Scottish Law Commission

DISCUSSION PAPER NO. 95

RECOVERY OF BENEFITS CONFERRED UNDER ERROR OF LAW

Volume 1

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This Commission would be grateful if comments on this Discussion Paper were submitted by 31 March 1994. All correspondence should be addressed to:-

Mr N R Whitty
Scottish Law Commission
140 Causewayside
Edinburgh
EH9 1PR
(Telephone: 031 668 2131)

NOTES

1. In writing a later Report on this subject with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Discussion Paper. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Discussion Paper can be used in this way.

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DISCUSSION PAPER NO 95

ON

RECOVERY OF BENEFITS CONFERRED UNDER ERROR OF LAW

Volume 1

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TABLE OF ABBREVIATIONS

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Birks "Restitution: Scots Law":

P Birks "Restitution: A View of the Scots Law" (1985) 38 Current Legal Problems 57.

Birks "Six Questions":

P Birks "Six Questions in Search of a Subject - Unjust Enrichment in a Crisis of Identity" [1985] Juridical Review 227.

Von Caemmerer "Problemes fondementaux":

E von Caemmerer "Problemes fondamentaux de l'enrichissement sans cause" (1966) 18 Revue Internationale de Droit Compare 573.

De Vos "Unjustified Enrichment in South Africa":

W de Vos "Liability Arising from Unjustified Enrichment in the Law of the Union of South Africa" [1960] Juridical Review 125, 226.

Dickson "Restitution in German and English law":

Brice Dickson "The Law of Restitution in the Federal Republic of Germany: A Comparison with English Law" (1987) 36 International and Comparative Law Quarterly 751.

Elchies Annotations

Lord Elchies (Patrick Grant) Annotations on Lord Stair's Institutions of the Law of Scotland (Edinburgh, 1824) [written about 1711 x 1725 and published posthumously].

Englard "Restitution of Benefits":

Izhak Englard "Restitution of Benefits Conferred Without Obligation" (Tubingen, 1991)
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Evans-Jones "Identifying the Enriched":

Robin Evans-Jones "Identifying the Enriched: Some Complex Relationships involving the Condictio Indebiti" 1992 SLT (News) 25.

Evans-Jones "Full Circle?":

Robin Evans-Jones "Payments in Mistake of Law - Full Circle?"
(1992) 37 Journal of the Law Society of Scotland 92.

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Daniel Friedmann and Nili Cohen "Payment of Another's Debt" (Tubingen, 1991)
Chapter 10 in volume 10 Restitution - Unjust Enrichment and Negotiorum Gestio of International Encyclopaedia of Comparative Law.

Gloag Contract:

W M Gloag The Law of Contract, A Treatise on the Principles of Contract in the Law of Scotland (Edinburgh, 2nd edn, 1929).

Goff and Jones Restitution:

Lord Goff of Chieveley and Gareth Jones The Law of Restitution
(London, 3d edn, 1986).

Gordon Scottish Land Law

William M Gordon Scottish Land Law (Edinburgh, 1989).

Grotius Inleiding:

Hugo Grotius Inleiding tot de Hollandsche Rechtsgeleertheyd, (2d edn; 1631) trans. R W Lee sub nom The Jurisprudence of Holland (London, 1926).

Law Com CP No 120:

Law Commission, Consultation Paper No 120 on Restitution of Payments Made Under a Mistake of Law.

Lotz "Enrichment":

J G Lotz "Enrichment" in WA Joubert (ed) The Law of South Africa vol 9 (Durban, 1979).

LRCBC 51:

Law Reform Commission of British Columbia, Report No 51 on Benefits Conferred under a Mistake of Law (1981).

McBryde Contract:

William W McBryde The Law of Contract in Scotland (Edinburgh, 1987).

Macdonald "Mistaken Payments":

D R Macdonald "Mistaken Payments in Scots Law" [1989] Juridical Review 49.

Mackay Practice:

A J G Mackay The Practice of the Court of Session (2 vols) (Edinburgh, 1877).

Maclaren Practice:

J A Maclaren Court of Session Practice (Edinburgh, 1916).

Maddaugh and McCamus Restitution:

Peter D Maddaugh and John D McCamus, The Law of Restitution (Aurora, Ontario, 1990).

Maxwell Practice:

David Maxwell The Practice of the Court of Session (Edinburgh, 1980).

SALRC 84:

Law Reform Committee of South Australia, Report No 84 relating to The Irrecoverability of Benefits Obtained by Reason of Mistake of Law (1984).

Smith Short Commentary:

T B Smith, A Short Commentary on the Law of Scotland (Edinburgh, 1962).

Stewart Restitution:

William J Stewart, The Law of Restitution in Scotland (Edinburgh, 1992).

Vinnius Select Questions:

Arnoldus Vinnius, Selectarum juris quaestionum (Leiden, 1653) Book 1, chapter 47, translated by W D Evans in Pothier, Treatise on the Law of Obligations (1806) vol 2, p 437 ff.

Voet Commentary on Pandects:

Johannes Voet Commentarius ad Pandectas (Paris edition, 1829) translated P Gane under the title The Selective Voet being the commentary on the Pandects (6 vols)
(Durban, 1955).

Walker Civil Remedies:

D M Walker The Law of Civil Remedies in Scotland (Edinburgh, 1974).

Walker Contracts:

D M Walker The Law of Contracts and related obligations in Scotland (London, 2d edn, 1985).

Wessels Contract:

J W Wessels The Law of Contract in South AFrica (2 vols) (Durban, 2d edn, 1951, ed. A A Roberts).

Zimmermann "A road through the enrichment-forest?":

R Zimmermann "A road through the enrichment-forest? Experiences with a general enrichment action"

(1985) 18 *Comparative and International Law Journal of Southern Africa* 1.

Zimmermann *Law of Obligations*:

Reinhard Zimmermann *The Law of Obligations, Roman Foundations of the Civilian Tradition*
(Cape Town, 1990).

Zweigert/Kotz/Weir *Comparative Law*:

Konrad Zweigert and Hein Kotz *Introduction to Comparative Law*, translated from the German by Tony Weir
(Oxford, 2d edn, 1987).

NB. References to Institutional writings are, unless the contrary appears, references to the last edition thereof except that references to Stair's *Institutions* are references to the second edition of 1693.

PART I

INTRODUCTION

Purpose of paper

1.1 In this Discussion Paper we seek views on provisional proposals to abolish the common law rule precluding the recovery of benefits conferred under error of law. The Discussion Paper is issued under Item 14 of our First Programme of Law Reform,[1] the reform of the law of obligations.

The British and international context

1.2 The impetus to examine this topic at this time derives in part from the Law Commission's Consultation Paper No 120 on Restitution of Payments Made Under a Mistake of Law published in July 1991. Part II of that Consultation Paper provisionally proposes the abolition of the mistake of law rule in English law. It would be most unfortunate if that much criticised rule, which was introduced in Scots law from English law,[2] were to be abolished in England but to remain in force in Scotland. There is also the fact that the error of law rule has been abrogated by judicial decisions in Canada[3], Australia[4] and South Africa.[5]

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[1]Scot Law Com No 1 (1965).

[2]See para 2.8 below.

[3]Air Canada v British Columbia (1989) 59 DLR (4th) 161 (Supreme Court of Canada).

[4]David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 109 ALR 57 (High Court of Australia).

[5]Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992 (4) SA 202(A).

1.3 The Law Commission's Consultation Paper No 120 dealt with three topics namely (a) restitution of money paid under a mistake of law;[1] (b) recovery of payments made to public bodies which were demanded or received ultra vires[2]; and (c) recovery of ultra vires payments made by public bodies.[3]

Scope and arrangement

1.4 The present Discussion Paper covers the first of these topics for Scots law. Part II deals with abolition of the error of law rule in actions for repetition of money paid by the pursuer to the defender (the condictio indebiti). This is by far the most important context in which the error of law rule applies.

1.5 Whereas the Law Commission's Consultation Paper No 120 is confined to recovery of money, the present Discussion Paper considers the error of law rule in all branches of the law where error, and therefore error of law, is or may be relied on as a ground for the redress of unjustified enrichment. It would be wrong to abolish the rule in respect of benefits in cash but to leave it applying undisturbed in relation to benefits in kind. In Part III, therefore, we consider the error of law rule as it applies in claims for restitution of property, recompense for services or other benefits and repetition of money in cases not covered by the condictio indebiti (eg where the pursuer's money is paid to the defender by

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[1]Law Com No 120, Part II.

[2]Ibid, Part III.

[3]Ibid, Part IV.

a third party), as well as in the defences of bona fide payment and bona fide consumption.

Forthcoming Discussion Paper on recovery of ultra vires public authority receipts and disbursements

1.6 In the recent English case of Woolwich Equitable Building Society v IRC,[1] the House of Lords by a majority[2] held that a citizen who makes a payment of tax pursuant to an unlawful or ultra vires demand by a public authority for tax is prima facie entitled to recover the money as of right. This topic was also considered by the Law Commission in Part III of Consultation Paper No 120, which was referred to in the speeches of the House of Lords. Lord Goff encouraged the Law Commission, in consultation with the competent authorities, to consider and propose appropriate legislative bounds to the new right of recovery.[3] The Law Commission are now actively considering this matter including questions whether the scope of the Woolwich rule should be defined, and what legislative provision (if any) should be made introducing or regulating limitation periods and defences in actions based on that rule.

1.7 In some ways, the error of law rule is closely related to the recovery of payments made to a public authority pursuant to an ultra vires demand. The two causes of action, based respectively on error and ultra vires demands, may overlap. A payment made under error of fact or law may be made pursuant to an ultra vires demand.

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[1][1993] 1 AC 70 (CA and HL).

[2]Lord Goff, Lord Browne-Wilkinson and Lord Slynn; Lord Keith and Lord Jauncey dissenting.

[3][1993] 1 AC 70 (HL) at pp 176, 177.

The finances of public authorities could be disrupted by a judicial decision changing the law on liability for a public levy if that were to have the effect of reviving a wide circle of previously settled payment transactions. The previous payers could rely either on the Woolwich rule or (if the error of law rule were abolished) error of law. Arguably the question whether statutory provision should be made protecting the finances of public authorities from the revival of previously settled claims is broadly the same under both causes of action.

1.8 We think, however, that it would be convenient to deal separately in a forthcoming Discussion Paper with any special provisions which might be necessary to deal with the special problems of the protection of public finances. The question whether the error of law rule should be abolished is severable from that topic, and relates to private sector as well as public sector recipients.

1.9 The Woolwich rule seems to introduce the public/private dichotomy into the law of unjustified enrichment on a scale unprecedented in Scots law, which for example has no doctrine of colore officii.[1] We have grave doubts whether this innovation is necessary or desirable. We have therefore been considering not only possible legislation affecting the Woolwich rule but also whether an alternative legislative approach could be devised which would give the payer a remedy in most of the situations covered by the Woolwich rule and yet apply in the private sector as well as the public sector. We do not wish to hold up consultation on legislative abolition

[1]As to the Scots law on improper compulsion, see vol 2, Part III.

of the error of law rule pending formulation of provisional proposals on the recovery of ultra vires public authority receipts and disbursements. Furthermore inclusion of that topic could well overload this Discussion Paper.

1.10 In view of the links between abolition of the error of law rule and recovery of ultra vires public authority receipts and disbursements, we propose that our eventual report to the Lord Advocate, and draft Bill annexed thereto, should cover both topics in the light of consultation on both Discussion Papers.

Background research papers (volume 2)

1.11 In volume 2 of this Discussion Paper, we publish some background research papers on the historical development of the error of law rule (Part I); the condictio indebiti (Part II); and recovery of payments made under improper compulsion (Part III).

Acknowledgments

1.12 We acknowledge with gratitude the help given to us by Mr D R Macdonald of Dundee University (who submitted a research paper which has been of very considerable assistance). We are also greatly indebted to Mr K G C Reid of Edinburgh University and Dr R Evans-Jones for valuable comments on parts of earlier drafts. Our indebtedness to Law Com CP No 120 will be very apparent and we are particularly grateful to Mr Jack Beatson, a member of the Law Commission, for his helpful comments and advice. None of these persons bears any responsibility for any errors in this Paper.

PART II

ABOLITION OF THE ERROR OF LAW RULE IN ACTIONS FOR REPETITION OF MONEY (CONDICTIO INDEBITI).

A. Preliminary

2.1 In this Part, we seek views on the abolition of the rule under which an action of repetition of money does not lie where the money was paid under an error of law. The principal authorities on the error of law rule relate to the condictio indebiti, the remedy or doctrine governing the repetition of money paid under error at the instance of the payer against the payee.

2.2 As we indicate in volume 2, however, the condictio indebiti also lies to recover property transferred under error,[1] and there seems no reason to doubt that the error of law rule applies in that context. We deal with the condictio indebiti for restitution of moveable property under error of law in Part III. We are here concerned with the condictio indebiti, that is an action for repetition brought by the payer against the payee.[2] Other innominate actions of repetition of money paid under error of law (eg by an unpaid true creditor against a wrongly paid putative creditor) are considered in Part III.[3]

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[1]See vol 2, paras 2.3 and 2.106 ff.

[2]For the definition and scope of the condictio indebiti, see vol 2, paras 2.1 to 2.12.

[3]See paras 3.38 and 3.39; 3.56 to 3.73.

(1) The reception of the error of law rule from English law

2.3 In Scots law, while money paid under an error of fact is prima facie recoverable, the general rule is that money paid under an error of law is not recoverable. The background to this rule reaches back fifteen centuries to the Corpus Juris Civilis of Justinian and indeed beyond to the first life of the Roman law.

2.4 The history of the reception of the error of law rule in Scots law is too long and complex to set out here and reference is made to the fuller survey in volume 2, Part I. There is space here to set out only the main points.

2.5 The old law may yet be relevant because it may possibly still be open to the House of Lords or a Court of Seven Judges of the Court of Session to hold that the error of law rule is not part of Scots law and to restore the old law as it had developed in the Institutional period.[1] After all, the error of law rule has been

[1]In Woolwich Equitable Building Society v IRC[1993] 1 AC 70 (HL), Lord Slynn of Hadley expressly stated (at p 177) that the error of law rule was "open to review" by the House of Lords. Lord Goff of Chieveley (at p 164) and Lord Jauncey of Tullichettle (at p 192) criticised the error of law rule without stating whether it was open to review by the House. On the other hand, Lord Keith of Kinkel (at p 154) said that the rule was "too deeply embedded in English jurisprudence to be uprooted judicially". All these dicta were obiter. These remarks relate to English law. Although the rule was introduced in Scots law as a result of dicta in the House of Lords in two Scots appeals, the dicta were obiter: see para 2.15 below.

abrogated by the courts in Canada, Australia and South Africa.[1]

2.6 In the Institutional period[2] the development by the Court of Session[3] and Institutional writers of the Scots law on recovery of payments made under error of law was greatly influenced by continental civilian writers among whom it provoked much controversy.[4] At the end of the Institutional period, Scots law, following one strand of authority deriving from the Roman jurist Papinian and civilian jurists, especially Vinnius, accepted that money paid under error of law was recoverable, unless perhaps it was due under a natural obligation. This rule was regarded as reasonable[5] and founded on equity.[6] The view of the Roman-Dutch jurist Vinnius was accepted that error of law cannot prejudice one who is seeking to avoid loss by

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[1]See para 1.2 above.

[2]ie the 150 years between the publication of the first edition of Stair's Institutions in 1681 to the fourth and last personal edition of Bell's Principles in 1839.

[3]It is interesting to observe that in Scotland the law was developed by the Court of Session in a few cases as well as by the Institutional writers. Of the Roman-Dutch law in the same period, it has been remarked: "Amidst the dissension in the ranks of the jurists the Dutch Courts remained unaccountably silent. Researchers have been able to find only one case ...": Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992 (4) SA 202 (A) at p 217 per Hefer J A.

[4]See vol 2, para 1.3 ff.

[5]Bankton Institute I,8,24 (see vol 2, para 1.10).

[6]Erskine Institute III,3,54 (see vol 2, para 1.11); Carrick v Carse (1778) Hailes 783 per Lord Braxfield (see vol 2, para 1.16).

recovering his own.[1] This is evident from the pleadings (recently discovered by Mr D R Macdonald[2]) in Stirling v Earl of Lauderdale,[3] which make it clear that the opinion of Vinnius was preferred to the contrary opinion of another great Roman-Dutch jurist, Johannes Voet.[4] The Stirling case was later brushed aside[5] on the ground that the report was only one sentence of ten words, and was therefore not authoritative. The pleadings show, however, that the Court of Session must have had regard to the leading opinions in Roman-Dutch law, part of the mainstream of European legal thought.

2.7 There is also support in the passages from Vinnius cited in Scots cases[6] that the refusal of repetition for error of law clashed with Pomponius' enrichment principle and it is significant that in Carrick v Carse[7] the Lord Ordinary based his decision on the ground that payment under error of law is recoverable if made sine causa, in

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[1]Bankton Institute I,8,24 (see vol 2 para 1.10); Baron Hume's Lectures vol III p 174 (see vol 1, para 2.12).

[2]"Mistaken Payments" [1989] Juridical Review 49 at p 58. See vol 2, para 1.15 and Appendix A (extracts from the pleadings).

[3](1733) Mor 2930. This would have been the leading case if it had been fully reported.

[4]See vol 2, para 1.6 and Appendix A.

[5]Dixon v Monkland Canal Co (1831) 5 W and S 445 at p 452 per Lord Brougham LC; Glasgow Corporation v Lord Advocate 1959 SC 203 at p 215 per Lord Wheatley; at p 231 per Lord President Clyde.

[6]See vol 2, para 1.4.

[7](1778) Mor 2931 at 2933.

other words that the defender's enrichment was unjustified.

2.8 By the end of the Institutional period, however, the civilian influence had waned and about that time, in Bilbie v Lumley,[1] English law accepted the rule of non-recovery for error of law subject to exceptions. While the main continental legal systems went on to reject that rule,[2] Scots law, under the influence of obiter dicta by Lord Chancellor Brougham in the House of Lords in two cases in 1830 and 1831,[3] after a long period of hesitation and uncertainty (and despite a valiant "rearguard action" by Lord Ivory in Dickson v Halbert[4]), eventually accepted the rule in the Glasgow Corporation case in 1959.[5]

(2) The English law background

2.9 The main English rule. In English law, the rule precluding recovery of payments made under error of law originated in Bilbie v Lumley.[6] An insurance underwriter sued for repayment of a sum he had paid out under an insurance policy. The defendant had not disclosed a material fact at the time of insurance but had disclosed prior to payment of the claim. The underwriter had knowledge or means of knowledge of the facts but failed to

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[1](1802) 2 East 469.

[2]See para 2.68 below.

[3]Wilson and McLellan v Sinclair (1830) 4 W and S 398 at p 409; Dixon v Monkland Canal Co (1831) 5 W and S 445 at pp 452 ff. See vol 2, paras 1.26-1.37.

[4](1854) 16 D 586: see vol 2, paras 1.24, 1.25.

[5]Glasgow Corporation v Lord Advocate 1959 SC 203.

[6](1802) 2 East 469.

appreciate their legal import. In refusing the underwriter's action, Lord Ellenborough CJ held:

> "every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried."[1]

The decision was followed in Brisbane v Dacres[2] whence it was introduced into Scots law.[3]

2.10 The Bilbie case was approved in Kelly v Solari[4] where the facts were similar but the mistake was one of fact not law, and restitution was allowed. The Bilbie and Kelly cases have fixed the fact/law dichotomy in the English law on restitution of mistaken payments. In English law the mistake of law rule was criticised but not overturned in the recent Woolwich case,[5] though it has

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[1]Ibid at p 472. It appears that there were earlier contrary English cases which were not cited and it has been said that the error of law doctrine itself proceeds on an error of law.

[2](1813) 5 Taunt 143 (Naval captain made a payment to his admiral out of the captain's allowance for carrying public treasure in the mistaken belief that he was legally bound to do so).

[3]Wilson and McLellan v Sinclair (1830) 4 W and S 398 at p 409 per Lord Brougham LC (obiter).

[4](1841) 9 M and W 54. Directors of insurance company paid sums to a widow under a policy of assurance on her deceased husband's life. The policy had lapsed through non-payment of one of the premiums. This fact was drawn to the directors' attention but forgotten when the insurance claim was made. Recovery was allowed because unlike Bilbie's case, the mistake was of fact not law.

[5]Woolwich Equitable Building Society v IRC [1993] 1 AC 70 (HL affg CA).See para 2.5 above. The payment in that case was not made under any error of fact or law and therefore the House of Lords could not overturn the mistake of law rule.

been overturned in Canada and Australia.[1] The Woolwich case did, however, introduce an additional large exception to the error of law rule.[2]

2.11 Exceptions to the English rule. There are a number of exceptions to the general mistake of law rule in English law.[3] These include cases where what is arguably a mistake of law is treated as if it were a mistake of fact such as (1) mistake as to private rights;[4] (2) mistake as to a foreign law;[5] (3) mistake as to personal status;[6] (4) mistake as to whether a law exists.[7] Other exceptions do not depend on judicial manipulation of the fact-law distinction. They include (5) payments to an officer of the court;[8] (6) payments by an officer of the

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[1]Air Canada v British Columbia (1989) 59 DLR (4th) 161; David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 109 ALR 57.

[2]See para 2.12 below.

[3]See eg Law Com CP No 120, paras 2.6 to 2.12; Goff and Jones Restitution pp 128 to 135; Maddaugh and McCamus Restitution pp 262 to 276.

[4]Cooper v Phibbs (1867) LR 2 HL 149; Earl of Beauchamp v Winn (1873) LR 6 HL 223; Solle v Butcher [1950] 1 KB 671 (CA).

[5]Lazard Bros & Co v Midland Bank Ltd [1933] AC 289 (HL) cited by Maddaugh and McCamus, Restitution p 263; cf Law Com CP No 120, para 2.16 (no authority).

[6]Clelland v Clelland [1944] 4 DLR 703.

[7]George (Porky) Jacobs Enterprises Ltd v City of Regina (1964) 44 DLR (2d) 179.

[8]Ex parte James (1874) LR 9 Ch App 609; Ex p Simmonds (1885) 16 QBD 308; Re Rhoades [1899] 2 QB 347; Re T H Knitwear (Wholesale) Ltd [1988] Ch 275; cf London Guarantee & Accident Co v Henderson and McWilliams [1915] 23 DLR 38.

court;[1] (7) in some circumstances overpayments by trustees and personal representatives (which may be deducted from future payments to a beneficiary[2] or be recovered by next-of-kin after exhausting remedies against the trustees or representatives);[3] (8) apparently payments by a party who is not in pari delicto with the recipient.[4] Where the error of law concurs with another ground of recovery, then of course recovery is permitted under the other ground, eg compulsion,[5] or ultra vires payments out of the Consolidated Fund,[6] or an agreement to repay.[7] These, however, are not strictly exceptions to the general rule but separate grounds of claim.

2.12 The Woolwich case has added a new ground, which Lord Goff expressed as being that money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires levy is prima facie recoverable by the citizen as of right.[8] The Court of Appeal had reluctantly felt bound to hold that it would be a defence

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[1]Re Birkbeck Permanent Benefit Building Society [1915] 1 Ch 91, sequel to Sinclair v Brougham [1914] AC 398 (HL).

[2]Re Musgrave [1916] 2 Ch 417.

[3]Re Diplock [1948] Ch 465 (CA) affd sub nom Ministry of Health v Simpson [1951] AC 251.

[4]Kiriri Cotton Co Ltd v Dewani [1960] AC 192 (PC). Eadie v Township of Brantford [1967] 63 DLR (2d) 561; Law Com CP No 120, paras 2.8, 2.9.

[5]Law Com CP No 120, para 2.7.

[6]Auckland Harbour Board v The King [1924] AC 318 (PC).

[7]Woolwich Equitable Building Society v IRC [1993] 1 AC 70 (HL) at pp 150, 165-166.

[8]Ibid at p 177.

to an action based on that principle that the money had been paid under error of law,[1] but the defence was rejected by two Lords of Appeal obiter[2] and it seems likely that it is not a defence.

2.13 The English courts have a general power in Equity to grant relief from the consequences of mistake,[3] which does not seem to have any exact parallel in Scots law. It appears that the "private rights" exception mentioned above derives from this Equity jurisdiction.

2.14 The proliferation of exceptions to the main rule of non-recovery is seen as the product of the judges' dissatisfaction with that rule, and as causing undue uncertainty and anomalies.[4]

(3) The existing Scots law

(a) The general rule of non-recovery for error of law

2.15 In Scots law, as already mentioned, the rule precluding recovery of money paid under error of fact originated in obiter dicta of Lord Brougham LC in two decisions of the House of Lords, Wilson and McLellan v Sinclair[5] and Dixon v Monkland Canal Co.[6]

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[1] [1993] 1 AC 70 (CA) at p 101, and p 140.

[2] [1993] 1 AC 70 (HL) at p 177 per Lord Goff of Chieveley; at p 205 per Lord Slynn of Hadley.

[3] Law Com CP No 120, paras 2.17 to 2.20.

[4] Ibid, para 2.23.

[5] (1830) 4 W & S 398.

[6] (1831) 5 W & S 445.

2.16 The facts in Wilson and McLellan v Sinclair were complex. W and M had a promissory note payable by C and H as endorsers. The note was protested and became a warrant for diligence. D S, a messenger-at-arms, was instructed by W and M to execute diligence against H but failed to do so. W and M then obtained a decree for the debt and damages against D S and his brother A S who was D S's cautioner. A S paid W and M, obtained an assignation of the debt and diligence against C and H and obtained payment from C by way of relief. It transpired that the protest against C and M had been blundered by insertion (by W and M or their agents) of the wrong date for payment; therefore the messenger D S's failure to carry out diligence against M had caused W and M no loss; therefore W and M's decree in absence against A S was reducible and A S's payment to W and M was recoverable. C obtained repetition from S (since in this circumstance the diligence against C was illegal). A S then brought an action of reduction of W and M's decree and repetition of his payment. The Court of Session granted decree of repetition without first reducing the decree.

2.17 The House of Lords reversed this decision holding that no decree of repetition could be granted until W and M's decree against A S had been first reduced. The only judgment was given by Lord Chancellor Brougham who, after dealing with the need for reduction before repetition, remarked:[1]

> "But, my Lords, there are other circumstances in this case, and I shall only refer to one or two, which make it perfectly clear that there can be no affirmance of any part of the decree. When a person pays money under a mistake, he has no right to recover that money, unless where it was a mistake in

[1](1830) 4 W & S 398 at p 409.

point of fact. If he pays by mistake in point of law, there was at one time a little doubt in Westminster Hall; but it is now settled, that he has no right to recover it back again. Since the case of Brisbane v Dacres, ... it has been considered an established point that the mistake must be in the fact."

He then proceeded to deal with mistakes of fact in a passage we quote elsewhere,[1] observing that "the ground of action being ignorance, it must be unavoidable ignorance".[2]

2.18 In the Glasgow Corporation case[3] Lord Wheatley (Ordinary) said that the Lord Chancellor "correlated" the distinction between avoidable and unavoidable mistake "to a mistake in law, on the basis that a person who makes a mistake in law has made an avoidable mistake".[4] This may be doubted: the Lord Chancellor's remarks seemed confined to mistakes of fact. Lord Wheatley also argued that the Lord Chancellor's remarks on error of law were part of the ratio decidendi,[5] but they have been generally treated as obiter.[6]

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[1]See vol 2, para 2.33.

[2](1830) 4 W & S 398 at p 409.

[3]Glasgow Corporation v Lord Advocate 1959 SC 203 at p 216.

[4]Compare the distinction between invincible and surmountable error accepted by the German Pandectists (see vol 2, para 1.7) and Lord President Clyde's view 1959 SC 203 at p 233.

[5]1959 SC 203 at p 216.

[6]By agreement of counsel in the Glasgow Corporation case and see also 1959 SC 203 at p 232 per Lord President Clyde: "These opinions were strictly obiter ..."; at p 243 per Lord Sorn "numerous adverse dicta ...".

2.19 In Dixon v Monkland Canal Co,[1] a canal company in 1804 levied increased charges on vessels using their canal without observing a statutory condition that the canal had first to be deepened. The pursuer challenged the increase on grounds other than want of depth which the court repelled. The pursuer then paid the charges until 1815 when the charges were again increased by the company without observing the statutory condition. The pursuer challenged the new increase on the ground of the want of depth and obtained decree.[2] He sought repetition of the overpaid dues but was held barred by acquiescence from claiming repetition of dues overpaid prior to his protest in 1815.[3]

2.20 Lord Chancellor Brougham, however, took the opportunity of making fuller remarks, this time expressly obiter,[4] on repetition of payments made under error of law. First, he criticised the Roman and Scots authorities. He referred to "the great difference of opinion among the Roman lawyers" on the fact/law dichotomy. He observed that "a great distinction was taken between a volunteer payment and one where the party was in damno vitando".[5] This observation is obscure but may be a reference to the

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[1](1831) 5 W & S 445, affg (1830) 8 S 826.

[2](1825) 1 W & S 636, revg (1821) 1 S 145.

[3](1830) 8 S 826 per Lord Gillies, Lord President Hope and Lord Balgray concurring (Lord Craigie dissented); (1831) 5 W & S 445 at pp 453, 454 per Lord Brougham LC.

[4](1831) 5 W & S 445 at pp 447, 448.

[5]Ibid, p 448.

argument of Vinnius noted elsewhere.[1] The Roman authorities favouring repetition for error of law were then dismissed with the comment:

> "it is hardly possible to conceive a question which raises more difficulties, and which, in explicating it, and following it into its consequences, would, in practice, be attended with more interminable mischief."[2]

Carrick v Carse[3] was "disposed of" by characterising it as involving error of fact[4] and therefore the court's dicta on error of law were treated as obiter. Stirling v Earl of Lauderdale[5] was rejected because of the meagreness of the report, and Erskine[6] was rejected as insufficiently strong authority to support such a "dangerous" principle.[7] Further "if what is contended for be the undoubted law, it is a marvellous thing that there should be no other cases in support of it".[8]

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[1]See vol 2, para 1.5, last two sentences.

[2](1831) 5 W & S 445 at p 448.

[3](1778) Mor 2931; Hailes 783: see vol 2, para 1.16.

[4](1831) 5 W & S 445 at p 448: "the party alleged that he was ignorant that the seven years had elapsed, although in fact there had been a lapse of eight years"; p 452, "I have disposed of the case of Carrick".

[5](1733) Mor 2930; see vol 2, para 1.15.

[6]Institute III, 3, 54; see vol 2, para 1.11. Bankton Institute I, 8, 24 was not mentioned although Bankton 8,23,28 cited to the House (see 5 W & S 445 at p 454).

[7](1831) 5 W & S 445 at p 452.

[8]Idem. There were, of course, other unreported cases though presumably not cited (ibid at p 454): see vol 2, paras 1.18 to 1.20.

2.21 His Lordship as much as admitted that his intention was to change the Scots law[1] and to introduce in its place the English law[2] as stated in Bilbie v Lumley[3] and Lowry v Bourdieu.[4] Bell's editors, in a passage very unusual in its critical tone, remarked that:

> "it is doubtful whether the [error of law rule] is that which accords best with the natural development of our law; but the rule of the English common law was thrust upon us by Lord Brougham".[5]

2.22 There followed a long period between 1831 and 1959 in which the law was uncertain because of the obiter nature of Lord Brougham's dicta and their inconsistency with the pre-existing law of Scotland. The cases in this period are described in volume 2.[6]

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[1]He began his opinion ibid at p 447 by stating: "My Lords, I am not impressed sufficiently with the danger of appearing to sanction the introduction of any thing novel in the law of Scotland, and thereby to unsettle the fixed principles of jurisprudence of that country, to induce me to abstain from delivering to your Lordships the opinion I have formed upon this case, even though I am perfectly sensible, that to one or two of your Lordships I may appear to run counter to some of the authorities which have been cited at the Bar."

[2]Ibid at p 450.

[3](1802) 2 East 469.

[4](1780) 2 Doug 468 at p 471 per Buller J (obiter), a case which concerned pacta illicita rather than payments made under error of law.

[5]Bell Principles (10th edn) s 534, fn (1).

[6]See vol 2, para 1.38 ff. The inconclusive development can be traced through dicta in Ross v Mackenzie (1842) 5 D 151 (OH); Dickson v Halbert (1854) 16 D 586; Young v Campbell (1851) 14 D 63 at p 64; Gray v Walker (1859) 21 D 709 at p 715; Bremner v Taylor (1866) 3 SL Rep 24 (OH) at p 26 (the only case in which the rule of non-recovery was applied); Bell v Thomson (1867) 6 M 64 at p 68; Baird's Trs v Baird & Co (1877) 4 R 1005 at

2.23 The general rule precluding repetition of money paid under error of law was eventually accepted by the leading case of Glasgow Corporation v Lord Advocate,[1] at least as respects an erroneous interpretation of a public general general statute.[2]

2.24 The pursuer local authority paid purchase tax on stationery which was manufactured in their in-house printing and stationery department and used by them inter alia in those departments which did not conduct commercial activities. It was held that the manufacture of stationery for that purpose did not attract purchase tax.[3] Although in the pleadings, averments were made by the pursuers which might have justified a plea (in the alternative) of improper compulsion,[4] nevertheless they averred that the sums in name of purchase tax had been "paid in error",[5] and their plea-in-law was based on that averment.[6] The

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p 1011; Agnew v Ferguson (1903) 5 F 879; Oswald v Kirkcaldy Magistrates 1919 SC 147; Manclark v Thomson's Trs 1958 SC 147 (where the court reserved their opinion).

[1]1959 SC 203.

[2]In so far as the case rejected the automatic right of a taxpayer based on constitutional principle to recover undue tax, it will be considered in our forthcoming Discussion Paper, mentioned in para 1.8 above.

[3]1959 SC 203 at p 204.

[4]Ibid at p 205, Condescendence 3, denying that the pursuers had paid the tax voluntarily.

[5]Ibid at p 206, Condescendence 5.

[6]Idem, "The said sums in name of purchase tax having been paid by the pursuers under essential error the said Commissioners are bound to repay the same to the pursuers".

report does not disclose any plea-in-law based on improper compulsion and the case was argued and decided on the basis that as a matter of relevancy the only ground of repetition (apart from the constitutional ground) was error.[1] No reference was made to the important case of British Oxygen Co v SSEB where recovery was permitted on the basis of improper compulsion,[2] no doubt for the very good reason that the grounds of action were quite different.

