaded only by a customer[70] whose account hs been erroneously credited with a larger sum as a result of a mistake on the part of a banker. The rationale precluding recovery seems to be that a bank is under a duty when they deliver a statement of account to a customer to exercise reasonable care to see that those statements are accurate. As pointed out earlier a bank owes no duty of care to a third party and therefore a third party is precluded from raising the defence of estoppel on the basis of a breach of duty.

[67](1895) 12 T.L.R. 106.

[68]*Id.* 107. See also *R.E. Jones Ltd.* v. *Waring and Gillow* [1926] A.C. 670, 682—685.

[69]*National Westminister Bank* v. *Barclays Bank* [1975] Q.B. 654; *Imperial Bank of India* v. *Abeysinghe* (1927) 29 N.L.R. 258.

[70]For the purpose of this defence the word "customer" is narrowly defined to include only a person who has an account with a particular bank and which amount has been erroneously credited by the bank with a larger sum.

Skyring v. *Greenwood*[71] was an early case where breach of a duty on the part of the payer, estopped him from claiming the money back. There the paymaster of a military corps credited the account of Major Skyring for a period of four years with certain increased pay erroneously supposed to be granted under a general order to an officer of his position. Before making any payment, the paymaster had received notice from the Board of Ordinance that the increased pay did not apply to persons in the position of the major but his was not communicated to the major. Both Abbott C.J. and Bayley J. gave judgement against the paymaster on the basis that he was guilty of a breach of duty in not communicating to the major the notice that had been received.[72] This decision it is submitted would apply *mutatis mutandis* to the case of a banker erroneously crediting a customers account with a larger sum.

In *Lloyds Bank Ltd.* v. *Brooks*[73] the court applied the principle enunciated in *Skyring* v. *Greenwood*. There the defendant was a beneficiary of a trust of certain shares. The plaintiff bank which held standing instructions from the trustees as regards the application of the dividends over a number of years credited the defendant's account with the dividends. During this period the plaintiff bank had mistakenly credited the defendants account with a sum of over $1000, which sum was in fact payable to her brother under the same trust. When sued by the bank to recover the amount erroneously credited, the defendant pleaded that by relying upon the plaintiff's representation, she had altered her position to her detriment. She had been led to believe that her income was greater than it was in fact and has spent more money than she would otherwise have done. In upholding the plea, Lynskey J. said, "I am satisfied on the facts of this case and I find in fact, the Miss Brooks did act to her detriment in making this overpayment and in their breach of duty in representing to her that she was entitled to money to which they now say she is not entitled. Under those circumstances it seems to me that there must be judgment for the defendant".[74]

It would follow that if the customer knew that he was not entitled to the money, then a breach of a duty of care on the part of the banker would not assist the customer to resist the banks claim for restitution. As Lynskey J. said, "If I had taken the view that the knew she was not entitled to this money, then of course her defence would fail because there could be no estoppel under circumstances where a person, knowing she was receiv-

[71](1825) 4 B & C 281 (107 E.R. 1064).

[72]*Id.* 290.

[73](1967—1954) 6 L.D.A.B. 161.

[74]*Id.* 169.

ing money to which she was not entitled, does not repay it. She could not under those circumstances resist a claim for repayment.[75]

Change of Position

This defence has been restrictively interpreted by the English courts. The onus is a very heavy one since the defendant must show a change of position as a result of the particular payment. It has been stated that "where the payee had done nothing more than to expend the money on his own purposes, that has been held to afford no defence".[76]

It has been stated that where an agent receives money on behalf of a principal and before notice of the mistake pays it over to the principal, then the agent is not liable. In such situations the claimant will have to sue the principal for repayment. As Lord Atkinson observed in *Kleinwort Sons & Co.* v. *Dunlop Rubber Co.*[77] whether he would be liable if he dealt as agent with such a person will depend upon this, whether before the mistake was discovered, he had paid over the money which he received to his principal or settled such an account with the principal as amounts to payment or did something which so prejudiced his position that it would be inequitable to require him to refund".

In *Gower's* v. *Lloyds and National Provincial Foreign Bank Ltd.*[78] the plaintiffs who were Crown Agents for the Colonies were responsible for the payment of pensions to retired members of the Colonial Civil Service. G. a retired officer had during the period 1916—1926 collected his pension from the defendant bank by coming to the bank in person. In 1926 when G changed his place of residence he decided to collect his pension through the post. Under this procedure the receipt forms were sent direct to G, by the plaintiff. G. in addition to filling up the receipt form, had also to fill up a certificate stating that he was still alive. This certificate had to be attested by a competent witness. The completed documents were then presented through the defendant bank for collection of the pension G. died in 1929 and after his death for a period of nearly six years the pension was collected by means of forged receipts. The defendant bank was unaware of G's death or of the forgery that had been going on. When the forgery came to light the plaintiffs sued the defendant bank to recover these payments. The Court of Appeal held that the money so paid cannot be recovered. The defendant bank was in the position of an agent and had

[75] *Id.* 165—166 *Cf. Standish* v. *Ross* (1849) 3 Ex. 527 (recovery of money by a sheriff), *Baylish* v. *Bishop of London* [1913] Ch. 127. (over-payment of tithes) and *R.E. Jones Ltd.* v. *Waring & Gillow Ltd.* [1926] A.C. 671, (recovery of money induced by a third party's fraud) where the courts held that there was no duty in the first instance owed to the receipient.