2.25 So far as authority was concerned, Roman law was referred to but merely as background.[3] As regards Scots authority, Stirling v Earl of Lauderdale[4] was not relied on because of the brevity of the report.[5] Carrick v Carse[6]

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[1]R Evans-Jones (1992) "Full Circle?" 37 JLSS 92 states at p 93 that "there are grounds on which to question whether the payment was made in mistake of law by the pursuer. Was the mistake not that of the defender?" He further states (idem) that "the pursuer only paid in fear of incurring statutory penalties and under protest that the claim was invalid". Whether or not the payment was made under compulsion, or error induced by the defender, may be disregarded in view of the way in which the pursuers pleaded their case.

[2]1959 SC (HL) 17; affg 1958 SC 53. See vol 2, paras 3.30 to 3.34. In Woolwich Equitable Building Society v IRC [1993] 1 AC 70 (CA) at p 134 Ralph Gibson LJ pointed out that the SSEB appeal to the House of Lords was dated 16 April 1959, and the Glasgow Corporation case dated 20 March 1959, but neither case was cited in the other.

[3]1959 SC 203 at p 231 per Lord President Clyde, citing C.1,18,10; at p 243 per Lord Sorn.

[4](1733) Mor 2930.

[5]1959 SC 203 at pp 221, 222 per Lord Wheatley; at pp 231, 232 per Lord President Clyde; at p 243 per Lord Sorn.

[6](1778) Mor 2931; Hailes 783.

was treated as relating to error of fact.[1] The Institutional writers, Bankton and Erskine, were mentioned but not regarded as decisive.[2] Keith v Grant[3] was treated as relating to bankruptcy where special considerations were said to apply[4] though this has been controverted more recently.[5] The main authorities followed were the obiter dicta of Lord Brougham,[6] the Outer House decision in Bremner v Taylor;[7] and what Lord Wheatley called "a chain of judicial opinion even if only obiter to the effect that the views expressed by Lord Chancellor Brougham are now the law of Scotland".[8] English cases were relied on as persuasive.[9] In the First Division the issue was treated as technically open for the Court to determine on principle.

2.26 In both the Dixon and Glasgow Corporation cases, reasons of legal policy or principle were given for

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[1]1959 SC 203 at p 215 per Lord Wheatley; at p 232 per Lord President Clyde.

[2]Bankton Institute I, 8, 24; Erskine Institute III, 3, 54; see 1959 SC 203 at p 215 per Lord Wheatley; at p 232 per Lord President Clyde.

[3](1792) Mor 2933.

[4]1959 SC 203 at p 215 per Lord Wheatley; cf Gloag Contract (2d edn) p 61.

[5]Taylor v Wilson's Trs 1975 SC 146 at pp 150, 151 per Lord Fraser.

[6]See paras 2.16 to 2.21 above.

[7](1866) 3 S L Rep 24.

[8]1959 SC 203 at p 219.

[9]1959 SC 203 at pp 220, 221 per Lord Wheatley; at p 233 per Lord President Clyde.

introducing the error of law rule. We revert to these at paragraph 2.71 below.

(b) Exceptions to the error of law rule

2.27 Overview. We have already indicated[1] that there are a large number of exceptions to the error of law rule in English law. Scots law has also recognised some exceptions to the error of law rule but the extent of the exceptions is debatable. In summary the following errors of law do or may ground recovery:

(i) error of law as to private rights;

(ii) possibly error of law resulting in over-payments by a trustee, executor or liquidator (though the weight of authority is against recovery);

(iii) error of law where the payer is not in pari delicto with the recipient;

(iv) an error of law induced by fraud or similar conduct;

(v) in some cases, error as to the existence or validity of a law, contract or other instrument; and

(vi) possibly some exceptions derived from English law such as error as to foreign law, and (more debateable) error concerning personal status.

The categories of exceptions are not closed. There is authority that an error on a question of mixed fact and law does not preclude recovery.[2] Payments to an officer of the court are not exceptions to the error of law rule though admitted as exceptions in English law.

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[1]See para 2.11 above.

[2]Bell v Thomson (1867) 6 M 64 at pp 68, 69 per Lord Cowan (obiter).

(i) Error of law as to private rights

2.28 English origins. The origin of the "private rights" exception, which draws an artificial distinction between an error as to "private rights" and an error as to "the general law"[1] lies in two English cases Cooper v Phibbs[2] and Earl of Beauchamp v Winn.[3] In the former Lord Westbury said:[4]

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

These cases were judgments in Equity setting aside agreements on the ground of mutual error. It seems that there is no English authority applying the "private rights" exception to an action at common law (as distinct from Equity) for repayment of money.

2.29 Scots cases upholding the exception. In Scots law, the Cooper and Earl of Beauchamp cases were applied by

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[1]See Law Com CP No 120, para 2.17.

[2](1867) LR 2 HL 149.

[3](1873) LR 6 HL 223.

[4](1867) LR 2 HL 149 at p 170. See also (1873) LR 6 HL 223 at p 234 per Lord Chelmsford: "the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. This is very different from ignorance of a well-known rule of law".

Lord Ormidale in Baird's Trs v Baird and Co.[1] In that case the hire of machinery leased was payable by instalments. The lessees paid interest on the unpaid balance of the hire whereas, under the contract, interest was only due on instalments which were in arrears. The Second Division held that the lessees were entitled to credit for the overpayments in accounting with the lessor; that is, the overpayments were set off against future instalments. Lord Ormidale observed[2] that the English cases were within the doctrine of the condictio indebiti as stated by Bell's Principles,[3] and held that they applied to that case which involved "a mistaken view of the legal construction of the somewhat ambiguous stipulation in the contract of lease".[4] The case was followed by Lord Kilbrandon in the British Hydro-Carbon Chemicals case.[5]

2.30 Comparison of the Scots and English "private rights" exceptions. The scope and nature of the "private rights" exception is not necessarily the same as in English law. First, whereas the English private rights doctrine applies

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[1](1877) 4 R 1005 at pp 1011, 1012. Lord Gifford gave a concurring judgment (at p 1016); Lord Justice-Clerk Moncreiff dissented (at pp 1019, 1020), holding that adjustments of accounts was not a condictio indebiti.

[2]Ibid at p 1012.

[3]s 531: "Whatever has been delivered or paid on an erroneous conception of duty or obligation, may be recovered on the ground of equity."

[4]Ibid at p 1012.

[5]British Hydro-Carbon Chemicals Ltd and British Transport Commission, Petitioners 1961 SLT 280 (OH) (overpayments by company to BTC under a mistaken construction of a private commercial contract).

to "relief in Equity" (eg setting aside deeds for mutual error), in Scots law it applies to proceedings for repetition for money. In the Baird's Trs case, Lord Ormidale subsumed the doctrine under the condictio indebiti[1] and Lord Gifford observed that the payments must either be repaid or credit given for them. In the British Hydro-Carbon Chemicals case,[2] repetition was held due.

2.31 Second, both of these Scots cases involved common error as did the original English cases cited. It is thought likely, however, that unilateral error on the part of the payer alone suffices on the ground that generally in the condictio indebiti, it is only the error of the payer which is material. If the recipient was not under error, there is an even stronger case for repetition since his acceptance of the money must ex hypothesi have been in bad faith. In this respect, the English context of setting aside deeds may be a false analogy.

2.32 Third, there is some doubt whether in Scots law, an erroneous interpretation of a private contract is treated as an error of fact as in English law. In the British Hydro-Carbon Chemicals case[3], it was so regarded, though probably not in the Baird's Tr case.[4] In the Unigate Foods case, Lord Stott observed that an error in construction of

[1](1877) 4 R 1005 at pp 1011, 1012.

[2]1961 SLT 280 (a petition for summary trial).

[3]Ibid at p 281: "Is an error in the construction of a private contract to be treated as an error in fact or as an error in law?"

[4](1877) 4 R 1005 at p 1011 where Lord Ormidale observed that "it is all the more difficult to obtain such redress where the error ... was more of the nature of one in law than of fact".

a legal instrument is prima facie an error of law,[1] though in his view, the error did not for that reason preclude repetition. We revert to this at paragraph 2.98 below.

2.33 The scope of the exception. The "private rights" exception has been said to arise where the error was one of construction of a private contract affecting no-one but the parties to the contract.[2] On the other hand, the error of law rule applies to an error in construing a public general statute.[3] In between these two extremes, there are instruments which affect smaller or larger groups according to circumstances. In Unigate Foods Ltd v Scottish Milk Marketing Board[4] there was an error on the part of the defender Board's auditors in construing a statutory memorandum of the Board, as a result of which they issued a certificate of the price (of milk sold by the Board to butter manufacturers) which was in excess of what should have been certified. Lord Stott (Ordinary) held the error to be one of law but not one which precluded repetition.[5] In the First Division, however, the pursuers were held not to have been in error, whether of

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[1]Unigate Foods Ltd v Scottish Milk Marketing Board 1975 SC (HL) 75 at p 80 (citing Hunter's Trs v Hunter (1894) 21 R 949; Rowan's Trs v Rowan 1940 SC 30). See however paras 2.39 ff below.

[2]British Hydro-Carbon Chemicals Ltd and British Transport Commission, Petitioners 1961 SLT 280 at p 281; Unigate Foods Ltd v Scottish Milk Marketing Board 1975 SC (HL) 75 at p 79 per Lord Stott (Ordinary).

[3]Glasgow Corporation v Lord Advocate 1959 SC 203.

[4]1975 SC (HL) 75.

[5]Ibid at p 80.

fact or law.[1] It is not clear what was the category to which the statutory memorandum properly belonged for the purpose of the error of law rule.

2.34 Conflict of authority as to scope and existence of "private rights" exception. There are other cases precluding recovery of overpayments made by trustees under error in construing trust deeds[2] which conflict with the "private rights" cases just discussed.[3] Until recently, neither line of authority referred to the other,[4] and indeed arguably not all the trustee cases are consistent.[5] One possible reconciliation suggested is that:

> "because the basis of this part of the law is equity, the equitable considerations applying to a beneficiary under a trust who in good faith receives and spends income under the trust, produce a different result from the same considerations applying to a commercial contract."[6]

2.35 Another possibility is that a special rule applies to trustees and executors forming an exception to the

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[1]Ibid at p 89, 90 per Lord President Emslie.

[2]Hunter's Trs v Hunter (1894) 21 R 949; Rowan's Trs v Rowan 1940 SC 30; Grant v Royal Bank of Scotland plc (unreported, 2 February 1993) 1993 GWD 11-794 (OH); Renwick's Exix v Muir (1886) 2 Sh Ct Reps 380; see para 2.39 below.

[3]Baird's Trs v Baird and Co (1877) 4 R 1005; British Hydro-Carbon Chemicals Ltd and British Transport Commission Petitioners 1961 SLT 280.

[4]McBryde Contract para 9-95. The first case to address both lines of authority was Grant v Royal Bank of Scotland plc 1993 GWD 11-794 (OH).

[5]See Armour v Glasgow Royal Infirmary 1909 SC 916.

[6]McBryde, op cit, para 9-95.

"private rights" exception to the error of law rule, which itself is arguably an exception to the general rule allowing repetition of erroneous payments. In Taylor v Wilson's Trs,[1] Lord Justice-Clerk Wheatley "did not necessarily exclude the possibility of there being exceptions to the general rule" (of non-recovery for error of law) and said that "these exceptions, if there be exceptions, would normally have to be in ... the private as distinct from the public sector of the law".[2] Lord Cameron, after referring to some of the conflicting authorities, observed: "it may well be that in an appropriate case the whole question of the limits to be placed on the interpretation of the words 'error of law' may have to be more fully considered",[3] a view reiterated more recently by Lord Coulsfield.[4]

(ii) Trustee, executor or liquidator paying to wrong person

2.36 Preliminary. The rule precluding recovery for error of law presents considerable difficulties in three-party situations of which the most common (but not the only) examples are payments by trustees, executors or liquidators to the wrong person. An overpayment to a beneficiary under a trust is, to the extent of the wrongly paid excess, a payment to the wrong person. The law is complicated because it involves the complexities of three-party situations and brings into play the title of the payer to sue the recipient in a condictio indebiti; the

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[1]1975 SC 146.

[2]Ibid at p 155.

[3]Ibid at pp 157, 158.

[4]Grant v Royal Bank of Scotland plc (unreported, 2 February 1993) 1993 GWD 11-794 (OH).

title of the true creditor to sue the debtor who paid the wrong person;[1] the possible title of the true creditor to sue the wrongly paid recipient directly (with or without the concurrence of the debtor who made the wrong payment) in an innominate action of repetition[2] and the possible rights of the debtor, after paying the money a second time to the true creditor, to recover his first payment from the wrongly paid putative creditor.[3]

2.37 In two-party situations, if a person pays under error of law and fails to recover, only the payer is prejudiced. In three-party situations, however, where a debtor under a bond or a trustee, executor or liquidator pays the wrong person under error of law, the true creditor has a right of action against the debtor, trustee etc but if the latter is insolvent, then the error of law rule has operated to prejudice not the payer who made the error but the true creditor. The policy reasons for upholding the error of law rule barring recovery may therefore differ in this class of case from cases in which a payment under error of law prejudices only the payer.

2.38 Recovery for payment to true creditor or beneficiary. In an early case, Gray v Walker[4] a bond was granted to a married lady and interest paid thereon to her and her trustees and representatives after her death. The payments were made under error of law since the bond had

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[1]See Vol. 2, para 2.195.

[2]See paras 3.56 to 3.73 below.

[3]See Gray v Walker (1859) 21 D 709 at p 715 quoted at para 2.38 below.

[4](1859) 21 D 709.

vested in the lady's husband under the jus mariti and the interest should have been paid to him and his representatives. In a multiplepoinding brought by the debtor's trustees, the true creditor (the husband's executor) claimed the interest. The wife's trustee pleaded that the husband's executor's claim was "of the nature of a condictio indebiti" against him and was unfounded since the money had been spent by the wife in the bona fide belief that she was entitled thereto. The case however was disposed of as if it were an action for payment by the true creditor against the debtor under the bond,[1] and the true creditor's claim was upheld.[2] In the Outer House, however, Lord Neaves remarked:[3]

> "If [the husband's executor's] claim against the [the debtor] would have been good, the [debtor's] claim of relief against the [wife] and her trustee would seem also to be good. [The husband's executor] pleads that this is a case of condictio indebiti, and that the money paid cannot be recovered back upon a mere error in law. The Lord Ordinary is not satisfied that this would in any view be a sound plea; but supposing that [the debtor] could not have recovered back this money merely in order to retain it, it is a different question whether he may not get it back in order to enable him to pay it to the right creditor. There seems to be a sort of warrandice implied on the part of every person receiving money as a debt, that his title to do so is good, and that his discharge will be available to the debtor. On this footing, it would follow that [the wife's] trustee could not refuse to reimburse [the debtor], so as to save him from a claim at [the husband's executor's] instance." (emphasis added)

In the Inner House it was held that a claim of relief by the debtor against the wife's executor could not be

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[1] Ibid at p 713.

[2] Ibid at p 716; Buchanan v Royal Bank of Scotland (1842) 5 D 211.

[3] Ibid at p 715.

disposed of in the multiplepoinding.[1] Since the error of law seems to have related to the general law on the jus mariti in its application to personal bonds, the dicta on error would not now be upheld. Moreover, the observations on warrandice on the part of the recipient have never been accepted. However, the obiter dictum by Lord Neaves that while error of law may preclude a payer from recovering money in order to retain it, it is a different question whether he may recover it in order to pay it to the true creditor, may have much to commend it if (contrary to our provisional proposals) the error of law rule were to be retained.

2.39 Payments by executors or trustees. In Taylor v Wilson's Trs Lord Fraser observed: "It is now well settled that an overpayment made by trustees based on an error in construing documents cannot be recovered by them".[2] The two cases relied on were Hunter's Trs v Hunter[3] and Rowan's Trs v Rowan.[4] In the Hunter's Trs case, testamentary trustees through misconstruction of a will failed to make the required deductions from an annuity to the testator's widow and the Second Division held that

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[1]Ibid at p 717.

[2]1975 SC 146 at p 152.

[3](1894) 21 R 949.

[4]1940 SC 30. The Hunter's Trs and Rowan's Trs cases were applied by Lord Coulsfield in Grant v Royal Bank of Scotland plc 1993 GWD 11-794 (OH) (unreported, 2 February 1993). See also Renwick's Exix v Muir (1886) 2 Sh Ct Reps 380 (executrix held not entitled to obtain repetition from a legatee of trust money paid in error under a scheme of division prepared by her law agents and those of the legatee. This result was reached on the basis of Wilson & McLellan v Sinclair (1830) 4 W & S 398, and the Baird's Trs case was not cited).

they were not entitled to recover the over-payments. Though Lord Young based his judgment solely on bona fide consumption,[1] Lord Justice-Clerk Macdonald relied in part on the trustees' "error of view as to the widow's legal right, on a question of construction of documents";[2] and Lord Trayner relied on the fact that both the trustees and the widow "were in error as to the legal effect of the settlement".[3] Lord Rutherfurd Clark concurred. In Darling's Trs v Darling's Trs[4] Lord President Dunedin criticised Lord Young's reliance on bona fide consumption in Hunter's Trs but did not criticise the majority's reliance on error in construction. In Rowan's Trs v Rowan[5] trustees made overpayments to a beneficiary on an erroneous construction of the trust deed and recovery was refused. Lord President Normand observed:

> "It is, however, clear that we are bound by the decision that an overpayment by trustees based on error in construing the documents cannot be recovered by them. The decision was not seriously challenged as inconsistent with other authorities and we must follow it."[6]

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[1](1894) 21 R 949 at p 953.

[2]Idem. He also relied on equity, the widow being in his view entitled to assume that she was paid only what she was entitled to.

[3]Ibid at p 955.

[4]1909 SC 445 at p 451.

[5]1940 SC 30.

[6]Ibid at pp 39, 40. Lord Fleming and Lord Carmont concurred; Lord Moncrieff (at p 48) expressly applied Hunter's Trs.

2.40 It seems, however, that Baird's Trs v Baird and Co[1] was not cited, nor was Armour v Glasgow Royal Infirmary.[2] In that case the beneficiaries under a trust were held entitled to sue a person, to whom a legacy had been paid, for repetition to the trustees. The legacy was paid upon the erroneous assumption that a clause in a codicil was valid when in truth it was void from uncertainty. The case appears therefore to have concerned not an error of law in the construction of a trust deed but a payment under an error that a clause in a codicil was valid when it was in fact void. Since both the executors and the putative beneficiaries to whom the legacy was wrongly paid had concurred in opposing the beneficiaries' claim, it was held that the beneficiaries had title to sue provided the trustees as well as the payees were convened as defenders. The error of law rule and its exceptions were not discussed. In Grant v Royal Bank of Scotland plc[3], Lord Coulsfield held that Rowan's Trs was not inconsistent with the Armour case since Rowan's Trs involved a payment based on a misconstruction whereas Armour involved a payment made in pursuance of a clause in a codicil which was invalid. Lord Coulsfield observed that it was anomalous that the rule which applies to one class of private documents, trust deeds, should differ from that applied to another class, private contracts. He further rejected a contention that the rule in Rowan's Trs precluding recovery by trustees of overpayments made on a misconstruction of a trust deed was limited to overpayments of income and did not apply to overpayments

[1](1877) 4 R 1005, see para 2.29 above.

[2]1909 SC 916.

[3](Unreported, 2 February 1993) (OH) 1993 GWD 11-794.

of capital. It was already sufficiently anomalous that a distinction should exist between the construction of trust deeds and the construction of contracts without introducing a further anomalous distinction between payments of income and payments of capital. Another distinction not referred to in the Grant case was that the Rowan's Trs case, like the Grant case itself, was an action by the paying trustee against the payee (ie a condictio indebiti) whereas the Armour case was an action by the unpaid true beneficiary against the wrongly paid payee for payment to the trustee convening the trustee as defender (ie an innominate action of repetition which in the ius commune was treated as a condictio sine causa). We consider innominate actions of repetition at the instance of an unpaid true creditor against the wrongly paid recipient at paras 3.56 to 3.67 below. A question arises in such cases whether the unpaid true creditor's claim is an independent claim (in which defences available against the payer are not available) or a dependent claim derived from the payer's claim (in which such defences are available). For the reasons given in paras 3.61 to 3.63 below, we tentatively conclude that the Armour case was a dependent claim. If that is right, the error of law defence might have been available even though the error was that of the trustee not that of the pursuer. On that basis, the Court in the Grant case did need to distinguish the Armour case.

2.41 Payments by liquidators. In Taylor v Wilson's Trs[1] Lord Fraser (Ordinary) referred to the trustee cases[2] for

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[1] 1975 SC 146.

[2] Hunter's Trs v Hunter (1894) 21 R 949; Rowan's Trs v Rowan 1940 SC 30.

the proposition that an over-payment by trustees based on an error in construing documents cannot be recovered by them, and remarked that by parity of reasoning an over-payment by a liquidator is not recoverable.[1] In that case, the liquidator's error of law lay not in construing documents (as in the trustee cases) but in failing to know or appreciate that under the Finance Acts the company in liquidation was owing more money to the Inland Revenue than he had budgeted for.

2.42 In that case, the liquidator founded on a passage in Gloag[2] to the effect that it is "a rule in bankruptcy that if a creditor is paid on a ranking given by mistake...the mistake may be rectified by the recovery of the money", but this passage was disapproved.[3]

2.43 It was contended that the special position of the liquidator vis-a-vis the defenders as shareholders of the company did not take the case out of the general rule of non-recovery for error of law.[4] One argument in favour of this special position was that an over-payment to a shareholder necessarily involved an under-payment to a creditor. This was rejected on the ground that creditors harmed by a breach of trust on the part of the liquidator may sue him for damages for their loss and so "this is not the kind of case in which it could be said that the

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[1]1975 SC 146 at p 152.

[2]Gloag Contract (2nd edn) p 61.

[3]1975 SC 146 at pp 150, 151 per Lord Fraser.

[4]Ibid at pp 155, 156 per Lord Justice-Clerk Wheatley; at pp 159, 160 per Lord Cameron.

liquidator was 'in the middle' and what he overpaid Peter was eo ipso to the loss of Paul".[1]

2.44 In cases where trustees or liquidators do not have bonds of caution, and where their personal estate does not suffice to make good the loss to creditors resulting from the over-payment to beneficiaries or shareholders, this reasoning would not apply.

(iii) Defender primarily responsible for the error of law; pursuer not "in pari delicto"

2.45 An exception to the rule of non-recovery for error of law has been derived from the law on recovery of benefits transferred under illegal contracts (pacta illicita). In general, Scots law influenced originally by Roman law and then by English law, prohibits recovery of money paid or property transferred under an illegal or unenforceable contract. In the early Institutional period,[2] the law was expounded following the tripartite classification of Roman law; if (1) the payee alone was guilty of turpitude, or (2) both the payer and payee were guilty of turpitude, there was no recovery, the second proposition being expressed in the maxim "in pari delicto potior est conditio defendentis". (3) If, however, the payer alone was not guilty of turpitude, recovery was allowed. Modern Scots law probably now follows English law in stating a general rule of non-recovery, subject to exceptions. The Scots courts have occasionally demurred about the practice of relying on English authorities on

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[1] 1975 SC 146 at p 160 per Lord Cameron.

[2] Stair Institutions I, 7, 8; Bankton Institute I, 8, 22; Erskine Institute III, 1, 10. See Vol 2, para 3.7.

the rule of non-recoverability,[1] or followed their own path,[2] but on the whole have accepted the English rule and its exceptions.[3] One of the exceptions to the general rule of non-recovery (ie one of the grounds of the condictio ob turpem vel iniustam causam) arises where the object of the statutory provision or rule of law which renders the contract illegal is to benefit a class of persons of whom the pursuer is a member.[4] In McNair v Arrol[5] a person claimed from his butcher repetition of sums paid over a decade as the price of meat sums in excess of the maximum prices laid down by statutory orders. The butcher contended that the claim for repetition was irrelevant because the error was one of law. The sheriff held that an error of law did not preclude recovery of payments particularly where, as here, the defender had received the payments in breach of a statutory regulation and that the pursuer was entitled to recover. This case was, however, decided before the Glasgow Corporation case established the rule of non-recovery for error of law.

2.46 The in pari delicto exception to the error of law rule stems from the judgments of the Privy Council in Kiriri Cotton Co Ltd v Dewani.[6] A tenant sought repayment

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[1]Macfarlane v Nicoll (1864) 3 M 237 at p 244 per Lord Deas.

[2]Cuthbertson v Lowes (1870) 8 M 1073.

[3]See especially Jamieson v Watt's Tr 1950 SC 265.

[4]Phillips v Blackhurst (1912) 2 SLT 254 (OH); McCarroll v Maguire (1920) 2 SLT 108 (OH); Foster v Brown 1923 SLT (Sh Ct) 53.

[5]1952 SLT (Sh Ct) 41.

[6][1960] AC 192 (PC).

of a premium, "key money", paid for the lease of a flat. The agreement to make the payment was illegal under a rent restriction ordinance designed to protect prospective tenants such as the appellant. Giving the advice of the Judicial Committee, Lord Denning held that the landlord must take the primary responsibility for non-compliance with the ordinance, that therefore the parties were not in pari delicto and so the landlord must return the money.

2.47 In response to the landlord's submission that the premium was paid under mistake of law and therefore not recoverable, Lord Denning remarked:[1]

> "The true proposition is that money paid under a mistake of law, by itself and without more, cannot be recovered back....If there is something more in addition to a mistake of law - if there is something in the defendant's conduct which shows that, of the two of them, he is the one primarily responsible for the mistake - then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other - it being imposed on him specially for the protection of the other - then they are not in pari delicto and the money can be recovered back....Likewise, if the responsibility for the mistake lies more on the one than the other - because he has misled the other when he ought to know better - then again they are not in pari delicto and the money can be recovered back.".

2.48 In that case the "something more" was that the plaintiff was not in pari delicto with the defendant because the statutory provision rendering the agreement illegal was designed to protect payers in the plaintiff's position. In Eadie v Township of Brantford,[2] the Supreme Court of Canada applied the in pari delicto rule to a case

[1] Ibid at p 204.

[2] [1967] 63 DLR (2nd) 561.

where a local authority levied charges under an ultra vires bye-law. Goff and Jones call this "a novel extension of Kiriri Cotton, for the transaction in Eadie could hardly be described as illegal or unlawful".[1] This extension has been criticised.[2] The Law Commission observed[3] that there "seem to have been no cases in England in which [the in pari delicto rule] has been applied outside its original context, and its status as a general principle is thus clearly in some doubt although there is support for it to be so extended".[4]

2.49 Lord Denning's statement of the law in Kiriri Cotton was accepted as part of Scots law in Taylor v Wilson's Trs,[5] which was not a case of illegality but concerned an overpayment by a liquidator in a member's voluntary liquidation. Unlike the Kiriri case, it was the payer not the payee who was primarily responsible for the error of law. In the Outer House, Lord Fraser said that the reference to the defendant being the one primarily responsible for the mistake was illustrative and not exhaustive of cases in which "something more" might turn the scales in the pursuer's favour.[6] However, he rejected

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[1]Restitution pp 126, 127.

[2]Hydro Electric Commission of the Township of Nepean v Ontario Hydro [1982] 132 DLR (3rd) 193 at pp 234 ff per Estey J; Crawford "Restitution: Mistake of Law and Practical Compulsion" (1967) 17 Univ of Toronto LJ 344.

[3]Law Com CP No 120, para 2.9.

[4]Citing Birks Introduction p 167 where the Kiriri case is treated as an example of "transactional inequality". This may be doubted.

[5]1975 SC 146.

[6]Ibid at p 149.

the contention that the "something more" included the liquidator's position vis-a-vis the defender shareholders.[1] In the Second Division, Lord Justice-Clerk Wheatley concurred with Lord Fraser's views of Lord Denning's dictum.[2] Lord Cameron distinguished the Kiriri Cotton case on the ground that Lord Denning's observations were directed to the conduct of the recipient of the money paid in error and did not relate to a case where the recipient shareholders had done nothing to induce the liquidator's erroneous payment.[3]

2.50 This broad approach was followed in the sheriff court case of Ali v Wright[4] where the purchaser of a grocer's business included in the price an element for VAT for the transfer of stock not knowing that VAT was not payable on such a transfer. The error was induced by the seller's stocktaker producing a figure for the price which included VAT. In an action for repetition of the VAT element, proof before answer was allowed. The sheriff relying on the Kiriri Cotton and Taylor cases, observed that if the seller defenders were responsible for the pursuer's error, they should not be allowed to benefit from it.

(iv) Error of law induced by fraud or similar conduct

2.51 There is no doubt that a payment made under error of law induced by the fraud of the payer may be recovered. In his obiter dicta introducing the rule of non-recovery

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[1] Ibid at pp 150-152.

[2] Ibid at p 155.

[3] Ibid at p 159.

[4] 1989 GWD 11-456.

for error of law into Scots law, Lord Brougham LC made the following exception:

> "(for this qualification must be added, even in an English Court,) where there is nothing against good conscience in retaining the money; that is to say, where the payor has not been induced to pay by any ignorance impressed upon him, as it were, by the person procuring it to be paid, or any other fraudulent interposition, which would make it contrary to good conscience for him to retain it".[1]

It is not altogether clear whether an action to recover payment under error of fact induced by fraud should be characterised as a condictio indebiti.[2] As we note elsewhere,[3] the condictio indebiti in Roman law was confined to unilateral error because the condictio furtiva was available to deal with cases where the payee received the money in bad faith knowing it was not due.[4] The condictio furtiva has not been received in Scots law,[5] but receipt of money in bad faith knowing that the payer

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[1]Dixons v Monkland Canal Co (1831) 5 W & S 445 at p 447. For examples of the maxim "nemo debet ex proprio dolo lucrari" (nobody should be enriched by his own intentional wrongdoing) see Grieve v Thomson (1705) Mor 9478 at p 9480; McGuffock v Blairs (1709) Mor 9483 at p 9484.

[2]In Post Office v Morton 1992 GWD 26-1492 (OH) there were averments of error and averments of fraud. It is not altogether clear from the judgment on relevancy whether the averments of fraud supported a condictio indebiti or some other ground of repetition.

[3]See vol 2, para 2.40.

[4]D.13.1.18; Thomas Textbook of Roman Law (1976) p 327.

[5]Bankton Institute I, 8, 33.

entertained an erroneous belief as to the law would found an action of repetition as it does in English law.[1]

2.52 It has been held that a compromise or "transaction" (of all agreements, the most difficult to set aside in respect of error or inequality[2]) may be reduced on the ground of fraudulent misrepresentation or fraudulent concealment or something equivalent.[3] It seems likely that similar conduct is a ground of repetition of payments made under error of law. "Something equivalent" might be undue influence or breach of a fiduciary relationship.[4]

(v) Error as to the existence or validity of a law, contract or other instrument

2.53 A remarkable exception to the error of law rule has been affirmed in Canada by the device of characterising an error as to the existence of a law (eg a bye-law) as an error of fact.[5] It has been observed that "[on] the basis

[1] Goff and Jones, Restitution p 125, citing Ward & Co v Wallis [1900] 1 QB 675 at p 678 per Kennedy J; Nicholls v Leeson (1747) 3 Atk 573 at p 575 per Lord Hardwicke.

[2] Dickson v Halbert (1854) 16 D 586 at p 600 per Lord Rutherfurd; Stewart v Stewart (1836) 15 S 112 at p 115 per Lord Justice-Clerk Boyle.

[3] Johnstone v McKenzie (1824) 3 S 321 at p 322 per Lord Alloway; Stewart v Stewart (1836) 15 S 112 at p 115 per Lord Glenlee; Assets Co Ltd v Guild (1885) 13 R 281 at p 297 per Lord President Inglis; Bell Principles s 535; cf Johnston v Johnston (1857) 19 D 706; Dempsters v Raes (1873) 11 M 843.

[4] Cf Goff and Jones Restitution p 124.

[5] George (Porky) Jacobs Enterprises Ltd v City of Regina (1964) 44 DLR (2d) 179: plaintiff wrestling promoter advised by defendant local authority that bye-law required payment of a licensing fee on a "per day" basis when it in fact required payment on an annual basis.

of this analysis, it would appear that many errors of law could be converted into factual errors."[1] It may be that this strained conception could provide an explanation of Magistrates of Dunbar v Kelly[2] in which the pursuers recovered customs dues which they erroneously believed had been imposed by a private Act. Then there are many cases in which a person makes a payment under a void or non-existent contract or other instrument which he erroneously believes to be valid and binding and has been held entitled to recover. In Haggarty v Scottish TGWU,[3] for example, a condictio indebiti was held competent for the recovery of a payment made in the erroneous belief that an ultra vires rule of a trade union was valid. It seems that the payer's erroneous belief that an invalid contract is legally valid is generally treated as one of fact and not of law for the purposes of the condictio indebiti.[4] While the result is equitable, this approach does highlight the inadequacy of the distinction between fact and law, because the error could as easily be characterised as one of law.

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[1]Maddaugh and McCamus Restitution p 264.

[2](1829) 8 S 128.

[3]1955 SC 109. In the "private rights" cases such as Baird's Trs v Baird & Co (1877) 4 R 1005 the error was as to the interpretation of a contract and not as to its validity.

[4]A similar distinction in trust cases was relied on in Grant v Royal Bank of Scotland plc 1993 GWD 11-794 to reconcile the different results in Rowan's Trs v Rowan 1940 SC 30 (error of law in interpretation of trust deed: no recovery) and Armour v Glasgow Royal Infirmary 1909 SC 916 (invalid clause in codicil; recovery allowed). See para 2.40 above.

(vi) Miscellaneous possible exceptions derived from English law

2.54 A number of exceptions or possible exceptions to the rule of non-recovery for error of law have been recognised in English law but not, or not yet, been clearly received in Scots law. Given that the rule has been introduced to Scots law from English law, it would be strange if the rule were so introduced without the exceptions unless there is some countervailing principle of Scots law which would preclude the recognition of the exception.[1]

2.55 Error as to foreign law. An error as to foreign law is generally treated as an error of fact in both Scots[2] and English[3] law. This rule is taken to apply to the recovery of payments under an error as to foreign law.[4] There may be a question whether it would apply to (say) the interpretation in Scotland of an English statute[5] for the purposes of repetition.

2.56 Error concerning personal status. It may be that an erroneous representation as to a person's marital or other personal status is to be regarded as an error of fact rather than law. It has been said in England that "there is not a single fact connected with personal status that

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[1]See para 2.58 below.

[2]Stuart v Potter, Choate and Prentice (1911) 1 SLT 377 at p 382; Armour v Thyssen Edelstahlewerke AG 1989 SLT 182 at p 185, Sanderson and Son v Armour and Son 1922 SC (HL) 117 at p 127.

[3]Lazard Bros v Midland Bank [1933] AC 289.

[4]eg Goff and Jones Restitution p 134.

[5]Cf Anton Private International Law (2nd edn; 1990) p 775; see also LRCBC 51, p 55.

does not, more or less, involve a question of law",[1] but that "when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law".[2] In Scots law, the distinction between error of fact and error of law has been discussed in connection with putative marriages (ie a void marriage believed by one of the parties in good faith and because of error, to be valid), the significance of which is that the children of the marriage are legitimate. The weight of authority favours the view that the error must be of fact, not law,[3] and the authorities seem to assume that the error must be one or the other. The exception must be regarded as extremely doubtful in Scots law.

(vii) Other exceptions

2.57 In Taylor v Wilson's Trs, Lord Justice-Clerk Wheatley did not exclude the possibility of other exceptions being recognised incrementally by the courts, though he thought that those exceptions would normally

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[1]Eaglesfield v Marquis of Londonderry (1876) 4 Ch D 693 (CA), at p 703 per Jessel MR. Commenting on this Maddaugh and McCamus p 263 remark: "Thus a representation that a particular individual is single, married or the eldest son of a marriage may be rendered false by legal considerations of which the representor is unaware.".

[2](1876) 4 Ch D 693 (CA) at p 702 per Jessel MR.

[3]See Purves' Trs v Purves (1895) 22 R 513 (Full Court) at pp 535, 536 (per five judges); cf at p 517 per Lord Kincairney (Ordinary); Clive Husband and Wife (3rd edn; 1992) p 160, and see p 354.

have to be in the private as distinct from the public sector of the law,[1] meaning presumably "private rights".[2]

(viii) English exception not received: payments to persons with a special duty to be honest

2.58 English and Canadian cases. In English law, there is a long line of cases holding that payments made to officers of the court are recoverable even though paid under a mistake of law. In Ex parte James[3] the court ordered repayment by a trustee in bankruptcy, and James LJ, remarking that the trustee was an officer of the court, observed that the court:[4]

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

2.59 In fact, the rule applies a higher standard of honesty and fair dealing than applies to ordinary citizens. This was recognised by Lord Bridge in the Chetnik case[5]:

> "So it emerges from these authorities that the retention of moneys known to have been paid under a mistake of law, although it is a course permitted to

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[1] 1975 SC 146 at p 155: "I see no profit in seeking to establish in vacuo what such exceptions might be. Each case would have to be considered on its own merits.".

[2] British Hydro-Carbon Chemicals Ltd and British Transport Commission 1961 SLT 280 was cited (idem) as an example of a case in the private sector.

[3] (1874) L R 9 Ch App 609. See Goff and Jones pp 129-133.

[4] Ibid at p 614.

[5] R v Tower Hamlets LBC ex parte Chetnik Developments Ltd [1988] AC 858 at pp 876-877.

> an ordinary litigant, is not regarded by the courts as a 'high-minded thing' to do, but rather as a 'shabby thing' or a 'dirty trick' and hence is a course which the court will not allow one of its own officers, such as a trustee in bankruptcy, to take."

Goff and Jones remark:[1]

> "It is not surprising that some judges have treated with reserve a principle which gives the court a discretionary jurisdiction to disregard legal rights ... wherever the enforcement of legal right would, in the opinion of the Court, be contrary to natural justice[2] and have said that it should be 'applied with the greatest caution'."[3]

2.60 The class of persons has however been enlarged to cover (in Canada) a solicitor receiving money in that capacity[4] and in England a local authority exercising a statutory discretionary power to repay overpaid rates.[5] In Canada it has been judicially suggested that it applies to civil servants in Government departments and local authority officials.[6] This line of authority was accepted

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[1] At p 132.

[2] Citing Re Wigzell [1921] 2 KB 835 at p 845 per Salter J.

[3] Citing Re Sandiford (No 2) [1935] Ch 681 at p 691 per Clauson J.

[4] London Guarantee and Accident Co Ltd v Henderson and McWilliams (1915) 23 DLR 38 (Man KB).

[5] R v Tower Hamlets LBC ex parte Chetnik Developments Ltd [1988] AC 858.

[6] Eadie v Township of Brantford (1967) 63 DLR (2d) 561 (Sup. Ct of Canada) at p 570 per Spence J: "The learned County Court Judge relied, inter alia, upon the exception that money paid to such person as a Court officer under a mistake of law may be recovered. He was of the view that money was paid to the respondent corporation on the insistence of its clerk-treasurer, whose position he equated to that of a highly-placed civil servant in a government department or an officer of the Court, and it

by the Court of Appeal in the Woolwich case as vouching a prima facie right of recovery of money demanded by a public authority ultra vires,[1] though in the House of Lords judgment proceeded in other grounds.

2.61 Scots law. This approach is inconsistent with Scottish authority. In Clyde Marine Insurance Co v Renwick & Co[2] the First Division held that while an insurance company, which was under no legal obligation to issue a policy to the holder of an initialled slip containing a proposal for insurance business, might have been under an honourable obligation to issue a policy to the holder, the Court had no power to order a voluntary liquidator to do so. The slip holders relied on the English line of cases beginning with Ex parte James,[3] and the jurisdiction of the English courts to direct or authorise officers of court to be "as honest as other people". It was held that the Court of Session has no equivalent jurisdiction of that kind. Lord President Clyde pointed out that a voluntary liquidator is not an officer of Court; that there were difficulties in distinguishing the duties of voluntary liquidators from compulsory liquidators; and that he preferred to put his judgment on the fact that the Court of Session had no jurisdiction of any kind possessed

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was highly inequitable, if not dishonest, for the respondent corporation to insist on the retention and that, therefore, they should be repaid. There is much to be said in support of such a view."

[1]Woolwich Equitable Building Society v IRC [1993] 1 AC 70 (CA) at pp 88 to 91 per Glidewell LJ; at p 140 per Butler-Sloss LJ.

[2]1924 SC 113.

[3](1874) LR 9 Ch App 609; Ex parte Simmonds (1885) 16 QBD 308; In re Wigzell [1921] 2 KB 835.

by the English Courts.[1] Lord Skerrington pointed out that "no trace [of the principle] is to be discovered in any Scottish text-book or decision", and that "even if the principle were held to form a part of the law of Scotland," he doubted whether it would apply to that case.[2] Moreover:[3]

> "there is every reason why the Court should refrain from converting a debt of honour into an ordinary debt at the expense of persons who, if they were consulted, might reply that they were legally unable or personally unwilling to exhibit so much generosity.".

Lord Cullen observed:[4]

> "According to Scottish law and practice, I conceive that a process of distribution in a company winding-up, as in a bankruptcy process outwith the Companies Acts, falls to proceed strictly in accordance with the independent legal rights of the parties claiming to be included in the class of creditors entitled to participate in it. Neither a liquidator nor a trustee in bankruptcy has any right or duty that I ever heard of to admit to competition with those having legal grounds of claim others who have none, or gratuitously to create for the benefit of the latter vouchers or grounds of claim which they do not independently possess. And I know of no jurisdiction possessed by this Court whereby it is empowered to direct or authorise a liquidator or a trustee in bankruptcy so to act. We were referred to various English cases, beginning with ex parte James[5]..."

He doubted whether those cases applied to the case before the Court, but if they did, respectfully declined to

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[1]1924 SC 113.

[2]Ibid at pp 126, 127.

[3]Ibid at p 127.

[4]Ibid at p 129.

[5](1874) LR 9 Ch App 609.

follow them. Lord Sands said:

> "I can find no authority in the law of Scotland in support of the proposition that a liquidator or a trustee in bankruptcy may voluntarily subject the estate which he administers to legal liabilities, unless he finds that it would be to the advantage of the estate that he should do so."[1]

Although this case did not concern the repayment of money paid under an error of law, it seems clear that the Court would have reached the same result.

2.62 On the basis of the English cases,[2] Gloag said that it is "a rule in bankruptcy that if ... a creditor gives up to the trustee money which he might have retained under some preferential right the mistake may be rectified by the recovery of the money ...."[3] This was commented on by Lord Fraser in Taylor v Wilson's Trs[4] who distinguished it as having no application to the converse case where a mistaken payment is made by an officer of court to another party. Gloag however seems to have overlooked the Clyde Marine Insurance Co case in this context.

2.63 The latter case is consistent with the authorities on judicial factors, who can be said to be officers of court. In Wardlaw v Mackenzie,[5] the question was whether a bond of caution for the tutor of an insane person was

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[1]1924 SC 113 at p 131. Thus for example "the administrator of a bankrupt estate or even a fiduciary executor must plead the rule that trust can be proved only by writ or oath" (idem).

[2]Ex parte James (1874) LR 9 Ch App 609; Ex parte Simmonds (1885) 16 QBD 308; Re Rhoades [1899] 2 QB 347.

[3]Contract (2nd edn) p 61.

[4]1975 SC 146 at p 151.

[5](1859) 21 D 940.

reducible on the ground of fraudulent misrepresentation, the action of reduction being brought against the curator bonis of the insane person. Lord Wood remarked: "I throw out of view all considerations of hardship. By them the defender, the curator bonis, could not allow himself to be influenced; and neither can the Court do so in discharge of its duty."[1] On the basis of this case, Sheriff N M L Walker, in discussing a judicial factor's duty to recover debts, observed that a judicial factor "must not be influenced by sympathy or considerations of hardship".[2] Thoms on Judicial Factors[3] remarked: "Judicial officers have no power to waive legal nullities .....[4] the principle is of undoubted and universal application.[5] Thus prescription must be pleaded against claims on the estate."[6]

2.64 The only Scots authorities imposing a higher standard of fairness on public authorities which we have traced are obiter dicta in an action of repetition of undue teinds (treated as State revenue) paid under error of fact, where it was observed that the defence of bona fide consumption, though available to an ordinary citizen

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[1]Ibid at p 948.

[2]N M L Walker Judicial Factors (1974) p 91.

[3](2d edn; 1881) pp 99,100.

[4]Citing Hunter (1739) Mor 16,341.

[5]Citing Kennedy v Steel (1841) 4 D 12; Doud v Simpson (1847) 9 D 511.

[6]Citing Barlas v Moncrieff (1859) 21 D 725.

defender,[1] was not available to the Crown.[2] The weight of Scots authority is nevertheless against the English rule.[3]

2.65 Difficulties arising from the English rule. The Law Reform Commission of British Columbia observe:[4]

> "There are two major problems with the defining of special classes subject to an obligation to be "fair" or "honest". The first derives from the absence in the reported cases of any criteria to be applied in determining either whether an individual falls within such a class or whether a new class should be created. Secondly, it is difficult to see why the standards of "fairness" and "honesty" imposed on such individuals should not be applied universally. Should the common law sanction less than the highest standards of honesty and fairness in any defendant?"

(4) The need for reform: dissatisfaction with the error of law rule.

2.66 There has long been dissatisfaction with the error of law rule in Scotland as in England and elsewhere. This is evidenced by the reluctance of the Scots courts to extend the rule to reduction of discharges[5] though

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[1]Lord Advocate v Drysdale (1874) 1 R (HL) 27 affg (1872) 10 M 499.

[2]Earl of Cawdor v Lord Advocate (1878) 5 R 710 at p 712 per Lord Young (obiter); at p 714, 715 (obiter) per Lord Justice-Clerk Moncreiff.

[3]Indeed if anything Scots law may be too favourable to some public bodies. Contrast Bell v Thomson (1867) 6 M 64 and National Bank of Scotland v Lord Advocate (1892) 30 S L Rep 579 (OH) at p 583 on the one hand with Purvis Industries Ltd v J & W Henderson (1959) 75 Sh Ct Reps 143 on the other. See vol 2, para 2.66. This will be considered in our forthcoming Discussion Paper referred to in para 1.8 above.

[4]LRC BC 51, at p 54.

[5]Dickson v Halbert (1854) 16 D 586: see vol 2, paras 2.39, 2.40.

arguably there is no difference in principle between an action of reduction of a discharge in respect of an underpayment and an action of repetition of an overpayment.[1] It is also evidenced by the recognition of exceptions to the rule, such as that relating to "private rights".[2] In Taylor v Wilson's Trs,[3] Lord Fraser reached his decision against recovery "with reluctance", observing that there seemed to him "little equity in allowing the defenders to retain money which was paid to them by an apparently careless mistake".[4] In the recent Woolwich case, Lord Jauncey remarked:

> "I very much doubt whether in all cases the distinction between mistake of fact and of law can be justified any longer. Can the reasoning of Lord Ellenborough CJ in Bilbie v Lumley, 2 East 469, be appropriately applied to the complex legislation both primary and subordinate to which the citizen is subject in present times?"[5]

Scots judges have observed that the rule is "essentially one of expediency rather than of equity as between the parties".[6] In England, reliance on the rule in some cases

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[1]See vol 2, para 1.25.

[2]Baird's Trs v Baird & Co (1877) 4 R 1005; British Hydro-Carbon Chemicals Ltd and British Transport Commission, Petitioners 1961 SLT 280 (OH). See para 2.28 ff above.

[3]1975 SC 146.

[4]Ibid at p 152.

[5]Woolwich Equitable Building Society v IRC [1993] 1 AC 70 (HL) at p 192. He continued: "These are however matters for the Law Commission and not for this appeal."

[6]Taylor v Wilson's Trs 1975 SC 146 at p 157 per Lord Cameron; see also British Hydro Carbon Chemicals Ltd and British Transport Commission Petitioners 1961 SLT 280 (OH) at p 282 per Lord Kilbrandon, quoted at para 2.78 below.

has been characterised by judges as "a shabby thing" or "a dirty trick".[1] Commentators in England and the Commonwealth[2] and in Scotland[3] have criticised the rule.

2.67 In some common law legal systems, abolition of the rule has been recommended by law reform bodies[4] or effected by statute.[5] The rule was introduced into Scots law from English law and the Law Commission in England have now provisionally proposed its abolition.[6] In the Common Law systems of Canada and Australia and in the Roman-Dutch law of South Africa, the rule has recently been abrogated by judicial decision.[7]

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[1]See paras 2.58 and 2.59 above.

[2]See, eg, Goff and Jones, Restitution Ch 4; McCamus, "Restitutionary Recovery of Moneys Paid to a Public Authority Under a Mistake of Law: Ignorantia Juris in the Supreme Court of Canada" (1983) 17 UBCLR 233; Knutson, "Mistake of Law Payments in Canada: A Mistaken Principle?" (1979) 10 Man LJ 23; Needham, "Mistaken Payments: A New Look At An Old Theme" (1978) 12 UBCLR 159. Tentative support for the rule is expressed by Birks, Introduction p 166. See also Sutton, "Kelly v Solari: The Justification of the Ignorantia Juris Rule" (1966) 2 NZULR 173.

[3]Bell Principles (10th edn) s 534, fn (1); Gloag Contract (2nd edn) p 62 fn 4; D M Walker case-note [1959] Jur Rev 218; Smith Short Commentary p 825; D R Macdonald "Mistaken Payments" [1989] Jur Rev 49 at p 60; R Evans-Jones "Payments in Mistake of Law - Full Circle?" (1992) 37 JLSS 92 at p 97.

[4]LRCBC 51 (1981); SALRC 84 (1984); NSWLRC 53 (1987).

[5]See para 2.96 below.

[6]Law Com CP No 120, Part II.

[7]Air Canada v British Columbia (1989) 59 DLR (4th) 161; David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 109 ALR 57; Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992 (4) SA 202(A), respectively.

2.68 In continental legal systems, as a matter of principle the error of law rule does not apply.[1] In German law, a pursuer need not show that he was in error in conferring a benefit (only that the benefit was conferred without legal ground, subject to a defence that he knew that he was not bound legally or morally).[2] In Austria, Switzerland and France, where error is a ground of recovery, there is no additional requirement that error must be one of fact.[3] The same is true of Quebec.[4] However, there are safeguards to protect the finality of transactions. Courts may demand more substantial evidence to establish the existence of a mistake of law, and it has been said that "civil law courts are equally reluctant to reopen settled transactions in the wake of judicial innovations"[5].

(5) The arguments for reform

(a) Injustice to the payer

2.69 Perhaps the principal argument for reform is that the error of law rule causes injustice to the payer.[6]

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[1]See Zweigert/Kotz/Weir Comparative Law vol 2, p 261; Zimmermann Law of Obligations (1990) p 870; Englard, "Restitution of Benefits" para 34.

[2]Idem.

[3]Zweigert/Kotz/Weir, supra; Englard, supra.

[4]Civil Code of Quebec article 1491 (new code promulgated in 1992); and see former civil code, article 1047, quoted at para 2.104 below.

[5]Englard, supra.

[6]See the (successful) argument for the Earl of Lauderdale in Stirling v Earl of Lauderdale (1733) Mor 2930; unreported pleading in Scottish Record Office (SRO 228/5/2/92) set out in vol 2, Part I, Appendix A: "if we consider this matter according to the principles of

Doubts have arisen in Scots law as to whether the condictio indebiti is truly a remedy for the redress of unjustified enrichment[1] but it is accepted on all sides that it is an equitable remedy. The error of law rule is unjust because the payee is inequitably and unjustifiably enriched at the payer's expense by receipt of a windfall benefit, and is thus inconsistent with the basis of the remedy, whether one treats that basis as unjustified enrichment[2] or equity.[3]

2.70 It is, however, misleading to say that the payer did not intend the payee to have the money.[4] On the contrary, the payer at the time of payment did "intend" the payee to have the money because, at that time, he thought the money was due. The true analysis is that the payer was misled by an error of law into intending the payee to have the money, and the payee is thus unjustifiably enriched.

(b) The justifications for the rule do not in fact support it

2.71 In our view, the various justifications of principle or legal policy which have been advanced in favour of the

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Equity, where is the Reason that an honest Man should be prejudiced by the loss of his means because he is ignorant of the Subtilties of the Law? Is one man to be made rich upon the Ruins of another because he induced his honest Neighbours to pay what he had no title to, while the greatest Lawiers differ in Law questions every day?"

[1]Royal Bank of Scotland plc v Watt 1991 SLT 138.

[2]Cf Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992 (4) SA 202 (A) at p 220 per Hefer J A.

[3]Cf Royal Bank of Scotland plc v Watt 1991 SLT 138.

[4]Cf Law Com CP No 120, para 2.24.

rule of non-recovery for error of law do not in fact support it. The justifications in the Scots cases include the following:

(1) that without such a rule, an enquiry would be opened in every case into a matter (the payer's knowledge of the law and capacity to apply it) which is not justiciable;

(2) that error of law is never excusable;

(3) that the rule of non-recovery is supported by analogy with criminal cases; and

(4) that allowing recovery would re-open settled transactions inequitably.

The first and third arguments were advanced by Lord Brougham LC in the Dixon case[1] and the last three by the First Division in the Glasgow Corporation case.[2]

(i) Opening an enquiry in every case: error of law not justiciable

2.72 In the Dixon case, Lord Brougham LC argued that if it makes no difference whether the error be one of law or fact, it would require the courts to open an enquiry in every case.[3] The payer would always allege that he would not have paid if he had known the law, even if he had obtained counsel's opinion (which he could say he did not understand). The courts would always be required to gauge the payer's knowledge of the law and his capacity to make the law apply to the facts of the case. These supposed

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[1]Dixon v Monkland Canal Co (1831) 5 W and S 445 at p 448 ff.

[2]Glasgow Corporation v Lord Advocate 1959 SC 203 at pp 232, 233.

[3](1831) 5 W and S 445 at p 449. See also Bilbie v Lumley (1802) 2 East 469 at p 472 per Lord Ellenborough CJ: "It would be urged in almost every case".

requirements were characterised as "gross absurdities".[1] The court, he observed, has no means of knowing whether a plea of ignorance of the law is made in good or bad faith: "you have no such hold over persons as you have where the only question is as to their ignorance of the fact".[2] There would thus be a grave risk that false claims would be upheld.

2.73 The Law Reform Commission of British Columbia rightly reject this argument as[3]:

> "unsatisfactory in that it confuses the right to plead a cause of action with the right to succeed. One could argue with equal plausibility that there should be no right to recover benefits conferred under duress, as it is equally possible to plead duress in every case. Even though due to the complexity of modern law mistakes of law are more likely to occur, responsible counsel would not plead such a mistake without some basis in fact. In any event, at most this amounts to a "floodgates" argument. It may be doubted whether courts will be swamped with mistake of law cases...".

They point out that there is no indication that courts in other common law jurisdictions which have rejected the mistake of law rule have been swamped by a flood of cases.[4]

2.74 As regards the difficulty of the court ascertaining whether the payer knew the law or not, it may be that the courts would require more substantial evidence to prove an error of law than an error of fact, as apparently occurs in continental legal systems which have rejected the error

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[1](1831) 5 W and S 445 at p 450.

[2]Ibid at p 451.

[3]LRC 51, pp 58, 59.

[4]Ibid p 59.

of law rule.[1] We do not think this consideration carries much weight. It may be significant that this justification was not relied on by the court in the Glasgow Corporation case,[2] though the Dixon case was fully considered.

(ii) Error of law never excusable

2.75 In Bilbie v Lumley Lord Ellenborough CJ based the rule of non-recovery on a legal fiction:

> "Every man must be taken to be cognizant of the law"[3].

This proposition has been much criticised. In view of the mass of enactments, Institutional writings and cases making up the law, such a presumption is unrealistic. There is also the point that if the payer must be taken to know the law, then the same must be true of the payee.[4] If the payee knows that the payment is not due, then he acts fraudulently or in bad faith in accepting the money

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[1]See para 2.68 above. See also LRCBC 51, p 60: "In many cases there will be adequate evidence to corroborate the plaintiff. Where such evidence does not exist, the plaintiff's task of proving his mistake will not be an easy one. It is unlikely that judges and juries would not be alive to the possibility that a plaintiff might seek to recover his funds by dishonesty asserting an error of law.".

[2]1959 SC 203.

[3](1802) 2 East 469 at p 472.

[4]See Dickson v Halbert (1854) 16 D 586 at p 597 per Lord Ivory: "The whole doctrine rests on the maxim ignorantia juris neminem excusat. And are you to apply that to the one party, and not to the other? Surely it applies equally to the party who pays and to the party who receives." See also LRCBC 51, p 58; Evans-Jones "Full Circle?" (1992) 37 JLSS 92 at p 93.

and the payment will be recoverable.[1] As Lord Ivory observed, where both payer and recipient are in error as to the law, the recipient should be no more protected than the payer, and repetition should lie.[2]

2.76 For reasons such as these, Lord Denning remarked:[3]

> "It is not correct to say that everyone is presumed to know the law. The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter. Ignorantia juris neminem excusat".

In similar vein, an American commentator observed:

> "The question is not whether it is reasonable to expect a man actually to know the law, but whether considerations of policy compel us to treat him as if he did."[4]

2.77 In the Dixon case, Lord Brougham based the rule of non-recovery on a presumption of knowledge of the law, but one resting on policy considerations, in particular "the interminable confusion and the innumerable mischiefs"[5] which he foresaw if recovery were allowed, notably false

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[1]Dixon v Monkland Canal Co (1831) 5 W and S 445 at p 447.

[2]Dickson v Halbert supra at p 597.

[3]Kiriri Cotton Co Ltd v Dewani [1960] AC 192 at p 204.

[4]B Smith "Correcting Mistakes of Law in Texas" (1931) 9 Texas Law Review 309 at p 326. Cf (1831) 5 W and S 445 at p 451 per Lord Brougham LC: "You are bound to know [the law], or, which is the same thing, you shall be treated as if you did know it."

[5](1831) 5 W and S 445 at 452.

claims unsettling payment transactions. He said:[1]

> "nobody shall be allowed to say he does not know the law, because the lawgiver can only proceed and judge upon one assumption, that the law is known to the community, and that he is dealing with persons in every case who are cognizant of the law; that the law <u>may</u> be known to every person, and that, therefore, it is not unreasonable to presume that it <u>is</u> known to every person. But he cannot presume the fact to be known to every person. On the contrary, ignorance of the fact is almost a necessary occurrence in many cases; and therefore, though the law may be presumed to be known, the fact cannot be presumed to be known. Upon these grounds, I cannot conceive how, in any country where many transactions and dealings are carried on between man and man, and where many law suits arise, any system of law can exist or can be conveniently administered if it is not to be maintained in this way." (emphasis in original)

Lord Brougham however did not regard the rule of non-recovery as based on equity as between the parties. Indeed, in drawing an analogy with criminal law, he conceded that in criminal cases the <u>ignorantia juris</u> rule could cause "a great hardship" and an infringement of "manifest natural equity".[2]

2.78 By contrast, in the <u>Glasgow Corporation</u> case, Lord President Clyde based the non-recovery rule on equitable considerations, linked to the requirement that the <u>condictio indebiti</u> lies only for excusable error. He remarked:

> "Moreover, if equity lies at the root of the doctrine of the <u>condictio</u>, the original mistake in paying must be excusable ... It is relatively easy to establish that an error in fact is excusable, as there may be a host of reasons why the fact was unknown, all of which could be justifiable. But the same is not true

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[1]<u>Idem.</u>

[2]<u>Idem</u>.

> of a question of law. For there the doctrine of ignorantia iuris haud excusat comes into play, and renders the ignorance devoid of that equitable quality which might otherwise have opened the door to the operation of the condictio."[1]

The notion that the non-recovery rule is based on equity as between the parties is most unusual and, in our respectful view, untenable. Subsequent judicial dicta have based the rule on expediency or "public considerations" rather than equity.[2] Moreover in principle excusability should be treated as a question of fact which differs according to the circumstances of the case. It seems indiscriminate and contrary to principle and reality to treat all errors of law as inexcusable.[3] In South African law, there is a requirement that the payer's ignorance of fact be excusable, defined as

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[1]1959 SC 203 at p 233. See also ibid at p 243 per Lord Sorn: "in Roman law the excusability of the error was material, and ... errors in law, or at least some of them, fell into the category of the inexcusable". On this see vol 2, para 1.3 ff.

[2]Taylor v Wilson's Trs 1975 SC 146 at p 157 per Lord Cameron: "this rule ... is essentially one of expediency rather than of equity as between the parties"; British Hydro-Carbon Chemicals Ltd and British Transport Commission, Petitioners 1961 SLT 281 (OH) at p 282 per Lord Kilbrandon: "There may be public considerations which must supersede that natural sense [of justice requiring repetition], as where the innocent mistake is a mistake as to the general law, but where such considerations cannot be demonstrated, repetition should in equity be the rule."

[3]An example of an excusable error in law arose in a delict case, Free Church of Scotland v MacKnight's Trs 1916 SC 349. Trustees had paid income tax in respect of funds which were, by virtue of a House of Lords decision on an English appeal, tax free. It was no longer reclaimable (the statutory period having expired). The trustees were held not liable for loss to the estate because the true legal position could not be said to be "common knowledge in the profession at the time."

"neither slack nor studied" (nec supina nec affectata). In abrogating the error of law rule, the Supreme Court of South Africa Appellate Division held that the same test should apply to mistakes of law,[1] and refused to lay down rules of thumb or specific definitions of the circumstances in which errors of law are inexcusable.

(iii) The analogy of criminal cases

2.79 Both Lord Brougham LC and Lord President Clyde relied on the analogy of the ignorantia juris rule in criminal cases.[2] In civil cases one may lose one's money but in criminal cases one may lose one's liberty (or as the law then stood) one's life.[3] All the more so, it was said, the ignorantia juris rule should apply in civil actions for repetition.

2.80 While there are other civil law contexts where the ignorantia juris maxim has been held applicable in Scots law,[4] and the maxim is undoubtedly applicable to civil

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[1]Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992 (4) SA 202 (A) at pp 223, 224.

[2](1831) 5 W and S 445 at pp 451, 452 per Lord Brougham LC; 1959 SC 203 at p 233 per Lord President Clyde.

[3](1831) 5 W and S 445 at p 451. See also the dissenting judgment of Van den Heever JA in the South African case of Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992 (4) SA 202 (A) at p 227: "The duty to take reasonable steps to discover the law is a real one .... I can think of no reason why the citizen should have a more onerous duty when his liberty is at stake than when it is merely his money that matters."

[4]eg Macfarlane v Nicoll (1864) 3 M 237 at p 244 per Lord Deas: "Every man is presumed to know the law" (action of repetition of payments made by a bankrupt under compulsion in defraud of creditors); cf Purves' Trs v Purves (1895) 22 R 513 at p 536 (per 5 judges): "everyone is bound to know as much of the law as is necessary to

wrongs (delict) as well as criminal wrongs, repetition is different. As Gloag remarked:

> "But surely the foundation of the condictio indebiti is that the defender has no justification for retaining money which was not due to him and, if so, the analogy of the criminal law is simply misleading."[1]

(iv) Reopening settled transactions

2.81 In the Dixon case, Lord Brougham considered one hypothetical restriction on the non-recovery rule, namely:

> "communis error; that is to say, that all mankind thought the law to be so till it was set right by subsequent decision, or a declaratory Act of Parliament, and that whatever is done under that impression is to be considered invalid."[2]

He denied that in the Dixon case there was any common error. Yet there had indeed been a change in the common understanding of the law effected by the earlier decision between the same parties.[3] His reasons for rejecting communis error are not clear.

2.82 In the Glasgow Corporation case on the other hand, the fact that an error of law was widely shared was adduced as a reason for refusing, rather than (as Lord Brougham hypothesised) for granting, a condictio

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regulate his conduct in the ordinary relations of life". See also the doctrines of bona fide payment (para 3.68 below) and bona fide perception and consumption (para 3.124 below).

[1]Contract (2nd edn) p 62, fn 4; to a like effect, see Law Com CP No 120, para 2.28; LRCBC 51, p 58.

[2](1831) 5 W & S 445 at p 450.

[3](1825) 1 W & S 636, revg (1821) 1 S 145.

indebiti.[1] Indeed, this was the principal ground of decision. Lord President Clyde observed:[2]

> "My main reason is that the doctrine is an equitable one, and it seems to me that in the case of an error in interpreting an Act of Parliament the balance of the equities are in favour of excluding repayment in such circumstances. Where the error is one of fact, it usually affects only the parties to the particular transaction, and not third parties. Equity may well then demand restitution as between these two parties. But where the error is in regard to the interpretation of a public Act of Parliament repayment of a sum paid by one party may very well affect a very large number of others who have made or received payments under a similar misinterpretation. To allow one repayment would necessarily involve allowing all to be repaid, and this would involve a widening circle of interference with transactions which the parties had treated as settled and completed on the law as it was then understood. There seems little equity in enabling B and C and D to secure an unexpected repayment merely because A has succeeded in upsetting the current interpretation of an Act of Parliament under which all of them paid away part of their funds. On a balance of these considerations equity demands finality in payments made in circumstances of this kind."

2.83 It should be noted that in the case of overpayment of many types of taxes and non-domestic rates, statutory assessment and appeal procedures are final either expressly by statute[3] or at common law in terms of the defence of failure to exhaust statutory remedies.[4] In

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[1]*Glasgow Corporation v Lord Advocate* 1959 SC 203 at pp 232, 233 per Lord President Clyde.

[2]*Idem*.

[3]Taxes Management Act 1970, ss 29(6) and 46(2); Inheritance Tax Act 1984, s 221(5); Car Tax 1983, s.3(3).

[4]*British Railways Board* v *Glasgow Corporation* 1976 SC 224; C T Reid "Failure to Exhaust Statutory Remedies" [1984] *Juridical Review* 185; A W Bradley in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 1 (1987) paras

other cases, the right to repayment is governed by statutes (which normally do not exclude repayment for error of law)[1] which exclude the common law rights of repetition.[2] We shall consider these in a future Discussion Paper but note here that they preclude re-opening settled transactions. The issue has here to be addressed, however, as a pure question of amending the common law. We agree that the need not to re-open settled transactions unfairly is the principal justification for the error of law rule. This factor however does not require that that rule be retained. It is true that in many cases an action of repetition is raised because a judicial decision has overturned a widely held understanding or interpretation of the general law.[3] But in many other cases, the error as to the general law is not widely shared[4] and in such cases there is no reason to deny recovery on that ground. As Professor D M Walker remarked: "No doubt past transactions cannot be opened

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304, 305.

[1]See Law Com CP No 120, paras 3.20 to 3.44 (An updated survey adapted for Scots law will be included in our forthcoming Discussion Paper referred to in para 1.8).

[2]National Bank of Scotland v Lord Advocate (1892) 30 SL Rep 579 at p 583; Alston's Trs v Lord Advocate (1895) 33 SL Rep 278 at p 281; Woolwich Equitable Building Society v IRC [1993] 1 AC 70 (HL) at pp 168-170.

[3]Eg Oliver(Bennet's Trs) v Scott, Bell Illustrations vol 1, p 328; Meiklejohn v Erskine 31 January 1815 FC; Dixon v Monkland Canal Co (1831) 5 W and S 445; Hogarth v Dewar and Webb (1897) 13 Sh Ct Reps 314; Manclark v Thomson's Trs, 1958 SC 147; Glasgow Corporation v Lord Advocate 1959 SC 203. See also Haggarty v Scottish TGWU 1955 SC 109, where repetition was allowed.

[4]Eg Bremner v Taylor (1866) 3 SL Rep 24 (OH); McNair v Arrol 1952 SLT (Sh Ct) 41; Taylor v Wilson's Trs 1975 SC 146; Ali v Wright 1989 GWD 11-456 (Sh Ct).

but surely the man who makes the challenge should not be barred."[1] In our view, the correct response to the risk of reopening settled transactions is a statutory provision specifically designed to safeguard payees from that risk. We revert to that at paragraph 2.108 below.

(c) Uncertainty and inconsistency

2.84 There is widespread agreement in other jurisdictions that the error of law rule is uncertain and inconsistent in its operation.[2] In Scots law, uncertainty results from the number, variety and arbitrary nature of the exceptions to the rule of non-recovery; from the uncertain extent to which English precedents on the exceptions will be followed; from conflicting Scots decisions on some points; and from the inherent difficulty of distinguishing between errors of fact and errors of law.

2.85 As the Law Commission remark, "the present law does not treat like cases alike. Inconsistency arises from the different treatment given to mistakes of law and mistakes of fact."[3] Thus an insurer who pays the sum insured erroneously thinking that a valid policy exists when in fact it is void (treated as an error of fact)[4] or thinking the person whose life is insured is dead when in fact he

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[1]Case-note [1959] Jur Rev 218.

[2]Law Com CP No 120; paras 2.25 and 2.26; LRCBC 51, pp 64-66.

[3]Law Com CP No 120, para 2.25.