[76] *R.E. Jones Ltd.* v. *Warring and Gillow Ltd.* [1962] A.C. 671.

[77] (1907) 97 L.T. 263, 265.

[78] [1938] 1 A.E.R. 766.

paid the money away to its principal. The fact that the bank was mistaken as to the identity of its principal was held to be immaterial.

If the amount between the principal and agent had not been settled, so that it was open to the agent to reverse the credit and retain control of the money, the available authorities point to the fact that the defence of change of position would fail.[79]

Mistake of Law

If money is paid under a mistake of law, such payment cannot in general be recovered.[80] As regards the Roman-Dutch law, the question whether relief under the *condictio indebit* was excluded by a mistake of law has been considered by the Roman-Dutch jurists and it appears that they were divided in their opinion.[81] The South African[82] and Ceylon Courts[83] have accepted the view that a mistake of law prevents recovery of payment.

Nevertheless the courts have enunciated certain qualifications to the above rule. In *Attorney-General* v. *Peiris*[84] Sirimanne J. in the Ceylon Supreme Court accepted the view that "if there is something more, in addition to a mistake of law — if there is something in the defendant's conduct which shows that of the two of them, he is the one primarily responsible for the mistake" or "if the duty of observing the law is placed on the shoulders of the one rather than the other"[85] a mistake of law will not hinder restitution. The rationale for permitting recovery is probably based on waiver of limitation.

It is submitted that the qualifications accepted by the Ceylon courts brings the Roman-Dutch law in harmony with the qualifications laid down for the English law by Lord Denning in *Keriri Cotton Co. Ltd.* v. *Dewani.*[86]

[79] *Bavins and Sims* v. *London and S.W. Bank Ltd.* [1900] 1 Q.B. 270 (C.A.) and *Admirality Commissioners* v. *National Provincial and Union Bank of England* (1922) 127 L.T. 452.

[80] *Holt* v. *Markham* [1923] 1 K.B. 504. See also Lord Denning in *Kiriri Cotton Co. Ltd.* v. *Dewani* [1960] A.C. 192, 204 who said, "The true proposition is that money paid under a mistake of law by itself without more cannot be recovered back" *Cf.* for Roman-Dutch law, Voet 12.6.7, who states, "The *condictio indebiti* lies only for ignorance of fact, not of law. If the payment of what was not due happened through ignorance of law, the true view is that a claim was denied by the Civil Law".

[81] Voew 12.6.7 and Schorer (ad Grotium) 457 denied recovery where payment had been included by a mistake of law, while the contrary opinion was expressed by Grotious 3.30.6., Van Leeuwen (Censura Forensis) 1.4.14.3 and Van der Kessel (Theses) 796.

[82] *Liquidators of Pearl Bank* v. *Rouz* 8 S.C. 205; *Heydenrych* v. *The Standard Bank of South Africa* 1924 C.P.D. 335.

[83] *Appuhamy* v. *Appuhamy* (1912) 15 N.L.R. 440; *A.G.* v. *Arumugam* (1963) 66 N.L.R. 463 and *A.G.* v. *Peiris* (1967) 70 N.L.R. 447.

[84] (1967) 70 N.L.R. 447.

[85] *Id.*

[86] [1960] A.C. 192; 204 (P.C.)

CONCLUSION

The theoretical foundation of the action under Roman-Dutch law is predicated on the doctrine of unjust enrichment. This is well established. By contrast in English law which does not accept a general theory of unjust enrichment in the area of restitution, money paid in mistake is actionable in an action for money had and received.

In view of certain controversies over the general principles of the action for the recovery of money paid under a mistake of fact, the courts administering English law ought to lay down with greater clarity, the essential requisites of the action. The view expressed in *Commonwealth Trading Bank* v. *Reno Auto Sales Pty. Ltd.* that a bank is precluded from recovery because it was not under a legal obligation to make payment to the holder of a cheque cannot be considered good law.

As regards payment on a forged instrument, English law makes a distinction between cases where the drawer's signature has been either forged or unauthorised and instances where a cheque has been fraudulently altered as for example by raising the amount. Recovery is permitted in the latter and not in the former. The recent case of National *Westminister Bank* v. *Barclays Bank* seems to ignore this distinction but since this was a decision of a judge of first instance, the case cannot be considered conclusive on this aspect of the law. The Roman-Dutch law does not accept this distinction.

On the aspect of countermand of payment, *Commonwealth Trading Bank* v. *Reno Auto Sales Pty. Ltd.* lends support to the view that the paying bank cannot recover. While that decision was justified in the circumstances of the case, it could be distinguished from the other cases involving countermand of payment where recovery has been permitted. What is countermand of payment is essentially a question of fact and each case ought to be decided on its own facts.

The rule that precludes recovery where payment had been made when the customer had insufficient funds is based on a well established principle of contract law known both to the common and civil law systems that once the property in the goods (which includes money) is vested in the transferee, the transferor has no legal title to it. *Chambers* v. *Miller* may be considered authoritative on this point.

The general rule which excludes mistakes of law as a basis of restitution appears to be well established in both English and Roman-Dutch law, although the limits of its application have not yet been fully demarcated. The reason is that everyone is presumed to know the law. In terms of policy too it is desirable that an improper understanding of legal rules should not be made the basis for recovery of money paid by mistake.

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