[4]Cf. Came v City of Glasgow Friendly Society 1933 SC 69; Davis v Salvation Army Assurance Society Ltd (1914) 30 Sh Ct Reps 6: both cases of assured recovering premiums paid under a void policy.

is alive,[1] may recover. An insurer who pays overlooking that known facts entitled him to repudiate liability for non-disclosure cannot recover.[2] Again, within the sphere of error of law itself, inconsistency arises from the different treatment accorded to error as to the general law and error as to private rights.[3]

2.86 Then inconsistency results from the reluctance of the courts to extend the error of law rule to transactions which should be treated in the same way as payments. There is no difference in principle between the reduction of a discharge granted on an underpayment and the repayment of a sum which has been overpaid. Yet error of law does not bar the former[4] but does bar the latter.

2.87 Another source of inconsistency is that courts have reached conflicting decisions on facts which for all practical purposes should be treated as identical, notably in the context of overpayments by trustees to

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[1]Masters and Seamen of Dundee v Cockerill (1869) 8 M 278.

[2]Bilbie v Lumley (1802) 2 East 469.

[3]See paras 2.28 ff above.

[4]Dickson v Halbert (1854) 16 D 586.

beneficiaries.[1] There are also inconsistent decisions in the wider context of private rights.[2]

2.88 The distinction between fact and law is notoriously difficult to draw.[3] In Bell v Thomson,[4] for example Lord Cowan remarked:

> "it is often difficult to say whether the error which has induced the payment be an error in fact or an error in law, or whether it be not a combination of both, falling to be determined upon just and equitable principles.[5]

It has been observed, that almost any mistake as to private rights involves a mistake as to the general law,

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[1]Contrast Hunter's Trs v Hunter (1894) 21 R 949; Rowan's Trs v Rowan 1940 SC 30; Grant v Royal Bank of Scotland plc 1993 GWD 11-794 (OH) (no recovery) with Gray v Walker (1859) 21 D 709; Darling's Trs v Darling's Trs 1909 SC 445; and Armour v Glasgow Royal Infirmary 1909 SC 916 (recovery allowed): paras 2.38-2.40 above.

[2]Contrast the Hunter's Trs and Rowan's Trs cases (supra) (no recovery) with Baird's Trs v Baird & Co (1877) 4 R 1005 (recovery); see para 2.34 above.

[3]See eg Winfield "Mistake of Law" (1943) 59 LQR 327 at p 327: "[W]hen we ask what is the distinction between 'law' and 'fact' in this connexion, no exact answer is discoverable in the law reports. The reason for this is that the intrinsic difficulty of laying down any hard and fast line separating the two ideas is so great as to make the task a practical impossibility".

[4](1867) 6 M 64.

[5]Ibid at pp 68, 69. See also Dickson v Halbert (1854) 16 D 586 at p 597 per Lord Ivory: "This case is not a pure error in law. It is a mixed error of law and fact. It is very difficult, however, to state in precise language where the distinction lies between fact and law; ..." The other judges assumed that the error was of law, the whole facts being known to both parties. The possibility of mixed errors of fact and law was also acknowledged in Glasgow Corporation v Lord Advocate 1959 SC 203 at p 232.

and conversely.[1] This leads to inconsistency and uncertainty and further the distinction is open to judicial manipulation.

(d) Indiscriminate method of protecting security of receipts

2.89 The Law Commission point out that underlying the error of law rule is a judicial concern to protect:

(i) the position of the individual payee; and

(ii) security of receipts generally[2].

2.90 The position of the individual payee. We agree with the Law Commission that the possibility that the payee may have changed his position (eg by increasing expenditure or incurring new liabilities) in reliance on the payment cannot justify a rule barring recovery even if there has been no such reliance. The security of his receipt is already protected by the equitable defence of "change of position", long recognised in Scots law,[3] which is a far more discriminating solution.

2.91 The policy of the present law is that a person disputing a claim for payment must be prepared to defend the claim in the law courts and so cannot pay promptly and bring entitlement to sue on his side. If that policy is to be retained, we agree with the Law Commission that it cannot justify a general rule of non-recovery of a payment under error of law.[4] Such a payment may for example have

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[1]Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992 (4) SA 202 (A) at p 223 per Hefer J A.

[2]Law Com CP No 120, paras 2.29 to 2.35.

[3]See vol 2, paras 2.64 to 2.66.

[4]Law Com CP No 120, para 2.32.

been "volunteered"[1] rather than made in response to a claim. Under the present law, error of law or fact is not a ground for reducing a compromise.[2] Abolition of the error of law rule would not affect compromises.

2.92 Security of receipts generally. The Law Commission observe:

> "If payments made as a result of a mistake of law are generally recoverable, it could be argued that, since such mistakes are frequent there will often be recovery of payments and payees generally will not be able to rely on their receipts."[3]

We have already rejected two arguments of this type namely that abolition of the error of law rule would lead to a flood of false and non-justiciable claims,[4] and that such abolition would involve re-opening unfairly a widening circle of payment transactions already treated as settled.[5]

2.93 We agree with the Law Commission[6] that the risk of letting in too much repetition is not sufficiently great to require retention of the error of law rule. In many cases, the payer may have waived objections to the payment or not made any error or excusable error. The payee is

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[1]Eg National Bank of Scotland v Lord Advocate (1892) 30 SL Rep 579.

[2]Kirkpatrick v Thomson (1903) 19 Sh Ct Reps 100 at p 102; vol 2, paras 2.79 to 2.82.

[3]Law Com CP No 120, para 2.34.

[4]See paras 2.72 to 2.73 above; Law Com CP No 120, para 2.33.

[5]See paras 2.81 to 2.83.

[6]Law Com CP No 120, para 2.34.

protected by equitable defences such as change of position so that existing safeguards suffice.

(6) Proposal for statutory abolition of error of law rule in actions of repetition by payer against payee

2.94 For the foregoing reasons, we provisionally conclude that the error of law rule should be abolished by statute. While it is true that the House of Lords or a Court of Seven Judges of the Court of Session might possibly abrogate the error of law rule, and that a case is in dependence in which conceivably that might be done,[1] such a result cannot be guaranteed. In relation to the English law, for example, Lord Keith has observed that the error of law rule is "too deeply embedded in English jurisprudence to be uprooted judicially."[2] Delay would be especially unfortunate if (as the Law Commission are likely to recommend) the rule were to be abolished by statute in English law.

2.95 We propose:

The common law rule under which money paid under an error of law as to the payer's liability to the payee is *prima facie* not recoverable should be abolished by statute.

(Proposition 1)

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[1] Grant v Royal Bank of Scotland plc 1993 GWD 11-794 (OH). This decision has been reclaimed to the Inner House.

[2] Woolwich Equitable Building Society v IRC [1993] 1 AC 70 (HL) at p 154.

(7) Options as to the statutory method of abolition

2.96 The field of choice. The Law Commission[1] identify several different approaches to statutory reform, namely:

(a) comprehensive statutory regulation of the grounds of recovery and defences in error of law cases;

(b) simple abrogation of the error of law rule by statute without reference to the common law principles of recovery for error of fact (the New York solution[2]) and

(c) abolition of the rule precluding recovery and application of the error of fact common law principles to cases of error of law, (or mixed fact and law), by one of the following techniques:

(i) allowing recovery in error of law cases if recovery would have been allowed had the error been one of fact (as in New Zealand[3] and Western Australia[4] and recommended in New South Wales[5]);

(ii) directing the court to have regard to the error of fact common law rules in error of law cases (as recommended in British Columbia[6]);

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[1]Law Com CP No 120, paras 2.41 to 2.55.

[2]New York Civil Code, s 3005 (added in 1942).

[3]Judicature Act 1908, s 94A, inserted by the Judicature Amendment Act 1958, s 2 (New Zealand).

[4]Law Reform (Property, Perpetuities and Succession) Act 1962, ss 23 and 24 (Western Australia), consolidated in the Property Law Act 1969 (Western Australia) ss 124 and 125.

[5]NSWLRC 53 (1987).

[6]LRCBC 51, p 82.

(iii) directing the court to have regard to the error of fact common law rules, coupled with a requirement that recovery would have been allowed had the error been one of fact (ie a combination of (i) and (ii) above); and

(iv) directing the court to apply error of fact common law rules to error of law cases, ie complete assimilation (as recommended in South Australia[1]).

The Law Commission provisionally favoured the last option (ie (c)(iv)).[2]

(a) Comprehensive statutory regulation of error of law cases

2.97 We provisionally agree with the Law Commission[3] that this approach, which has not been adopted in any legal system, should be rejected. This approach would require statutory provisions to be enacted on matters which arguably are best left to common law development, including the meaning of error, or error of law, and the ambit and content of the various defences. This solution would balkanise the law unnecessarily since error of fact or mixed fact and law cases would be left to common law development whereas error of law cases would be comprehensively regulated by statute. It would seem preferable for the common law to develop uniform solutions for all actions of repetition based on error.

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[1]SALRC 84 (1984).

[2]Law Com CP No 120, para 2.55.

[3]See Law Com CP No 120, paras 2.42 to 2.44.

(b) Abrogation of error of law rule without reference to common law on error of fact

2.98 The New York Civil Code, s 3005 provides:

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

A similar provision on recovery of excise duty or car tax exists in United Kingdom legislation.[1] One reason for rejecting such a provision given by the Law Commission is that:

> "the relevant common law ground for restitution is 'mistake of fact' rather than 'mistake' generally and, although a court would strive to give effect to the section by finding that 'mistake' is the ground for recovery, if it did not the section would not achieve its purpose. Proceedings could be dismissed because no ground for restitution would exist."[2]

It may be questioned whether in Scots law at least, the relevant ground of restitution is "mistake of fact".[3] Such a theory would not explain why, in important cases of

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[1]Finance Act 1989, s 29(2): "Proceedings to which this section applies shall not be dismissed by reason only of the fact that the amount was paid by reason of a mistake of law."

[2]Law Com CP No 120, para 2.54.

[3]See Unigate Foods Ltd v Scottish Milk Marketing Board 1975 SC (HL) 75 at p 80 per Lord Stott (see para 2.32 above); Birks "Restitution: Scots Law" 1985) 38 CLP 57 at pp 69, 70: "the Scottish rule appears more rational than the English in one important respect, namely that Scots law does not consider itself bound to force mistakes of private right into the category of mistakes of fact in order to allow recovery," citing the above dictum and British Hydro-Carbon Chemicals Ltd and British Transport Commission, Petitioners 1961 SLT 280 (OH). The Scots Institutional writers base recovery on error *simpliciter* (vol 2, paras 1.8 to 1.14) but their treatments antedate the introduction of the error of law rule.

error of law falling within the exceptions to the error of law rule, or cases of error of mixed fact and law, recovery is allowed. The better view may be that the error of law rule is an exception to the common law ground of recovery for error, an exception which does not cover all errors of law. The New York solution does the minimum necessary to abrogate the error of law rule and may therefore be attractive to those who believe that as much freedom as possible should be given to the courts to develop the law. On the other hand, if the Law Commission is right, a simple abrogatory provision would not be watertight.

2.99 Another criticism of the New York model is that whereas the approaches based on the common law analogy noted next would create, or tend to create, a uniform set of principles regulating both errors of fact and law, the New York model invites the creation of separate rules for error of law.[1] On the whole, we provisionally reject a simple abrogatory provision.

(c) Statutory analogy or assimilation with the error of fact ground of recovery

2.100 As noted above[2] the Law Commission identify four different statutory techniques for applying the common law error of fact ground of recovery directly, or by analogy, to error of law cases.

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[1]LRCBC 51, p 80 citing Mercury Machine Importing Corp v City of New York (1957) 3 NY 2d 418 holding that the section "is not drafted in such manner as to place mistakes of law upon a parity in all respects with mistakes of fact ... It removes technical objections in instances when recoveries can otherwise be justified by analogy with mistakes of fact."

[2]See para 2.96.

2.101 <u>Statutory hypothesis that error of law is one of fact</u>. In New Zealand, section 94A(1) of the Judicature Act 1908, inserted in 1958,[1] provides that where:

> "relief could be granted if the mistake was wholly one of fact, that relief shall not be denied by reason only that the mistake is one of law whether or not it is in any degree also one of fact."

This provision has three main effects. First, it abolishes the rule that payments under error of law are <u>prima facie</u> not recoverable. Second (unlike the New York model[2]) it requires that relief would have been given if the error had been one of fact. In a Scottish context it would thus attract to error of law cases the principles governing the grounds and defences in the <u>condictio indebiti</u>, including future common law developments of those principles. Third, no statutory codification of the grounds and defences in error of law cases is needed.

2.102 <u>Statutory direction to pay regard to the error of fact rules</u>. The Law Reform Commission of British Columbia observe:[3]

> "Section 94A(1) does not require a court to grant relief merely because relief would have been granted had the mistake been one of fact. Rather, relief is not to be denied <u>by reason only</u> that the mistake is one of law. Accordingly, it is open to the court to decline to grant relief having due regard to the actual character of the mistake. The court need not ignore the fact that a case turns on a mistake of law. Instead it may take that into account in determining whether it is appropriate to grant relief in the circumstances of the case."

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[1]Judicature Amendment Act 1958 (New Zealand), s 2.

[2]See para 2.98 above.

[3]LRCBC 51, p 68.

As the Law Commission put it:[1]

> "While the recoverability of the payment had the mistake been one of fact is thus necessary, it may not be sufficient."

The British Columbia proposals make it clear that, under those proposals, it is neither a necessary nor a sufficient condition of relief in error of law cases that redress would have been granted if the error had been one of fact. Those proposals state:

> "(a) Relief from the consequences of a mistake shall not be denied by reason only that the mistake is one of law or mixed fact and law.
>
> (b) When relief is claimed from the consequences of a mistake of law or mixed fact and law, regard shall be had to the law governing the granting of relief from the consequences of a mistake of fact."[2]

2.103 Combined statutory hypothesis and direction. A third option is identified by the Law Commission, namely, combining the approaches in paragraphs 2.101 and 2.102 above:[3]

> "It would be possible to combine the features of these two approaches. Thus, it could be provided that the court shall generally have regard to the principles governing mistake of fact cases (as is done in the British Columbia proposals) and, more specifically, that it shall be a precondition for such recoverability in a case of mistake of law that recovery would be allowed had the mistake been one of fact (as is done in the New Zealand statute). If it is considered desirable to leave open the possibility that the fact-law distinction should have some significance it would seem best to provide that the court has regard to the mistake of fact principles in

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[1]Law Com CP No 120, para 2.49.

[2]LRCBC 51, p 82.

[3]Law Com CP No 120, para 2.50.

> exercising what would in effect be a statutory discretion given in respect of payments made under a mistake of law."

2.104 <u>Assimilation of error of law to error of fact</u>. The South Australia Law Reform Committee observed:

> "The New Zealand legislation does not clarify the relationship between mistakes of law and mistakes of fact. The legislation does not require the courts to treat mistakes of fact and law on an identical basis and the courts could, if it appeared desirable, formulate different rules to govern mistakes of law."[1]

The same is broadly true of the British Columbia and combined approaches discussed above. A Canadian commentator suggested that the distinction should be abolished altogether and that this could be achieved by omitting the word "only" from section 94A(1) of the New Zealand precedent.[2] This suggestion was adopted by the South Australia report,[3] which stated:

> "It is undesirable that the reason that the mistake was one of law should be included among the reasons for denying recovery; and this is so despite the fact that some of the reasons for denying recovery may apply almost exclusively to mistakes hitherto characterised as mistakes of law."[4]

The South Australia Committee also cite civil law jurisdictions, including the former Quebec Civil Code, article 1047 which provided:

> "He who receives what is not due to him, through error of law or of fact, is bound to restore it; or

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[1]SALRC 84, p 29.

[2]Lange "Statutory Reform of the Law of Mistake" (1980) 18 <u>Osgoode Hall LJ</u> 429 at p 475.

[3]SALRC 84, pp 29, 30.

[4]<u>Ibid</u> p 30.

> if it cannot be restored in kind, to give the value of it."[1]

It will be noted that this provision is obligation-based rather than remedy-based, and we find that legislative approach attractive.

2.105 The Law Commission found it:

> "difficult to envisage a situation in which it would be appropriate to grant recovery for mistake of fact but not to grant recovery in parallel circumstances where there is a mistake of law. It has already been explained that any fact-law distinction brings problems of uncertainty and also appears unfair. This suggests that the best approach to reform might be completely to abolish the distinction between mistake of law and mistake of fact in the context of restitution for mistaken payments."[2]

We have reached the same provisional conclusion for the same reasons.

2.106 It should make no difference to this assimilative approach that, in Scots law, the error of fact must be excusable whereas in English law and Commonwealth laws, there is no such requirement. South African law also requires that the error of fact be excusable, ie in the South African version "neither slack nor studied". In abrogating the error of law rule, the Appellate Division of the South African Supreme Court held that the requirement of excusability should apply to mistake of law "so that the assimilation between the two kinds of error

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[1]See also Austrian Civil Code, art 1432 providing for restitution of benefits which the pursuer conferred "by mistake, even a mistake of law": see Zweigert/Kotz/Weir <u>Comparative Law</u> vol 2 (2nd edn) p 261; Englard, "Restitution of Benefits" para 34.

[2]Law Com CP No 120, para 2.52.

be complete".[1] The court refused to define the test in specific terms, observing[2]:

> "It is not possible nor would it be prudent to define the circumstances in which an error of law can be said to be excusable or, conversely, to supply a compendium of instances where it is not. All that need be said is that, if the payer's conduct is so slack that he does not in the Court's view deserve the protection of the law, he should, as a matter of policy, not receive it. There can obviously be no rules of thumb; conduct regarded as inexcusably slack in one case need not necessarily be so regarded in others, and vice versa. Much will depend on the relationship between the parties; on the conduct of the defendant who may or may not have been aware that there was no debitum and whose conduct may or may not have contributed to the plaintiff's decision to pay; and on the plaintiff's state of mind and the culpability of his ignorance in making the payment. (Consider, for example, the case of a person who, whilst in doubt as to whether money is legally due, pays it not caring whether it is and without bothering to find out.) These are only a few considerations that come to mind; others will no doubt manifest themselves with the passage of time as claims for the recovery of money paid in error of law come before the Courts."

We consider that if the requirement of excusability is to remain in the Scots condictio indebiti, it should apply to error of law and that no statutory definition of excusability should be enacted.

2.107 Proposal on method of statutory reform

(1) Views are invited on the various methods of statutory reform outlined in paragraphs 2.99 to 2.106 above.

(2) Subject to any specialities noted later, it is suggested that statutory provision should be made

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[1] Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992 (4) SA 202 (A) at p 224 per Hefer J A.

[2] Idem.

assimilating the grounds of recovery for error of law to the grounds of recovery for error of fact. In other words, where money is paid under error of law or mixed fact and law as to the payer's liability to the payee, the payee should be under an obligation to restore it if he would have incurred that obligation had the error been wholly one of fact.
(Proposition 2)

(8) Safeguard against reopening settled transactions

(a) Preliminary

2.108 We mentioned above[1] that if the error of law rule were to be abolished by statute, a statutory safeguard would be needed to prevent settled transactions from being opened unfairly and repetition allowed of a wide circle of past payments whenever an existing commonly held understanding of the law was overturned by the courts.

2.109 There appear to be two main types of safeguard against reopening settled transactions, namely:

(a) a statutory provision enabling the courts to overrule existing rules of law or interpretations of enactments prospectively; or

(b) a statutory provision precluding recovery of payments made in accordance with the general understanding of the law obtaining at the time of payment.[2]

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[1]See para 2.83.

[2]The first safeguard was examined by the Law Commission in connection with the automatic right of recovery of undue payments made to public authorities (Law Com CP No 120, para 3.76) and the second in connection with the abolition of the error of law rule (ibid, paras 2.57 to 2.65).

2.110 In theory, a third option is a statutory provision precluding recovery of payments made in accordance with the general practice prevailing at the time of payment. This derives from statutory provisions on the recovery of certain taxes[1] and is discussed by the Law Commission in the context of recovery from public authorities of ultra vires levies.[2] We shall discuss these provisions in a forthcoming Discussion Paper[3]. We do not think that the concept of "general practice" significantly differs from, or improves upon, the concept of "general understanding of the law" and for that reason reject it in the present context.

(b) Should a safeguard against reopening settled transactions be introduced?

2.111 The main argument against such a safeguard is that it would infringe the principle of unjustified enrichment or at least would be inequitable to the payer. Commenting on the second type of safeguard, a defence of payment under a common understanding of the law, the Law Reform Commission of British Columbia observed[4]:

> "Even where a "common understanding" can be shown, the practical consequences of excluding relief are undesirable. It seems odd that a defendant who has been unjustly enriched by a plaintiff operating under a common misunderstanding of the law could raise as a defence that he has also been enriched by many other persons acting under a similar error. It is even stranger that a defendant could successfully raise as a defence to a claim the fact that many

[1]Taxes Management Act 1970, s 33(2), proviso; Inheritance Tax Act 1984, s 255.

[2]Law Com CP No 120, paras 3.74, 3.75.

[3]See para 1.8 above.

[4]LRCBC 51, p 72.

other people who did not enrich the defendant thought at one time that the person seeking to recover the mistaken payment was compelled by law to pay the defendant. We conceive the main issue to be whether as between a plaintiff and a defendant in a particular case the benefit conferred is an unjust enrichment. It is true that where a large number of individuals have mistakenly paid the defendant, considering each case on an individual basis could lead to some hardship being imposed on a defendant. However, that hardship is common to all defendants against whom a number of plaintiffs may take judgment. Should the law prevent the families of passengers killed in an accident involving a large aircraft from bringing an action merely because the families of many other passengers wish to bring similar actions?"

There is also the argument that payment under a common error of law is generally excusable.[1]

2.112 As against this, we have already quoted Lord President Clyde's observation:

> "There seems little equity in enabling B and C and D to secure an unexpected repayment merely because A has succeeded in upsetting the current interpretation of an Act of Parliament..."[2]

In civilian legal systems where error of law is not a bar to recovery, it appears nevertheless that the courts are as reluctant as the courts in the United Kingdom to reopen settled transactions in the wake of a judicial change in the law, one technique being to hold that at the time of the payment, it was based on a perfectly valid legal

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[1]Cf Dixon v Monkland Canal Co (1831) 5 W and S 445 at p 450 per Lord Brougham LC, suggesting that communis error might be a defence: see para 2.81 above.

[2]Glasgow Corporation v Lord Advocate 1959 SC 203 at p 233.

reason.[1] In England and Wales, the Law Commission provisionally proposed that recovery should not be allowed.[2] We provisionally agree with this conclusion but seek views on the matter.

(c) Types of safeguard against reopening settled transactions

(i) "Prospective overruling"[3]

2.113 At present, the courts in Scotland,[4] as elsewhere in the United Kingdom[5], do not possess jurisdiction to overrule an earlier precedent in a way that has effect only in the instant case and future cases, (although in Scotland the Court of Session in at least one case assumed a similar power in the seventeenth century[6]). This power

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[1]Englard "Restitution of Benefits" para 34, citing Zweigert/Kotz/Weir Comparative Law vol 2, pp 263-265.

[2]Law Com CP No 120, para 2.65, last sentence.

[3]See Law Com CP No 120, para 3.76.

[4]Cf The Laws of Scotland: Stair Memorial Encyclopaedia vol 22 (1987) paras 247 to 354 on "Judicial Precedent" which make no mention of a power of prospective overruling.

[5]Birmingham Corporation v West Midland Baptist Association [1970] AC 874 at pp 898, 899 per Lord Reid; Morgans v Launchbury [1973] AC 127 at p 137 per Lord Wilberforce; Aries Tanker Corporation v Total Transport Ltd [1977] 1 WLR 185 at p 194 per Lord Simon of Glaisdale. See K Mason "Prospective Overruling" (1989) 63 Australian Law Journal 526, for a recent survey of Commonwealth and American practice and sources.

[6]See Swintoun v Notman (1665) Mor 16273 and Act of Sederunt anent Pro-Tutors 24 June 1665. Here the Court of Session finding the law uncertain held a pro-tutor not liable for omissions, but finding it "expedient that the foresaid question should be determined as to the future, and the liedges no longer left in uncertainty thereanent" passed an Act of Sederunt making pro-tutors liable for

has been invoked in the USA[1], and Canada[2], and applied in the context of recovery of undue payments by the European Court of Justice[3] and following that Court the Supreme Court of Ireland in internal Irish law[4]. In the Blaizot case[5], it was held by the European Court that a special enrolment fee charged by Belgian Universities to students who were nationals of other member states constituted nationality discrimination contrary to Article 7. The Court held that its interpretation of a rule of Community Law normally applied from the date when the rule originally took effect, and that restriction of this principle is exceptional, and may only be authorised by the European Court and in the interpreting judgment itself. An exceptional circumstance in that case was that the Commission might have misled the Belgian authorities into thinking that the special enrolment fee did not infringe Community Law. Further, "pressing considerations of legal certainty preclude any re-opening of the question of past legal relationships where that would retroactively throw the financing of university education into confusion and might have unforeseeable consequences for the proper

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omissions in the future.

[1]See Pannam "Recovery of Unconstitutional Taxes" (1964) 42 Texas Law Review 777 at pp 801 to 804.

[2]Mills v The Queen [1986] 1 SCR 863 at pp 948, 949; R v Coughlan (1987) 81 NBR (2nd) 199.

[3]Eg Case 24/86 Blaizot v University of Liege [1989] 1 CMLR 57 at p 69; cf Case 43/75 Defrenne v SABENA (No 2) [1976] 2 CMLR 98; N Brown "Agrimonetary Byzantism and Prospective Overruling" (1981) 18 CML Rev 509.

[4]Murphy v Attorney General [1982] 1 Irish Reports 241, 324.

[5]Supra.

functioning of universities"[1]. The Court therefore held that Article 7 could not be relied on for facts prior to the date of the Court's judgment except for claims already made before that date. A similar device was used by the Finance Act 1991, s 53 which retrospectively reversed a decision of the House of Lords holding certain tax regulations invalid[2] but saved the position of building societies which had commenced proceedings to challenge the validity of the regulations before 18 July 1986.

2.114 Probably any power of prospective overruling should apply to the pursuer in the instant case because "the successful plaintiff should enjoy the fruit of his victory on the basis that otherwise there would be little incentive to challenge an established rule",[3] and because it would seem very unjust if his success benefited others but not himself. On the other hand, such a rule seems unjust to the defender who lost the case but it may be that that is the lesser of two evils. Discussing prospective overruling in the context of recovery from public authorities, the Law Commission suggest that others who had instituted proceedings before the determination that the payment was invalid should also benefit from the prospective overruling[4] and this is in line with the Blaizot case.

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[1]Ibid at p 69.

[2]R v IRC, Ex parte Woolwich Equitable Building Society [1990] 1 WLR 1400; Income Tax (Building Societies) Regulations 1986.

[3]Pannam (1964) "Recovery of Unconstitutional Taxes" 42 Texas Law Review 777 at pp 802, 803, fn 97.

[4]Law Com CP No 120, para 3.76.

2.115 A serious constitutional disadvantage of this proposal however is that while some branches of law, especially revenue law, are administered or applied as one body of law covering the whole United Kingdom, the courts below the level of the House of Lords in one part of the United Kingdom do not have power to overrule even retrospectively the decisions of courts in another part of the United Kingdom. Most reported decisions on revenue law stem from the English courts, but for example, the Inner House or a Full Bench of the Court of Session could not overrule a decision by a judge of first instance of the High Court in England. Conversely, the Court of Appeal in England and Wales could not overrule a decision by a Lord Ordinary, still less a Division of the Court of Session, and the conferment of such a power would be open to objection on constitutional grounds[1]. There is even some doubt whether, or in what instances, the House of Lords sitting in (say) an English appeal can retrospectively overrule decisions of the Scottish courts and vice versa[2]. Though in practice the Scottish courts will follow faithfully decisions of the House of Lords in English tax cases and in other English appeals involving United Kingdom jurisprudence, the practice has not in our view become such a firm legal rule that it would provide a secure basis for legislation enabling the House of Lords in a Scots appeal to overrule prospectively decisions of the courts in another part of the United Kingdom and conversely. Until this general preliminary difficulty

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[1]See Article 19 of the Treaty of Union, 1707.

[2]See The Laws of Scotland: Stair Memorial Encyclopaedia vol 22 (1987) paras 270 to 282: see eg para 272: "A Scottish court should be regarded as entitled rather than obliged to accept a decision of the House of Lords in an English appeal as a precedent".

relating to retrospective overruling is authoritatively solved by statute or the House of Lords itself, any power to overrule prospectively might have to be limited to the jurisdiction from which the appeal stemmed and in for example revenue matters, this would appear to be very unsatisfactory. For these technical reasons, we feel bound to reject this proposal which otherwise may have considerable attractions, at least if the power of prospective overruling were to be conferred only on the House of Lords. We seek views on this provisional conclusion.

(ii) A "change in the law" defence

2.116 The Law Commission point out that where a statute changes the law, a payment made complying with the pre-existing law is irrecoverable because there was no error at the time it was made.[1] Where a general understanding of the law is changed by a judicial decision, however, there is a possible objection that judges do not "change" the law but merely "discover" and "declare" it.[2] So a payment made before a judicial decision declaring the law to be different from the pre-existing interpretation thereof is, on the declaratory theory, not mistaken and is irrecoverable. We agree however with the Law Commission's

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[1]Law Com No 120, para 2.57.

[2]For a robust affirmation of this traditional view, see Henderson v John Stuart (Farms) Ltd 1963 SC 245 (OH) at p 255 per Lord Hunter, quoting Balfour Practicks pp 1,2: "No judges within this realm hes pouer to mak lawes bot the parliament allanerlie".

observation that the declaratory theory is "a mere fiction and should not be allowed to affect substantive rights".[1]

2.117 Legislation in New Zealand and Western Australia enacts that recovery should not be allowed in such cases. In New Zealand, the Judicature Act 1908, s 94A(2)[2] provides:

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

This provision has been widely discussed.[3]

2.118 The intention underlying section 94A(2) appears to be that if A, who has paid money under error of law, recovers the money under section 94A(1)[4] in a test case which overturns a previous interpretation of the law, then B, C and D, who have likewise paid money under the law as

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[1]Law Com No 120, para 2.58. See also NSWLRC 53 para 5.25. For an example of express judicial innovation see Woolwich Equitable Building Society v IRC [1993] 1 AC 70 (HL affg CA).

[2]Inserted by the Judicature Amendment Act 1958, s 2; see also the identical provision in the Law Reform (Property, Perpetuities, and Succession) Act 1962, s 23 (Western Australia), re-enacted in the Property Law Act 1969 (Western Australia), s 124(2).

[3]LRCBC 51, pp 70-72; SALRC 84 pp 30, 31; NSWLRC 53 paras 5.20-5.29; Law Com CP No 120 paras 2.59-2.61; B J Cameron "Payments Made Under Mistake" (1959) 35 New Zealand LJ 4 at p 5; R J Sutton "Mistake of Law - Lifting the Lid of Pandora's Box" in J F Northey (ed) The A G Davis Essays in Law 218 at pp 230, 231.

[4]Quoted at para 2.101 above.

understood before A's test case, cannot recover. But the provision, literally construed, seems wide enough to prevent even A from recovering.[1] As this would deprive section 94A(1) of all content, the literal construction of section 94A(2) would presumably not be adopted by the courts, and does not seem to have been noticed in discussions of section 94A(2).

2.119 The identical Western Australia provision[2] was considered in Bell Bros Pty Ltd v Shire of Serpentine - Jarrahdale[3] by the Full Court of Western Australia. The points made in that case were conveniently summarised by the New South Wales Law Reform Commission as follows:[4]

"* The burden of proving that the case fell within s23(2) is on the defendant, although the defendant may rely on presumptions.

* The defendant needed to prove that at the time when each payment was made it was "commonly understood" that the fee was lawfully exigible.

* "Understood" is apt to cover everything from a positive and reasoned belief to a tacit assumption, but it must involve a state of mind,

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[1]First, A's payment is "made at a time when the law requires or allows, or is commonly understood to require or allow, the payment to be made or enforced". Second, A applies for relief in a case in which "the law is subsequently changed or shown not to have been as it was commonly understood to be at the time of the payment". Both parts of s 94A(2) appear to cover A's case.

[2]Law Reform (Property, Perpetuities and Succession) Act 1962, s 23(2), re-enacted in the Property Law Act 1969 (Western Australia) s 124(2).

[3][1969] W A R 155. In the appeal to the High Court of Australia (1969) 121 CLR 137, this matter was not discussed.

[4]NSWLRC 53, pp 52, 53.

and its existence or otherwise must always raise a pure question of fact.

* It is not enough that the parties were each mistaken: the section predicates some generality of understanding beyond that of the parties to the action.

* There can be no understanding about a subject unless the mind has been in some degree directed to that subject, and the class in which the understanding must be looked for is of necessity limited to persons who for some reason or another have at least to some extent adverted to the subject. The class will be wide or narrow according to the subject in question.

* Once a defendant shows an apparently adequate class and a common understanding in that class, then if the plaintiff contends that the class is in truth more extensive, or that there was not within the defendant's limited class the common understanding, which would otherwise be presumed, it is necessary for the plaintiff to adduce some evidence on the subject."

2.120 The subsection presents a number of difficulties, for example as to the definition and proof of "common understanding". The Law Commission thought the concept of "common understanding", though quite wide, might not be wide enough because it:

> "might be thought to preclude consideration, for example, of the particular court's own view of the weight of authority. It would seem desirable that the court should be able to determine the question of whether a decision constitutes an effective judicial "change" in the law from an examination of all the evidence, and without being restricted in any way."[1]

2.121 The Law Commission thought that the English courts would not wish to allow recovery in such cases in any

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[1]Law Com No 120 para 2.61.

event.[1] Doubt has been expressed whether the provision is needed: "in such cases it can hardly be said that there was any mistake in the law at the time the payment was made."[2] The South Australia Law Reform Committee rejected the provision as probably unnecessary and as causing too many problems.[3] The British Columbia Law Reform Commission rejected it for the very different reason that a provision aimed at closing the floodgates of litigation was wrong in principle.[4]

2.122 These differences of opinion suggest to us that a "change in the law" defence should be expressly enacted by statute. This was the view adopted by the New South Wales Law Reform Commission who recommended a provision enacting that "a person is not mistaken as to the law only because, after a benefit is conferred, the law is changed".[5] This rested on their view that the reference to " 'common understanding' ... casts the inquiry into a sea of subjective fact, an investigation about what unknown persons other than the parties believed to be the legal

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[1]Ibid para 2.65, citing Henderson v Folkestone Waterworks Co (1885) 1 TLR 329 per Lord Coleridge CJ: "at the time the money was paid ... the law was in favour of the company".

[2]B J Cameron "Payments Made Under Mistake" (1959) 35 New Zealand LJ 4 at p 5 The author continues: "It should, however, serve to avoid doubts, and in particular will prevent any argument based on the fiction that the law has always been what the latest and most authoritative decision has decided that it is".

[3]SALRC 84, pp 30, 31.

[4]LRCBC 51, pp 70-72.

[5]NSWLRC 53, p 77, draft Bill, clause 8.

position".[1] The Law Commission, on the other hand, comment that "this formulation begs the whole question whether a judicial departure from a previous line of authority does actually change the law".[2] There is force in this latter argument: any statute introducing a "change in the law" defence should be watertight.

2.123 Our provisional view is that, while a "change in the law" provision may be unnecessary in the sense that the courts might hold that a payment made before a change in the common law was not indebitum, yet the safeguard is too important to be left to the uncertainties of judicial decisions. We prefer a provision on the lines of the New Zealand and Western Australia model to that recommended by the New South Wales Commission for the reasons given by the Law Commission quoted in paragraph 2.122 above.

2.124 The payer under error of law who challenges the common understanding of the law in civil proceedings and obtains a judicial decision that the payment is recoverable, is not necessarily the only person who should be entitled to recover. We suggest that other payers under the same error of law who commence proceedings for recovery before the judicial decision in the first-mentioned payer's proceedings should also be entitled to recover.[3] Where the decision is overturned on appeal, and restored on further appeal, the first decision should be the relevant one for this purpose.

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[1] Ibid, para 5.28.

[2] Law Com CP No 120, para 2.63.

[3] See para 2.114 above.

(d) <u>Proposal on safeguard against re-opening settled transactions</u>

2.125

(1) Comments are invited on the following provisional proposals for precluding the re-opening of settled payment transactions following a change in the law, or in the common understanding of the law, effected by a judicial decision.

(2) It is suggested that provision should be made by statute for that purpose.

(3) The provision should not take the form of a statute enabling the court to declare that a judicial precedent is overruled only prospectively.

(4) Instead, by analogy with New Zealand legislation, it should be provided that where there has been a change in the law, or in the common understanding of the law, effected by a judicial decision in civil proceedings, and a payment was previously made in accordance with the law, or the understanding of the law, before that change, the payment should not be recoverable by reason only of that change. This provision however should neither:

(a) prejudice the right of a party to those proceedings to recover as envisaged in Propositions 1 and 2 above; nor

(b) preclude recovery by another person claiming recovery in other civil

proceedings commenced before the date of the judicial decision.

The decision referred to is the first decision which effects the change and not any later decision affirming or restoring that decision on appeal.

(Proposition 3)

PART III

ABOLITION OF THE ERROR OF LAW RULE IN OTHER CATEGORIES OF UNJUSTIFIED ENRICHMENT

A. PRELIMINARY: THE TAXONOMY OF UNJUSTIFIED ENRICHMENT

3.1 In Part II, we considered the error of law rule in the context of the condictio indebiti for repetition of money paid by the pursuer to the defender. This is by far the most important area where the rule applies, but there is authority that it does apply, or would be applied by the courts, in other cases where error is relied on as a ground for the redress of unjustified enrichment.[1] It seems desirable to abolish the error of law rule in all cases of unjustified enrichment where it applies, unless special reasons exist justifying its retention. Prima facie it would be contrary to principle to abolish the rule in respect of benefits in cash but to leave it applying undisturbed in relation to benefits in kind, eg restitution of property or recompense in respect of services rendered or expenditure incurred enriching the defender without legal justification. We note that the British Columbia, South Australia and New South Wales proposals extend to benefits in kind as well as in cash.[2] Our provisional proposals in this Part extend to abolition of the error of law rule not only in the grounds for the redress of unjustified enrichment but also in the defences of bona fide payment[3] and bona fide perception and

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[1]See eg Varney (Scotland) Ltd v Lanark Town Council 1974 SC 245 at pp 252, 260 quoted at para 3.100 below.

[2]See respectively LRCBC 51, p 67; SALRC 84, p 29; NSWLRC 53 paras 5.10 to 5.16.

[3]See para 3.68.

consumption[1] which are closely related branches of Scots law.

3.2 Provisional taxonomy of unjustified enrichment. The task of identifying the role of error in the Scots law on obligations for the redress of unjustified enrichment is rendered far more difficult than it ought to be because of the absence of any modern and useful taxonomy or classification-frame of this important branch of Scots law. The traditional taxonomy does not provide a useful analytic framework within which to expound and explain the role of error as a ground of redressing unjustified enrichment, and indeed can cause confusion. We first describe the traditional taxonomy and thereafter suggest an alternative provisional taxonomy as a framework in which to examine the role of error of law in the domain of unjustified enrichment.

(1) The traditional taxonomy of unjustified enrichment

3.3 Scots law does not have a general remedy for redressing unjustified enrichment. It organises its principles and rules under the heads of repetition, restitution, and recompense (the three R's).[2]

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[1]See para.3.124.

[2]To this is sometimes added "relief" between co-obligants, sometimes regarded as a sub-category of recompense: see eg Moss v Penman 1993 SCLR 374 at pp 377, 378 per Lord President Hope. Some obligations of relief are sometimes said to be based on unjustified enrichment (idem) though it has been held in a case of relief that the measure of recovery is the pursuer's expenditure not the defender's enrichment: Trades House of Glasgow v Ferguson 1979 SLT 187. The measure of recovery in relief varies to some extent with the type of relief.

3.4 Meaning of "restitution". "Restitution" has three meanings which in descending order of generality are (1) a synonym for the whole branch of law governing the redress of unjustified enrichment (the English usage); (2) on a lower plane, a category covering the recovery of both money and property; and (3) at the lowest level, a category covering the recovery of property or its value, the recovery of money being known as "repetition". In this Discussion Paper, "restitution" is used in its narrowest and most distinctive sense.

3.5 Repetition and restitution. Repetition covers almost all cases of money paid directly without legal justification (sine causa) by the pursuer to the defender. Subsumed within it are categories derived from the main condictiones of Roman law, the condictio indebiti, the condictio causa data causa non secuta and less clearly the condictio ob turpem vel iniustam causam.

3.6 The label "sine causa" is frequently used in Scots enrichment law, especially in the context of the condictio indebiti and other types of action of repetition.[1] References to the residual Roman category, condictio sine causa (specialis), are sparse since its place in the taxonomy is filled by innominate actions of repetition.

[1]See eg Bankton Institute I,8,21 (rubric) and 24; Kames Principles of Equity (5th edn; 1825) pp 53, 200, 349; Carrick v Carse (1778) Mor 2931 at 2933; Patten & Patten v Royal Bank of Scotland (1853) 15 D 617 at p 619; Dickson v Halbert (1854) 16 D 586 at p 595; Cullen v Kerr (1857) 19 D 969 at p 974; Bell v Thomson (1867) 6 M 64 at p 68; Watson & Co v Shankland (1871) 10 M 142 at p 152; Paterson v Paterson (1897) 25 R 144 at p 190.

3.7 Restitution in the narrowest sense used here covers the condictiones in their application to moveable goods. It is however wider than the Roman condictiones because it performs both the role of a condictio (applying where the thing transferred is owned by the transferee) and also the role of the rei vindicatio (applying where, properly speaking, the transferee is not enriched by the purported transfer because ownership of the thing purportedly transferred remains with the transferor).[1]

3.8 Innominate actions of repetition and restitution. In Scots law the three condictiones (indebiti; causa data causa non secuta, and ob turpem vel iniustam causam) apply only where there is a direct transaction (negotium) between the parties, ie a payment of money or transfer of property directly by the pursuer to the defender. Originally in Roman law the condictio sine causa specialis also required a direct payment or transfer but in the ius commune and in the modern Roman-Dutch law of South Africa, that restriction was removed.[2] It follows that in the ius commune, "sine causa" in the context of this condictio had reference not to the absence of a causa transferendi, but rather to the absence of a causa retinendi of something paid or delivered unduly.[3] In Scots law, the place of the condictio sine causa specialis is filled by innominate actions of repetition or restitution. These innominate

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[1]See volume 2, paras.2.3; 2.109 to 2.121; 2.136ff.

[2]See De Vos "Unjustified Enrichment in South Africa" [1960] Juridical Review 125 at p 138; Govender v Standard Bank of South Africa Ltd 1984 (4) SA 392 (C); vol 2, paras 2.10 and 2.11; para 3.60 below.

[3]ie something "apud alterum sine causa": Zimmermann Law of Obligations pp 854, 855.

actions thus cover the following types of case (the list is not necessarily exhaustive):

(i) a direct payment or transfer by the pursuer to the defender enriching the defender sine causa and actionable otherwise than by way of a nominate condictio[1];

(ii) a payment by the debtor to the putative creditor in error and the true creditor sues the putative creditor in repetition (competent only in exceptional cases);[2]

(iii) a direct unauthorised taking of money or property by the defender from the pursuer (D takes from P);[3]

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[1]Eg an action for repetition of undue taxes governed by the rule in Woolwich Equitable Building Society v IRC [1993] 1 AC 70 (HL); or repetition of ultra vires payments out of the Consolidated Fund, under the rule in Auckland Harbour Board v The King [1924] AC 318 (PC); possibly payments by banks under an error as to their mandate, though in Scots law normally held actionable by condictio indebiti: see vol 2 paras 2.9 and 2.10. If "undue influence" is a ground of repetition, it would be actionable by an innominate action.

[2]See paras 3.56 ff. below.

[3]Eg Kinniburgh v Dickson (1830) 9 S 153; Gowans v Thomson (1844) 6 D 606; George Hopkinson Ltd v N G Napier and Son 1953 SC 139; see para 3.110 ff below.

(iv) the unauthorised retention or misappropriation by the defender of money sent to him by a third party for the pursuer;[1]

(v) "enrichment chains" in which one or more links are gratuitous, void, voidable, illegal or failed payments or transfers and/or one or more links are unauthorised takings.[2] These include consecutive payments whereby money passes from the impoverished pursuer through the patrimony of an intermediary to the defender or a creditor of the defender enriching the defender sine causa (P pays T; T either pays D or discharges D's debt owed to X; P sues D).[3] These are known as cases of "indirect enrichment" (ie cases of enrichment of a person arising from a transaction between two others).[4]

It will be seen that the concept of an action or obligation of repetition (or restitution) is often used in cases where the obligation is not an obligation of the recipient of a payment to "pay back" to the original payer

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[1]Didsbury Engineering Co Ltd v Marshall (unreported, 9 July 1992) 1992 GWD 30-1748 (2d Div) affg 1991 GWD 16-964 (OH); Royal Bank of Scotland plc v Watt 1991 SLT 138 at p 144. Arguably the pursuer's action should be one of payment, not repetition: see Costin v Hume 1914 SC 134; para 3.114 below and vol 2, para 2.11.

[2]Eg Extruded Welding Wire (Sales) Ltd v McLachlan and Brown 1986 SLT 314 (erroneous payment by fourth party to T instead of P as true creditor; wrongful misappropriation by D from T; P recovers from D in action of restitution).

[3]Eg Clydesdale Bank v Paul (1877) 4 R 626 (repetition); M & I Instrument Engineers Ltd v Varsada 1991 SLT 106 (OH) (restitution). Arguably these cases should have been laid in recompense.

[4]See para 3.118 ff below.

but rather an obligation to pay to the true creditor. The existence of innominate actions of repetition and restitution, filling to some extent the role of the condictio sine causa specialis in the ius commune, shows that recompense is not a residual category of the law on unjustified enrichment. Restitution and repetition have their own residual category which it is open to the Scottish courts to develop incrementally. It must not be thought, however, that the requirements of the condictiones can simply be evaded by side-stepping into an innominate action of repetition. It is likely that in developing the law on innominate claims of repetition and restitution incrementally, the courts would seek to preserve those requirements in the typical fact-situations where the nominate condictiones apply.

3.9 Recompense. It has long been judicially recognised that the doctrine of recompense is in an uncertain and unsatisfactory state.[1] The scope of recompense depends in part on the scope of its near neighbours, especially repetition and restitution, and obligations of relief (contribution between co-obligants). Its scope is much influenced by history. In Roman law, the condictiones did

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[1] Buchanan v Stewart (1874) 2 R 78 at p 81 per Lord Neaves: "The doctrine of recompense is of great importance, and our authorities in regard to it are not altogether in a satisfactory state .... When we apply the law to individual cases great difficulty is often found"; Renfrew Bros v Stewart (1895) 11 Sh Ct Reps 179 at p 181 per Sheriff Erskine Murray: "That doctrine is one of considerable difficulty, and the authorities are somewhat contradictory"; Horne v Horne's Executors 1963 SLT (Sh Ct) 37 at p 38 per Sherff Hamilton: "Counsel assisted me as far as possible on the application of the doctrine of recompense and its limits. I think it is not very well defined and that it is unfortunate, looking to the period on which the question has been before the courts."

not lie for a factum (performance of services) and that may be one reason why in Scots law recompense rather than repetition or restitution is the proper remedy for redressing unjustified enrichment arising out of services.

3.10 The basis of the traditional classification. It has been suggested that the basis of the foregoing tripartite classification depends on the type of benefit received, ie repetition (money); restitution (property); recompense (services, or the product of services). On this view, "recompense covers only those cases in which the defender's benefit derives from a service, a facere as opposed to a dare, by the pursuer", and "in recompense, the defender will have received a benefit which is incertum in the sense of incapable of exact return, whether substitutional - as £100 for another £100 received - or specific, as this cow Daisy to be returned as received".[1] In fact however for historical reasons recompense is a conglomerate category or doctrine and an action of recompense lies in many cases where money or property is transferred to the defender eg loans to a person of limited capacity,[2] or aliment paid in cash,[3] or a benefit (goods or money) indirectly enriching the

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[1]Birks "Six Questions" [1985] Juridical Review 227 at p 234.

[2]Eg Stonehaven Magistrates v Kincardine County Council 1939 SC 760.

[3]See Scottish Law Commission Consultative Memorandum No 22 on Aliment and Financial Provision (1976) para 2.79.

defender.[1] Recompense may also apply where money is misappropriated by the defender.[2]

3.11 So far as our research goes, the traditional taxonomy of "the three Rs" seems to depend, or mainly depend, not on the type of benefit received but rather (as the very labels repetition, restitution and recompense imply) on the type of redress or remedy sought by the pursuer and in particular on the measure of recovery governing that redress: money plus interest (repetition);[3] specific property with its fruits and accessions, or the value thereof (restitution);[4] and a sum representing the extent of the defender's enrichment or quantum lucratus (recompense). In other words, the taxonomy depends not primarily on what the defender received but rather on what he is bound by an obediental obligation to give back, or to give in lieu of what he received.

3.12 Provisional typology of recompense. In practice, recompense covers enrichment arising from the following disparate events (the list is not necessarily exhaustive) namely:

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[1]Eg Bruce v Stanhope (1669) Mor 13403 (benefit in the shape of goods); Commercial Bank of Scotland v Biggar 1958 SLT (Notes) 46 (benefit in the shape of money).

[2]Eg Bennett v Carse 1990 SLT 454 (OH).

[3]Subject inter alia to an equitable defence of change of position or possibly bona fide consumption.

[4]Subject to a defence of bona fide perception and consumption and a right of retention or counter-claim for recompense for bona fide improvements.

(1) the pursuer's services or expenditures intended to benefit the defender without donation;
(2) the pursuer's payment or transfer to a defender, who, by reason of limited legal capacity, is not bound by obligations of repetition or restitution which would otherwise be owed to the pursuer;
(3) the transfer by the pursuer to the defender of property under a contract which is void or illegal where restitution is inappropriate;
(4) aliment provided in cash or kind;
(5) the fraud or other wrong by the defender or a third party inducing the pursuer to pay or transfer;
(6) the pursuer building on or improving or repairing the defender's property in the bona fide but erroneous belief that it is his own or a third party's;
(7) the pursuer's performance of the defender's obligations to a third party;
(8) the unauthorised use or taking by the defender of the pursuer's property;
(9) the defender's acquisition of the pursuer's moveable property by accession or transformation (mixing, union or creation) or his consumption of such property;
(10) the defender's profit on resale of the pursuer's property;
(11) (exceptionally) the pursuer's performance of obligations owed by him to a third party indirectly enriching the defender.

3.13 The elements of recompense. Recompense arises "because the law holds that in the circumstances it is

just and equitable that the enrichment of the defender at the expense of the pursuer should be redressed".[1] The classic Scots definitions of recompense[2] follow closely the civilian maxim "nemo debet locupletari ex aliena jactura" ("nobody ought to be enriched out of another's loss").[3] This is obviously far too wide and general to serve as a literal and directly applicable test of liability in recompense[4] and so the courts have developed "marks" or "notes"[5] to limit and define the situations to which recompense applies. The judges have repeatedly said that recompense cannot be defined precisely.[6]

3.14 The most common elements are the primarily factual requirements of (1) the defender's enrichment[7]; (2) the

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[1] PEC Barr Printers Ltd v Forth Print Ltd 1980 SLT (Sh Ct) 118 at p 122 per Sheriff R D Ireland.

[2] Eg Bell Principles (10th edn) s 538: "Where one has gained by the lawful act of another, done without any intention of donation, he is bound to recompense or to indemnify that other to the extent of the gain".

[3] Based on Pomponius' famous maxims in D.12.6.14 and D.50.17.206: see Zimmermann Law of Obligations p 852.

[4] Cf Kames Principles of Equity (5th edn, 1825) p 92: "[T]his maxim, like most general maxims, is apt to mislead, by being too comprehensive".

[5] Edinburgh & District Tramways Co Ltd v Courtenay 1909 SC 99 at pp 105, 106 per Lord President Dunedin.

[6] Edinburgh & District Tramways Co Ltd v Courtenay 1909 SC 99 at p 105; Varney (Scotland) Ltd v Lanark Town Council 1974 SC 245 at pp 250, 258; Lawrence Building Co Ltd v Lanark County Council 1978 SC 30 at p 53.

[7] Eg Microwave Systems (Scotland) Ltd v Electro-Physiological Instruments Ltd 1971 SC 140.

pursuer's loss[1]; and (3) a causative link between the enrichment and loss.[2] Then there are what may be termed "legal" requirements, eg the requirement of "subsidiarity" namely that where the pursuer has an alternative remedy (eg under contract) then as a general rule there must be special circumstances justifying recompense.[3]

3.15 The courts have, however, been slow both to develop a general requirement of a legal nature that the defender's enrichment is unjustified and to define the factors which have that result. Instead the requirement of absence of justification is found in a disparate and unsystematised number of rules reflecting the diverse origins and conglomerate character of recompense eg (a) that the pursuer must not have intended donation[4]; and (b)

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[1]Buchanan v Stewart (1874) 2 R 78 at p 81 per Lord Neaves; Stewart v Steuart (1878) 6 R 145; Rankin v Wither (1886) 13 R 903; Edinburgh & District Tramways Co Ltd v Courtenay 1909 SC 99; Exchange Telegraph Co Ltd v Giulianotti 1959 SLT 293 (OH). For an exception see Gloag Contract (2d edn) p 323; also p 291, fn 11.

[2]Kames Principles of Equity (5th edn; 1825) p 91; Stewart v Steuart (1878) 6 R 145 at p 149 per Lord President Ingis: "in every case there must be, in order to ground the claim, the loss to one party resulting in a benefit to the other"; PEC Barr Printers Ltd v Forth Print Ltd 1980 SLT (Sh Ct) 118 at p 122 per Sheriff R D Ireland: "the enrichment of the defender at the expense of the pursuer".

[3]Lawrence Building Co Ltd v Lanark County Council 1978 SC 30; Trade Development Bank v Warriner and Mason (Scotland) Ltd 1980 SC 74; Cliffplant Ltd v Kinnaird 1981 SC 9 at p 28; City of Glasgow District Council v Morrison McChlery & Co 1985 SC 52; Trans Barwil Agencies UK Ltd v John S Braid & Co Ltd 1989 SLT 73 (OH) at p 78; Bennett v Carse 1990 SLT 454 (OH); N V Devos Gebroeder v Sunderland Sportswear Ltd 1990 SC 291 at pp 300, 301.

[4]Eg Bell, Principles (10th edn) s 538.

various requirements that the pursuer's expenditure must not have been incurred (i) exclusively to promote his own interest (in suo)[1]; or (ii) to promote the interest of a third party;[2] or (iii) to promote partly his own interest and partly another's interest.[3]

3.16 Antinomies in existing law of recompense. Some of these requirements appear to conflict with decisions in other cases and the task of resolving the antinomies, or apparent antinomies, has not yet been achieved. Much confusion arises from attempts to formulate one set of principles for the doctrine of recompense without recognising that the range of diverse type-cases requires a modern typology and taxonomy which allow like cases to be assimilated and unlike cases distinguished. For example, the rule that the pursuer's expenditure must not have been incurred in suo derives from cases where the pursuer made improvements on his own property incidentally benefiting the defender.[4] There is an obvious contrast

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[1]See Lawrence Building Co Ltd v Lanark County Council 1978 SC 30 at p 53 per Lord Cameron; Gray v Johnston 1928 SC 659 at p 664 per Lord Murray (Ordinary).

[2]Thomson, Jackson, Gourlay and Taylor v Lochhead (1889) 16 R 373; Kirklands Garage (Kinross) Ltd v Clark 1967 SLT (Sh Ct) 60; Express Coach Finishers v Caulfield 1968 SLT (Sh Ct) 11.

[3]Site Preparations Ltd v Secretary of State for Scotland 1975 SLT (Notes) 41 (OH), explaining as obiter and not following dictum of Lord Shand in Landless v Wilson (1880) 8 R 289; Fernie v Robertson (1871) 9 M 437 at p 442 per Lord Neaves; Edinburgh and District Tramways Co Ltd v Courtenay 1909 SC 99 at p 106 per Lord President Dunedin.

[4]Buchanan v Stewart (1874) 2 R 78 at p 82 per Lord Neaves; see also Stewart v Steuart (1878) 6 R 145 at p 149 per Lord President Inglis; cited in Edinburgh and District Tramways Co Ltd v Courtenay 1909 SC 99 at p 102

between such cases and cases where a bona fide possessor recovers recompense for improvements to another's property. The rule then became generalised as a requirement that the pursuer's expenditure must not have been incurred exclusively to promote his own interests[1] (an extended secondary sense of in suo) or partly his own interests and partly the defender's interests.[2]

3.17 It was overlooked that in this extended sense, the requirement of in suo conflicts with mistaken improver cases since in such cases the improver's bona fide but mistaken belief that the land is his own demonstrates that he acted to promote only his own interest. Yet he is entitled to recompense.[3] The extended in suo requirement also conflicts with decisions allowing the pursuer, who has paid the defender's debt, recompense from the defender. In such cases, the successful pursuer may have acted exclusively to benefit himself as where he erroneously thinks that he and not the defender is the true debtor,[4] or where he has a legitimate interest to

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(defender's argument) and at p 106.

[1]Lawrence Building Co Ltd v Lanark County Council 1978 SC 30 per Lord Cameron at p 53: "in suo, that is, on his own property or for his own benefit or with a view to his own profit or benefit", and at p 54 "the words in suo ... relate ... with equal force and relevance to interest as to property".

[2]Edinburgh and District Tramways Co Ltd v Courtenay 1909 SC 99 at p 106.

[3]See para 3.74 ff below.

[4]Edinburgh Life Assurance Co v Balderston (1909) 2 SLT 323 (OH). See para 3.97 below.

protect by paying the defender's debt.[1] It may be that the province of the in suo rule is to preclude recompense where the benefit to the defender was incidental to the pursuer's purpose and where therefore, in conferring the benefit on the defender, the pursuer did not incur any extra expenditure and so did not suffer loss.

3.18 A taxonomy based on a comprehensive typology of recompense cases would help to avoid these difficulties.

3.19 When is error a requirement in recompense? It is in the context of the requirement of absence of justification for the enrichment that the question whether error is an essential legal requirement of recompense over and above the factual requirements becomes relevant, as Professor Birks has observed.[2] There is in Scots law a line of judicial dicta affirming that in recompense error on the pursuer's part is essential.[3] More recently however it has been affirmed that error is a requirement in some recompense cases but not in others.[4] Very little progress, however, has been made in defining the

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[1]Morgan v Morgan's JF 1922 SLT 247 (OH); see para 3.95 below.

[2]Birks "Restitution: Scots Law" (1985) 38 CLP 57 at pp 61-63; p 79; Birks "Six Questions" [1985] Juridical Review 227 at pp 240, 241.

[3]Buchanan v Stewart (1874) 2 R 78 at p 81; Rankin v Wither (1886) 13 R 903 at p 908; Soues v Mill (1903) 11 SLT 98; Newton v Newton 1925 SC 715 at p 723; Gray v Johnston 1928 SC 659 at p 664; MacKechnie v Cameron (1936) 52 Sh Ct Reps 44.

[4]See Varney (Scotland) Ltd v Lanark Town Council 1974 SC 245 at pp 252, 256, 260; Lawrence Building Co Ltd v Lanark County Council 1978 SC 30 at pp 53, 54; Horne v Horne's Executors 1963 SLT (Sh Ct) 37 at p 39.

circumstances where error is essential and where it is not.

3.20 Definition of "absence of justification" requires a taxonomy based on a typology of enrichment claims. Apart from factors peculiar to Scots law, such as academic and official neglect, there is a factor probably appearing universally in all legal systems which explains the difficulties inherent in evolving a general requirement of "absence of justification". This is explained by Professor Zimmermann (under reference to the evolution of the Wilburg-Von Caemmerer typology and taxonomy in German law) as follows[1]:

> "It was Walter Wilburg who in 1934 acknowledged for the first time that one uniform answer to the question of when an enrichment is unjustified, cannot be given. Whereas it seems to be possible to state positively when an enrichment is justified: namely when the enriched party under a contract or under a law is entitled to keep the enrichment, the converse does not apply. One cannot say that a person who increases his property at the expense of another without a specific contractual or legal causa is bound to return the enrichment to this other person. This would not take into account that the enrichment may be due to the display of particular skill in (lawful) competition or to acquisitive or extinctive prescription. It can also be due to reflexive effects. Somebody builds a dam and the neighbours who have refused to participate in the expenses, also benefit from its construction. This benefit accrues to them without specific contractual or legal reason. Nevertheless they are not unjustifiedly enriched, a claim for unjustified enrichment does not lie. Wilburg, and twenty years later especially Von Caemmerer, therefore distinguished different types of enrichment claims."

[1] "A road through the enrichment-forest?" (1985) 18 CILSA 1 at p 11 (footnotes omitted).

(2) The need for a new taxonomy

3.21 The traditional remedy-based taxonomy is misleading and unsatisfactory. For example, because the Institutional treatments of the topic do not formally affirm, but rather take for granted, the ineluctable fact that repetition of money almost always arises where the defender was enriched (lucratus) at the time of payment, the Court of Session has recently stated that unjustified enrichment does not form the basis of repetition.[1] It only underlies recompense. We venture to criticise this reasoning in volume 2, paragraphs 2.93 to 2.105. Moreover, there is much force in Professor Birks' very important criticism of the traditional taxonomy that as a general rule the same grounds of recovery, so far as relating to the factors rendering the defender's enrichment unjustified, should apply whether the enrichment takes the form of a benefit in cash or a benefit in kind (property transferred or the product of services rendered).[2] From the standpoint of evolving a modern taxonomy, this observation of Professor Birks is perhaps the most helpful that has ever been made concerning the Scots law on unjustified enrichment in modern times.

3.22 No classification-frame is likely to be useful in practice and thus win general acceptance unless it is soundly based on a comprehensive and properly researched typology of the situations, cases and contexts in which the doctrine of unjustified enrichment applies in Scots

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[1] Royal Bank of Scotland plc v Watt 1991 SLT 138.

[2] Birks "Restitution: Scots Law" (1985) 38 CLP 57 at p 63; Birks "Six Questions" [1985] Juridical Review 227 at pp 237, 238.

law. These cases and contexts often lie in unexpected places scattered throughout large tracts of Scots law. Their identification requires much time-consuming research which the law faculties of the Scottish universities are only now undertaking. Much help may be derived from comparative law. Professor Birks, acknowledging the problem, has suggested one possible taxonomy[1] and this has been adopted by Mr W J Stewart in the first short monograph on the topic in Scots law.[2] While this is an interesting development, the methodology seems suspect. Professor Birks' "map of restitution" is exactly the same as that adopted by him for English law and elaborated in a celebrated and influential book.[3] That book was preceded by an equally celebrated but more exhaustive monograph on the English law, Goff and Jones The Law of Restitution[4].

3.23 There is not, or not yet, any monograph in Scots law comparable to Goff and Jones in its depth and thoroughness of treatment. The purpose of Professor Birks' book was to provide "the simplest structure on which the material in Goff and Jones can hang".[5] We have no doubt that Scots law has much to learn from these and

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[1]See Birks "Restitution; Scots Law" (1985) 38 CLP 57, especially at pp 65-67; Birks "Six Questions" [1985] Juridical Review 227.

[2]Stewart The Law of Restitution in Scotland (1992), especially Chapter 3 entitled "The Birksian Analysis and Scots Law".

[3]An Introduction to the Law of Restitution (1984, paperback edn with additional notes, 1989).

[4]Now in its third edition (1986), the first two editions being published in 1966 and 1978.

[5]Introduction, p 3.

other works on the English law. It would however be an odd coincidence if the Scots law on unjustified enrichment, with its vastly different history and its separate development from civilian rather than English roots, were to fit easily and smoothly into such a structure. In fact, we do not think that it does. For example, mistaken improvements by a bona fide possessor of another's property were described by Gloag as "the strongest case for a plea of recompense"[1] and by Lord Wark,[2] echoing Lord President Inglis,[3] as "the best and most familiar example" of recompense. This category of claim is of great theoretical importance in Scots law. The judicial dicta that error is an essential requirement of recompense were pronounced in cases on such claims.[4] Moreover, it has been argued in effect that such cases show that Scots law does not require "free acceptance" (to use a term of English law)[5] as a requirement of recompense for services even in cases not involving bona fide mistaken improvers.[6] By contrast English law does not recognise the enrichment claim of the bona fide possessor making mistaken improvements for it requires "free acceptance" as an additional element of liability in

[1]Contract (2d edn) p 324.

[2]Encyclopaedia of the Laws of Scotland vol 12 (1931) sv "Recompense" para 725.

[3]Stewart v Steuart (1878) 6 R 145 at p 149.

[4]See para 3.19 above.

[5]It is said that in English law a "free acceptance occurs where a recipient knows that a benefit is being offered to him non-gratuitously and where he, having the opportunity to object, elects to accept": Birks Introduction p 265.

[6]Gloag Contract (2d edn) p 324.

recompense for services.[1] Moreover, it has been said that in English and Commonwealth legal systems the issue whether the mistaken improver can recover "seems to be regarded as being of somewhat marginal significance for the development of restitutionary theory".[2] Paradoxically, substantive harmonisation with English law might be more likely if mistaken improver claims were recognised as one of the main categories of Scots Law with rules of its own which are severable from other main categories of recompense for services, thereby making it possible to let in "free acceptance" in such cases. On that possibility we express no opinion. Then there is another linked difficulty in using an English taxonomy for the Scots law on unjustified enrichment. In Scots law there is no doubt that recompense generally, and recompense for services in particular, is based on unjustified enrichment[3], the measure of recovery being "quantum lucratus".[4] In English and Commonwealth laws by contrast, restitutionary claims in respect of services are increasingly seen by commentators as based not on unjustified (or unjust) enrichment but on some other ground, such as unjust

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[1]Goff and Jones Restitution pp 18, 19; Birks Introduction pp 265-293.

[2]R J Sutton "What Should be Done for Mistaken Improvers?" Chapter 8 (p 241 ff) in P D Finn (ed) Essays on Restitution (1990) at p 242.

[3]Royal Bank of Scotland plc v Watt 1991 SLT 138.

[4]Gloag Contract (2d edn) p 328 observes that the distinction between quantum meruit (the measure of recovery in implied contract) and quantum lucratus "is generally obscured by the fact that the only way in which it can be determined how far a man has been enriched by goods or services of which he has had the benefit is by ascertaining what he would have had to pay if he had obtained them by express contract". However it does not follow that the tests are precisely the same in all cases.

sacrifice" and the whole question of the scope and basis of liability of this type of claim is controversial.[1] It follows from this that the Scottish terrain must be fully surveyed before it can be known how far a map of English law will serve as a reliable guide to it. Otherwise there is a risk that the terrain will be inappropriately and even inadvertently changed to fit the English map. Moreover, as Professor Birks acknowledged,[2] his own taxonomy is not universally accepted even in English law,[3] (though that may indeed make it more suitable for Scots law).

3.24 Other legal systems stemming from the same Roman roots as Scots law organise their principles of unjustified enrichment in a manner broadly similar to Scots law. French law acknowledges a distinction between the codal "repetition de l'indu" and the non-codal "enrichissement sans cause" which (at least on first impression) seems broadly comparable to the Scots distinction between repetition/restitution and recompense and to be based in part on similar historical roots (the condictiones and the actio de in rem verso of the ius commune respectively). The Roman-Dutch law of South Africa also presents some close parallels, for similar

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[1]See the authorities cited in vol 2, para 2.105, footnote 2.

[2]Birks "Restitution: Scots Law" (1985) 38 CLP 57 at p 65.

[3]For a survey of three different English taxonomies (Goff and Jones; Beatson/Chitty (25th edn; 1983); Birks), see Dickson "Restitution in German and English Law" (1987) 36 ICLQ 751 at pp 757 to 760.

reasons,[1] although recourse is had to Roman and civilian sources much more than in modern Scots law.

3.25 Among civilian legal systems it seems generally accepted that German law has gone furthest towards systematising the law on unjustified enrichment. We note that Professor Zimmermann has recommended the German law as a possible model for the recognition in South African law of a "general enrichment action" and the development of a modern taxonomy based on the Wilburg-von Caemmerer typology of enrichment claims.[2] Professor Zimmermann points out that:

> "the scope of application and the functioning of the law of unjustified enrichment are dependent on the structure of and interaction with related areas, such as the law of contracts, _negotiorum gestio_, the law of delict and the law of things."

In its structure, principles and rules, the Scots law of unjustified enrichment and related areas exemplifies important points of difference from the English law and of resemblance to civilian or mixed systems which are too

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[1]See eg J G Lotz "Enrichment" in W A Joubert (ed) _The Law of South Africa_ (Durban, 1979) vol 9; De Vos "Unjustified Enrichment in South Africa" [1960] _Juridical Review_ 125, 226.

[2]Zimmermann "A road through the enrichment-forest?" (1985) 18 _CILSA_ 1. For other brief treatments in English of the German law, see Dickson "Restitution in German and English law" (1987) 36 _ICLQ_ 751 at pp 771-783; Zweigert/Kotz/Weir _Comparative Law_ (2d edn) pp 232-237; Zimmermann _Law of Obligations_ pp 887-891; _International Encyclopaedia of Comparative Law_ vol 10, chapter 5 (Englard); chapters 10 and 11 (Friedmann and Cohen). The Wilburg-von Caemmerer typology is described in E von Caemmerer "Bereicherung und unerlaubte Handlung" _Festschrift fur Ernst Rabel_ vol 1 (1954) 333; see also E von Caemmerer "Problemes fondamentaux de l'enrichissement sans cause" (1966) 18 _Revue internationale de droit compare_ 573.

complex or unexplored to specify in detail, but (without citing sources) mention may be made of such obvious matters as the reliance on quasi-contractual remedies rather than the tort of conversion for specific restitution and the absence of any doctrine of waiver of tort; the problems of co-ordinating overlapping possessory remedies (with their defence of _bona fide_ perception and consumption) with quasi-contractual remedies (with their equitable defences eg of change of position); the acceptance of _negotiorum gestio_; the role of recompense in tempering the loss by a _bona fide_ possessor of ownership of materials by accession to another's property; affirmation of an unauthorised person's power to discharge another's debt; and the rejection of the basic distinction between Law and Equity and the consequent very restricted role of the constructive trust as a restitutionary remedy.

3.26 Civilian systems themselves differ. Scots law resembles French law but differs from German law in treating recompense as a subsidiary remedy, but differs from French law and resembles German law in relying on the pursuer's contract with a third party as a reason for precluding redress of the defender's indirect enrichment (ie enrichment of a person arising from a transaction between two others). Scots law seems to differ from civilian systems as well as English law in allowing a _condictio causa data causa non secuta_ for redress of enrichment arising from frustration of contract, these systems using other remedies, contractual or statutory. It is not yet clear whether Scots law follows German and South African law, and differs from English law and most civilian systems, in accepting an abstract theory rather than a causal theory of the transfer of ownership of

moveables, which in turn affects the scope of the _condictio indebiti_.

3.27 In short, in framing a taxonomy of unjustified enrichment, no one foreign model may suffice. Our preliminary and provisional view, however, is that the German example recommended for South African law, suitably adapted, is more likely than any other legal taxonomy so far seen to serve as a useful model for Scots law. It has assisted us greatly in identifying the different uses of unjustified enrichment doctrines and the way in which the specific principles and rules may be organised and classified for the purpose of understanding the role of error, and hence error of law, in this domain.

3.28 The German taxonomy provides for four main categories of enrichment claim, namely:

(1) claims arising from the pursuer's "performance", ie the pursuer's intentional or conscious conferment of a benefit (in money, goods or services) on the defender (_Leistungskondiktion_ or "performance action");

(2) claims arising from the pursuer's unauthorised improvements of the defender's property in the erroneous belief that it is his own (_Verwendungskondiktion_ or "expenditure action");

(3) claims arising from the pursuer's discharge of the defender's debt or performance of the defender's obligation (_Ruckgriffskondiktion_ or "recourse action"); and

(4) claims arising from the defender's, or a third party's, unauthorised interference with the pursuer's property rights enriching the defender (_Eingriffskondiktion_ or "interference action").

3.29 We have, however, modified the foregoing taxonomy by adding a fifth category. In Scots law, generally when money is paid in error under a purported obligation which turns out not to exist, only the payer has an action of repetition against the payee. In exceptional circumstances noted below,[1] however, the true creditor has an innominate action of repetition against the payee. We have some doubts whether this category of case fits easily into any of the four categories of the Wilburg-von Caemmerer taxonomy and accordingly we have added a new category to cover such cases.[2]

3.30 Against this background, for the limited purpose of considering abolition of the error of law rule, we have adopted the following provisional taxonomy of categories of unjustified enrichment falling outside the condictio indebiti for repetition of money:

(1) Repetition, restitution and recompense redressing pursuer's intentional conferment of benefit on the defender.
(2) Repetition at instance of true creditor redressing his debtor's erroneous payment to the defender.
(3) Recompense redressing enrichment by unauthorised improvements of another's property.
(4) Recompense redressing enrichment by performance of another's obligation.

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[1]See paras 3.56 to 3.73.

[2]Idem. Some cases, eg a trustee giving a wrong priority in distributing the trust estate, could fall within the category of unauthorised interference with property rights but for the fact that in Scots law, the beneficiary of a trust has only a jus crediti.

(5) Repetition, restitution and recompense redressing enrichment by unauthorised interference with property rights.

In addition, it is convenient to add a sixth category dealing with "indirect enrichment", ie enrichment of a person arising from a transaction between two others. This deals with "enrichment chains" whose links consist of two or more transfers of wealth falling within the foregoing categories (eg P pays T and T pays D; or P pays T and D takes from T without T's authority).[1]

3.31 It will be seen that in this provisional taxonomy, the traditional Scots classification of "the three Rs" (repetition, restitution and recompense) has been to some extent preserved but their content has been split up and redistributed as categories or sub-categories of a five-fold classification which cuts across them.

B. CATEGORIES OF UNJUSTIFIED ENRICHMENT WHERE ERROR OF LAW RULE APPLIES

(1) Repetition, restitution and recompense redressing pursuer's intentional conferment of benefit on defender

3.32 Scope of category. This category of obligations for the redress of unjustified enrichment concerns cases where the defender's enrichment arises out of the pursuer's transfer of property or performance of services enriching the defender. The category roughly corresponds to the German category of claims arising from the pursuer's "performance" (Leistung). There is no single English word

[1] See paras 3.8 above and 3.118ff below.

precisely equivalent to "Leistung".[1] This category covers not only the performance of an actual or purported obligation but also transfers by way of gift, or in expectation of receipt of a counter-prestation or benefit. The feature giving unity to this category of case is that the pursuer intentionally confers a benefit on the defender.[2] Typically a claim arises because the pursuer's intention is vitiated by error or compulsion or a future condition annexed to a transfer does not materialise, or something else has gone wrong with the pursuer's performance so that it does not achieve its purpose.[3]

3.33 This category therefore differs from cases of recompense for a bona fide possessor's mistaken improvements of another's property,[4] because in such cases the improver thinks that the property belongs to himself or a third party and so does not intend to confer a benefit on the defender. It also differs from cases of

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[1]See Dickson "Restitution in German and English Law" (1987) 36 ICLQ 751 at p 773, footnote 102; Englard "Restitution of Benefits" para 7.

[2]See Dickson, idem, previous footnote.

[3]See Zimmermann "A road through the enrichment-forest?" (1985) 18 CILSA 1 at p 12: "The enrichment-by-transfer claim (Leistungskondiktion) concerns the recovery of performances which have gone wrong or which have to be returned after the underlying causal transaction has fallen away. Central for determining when and between which parties this type of condictio lies is the concept of performance ("Leistung"). If one party has rendered performance to somebody else, he has done so with a specific purpose in mind: eg he has performed solvendi causa or obligandi causa. If this purpose has not been achieved, the performance has been made without legal ground and he will be able to institute the condictio".

[4]See paras 3.74 to 3.84 below.

recompense for discharge of another's debt[1] because in such cases the payment is made to the defender's creditor, not to the defender, and generally recompense is allowed only if the payment fulfils the pursuer's intention of discharging the debt. This category also differs from cases where the defender's enrichment arises from his or a third party's unauthorised taking or use of the pursuer's property[2] because in that category of case the defender's enrichment arises from his own or the third party's act and not from the pursuer's transfer or performance intentionally benefiting the defender.

3.34 Apart from a condictio indebiti for money considered in Part II above, this category covers:

(a) condictio indebiti for specific restitution of moveables;

(b) condictio causa data, causa non secuta and condictio ob causam finitam;

(c) innominate actions of repetition or restitution for recovery of a benefit intentionally paid or transferred by the pursuer to the defender;

(d) reduction of title to heritable prperty for the purpose of specific restitution; and

(e) recompense for services and other benefits in cash or kind.

(a) Condictio indebiti for specific restitution of moveables

3.35 Although the cases are rare, the better view is that the condictio indebiti applies as a remedy for the

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[1]See paras 3.85 to 3.109 below.

[2]See paras 3.110 to 3.117 below.

specific restitution of moveable property.[1] The error of law rule was received and developed in actions for repetition of money[2] but it seems likely that it applies also in a condictio indebiti for specific restitution of moveables. We propose that the error of law rule should be abolished in that context also.

(b) Condictio causa data, causa non secuta; condictio ob causam finitam

3.36 The obligation to repay money or restore property under the principle causa data causa non secuta or the related principle ob causam finitam arises only if there has been a condition attached to the payment. The condition refers to a future state of affairs which may or may not materialise. The payment may be regarded as made on the basis of a prediction as to the future state of affairs which turns out to be a misprediction. This misprediction may be an erroneous prediction that an existing state of affairs will continue to subsist (ob causam finitam). Alternatively it may be a prediction that some event will occur in the future which in fact does not actually occur (causa non secuta).

3.37 This misprediction could be based on an error of law. For example, a common instance given of this condictio is a gift made in contemplation of the

[1]See Pride v St Anne's Bleaching Co (1838) 16 S 1376; Caledonian Railway Co v Harrison and Co (1879) 7 R 151; Stewart Restitution para 7.6; see vol 2, paras 2.3; 2.106 to 2.122; 2.136 to 2.144.

[2]See Part II above.

recipient's marriage.[1] If a person knowing the relationship of two parties,but not appreciating that the relationship implies a legal bar to their marriage (ie that the marriage would be incestuous), makes a gift of property conditional on them marrying each other, the error of law rule might conceivably operate to bar the condictio. This seems unsatisfactory.

(c) Innominate action of repetition or restitution for recovery of benefit intentionally conferred by pursuer on defender

3.38 The place of the civilian condictio sine causa in Scots law is filled by innominate actions of repetition or restitution.[2] Where a mandatory pays his mandator's debt under an error of law as to the scope of his mandate, his action would probably be an innominate action of repetition rather than a condictio indebiti properly so called.[3] The error of law rule should not bar his right to recover.

3.39 It is conceivable that the error of law rule could apply to a non-liability error actionable by innominate action of repetition. Under the present law, for example, although a gift made under an error as to the occurrence of a future event is recoverable by a condictio causa data causa non secuta,[4] a gift made under an error as to

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[1]Stair Institutions I,7,7; Bankton Institute I,8,21; Erskine Institute III, 1,10; Savage v McAllister (1952) 68 Sh Ct Reps 11 (engagement ring).

[2]See paras 3.6 and 3.8 above.

[3]See vol 2, paras 9 and 10.

[4]See paras 3.36, 3.37 above.

existing facts or the existing law is not recoverable.[1] We are considering whether to propose in a further Discussion Paper that this rule should be changed. If the law were to be changed, then clearly the error of law rule should not operate to bar an action of repetition or restitution of a gift made under an error as to the existing law, eg as to the donee's ineligibility for social security or pension rights. The donor's remedy would be an innominate action of repetition.

(d) Reduction of title of heritable property for purpose of specific restitution

3.40 Although there is a view that "Restitution is properly applicable only to moveables",[2] there is little doubt in our opinion that in principle the rules governing restitution of moveable property apply also to heritable property, with the modification that the remedy will normally be an action of reduction of the transferee's title or rectification of the conveyance.[3] Thus there is authority for applying the condictio ob turpem vel iniustam causam[4] and the condictio causa data causa non

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[1]Masters and Seamen of Dundee v Cockerill (1869) 8 M 278.

[2]Encyclopaedia of the Laws of Scotland vol 12 (1931) sv "Restitution" para 1236.

[3]Law Reform (Miscellaneous Provisions)(Scotland) Act 1985, ss 8 and 9.

[4]Nisbet's Creditors' Tr v Robertson (1791) Mor 9554; Bell's Octavo Cases 349 (reduction of heritable bond securing the price of contraband goods due under an illegal smuggling contract); Duke of Hamilton v Esten (or Scott Waring) (1820) 2 Bligh 196; 6 Paton 644; also rep sub nom A v B 21 May 1816 FC (reduction of tenancy granted ob turpem causam adulterii: decree refused because of

secuta[1] to heritable property. An example of "performance error" relating to heritable property is Anderson v Lambie[2] in which a disposition conveying more ground than was stipulated in the missives of sale was reduced because it did not give effect to the agreement in the missives.

3.41 There is some doubt whether the error of law rule applies to actions of reduction not inferring repetition of money,[3] because of the leading case of Dickson v Halbert,[4] discussed elsewhere,[5] where the error of law rule was held not to apply in a reduction of a discharge proceeding on an underpayment. In Mercer v Anstruther's Trs[6] a discharge in a marriage contract was reduced by a Court of Seven Judges. It was held that an error in essentialibus may be a ground of reduction though arising from an error of law, and there are dicta suggesting that the error of law rule applies only to cash payments[7] or to

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pursuer's turpitude, not because of restitutionary nature of remedy sought).

[1]Grieve v Morrison (unreported) 9 April 1986 (OH) per Lord Morison (obiter): "No doubt the condictio can apply to a gift made by transfer of title to heritable property, equally to one of money or moveable property ..."

[2]1954 SC (HL) 43 revg 1953 SC 94.

[3]See Montgomerie Bell, Lectures on Conveyancing (3d edn; 1882) vol 1, p 167.

[4](1854) 16 D 586.

[5]See paras 2.8 and 2.75, and volume 2, paras 1.24 and 1.25.

[6](1871) 9 M 618.

[7]Ibid at p 652 per Lord Kinloch.

a condictio indebiti.[1] Lord President Inglis stated the law in terms of actions of reduction generally.[2] The authorities excluding the error of law rule, however, relate to reductions of discharges, or of gratuitous obligations[3] and it is not clear whether or not the error of law rule applies to reductions of other types of deed.

3.42 In these circumstances, we think that the safest course is for statute to abolish the rule in terms covering reductions of conveyances of heritable property for the purpose of specific restitution.

(e) Recompense for benefits in cash or kind intentionally conferred by pursuer on defender

3.43 Error not essential but may be a factor rendering defender's enrichment unjustified. In this Section, we are concerned with recompense for benefits intentionally conferred by the pursuer on the defender. We have noted that recompense is a conglomerate category, with diverse origins and a wide scope, governing the recovery of benefits in kind and (exceptionally) benefits in cash.[4] We have also noted that apart from the core elements of enrichment, loss and a causative link, it is necessary to

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[1]Ibid at p 646 per Lord Neaves.

[2]Ibid at p 628: "I am not aware that an error in essentialibus, as a ground of reduction, must necessarily be an error in fact, and may not be an error in law. On the contrary, one of the most common examples of essential error is where the pursuer of a reduction complains, that when he entered into the contract or arrangement sought to be reduced he was excusably mistaken as to the nature of his legal rights."

[3]See Hunter v Bradford Property Trust Ltd 1970 SLT 173 (HL); McBryde Contract para 9.40 ff.

[4]See paras 3.9 to 3.15 above.

consider the factors which the law recognises as rendering the defender's enrichment unjustified.[1] Our provisional taxonomy is based on the view that, in the context of the pursuer's intentional conferment of a benefit by the pursuer on the defender, the factors rendering the defender's enrichment unjustified should be the same whether the applicable remedy or doctrine is repetition, restitution or recompense. If, as we believe, the distinction between "the three Rs" is based mainly on the measure of recovery, that distinction should not affect the factors rendering the defender's enrichment unjustified (eg error as to legal liability, improper compulsion and the like). This proposition is already tacitly recognised in some legal contexts. For example, the doctrine of ob turpem vel iniustam causam applies to recompense for work or services[2] as well as to the more common cases of repetition of money and restitution of property. Moreover, there are cases in which the provision of services conditional on a future counter-prestation or other future event which fails to occur has been held remediable by recompense.[3] There is here an analogy with the condictio causa data causa non secuta which, for purely historical reasons, is confined to repetition and restitution.[4] In our view, if attention is (as it ought to be) focussed on the factors rendering the

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[1]See para 3.15.

[2]See eg Jamieson v Watt's Tr 1950 SC 265.

[3]See eg Ramsay & Son v Brand (1898) 25 R 1212; McBryde Contract paras 6.29 ff; Thomson v Archibald 1990 GWD 26-1438 (Sh Ct).

[4]See eg Cantiere San Rocco v Clyde Shipbuilding and Engineering Co 1923 SC (HL) 105; cf. Connelly v Simpson 1993 GWD 15-981 (Extra Div).

defender's enrichment unjustified, then (1) the analogy between a claim of recompense for the intentional conferment of a benefit on the defender and the condictiones is closer than (2) the analogy between such a recompense claim and a recompense claim by a bona fide possessor for mistaken improvements designed to benefit himself and not the defender.

3.44 In the domain of recompense, the factors rendering the defender's enrichment unjustified have not been fully researched and systematised. While authority is scant,[1] it is argued in this Section that in the case of recompense for benefits intentionally conferred by the pursuer on the defender, error is one of those factors; that it is likely that the error of law rule applies; and accordingly that that rule should be abolished.

3.45 We refer elsewhere to obiter dicta that in recompense, error is an essential ingredient but these dicta occurred in recompense cases involving the pursuer's improvement of another's property.[2] There the normal rule is that only a bona fide possessor improving another's property in the erroneous belief that it is his own or a third party's, and therefore intending to benefit only

[1]It is perhaps not surprising that in Scots law authority is scant. Even in English and Commonwealth law, it seems to be sparse. The New South Wales Law Reform Commission observed that they were "not aware of any reported cases where appropriate restitution has been refused on the ground that a benefit other than money was transferred under mistake of law": NSWLRC 53, para 5.15. Nevertheless the Commission recommended its abolition in that context also: idem.

[2]See para 3.19 above.

himself or the third party, can recover recompense.[1] Here we are concerned with cases where the pursuer intended to benefit the defender without donation, and as mentioned above the factors rendering the enrichment unjustified may well be different. There is more recent authority, also by obiter dicta, that error is usually, but not always, essential in recompense.[2] These obiter dicta were pronounced in cases involving recompense for discharge of another's obligation without donation. Discharge of another's obligation is simply a type of benefit, and the analogy with cases discussed here is close. It is well established that where a person who is not an alimentary debtor provides aliment in cash or kind without donation, his entitlement to claim recompense for the cost of the aliment from the alimented person need not be based on error.[3] It is conceivable, however, that such recompense could be based on error as where the provider of the aliment mistakenly believes that he is an alimentary debtor when in fact he is not.

3.46 There is no doubt that there are some cases where the pursuer performs services for the defender intending to benefit him without donation and is entitled to recover recompense. In some of these cases the pursuer acted in an emergency but had no remedy in negotiorum gestio because the defender was not "absent from the

[1]See para 3.77 below.

[2]See para 3.91 below.

[3]Horne v Horne's Executors 1963 SLT (Sh Ct) 37 at p 39 per Sheriff Hamilton; see also Scottish Law Commission Consultative Memorandum No 22 on Aliment and Financial Provision (1976) para 2.79 for the relevant principles.

transaction".[1] Recompense was therefore the only available remedy.[2] In other cases, the defender accepted the services or at least had an opportunity to object but did not use it.[3] Here the factor rendering the enrichment unjustifiable resembles what in English law is known as "free acceptance". Given that in addition to the factual requirements, there must be a factor rendering the defender's enrichment unjustified, it seems likely that the pursuer's error as to his legal liability is such a factor.

3.47 Alternative remedies. The cases of recompense for the pursuer's intentional conferment of a benefit in kind on the defender without donation are sparse for reasons which are not altogether clear. One reason is the existence of other remedies. In some cases, the defender is "absent from the transaction" and the remedy lies in negotiorum gestio. In some, a contract is implied and the remedy is remuneration quantum meruit rather than recompense quantum lucratus.[4] In some, the remedy is governed by the doctrine of reimbursement of expenses incurred in reliance on the defender's unwarranted,

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[1]Ie physically absent or incapax: see R D Leslie "Negotiorum Gestio in Scots Law: The Claim of the Privileged Gestor" [1983] Juridical Review 12 at pp 33, 34.

[2]Garriock v Walker (1873) 1 R 100; North British Railway Co v Tod (1893) 9 Sh Ct Reps 326 (expense incurred by carriers to save defender's goods; defender present but refused to intervene).

[3]Eg McGregor v Ireland (1901) 17 Sh Ct Reps 326 (outgoing tenant of farm sheltering incoming tenant's horses while latter harvesting the waygoing crop).

[4]Gloag Contract (2d edn) pp 328, 358, 540, 606; McBryde Contract paras 3.29-3.31; 3.39; 6.27; 6.50.

express or implied representations that a contract existed[1], a doctrine held to be sui generis and distinct from recompense.[2] Under the subsidiarity doctrine,[3] the existence of an alternative remedy bars recompense. It is therefore not altogether surprising that authority for recompense for the intentional conferment of a benefit is scanty.

3.48 Two types of error as to legal liability. In principle, as in the case of the condictio indebiti, an error as to legal liability to perform services or confer other benefits may be either (i) an error that a purported obligation exists when in fact it is void, illegal, non-existent or terminated, or (ii) an error as to the nature, manner or extent of the performance required under an obligation which does exist (performance error). Error of the first type may in practice require reduction of the purported obligation as a preliminary to recompense; error of the second type does not require reduction but only recompense for the mistaken performance.

3.49 Error that purported obligation exists. Under the rubric "Recompense where contract void", Professor Gloag

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[1]Sometimes called "Melville Monument liability": see the line of cases commencing with Walker v Milne (1823) 2 S 379 and culminating in Dawson International plc v Coats Patons plc 1989 SLT 655 affg 1988 SLT 854 and Bank of Scotland v 3i plc 1990 SC 215 at pp 225, 226; Gloag Contract (2d edn) pp 176-178; Stewart Restitution paras 10.1 to 10.9.

[2]Dawson International plc v Coats Patons plc 1988 SLT 854 at p 865 per Lord Cullen.

[3]See para 3.14 above.

remarked:

> "the plea of recompense may be put forward where parties have acted under an actual agreement, but where, by some positive rule of law, that agreement is not enforceable."[1]

The cases which he cites are somewhat special, namely loans to persons of limited capacity,[2] and cases of statutory nullity.[3] Professor McBryde also affirms that in cases of void contracts, quasi-contractual remedies including recompense are available.[4]

3.50 A payment made to a person of limited capacity under a purported obligation void through incapacity or ultra vires was characterised in one case as a condictio indebiti,[5] the implication being that the error as to the contract's validity or invalidity was one of fact. The weight of authority however favours recompense as the appropriate remedy.[6] In such cases error is not an essential ingredient. In Magistrates of Stonehaven v Kincardine County Council[7], a loan to a local authority which was known by the lender to be ultra vires the local authority's borrowing powers, was held recoverable by recompense to the extent of the local authority's enrichment. Abolition of the error of law rule would not

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[1]Gloag Contract (2d edn) p 321.

[2]See vol 2, para 2.216.

[3]Cuthbertson v Lowes (1870) 8 M 1073.

[4]McBryde Contract para 26.05, head (4).

[5]Haggarty v Scottish TGWU 1955 SC 109.

[6]See the cases cited in vol 2, para 2.216.

[7]1939 SC 760.

affect such cases (which appear to include cases of recompense following "swap transactions").

3.51 The other case cited by Gloag, that of statutory nullity, rests on Cuthbertson v Lowes,[1] which is difficult to reconcile with Jamieson v Watt's Tr[2] and whose authority is in some doubt. Though error was present, it does not seem that it was treated by the court as an essential requirement of recovery.

3.52 It nevertheless seems possible that where the pursuer confers a benefit in kind on the defender intending to benefit him without donation and in the erroneous belief that a purported obligation is valid when it is in fact void, or has been terminated, and the factor rendering the defender's enrichment unjustified is the pursuer's error, recompense may be precluded if the error is characterised as one of law.

3.53 Performance error. Where the pursuer is under a legal obligation to perform services for the defender, and through an error does extra work, it is possible that he may be entitled to recompense. It seems, however, that the law does not favour claims for recompense for extra work[3] even when the pursuer erroneously thought he would be paid.[4] There are authorities allowing recompense in

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[1](1870) 8 M 1073.

[2]1950 SC 265.

[3]Scott v Marshall (1847) 10 D 226; Grant v Macleod (1856) 19 D 127; Tharsis Sulphur etc Co v McElroy and Sons (1878) 5 R (HL) 171 revg (1877) 5 R 161; Gloag Contract (2nd edn) p 322.

[4]Grant v Macleod (1856) 19 D 127.

respect of deviations from building contracts.[1] We have traced no case of a claim in recompense based on error of law in performance of a contract, but such a case could conceivably arise.

3.54 Non-liability error. Recompense may also lie in respect of a non-liability error,[2] and such an error could conceivably be a mistake of law.

(f) Our proposals

3.55 We propose

(1) Where heritable or moveable property is conveyed under error of law or mixed fact and law as to the transferor's liability to make the conveyance, the transferee should be under an obligation to make restitution of it if he would have incurred that obligation had the error been wholly one of fact.

(2) Our proposals for abolition of the error of law rule in obligations of repetition or restitution should apply not only where the payer or transferor is misled by an error of law or mixed fact and law into believing that he owes an obligation to the recipient to make the payment or conveyance, but also where:

(a) the payment or transfer is subject to a future condition and the error relates to that condition; or

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[1] Ramsay and Son v Brand (1898) 25 R 1212; McBryde Contract paras 6.26 to 6.36.

[2] cf Scanlon v Scanlon 1990 GWD 12-598 (Sh Ct); see para 3.97 below.

(b) the error relates to a purported obligation owed to a third party to make the payment or conveyance.

(3) Where a person intentionally confers a benefit in cash or kind on another person under an error of law or mixed fact and law, the provider of the benefit should be entitled to recompense from the recipient if he would have been so entitled had the error been wholly one of fact.

(Proposition 4)

(2) Repetition at instance of true creditor redressing his debtor's erroneous payment to the defender

3.56 General principles of title to sue. In general in Scots law, where a debtor pays money to a putative creditor erroneously believing him to be the true creditor, only the debtor has a title to sue for repetition,[1] the remedy being a condictio indebiti. Normally the true creditor has no title to sue an innominate action of repetition either for repayment to the debtor (for onward transmission to the true creditor) or for direct "re-payment" to the true creditor.

3.57 The reasons for this relatively strict rule on title to sue appear entirely rational. (a) It is essential to have strict rules of title to sue in three-party situations lest the recipient of the erroneous payment (the putative creditor) suffer double jeopardy[2] viz

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[1]Walker Civil Remedies p 289.

[2]The relevant brocards are "ius non patitur idem bis solvi" (the law does not suffer the same debt to be paid twice) Stair Institutions I,7,9; Moore's Executors v McDermid (1913) 1 SLT 278 at p 279; and "bona fides non patitur ut bis idem exigatur" (good faith does not allow the same debt to be exacted twice) D.50.17.57; Stair

liability to the paying debtor in a condictio indebiti and liability a second time to the true creditor in an innominate action of repetition. This concern is evident in Sheriff Craik's judgment in Fraser v Robertson.[1] (b) Correspondingly, there would be a risk that the true creditor would obtain double payment, once by an action of payment against the debtor and a second time by an innominate action of repetition against the wrongly paid putative creditor. (c) It is a general and salutary rule of Scots law that a creditor has no title to sue his debtor's debtor.[2] Normally the creditor's remedy is to constitute his debt against his debtor and proceed against his debtor's debtor by arrestment and furthcoming.[3] (d) Where a payment is made by a debtor to the wrong person, the true creditor is not thereby impoverished. He has not suffered loss. Notwithstanding the payment, the debtor remains liable to the true creditor in exactly the same amount.[4]

Institutions I,18,5; IV,40,33.

[1](unreported) 1989 GWD 5-194 distinguishing Armour v Glasgow Royal Infirmary 1909 SC 916.

[2]Henderson v Robb (1889) 16 R 341; Gill's Trs v Patrick (1889) 16 R 403; Crawford v Boyle (1849) 11 D 714.

[3]Henderson v Robb (1889) 16 R 341 at p 345 per Lord Adam.

[4]If authority is needed for this obvious proposition, see Symington's Executor v Galashiels Co-operative Store Co Ltd (1894) 21 R 371 (friendly society paid funds to a person other than the legal representative of a deceased member: decerned to pay again to the true representative); Kames Principles of Equity (5th edn) p 347: "payment made to any but to the creditor avails not at common law".

3.58 Mr W J Stewart in his book on Restitution[1] refers to a doctrine of "interceptive subtraction", advanced by Professor Birks in the context of English law,[2] which appears to confer a title on the true creditor to sue the wrongly paid creditor in certain circumstances. For the reasons set out in the previous paragraph, we do not think that that doctrine applies, or should apply, in Scots law. Its applicability to English law has been cogently criticised.[3] We revert to the competing policy considerations at paragraph 3.62 below.

3.59 Exceptional cases of true creditor's title to sue the payee putative creditor. There are, however, limited and exceptional circumstances in which the unpaid true creditor is conceded a title to sue the wrongly paid putative creditor, the remedy being an innominate action of repetition. The categories of case which we have so far identified may be summarised as follows.[4] (i) In the case of an erroneous payment to the putative creditor (eg the cedent following an unintimated assignation of the debt), the true creditor (the assignee) has a title to sue the payee (the cedent) where the debtor has a defence of

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[1]Para 3.4.

[2]Birks Introduction pp 133-139; 142-145.

[3]Lionel D Smith "Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction" (1991) 11 Oxford Journal of Legal Studies 481.

[4]Liability of the wrongly paid party to pay the true creditor may be regulated by specific enactments. This seems to be the explanation of Robertson v Landell (1843) 6 D 170.

bona fide payment against the true creditor's claim.[1] (ii) There is authority in cases involving mistaken payments of teinds to the effect that, in order to avoid "circuity of action" (unpaid true creditor sues paying debtor; paying debtor sues wrongly paid putative creditor), the unpaid true creditor may sue the wrongly paid putative creditor direct either with the debtor's concurrence[2] or where the paying debtor is also convened in the process or in a combined action as defender.[3] (iii) On general principles, in the case of an erroneous payment by a trustee, the unpaid beneficiary may sue the wrongly paid putative beneficiary with the trustee's concurrence.[4] Similar rules apply to trustees in bankruptcy sequestrations and liquidators.[5] (iv) A special legatee may sue directly the holder of the legacy provided he convenes the executor in the process[6]. (v) If the trustee refuses to lend his name to an action of repetition by the true beneficiary and refuses to acknowledge any error, holding that the actual payee is the true beneficiary, the unpaid true beneficiary may sue the wrongly paid payee for repetition to the trustee convening the trustee as additional defender.[7]

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[1]Stair Institutions IV,40,33: "the law secures the payer, without prejudice to the pursuer to insist against the obtainer of the payment"; approved Stewart's Trs v Evans (1871) 9 M 810 at p 813; Kames Principles of Equity (5th edn) p 349.

[2]Countess of Cromertie v Lord Advocate (1871) 9 M 988.

[3]Earl of Cawdor v Lord Advocate (1878) 5 R 710.

[4]Morrison v Morrison's Exix 1912 SC 892.

[5]Henderson v Robb (1889) 16 R 341.

[6]Innerarity v Gilmore (1840) 2 D 813; Wilson and Duncan Trusts, Trustees and Executors (1975) p 122.

[7]Armour v Glasgow Royal Infirmary 1909 SC 916.

(vi) The creditor of a deceased may in certain circumstances sue a wrongly paid beneficiary of the deceased's estate for repetition (direct to himself) of money erroneously paid by the deceased's executor to that beneficiary, to the prejudice of the creditor's prior claim.[1] The reason is that the beneficiaries, being gratuitous creditors, are postponed to the onerous creditors of the deceased.[2] The creditor must exhaust his remedy against the executor first. (vii) A discharged bankrupt re-invested in his estate on the termination of his sequestration may sue for repetition of an over-payment made by the trustee in bankruptcy.[3] (viii) Where the true owner of a landed estate reduces the putative owner's title, he may sue the putative owner for repetition of rents or feuduties drawn by the putative owner as ostensible landlord or superior during the period of his possession.[4] (ix) There is one Outer House case which does not seem reconcilable with the foregoing principles or to fall into any recognisable exception. In Extruded Welding Wire (Sales) Ltd v McLachlan and Brown[5], customers of P, a factoring company, erroneously paid the

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[1]Robertson v Strachans (1760) Mor 8087; Poole v Anderson (1834) 12 S 481; Wyllie v Black's Tr (1853) 16 D 180 (the leading case); Threipland v Campbell (1855) 17 D 487; Stewart's Trs v Evans (1871) 9 M 810; Beith v Mackenzie (1875) 3 R 185; St Andrews Magistrates v Forbes (1893) 31 S L Rep 225.

[2]Erskine Institute III,9,46; Stewart's Trs v Evans (1871) 9 M 810 at p 817 per Lord Cowan.

[3]Patten and Patten v Royal Bank of Scotland (1853) 15 D 617.

[4]See eg Lawrie's Trs v Donald (1825) 4 S 56; Justice v Ross (1829) 8 S 108; Moir v Glen (1831) 9 S 744; Gracie v Hannay's Representatives (1832) 10 S 628.

[5]1986 SLT 314 (OH).

price of goods to T, the manufacturer, from whom P had bought the goods for re-sale. D, a firm of accountants investigating T's finances, misappropriated the funds in settlement of fees due by T to D. D had knowledge that the price of the goods was due to P not T and acted in bad faith. In an action of payment, P recovered the money from D. The only authorities cited were two general passages from Bell's Principles[1]. It does not appear from the report that either T or P's customers were called as parties to the action. Yet P's customers were presumably still liable to P and had a title to sue a condictio indebiti against T (who however were in liquidation by the time of the action). The result was just and convenient, but the authority of the case is in some doubt. It may be that the element of bad faith gives the case an exceptional character.[2] The case is also an illustration of indirect enrichment, for the defender D was not the recipient of the erroneous payment but a third party who had misappropriated the funds from the recipient, T.[3]

3.60 The basis of repetition. We understand that in South African law, an action by the unpaid true creditor against the wrongly paid putative creditor is a species of condictio sine causa (specialis). The relevance of the

[1] Ibid at pp 316, citing Bell Principles s 526: "The law gives an action of restitution against one in possession of the property or goods of another without his consent; or who has, in consequence of error, received payment of money not legally due to him"; s 528: "It is an exception to the above rule of restitution, that money ... cannot be vindicated against one who acquires them in bad faith." Quaere, does "vindication" here denote a proprietary remedy or a personal action?

[2] Bell Principles s 528 (previous footnote).

[3] See para 3.120 below.

distinction between such a condictio and a condictio indebiti for our purposes lies in the different treatment of error. In the Govender case Rose-Innes J observed:[1]

> "The claim appears, thus, to be a claim for recovery of money which has come into the hands of the defendant for no justifiable cause. In the condictio sine causa situation there often is error causing payment to defendant, but error is not an essential requirement of the condictio sine causa. For example, if an executor pays my legacy to you to whom no legacy is payable, I can recover it from you by the condictio sine causa although I was under no error of fact at all and the error was entirely that of the executor, and the same applies to other payments by third parties where the person whose money it rightly is, is not party to any error. The condictio sine causa is brought where plaintiff's money is in defendant's hands without cause, there need be no erroneous belief that the money was owing to the defendant, as is the case under the condictio indebiti. It is necessary for a condictio indebiti to show reasonable mistake of the plaintiff, but a condictio sine causa lies whether the money is in the hands of the defendant without cause, whether due to mistake of the plaintiff, or not. It is therefore a defence to the condictio indebiti that the mistake was not reasonable but negligent, but it would not seem to be a defence to the condictio sine causa since no error need be proved, whether reasonable or unreasonable."

Although there was a mention of "sine causa" in at least one of the Scots cases cited in the preceding paragraph,[2] in none of these cases was the relevant doctrine or form of action characterised as a condictio sine causa. In Scots practice, the action by the true creditor is treated as an innominate action of repetition. It appears from paragraph 3.59 above that the rules of title to sue such

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[1]Govender v Standard Bank of South Africa Ltd 1984 (4) SA 392 at p 400.

[2]Patten and Patten v Royal Bank of Scotland (1853) 15 D 617 at p 619 per Lord Cuninghame: "in error, as in their hands sine causa". See also Kames Principles of Equity (5th edn; 1825) p 349.

an innominate action of repetition in Scots law are less liberal than title to sue a condictio sine causa in South African law.

3.61 In Scots law, there appear to be two possible theoretical approaches to the basis of liability in this category of innominate action of repetition. The first is to treat the unpaid creditor's claim against the wrongly paid payee as an independent cause of action. The second is to treat the unpaid creditor's claim against the wrongly paid payee as a dependent claim derived from the payer's claim. On the first approach, defences available to the payee against the payer (eg the error of law rule or the inexcusable nature of the payer's error) would not be available against the unpaid true creditor. On the second approach, such defences would be available against the unpaid true creditor.

3.62 From the standpoint of legal policy and principle, there is something to be said for each of these conflicting approaches. On the first approach, it may be said that if the payer is insolvent, the unpaid true creditor will not be paid in full. In equity it is arguable that he should not be barred from repetition from the wrongly paid payee by an error which was not his (the true creditor's) but the payer's. If the payer is a trustee, the unpaid true creditor may have an action of damages against him personally,[1] but if the trustee is insolvent, that remedy may be worthless. On the second approach, it may be argued that if the payee has a defence in a condictio indebiti by the payer, then he should

[1]Cf Taylor v Wilson's Tr 1975 SC 146 at p 160 per Lord Cameron.

equally have the same defence in an innominate action of repetition against him by the unpaid true creditor which, after all, arises from exactly the same payment transaction.

3.63 Although the competing policy considerations have not been thoroughly canvassed by courts or writers, it seems to us that in Scots law the dominant theory is that the true creditor has no independent right of action, no doubt for the reasons given at paragraph 3.57 above. This is consistent with the theory in the teinds cases that the unpaid true creditor sues the payee only to avoid "circuity of action" and must convene the payer in the process.[1] It is also consistent with the requirement that trustees and liquidators are normally required to lend their name to an action by the unpaid true beneficiary or creditor against the payee.[2] This theory also explains why, in a case where the trustee refuses to lend his name, the unpaid true beneficiary concludes for payment to the trustee and not to himself.[3]

3.64 On the other hand, the true creditor's right to sue the putative creditor where the true creditor's action is cut off by the debtor's defence of <u>bona fide</u> payment[4] may be an independent right of action. The true creditor cannot receive double payment because his right against the debtor has been cut off. Nor is there any risk of double jeopardy. The basis of the unpaid true creditor's

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[1]See para 3.59, head (ii).

[2]See para 3.59, head (iii).

[3]See para 3.59, head (v).

[4]See para 3.59, head (i).

right to sue the paid putative creditor is explained by Kames as resting on unjustified enrichment:

> "The sum received by the putative creditor is in his hand sine justa causa, and he is answerable for it to the true creditor. In this view, the operation of bona fide payment is only to substitute one debtor for another, which may as often be beneficial to the true creditor, as detrimental."[1]

The claim of the unpaid onerous creditor of a deceased debtor against the wrongly paid gratuitous beneficiary[2] has also been expressly founded on unjustified enrichment[3] and may be an independent claim. Since the creditor must unsuccessfully claim against the debtor's executor first, there is no risk of him being paid twice. Nor is there any risk of double jeopardy. So it seems likely that Scots law allows independent claims of repetition by the unpaid true creditor only where there is no risk of double payment or double jeopardy.

3.65 Abolition of error of law rule in repetition claims by true creditor. There is some doubt whether the error of law rule does apply to actions of repetition by the unpaid true creditor against the wrongly paid putative creditor. We have not traced any authority. It has now been decided that the case of Armour v Glasgow Royal Infirmary,[4] sometimes cited in discussions of the error of law rule, is not to be treated as an authority on error of law since

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[1]Kames Principles of Equity (5th edn; 1825) p 349.

[2]See para 3.59, head (vi).

[3]See the leading case of Wyllie v Black's Tr (1853) 16 D 180 at p 188 per Lord Justice-Clerk Hope: quoted in volume 2, para 2.103.

[4]1909 SC 916.

the error in that case related to the validity of a will and not to its interpretation.[1]

3.66 Whether the unpaid true creditor's action of repetition against the wrongly paid putative creditor is a dependent claim to avoid circuity of action, or an independent claim based on the putative creditor's unjustified enrichment, we do not think that the fact that the payment was made to the putative creditor by the debtor under an error of law should preclude the true creditor's claim. If (as we propose in Part II) the paying debtor himself will not in future be precluded from raising a condictio indebiti by the error of law rule, then all the more so the true creditor, who did not commit the error, should not be barred from claiming repetition.

3.67 We propose

> **Where a debtor pays a debt to a putative creditor under error of law or mixed fact and law, the true creditor should be entitled to claim repetition by the putative creditor to either:**
>
> **(a) the true creditor; or**
>
> **(b) the debtor for disbursement to the true creditor,**
>
> **if he would have been so entitled had the error been wholly one of fact.**
>
> **(Proposition 5)**

In the foregoing proposition, head (b) is intended to cater for cases like Armour v Glasgow Royal Infirmary[2]

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[1] Grant v Royal Bank of Scotland plc 1993 GWD 11-794 (OH) discussed at para 2.40 above.

[2] 1909 SC 916.

(where the true beneficiary obtained decree of repetition in favour of the mistaken paying trustee).

3.68 Defence of bona fide payment and error of law. There is one matter which arises in actions of payment but is closely related to actions of repetition by the true creditor and merits consideration. There is Institutional authority for a rule that a debtor who has made an erroneous payment to a putative creditor under error of law cannot found on the defence of *bona fide* payment in an action for payment by the true creditor. Thus Erskine remarks:

> "Payment made to one to whom the law hath denied the power of receiving payment is not accounted *bona fide* payment: for *ignorantia juris neminem excusat*."[1]

In the Institutional period, this rule would not have worked injustice to the mistaken payer. As the law then stood, he would have continued to have the right to recover the erroneous payment from the putative creditor, because, as we have seen, at that period, the error of law rule did not bar a *condictio indebiti*.

3.69 A hitherto unidentified unjust consequence of the introduction of the error of law rule in the *condictio indebiti* is that where a debtor pays a putative creditor under error of law, he has no defence against an action of payment by the true creditor (because error of law bars a defence of *bona fide* payment) and no right to recover the erroneous payment from the putative creditor (because error of law bars a *condictio indebiti*). The debtor thus

[1]Erskine *Institute* III,4,3; see also Bell *Principles* (4th edn; 1839) s 561, fn (c). See also cases collated in Morison's Dictionary, sv *Bona et Mala Fides*, pp 1696 to 1702.

suffers liability in double payment and the putative creditor is unjustifiably enriched by a windfall benefit.

3.70 This injustice would be removed if the error of law rule were to be abolished in the *condictio indebiti* as proposed in Part II.

3.71 The question arises, however, whether it should be provided by statute that the debtor's error of law should not preclude a defence of *bona fide* payment. The effect would be that the true creditor would have to sue the wrongly paid putative creditor rather than, or as well as, the debtor which, as Kames remarked, "may as often be beneficial to the true creditor, as detrimental".[1] This would normally depend on whether the debtor or the putative creditor were insolvent.

3.72 It seems to us that the difficulties of distinguishing between error of fact and error of law identified in Part II are as likely to arise in the context of a defence of *bona fide* payment as in the context of a *condictio indebiti*. On this view, the opportunity should be taken of abolishing the error of law rule in that context also.

3.73 We propose:

> **Where a debtor pays a debt to a putative creditor under error of law or mixed fact and law, and the true creditor raises an action against the debtor for payment of that debt, the debtor should be entitled to found on a defence of *bona fide* payment in that**

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[1] *Principles of Equity* (5th edn; 1825) p 349.

action if he would have been so entitled had the error been wholly one of fact.
(Proposition 6)

(3) Recompense for unauthorised improvements of another's property

3.74 Preliminary. Another group of typical fact-situations consists of those cases where the pursuer has incurred expenditure in work or materials effecting improvements on or repairs to the defender's property without the latter's consent or authority. These include cases of building or agricultural operations on another's land, works of maintenance and improvement on another's buildings, and repairs of moveables belonging to another.[1] The pursuer loses his materials by accession to the defender's property. Moreover, the product of his work enriches the defender and not the pursuer who, apart from an enrichment claim, would derive no benefit from it. Most cases in this category where recompense is allowed involve improvements by the possessor of another's property in the bona fide but mistaken belief that it is his own. In claims for recompense for improvements by a person possessing on a limited title, the improvements are generally deemed to be for his own benefit and recompense is normally refused.[2]

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[1]Most of the cases relate to improvements of heritable property by building thereon but other improvements such as planting or draining found a claim: Gordon Scottish Land Law para 14.55. Probably the same principles apply to moveables: Edinburgh Life Assurance Co v Balderston (1909) 2 SLT 323 (premiums on life assurance policy by holder under a void title).

[2]Eg Erskine Institute III,1,11; Bell Principles s 538; Hodge v Brown (1664) Mor 13400; Grant v Macleod (1856) 19 D 127; Scott's Executors v Hepburn (1876) 3 R 816; Fraser's Trs v Fraser (1894) 21 R 790; Wallace v

3.75 Mistaken improvements by bona fide possessors. In cases of mistaken improvements by bona fide possessors, the pursuer does not act with the object of fulfilling a purported contractual or legal obligation which he erroneously thinks he owes the defender, nor does he act under improper compulsion, undue influence or the like, nor does he make a conditional gift. Such cases differ therefore from the first category.[1] Nor does the pursuer have a remedy in negotiorum gestio (an actio neg gest contraria) because he is a bona fide possessor acting exclusively to promote his own interest rather than the defender's interest. Bona fide possessors' mistaken improvements are best treated as a separate category which differ in their features and legal policy implications from other categories of enrichment claim.

3.76 Civilian background. In Roman law the bona fide possessor of another's property had a right of retention in respect of erroneous improvements to that property, but through an important historical development noted by Bankton,[2] in the ius commune he was also conceded an affirmative right of action. Both of these rights of retention and action survive in civilian and mixed systems such as French, German and South African law.[3] This

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Braid (1900) 2 F 754; and see Rankin v Wither (1886) 13 R 903.

[1]See paras 3.32, 3.33 and 3.43 ff.

[2]Institute I,9,42.

[3]See eg Dawson Unjust Enrichment pp 51, 52; 67 to 70; 98; 132-134; De Vos "Unjustified Enrichment in South Africa" [1960] Juridical Review 125 at pp 133, 134; 139-141; von Caemmerer "Problemes Fondamentaux" (1966) 18 Rev Int de Droit Compare 573 at pp 584-585. German law calls the action an "expenditure action"

contrasts with the traditional approach in English and Commonwealth law which in principle denies the mistaken improver an enrichment claim.[1]

3.77 The basis of the bona fide possessor's claim. In this respect, Scots law has followed the civilian approach, and the Institutional writers subsume the bona fide possessor's remedy under the doctrine of recompense.[2] This category of case is important for enrichment theory inter alia since most of the judicial dicta affirming the need for error as a requirement of recompense were stated in recompense actions by improvers of another's property.[3] The case of the bona fide possessor's mistaken improvements is however rather special.[4] The bona fide possessor has enriched the owner defender by his own act without payment or other prestation. He desired to act only in his own interest. If he had known the true facts, he would be denied an enrichment claim because he would have assumed the risk of being paid. The error which he makes does not relate to his legal liability but is rather

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(Verwendungskondiktion).

[1]See Goff and Jones Restitution pp 144-149; Birks Introduction pp 121-124; Maddaugh and McCamus, Restitution p 283 ff; R J Sutton "What should be Done for Mistaken Improvers?", Chapter 8 (p 241 ff) in P D Finn (ed) Essays on Restitution (1990).

[2]Stair Institutions I, 8, 6; II, 1, 40; Bankton Institute I, 9, 42; II, 9, 68; Erskine Institute II, 1, 15; II, 6, 39, 43; III, 1, 11; Kames Principles of Equity (5th edn) pp 92-96; Baron Hume Lectures vol III, pp 169-172; Bell Principles ss 538, 937, 1063, 1255.

[3]See para 3.19 above.

[4]Von Caemmerer "Problemes Fondamentaux" (1966) 18 Rev Int de Droit Compare 573 at pp 584, 585.

a bona fide but erroneous belief that he (or a third party[1]) is the true owner of the property which he has improved,[2] or that he has a contractual right to become owner,[3] or that he possesses under a title equivalent to ownership.[4]

3.78 Whether error of law precludes recompense. Stair thought that even a mala fide possessor had a right to recompense for improvements[5] and therefore would not have regarded error of law as a bar to recovery. It is however now established that a mala fide possessor does not have a right to recompense for improvements.[6] There does not seem to be any authority in mistaken improver cases holding that possession based upon error of law cannot be bona fide. On the other hand, in the related context of claims by a bona fide possessor to the fruits of the

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[1]Duff, Ross and Co v Kippen (1871) 8 S L Rep 299; McDowel v McDowel (1906) 14 SLT 125 (OH).

[2]See eg York Buildings Co v Mackenzie (1795) 3 Paton 378; (1797) 3 Paton 579; Magistrates of Selkirk v Clapperton (1830) 9 S 9; Douglas v Douglas's Trs (1864) 2 M 1379; Morrisons v Allan (1886) 13 R 1156; Newton v Newton 1925 SC 715 (pursuer took title in fiancee's name intending her to hold it in trust for him: failed to prove trust by writ or oath); Wood v Gordon (1935) 51 Sh Ct Reps 132.

[3]Yellowlees v Alexander (1882) 9 R 765.

[4]Clarke v Brodie (1801) Hume 548; McKay v Brodie (1801) Hume 549; (tenure described as "kindly tenancy").

[5]Institutions I, 8, 6; see also Bankton Institute I, 9, 42 (mala fide possessor had right of retention); contra Erskine Institute III, 1, 11; Bell Principles s 538.

[6]Barbour v Halliday (1840) 2 D 1279; Buchanan v Stewart (1874) 2 R 78 at p 81 per Lord Neaves; Rankin v Wither (1886) 13 R 903 at p 908 per Lord Young; Duke of Hamilton v Johnston (1877) 14 SL Rep 298; Waugh v More Nisbett (1882) 19 SL Rep 427; Soues v Mill (1903) 11 SLT 98 (OH).

subjects possessed (ie the defence of bona fide perception and consumption), there is Institutional authority that the possession is not bona fide if it rests on an error of law.[1] Furthermore, an error of law precludes a defence of bona fide payment.[2] On these analogies,[3] it may be that error of law would bar an improver's claim though the matter is not free from doubt. In McDowel v McDowel[4] recompense was allowed for improvements made in the bona fide but mistaken belief that a lease was valid whereas in fact it was null, and was subsequently reduced, as contravening the Montgomery Act[5] relating to entails. As a matter of logic this could be characterised as an error of law. It seems however that, as we have seen[6], a belief that a contract is valid is treated as an error of fact. The question is therefore still open.

3.79 Whether error must be excusable. There are judicial dicta in cases of recompense for improvements which require that the error be "justifiable or excusable".[7]

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[1]Stair Institutions II, 1, 24; Bankton Institute I, 8, 16; Erskine Institute II, 1, 27; Carey Miller Corporeal Moveables p 80. See para 3.124 below.

[2]See para 3.68 above.

[3]Cf Gordon Scottish Land Law para 14.57; "In general, the question of the bona fides of the possessor is determined in the same way in the case of meliorations as in the case of a claim to fruits. ..."

[4](1906) 14 SLT 125.

[5]1770, 10 Geo.III c.51.

[6]See para. 2.53 above; Haggarty v Scottish TGWU 1955 SC 109.

[7]See eg Soues v Mill (1903) 11 SLT 98 at p 100 per Lord Kyllachy: "In all cases ... it appears to me to be an essential requisite that the expenditure for which

This requirement, or possible requirement, seems to have been borrowed in this century from the requirement of "excusable error" in the condictio indebiti. The supposed requirement is not however firmly established.

3.80 Policy considerations. Enrichment claims by mistaken bona fide possessors raise difficult policy questions. On the one hand, it may seem harsh to impose an obligation of recompense on the true owner in respect of an "enrichment" which he does not want; which he cannot realise except by selling the whole property; and which he cannot afford to pay for otherwise.[1] On the other hand, it may seem equally harsh if the bona fide possessor cannot recover expenditure which otherwise the true owner would not have been able to avoid incurring out of his own funds.[2] These policy considerations have not been discussed by commentators on the Scots law.

3.81 As noted above,[3] there is doubt whether error, or excusable error, of law does indeed bar a claim for recompense by a mistaken improver. Unless it can be said

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recompense is sought shall have been made in error, and not only in error, but in justifiable or excusable error; ..."; Newton v Newton 1925 SC 715 at p 723 per Lord Anderson: "The claimant for recompense must establish three things: (1) that expenditure was made by him; (2) that this expenditure was made in error; and (3) that this error was justifiable or excusable"; Gray v Johnston 1928 SC 659 at p 664 per Lord Murray (Ordinary): "error - that is, under a bona fide and justified, but mistaken, belief as to the actual existing facts".

[1] Cf von Caemmerer, "Problemes fondamentaux" (1966) 18 Rev int de droit compare 573 at p 585.

[2] Idem.

[3] See para 3.78.

that such claims should not be extended beyond their existing limits or possible limits, it seems right that any enactment abolishing the error of law rule should apply to cases where the improver's error is an error of law. The basis of the claim is unjustified enrichment and, as stated above, whether the error is of fact or law is irrelevant to that issue. Thus for example in a case where the true owner would have had to incur the expenditure out of his own funds, the fact that the improver's mistake was an error of law seems irrelevant. We seek views on this provisional conclusion.

3.82 Erroneous predictions or expectations. There are cases involving erroneous predictions as to future events which have resulted in conflicting decisions which are difficult to reconcile, eg a husband's improvements to his wife's property in the mistaken expectation that she would bequeath it to him.[1] In principle, an expectation of future benefit amounts to a voluntary assumption of risk rather than a factor making the defender's enrichment unjustified.[2]

3.83 Management expenses. In Anderson v Anderson[3] one of four brothers and sisters carried on the management of a farm tenanted by them in the erroneous belief that he had entered into an agreement with them that the farm was to become exclusively his own. In fact the agreement

[1]Compare Rankin v Wither (1886) 13 R 903 (no recovery) criticised by Clive Husband and Wife (3d edn, 1992) pp 256, 257; and Reedie v Yeaman (1875) 12 SL Rep 625 (OH) (recovery allowed).

[2]See para 3.99 below.

[3](1869) 8 M 157.

stipulated that he was to manage for them all. It was held that he was entitled to reimbursement of a reasonable sum, either on the ground of recompense or implied agreement. On the basis of this case, Gloag states that the bona fide possessor's claim for recompense will cover the management of property reasonably believed to belong to the party who has managed it, and is not confined to improvements.[1]

3.84 Proposal. We provisionally propose:

It should be made clear by statute that where the possessor of another's property makes repairs of or improvements to that property or manages that property believing in good faith but under an error of law or mixed fact and law that it belongs to either the possessor or a third party, the possessor should be entitled to recompense from the true owner if he would have been so entitled had the error been wholly one of fact.
(Proposition 7).

(4) Recompense from a debtor for payment of his debt or performance of his obligation

(a) Preliminary

3.85 Another group of typical fact-situations involves cases of payment of another's debt. Payment of another's debt is simply a type of enrichment and if the main taxonomy were based on grounds of recovery, such cases might be subsumed under the first category. But there are at least two reasons why it seems convenient to treat such cases separately as a main category in the taxonomy.

[1]Gloag Contract (2d edn) p 325.

3.86 First, in the case of benefits (payments, transfers or the product of services) conferred without donation or obligation, normally the pursuer can only recover from the defender if his purpose in conferring the benefit (discharge of the purported obligation) was not fulfilled because of error, or his conferment of the benefit was vitiated by compulsion or by some other factor. By contrast, in cases of payment of another's debt, not only does recompense lie against the debtor even though the payer's purpose (discharge of the debt) was fulfilled but also it can be said that recompense does not lie against the debtor unless the payer's purpose was indeed fulfilled. For if the debt is not discharged, the debtor is not enriched and so cannot be liable in recompense to the third party payer.

3.87 Second, recompense for payment of another's debt involves the complexities of three-party situations. The third party's claim of recompense against the debtor is closely related to the question whether he can recover from the payee/creditor.

3.88 We note that in the Wilburg-von Caemmerer taxonomy, recompense against a debtor for payment of his debt, called a "recourse action" (Reichgriffskondiktion), is one of the four main categories of the law on unjustified enrichment. In Scots law, resembling civilian legal systems but differing from English law, a third party has in principle a legal power to discharge another's debt though the power is not unfettered and the principle is not entirely free from doubt.[1]

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[1]See vol 2, paras 2.158 to 2.160.

3.89 Repetition from the putative creditor. Where a third party pays another's debt in error, he may have an action of repetition (a condictio indebiti) against the creditor in broadly two situations. The first is where the third party erroneously believes that he is paying his own debt to the creditor.[1] Here a condictio indebiti lies against the creditor. The second case is where the third party's error relates not to his own liability to the payee (for he knows he is not liable) but to his own relationship with the debtor, or the debtor's relationship to the payee/creditor. This second type of case involves a three-party payment system recently explored by Dr R Evans-Jones[2] whose analysis is accepted with minor modifications in volume 2.[3] It is intended that our proposals for abolition of the error of law rule should apply in both of these types of case since the policy considerations are the same as in other cases where the condictio indebiti applies (eg overpayments or double payments). The discussion which follows proceeds on that assumption.

3.90 Overview. In this Section, we are concerned to establish the following propositions.

(1) In claims for recompense from a debtor for discharge of his debt (or performance of his obligation), error may found a claim but is not essential in all cases (para 3.91).

(2) That proposition is true even though some of the cases relied on as supporting it do not in fact

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[1]See vol. 2, paras 2.163 to 2.167.

[2]"Identifying the Enriched" 1992 SLT (News) 25.

[3]See vol. 2, paras 2.168 to 2.182.

do so since they relate to cases of unauthorised use of another's property. These form a separate category in the taxonomy in which liability is not based on an act of the pursuer conferring a benefit on the defender (paras 3.91, 3.92).

(3) Cases in which error is not essential include some cases where payment is made to protect another's interest (para 3.94) and some cases where the payment is made to protect the payer's interest (paras 3.95-3.99).

(4) Where a claim for recompense from a debtor for payment of his debt is founded on error, the error must be of fact. An error of law does not support the claim (paras 3.100, 3.101).

(5) Where a third party pays another's debt in error and repetition from the creditor is precluded (eg because the creditor has a defence of change of position), the third party should be entitled to recompense from the debtor, and it should not matter that his error is one of law (paras 3.104, 3.105)

(6) Where a third party pays another's debt in error and repetition from the creditor is allowed, the third party should claim against the creditor first in a condictio indebiti and only therefter against the debtor in recompense, since recompense is a subsidiary remedy not normally available until other remedies have been exhausted (paras 3.106-3.108).

3.91 Whether error essential in recompense claims against the debtor. In the leading modern cases on recompense for performance of another's obligation Varney

(Scotland) Ltd v Lanark Town Council[1] and Lawrence Building Co Ltd v Lanark County Council,[2] the question was discussed whether a claim for recompense can succeed where the pursuer has not incurred his loss under some error of fact. The view was accepted that error of fact may be essential in some cases, but not in others.[3] Lord Kissen remarked:[4]

> "While error of fact may found a claim, its absence cannot invalidate a claim if the other circumstances justify it."

In reaching this conclusion, reference was made to cases of unauthorised use of another's property[5]. This is the fifth category in our provisional taxonomy which is described briefly below.[6] In cases of the unauthorised use or interference with another's property, however, the basis of the defender's liability is not unjustified enrichment arising from the pursuer's act as in the first, third and fourth categories of the taxonomy, namely:

first category: P's payment or transfer to D[7];

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[1]1974 SC 245.

[2]1978 SC 30.

[3]Varney (Scotland) Ltd v Lanark Town Council 1974 SC 245 at pp 252, 256, 260; Lawrence Building Co Ltd v Lanark County Council 1978 SC 30 at pp 35, 42, 53, 54.

[4]Varney (Scotland) Ltd v Lanark Town Council 1974 SC 245 at p 256.

[5]See Varney (Scotland) Ltd v Lanark Town Council 1974 SC 245 at p 252 per Lord Justice-Clerk Wheatley (citing Mellor v William Beardmore and Co Ltd 1927 SC 597); at p 256 per Lord Kissen.

[6]See paras 3.110 to 3.117 below.

[7]See paras 3.32 to 3.55 above.

third category: P's unauthorised improvement of D's property;[1] and

fourth category: P's discharge of D's debt or other obligation (the present category).

Rather the basis of liability in the fifth category is the defender's act in taking, using or interfering with the pursuer's property without the pursuer's authority.

3.92 Since the basis of liability in the fifth category is the defender's act enriching himself, it is obvious (at least once stated) that consideration of the pursuer's error is out-of-place in determining liability in cases in that category. It follows that the fact that error is not a ground of recovery in cases of recompense for unauthorised use falling in the fifth category is not relevant to the question whether the pursuer's error is a ground of recovery in the other categories where liability does depend on the pursuer's act. In evolving principles of liability, it is necessary to compare like cases with like. As we indicate in the next following paragraphs, however, it is not necessary to found on cases of the defender's unauthorised interference with the pursuer's property in order to show that error is not a necessary ingredient of recompense in all cases.

(b) Recompense claim by third party payer against debtor where error not essential

3.93 In Scots law, as in other legal systems[2], there are undoubtedly cases where a third party discharges another's

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[1]See paras 3.74 to 3.84 above.

[2]See Friedmann and Cohen "Payment of Another's Debt" sub-chapters II (Payment to Protect Another's Interest) and III (Payment to Protect the Interest of the Payer).

debt, or performs another's obligation, without error and yet is entitled to recompense from the debtor.

3.94 Payment to protect another's interest. Payments to protect another's interest are usually actionable (if at all) in negotiorum gestio, but in some cases, recompense lies. An example is where a third party pays aliment to an alimentary creditor and claims recompense from the alimentary debtor whose obligation of aliment he has thereby discharged.[1] There are also older cases where a person providing aliment for a pauper entitled to poor relief recovered its cost from the liable poor law authority.[2] A modern example is Duncan v Motherwell Bridge and Engineering Co[3] where employers of a workman in a foreign country on repatriating him, discharged his debts incurred there and were held entitled to reimbursement, there being no contractual obligation and no intention of donation.

3.95 Payment to protect the third party payer's interest. Another category of case where error is not, or not

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[1]Reid v Robertson (1868) 6 SL Rep 77; Stevenson v McDonald's Tr 1923 SLT 451; Mackenzie's Tutrix v Mackenzie 1928 SLT 649: see our Consultative Memorandum No 22 on Aliment and Financial Provision (1976) para 2.80. Sometimes the third party's claim is regarded as an actio negotiorum gestorum contraria on the theory that the third party payer is the gestor and the alimentary debtor is the dominus negotii: see Thom v Jardine (1836) 14 S 1004; Ligertwood v Brown (1872) 10 M 832; Gilbert v Hannah (1924) 40 Sh Ct Reps 262.

[2]Howie v Kirk Session of Arbroath (1800) Mor sv "Poor" App'x 1; Malvie v Mackenzie (1859) 1 Guthrie 400.

[3]1952 SC 131 at pp 147, 157 and 159. The company also recovered recompense for paying the workman's homeward fare under a contractual provision which turned out to be void.

always, essential are those cases where the third party makes the payment to protect his own interest.[1] An example is a case where if the debt is not discharged, the third party payer may lose a proprietary or possessory right or expectancy. Thus in Morgan v Morgan's JF[2] a wife recovered recompense in respect of premiums advanced to trustees to keep up an assurance policy, on her husband's life, over which she had a *spes successionis*. Recompense must however be claimed from the debtor and not from a person over whose property the debt is secured where that person is not the debtor.[3]

3.96 Sometimes "public law" allocates duties differently from private law. Where a public authority, by a statutory notice, requires a citizen (eg an owner, tenant or occupier of premises) to carry out works (eg under building control, housing, planning or public health legislation), the works may have the effect of discharging another's private law obligations, such as a landlord's or tenant's duties of repair and maintenance under a lease. In the absence of statutory provision for recompense or relief, it is possible that a private law claim for

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[1]See Friedmann and Cohen, "Payment of Another's Debt" sub-chapter III.

[2]1922 SLT 247 (OH) cited in Varney (Scotland) Ltd v Lanark Town Council 1974 SC 245 at pp 248, 249 per Lord Stott (Ordinary). See also Brown v Meek's Trs (1896) 4 SLT 46 (action of recompense premature).

[3]Wallace v Braid (1900) 2 F 754 (liferentrix of heritable property paid debt secured over the property in order to prevent the property being sold. Held not entitled to recompense from the fiar who was not the debtor).

reimbursement may nevertheless lie which could in principle be laid in recompense.[1]

3.97 Where a third party payer discharges another person's debt or obligation under a contract, which subsequently turns out to be void,[2] or which fails through breach of contract[3] and recovers recompense, he acts in his own interest and may recover recompense. In the cases cited involving void contracts, the payer mistakenly thought he was obliged to discharge the debt. In a recent case, error was also present. A woman paid instalments towards the purchase of a car under a hire purchase agreement in which her "common law husband" was purchaser, in the mistaken belief that the car would be jointly owned

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[1]Cf Trades House of Glasgow v Ferguson 1979 SLT 187 (right to reimbursement for demolition of common gable wall from adjoining owner based on relief, not recompense); see also Moray County Council v Grant (1932) 48 Sh Ct Reps 292 at p 294.

[2]Edinburgh Life Assurance Co v Balderston (1909) 2 SLT 323 (OH) (insurance premiums paid by ostensible assignee-owner of life assurance policy in mistaken reliance on validity of an invalid assignation; recompense from true owner); cf White v Romanes (1921) 37 Sh Ct Reps 111; Duncan v Motherwell Bridge and Engineering Co 1952 SC 131 at pp 147, 157, 159 (employer company paid fare for employee defender's passage home under a provision in a contract subsequently held void: recompense from employee).

[3]Campbell v Price (1831) 9 S 264 (man employed to look after personally a steamboat in harbour but defaulted in obligation. Under regulations of the harbour, the owners bound to have some person on board to protect the vessel. Employee employed a boy to fulfil this obligation "of police". Held: employee's expense in hiring boy's service was in rem versum of the vessel owners who were therefore bound to recompense him).

by them both under the contract. She was held entitled to recompense from him.[1]

3.98 The two leading cases on recompense for performance of another's obligation concerned the performance by a builder of a local authority's statutory duty to construct sewers.[2] In such cases, there is no debtor properly so-called since the local authority's duty is owed to the public. In the Varney case, the pursuer's claim was refused because he failed to use a remedy available to him, namely a declarator or petition for specific performance, it being affirmed that recompense is a subsidiary remedy. In this case there was a dispute from the start as to the local authority's liability to make or pay for the sewers. The pursuer unilaterally sought to create a recompense situation by carrying out the work, instead of having the dispute judicially determined. Lord Fraser observed that if the pursuers succeeded:

> "it would open the door very wide for any party to short-cut proper procedure, by undertaking a duty which rested upon a local authority and then turning round and claiming reimbursement from the local authority. In principle, of course, the possibility would not stop at local authorities but could extend to other persons. That would introduce quite novel and ... undesirable possibilities."[3]

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[1] Scanlon v Scanlon 1990 GWD 12-598 (Sh Ct).

[2] Varney (Scotland) Ltd v Lanark Town Council 1974 SC 245; Lawrence Building Co Ltd v Lanark County Council 1978 SC 30.

[3] Varney (Scotland) Ltd v Lanark Town Council 1974 SC 245 at p 259: see also at p 253 per Lord Justice-Clerk Wheatley: "the practical repercussions of allowing such unilateral action to supersede the duty imposed by statute on a local authority to secure a planned and efficient system of sewerage within the burgh need only be stated for their dangers to be manifest".

There are echoes here of the rule debarring "officious intermeddlers" from recompense,[1] but this concept is not found in Scots law to the same extent that it is in English law which acknowledges no doctrine of negotiourum gestio.

3.99 By contrast, in the Lawrence Building Co case,[2] the facts were materially different. The parties were not initially in dispute; the pursuers had followed previous officially approved practice in which they made up sewers and were paid by the local authority. The pursuers averred that they carried out the works "in the erroneous belief that the defenders would on satisfactory completion pay an agreed valuation sum for them".[3] This was perhaps an expectation or misprediction which does not normally qualify as error,[4] but it was characterised as "in a sense an error in fact, in that the pursuers thought that they

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[1]See Bankton Institute IV, 45, 66 "It is a fault for one to intermeddle in the affairs of another, wherein he has no concern" (commenting on D.50.17.36); ibid IV, 45, 135 "A benefit cannot be obtruded upon a man, against his will" (commenting on D.50.17.69).

[2]Lawrence Building Co Ltd v Lanark County Council 1978 SC 30.

[3]Ibid at p 35.

[4]See eg Rankin v Wither (1886) 13 R 903; Gilchrist v Whyte 1907 SC 984 at p 994; Gray v Johnston 1928 SC 659; Site Preparations Ltd v Secretary of State 1975 SLT (Notes) 41 (OH); Dawson International plc v Coats Patons plc 1988 SLT 854 (OH) at p 866; MacKechnie v Cameron (1936) 52 Sh Ct Reps 44; McIvor v Roy 1970 SLT (Sh Ct) 58. Cf the Lawrence Building Co case 1978 SC 30 at p 54 per Lord Cameron: "the use of the word 'expectation' can be misleading and not very happy. Much depends on the circumstances and actions which are said to have induced the expectation and therefore the extent to which that expectation is to be regarded as justified in the circumstances of the particular case ..."

were carrying out work for which the defenders would pay them in due course".[1] Proof before answer was allowed.[2]

(c) Recompense claim by third party payer against debtor where error essential

3.100 Error of law rule applies to recompense founded on error. There is obiter but clear authority that where a third party performs another's obligation under error, and the third party claims recompense from the obligant relying on his (the third party's) error, the error must be one of fact. An error of law will not support the claim.[3]

3.101 It seems to us that the error of law rule should be abolished in this class of case as in the case of a condictio indebiti.

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[1] Ibid per Lord Maxwell at p 35; ibid at p 43 per Lord President Emslie; cf ibid at pp 53, 54 per Lord Cameron: "if there was no contract between the parties then plainly the pursuers were acting under an obvious error as to the true situation of the county council's powers and consequent liability to pay for sewers constructed in the circumstances..."

[2] There are other cases in which performance of a "public law" obligation has given rise to recompense. See Campbell v Price (1831) 9 S 264.

[3] Varney (Scotland) Ltd v Lanark Town Council 1974 SC 245 at p 252 per Lord Justice-Clerk Wheatley: "The mistake here may have been an error in regard to the law but it was not an error in fact, and an error in law would not support the pursuers' claim"; ibid at p 260 per Lord Fraser: "The pursuers here were under no error of fact; if they acted under any error, it was an error as to the general law and that would not help their claim". See also at p 256 per Lord Kissen: "While error of fact may found a claim, its absence cannot invalidate a claim, if the other circumstances justify it." (emphasis added).

3.102 We are concerned here with cases where the third party paid a debt in circumstances where the debtor neither solicited the payment nor induced it by fraud or otherwise. As Friedmann and Cohen point out, in such cases the right of the mistaken payer to recompense from the debtor is "strongly related" to the question whether he is entitled to repetition from the payee/creditor.[1]

3.103 In their analysis, there are two possibilities.[2]

(i) Where repetition from the creditor is precluded, a claim of recompense against the debtor remains the third party's sole remedy.

(ii) Where repetition from the creditor is allowed, whether recompense from the debtor lies turns on whether the mistaken payer can choose to sue him or whether he must sue the creditor.

(i) Where repetition from the creditor is precluded

3.104 Where a third party pays another's debt erroneously believing that the debt is due by him (the third party) and the error is one of law, he cannot under the existing law recover from the creditor[3] nor, it seems, from the debtor (unless there are other circumstances justifying his claim).[4] If the error of law rule were to be abolished as proposed in Part II, he would normally be entitled to recover from the creditor by *condictio*

[1]Friedmann and Cohen "Payment of Another's Debt" para 79.

[2]*Idem*.

[3]Part II above.

[4]See para 3.100 above.

indebiti. He may however be met by an equitable defence of change of position in a *condictio indebiti* against the creditor. In such circumstances, the third party payer's only remedy would be in recompense against the debtor. Friedmann and Cohen remark[1]:

> "It is generally accepted by most legal systems that the debtor should not get a free discharge because a third party paid his debt under mistake."

Since the third party's payment is vitiated by error and the debtor has been enriched unjustifiably by the discharge of a debt which he is under a legal obligation to pay, the third party should have a claim of recompense against the debtor and it should not matter that the error is one of law. This type of case is in principle the same as cases where under the existing law a third party pays another's debt under a void contract thinking he is liable, and has been held entitled to recompense from the debtor.[2]

3.105 There is, however, an apparent logical or theoretical difficulty in allowing a third party payer to sue the creditor first by *condictio indebiti* and, on its failure, to sue the debtor second in recompense. Where the third party sues the creditor by *condictio indebiti*, he affirms that the debt is not discharged. For if his payment did discharge the debt, the payment would be irrecoverable. By contrast, where the third party sues the debtor in recompense, he affirms that the debt is discharged. For if his payment did not discharge the debt, the debtor would not be enriched and so would not be liable in recompense. The solution would seem to be that

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[1] "Payment of Another's Debt" para 49.

[2] See para 3.97 above.

in the recompense claim, the third party would be treated as homologating his erroneous payment to the creditor, and thereby discharging the debt so as to enrich the debtor.

(ii) Where repetition from the creditor is allowed

3.106 Where the third party pays another's debt under error of law, and assuming legislation ultimately abolishes the error of law rule, he may have a *condictio indebiti* against the creditor and an action of recompense against the debtor. In some legal systems, the third party has a right to choose or elect between these remedies which are thus concurrent.

3.107 In Scots law, however, the doctrine of subsidiarity applies to an action of recompense, and in particular to recompense for discharge of another's obligation.[1] It does not apply to a *condictio indebiti* or other action of repetition. It would follow that the third party would be bound to raise a *condictio indebiti* first against the creditor. Only if that action failed would he be entitled to maintain the payment as a valid discharge and bring an action of recompense against the debtor. The result is similar to the French law where the doctrine of subsidiarity applies to an action under the doctrine of "*enrichissement sans cause*" (against the debtor) but not to an action of "*repetition de l'indu*" (against the creditor).[2]

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[1] *Varney (Scotland) Ltd* v *Lanark Town Council* 1974 SC 245. See para 3.14 above.

[2] Friedmann and Cohen, "Payment of Another's Debt" para 84.

3.108 There may be a question whether the doctrine of subsidiarity is sound in principle but that is not a matter with which this Discussion Paper is concerned. It seems to us that the foregoing requirement of suing the creditor first and the debtor later is not unsatisfactory.

(d) Our proposal

3.109 We propose:

Where a third party (ie a person who is neither the debtor nor the creditor) under error of law or mixed fact and law pays a debt, or discharges an obligation, due by another person, the third party should be entitled to recompense from that person if he would have been so entitled had the error been wholly one of fact.

(Proposition 8).

(5) Repetition, restitution and recompense redressing enrichment arising from unauthorised interference with property rights

3.110 A separate category. It does not seem that Scots law received the Roman or civilian condictio (ex causa) furtiva[1] which lay inter alia for unauthorised and unjustified interference with property rights, and did not require a direct payment or transfer by the pursuer to the defender.[2] Nevertheless there exists in Scots law a separate and very important category of unjustified enrichment cases which concerns those fact-situations in which the defender's enrichment flows not from the conferment on him of a benefit by the act of the pursuer

[1] Cf Bankton Institute I,8,33; Dawson v Stirton (1863) 2 M 196 at p 202 (pursuer's argument).

[2] See Zimmermann Law of Obligations pp 836, 838-840, 853, 919, 941 ff, 943, 947 ff, 951 ff.

(as in the first, third and fourth categories mentioned above) but rather from an unauthorised interference by the defender, or sometimes by a third party, with the pursuer's property rights. The existence of such a category has already been recognised by some modern expositions of the Scots law on recompense[1] perhaps however without sufficient emphasis being laid upon the key differences between this and other categories of unjustified enrichment.

3.111 English and German jurists recognise respectively a wrong-based and interference-based category within their differing taxonomies. Thus Goff and Jones recognise, as one of their three major categories of restitutionary claims, cases where "the benefit has come into the hands of the defendant in consequence of some wrongdoing on his part".[2] Birks[3] argues that the main division is between restitution for unjust enrichment "by subtraction" (ie at the plaintiff's expense) and restitution for wrongs, which are separated by "a major divide"[4]. Similarly, as we have seen, German law distinguishes actions based on the defender's unauthorised interference with the pursuer's property rights (called an "interference condictio",

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[1]The category of "unauthorised use of property" is found in Gloag Contract (2d edn, 1929) pp 329-330, and in Lord Wark's article on "Recompense" in the Encyclopaedia of the Laws of Scotland vol 12 (1931) 342 at pp 345, 346, where it is called "Remuneration for use of property".

[2]Goff and Jones, Restitution p 57.

[3]Birks Introduction pp 313 ff.

[4]Ibid at p 313.

Eingriffskondiktion) from other enrichment actions.[1] In an important pioneering article,[2] Professor Blackie has recently considered Scottish authorities on a claim for the disgorgement of an enrichment not mirrored by loss to the pursuer. He concludes:[3]

> "Scots Law does not have any rule constituting an absolute barrier to a claim from enrichment from wrong not mirrored by loss. It has at times randomly supported claims and found itself able to accommodate English law relating to fiduciary duties in a form that was not inevitable given its own existing materials.
>
> Scots material, however, does not contain any formulation or discussion of a general principle to unify the examples. Nor has there been any attempt to point to any unifying feature. Although it is possible, perhaps, to discern a policy against exploitation of being in an advantageous situation."

The article refers to few of the authorities cited in paragraphs 3.112 to 3.116 below and generally deals with doctrines (such as spuilzie and auctor in rem suam) outside the classic domain of repetition, restitution and recompense. It seems to us that within that domain, the relevant category is not enrichment by wrongdoing (as if for example the torts of conversion or detinue were part of Scots law which they never have been) but enrichment by unauthorised interference with the pursuer's property rights. Indeed, the forms of unauthorised interference with property rights remediable by repetition, restitution

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[1]See Zweigert/Kotz/Weir Comparative Law vol 2 pp 236-237; Dickson "Restitution in German and English Law" (1987) 36 ICLQ 751 at pp 776-778; Zimmermann "A road through the enrichment-forest?" (1985) 18 CILSA 1 at pp 12-14; E von Caemmerer "Problemes fondamentaux" (1966) 18 Revue Internationale de Droit Compare 572 at pp 580-584.

[2]John Blackie "Enrichment and Wrongs in Scots Law" [1992] Acta Juridica 23.

[3]Ibid at p 47.

or recompense under Scots law appear similar to the typology of "eingriffskondiktion" cases in German law.[1] In some cases of recompense for unauthorised use of another's property, it does not seem that the pursuer has to establish loss.[2] This conforms to the rule in German law on the eingriffskondiktion and, despite Gloag's criticism,[3] appears consonant with principle.

3.112 Recompense for defender's interference with pursuer's property rights. The forms of unauthorised interference with property rights remediable by recompense include cases where the enrichment flows from the defender's unauthorised possession and use of the pursuer's moveable goods[4], or intellectual property rights such as a patented invention[5] or the defender's unauthorised occupation of the pursuer's

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[1]See fn 1 p 176 above.

[2]See eg Mellor v William Beardmore and Co Ltd 1927 SC 597 and the cases on the defender's possession and use of the pursuer's heritable property without his consent to its gratuitous use cited in the next paragraph.

[3]See the comments by Gloag Contract (2d edn) p 291, fn 11, referred to by Lord Kissen in the Varney case, 1974 SC 245 at p 256.

[4]Chisholm v Alexander & Son (1882) 19 SLR 835.

[5]Mellor v William Beardmore & Co Ltd 1927 SC 597.

heritable property[1], or his unauthorised sale[2] or consumption or destruction[3] or industrial or other processing (union, mixing or creation) of the pursuer's goods[4], whereby in some cases the defender obtains title to the new product by industrial accession[5].

3.113 Specific restitution. An unauthorised taking and retention of the pursuer's moveables by the defender is remediable by an action of specific restitution sometimes combined with an alternative conclusion for the value of

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[1]See Young v Cockburn (1674) Mor 11624; Earl of Fife v Wilson (1864) 3 M 323; Glen v Roy (1882) 10 R 239; Cooke's Circus Buildings Co v Welding (1894) 21 R 339; Stirling County Council v Cullen (1943) 59 Sh Ct Rep 83; HMV Fields Properties Ltd v Skirt 'n' Slack Centre of London Ltd 1986 SC 114 (OH); Shetland Islands Council v BP Petroleum Development Co Ltd 1990 SLT 82 (OH); 1989 SCLR 48 (OH); Rochester Poster Services Ltd v A G Barr plc (unreported, Sheriff Principal N D Macleod at Glasgow, 17 March 1993) 1993 GWD 15-976; cf City of Glasgow DC v Morrison McChlery and Co 1985 SC 52.

[2]Ferguson v Forrest (1639) Mor 4145; Findlay v Monro (1698) Mor 1767 (defender's admission: "if he had sold it, he would have been liable as locupletior factus"); Scot v Low (1704) Mor 9123; Henderson v Gibson (1806) Mor voce "Moveables" App'x No 1; Faulds v Townsend (1861) 23 D 437; North West Securities Ltd v Barrhead Coachworks Ltd 1976 SC 68 (OH), 1975 SLT (Sh Ct) 34.

[3]Findlay v Monro (1698) Mor 1767 (consumption); Walker v Spence and Carfrae (1765) Mor 12802 (slaughter of sheep and sale of their meat).

[4]Faulds v Townsend (1861) 23 D 437 (killing of horse and boiling of carcass with other horse carcasses to make manure); Oliver & Boyd v Marr Typefounding Co 1901, 9 SLT 170 (OH); International Banking Corporation v Ferguson 1910 SC 182.

[5]See previous footnote.

the goods or recompense.[1] Sometimes it is not clear whether the action is a proprietary action in the nature of a rei vindicatio or a personal action for recovery of possession. Where a vitium reale attaches (because the goods are stolen) the action is proprietary, but in other cases the remedy may be in unjustified enrichment.

3.114 Repetition or recompense for misappropriation of funds. Where recovery is sought of funds in the defender's possession which the defender has misappropriated, the remedy has sometimes been held to be repetition[2] and sometimes recompense.[3] A recent obiter dictum suggests that either remedy is available,[4] but the issue has not been examined in depth by the courts.

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[1]Smith v Arnot (1821) 1 S 8 (horse arrested as belonging to debtor but in fact belonging to third party; restitution ordered); George Hopkinson Ltd v N G Napier & Son 1953 SC 139; Carlton v Miller 1978 SLT (Sh Ct) 36 (restitution following poinding of pursuer's goods for third party's debt); Kinniburgh v Dickson (1830) 9 S 153 (when pursuer fell into canal, defender assumed charge of the pursuer's pocketbook: held liable in restitution); Gowans v Thomson (1844) 6 D 606 (action by seaman for restitution of moveables, or their value in money, against owner of vessel which had abandoned him at a foreign port with the goods on board).

[2]Eg Didsbury Engineering Co Ltd v Marshall (unreported) 1992 GWD 30-1748 (2d Div) affg 1991 GWD 16-964 (OH) (defender misappropriated funds sent to him for payment to the pursuer); cf Costin v Hume 1914 SC 134 at p 138, suggesting that the pursuer's remedy is an action of payment. See volume 2, para 2.11.

[3]Eg Bennett v Carse 1990 SLT 454 (OH) (defender used funds of pursuer to meet defender's liability to rates due on the defender's house without the authority and contrary to the wishes of the pursuer).

[4]Royal Bank of Scotland plc v Watt 1991 SLT 138 at p 144 per Lord Justice-Clerk Ross.

3.115 Rationale. Borrowing at a general level from comparative law, it is perhaps possible to state in general terms the rationale underlying the rules applicable in those cases where the enrichment derives from the invasion of the pursuer's property rights. The right of property or ownership carries with it the exclusive rights of use, consumption, and disposal (jus utendi, fruendi, abutendi[1]): the objective of the law in attributing the ownership of a thing to any individual is to allow him the exclusive exercise and enjoyment of these rights. Any enrichment which any other person acquires by exercising these rights without the owner's authority is therefore, in principle, unjustified. It follows that that person must restore to the owner the value which he would have had to pay if he had bargained for the benefits in question. In such a case the defender's enrichment is unjustified because it contradicts the objectives pursued by the law of property. In this category of case a claim

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[1]Von Caemmerer uses this Romanistic definition of ownership which the commentators adapted from the definition of usufruct. For Scottish definitions see Erskine Institute II,1,1: "the right of using and disposing of a subject as our own, except in so far as we are restrained by law or paction"; Baron Hume's Lectures vol III p 201: "the powers and privileges that wait on a right of Property ... seem to be mainly three: the power to use and enjoy the thing (or subject) - the power to recover [and vindicate] it when lost or taken away - and the power to alienate and dispose of the thing (subject) at pleasure. The first and most material of these vizt. the right to use the subject seems to sub-divide into two articles: the owner may hinder others from taking any use of his subject, - and he is entitled to take every use of it himself"; Bell Principles s 939.

for unjustified enrichment "forms an appendix to the rules on the protection of ownership and of other rights".[1]

3.116 Liability not dependent on error. In some cases involving the defender's invasion of the pursuer's property rights, an element of error may be present. For example, in Dunn and Stephen v Moyse and Co[2] coal dross belonging to the pursuers, through an erroneous or wrong order by a third party, was put on board the defenders' vessel (without the defenders' knowledge or the pursuers' knowledge or authority) where it was inmixed with the defenders' coal dross. This was discovered during the vessel's voyage to a foreign port, and the defenders had no option but to sell both quantities of coal dross. The defenders were held to be lucrati and liable to make good the pursuers' loss. Although the third party had probably acted in error, his state of mind was irrelevant to the issue of liability and was not discussed.

3.117 Since liability in these cases is dependent on the defender's interference with the pursuer's property rights and not on error (whether on the part of the pursuer, the defender or a third party), the abolition of the error of law rule will have no effect on them.

(6) Redress of indirect enrichment

3.118 The expression "indirect enrichment" (sometimes called "third party enrichment") is not a technical term of art in Scots law. It is, however, commonly used in

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[1]K Zweigert and D Muller-Gindullis, "Quasi-Contracts" in International Encyclopaedia of Comparative Law, vol III "Private International Law", Chapter 30, p 17, para 35.

[2](1891) 7 Sh Ct Reps 12.

legal writing to denote, broadly speaking, enrichment of a person arising out of a contract or other transaction between two others.[1] The topic has been called "the most notoriously difficult of all enrichment constellations"[2] and cannot be explored in depth here.

3.119 Typically the phenomenon of indirect enrichment arises where the pursuer transfers wealth to an intermediary or middle-man who transfers it to the defender or applies it for the defender's benefit, or where the pursuer, in pursuance of a contract with the intermediary, performs services enriching the defender. As a general rule, there is no recovery in cases where there is "a valid juridical act" (eg a contractual performance, negotiorum gestio, gift, or an involuntary transfer such as bankruptcy sequestration or diligence) (i) between both the pursuer and the intermediary and between the intermediary and the defender[3]; or (ii)

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[1]See eg A M Honore "Third Party Enrichment" [1960] Acta Juridica 236; de Vos "Unjustified Enrichment in South Africa" [1960] Juridical Review 125, 226 at pp 244-250; B Nicholas, "Unjustified Enrichment in the Civil Law and Louisiana Law" (1962) 36 Tulane Law Review 605 at pp 611-633; John P Dawson "Indirect Enrichment" in Ius Privatum Gentium. Festschrift fur Max Rheinstein zum 70 vol 2 (Tubingen, 1969) p 789; D H van Zyl Negotiorum Gestio in South African Law (1985) pp 102-105; 113-118.

[2]Zimmermann Law of Obligations p 874.

[3]Eg Thomson, Jackson, Gourlay and Taylor v Lochhead (1889) 16 R 373 (the pursuer an accountant was hired by the intermediaries, the creditors of the defender, to prepare a composition settlement between the intermediaries and the defender. The pursuer failed to recover recompense from the defender for his services); J B Mackenzie (Edinburgh) Ltd v Lord Advocate 1972 SC 231 (the pursuer, a sub-contractor, was hired by the intermediary principal contractor to do work on the defender's property. On the principal contractor's

between the pursuer and the intermediary but not between the intermediary and the defender;[1] or (iii) between the intermediary and the defender but not between the pursuer and the intermediary.[2]

3.120 A claim for recovery of indirect enrichment,

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bankruptcy, the pursuer failed to recover recompense from the defender for his services); White v McIntyre (1841) 3 D 334 (the pursuer supplied goods to the intermediary, a joint adventurer purchasing in his own name. The goods were used by the joint adventure. The pursuer failed to recover recompense from the defender, the other joint adventurer); Selby's Heirs v Jollie (1795) Mor 13438 (the pursuer was hired by the intermediary, a debtor in a heritable security, to make improvements on the security subjects. The pursuer failed to recover recompense from the defender, the creditor in the heritable security); Mess v Sime's Tr (1898) 1 F (HL) 22 affg (1898) 25 R 398 (the claimant in a sequestration under a contract with the intermediary, an insolvent farmer, had spent money on labour and seed for a crop on the intermediary's farm. On the intermediary's sequestration, the claimant sought recompense for his outlay over the proceeds of the crop, ie a preference over those proceeds. Held that the claimant could not claim such a preference but could only rank for a dividend as an ordinary creditor).

[1]Eg Ellis v Fraser (1840) 3 D 264 (the pursuer, on the instructions of the intermediary, erected hustings for an election. The defender used the hustings without the authority of the intermediary. The pursuer failed to recover recompense from the defender); Exchange Telegraph Co v Giulianotti 1959 SC 19 (OH) (the pursuer news agency supplied the intermediary, a subscriber, with information on condition that it was not to be communicated to non-subscribers. The intermediary supplied the defender, a non-subscriber, with the information. Held that the pursuer could not recover recompense from the defender).

[2]Eg Thomson v Clydesdale Bank (1893) 20 R (HL) 59 (the intermediary, a stock-broker, wrongfully misappropriated money belonging to his client, the pursuer, and paid it into his own overdrawn account with the defender bank. On the intermediary's abscondence, the pursuer failed to recover the money from the defender bank).

however, may be upheld in some cases, notably:

(a) where there is no valid juridical act either between the pursuer and the intermediary or between the intermediary and the defender[1]; or

(b) where the intermediary takes money or property from the pursuer by fraud and transfers it to the defender by way of donation[2] or the defender is implicated in the intermediary's fraud[3]; or

(c) "unauthorised agent" cases where the pursuer erroneously thinks that the intermediary is the defender's agent having the defender's authority to contract with the pursuer in that capacity when in fact the intermediary has no such authority, and the purported contract is null.[4]

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[1] Cf Extruded Welding Wire (Sales) Ltd v McLachlan and Brown 1986 SLT 314 (customers of the pursuer paid money to the intermediary in error when they should have paid the pursuer. The defender wrongfully misappropriated the funds from the intermediary. Held the pursuer could recover the money from the defender). See para 3.59 above.

[2] M & I Instrument Engineers Ltd v Varsada 1991 SLT 106 (OH) (intermediary obtained money from the pursuer by fraud, and donated it to the defender, his mistress. Held that the pursuer could recover from the defender).

[3] Scholefield v Templer (1849) 4 De G and J 429 at pp 433, 434 per Lord Campbell LC cited in Gibbs v British Linen Co (1875) 4 R 630 at p 634 ff; Clydesdale Banking Co v Paul (1877) 4 R 626 at pp 628, 629.

[4] Eg Bruce v Stanhope (1669) Mor 13403; Hawthorn v Urquhart (1726) Mor 13407; Commercial Bank of Scotland v Biggar 1958 SLT (Notes) 46. This category could be classified as a special instance of category (a).

It will be seen that at least in cases within categories (a) and (c), error may be involved (which could be an error of law). For example in a case of type (a), the pursuer may pay money to the intermediary in error and the defender may misappropriate it by taking it from the intermediary without his authority.[1] In a case in type (c), the error which misleads the pursuer into thinking that the intermediary has the defender's authority to accept the money could conceivably be an error of law eg as to statutory authority.

3.121 Since claims for redress of indirect enrichment were historically actionable by the actio (or actio utilis) de in rem verso of the ius commune, normally the remedy in Scots law is recompense which, is the modern descendant of that actio[2]. In some cases, however, for reasons which are obscure, the remedy is repetition[3] or restitution[4]. Because of the novel doctrine of subsidiarity in recompense, there may be a temptation to lay an action to redress indirect enrichment in repetition or restitution in order to avoid that doctrine.

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[1]Compare Extruded Welding Wire (Sales) Ltd v McLachlan and Bron 1986 SLT 314.

[2]Eg Stair Institutions I,8,7; Bankton Institute I,9,41; Skinner v Haddington Magistrates 17 February 1813 FC per Lord Robertson: "the action in rem versum is well known in our law"; and see the "unauthorised agent" cases cited in the previous paragraph, head (c).

[3]Clydesdale Banking Co v Paul (1877) 4 R 626.

[4]M & I Instrument Engineers Ltd v Varsada 1991 SLT 106(OH).

3.122 In principle the error of law rule should be abolished in the context of indirect enrichment claims as in other claims for the redress of unjustified enrichment.

3.123 We propose:

> **Where a person ("the defender") is enriched by reason of either:**
>
> **(a) the transfer of money or property from the pursuer to a third party and thereafter from the third party to the defender; or**
>
> **(b) expenditure or the performance of services by the pursuer under an actual or purported obligation owed by the pursuer to a third party, or by the third party to the defender,**
>
> **and the transfer or performance was made under an error of law or mixed fact and law, the pursuer should be entitled to redress of the defender's enrichment if he would have been so entitled had the error been wholly one of fact.**
>
> **In this proposition the reference to "transfer" includes a reference to a payment or conveyance by the pursuer or the third party, and to an unauthorised taking of the money or property by the third party or the defender, as the case may be.**
>
> **(Proposition 9)**

(7) Defence of *bona fide* perception and consumption

3.124 The defence of *bona fide* perception and consumption, or *bona fide* consumption, of the fruits of a heritable or moveable subject may be available in an action of restitution of the subject to preclude recovery

of the fruits ingathered (or separated) or consumed.[1] The defence has been extended to interest on a principal sum of money, and even to the principal sum itself, in an action of repetition though these extensions are controversial.[2] The basis of the bona fide possessor's right to the fruits has not been definitively settled[3] but it seems to rest on a variety of policies including the need to give "quiet or security to men's minds",[4] equitable considerations analogous to those underlying the defence of change of position in repetition,[5] or the rule that property in moveables is presumed from possession.[6] Erskine's definition of a bona fide possessor is authoritative:

> "A bona fide possessor is one who, though he be not truly proprietor of the subject which he possesses, yet believes himself proprietor upon probable grounds, and with a good conscience."[7]

In general the possessor must believe in good faith that he is owner under a colourable title.

3.125 The early Institutional writers state that, for the purpose of the bona fide possessor's claim to fruits,

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[1]Gordon Scottish Land Law paras 14.48-14.51; Carey Miller, Corporeal Moveables paras 6.04-6.08.

[2]See volume 2, paras 2.145 to 2.154.

[3]Carey Miller, Corporeal Moveables para 6.04.

[4]Stair Institutions II,1,23; Erskine Institute II,1,25.

[5]Cf Baron Hume Lectures vol III, p 241, noted Carey Miller Corporeal Moveables para 6.04, p 78, fn 22.

[6]Rankine Landownership (4th edn) p 84.

[7]Erskine Institute II,1,25, cited by Gordon Scottish Land Law para 14.43; Carey Miller Corporeal Moveables para 6.05.

possession is not bona fide if the belief that he is owner is induced by an error of law. Thus Stair remarks:[1]

> "when by a common or known law, the title is void materially, in this case the possessor is not esteemed to possess bona fide, it being so evident, nam ignorantia juris non excusat."

Bankton refers to a "title ... void by a known law",[2] and Erskine speaks of a title "void by the obvious and universally known rules of law".[3] All three Institutional writers cite Grant v Grant[4] in which a wife's right to lands by infeftment in terms of her contract of marriage was extinguished by her husband's death. She continued thereafter to draw the rents for several years and was then held liable to restore them to the true owner, her defence of bona fide consumption being repelled. Another example drawn by Erskine from the recently abolished law on the legal capacity of minors is that "one cannot possess bona fide upon a right granted by a minor having curators without their consent".[5]

3.126 It seems to us that where a possessor believes in good faith and under a colourable title that he is the owner of property, the fact that this honest belief was induced by an error of law or ignorance of a law should not by itself cut off his claim to the fruits. What is meant by a "common or known law" is not clear. It seems

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[1]Stair Institutions II,1,24. See Carey Miller Corporeal Moveables para 6.05.

[2]Bankton Institute I,8,16.

[3]Erskine Institute II,1,27.

[4](1633) Mor 1743.

[5]Erskine Institute II,1,27. The assumption must be that the possessor knew that the minor had curators: otherwise the error would be one of fact.

artificial to distinguish between "known" and "unknown" laws. If the possessor's belief is honestly held and excusable, the fact that it was based on an error of law seems irrelevant. The rule is open to the same objections as the error of law rule in claims for repetition, including the difficulty of distinguishing errors of fact from errors of law.

3.127 We propose:

> **Where a person possessing property is misled by an error of law or mixed fact and law into believing that he has a legal right thereto, he should be entitled to the fruits of that property under the doctrine of *bona fide* perception and consumption if he would have been so entitled had the error been wholly one of fact.**
>
> **(Proposition 10).**

PART IV

SUMMARY OF PROVISIONAL PROPOSALS AND QUESTIONS

Note Attention is drawn to the notice at the front of this Discussion Paper concerning confidentiality of comments. If no request for confidentiality is made, we shall assume that comments submitted in response to this Discussion Paper may be referred to or attributed in our subsequent report.

ABOLITION OF ERROR OF LAW RULE IN ACTIONS BY PAYER AGAINST PAYEE FOR REPETITION OF MONEY (CONDICTIO INDEBITI) (PART II)

Main proposal

1. The common law rule under which money paid under an error of law as to the payer's liability to the payee is not recoverable should be abolished by statute.

(Para 2.95)

Method of statutory reform

2. (1) Views are invited on the various methods of statutory reform outlined in paragraphs 2.96 to 2.106 above.

(2) Subject to any specialities noted later, it is suggested that statutory provision should be made assimilating the grounds of recovery for error of law to the grounds of recovery for error of fact. In other words, where money is paid under error of law or mixed fact and law as to the payer's liability to the payee, the payee should be under an obligation to restore it if he would have incurred that obligation had the error been wholly one of fact.

(Para 2.107)

Safeguard against re-opening settled transactions

3. (1) Comments are invited on the following provisional proposals for precluding the re-opening of settled payment transactions following a change in the law, or in the common understanding of the law, effected by a judicial decision.

(2) It is suggested that provision should be made by statute for that purpose.

(3) The provision should not take the form of a statute enabling the court to declare that a judicial precedent is overruled only prospectively.

(4) Instead, by analogy with New Zealand legislation, it should be provided that where there has been a change in the law, or in the common understanding of the law, effected by a judicial decision in civil proceedings, and a payment was previously made in accordance with the law, or the understanding of the law, before that change, the payment should not be recoverable by reason only of that change. This provision however should neither:

(a) prejudice the right of a party to those proceedings to recover as envisaged in Propositions 1 and 2 above; nor

(b) preclude recovery by another person claiming recovery in other civil proceedings commenced before the date of the judicial decision.

The decision referred to is the first decision which effects the change and not any later decision affirming or restoring that decision on appeal.

(Para 2.125)

ABOLITION OF THE ERROR OF LAW RULE IN OTHER CATEGORIES OF UNJUSTIFIED ENRICHMENT AND IN DEFENCES OF BONA FIDE PAYMENT AND BONA FIDE CONSUMPTION (PART III)

Repetition, restitution and recompense redressing pursuer's intentional conferment of benefit on defender

4. (1) Where heritable or moveable property is conveyed under error of law or mixed fact and law as to the transferor's liability to make the conveyance, the transferee should be under an obligation to make restitution of it if he would have incurred that obligation had the error been wholly one of fact.

(2) Our proposals for abolition of the error of law rule in obligations of repetition or restitution should apply not only where the payer or transferor is misled by an error of law or mixed fact and law into believing that he owes an obligation to the recipient to make the payment or conveyance, but also where:

(a) the payment or transfer is subject to a future condition and the error relates to that condition; or

(b) the error relates to a purported obligation owed to a third party to make the payment or conveyance.

(3) Where a person intentionally confers a benefit in cash or kind on another person under an error of law or mixed fact and law, the provider of

the benefit should be entitled to recompense from the recipient if he would have been so entitled had the error been wholly one of fact.

(Para 3.55)

Repetition at instance of true creditor redressing his debtor's erroneous payment to the defender

5. Where a debtor pays a debt to a putative creditor under error of law or mixed fact and law, the true creditor should be entitled to claim repetition by the putative creditor to either:

   (a) the true creditor; or

   (b) the debtor for disbursement to the true creditor,

   if he would have been so entitled had the error been wholly one of fact.

(Para 3.67)

Defence of bona fide payment

6. Where a debtor pays a debt to a putative creditor under error of law or mixed fact and law, and the true creditor raises an action against the debtor for payment of that debt, the debtor should be entitled to found on a defence of bona fide payment in that action if he would have been so entitled had the error been wholly one of fact.

(Para 3.73)

Recompense for unauthorised improvements of another's property

7. It should be made clear by statute that where the possessor of another's property makes repairs of or improvements to that property or manages that property believing in good faith but under an error of law or mixed fact and law that it belongs to

either the possessor or a third party, the possessor should be entitled to recompense from the true owner if he would have been so entitled had the error been wholly one of fact.

(Para 3.84)

Recompense from a debtor for payment of his debt or performance of his obligation

8. Where a third party (ie a person who is neither the debtor nor the creditor) under error of law or mixed fact and law pays a debt, or discharges an obligation, due by another person, the third party should be entitled to recompense from that person if he would have been so entitled had the error been wholly one of fact.

(Para 3.109)

Redress of indirect enrichment

9. Where a person ("the defender") is enriched by reason of either:

(a) the transfer of money or property from the pursuer to a third party and thereafter from the third party to the defender; or

(b) expenditure or the performance of services by the pursuer under an actual or purported obligation owed by the pursuer to a third party, or by the third party to the defender,

and the transfer or performance was made under an error of law or mixed fact and law, the pursuer should be entitled to redress of the defender's enrichment if he would have been so entitled had the error been wholly one of fact.

In this proposition the reference to "transfer" includes a reference to a payment or conveyance by the pursuer or the third party, and to an unauthorised taking of the money or property by the third party or the defender, as the case may be.

(Para 3.123)

Defence of bona fide perception and consumption

10. Where a person possessing property is misled by an error of law or mixed fact and law into believing that he has a legal right thereto, he should be entitled to the fruits of that property under the doctrine of bona fide possession and consumption if he would have been so entitled had the error been wholly one of fact.

(Para 3.127)

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